AUTHORIZATION – Part IV permission – Cancellation – Fit and proper person – Whether Applicant falls short of Threshold Condition 5 – Whether Applicant has failed to conduct business with integrity and in compliance with proper standards and failed to treat customers fairly and failed to be open and co-operative with the Authority – Yes – Reference dismissed

FINANCIAL SERVICES AND MARKETS TRIBUNAL

VIRENDRA RAI AGARWALA **(T/A ABBEX INSURANCE)**	**Applicant**
- and -	
FINANCIAL SERVICES AUTHORITY	**The Authority**

Tribunal: SIR STEPHEN OLIVER QC
TERENCE CARTER FCA
KEITH PALMER

Sitting in public in London on 5 February 2007

Gareth Fatchett, The Financial Services Legal LLP, for the Applicant

Daniel Thornton of the Financial Services Authority, for the Authority

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DECISION

1. Virendra Rai Agarwala ("The Applicant"), a sole trader insurance intermediary, has referred:

(i) a First Supervisory Notice of 1 November 2006 ("The Supervisory Notice") by which the Authority varied his Part IV permission by removing all regulated activities with immediate effect and

(ii) a Decision Notice of 7 December 2006 by which the Authority decided to cancel his Part IV permission.

At a hearing of the Tribunal, in December 2006, where the Applicant had unsuccessfully applied to have the immediate effect of the Supervisory Notice suspended, the Tribunal directed that both references be consolidated.

2. We heard evidence from Mr Andrew Honey, Head of the Insurance Department in the Small Firms Division of the Authority and from the Applicant.

The Background

3. It came to the Authority's notice that the Applicant had failed to disclose certain matters about himself in his application for authorization (and related approval) dated 12 June 2004 or at any later stage. These were:

(a) the erasure of the Applicant's name from the Register of Insurance Brokers, on 6 September 1993, by the Insurance Broker's Registration Council ("The IBRC");

(b) the issue of an Intervention Notice to the Applicant on 15 November 1996 by the Personal Investment Authority ("The PIA"), prohibiting him from conducting any investment business because he had failed to co-operate with the PIA and in particular for failing to reply to significant correspondence from the PIA (including the report of a visit by the PIA which specified remedial action);

(c) the revocation of the Application's PIA authorization on 30 July 1997 because he had admitted failing to co-operate with the PIA;

(d) the notification to the Applicant by the FOS on 30 September 2003 of the FOS's reasoned preliminary view ("the FOS Adjudication") that a complaint made in February 2003 in connection with inappropriate pension advice given to one of his clients should succeed and

(e) the making of a final award by the FOS against the Applicant on 15 December 2004 ("The FOS Award") in connection with the same complaint, which found in favour of the client and directed the Applicant to carry out a loss assessment and pay redress if appropriate. (Although the application for authorization and approval had been made on 12 July 2004, i.e. after the FOS Adjudication but prior to

the FOS Award, the FOS Award was made before the Applicant was authorized and, it was considered by the Authority, that the Applicant had an ongoing obligation to disclose the matter to the Authority.)

5 A further concern of the Authority was that, so far as it was aware, the Applicant had not complied with the FOS Award.

4. The Authority acknowledges that the Applicant's erasure from the IBRC register and his subsequent non-disclosure of this when applying for the 10 authorization/approval were not, of themselves, sufficiently serious to prevent the Applicant from being authorized/approved. Nonetheless the Authority's concerns took into account both the erasure and its non-disclosure in forming the view of the Applicant's other non-disclosures and also his repeated failures to comply with the standards imposed by the regulatory system.

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5. Following the issue of the PIA Notice (3(b) above) the PIA had commenced formal disciplinary proceedings to revoke the Applicant's authorization in relation to the non-co-operation. The Applicant resisted the PIA's action and on 29 January 1997 he exercised his right to have the matter referred to the PIA Membership and 20 Disciplinary Tribunal. The PIA submitted a Notice of Intention to Make an Order to the PIA Tribunal in July 1997; this recorded that the Applicant was withdrawing his appeal, admitting the charges against him and agreeing to be expelled from the PIA. On 30 July 1997 a public order of the PIA enforcing the Applicant's expulsion was sent to him.

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6. On 20 February 2003 a client of the Applicant complained to the FOS that in April 1989 she had been inappropriately advised by Abbex Insurance (the Applicant's trading name) in respect of her pension. On 30 September 2003, the FOS wrote to the Applicant setting out the FOS Adjudication that the complaint should succeed.

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The applications and the non-disclosures: the Authority's observations

7. On 12 July 2004, the Applicant applied to the FSA for authorization to conduct general insurance business by submitting a Firm Application Form ("FAF"), 35 and for individual approval by submitting a Controlled Function and Individual Controllers Form ("CFICF"). Both the FAF and the CFICF were signed by the Applicant.

8. In submitting the FAF, the Applicant failed to disclose:

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(a) his erasure from the IBRC's Register in 1993. In particular he had answered "No" to the question asking whether the firm had "ever been refused, had revoked, any licence, membership, authorization, registration or other permission granted by a financial services regulator in the UK or overseas?";

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(b) the revocation of his authorization by the PIA in July 1997. He had answered "No" to the same enquiry and

(c) that the FOS had issued the FOS Adjudication. He had answered "No" to the questions which asked whether there was "any award outstanding" or there were "other significant events regarding the firm … that might adversely affect the application?"

In submitting the CFICF the Applicant failed to disclose:

(a) the IBRC erasure. In particular the Applicant should not have answered "No" to the question asking whether he had ever "been refused, restricted in, or had suspended, the right to carry on any trade … for which specific licence, authorization, registration … is required?" Nor should he have answered "No" to the questions whether he had ever been refused, had revoked, restricted or terminated any licence, authorization, registration, notification, membership … of such "body" or "been the subject of any … disciplinary or intervention action by such body?", and

(b) the PIA's Intervention Notice of November 1996 preventing him from carrying on investment business and revocation of his authorization in July 1997. He should not have answered "No" to the same questions.

The FOS Award : the Authority's observations

9. With reference to the FOS Adjudication, the Authority observed that had the Applicant been in any doubt as to whether to disclose the FOS Adjudication in his application forms, it was nonetheless clear that he had to disclose the FOS Award when he became aware of it after his application for authorization. He was obliged to do so given his awareness that the Authority required that it be made aware of any "award outstanding" and of "any outstanding financial obligation arising from regulated activities" and pursuant to the declaration in Section K of the FAF that the Authority be notified "immediately if there is a change to the information given in the application pack".

Supporting evidence for the Authority

10. We heard evidence from Andrew Honey, Head of the Insurance Department in the Small Firms Division of the Authority.

11. Mr Honey pointed out that section 41(2) of the Financial Services and Markets Act ("the Act") required the Authority to ensure, in giving permission under Part IV of the Act, that the person concerned would satisfy, and continue to satisfy, the Threshold Conditions set out in Schedule 6 of the Act in relation to all of the regulated activities for which he is to have permission. To this end the Authority maintains a register recording such authorization (as required by statute). This is available to the public on the Internet. Mr Honey's opinion is that the public view the status of being authorized and regulated by the Authority as being significant because it demonstrates that the Authority has certified that the firm in question has satisfied, and continues to satisfy, the minimum standards and requirements of the regulatory system. The public is entitled to place reliance on the status of an approved firm when doing business with it. There was no challenge to this view on the part of the Applicant. We accept Mr Honey's evidence.

12. The Authority's guidance is contained in the source book entitled "Threshold Conditions". Among the conditions taking into account by the Authority in determining whether a firm is satisfying (and is likely to continue to satisfy) the Threshold Conditions are these:

- the size, nature, scale and complexity of the firm's business;
- whether the firm in question is ready, willing and organized to comply, on a continuing basis, with the requirements and standards under the regulatory regime which apply to the firm;
- whether the resources of the firm are adequate; the term "resources" includes all financial resources, non-financial resources and means of managing its resources;
- whether the firm can demonstrate that it is "fit and proper" to have Part IV permission;
- the suitability of each person who performs a controlled function under the approved persons regime and
- matters such as whether the firm conducts, or will conduct, its business and affairs with integrity and in compliance with proper standards with a competent and prudent management and the exercise of due skill, care and diligence.

13. Matters relevant to the question of whether the firm is fit and proper to have Part IV permission may include whether the firm has been open and co-operative in all its dealings with the Authority and any other regulatory body and is ready, willing and organized to comply with the requirements and standards under the regulatory regime and other legal, regulatory and professional obligations. For this purpose the relevant requirements and standards will depend on the circumstances of each case, including the regulated activities which the firm has permission to carry on. Also relevant in determining whether the firm is "fit and proper" is whether it or a person connected with it has been refused registration, authorization, membership or licence to carry out a trade or has had any of those revoked, withdrawn or terminated, or has been expelled by a regulatory or government body.

14. Mr Honey explained (and this was not disputed) that the Authority places considerable importance on an open and co-operative relationship with firms. Small firms, such as the Applicant, do not have regular contact with supervisory staff and the Authority. It is important therefore 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. The non-disclosures on the FAF and CFICF forms (and subsequently) had indicated to the Authority that the Applicant did not meet the standards of integrity or the standards of competence required in dealings with the Authority. We will return to this point when we draw our own conclusions as to what the appropriate course should be in the present circumstances.

15. We turn now to the specific non-disclosures.

The IBRC matter

16. The non-disclosure of the IBRC matter was, argued the Applicant, of no significance. It was, again to use his own words, "primarily an administrative matter" and a non-event of which he could not remember the details. The Applicant's failure to disclose the matter on the application forms had in any event been unintentional.

17. The Authority had, as appears from the evidence of Mr Honey, discovered the omission of the IBRC matter from its own checks. The checks had not revealed the reasons for the erasure of the Applicant from the register. The discovery had been made before granting the authorization and approval; and, viewed in isolation, the Authority would not have considered its non-disclosure to have been sufficiently material to prevent authorization.

18. We will return to this when making an overall review of the matter. At this stage we record our impressions from the evidence. The Applicant knew that his name had been erased from the Register. He could not remember exactly why but thought it might have been on account of his failures to supply annual accounts.

The PIA issue

19. The Applicant said of the 1996 PIA issue that it had been "stale" and in any event it had not related to Abbex's general insurance business which, he understood, had been what the forms related to. There had been an independent financial advisory ("IFA") side to the Abbex business. This had been run by a Mr Sean Jein. Since Mr Jein's departure from Abbex in 1990 the Applicant had not filed any accounts for the IFA side. The Applicant's business had however continued to receive commissions arising from earlier IFA activities. The Applicant accepted that he had appealed against the PIA Intervention Notice but had withdrawn the appeal in February 1997. This, he said, had given him the opportunity to concentrate solely on the general insurance business. He had, he said, "actually wanted this to occur". In the events, he said, the PIA matter had been a thing of the past and the Authority were, he submitted, acting unduly harshly in preventing him from carrying on the general insurance business that had had no regulatory problems since its commencement 30 years ago.

20. Our interim observation on the PIA issue is that this was of greater significance than the Applicant would have us infer. The fact that the Applicant appealed the Notice to the PIA Tribunal in January 1997 is inconsistent with his current assertion that he wanted the revocation to occur. Moreover, when the Applicant did eventually consent to the revocation, the Notice of Charges and Statement of Case detailed that his failings went beyond simply failing to file accounts. It related more broadly to his failures to be open and co-operative with the PIA in matters that included his pension review obligations. Additionally, we do not

accept that the questions in the FAF and CFICF forms were, as the Applicant was implying, limited to a particular class of activity (e.g. general assurance and are not also directed to investment activities) when both have been carried on by the same Applicant.

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The FOS Award

21. The FOS Award, the Applicant pointed out, related to a "pension breach" based on erroneous advice from Mr Jein who had operated the investment side of the
10 business. The advice had been given many years earlier and the Applicant's responsibility did not last indefinitely. The Applicant's authority to conduct "investment business" had been withdrawn by the PIA; the firm should therefore have qualified to be dealt with by an outfit he referred to as the PIA PRU. At the time when the forms were submitted (July 2004) the FOS Award had not been made: (it
15 was made on 15 December 2004).

Should the FOS Award have been disclosed in the Forms?

22. The Authority referred to the FOS Adjudication of 30 September 2003 (see
20 paragraph 3(d) above). This, they said, should have been disclosed in response to question 35 of the FAF (as an "award outstanding") or in response to question 40 (as "a significant event" that "might adversely affect the application").

23. Referring to the FOS Award, the Authority pointed out that this had been
25 made on 15 December 2004 (and accepted by the relevant individual on 5 January 2005). The authorization of the Applicant to carry out the regulated activities had been given on 14 January 2005. The Applicant should, the Authority contended, have disclosed the award as a matter of significance to the Authority as part of his continuing obligation (undertaken in the Declaration at the end of the FAF) to notify
30 changes.

24. Our interim conclusions on this point are that, looking at the non-disclosure of the FOS Adjudication and the FOS Award in isolation, we think that they were matters that should have been disclosed. We recognize that when the Applicant made
35 the application and received the authorization he was no longer actively conducting any investment business. But the FOS Adjudication and the FOS Award were "awards" or, at least, significant events that related directly to the firm's continuing activities; and those activities were the object of the application for permission as regulated activities.

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The Applicant's failure to comply with the FOS Award

25. It is common ground that the Applicant has not, to date, complied with the FOS Award. The Applicant stated that it was "not within the means of the Applicant
45 to meet". More specifically, he asked us to take into account the fact that, since he was no longer authorized to conduct pensions business, he no longer had the suitable technical competence to undertake the loss calculation. He had found the FOS letters

unhelpful because these had done nothing to recognize that he was unable to deal with the calculations. Thus the Authority should have stepped in to assist in the calculations. This was particularly the case here as there had been a wide disparity between the figure calculated by the PIA PRU (£6,600) in May 2002 and the "re-instatement cost" of some £50,500 obtained in 2006.

26. The Authority referred us to a series of letters from the FOS requesting information and chasing up non-responses from the Applicant. In April 2002 the Authority had informed the Applicant of the pension review programme and had asked the Applicant to supply the relevant client's file. The Applicant's evidence was that he had not been able to locate the file and in December 2003 he had written claiming that the file was missing. The FOS wrote on 29 June 2004 sending a "statement of redress" and asking for comment and a response within two weeks. The Applicant responded briefly in mid-August 2004. The FOS wrote in mid-September asking for clarification of certain matters. The Applicant did not reply despite various chasing letters. The FOS Award was made in December 2004. We note that despite being informed of his acceptance of the FOS Award in 5 January 2005 and being chased by the relevant individual by post in August 2005 and by telephone and post in October 2005, the Applicant took no steps to comply with it until over a year later when, on 9 January 2006, he wrote to the Teachers' Pension Authority requesting a re-instatement quotation. We note also that, since then , over a year has elapsed and the only progress made by the Applicant has been to obtain a re-instatement value in respect of the Teacher's Pension Scheme (in March 2006) and details of the relevant individual's pension policy in November 2006.

27. The Authority pointed out that neither of the FSA calculations referred to by the Applicant (i.e. the loss calculation of May 2002 and the "statement of redress" of February 2004) had been carried out due to any assessment or awareness on the part of the Authority that the Applicant was somehow not competent to deal with the pension review issues. This was not challenged. Nor did the Authority accept that the steps required to comply with the FOS Award were complicated. As we understand the position, all the Applicant has to do is to obtain reinstatement quotation from the Teacher's Pension Scheme, subtract the surrender value of the relevant individual's personal pension and pay the difference. It appears that the Applicant was aware of this from the steps that he took over the course of 2006. In any event we see no reason why, if the Applicant considered that he was not capable of dealing with the matter, he should not have obtained suitable advice. Our impression overall is that for at least three years from early 2002 the Applicant had been stalling and burying his head in the sand in relation to the pension re-instatement matter.

28. Looking at the events relating to the FOS Award, we think that they demonstrate a lack of willingness to co-operate with the Authority. As we understand the letters and the Applicant's answers in oral evidence, he made no real effort to resolve the matter. He could, as we have noted, obtain advice. Those factors show a level of such incompetence that we share the view of the Authority that the Applicant does not satisfy the "suitability" condition of Threshold Condition 5.

Conclusions

29. Omissions in application forms may be deliberate. They may be by oversight. They may occur because the Applicant in question takes the view that the information admitted should not be of concern to the Authority in reaching its decision. Whatever the reason, we agree with the Authority's approach that the omissions in the information provided by any applicant in both the FAF and CFICF forms (and subsequently) are potentially matters of serious concern in terms of that Applicant's openness, honesty, willingness and ability to be open and honest with the regulator.

30. We are satisfied that the present Applicant was well aware of the PIA issue when he made the application. He may have persuaded himself that this should not have been of concerned to the Authority. But he should not have given himself the benefit of the doubt. The fact that the Applicant had been erased from the IBRC Register should have been disclosed. The Applicant may, we accept, have had little recall of the details, but that does not excuse his non-disclosure. Although not a serious matter in its own right, it shows a general attitude on the Applicant's part to disregard the disclosure requirements.

31. The wording of the FAF and CFICF forms is in our view express and unambiguous when it comes to the obligation to disclose. The Applicant should have understood he was required to enclose any material information if he was in any doubt that this was necessary.

32. We are satisfied from the evidence and circumstances summarized above that Mr Agarwala's failure to disclose the material information, taken as a whole, shows that he is not a fit and proper person (for the purposes of Threshold Condition 5). He has failed to conduct his business with integrity and in compliance with proper standards. He has, in inexcusably failing to make good the FOS Award, failed to treat customers fairly. Moreover he has failed to be open and co-operative with the Authority. Those factors show, not just a lack of candour, but a distinct lack of competence and appreciation of the high regulatory standards expected of him and his firm.

33. Our overall conclusion is that it was, in the circumstances, proportionate for the Authority to have imposed the variation of the Part IV permission (and requirements) as set out in the Supervisory Notice upon the Applicant in pursuance of the Authority's statutory objectives in order to protect consumers. We are satisfied therefore that the proper course is for the Authority to cancel the Applicant's Part IV permission. We direct accordingly.

SIR STEPHEN OLIVER QC
CHAIRMAN