IN THE DISTRICT COURT
AT WELLINGTON

CIV-2011-085-954

UNDER	The Financial Advisers Act 2008
IN THE MATTER OF	An appeal from the decision of the Financial Markets Authority dated 21 October 2011 declining the appellant's application for authorisation as a financial adviser
BETWEEN	SEAN FLOYD WOOD Appellant
AND	FINANCIAL MARKETS AUTHORITY Respondent

Hearing: 15 February 2012

Counsel: Mr C T Patterson for the Appellant
Mr J B M Smith and Mr J L W Wass for the Respondent

Judgment: 13 April 2012

RESERVED JUDGMENT OF JUDGE S M HARROP

Introduction

[1] On 15 August 2011 Mr Wood applied for registration under s 52 of the Financial Advisers Act 2008 (the Act) as an Authorised Financial Adviser (AFA). He was already a Registered Financial Adviser (RFA), which in his view enabled him to advise only on simpler products such as insurance, bank term deposits and mortgages. He considered that he needed to be an AFA in order to operate his PropertyTutors business in the way he wished, involving advice on more complex investment products, and offering investment management and investment planning services.

[2] One of the threshold criteria for becoming an AFA is that the applicant is a person of good character.[1] Although Mr Wood met all of the other statutory criteria and requirements, the respondent (the FMA) determined that he was not a person of good character and declined his application on 21 October 2011. Essentially this was based on his failure to disclose convictions under the Building Act 2004 that he, and a company of which he was sole director and shareholder, had incurred in 2008, on his conduct which lay behind those convictions and on his attitude to Building Act requirements as displayed in an interview with FMA representatives on 14 October 2011.

[3] Mr Wood has exercised his right of appeal under s 138 of the Act against the FMA decision. In brief, he contends that he is of good character, that the FMA gave disproportionate weight to the convictions and no or inadequate weight to his explanation for their non-disclosure and to all the other indications that he is of good character, especially his unblemished record during 12 years practising as a real estate agent and his history in the property investment industry.

The approach on this appeal

[4] Section 141 of the Act makes it clear that this appeal is by way of rehearing. The Court is empowered to confirm, reverse, or modify the decision appealed against and may make any other decision that the FMA could have made. Aside from a right of appeal on a question of law to the High Court, the decision of this Court is final. Section 143 provides that the Court may, instead of determining the appeal, direct that the FMA reconsider, either generally or in respect of any specified aspect, the whole or any part of the decision.

[5] The approach to an appeal by way of rehearing was clarified by the Supreme Court in *Austin, Nicholls and Co Inc v Stichting Lodestar* [2008] 2 NZLR 141. At [4] and [5] the Court said:

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[1] Section 54(a)(ii)

> [4] Perhaps the most familiar general appeals are those between the Courts. So, in the present case, the Court of Appeal on general appeal from the High Court under s 66 of the Judicature Act 1908 was entitled to take a different view from the High Court. Similar rights of general appeal are provided by statute in respect of the decisions of a number of Tribunals. The appeal is usually conducted on the basis of the record of the Court or Tribunal appealed from unless, exceptionally, the terms in which the statute providing the right of appeal is expressed indicate that a de novo hearing of the evidence is envisaged ... in either case, the appellant bears an onus of satisfying the appeal Court that it should differ from the decision under appeal. It is only if the appellate Court considers that the appealed decision is wrong that it is justified in interfering with it.
>
> [5] The appeal Court may or may not find the reasoning of the Tribunal persuasive in its own terms. The Tribunal may have had a particular advantage (such as technical expertise or the opportunity to assess the credibility of witnesses, where such assessment is important). In such a case the appeal Court may rightly hesitate to conclude that findings of fact or fact and degree are wrong. It may take the view that it has no basis for rejecting the reasoning of the Tribunal appealed from and that its decision should stand. But the extent of the consideration an appeal Court exercising a general power of appeal gives to the decision appealed from is a matter for its judgment. An appeal Court makes no error in approach simply because it pays little explicit attention to the reasons of the Court or Tribunal appealed from, it comes to a different reasoned result. On general appeal, the appeal Court has the responsibility of arriving at its own assessment of the merits of the case.

[6] Mr Patterson submitted that because Mr Wood was not appealing on some technical or competency ground, but rather challenging an assessment of his character, I was in as good a position as the FMA to make that assessment; the obligation to pay due deference to the FMA did not have the force it might otherwise have had. Mr Smith accepted that deference was on a continuum and that assessment of good character may be at the lower end of the spectrum but he still maintained that I was not in as good as a position as the FMA to assess Mr Wood's character. I accept that submission primarily because, as will be mentioned, a critical part of the FMA's assessment in this case derived from the impressions conveyed by him at the interview on 14 October 2011. Although I have been provided with the 20 page transcript of that interview, I consider that the FMA, through its representatives Sue Brown and Simone Robbers, had a material advantage over me by being able to observe the way Mr Wood answered questions during the interview, which lasted some 41 minutes.

[7] I therefore proceed on the basis that appropriate but not excessive deference needs to be paid to the FMA's assessment of Mr Wood's character.

[8] Immediately following the hearing counsel filed brief memoranda arising from an observation I made near the end of the hearing that Mr Wood had had an opportunity to put any further evidence before the Court and, subject to the two brief affidavits he had filed, he had not taken that opportunity. Mr Patterson was concerned that this observation may have indicated that I thought the hearing of the appeal was on a de novo rather than rehearing basis. However, as Mr Smith pointed out in his memorandum in reply, the correct position is that it is not inconsistent with an appeal by way of rehearing that further evidence may be provided. I made the observation with Rule 14.18 of the District Courts Rules 2009 in mind. That provides the Court with *"full discretionary power to hear and receive further evidence on questions of fact"*. This is a provision with which I am familiar as a result of hearing a number of appeals from the Tenancy Tribunal, which are on the same nature as this one.

[9] There was nothing to stop Mr Wood applying for the exercise of that discretion. As Mr Smith points out that does not mean that an application would necessarily have been granted but there is no question that Mr Wood had the opportunity to *attempt* to put forward further evidence as to his character if he wished to do so.

Issue

[10] Against this background the issue I have to decide is whether or not the FMA determination that Mr Wood is not a person of good character was wrong. Mr Wood carries the onus of persuading me that it was.

[11] I was told that this is the first appeal to have been taken against a decision to decline AFA authorisation under the Act. Mr Wood has also made it clear how significant this decision is for him and for his company PropertyTutors Limited which is involved in educating paying members of the public about investment in the real estate market in Auckland. Mr Wood says in his affidavit of 18 November 2011

in support of a request for urgency in respect of this appeal that the services the company is able to offer have been significantly curtailed pending determination of this appeal. Substantial revenue has been foregone since May 2011 when Mr Wood says he decided to cease all marketing for new business pending obtaining what he considers to be the requisite authorisation. Considerable effort and cost has been expended in preparing the application and in preparing his business in the belief that it ought to be granted.

The legislation and what led to it

[12] Before considering the relevant statutory provisions, it is pertinent to traverse the circumstances which led to the enactment of the Act. For the purposes of the appeal Sue Brown, the head of primary regulatory operations at FMA and the maker of the decision under appeal, filed a helpful 14-page report pursuant to Rule 14.15 of the District Courts Rules 2009. She annexed a number of supporting documents produced during the process which led to the enactment of the Act. Mr Smith highlighted various aspects of this report during the hearing. Mr Patterson did not make any submissions suggesting that the contents of the report were inaccurate or ought not to guide me in considering the appeal.

[13] Ms Brown noted that the Act was born out of a wide-ranging regulatory reform project that sought to improve the conduct and practices of financial service providers and financial intermediaries, and to restore consumer confidence in financial advisers and financial markets. The government concluded that the previous model of self-regulation was ineffective and did not adequately protect consumers. It accordingly established a regulatory framework that set minimum standards of conduct and competency for providers of financial advice, requiring them to register as financial advisers (RFAs) and for those advising retail clients on more complex investments to become AFAs. Registration requirements for most financial service providers became mandatory from 1 December 2010 and the balance, including the need for authorisation, on 1 July 2011.

[14] Ms Brown pointed out that although the regulatory reform project had begun in 2004, subsequent developments in the market reinforced the need for regulation of

financial advisers. Various finance company collapses involving substantial investor losses could to a significant degree be attributed to failures in the professionalism, integrity and competence of the financial advisors who were responsible for investors placing their funds with those companies.

[15] In 2004 the Minister of Commerce established a taskforce on the regulation of financial intermediaries which noted in its final report that there were no mandatory standards for advisers, that both advisers and consumers lacked an understanding of advisers' legal obligations and there were inadequate means of ensuring compliance. There was often no culture of compliance, resulting in unprofessional behaviour such as acting in a conflict of interests.

[16] When the Financial Advisers Bill was introduced the responsible Minister noted that:

> The intention of this Bill is to foster consumer confidence in those who hold themselves out to be financial advisers, and to ensure that those who claim to be professionals in this important area are held accountable for their performance, integrity, and competence. Recent events have shown the significance of the role of financial advisers not only in terms of people making investments in finance companies but also in terms of investments in property companies and other vehicles.

[17] As Ms Brown put it, the reforms were not merely intended to ensure that advisers were competent and sufficiently knowledgeable to perform their role. The fundamental change was to require a culture of professionalism because Parliament recognised that this was the only way to ensure that consumers' interests would be protected.

[18] The Act reflects these sentiments. Section 3(1) provides that:

> The purpose of this Act is to promote the sound and efficient delivery of financial adviser and broking services and to encourage public confidence in the professionalism and integrity of financial advisers and brokers.

[19] Section 54, which includes the good character requirement at issue on this appeal, provides:

54 Eligibility to be authorised

A person ("A") is eligible to be authorised if—

(a) the [FMA] is satisfied that—

(i) A is registered or complies with section 13(a) and (b) of the FSP Act; and

(ii) A is a person of good character; and

(iii) A meets the levels of competency, knowledge, and skills specified in the code for an authorised financial adviser; and

(iv) A is not debarred from applying for authorisation; and

(b) the [FMA]—

(i) is not aware, after [making any inquiries that it considers appropriate], that A has been convicted by a court in New Zealand or elsewhere of an offence punishable by imprisonment for a term of 6 months or more; or

(ii) if the [FMA] is so aware, is satisfied that the commission of the offence does not reflect adversely on A's fitness to act as an authorised financial adviser.

[20] Once authorised, AFAs are required to comply with a code of professional conduct that includes ethical obligations. There are clear analogies with barristers and solicitors of the High Court.

[21] In order to provide advice on complex investment products such as securities, futures contracts or land investment products (known as Category One products) advisers need be not only RFAs registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008, but must also be AFAs under s 54. Accordingly a large proportion of financial advisers are not required to be authorised. The fact that only a proportion of them will carry the label of AFA, combined with the new minimum competence requirements and standards of professionalism that attach to that label, means that the status of AFA will carry significant weight. Ms Brown observed:

> To permit an individual to carry that title and fall short of the standards to which the Act and the Code aspire will inevitably undermine the AFA "brand" and the Act's purpose of promoting a culture of integrity and consumer confidence in the professionalism of the financial adviser industry.

[22] Ms Brown noted, and I accept, that the purpose of the Act is to force a cultural change. Where the financial advisers involved in the collapse of finance companies were often focussed on selling products and exploiting their clients for personal gain, the Act now imposes clear statutory conduct obligations on advisers and, through the Code of Conduct, it imposes fiduciary-type obligations on them to place the interests of their client first and act with professionalism and integrity. [2]

[23] In October 2011 the Commerce Committee of the House of Representatives reported following its enquiry into finance company failures since May 2006. There had been 45 such failures resulting in about $6 billion of investors' funds being put at risk, much of it never to be recovered. Losses to that point were about $3billion. It noted that the protection of consumers would not be achieved by merely spelling out a series of specific obligations. That would not likely alter the behaviour of an individual who fundamentally does not understand or respect his or her obligations. As a result the code of professional conduct promulgated under the Act begins with the following ethical obligations:

> **Code Standard 1:** An authorised financial adviser must place the interests of the client first, and must act with integrity.
>
> **Code Standard 2:** An authorised financial adviser must not do anything or make an omission that would or would be likely to bring the financial adviser industry into disrepute.

[24] As Ms Brown noted, in assessing applications for authorisation, FMA's role is to ensure as best it can that applicants have the insight, knowledge and attitude necessary to uphold and respect the new standards of professionalism and integrity that the Act seeks to promote. She observes that that is necessarily a subjective exercise but an important one because once an adviser is authorised, the ability of the FMA and the industry to control their activities and limit any harm caused by them is limited.

[25] It was for this reason that the Select Committee introduced the good character requirement which provides the basis for analogy with the requirements for admission of a barrister and solicitor of the High Court.

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[2] See ss 33, 34 and 35

[26] Ms Brown explained that because the Act does not specify what constitutes good character for the purposes of authorisation, the Securities Commission (now FMA) produced a guidance note on this requirement the substance of which I will discuss below.

[27] Ms Brown emphasised that the assessment of good character had to be made by FMA against the background of the clear purposes of the legislation. As she put it:

> FMA must ... ask itself whether it is satisfied that the applicant is the type of person who will understand and comport himself according to the high standards of professionalism and integrity that Parliament demands. FMA's reasons for concluding that it was not satisfied that Mr Wood was such an individual included a clear lack of willingness shown by Mr Wood to comply in the very recent past with his legal obligations and with accepted professional standards. This behaviour is precisely the sort of conduct that the Act seeks to prevent by including good character and competence as eligibility thresholds for authorisation.

[28] As I have noted, no submissions were made by Mr Patterson challenging the observations and conclusions made by Ms Brown as to the background to the legislation and the way in which this must inform assessment of the good character requirement. I accept those observations. Clearly *"good character"* cannot be considered in a vacuum. It must be considered in the context in which the requirement is made namely as it applies to a person who seeks high-level approval to operate as a financial adviser. I accept that it was intended to and must be taken as incorporating the fiduciary and ethical obligations which are outlined above. There are close similarities with the obligations of a barrister and solicitor of the High Court. This is reinforced by a number of disclosure and record-keeping obligations contained in either the Act or the code of professional conduct.

[29] Mr Smith submitted that there was a clear theme of self-regulation underlying the regulatory framework; I accept that submission. He noted that there is an obligation (which I understand to be a standard condition imposed by the FMA under s 55 of the Act) for an AFA to notify FMA in writing within five business days of any significant matter concerning the AFA's authorisation, or financial adviser activities including anything that would have been required to be disclosed in the original application. This, quite apart from other obligations, clearly highlights

the need for financial advisers to recognise an actual or potential breach of fiduciary or other ethical obligation and, proactively and potentially very much against the AFA's interests, to refer it to the FMA for consideration.

The FMA decision and what led to it

[30] Mr Wood, who is now 50, worked between 1992 and 2003 as a real estate agent primarily in the South Auckland area. During that time he acquired real estate property of his own and subsequently decided to enter into the business of educating others about investment in real estate. From October 2004 to December 2008 Mr Wood was a consulting mentor to a company called Richmastery Limited that educated paying members of the public about investing in the residential property market. Since February 2009 Mr Wood has been the sole director and shareholder of PropertyTutors Limited which is engaged in the provision of similar educative advice.

[31] Prior to lodging his application for authorisation as an AFA on 15 August 2011 Mr Wood along with others involved in his company undertook substantial training with the assistance of a company called Strategi Limited. Accordingly he completed the application itself having taken their professional advice.

[32] The questions and answers under the heading *"Good character"* were:

> (c) Are you aware of any matters that may have an adverse impact on the FMA's view of your character? Please read the AFA authorisation guide before answering this question.
>
> No
>
> (d) Have you been convicted by a Court in New Zealand or overseas on an offence punishable by imprisonment for a term of six months or more?
>
> No

[33] The AFA authorisation guide relevantly provides at pages 7 and 8 (emphasis in italics is mine):

Proof of good character

The Commissioner must be satisfied that you are of good character before it will grant authorisation. The Commission's assessment of an adviser's character is an important tool in preserving public confidence in the professionalism and integrity of financial advisers. To enable the Commission to make an assessment about your character, you are required to declare any matters that may have an adverse impact on the Commission's view of your character, provide details of *relevant criminal convictions* and provide up to three testimonials.

During the online application process you will be asked:

"Are you aware of any matters that may have an adverse impact on the Securities Commission's view of your character?"

When responding to this question, please consider the following questions:

- Have you ever been dismissed or asked to resign from any position of employment or from a position of trust, fiduciary appointment or similar position?

- Have you ever been investigated, *charged,* disciplined, censured, suspended or criticised by a regulatory or professional body, *court* or tribunal?

- Are you the subject of any current or pending disciplinary or criminal charges, dispute resolution matters in New Zealand or overseas?

- Have you:

    - been a director of
    - been a partner in
    - held any form of controlling equity ownership in, or
    - held a position of senior management in

  any business which has gone into liquidation or receivership while you were connected to that organisation or within one year of that connection?

If you answer "Yes" to any of these questions, please provide the Commission with all relevant information.

The fact that you have answered "Yes" to any of the above questions will not automatically result in the Commission taking an adverse view of your good character or disqualify you from being eligible to be authorised as an AFA. The Commission has the discretion to take into account the circumstances regarding the matters you disclose and decide whether they reflect adversely on your fitness to act as an AFA.

The Commission expects the following types of information to be disclosed by applicants and/or referees:

- *information suggesting a lack of willingness to comply with legal obligations, regulatory requirements* or professional standards;
- obstructive, misleading or untruthful dealings with others;
- a breach of fiduciary obligation or other obligation involving trust;
- a failure to deal appropriately with conflicts of interest;
- *involvement in negligent, deceitful or otherwise discreditable business or professional practices;*
- failure to manage business or personal debts or financial affairs satisfactorily.

The information can be set out in a Word document then scanned and uploaded as part of the application process.

Declaration of criminal convictions

The Commission needs to know if you have any criminal convictions in New Zealand or overseas for which you **could** have been sentenced to six or more months in prison. It makes no difference whether or not you were actually sentenced to six months' imprisonment or that you didn't serve an entire six months' term; any conviction carrying a potential penalty of six or more months' imprisonment must be disclosed. If you have any such convictions then you need to disclose to the Commission the details of your convictions including the offence, the penalty and when and where you were convicted.

The Commission will check records held by the Ministry of Justice and may check with overseas government agencies to verify the information you provide.

If you have been convicted of such an offence the Commission must satisfy itself that the offence does not reflect adversely on your fitness to act as an AFA. The fact that you have been convicted of such an offence will not automatically disqualify you from being eligible to be authorised. The Commission has the discretion to take into account the circumstances of the conviction and decide whether the offence reflects adversely on your fitness to act as an AFA.

It is in your interest to disclose any convictions you have and to submit to the Commission any factors it might take into account in reaching its decision. You can also provide relevant information about your financial adviser services or your role relevant to the circumstances of the offence as part of that submission.

Note that nothing in this section affects your rights under the Criminal Records (Clean Slate) Act 2004.

[34] In addition, Mr Wood was supplied by the FMA prior to completing his application with a further document prepared by the Securities Commission (the FMA's predecessor) in March 2011 namely a Guidance Note on the topic of *"Good character and criminal convictions: Financial Advisers Act 2008"*. That document relevantly provided at page 3:

> In addition to all other considerations relevant to character, criminal convictions within s 54(b) **and** any convictions outside of s 54(b) may be relevant. Advisers should keep this in mind when applying for authorisation and making the adverse impact declaration (below). (Emphasis in original)

[35] The Guidance Note advises at pages 5 and 6 that FMA would take into account information from the following sources in deciding whether an applicant for authorisation was of good character:

> 1. ***Adverse Impact declaration.*** During the process of applying for authorisation, applicants are asked:
>
> *Are you aware of any matters that may have an adverse impact on the Securities Commission's view of your character?*
>
> Applicants should respond to this question by providing information which the Commission might wish to know before granting authorisation. Applicants should include all such relevant information in their applications. The Commission will not be satisfied that full disclosure has been made unless applicants disclose all relevant information themselves even if the applicant knows the Commission might obtain the information from another source.
>
> If an applicant is uncertain whether a matter should be disclosed, they should either disclose the information or take legal advice on whether or not to disclose the information.
>
> The AFA Authorisation Guide provides a non-exhaustive list of information advisers should disclose when responding to the question above including information about:
>
> - having been dismissed from employment or asked to resign from a position of trust, fiduciary responsibility or similar;
> - having been investigated, charged, disciplined, censured, suspended or criticised by a regulatory or professional body, court or tribunal;
> - any current or pending disciplinary or criminal charges, or dispute resolution matters in New Zealand or overseas;
> - holding certain positions in a business which has gone into liquidation or receivership while the applicant was

connected with that business or within one year of that connection;

and information suggesting:

- a lack of willingness to comply with legal obligations, regulatory requirements or professional standards;
- obstructive, misleading or untruthful dealings with others;
- a breach of fiduciary obligation or other obligation involving trust;
- a failure to deal appropriately with conflicts of interest;
- involvement in negligent, deceitful or otherwise discreditable business or professional practices including being involved in the management or being a major shareholder of a company employing discreditable practices;
- failure to manage business or personal debts or financial affairs satisfactorily.

As explained above, when assessing whether an adviser is of good character, the Commission may take into account any criminal convictions held, including those falling outside the parameters set out in section 54(b). Advisers should have this in mind when applying for authorisation and making the adverse impact declaration.

In addition to the above, applicants should disclose information about criminal convictions:

- involving dishonesty, deceit, theft or fraud;
- suggesting a lack of competence, diligence, judgement, honesty or integrity;
- that relate to types of information set out in the AFA Authorisation Guide (see bullet points above).

The Commission would not, however, expect applicants to disclose minor traffic offences (such as parking infringements) unless the overall history of offending suggests a lack of willingness to comply with the law. For example, if the applicant had been involved in a large number of minor offences (such as a large number of parking infringements and/or failure to pay the associated fines), then the applicant should disclose this so the Commission can assess whether and how that behaviour might reflect adversely on the applicant's character.

2. ***Criminal convictions:***

> *Ministry of Justice:* The Ministry of Justice checks all applicants for histories of criminal convictions, and provides the Commission with any conviction information relating to the applicant.
>
> *Disclosure by applicant:* The applicant must declare any criminal convictions falling within section 54(b) namely convictions by a court in New Zealand or elsewhere of an offence punishable by imprisonment for a term of six months or more.
>
> In addition, as discussed above, applicants should disclose any criminal convictions in their adverse impact declaration including those falling outside the parameters of section 54(b) convictions if that information may be relevant to the Commission's view of the adviser's character.
>
> If an applicant is uncertain whether a conviction should be disclosed, he or she should either disclose it or take legal advice on whether or not to disclose it. The requirement to disclose information relating to either section 54(a) or (b) of the FAA does not affect applicants' rights under the Criminal Records (Clean Slate) Act 2004.

[36] Two days after Mr Wood lodged his application, on 17 August 2011, the FMA received an anonymous complaint about him in which it was asserted that it was not acceptable for him to become an AFA given his activities in the property investment sector. Mr Wood was interviewed on 19 September 2011 about this and a transcript was provided to me. Because ultimately FMA placed no reliance on this complaint I will discuss this aspect of the history no further.

[37] On 21 September 2011 the FMA advised Mr Wood that it had received a criminal conviction report which revealed that he had been sentenced on 26 May 2008 in the Manukau District Court in respect of two breaches of the Building Act. Further details were sought from him and an explanation as to why these convictions had not been disclosed in the initial application.

[38] Mr Wood replied by letter of 23 September 2011 saying "I did not believe the Manukau Court fines to be a criminal conviction or certainly not of a nature that would concern the FMA". He then set out the circumstances surrounding the offending and pointed out that the conduct had occurred some five years earlier. He also apologised unreservedly and said that the non-disclosure was not indicative of

any intention to mislead the FMA but rather arose from an error on his part as to what would be relevant.

[39] Mr Wood explained that his company City Link Properties Limited and he as Director were each fined $15,000 having pleaded guilty to charges under the Building Act of carrying out unconsented building works and failing to comply with a notice to fix. Court costs of $3,000 were also awarded to the informant Council. Mr Wood said:

> In fact, during our training processes and such we even asked Strategi to make general comment to us, about what the FMA might think in this regard. The consensus of these several discussions internally and with our trainer, confirmed that it was absolutely worth me applying and that sure I might get a few questions about it, but it wasn't likely to stop me becoming an AFA.
>
> That said, and to be fair to all involved in the discussion/s, *this was on the basis that I did not see the Court fines as being a criminal matter* and certainly not having imprisonment terms or anything like it attached to them. I may be making a mistake here in that, the fact that I was only given a fine might be incorrectly flavouring my thinking, however, that is what I believed.
>
> When I was doing the online application ... , the question about criminal convictions of effect six months or came up, and as such raised the matter again, and I again decided, at that time, on the basis of my knowledge of the matter, that I should not answer Yes, as I simply do not have any serious criminal convictions remotely involving any imprisonable offences.
>
> This was obviously on the basis that I did not believe for a second that the criminal justice check I was well aware you do, would have pulled this up as an issue. (*Emphasis in original*).

[40] Mr Wood added:

> The discussion in this area keeps on referring to the six month term of imprisonment benchmark and I believed then and do now this wasn't an issue for me.

[41] As to the offending itself Mr Wood explained that he had purchased the property at Corin Avenue site unseen and on the basis that the vendor gave no warranties as to the legitimacy of any work that had been done on the property. Mr Wood accepted he took a risk that, as is common with South Auckland properties, there may have been unpermitted work done on the property. As to this he observed:

> This doesn't mean it's fair that a purchaser should be targeted for someone else's illegal works.

[42] He added:

> The Council sent me a notice to fix which I responded to, in that I applied for a certificate of approval and they declined it. The facts are that the Council had proved well beyond any reasonableness and it's absolutely accurate to say they were and are very difficult to work with for business.

[43] Mr Wood described the stress and difficulty of dealing with the Council and noted:

> The irony is that, a few months after I was fined, they changed the rules so that the addition of internal walls was not a building consent issue anyway. Yes I was out of line, and I don't dispute that, and it's a shame that it happened.
>
> I don't believe that the to-ing and fro-ing between myself and the Council should have got as far as it did, and if they had been a little more human to deal with I probably would have been as well. In hindsight I could have handled it a lot better, sure.

[44] Mr Wood went on to explain that the reason he pleaded guilty just before the defended hearing was that he was under considerable financial and home pressure to bring the matter to a close. The hearing had been delayed either five or six times and he and his wife and three year old son were at the time living in Helensville, a round trip of some 100kms. He said that he and his solicitor sought to have his wife Maureen removed as a defendant because she was only a 1% shareholder and had never had anything to do with the property. He said the Council only agreed to do that if he pleaded guilty and that he did plead guilty because he felt that he had no choice but to take that option given the family stresses involved.

[45] Ms Brown replied on behalf of the FMA by letter of 10 October 2011 advising that the offending coupled with the failure to disclose it caused the FMA to have concerns about the good character element of Mr Wood's application. She requested a meeting. In his submissions Mr Patterson said the letter attached the guidance note although the letter does not purport to do so. Assuming that it was attached, it may be that Mr Wood had not seen it before then. However given that I understand the guidance note is available on the FMA's website, and having regard to the effort he says was put into the preparation for his application including the

taking of professional advice, I think it can safely be inferred that he was aware of both the guidance note and the AFA authorisation guide itself before he submitted his application.

[46] On Friday 14 October 2011 Ms Brown and Simone Robbers met with Mr Wood in Wellington. I have been provided with a full transcript of the 41-minute meeting. I will discuss the relevant aspects in the context of the points made by Mr Patterson in support of the appeal. On Friday 21 October 2011 the FMA wrote to Mr Wood declining his application and saying that it was not satisfied as to his good character because:

> a) the offences for which you were convicted were clearly included in the list of information advisers are advised to disclose in their application when responding to the question *"are you aware of any matters that may have an impact on FMA's view of your character?"* This list includes having been investigated, charged, disciplined, censured, suspended or criticised by a regulatory or professional body, court or tribunal;
>
> b) FMA's policy on Good character also clearly states that FMA will not be satisfied that full disclosure has been made unless applicants disclose all relevant information themselves even if the applicant knows FMA might obtain the information from another source;
>
> c) the conduct relating to non compliant building work was serious in nature and resulted in two convictions and significant fines for yourself personally and for your company;
>
> d) the information provided by you (including all information provided in support of your application and information we obtained during our meeting) does not satisfy us that you also regard the conduct as serious, that you regard the council's action as justified, or that you have genuinely recanted the behaviour. In particular we were concerned with your explanation at our meeting that you knew the works you undertook were in breach of the Building Act when you carried them out and knew the work required resource consent which you did not have, but you proceeded with the works anyway on the basis you considered that carrying out non permitted or non compliant works was common practice in that area; and
>
> e) that you took no action to comply with the council's legal notice to fix work carried out by a previous owner of the property as you considered the council should take this up with the previous owner of the property.
>
> We have applied the facts of your situation to the assessment factors in FMA's policy on good character for the purposes of authorisation, and we consider that your conduct and circumstances indicate several areas of character and behaviour that give rise to concern. These are:

i) a lack of willingness to comply with legal obligations, regulatory requirements or professional standards; and

ii) obstructive, misleading or untruthful dealings with others; and

iii) being involved in otherwise discreditable business practices, including being involved in the management of a company employing discreditable practices.

Your explanation of the events that lead to your conviction and your attitude towards your conduct at that time indicate an attitude towards compliance with the law only where you consider it is warranted. Your conduct was serious in nature and is at the upper end of unprofessional behaviour, and has direct relevance to the role of a financial adviser. We are therefore not satisfied that you would be willing to comply with the high standards of professionalism required by the Code of Professional Conduct for AFAs, and the legal obligations for authorised financial advisers imposed by the Financial Advisers Act 2008.

All of the above factors and information you have provided, taken together as a whole have led us to conclude that you do not meet the requirements of good character for the purpose of eligibility for authorisation under section 54.

The grounds of appeal

[47] The grounds on which Mr Wood challenges the FMA decision are:

1. The FMA failed to give any weight or consideration to the appellant's explanation for the non-disclosure of his previous regulatory breach;

2. The FMA gave disproportionate weight to the seriousness of the appellant's previous regulatory breach; and

3. The FMA failed to take into account other relevant factors in its assessment of the appellant's character including:

   (a) His unblemished record during twelve years practicing as a licenced real estate agent;

   (b) His history in the property investment industry;

   (c) His decision in May 2011 to cease any business activities and invest in external training until such time that he was able to resume business activities as an authorised financial advisor;

   (d) Any comments that could have been made by his referees, the contact details of which were provided to the FMA but to whom it appears the FMA did not make any contact;

(e) His satisfaction of all other requirements for approval as a financial advisor pursuant to section 54 of the Financial Advisers Act 2008 ("the Act"); and

(f) His full and proper co-operation with the FMA's investigation.

4. The Decision was made following a procedurally unfair process. The appellant was not afforded an opportunity to be heard after the FMA drew adverse conclusions about the seriousness with which it viewed both the appellant's regulatory offending and the non-disclosure of it to the FMA before making the Decision.

5. The FMA gave no consideration, or appears to have given no consideration, to authorising the appellant on certain terms and conditions pursuant to section 55(2) of the Act, so as to be able to assure itself on an ongoing basis of the appellant's good character.

The meaning of good character in other statutory contexts

[48] Before considering the grounds of appeal against the statutory framework and legislative history which informs the meaning of good character, it is pertinent to consider how good character has been assessed in other statutory contexts. This is especially so because as far as I am aware no Court has yet considered the meaning of good character under the Act.

[49] As Mr Patterson submitted good character requirements are found in several other statutes including the Education Standards Act 2001, the Sentencing Act 2002, the Citizenship Act 1977, the Fisheries Act 1996 and of course the Lawyers and Conveyancers Act. Mr Patterson rightly submits that it is clear from the case law that the context in which the good character requirement is imposed will be an important factor in the assessment to be undertaken. He referred to *Mrs C v Teacher Registration Board* [2000] DCR 803 where the District Court reviewed the deliberations of the Teacher Registration Board which had decided to cancel the registration of a teacher on the ground that convictions for misappropriation of funds while employed in a non-teaching role rendered her not of good character. The District Court found that the Board had focussed too narrowly on the fact of the teacher's convictions and on her behaviour with regard to the disclosure of details about them, rather than looking at the facts of the case in the round. Insufficient consideration had been given to the impact of the particular nature and circumstances of the teacher's offending on her present and future character and fitness to be a

teacher and to her record since the convictions. In that case the Court referred the matter back to the Board for reconsideration, as I am empowered to do here under s 143.

[50] Mr Patterson also referred to the judgment of Panckhurst and Chisholm JJ in *Re: B* , which was reported as *Re:M* at [2005] 2 NZLR 544, a judgment which Judge Tuohy in *Mrs C* had found helpful. That case concerned an application for admission as a barrister and solicitor. The applicant had an extensive criminal history but it was only subsequent events rather than the convictions that formed the primary basis for the Law Society's opposition to her admission.

[51] After exploring the general considerations as to why it was necessary for barristers and solicitors to be of good character, the High Court identified four features as relevant to its assessment, at paragraphs [21] to [23]. These were:

> 1. ... The focus is necessarily forward-looking. Importantly, the function of the Court is not to punish the applicant for past conduct. Rather the issue is the applicant's "worthiness and reliability for the future".
>
> 2. ... The onus upon a person who has erred in a professional sense following admission to the legal profession, is a heavier one than that upon a candidate for admission.
>
> 3. ... Due recognition must be given to the circumstance of youth where errors of conduct occurred when an applicant was immature.
>
> 4. ... It is important to look at the facts of the case in the round, to not just pay regard to the fact of a previous conviction or convictions.

[52] I did not understand Mr Smith to disagree with the applicability of these observations in the present context. Counsel appeared to agree that a useful analogy of the qualities required of an AFA may be drawn with the qualities required of a candidate for admission as a barrister and solicitor of the High Court.

Discussion and Decision

Failure to disclose the Building Act convictions

[53] Mr Wood told the FMA representatives at the interview on 14 October 2011 that he was fined $15,000 personally and his company a further $15,000 for the offences under the Building Act. The first was an offence against s 40 of the Building Act 2004 of carrying out building work otherwise in accordance with a building consent. That offence made him liable to a fine not exceeding $100,000 and in the case of a continuing offence to a further fine not exceeding $10,000 for every day during which the offence has continued. The second offence was failing to comply with a notice to fix, contrary to s 168 of the Building Act. That offence carries a maximum penalty of a fine not exceeding $200,000 and in the case of a continuing offence carries a further fine not exceeding $20,000 for every day during which the offence has continued. It seems to me unlikely to be correct that the Court fined Mr Wood $15,000 personally and his company $15,000. His *personal* criminal conviction list refers to both charges and to the sentence being a fine of $30,000. However this point was not raised by Mr Smith at the appeal nor was it something relied on by the FMA in its decision. There is no dispute however that Mr Wood accepted he was responsible for both offences and that overall fines in respect of his conduct totalled $30,000, plus Court costs of $3,000.

[54] In order to assess the significance for present purposes of Mr Wood's failure to disclose these convictions, it is necessary to examine the conduct which lay behind them. As I have mentioned Mr Wood purchased the Corin Avenue property site unseen and found that considerable work was required to bring it up to the standard he sought. He paid $250,000 for the property and spent $50,000 renovating it. In the course of that he decided to remove what he considered was illegal work and turn it from a *"two-dwelling back to a one-dwelling"*. He admitted that what he did was to put in four non-load-bearing walls, work which he accepted, at the time, needed building consent which was not sought. He accepted that, at the time that work was done, he knew it was in breach of the Council's requirements and the law. He said that despite that he decided to go ahead with the work anyway because of the number of properties in South Auckland that have non-load-bearing walls. It appeared to him that this was not an issue from a Council perspective because they have so many properties that are non-compliant in that way. So, if the Council later approached him, then *"you either took them down or you got a code of acceptance on it"*. In this case the Council issued Mr Wood with a notice to fix some non-

complying work done by the previous owner and he did not comply with it; that led to the second of the convictions. On this issue he said:

> In response to that notice to fix we did nothing because we were arguing with the Council over that period of time, for that whole year, on the basis that we felt they needed to contact the old owner and take up all those issues with the old owner. Because for me to actually do that was going to be around $20,000 of my costs to actually get new building consents, new resource consents, and to have the property completely redrawn up and redrafted – and yet I hadn't done the work.

[55] Having considered both Mr Wood's letter and the transcript of the interview, I am satisfied that his conduct in relation to the Corin Avenue property reveals, as the FMA concluded, a disturbing attitude to compliance with the law. He demonstrated that, at least at that time and in relation to that issue, he was unwilling to comply with legal obligations of which he was fully aware and that he was willing to make his own assessment of how serious the breach of the Building Act was with regard to how prevalent it was in the area. In short, Mr Wood clearly had the opinion that he did not think his breaches of the Building Act were very serious because so many other South Auckland property owners were just as guilty as he was. He also clearly implies that he is prepared to do non-compliant work and wait and see if the Council picked up on it and only to do something about it if they did. In short, he was prepared to break the law and wait and see if he could get away with it.

[56] On top of this when he was given a notice to fix work carried out by the previous owner that was non-compliant, he did not accept responsibility for that, saying that the Council should be pursuing the previous owner. That was not the correct legal situation because he was the current owner responsible for it. Furthermore, he also had expressly taken the risk that he might be called to account for non-compliant work carried out by a previous owner. He brought the property site unseen and on the basis of a contract where the vendor made no warranties as to this.

[57] Even at this time of the interview, he still appeared to regard the whole of the Council's conduct and the prosecution itself as unreasonable and unjustified.

[58] Clearly the Court regarded the offending as quite serious given the level of fines imposed notwithstanding guilty pleas. While I accept Mr Patterson's submission that the fines do not represent a significant proportion of the available maxima, a first offender otherwise of good character who pleads guilty is entitled to a sentence well below the statutory maximum. The maximum penalties themselves indicate how seriously Parliament regards these matters. I note indeed that under s 118 of the Financial Advisers Act itself, the penalties for misleading and deceptive conduct by an authorised financial adviser are a fine of $100,000 for an individual and $300,000 for a company. If Mr Wood thinks that the offending under the Building Act was not especially serious then presumably he must have the same view about such offending under the Financial Advisers Act, given the similar penalties.

[59] Against this background I turn to consider the import of Mr Wood's failure to disclose the convictions in completing his application. I can accept Mr Patterson's submission that a lay person *might* without much thought on the topic consider that breaches of the Building Act were regulatory in nature and not in the same category as offending against the Crimes Act. However this is a case where Mr Wood was applying to acquire what he well understands is significant status in the new financial adviser regime. On his own evidence, he and his staff had gone to considerable trouble and expense to train and prepare for this and he had engaged professional advice including as to completion of his application. It may be, as he implies, that he was to some extent misled by that advice but of course he personally must take responsibility for the way he completed his application.

[60] It is reasonable, indeed I would say a minimum requirement, to have expected Mr Wood to have carefully scrutinised both the AFA guide and the guidance note before completing his application. He admitted in his interview that he had not gone through the guide "*with a fine tooth comb*" or at least he was not sure that he had. This in itself is disturbing and gives rise to proper concern as to his likely level of assiduousness in completing the onerous tasks and ongoing responsibilities required of an AFA. If he is not prepared to go through these key advisory documents *"with a fine tooth comb"*, what confidence can there be that he will do so in respect of the kinds of documents an AFA must comply with?

[61] Even a relatively cursory reading of the AFA guide makes it clear that the convictions under the Building Act should have been disclosed and that it was reasonable for the FMA to have expected them to be disclosed. While s 54 highlights more serious convictions where the maximum penalty was imprisonment, for six months or more, the guide is clear that it is in the interests of the applicant to disclose *any convictions* and to submit to the Commission any factors it might take into account in reaching its decision. On this basis Mr Wood clearly should have provided the Commission with notification of the Building Act convictions and his explanation of the circumstances so as to attempt to persuade them that the convictions should not deprive him of registration on the grounds of bad character. It is also clear from the guide that even the more serious kind of convictions are not automatically disqualifying. Any reasonable applicant in Mr Wood's position would conclude from the guide that the sensible course was to disclose the less serious Building Act convictions and provide an explanation for how they should be viewed.

[62] In addition, the guide expressly asked applicants to consider the question of whether they have ever been investigated, charged, disciplined, censured, suspended or criticised by a regulatory or professional body, Court or tribunal. Self-evidently if the answer to that was "Yes" (as it clearly should have been in Mr Wood's case) then the FMA would regard that as a matter that may have an adverse impact on its view of his character. Applicants are then asked to provide the FMA with all relevant information.

[63] As if that were not enough, there is a clear statement in the guide that the FMA expects information suggesting a lack of willingness to comply with legal obligations or regulatory requirements to be disclosed and the same applies to involvement in negligent, deceitful or otherwise discreditable business or professional practices. The Building Act convictions clearly meet those criteria as well.

[64] Mr Wood should not have needed to go through the guide with a fine tooth comb to have readily reached the conclusion, knowing of the nature of the application he was making, that the Building Act convictions should be disclosed and proactively accompanied by an explanation of the circumstances.

[65] The message is reinforced by the guidance note which expressly says – with emphasis - that "convictions outside of s 54(b)" may be relevant. Mr Wood's comment that the main message he took out of the guides was the need to disclose convictions for offences carrying six months' imprisonment or more reveals either a worryingly cursory consideration of the guidance note or a serious misunderstanding of its advice. It is not an answer for him to say that he knew the FMA would obtain the conviction details in any event; the advice about answering the adverse impact declaration expressly says that information must be disclosed even if the applicant knows that the FMA might obtain it from another source. On page 7 of the guidance note, there are two references to the potential relevance of criminal convictions falling outside s 54(b).

[66] It was suggested by Mr Patterson that the reference on that page to the FMA not expecting applicants to disclose minor traffic offences made Mr Wood's non-disclosure understandable. I do not agree. The full passage says that even minor traffic offences ought to be disclosed if the overall history of such offending suggests lack of willingness to comply with the law. In any event, convictions under the Building Act for offences which carry very substantial fines can in no sense be described as minor offences.

[67] Finally, at the bottom of page 6 of the guide the FMA suggests that if an applicant is uncertain whether a conviction should be disclosed then he should disclose it or take legal advice on whether or not to disclose it.

[68] Overall, the clear message given to applicants by the authorisation guide and the guidance note is that the onus is on applicants to ensure that the FMA is told everything that *might* have relevance to the application so that the FMA can consider it. Adverse information will by no means be treated as fatal or even ultimately adverse to the application but without it there is the obvious risk that the FMA is unaware of something relevant. While Mr Patterson submitted that an applicant was required to make his/her own assessment of what the FMA could consider relevant, that should not be seen as an acceptance by the FMA that whatever judgment the applicant made would be sufficient. Rather it is simply a common sense acknowledgement that the applicant is the one who knows about themselves. The

FMA does not and needs to be informed of everything that *might* be relevant even if the applicant thinks it is or may be or little or no relevance.

[69] In summary, I have no hesitation in agreeing with the FMA that Mr Wood's failure to disclose the convictions was in itself a proper basis for concern about his good character in the sense of his likely compliance with the onerous obligations an AFA has. If Mr Wood is not able to discern, having been provided with two helpful guides as to what is or may be relevant, that the Building Act convictions were not something the FMA needed to know about, together with his explanation, then what confidence could the FMA have that he would understand and address appropriately his obligations as an AFA? This is exactly the kind of forward-looking approach which Mr Patterson rightly suggests the FMA (and I) need to take. The assessment of the failure to disclose as to its bearing on good character needs to be made in the context of what it reveals about his likely future compliance with various statutory obligations and with the code of professional conduct with which an AFA must comply.

[70] I reject Mr Patterson's submission that the FMA placed too much weight on the failure to disclose the convictions and not enough weight on his explanation for the non-disclosure. Indeed, ironically, in my view the FMA was entitled to regard his non-disclosure in the circumstances as *adding to* its concerns about his character. I accept this was not a case of Mr Wood attempting to mislead the FMA but it is a case of him failing to appreciate that the convictions and the conduct which lay behind him were undoubtedly matters that the FMA should have been told about.

[71] In short, Mr Wood's view, even now, that the Building Act convictions should not be seen as bearing on his good character in any way, adds weight to the FMA's view that they do.

To what extent did Mr Woods' conduct in relation to the Corin Avenue property and the prosecution bear on his character for FMA's purposes?

[72] As Mr Smith noted in his submissions, FMA's original concern with Mr Wood's application was his failure to disclose the fact of the Building Act convictions. However following receipt of his letter and what was disclosed at the interview on 14 October, their concerns about his character were increased rather than allayed. In my view the FMA was entirely justified in drawing adverse inferences about his character both from his conduct in relation to the building issues and the prosecution and from his current attitude towards those matters as displayed in the interview. I accept Mr Smith's submission that the following concerning aspects of Mr Wood's character emerged:

(a) Mr Wood was motivated throughout the entire proceeding by a desire to maximise his investment and in order to do so was prepared knowingly to breach Council requirements. He, at least by implication, chose not to comply with the Council's notice to fix because he regarded it as too costly. In short, his attitude to the issues raised by the Council was assessed by him on a cost-benefit basis.

(b) Mr Wood revealed a tendency not to take responsibility for his actions; he said that his guilty plea was for practical reasons rather than because he was truly responsible. He blamed the Council for being difficult to deal with and painted himself as a victim both of the Council's attitude and poor representation by his solicitor as well as failures on the part of his property manager and non-compliant work carried out by the previous owner.

(c) Mr Wood either did not regard compliance as necessary or at least merited because of the extent of other non-compliant work in the area. In short, he appeared to have the view that if the law was not being honoured by others then why should he comply with it?

[73] Mr Patterson submitted that far too much was taken by the FMA from these convictions and Mr Wood's attitude to them. He pointed out that Mr Wood had clearly accepted responsibility for his failures by pleading guilty, that the offences had related to his own property rather than that of a third party and that the offences related to a matter that no longer requires a building consent. Mr Patterson also submitted that there was a genuine dispute between Mr Wood and the local authority about whether the regulations would allow the building work in question. He ultimately decided not to put that issue to the test by his plea of guilty but that was not to say that he had not genuinely advanced a legitimate point. Mr Patterson submitted that the close interest that the FMA had now taken several years later in the matter was an unforeseen and unforeseeable consequence of his decision to plead guilty. In short, the matter needed to be kept in perspective and Mr Wood's explanations properly taken into account before any adverse inferences were drawn.

[74] I accept Mr Smith's submission that these points are unconvincing. As he said, people do not simply plead guilty and accept without appeal $30,000 in fines and $3,000 in Court costs when they genuinely believe that their conduct was not wrongful; all the more so in the case of a property investor who was conscious of cost. Although I can accept that pragmatic considerations played a role in Mr Wood's decision to plead guilty, he had by that point invested so much time and effort in the matter that if he had genuinely believed in his prospects of success in defending the charges it is likely that he would have continued to a hearing. I am not prepared to look behind the guilty pleas in the way that Mr Patterson suggests I should. While I acknowledge of course that some defendants plead guilty for pragmatic reasons when they believe they have reasonable prospects of acquittal, there is no particular reason in this case to think that Mr Wood would have been acquitted. His focus in discussing the convictions was not to say that the Judge would have acquitted him and to explain why but rather to explain that he ought not to have been prosecuted at all, that the Council should have been more reasonable to deal with and ought to have pursued the previous owner.

[75] I do not consider it relevant that the law changed soon after Mr Wood pleaded guilty; what matters is what the law required at the time the conduct in question took place.

[76] I also agree that it is irrelevant that the offending related to Mr Wood's own property rather than that of a client, especially as he is in the business of advising others about how they may profit from investment in property.

[77] I accept too that the convictions have relevance because they arose out of Mr Wood's business activities. They relate to the area of expertise, property investment and development, on which he intended to advise others if approved as an AFA. While I accept, consistent with *Re:M* , that the conduct is not quite as relevant as it would have been if he had been convicted of offences as a financial adviser, nevertheless it is much more relevant than for example serious traffic offending would have been.

[78] As is obvious from this discussion, I do not accept that the FMA failed to give any or sufficient weight or consideration to Mr Wood's explanation for not disclosing the Building Act convictions; the clearly stated obligations in the disclosure in the AFA authorisation guide and in the guidance note mean that Mr Wood's explanation was untenable. Further, his explanation *added* weight to the FMA's proper concerns.

[79] As is also obvious, I do not accept that the FMA gave disproportionate weight to the seriousness of the Building Act offending. Again, it was entitled to place significant weight on his conduct and attitude and to regard that as supplemented by his explanations and comments in his letter and at interview. I think it relevant too, though this was not expressly a factor in the FMA decision, that Mr Wood's offending was relatively recent and committed when he was about 45. It is not a case where it could be passed off as youthful or immature indiscretion with which it would be unfair to saddle him many years later. That this is a relevant consideration is confirmed in the passage cited from *Re M* (at [51] above); or at least it represents the absence of a mitigating factor.

[80] Mr Patterson's next submission was that the FMA failed to take into account other relevant factors in Mr Wood's favour, i.e. as pointing to his good character namely his unblemished record as a real estate agent, his history in the property investment industry, his commitment to the training required to become an AFA, his

referee's comments and his satisfaction with all other requirements for approval as a financial adviser and his full and proper co-operation with the investigation.

[81] I accept it would have been preferable for FMA to have made reference to and commented on these aspects in its decision but its failure to do so does not mean that these points were not taken into account. Obviously, in conveying its decision, the FMA was primarily concerned to tell Mr Wood why it was not satisfied as to his good character rather than to mention the reasons why it might otherwise have been.

[82] I am not satisfied that the FMA failed to take these matters into account; rather it is clear that it had such concerns arising from the failure to disclose the Building Act convictions and from Mr Wood's conduct and continuing attitude as displayed at interview that it simply could not , despite countervailing factors , be satisfied of his good character as required.

Was the FMA process procedurally unfair?

[83] Mr Patterson submitted that Mr Wood was not, and ought to have been, given an opportunity to be heard after the FMA drew adverse conclusions about how seriously it viewed the Building Act offending and its non-disclosure, and before it made its final decision. I accept Mr Smith's submission that this contention has no place in an appeal of this kind because I have to form my own view on whether the FMA was right or wrong to have declined Mr Wood's application. Although I do, contrary to Mr Smith's submission, have the power to refer the matter back to the FMA, realistically that would only have any point to it in this case if I thought Mr Wood could have added further relevant information had he been given the opportunity. There is no reason to think he could have done so. Mr Patterson did not explain what more he would have said if given a further opportunity. Nor, as I have noted, was an application made under Rule 14.18.3 for further evidence to be adduced at the appeal hearing.

[84] In any event , I accept Mr Smith's submission that it appears the FMA did proceed fairly and in accordance with the principles of natural justice. Arguably there need not have been an interview about the adverse information coming to the

FMA's attention both in respect of the anonymous complaint and the non-disclosure of the Building Act convictions but the FMA prudently and fairly decided to hold interviews in respect of both matters. The fairness of its approach is manifest not only from the fact of those interviews but from the fact that the outcome of the first was to put the anonymous complaint to one side. It appears to me that if at the second interview Mr Wood had provided an acceptable explanation for non-disclosure of the Building Act convictions and as to his conduct and displayed an appropriate attitude to the offending, the FMA may well have come to a different decision. As it happened, the interview only served to reinforce the concerns it had.

[85] Mr Patterson relied on the judgment of Heath J in *Janjua v Chief Executive of the Department of Labour* (High Court Auckland, 31 May 2004, CIV-2003-404-3381 / CIV-2003-404-472). That was a case where Justice Heath held that natural justice required that a person be given sufficient information to know that a particular matter is in issue and must be addressed. Because Mr Janjua had been expressly warned that *"given the seriousness of the false and misleading information provided, it is likely that your application may be declined on character grounds"* Justice Heath found that natural justice had been complied with. Mr Patterson sought to contrast the present case because at no stage was Mr Wood warned that his failure to provide satisfactory answers at the interview might lead to his application being declined.

[86] I do not accept this submission. Mr Wood was expressly advised in the FMA letter of 10 October 2011 that the nature of the conviction was one that related directly to his failure to adhere to regulation which is of specific relevance to the question of his character in the context of applying to be authorised in a regulated market. He was expressly advised that the FMA had concerns in regard to the good character element of his application. Mr Wood must therefore have been well aware that the way he spoke about the Building Act convictions and the surrounding circumstances at the interview would be important to the FMA's decision on the question of good character. If he did not realise that, then that is yet another reason why he is not suited to be an AFA.

[87] Mr Wood was applying for authorisation to hold a position of high status under the Act . He knew that the matter that was causing the FMA concern was the implication for its assessment of his character of the conduct relating to the Building Act convictions and their non-disclosure. He can have been under no illusions about the importance of the interview and as to the matters that would be discussed. As Mr Smith submitted, the decision that was ultimately reached relates closely to the concerns expressed in the letter preceding the interview. I agree that Mr Wood's real complaint is that his explanations during the interview not only did not persuade FMA that he was a person of good character, but in fact reinforced its concerns that he was not. But it is not as if he did not know what would be discussed and why it was important.

Authorisation on terms and conditions?

[88] Mr Patterson submitted that the FMA had also erred in not apparently considering authorisation of Mr Wood on certain terms and conditions pursuant to s 55(2) of the Act so as to be able to monitor and assure itself on an ongoing basis of his good character.

[89] Section 55 of the Act provides:

> **[55 [[FMA]] must approve or decline application for authorisation**
>
> (1) If an applicant for authorisation is eligible, the **[[**FMA**]]** must authorise that person in respect of 1 or more of the following for a specified period:
>
> (a) providing any financial adviser service, or specified kinds of financial adviser services, in relation to any category 1 product, specified category 1 products, or specified classes of category 1 product:
>
> (b) providing a discretionary investment management service on behalf of clients, generally or in specified cases, in relation to any category 1 product, specified category 1 products, or specified classes of category 1 product:
>
> (c) providing investment planning services generally or in specified cases:
>
> (d) providing, in any case that is specified in the regulations for the purposes of this paragraph, services of the kind referred to in paragraph (a) or (b) or both, but in relation to any

category 2 product, specified category 2 products, or specified classes of category 2 products.

(2) The authorisation may be subject to terms and conditions relating to financial adviser services or broking services or to both.

(3) If the [[FMA]] approves the application, the [[FMA]] must notify the applicant in writing of—

(a) the authorisation; and

(b) the terms and conditions (if any); and

(c) the period of authorisation.

(4) The [[FMA]] may incorporate, with any modifications it considers appropriate, the standard conditions.

(5) If an applicant for authorisation is not eligible, the [[FMA]] must—

(a) decline the application; and

(b) notify the applicant in writing of—

(i) the decision and the reasons for it; and

(ii) the applicant's right of appeal against the decision.

(6) Subsection (1)(d) does not limit or affect anything in section 18.]

[90] In my view it is clear from the opening words of s 55(1) that the question of what an AFA is authorised to do and to what terms and conditions, if any, that authorisation is subject only arises if the applicant's authorisation achieves eligibility, as defined in s 54. I therefore accept Mr Smith's submission that unless it was satisfied that Mr Wood was a person of good character, the question of authorisation and of any attached terms and conditions simply did not arise. To put it another way, there is no basis in the legislation for the question of good character to be monitored after authorisation; either the applicant is of good character or he or she is not. If the FMA was not satisfied that he was of good character then the Act (s55(5)(a)) required it to decline his application.

Conclusions

[91] As is obvious from the foregoing, I am not only not satisfied that the FMA decision was wrong, I would on the information available to me (which does not include the benefit of observing Mr Wood at the interview) have come to the same

conclusion. Adopting the forward-looking and contextual approach which is required, in my view Mr Wood's failure to disclose convictions and, more importantly, the fact of his conduct behind the convictions and his attitude to compliance with the law, mean that he is not of good character such as is required to be an AFA.

[92] The FMA quite properly came to the conclusion, in effect, that the adverse inferences it could and did properly draw as to his character meant that it could not be satisfied that he would comply with the onerous documentary, ethical and fiduciary obligations with which an AFA must comply. Like a barrister and solicitor, an AFA is required not only to respect and apply the law but to put the interests of clients ahead of himself where there is a conflict. The FMA was entitled to conclude that Mr Wood, based on his attitude to the Council and to the Building Act, is not or may not be someone who would do the right thing in such a situation. In respect of his company's Corin Avenue investment project, he had deliberately put his own views and interests ahead of the law, and relatively recently. That is a proper basis for thinking he would or at least may well do so again in situations of conflict of interests as an AFA.

[93] Taking a step back and measuring this case "in the round" against the purpose of the Act, the strong public policy factors which led Parliament to enact it, and the onerous fiduciary and ethical obligations imposed on AFAs by the Act, like the FMA I am satisfied that Mr Wood is not of good character in the sense in which that phrase is used in s 54.

[94] In terms of s 141(3)(a) of the Act I therefore confirm the FMA decision appealed against. The appeal is dismissed.

[95] FMA is entitled to costs. My preliminary view is that these should be awarded on a 2B basis. If counsel cannot agree, submissions should be filed within 14 days.

S M Harrop
District Court Judge

Signed at 4.15 pm on 13 April 2012