PRELIMINARY ISSUE – Applicant prohibited from performing any function in relation to any regulated activity carried on by an authorised or exempt person or exempt professional firm because it appeared to the Authority that he was not a fit and proper person – Applicant had been found to be dishonest by the High Court in a civil trial - whether the judgment of the High Court was admissible evidence in the reference – yes – whether it would be an abuse of process to permit the Applicant to challenge the findings of the High Court by adducing relevant evidence, and presenting relevant arguments, to the Tribunal – no - Financial Services and Markets Act 2000 s 56

THE FINANCIAL SERVICES AND MARKETS TRIBUNAL

CHRISTOPHER REGINALD COLIN HENTON

Applicant

- and -

THE FINANCIAL SERVICES AUTHORITY

Respondents

Tribunal: DR A N BRICE (Chairman)

Sitting in public in London on 20 April 2007

The Applicant in person

Dan Enraght-Moony, of the Financial Services Authority, for the Authority

PRELIMINARY DECISION

The preliminary issue

1. In this reference I was asked to determine, as a preliminary issue, whether the Financial Services Authority (the Authority) were entitled to rely on the findings of the High Court in a civil trial.

2. On 18 October 2006 the Authority issued a Decision Notice stating that they had decided to make an order prohibiting Mr Christopher Reginald Colin Henton (the Applicant) from performing any function in relation to any regulated activity carried on by an authorised or exempt person or exempt professional firm. The Decision Notice was issued because it appeared to the Authority that the Applicant was not a fit and proper person to perform any such function. The Applicant has referred that Decision Notice to the Tribunal.

The legislation

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

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

The preliminary issue

4. The preliminary issue I was asked to determine was whether the Authority were entitled to rely on the findings of the High Court in *Sphere Drake Insurance Limited and Another v Euro International Limited and Others* [2003] EWHC 1636 (Comm). In that case the Applicant was one of a number of defendants and he appeared in person (with some very limited legal assistance). In his judgment Thomas J made findings of dishonesty against the Applicant.

The facts

5. Two bundles of documents were produced at the hearing. From the evidence before me I find the following facts for the purposes of the preliminary issue only.

Sphere Drake

6. The judgment in *Sphere Drake* was given on 8 July 2003 after a trial which lasted, I was told, about one year. The claimant was an insurance company and claimed damages against seven defendants, of which the Applicant was the third. The judgment is long and comprehensive and runs to 1873 paragraphs with an Appendix of 32 paragraphs.

7. The seven defendants were involved in the operation of a reinsurance market in the 1990s which traded in losses generated by United States Workers' Compensation (WC) business. The overall sum claimed in the action was in excess of $250m. The nature of the reinsurance business carried on was summarised by Thomas J at paragraph 7(v) to (xiii) of his judgment in the following way:

> "(v) Some of those that provided reinsurance … did so at a premium which was far less than what they knew they would have to pay out by way of claims; they were therefore deliberately writing reinsurance under which they knew and intended would make a gross loss; this was wholly different from conventional reinsurance and was not done for ordinary competitive market reasons such as for writing loss leading business.
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> (vi) They did so only on the basis that they had outwards reinsurance by way of retrocession at a price which enabled them (1) to pay a small portion of each loss by way of retention, (2) to pay the premiums for their own outwards reinsurance by way of retrocession and (3) to make a small profit. They were therefore writing this business on the basis that they would make a "turn" and not assessing the risk and the premium in the manner of conventional reinsurance; some called it "arbitrage" or "net underwriting". It would more accurately be described as deliberately accepting business known to produce losses in excess of the premium charged on the backs of reinsurers who would be expected to pay the losses for even less premium.
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> (vii) Those that provided the retrocession received substantially less premium than the underlying reinsurers but had to pay the greater part of the losses; they therefore made an even greater gross loss, but were prepared to do so on the basis that they in turn had a retrocession from which they could therefore make a turn. Those that provided that retrocession had reinsurance themselves by way of further retrocession and so on. The reinsurer at each tier was in effect passing the bulk of the losses on to the reinsurer at the next tier for progressively less premium (the total premium at each successive tier was often 25% of that on the tier above); they were trading in losses. For example, a series of contracts that produced £50m of the £70m loss on one programme had been reinsured for a gross premium of £148,392; the loss ratios on these contracts were between 20,000% and 30,000%.

(viii) It was those that acted in this way that formed, with those who accepted the business, the reinsurance market that traded in losses with which this trial was concerned.

(ix) The brokers who arranged the reinsurances earned brokerage at the rate of 10%-15% on each trade; sometimes it was more. This further progressively reduced the amount of premium that was available to pay the losses and enriched the participating brokers by "churning" on each successive trade.

(x) Between these reinsurers and retrocessionaires in this small part of the insurance market there arose a spiral which entailed the losses being passed round between participants. Spirals in the catastrophe market had caused disastrous losses to Names at Lloyd's as a result of catastrophes in 1988-90. In the catastrophe market, there had been at least the prospect of profit in some years with those who might end up with the liabilities, as catastrophes did not occur each year. In the market that reinsured WC carveout losses, there were heavy and certain losses on an enormous scale which had to be paid year in year out.

(xi) The scale of the WC losses took about three or so years to manifest themselves and the participants in the spiral market then suffered serious cash flow and other problems.

(xii) It was plainly a market that was unsustainable and would end, as it has, in disaster, with the massive losses produced year in year out by WC business landing on some of those who participated in this market, resulting in litigation on an extensive scale.

(xiii) The market was, in my view, rightly characterised … as "pass the parcel" or "Russian roulette by proxy"".

8. After summarising the proper duty of disclosure, Thomas J continued at paragraph 10 of his judgment:

"10 The market which traded in losses in this way was one in which no rational and honest person would participate (either by committing his capital or by writing a line on the reinsurance of the business) if he had understood the market and proper disclosure had been made."

9. At paragraphs 12 to 15 Thomas J described the formation of the two companies of reinsurance brokers who were the fourth and fifth defendants in *Sphere Drake* and referred to jointly as SCB, and the two individuals connected with them who were the sixth and seventh defendants. SCB became the leading brokers in the market that traded in losses. From 1993 SCB deliberately constructed tight spirals which had the effect of passing losses from those who wrote lower layers of reinsurance to those who wrote higher layers and rated those higher layers on the basis that they would only be reinsuring catastrophe type losses and thus would attract

lower rates. They thus protected those who were prepared to provide the lower layer reinsurances.

10. At paragraph 16 Thomas J related that the claimants (Sphere Drake) became involved in the business as a result of the grant in January 1997 of a binding authority to a former Lloyd's underwriter who was the second defendant. The binding authority was subsequently transferred to a company formed by the second defendant; that company was referred to as EIU and was the first defendant. The business accepted under the binding authority was written by the Applicant who was an underwriter employed by EIU, and a director of EIU after 12 February 1997. The Applicant was the third defendant. Very high commission was payable under the binder. During the approximately eighteen months when the binder operated the Applicant accepted a total of 119 contracts of reinsurance under the binder, 112 of which were placed with the Applicant by SCB; these 112 contracts were grouped together as 35 programmes of reinsurance.

11. The issues were identified in paragraphs 39 to 109 of the judgment of Thomas. J and three are relevant to the Applicant. These were: whether EIU, the second defendant and the Applicant had acted in dishonest breach of the fiduciary duties they owed to the claimant; whether there had been dishonest assistance in breach of the fiduciary duties, and whether there had been fraudulent misrepresentation.

12. Thomas J summarised his overall conclusions at paragraphs 1861 to 1866. He found that the sixth defendant was the driving force in the dishonest enterprise and acted with "singular dishonesty". He also found that the seventh defendant had acted dishonestly. He partly accepted that EIU had been a dupe and, to a certain extent, was a victim, but also added (at paragraph 1861(iii)) that the Applicant "was intelligent and acute enough to know what he was doing and that it was dishonest to acquiesce as he did.". At paragraph 1862 Thomas J summarised his findings of fact and the following sub-paragraphs are relevant to the Applicant:

> "(v) I am sure that SD [Sphere Drake] were never told that business Mr Henton intended to write was to be accepted in the knowledge that it would create gross losses that would be passed on to reinsurers. They were therefore dishonestly brought into this market to provide capacity without being told what they were actually being asked to write; if they had been told of the true nature of the market they would not have entered it. No rational person told of what was intended would have written such business, particularly given the scale and volume presented by SCB to Mr Henton.
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> (vi) When EIU obtained the binding authority from SD EIU agreed to write the programmes offered to them without SCB having to place reinsurance for them; EIU, having misled SD as to the nature of the business to be written, were content that the losses should be dumped on SD or on their reinsurers wham they knew must similarly have been unaware of the true nature of the business to be written.

(vii) Mr Henton accepted in his evidence that he knew exactly what he was doing when he accepted the programmes; it was not a case of naivety or incompetence on his part. He was an intelligent man with an acute trader's instinct. When the circumstances surrounding the entirety of the business accepted by EIU in the 35 programmes placed are looked at as a whole (in the sense of the scale of the gross losses being assumed, the lines being written, the brokerage being allowed and the nature of the reinsurance cover obtained) I am sure that no person acting honestly, however imprudent, would have ever accepted those programmes. …

(ix) Both SCB and EIU were content that SD remain the dump for the losses until the end of 1997. For their own purposes, SCB procured reinsurance that re-created a spiral and that EIU were to write gross loss making business that they had been unable to place in 1997 and that they were to continue to write such business in 1998. SCB and EIU were both fully aware that SD had no knowledge this was being done and that what was being done was wholly contrary to their interests and dishonest.

(x) I am sure that all the Defendants acted in collusion. …

(xi) Mr Henton (and through him EIU), [the sixth and seventh defendants] (and through them SCB) all knew that writing gross loss making business on the back of reinsurance could only be achieved through a scheme involving either the deception of capacity (as for example in the case of SD) or of reinsurers who would ultimately have to pay the losses. They each fully understood that this was dishonest. …

(xiii) Throughout I have endeavoured to test the credibility of each witness whose credibility was in issue against the objective facts, the contemporary documents, and the overall probabilities. I have had the advantage of seeing each of the main witnesses undergo long and searching cross-examinations that have also afforded me the opportunity to test their credibility. I am sure that .. Mr Henton … were witnesses who had given untruthful evidence in the respects which I have set out."

13. At paragraphs 1863 and 1964 Thomas J summarised his findings as:

"1862 I therefore find that the claim for dishonest breach of fiduciary duty succeeds against …Mr Henton (from February 1998) … and the claim for dishonest assistance succeeds against … Mr Henton (for matters before February 1998) … .

1863 I also find that the claim for fraudulent misrepresentation succeeds against … Mr Henton . …"

The application for leave to appeal against the judgment in Sphere Drake

14. On 14 October 2003 Thomas LJ (sitting as a Judge of the Commercial Court) heard an application from the Applicant for leave to appeal against the judgment given on 8 July 2003. The Applicant appeared in person. There were three grounds of appeal. The first was that the court had failed to take account of a number of relevant matters in reaching the findings made. In paragraphs 4 and 5 of his judgment on the application Thomas LJ said:

> "4. … In considering that ground I must first bear in mind that there are no issues of law, as set out in the very lengthy judgment. In the ultimate analysis the issues of law were largely agreed and on those on which I reached decisions they, in my view, are really not material to any possible appeal.
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> 5. In reaching findings of fact , because of the gravity of the allegations, I applied the very high criminal standard of proof. I have very carefully considered whether there would be a realistic prospect of success in overturning the findings of fact which I have made. The findings of fact are set out extensively in the very lengthy judgment. The findings of dishonesty are made in relation to numerous matters. Sitting as I do and reflecting on the matter some three months after I have given judgment, I cannot see that there is any realistic prospect of successfully appealing the judgment on issues of fact."

15. The third ground of appeal was an alleged breach of human rights and Thomas LJ dealt with this ground at paragraphs 9 to 11 of his judgment on the application in the following way:

> "9 The third ground put forward is an alleged breach of human rights as a result of "inequality of arms ". At paragraphs 37 and 38 of Part I of my judgment I set out the position in respect of EIU, [the second defendant] and Mr Henton; the fact that they had virtually no legal representation at the trial; the fact that I had taken that into account in considering the findings I had to make. I. of course, had no power to grant legal aid, though I made observations at the outset of the trial in relation to its nature and complexity. I have little doubt that these were referred to the Legal Services Commission by those assisting … Mr Henton, if not by … Mr Henton themselves. I also understand from Mr Hirst [Leading Counsel for the claimants] that (in accordance with what is to be expected of those who appear in court where individuals are representing themselves in person) he drew to the attention of … Mr Henton a decision where a challenge had been made to a ruling of the Legal Services Commission on legal aid.
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> 10. It seems to me that if a challenge was to have been made to the position on legal aid, that should have been made at the outset. Of course, I would have considered adjourning the trial. Indeed, I did adjourn the trial for several days in February of last year whilst attempts were made to obtain funding from another source.

> 11. I cannot see that at the conclusion of the trial it can be right to reopen this question. The judgment in this case has important implications for a very large number of people and a large number of contracts. Furthermore, the costs of Sphere Drake alone have been in excess of £6million. It seems to me that at this stage there can be no real prospect of success on an appeal based on a breach of human rights."

16. Thomas LJ refused permission to appeal. The Applicant did not apply to the Court of Appeal for permission to appeal.

The Decision Notice

17. The Authority issued their Decision Notice to the Applicant on 18 October 2006. In giving the Decision Notice the Authority relied upon the findings of dishonesty made against the Applicant in *Sphere Drake.*

18. On 26 November 2006 the Applicant referred the Decision Notice to the Tribunal On 22 December 2006 the Authority filed their statement of case making clear that they were relying on the findings of Thomas J in *Sphere Drake*. The Applicant filed his Reply on 19 January 2007. Paragraph 2 of that reply read:

> "2. If it is indeed the case that this Appeal will inevitably fail because it is a prerequisite that the decision of the Court made on 8 July 2003 must first be overturned I do not wish to waste anybody's time, not least my own, on a fruitless exercise."

The arguments

19. The Applicant argued that he did not accept the Authority's decision which was based wholly on the judgment in *Sphere Drake* which he also did not accept. In particular, he did not accept the findings of dishonesty and lack of integrity and was concerned at the impact which the Decision Notice could have on his life and future career. He was rebuilding a career in estate agency, and if that activity were to become regulated by the Authority, he might be forced to change paths again. He argued that the actions which were at issue in *Sphere* Drake had taken place before the year 2000; that the style of underwriting he had carried out was commonly practised in the market; that he had not been legally represented at the trial; that he had been interrupted by the judge; and that the legal points were so complex that he was unable to formulate a coherent argument. There had been a "massive deluge of documents" which it was quite impossible for him to read and he relied upon *Kuopila v Finland* (2001) 33 EHRR 25. He also argued that, at the trial, the judge had interrupted his examination of witnesses and he cited *CG v United Kingdom* (2002) 34 EHRR 31 and *175 Interpertinger v Austria* (1986) 14 EHRR 175. Finally, the complexity of the legal arguments meant that he was unable to formulate a coherent argument and he cited *Granger v United Kingdom* (1990) 12 EHRR 469. In conclusion the Applicant said that he had no more evidence to give nor could he provide any arguments not already given at the trial and would not know where to begin to challenge the findings made. If the decision of the Tribunal was that the

judgment in *Sphere Drake* could be relied on then he would not be pursuing his reference before the Tribunal.

20. For the Authority Mr Enraght-Moony argued that the findings of Thomas J in *Sphere Drake* demonstrated serious and sustained deliberate and dishonest conduct by the Applicant going directly to his lack of fitness and propriety. He referred to the *FSA Handbook* at FIT 2.1 and he also referred to Rule 19(3). He relied upon S*ecretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321; the decision of the Tribunal in *Allen Philip Elliott v The Financial Services Authority* Decision No. 017; and *Paul Francis Simms v Michael Ambrose Conlon and Roger Harris* [2006] EWCA Civ 1749.

Reasons for Decision

21. In considering the arguments of the parties I first consider the framework of the legislation which applies to this reference. I then consider the relevant authorities to see what legal principles they establish before applying those principles to the facts I have found.

The framework of the legislation

22. Section 2 of the 2000 Act sets out the general duties of the Authority and provides that, in discharging its general functions, the Authority must, so far as is reasonably possible, act in a way which is compatible with the regulatory objectives. These are defined in section 2(2) and include the protection of consumers and market confidence. Section 56 contains the provisions about the making of prohibition orders and are set out in paragraph 3 above. Section 57(5) provides that a person against whom a decision to make a prohibition order is made may refer the matter to the Tribunal

23. Section 132 establishes the Tribunal and provides that it is to have the functions conferred on it by or under the Act, Section 133(3) provides that, on a reference, the Tribunal may consider any evidence relating to the subject-matter of the reference, whether or not it was available to the Authority at the material time. Section 133(4) provides that, on a reference, the Tribunal must determine what, if any, is the appropriate action for the Authority to take. The proceedings before the Tribunal are regulated by the Financial Services and Markets Tribunal Rules 2001 SI 2001 2476 (the 2001 Rules). Rule 19(2) provides that, subject to any directions by the Tribunal, the parties shall be entitled to give evidence, to call witnesses, to question any witnesses, and to address the Tribunal on the evidence and generally on the subject matter of the reference. Rule 19(3) provides that evidence may be admitted by the Tribunal whether or not it would be admissible in a court of law and whether or not it was available to the Authority when taking the referred action.

24. Returning to the provisions of the 2000 Act, Part X (sections 138 to 165) contains provisions about rules and guidance. Section 138 gives the Authority a general rule making power and section 157 provides that the Authority may give guidance consisting of such information and advice as it considers appropriate. The

FSA Handbook is published by the Authority and contains both rules and guidance, the former being denoted by "R" and the latter by "G".

25. Part of the Handbook (FIT) contains material about the fit and proper test for approved persons. FIT 1.3.1 states that the most important considerations will be the person's honesty, integrity and reputation; competence and capability; and financial soundness, FIT 2.1 summarises the matters to which the Authority would have regard in determining a person's honesty, integrity and reputation. These include at FIT 2.1.3(2) the question whether a person has been the subject of any adverse finding in civil proceedings, particularly in connection with investment or other financial business, misconduct or fraud. This material is denoted with "G".

26. Thus the framework of the legislation is governed by the 2000 Act. That Act gives the Authority general duties which must be exercised in accordance with stated regulatory objectives. Although the making of a prohibition order under section 56(2) is discretionary, it is clear that such a discretion has to be exercised within the general framework of the regulatory objectives. The Tribunal is established under, and derives its jurisdiction from, the 2000 Act. The function of the Tribunal is to determine the appropriate action for the Authority to take and so the Tribunal also has to have regard to the regulatory objectives. It is also relevant that the rules and guidance published by the Authority are published under statutory authority. Both the Act and the Tribunal Rules provide that the evidence before the Tribunal is not to be restricted to evidence which would be admissible in a court of law.

27. With that framework of legislation in mind I turn to consider the relevant authorities.

The authorities

28. *Bairstow* (2003) concerned the chairman and managing director of a public limited company who was dismissed and instituted proceedings against the company claiming damages for wrongful dismissal. The action was tried in the High Court over a period of one month and two judgments were given in 1999. In February 2000 the Secretary of State for Trade and Industry commenced proceedings under section 8 of the Company Directors Disqualification Act 1986 seeking a disqualification order against the chairman on the ground that his conduct made him unfit to be concerned in the management of a company. The application of the Secretary of State was supported by the affidavit of a Mr Burn, who had been appointed to investigate the affairs of the company. The affidavit contained the details of the matters relied on by the Secretary of State including the wrongful dismissal proceedings in the High Court and the conclusions in the two judgments. At a pre-trial review in the disqualification proceedings an order was made that the Secretary of State and the chairman were not entitled to challenge, but should be bound by, the findings of the High Court and that the chairman was permitted to file and serve further evidence dealing with mitigation. The chairman appealed against that order and his argument was that the factual findings and conclusions of the High Court were not evidence of those facts and there was no power to make admissible as evidence that which in law was not admissible. The chairman also argued that he was not initiating proceedings in order to mount a

collateral attack on a decision of the court; he was not abusing the process of the court in insisting that the serious allegations made against him were proved by legally admissible evidence.

39. The Court of Appeal reviewed all the authorities and summarised the legal principles in paragraph 38 of their judgment. The principles relevant in this reference are: (1) that a collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court; (2) that if the earlier decision is that of a court exercising a civil jurisdiction then it is binding on the parties to that action in any later civil proceedings; and (3) that if the parties to the later civil proceedings were not parties to the earlier proceedings than it will only be an abuse of the process of the court to challenge the factual findings and conclusions made in the earlier action if (a) it would be manifestly unfair to a party to the later proceedings that the same issue should be relitigated or (b) to permit such relitigation would bring the administration of justice into disrepute.

40. The Court of Appeal decided, in paragraph 39, that in that case it would not be manifestly unfair to the Secretary of State to prove the serious allegations made against the chairman and noted that Mr Burn's affidavit was admissible evidence without the need to refer to the judgment of the High Court. In paragraph 40 they said that, in the disqualification trial, the chairman would have to deal with the evidence of Mr Burn and be cross-examined about the findings of the High Court but it was the judge hearing the disqualification application who had to be satisfied that the chairman was unfit to be concerned in the management of a company. In paragraph 41 they decided that it would not bring the administration of justice into disrepute to permit the relitigation; the allegations were serious and also had to be proved to the court hearing the disqualification application by legally admissible evidence but the chairman would have to satisfy the court that he had good grounds for challenging the evidence of Mr Burn; the chairman had to identify which parts of the evidence of Mr Burn he wished to challenge and why he did so and to demonstrate that the further evidence he sought to adduce was relevant to the issue. CPR Rule 32.1 could not render admissible evidence which was inadmissible.

41. In considering the relevance of that judgment to the present reference I first note the difference in the applicable legislation. In *Bairstow* the relevant legislation was the Company Directors Disqualification Act 1986. Section 8(1) of that Act provides that, if it appears to the Secretary of State from a report made by inspectors under section 437 of the Companies Act that it is expedient in the public interest that a disqualification order should be made against any person who is or has been a director of any company, he may apply to the court for an order to be made against that person. Section 8(3) provides that the court means the High Court. It must therefore have been within the intention of the legislation that disqualification proceedings should be governed by the Rules applying in the High Court including the Rules as to the admissibility of evidence. That position may be contrasted with the legislation applicable to this reference where it is clearly the statutory intention that evidence should not be restricted to that which would be admissible in a court of law. For that

reason it seems to me that that part of the judgment in *Bairstow* which concerns the admissibility of evidence does not apply in this reference.

42. Turning to the question as to whether it would be an abuse of the process of the Tribunal to permit the Applicant to mount a collateral attack on the judgment in *Sphere Drake,* I apply the principles established by the Court of Appeal in paragraph 38 of their decision in *Bairstow.* Principle (3) is relevant because the parties to these proceedings were not the parties to the *Sphere Drake* proceedings. Accordingly, it would only be an abuse of process for the Applicant to challenge the factual findings and conclusions made in *Sphere Drake* if it would either be manifestly unfair to the Authority that the same issue should be relitigated or if to permit such relitigation would bring the administration of justice into disrepute. Here I bear in mind that the Court of Appeal decided that in *Bairstow* the chairman would have to be cross-examined about the findings of the High Court but that it was the judge hearing the disqualification application who had to be satisfied that the chairman was unfit to be concerned in the management of a company. Also, the Court of Appeal decided in *Bairstow* that the chairman had to identify which parts of the evidence he wished to challenge and why he did so and to demonstrate that the further evidence he sought to adduce was relevant to the issue.

43. Applying those principles to the facts of the present reference I conclude that the Applicant should be permitted to challenge the findings and conclusions in *Sphere* Drake to the extent that he should be permitted to adduce any evidence and put forward any argument that he wishes to adduce or put forward so long as it is relevant to the issue before the Tribunal. The Tribunal should then make its own decision as to whether the Applicant was a fit and proper person within the meaning of section 56 of the 2000 Act.

44. In *Elliott* (2005) the Tribunal reviewed the authorities cited to it and concluded that a findings and order of the Solicitors Disciplinary Tribunal were admissible evidence of the Applicant's lack of fitness and propriety and that the Authority could rely upon the findings and order without the need to re-prove each and every allegation which the Solicitors Disciplinary Tribunal found to be proved. However, the Tribunal also decided that it would consider any other evidence which either party wished to put before it after which it would make its own decision as to whether the Applicant was a fit and proper person within the meaning of section 56. Although *Bairstow* was not cited in *Elliott* the conclusion reached by the Tribunal is very similar to that which I have reached after a consideration of the principles established in *Bairstow.* As *Bairstow* is binding on me, but *Elliott* is not, I rely on the principles in *Bairstow.*

45. The third relevant authority was *Simms*. In *Simms* (2006) the parties had previously been partners in a firm of solicitors. Mr Simms had been found by the Solicitors Disciplinary Tribunal to be guilty of conduct unbefitting a solicitor and ordered to be struck of the roll of solicitors. The findings of the Solicitors Disciplinary Tribunal included findings of dishonesty. Mr Conlon and Mr Harris had been partners of Mr Simms and they took proceedings in the High Court alleging that Mr Simms

had induced them to enter into partnership by fraudulent misrepresentations and had failed to disclose the dishonest conduct of which the Solicitors Disciplinary Tribunal had found him guilty. In their pleadings they stated that they relied upon the findings of the Solicitors Disciplinary Tribunal. Mr Simms maintained that the findings of that Tribunal were inadmissible as evidence. The matter was tried before Lawrence Collins J who found for Mr Conlon and Mr Harris.

46. On appeal to the Court of Appeal the admissibility in evidence of the findings of the Solicitors Disciplinary Tribunal was considered in paragraphs 132 to 153 of the judgment. At paragraph 135 the Court concluded that the findings were inadmissible in evidence. At paragraph 136 the Court went on to consider whether it was an abuse of the process of the court for Mr Simms to seek to put in issue facts found by the Tribunal and at paragraph 139 reference was made to the *Bairstow* conditions of manifest unfairness and bringing the administration of justice into disrepute. The Court of Appeal did not consider that it would be unfair to the two partners who could have pleaded and proved specific examples of dishonesty and a single example might have been sufficient to support their claim. Neither did the Court of Appeal consider that relitigating the matters would bring the administration of justice into disrepute because the senior partner should not be prevented from requiring the other two partners to make out their case.

47. *Simms* may be distinguished from the present reference because it was an action between two parties whereas in this reference one of the parties is an authority established and regulated by statute with statutory objectives and a

48. statutory framework. It may also be distinguished because different rules as to the admissibility of evidence applied.

The application of the legal principles to the facts

48. I now turn to apply the principles established by the authorities to the facts of the present reference. First, I bear in mind the legislative framework within which the Tribunal operates and that it is the task of the Tribunal to decide whether the Applicant is a fit and proper person within the meaning of section 56 of the 2000 Act. The legislative framework includes section 133 and Rule 19(3) as a result of which the findings in *Sphere Drake* may be put before the Tribunal by the Authority as evidence and the Tribunal is free to make such use of those findings as is proper in the circumstances. However, the Tribunal will also have regard to any other evidence which is adduced before it, including any evidence of the Applicant or of witnesses on his behalf. For example, if the Applicant wishes to adduce evidence to support his contention that what he did was the normal practice of the market then he may do so. The Tribunal will also have regard to any argument put forward by either party. If the Applicant wishes to do so he may repeat his arguments that the actions which were at issue in the trial took place before the year 2000; that he had not been legally represented at the trial; that he had been interrupted by the judge; that the legal points were so complex that he was unable to formulate a coherent argument; and that the trial had infringed his human rights. Having heard all the evidence and argument put

before it the Tribunal will then decide whether it is satisfied that the Applicant is or is not a fit and proper person within the meaning of section 56.

Conclusion

49. My conclusion on the preliminary issue is that the Authority is entitled to put before the Tribunal the findings of the High Court in *Sphere Drake* as evidence of the Applicant's lack of fitness and propriety. However, the Tribunal will also consider any other relevant evidence, and any other relevant argument, which either party wishes to put before it and will then reach its own decision as to whether the Applicant is a fit and proper person within the meaning of section 56.

DR A N BRICE

CHAIRMAN
RELEASE DATE:

FIN/2006/0017
04.05.07