

Regulated Activity - Chairman of Credit Union – Prohibition Notice – Fit and proper person – Chairman failing to disclose interest in transaction entered into by Credit Union and preferring own interest to that of Credit Union –Credit Union suffering loss - Statements of Principle 1 and 2- Reference dismissed – Prohibition Order should issue

FINANCIAL SERVICES AND MARKETS TRIBUNAL

DR ALBERT ALPHONSO CARLYLE WAITE

Applicant

- and -

FINANCIAL SERVICES AUTHORITY

Respondents

**Tribunal: TERENCE MOWSCHENSON QC
PETER BURDON
CHRISTOPHER CHAPMAN**

Sitting in public in London on 25 and 26 July 2005

The Applicant, until he withdrew, in person

Nicholas Vineall, Counsel, for the Respondents

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DECISION

The Reference

- 5 1. Following a Decision Notice dated 27th October 2004 by the Financial Services Authority (“the FSA”) pursuant to section 56 of the Financial Services and Markets Act 2000 (“FSMA”) to the effect that the FSA proposed to make an order prohibiting the Applicant (“Dr Waite”) from performing any function in relation to any regulated activity carried on by a credit union, on the grounds that Dr Waite
10 was not a fit and proper person to carry on such activities, Dr Waite referred the matter to this Tribunal by a reference notice dated 21st November 2004.
2. At all material times until 11th July 2004 Dr Waite was the Chairman of the Board of the London Adventist Credit Union (“LACU”). The circumstances
15 giving rise to this reference arose out of activities carried out by Dr Waite in relation to LACU between about March 2001 and 11th July 2004. In their decision notice the FSA summarised the conduct which caused them concern as being:
- 2.1. Dr Waite’s conduct in facilitating an investment of LACU funds by the
20 LACU Board for the purchase and development of a property at 157 Chingford Road, Walthamstow, London (“the Property”) which contravened requirements of the previous regulatory regime;
- 2.2. the failure to protect LACU’s investment by ensuring that there was adequate security for its investment and to disclose to the LACU Board the true level
25 of risk associated with the investment;
- 2.3. the failure to disclose to the full LACU Board or the LACU membership the full extent of Dr Waite’s personal interest in the Property development and the fact he had agreed with the developer that he would receive the sum of £55,000 as a result of an investment agreement with the developer;
- 30 2.4. the fact that he had a conflict of interest between his role as Chairman of LACU and his personal financial interest in the development;

- 2.5. that Dr Waite put his personal interest in receiving a sum of more than £55,000 from the development before the interests of LACU in recovering its monies;
- 2.6. Dr Waite's failure to ensure that LACU met its capital requirements as prescribed by the Credit Union Sourcebook ("CRED") resulting in LACU voluntarily varying its own position in November 2003 in order to preserve its financial position.
3. In coming to its conclusion that Dr Waite was not a fit and proper person to perform any functions in relation to any regulated activities carried on by a credit union the FSA had regard to its guidance published in the FSA Handbook, and in particular Chapter 8 of the Enforcement Manual, the criteria in Chapter 2 of the Fit and Proper Test, and the Statements of Principle and Code of Practice for Approved Persons ("APER"). These matters include
- 3.1. honesty and integrity; these include an individual's openness and honesty, willingness to comply with requirements placed on him by the regulatory regime to which he is subject, as well as ethical standards; this is reflected in Statement of Principle 1 in that an approved person must act with integrity in carrying out his controlled function. In APER at 4.1.13 failing to disclose a conflict of interest is given as an example of conduct not complying with Statement of Principle 1.
- 3.2. competence and capability; these include an assessment of the individual's skill in carrying out the controlled function; this is reflected in Statement of Principle 2 that an approved person must act with due skill, care and diligence in carrying out his controlled function. In APER at 4.2.3 and 4.2.10, failing to disclose information to firm (in this case LACU) where disclosure was required and failure to disclose a conflict of interest are given as examples of conduct not complying with Statement of Principle 2.
4. Dr Waite attended the commencement of the hearing on 25th July 2005 to make an application for an adjournment. That application was refused for reasons given in

a separate judgment. Upon the refusal of his application Dr Waite withdrew from the hearing.

5 5. The evidence before the Tribunal included a large number of contemporaneous documents and a number of witness statements. The FSA produced 6 witness statements and Dr Waite had produced 10, including his own. Prior to the hearing Dr Waite had indicated that he wished to cross examine all but one of the FSA's witnesses. In the event, his failure to do so resulted in the witness statements not being challenged by him. It did not, of course, follow that the Tribunal was bound to accept the evidence in the witness statements. The FSA had indicated that it wished to cross examine Dr Waite and Mr Ecroy Moore. Dr Waite and his witness were not available to be cross examined. The FSA did not submit that the Dr Waite's and Mr Moore's witness statements should not be admitted in evidence as a result of failure to attend for cross examination. Instead the FSA submitted that the failure to attend for cross examination should go to the weight to be attached to the witness statements. That was the position adopted by the Tribunal in relation to the witness statements. In fact there was only one significant issue in which the witness statements differed in respect of the relevant facts and that related to the question whether Dr Waite had disclosed his financial interest in the development of the Property to the Board on 25th March 2001, and if so, the extent of the disclosure.

The Regulatory Background

25 6. So far as the Tribunal is aware, this is the first reference to the Tribunal involving activities relating to a Credit Union. Credit Unions are mutually owned financial co-operatives established under the Credit Unions Act 1979 ("CUA 1979") and the Industrial and Provident Societies Act 1965. They are unique, in that their membership is restricted to individuals who share a particular common bond. The common bond may be one of a number of qualifications, the four most frequently used are: residence in a particular locality; being a member of, or having an association with, an organization; working for a common employer or in a particular locality; or following a particular occupation. The rationale behind the

“common bond” requirement is to ensure that members of a credit union have a degree of shared identity. In the case of LACU the “common bond” was originally that members were Seventh-day Adventists in the North London Area (at which time it was called the North London Adventist Credit Union); subsequently the “common bond” was changed to Seventh-day Adventists in the London Area and LACU’s membership was extended to cover the whole of London at which time its name was changed to its current name.

7. Generally speaking, most members of Credit Unions are individuals on low incomes who have no access, or limited access, to credit available from larger financial institutions. Most Credit Unions’ staff, including senior management, are part time unpaid volunteers drawn from the members.
8. Until 2nd July 2002 Credit Unions were supervised by the Registrar of Friendly Societies (“RFS”). Since then they have been regulated by the FSA under the Financial Services and Markets Act 2000 (“FSMA”). The FSA has provided rules and guidance applicable to Credit Unions which are set out in the Credit Union Sourcebook (“CRED”). The transition from regulation by the RFS to regulation by FSA was assisted by a “grandfathering” process. Under this process, all credit unions which were registered and operating under the regulation of the RFS as at July 2002 were not required to undertake the process for authorisation. They were automatically deemed to be authorised by the FSA under the Part IV provisions of the FSMA to conduct the regulated activity of accepting deposits.
9. The “grandfathering” process also operated for individuals undertaking Controlled Functions in the credit union. They were automatically deemed to be Approved Persons for the purposes of FSMA, albeit subject to the same requirements and standards of persons who have to apply for authorization through the FSA’s application process.
10. By section 1(3) of the CUA 1979 Act the objects of a Credit Union are, and can only be:

(a) the promotion of thrift among the members of the society by the accumulation of their savings;

(b) the creation of sources of credit for the benefit of the members at a fair and reasonable rate of interest;

5 (c) the use and control of members' savings for their mutual benefit; and

(d) the training and education of the members in the wise use of money and in the management of their financial affairs.

11. There are limitations on the uses to which Credit Union funds may be put. The
10 Credit Unions (Authorised Investments Order) 1993 ("the Authorised Investments Order") made under section 13(1) of the CUA 1979, applied at the time of the £100,000 transfer from LACU funds. Under the Authorised Investments Order Credit Unions could invest only in a very narrow range of authorised investments, basically limited to government securities, building society shares, or bank
15 deposits.

12. By section 12(1) of the CUA 1979:

A credit union may hold, purchase or take on a lease in its own name any land for the purpose of conducting its business thereon but, subject to subsection (3) below, for no other purpose, and may sell exchange mortgage
20 or lease any such land.

and by section 12(3):

A credit union shall have power to hold any interest in land so far as it is necessary for the purpose of making loans to its members on the security of an interest in land and enforcing any such security.

25 13. For the period after 2nd July 2002 there are equivalent provisions in CRED (CRED 7.2.1) in respect of permitted investments and in relation to the restricted circumstances in which a credit union may hold land (CRED 7.2.8). The effect of these rules is that a credit union may only hold land (and buildings) for the purpose of conducting its business on that land and where it needs to do so as

security for loans to members. This means that a credit union must not acquire as an investment, land and buildings greatly in excess of its operating requirements.

14. Under the CRED regulations, a credit union must maintain positive net worth. (CRED 8.3.1) This means that a credit union's capital represented by its audited reserves, interim net profits and initial capital, must produce a positive figure so that a credit union's assets will at all times exceed its non capital liabilities (CRED 8.3.4). Bad and doubtful debts must be taken into account in establishing whether a credit union is maintaining a positive amount of capital (CRED 8.3.4).

The task of the Tribunal

15. The task of the Tribunal is to determine afresh the issues raised by the Decision Notice. On a reference, the Tribunal may consider any evidence relating to the subject matter of the reference whether or not it was available to the FSA at the time of the Decision Notice and must determine what action, if any, is the appropriate action for the FSA to take in relation to the referred matter; on determining the reference, the Tribunal must remit the matter to the FSA with such directions (if any) as the tribunal considers appropriate for giving effect to its determination: section 133 (3) to (6) of the FSMA.
16. The FSA accepted for the purpose of Dr Waite's reference that the burden of proof lay on the FSA to adduce sufficient evidence to persuade the Tribunal that Dr Waite is not a fit and proper person to perform any functions in relation to any regulated activities carried out by a credit union. The FSA submitted that the burden of proof had to be satisfied on the balance of probabilities. In the event, in the light of the evidence before it, the Tribunal has been satisfied on the matters upon which its conclusion is founded, beyond a reasonable doubt.

The Facts

17. From about 1993 Dr Waite was the Chairman of the Board of LACU. He is intelligent and highly qualified; his degrees include Grad RSc, MEd, MA Dip CTA, PhD, and Cert Ed. He is also a man with a charismatic and forceful personality. He played a leading role in LACU's affairs from about 1993 to July

2004 and appears to have played a primary role in dealing with its financial affairs and investments. As Mr Gordon, a witness for the FSA, stated in his witness statement, Dr Waite would lead and conduct meetings and was the major influence on the Board. Others were influential in the affairs of LACU in this period but to a lesser extent.

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18. In the mid to late 1990's LACU rented a small office in the John Loughborough School; certain of the members wanted LACU to have its own premises. Dr Waite prepared a 5 year plan for LACU in May 1996 which adverted to LACU becoming an independent credit union and acquiring office space and the possibility of acquiring a property to rent as a source of income. Between 1996 and 2001 Dr Waite was involved in reorganising the affairs of LACU so that it could become an independent credit union with a change of common bond. On 3rd December 1996 he contacted the office of the RFS and discussed a proposal to purchase property as a source of income and was warned by a Mr Martin of the RFS's office that such a course might contravene the CUA 1979. During 1997 he consulted with the RFS's office in procuring the adoption of new rules for LACU based on the Credit Union Model Rules ("the Rules"). Rule 42 of the Rules provides that any surplus funds of LACU may be invested in such manner as is authorised by an Order made by the Chief Registrar with the consent of the Treasury. As noted above, in 2001 the Order was the Authorised Investments Order which authorised a narrow range of investments. In the light of the above we conclude that Dr Waite was aware that there were rules governing the investment of LACU's surplus funds, was familiar with them, and knew that there were restrictions upon the investment of surplus funds in real property. In the course of his interview with the FSA, Dr Waite stated in relation to the acquisition of real property:

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“We've had the experience before of going to buy or trying to buy another property and advice we were given is not giving (sic) the Credit Union any investment, the Credit Union has to be there to buy a property. We've got the experience, we just used it” [Tape 5 lines 286 – 289]

19. Dr Waite carried on a business as a property developer through the medium of a limited company called Montego Limited. He knew a Mr Moverly Livingston, himself a small scale builder and property developer and some time in 2000 he lent Mr Livingston the sum of £30,000 to finance the completion of a new build project at Blythe Hill, Catford, London.

20. In 2000 Mr Livingston and Dr Waite identified the Property as having development potential. The Property consisted of an old post office building which was suitable, if planning permission could be granted, for conversion into residential accommodation consisting of 8 flats. Negotiations occurred between Dr Waite and Mr Livingston as to the nature of LACU's, and Dr Waite's, involvement in the venture in late 2000, early 2001.

21. Mr Livingston had a potential lender, B M Samuels Limited ("BMS") which was prepared to lend on a short term basis but was looking to Mr Livingston to put up about 25 per cent of the monies required to finance the purchase and development. Dr Waite was negotiating for an involvement in the development as a partner. Mr Livingston was not anxious to go into partnership with Dr Waite but was content to allow LACU to invest in the development as Dr Waite told him he could procure funds from LACU. In 2000 Dr Waite lent Mr Livingston £1,000 to assist him in obtaining planning permission for the development of the Property.

22. On 21st March 2001 Mr Livingston's solicitors (Collinson and Co) wrote to Dr Waite setting out their understanding of the position, noting that "Mr Livingston has no objections to you investing and becoming joint purchaser in the development, in your capacity as chairman of the North London Adventist Credit Union".

23. On the next day, 22nd March 2001, the London Borough of Waltham Forest granted planning permission for the conversion. The planning permission was for residential use and there is no indication that an application had been sought for any other type of use.

24. On Sunday 25th March 2001 there was an extraordinary general meeting of the LACU Board, attended by Dr Waite as Chairman, and board members Scantlebury, Daytes, Robinson, Rocke-Caton, Moore, Weekes, and Pastor Esson. According to the minutes which are signed by Dr Waite:

5 2. A unanimous vote was taken to transfer £100,000 as a deposit on the option of purchasing a ground floor apartment at 157 Chingford Rd Walthamstow. The Chairman is to monitor progress and report at interval to Board. If on completion of the building project the Board decides that the apartment is not suitable the money will be refunded at no loss in interest.

10 3. Vote to put £100,000 in telephone banking or ebanking in the name of A.A.C. Waite.

25. On 29th March 2001 a cheque for £200,000 was drawn on the LACU current account was met on presentation. The monies went to a personal account of Dr Waite.

15 26. On 2nd April 2001 Ashdown Lyons, chartered surveyors, provided a valuation of the Property, based on an inspection on 29th March 2001. Their clients were recorded as being Dr Waite and Mrs Patricia Livingston. They valued the property at £275,000 with the benefit of planning permission, and assessed the likely value of the completed conversion at £820,000. The valuation made no mention of the
20 proposed use of one of the flats as offices for LACU.

27. On Monday 2 April Rowberry Morris solicitors (acting for Dr Waite and perhaps LACU) wrote to Collinsons (for Mr Livingston). They said they had been instructed on Friday last (i.e. 30 March 2001). They set out their understanding of Dr Waite's instructions to them. They recorded (inter alia):

25 1. That the property will be bought in the joint names of our client and your client.

 2. That the documentation will recognise that our client has paid £1000 towards planning permission expenses last year;

30 3. That our client will facilitate a further investment in a sum of £106,000
 ...

4. Our client is looking to receive £45,000 from the proceeds of the sale of the flats or either a third of the profit whichever is greater or (if our client has responsibility under the mortgage) 40% of the profit whichever is greater.

5 5 We understand that [LACU] will have an option to take a ground floor flat and will decide on completion if this option is to be exercised

6. In any event the Agreement is to require repayment of the £106,000 investment plus £20,000 to [LACU] by the 30th of August 2001. Failure to repay will carry interest at 15% per annum.

10 28. There were further negotiations between Dr Waite and Mr Livingston. On 10th April 2001 Dr Waite faxed direct to Collinsons what appear to have been his (then) requirements for the agreement between himself and Mr Livingston. He required a fixed sum of £55,000 from the proceeds of sale, rather than a variable sum dependent on the overall profit, and he was agreeing to facilitate a sum of
15 £100,000 on or before completion of the purchase of the property. The money to be paid by LACU was £100,000. He also wanted a clause to provide that "All payments from the proceeds of the sale of the flats to be agreed, jointly, between Livingston and Waite".

20 29. An agreement along the lines of Dr Waite's letter of the previous day, was signed and dated 11th April 2001. The agreement provided as follows:

1. The property to be bought jointly between Mr Livingston and Dr A.A.C. Waite.

2. That Dr Waite will facilitate a sum of £100,000 on or before completion.

25 3. That the money be retained with the solicitor until a) Dr Waite receives a copy of the planning permission and b) documentation of joint purchase is in Dr Waite's possession.

30 4. A letter to be sent to [LACU] c/o Dr A.A.C. Waite recognising an input of £100,000, via AACW, which may be used as an option on a ground floor flat. The Credit Union must decide before completion, it (sic) they want to exercise this option. In any event, plans must be made to repay the £100,000 plus £20,000 to [LACU] by 20 September 2001. Failure to meet this date will attract a penalty of 1% of £100,000 per month or part thereof.

5. A sum of £55,000 (net) to be paid to Dr A.A.C. Waite from the proceeds of the sale of the flats. At least 50% before the last flat is sold.

6. Dr Waite is to bear no additional costs pertaining to the project as a whole.

5 7. This agreement recognises that Dr Waite is only an investor in the development.

30. Clause 7 of the Livingston-Waite agreement was not presaged by Dr Waite's 10th April letter, and, unlike the earlier proposal, the agreement did not include any provision as to agreeing payments from the proceeds of sale.
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31. On 12th April, the day after the agreement, Mr Livingston wrote to LACU, c/o Dr Waite in these terms:

15 This is to acknowledge receipt of £100,000 which may be used as an option on a ground floor flat. The Credit Union will decide, before the project is completed, if they wish to exercise this option. In any event, plans will be made to repay the One Hundred Thousand Pounds (£100,000) plus £20,000 to [LACU] by 20 September 2001. In the event of inability to meet the above date, a letter will be sent to the Credit Union, via Dr Waite, informing them of the situation and providing the date that the settlement will be made, if the option is not exercised.
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32. On 20th April Dr Waite and Mr Livingston applied for a loan from BMS, and by letter of 25th April 2001 BMS offered, and they accepted, terms for a facility of £450,000 (for 6 months) to be secured by way of first charge over the Property £165,000 was to be provided by way of initial advance, with the balance of £285,000 to be released in stages. Interest was chargeable at 1.65% pcm. In the application for the loan Dr Waite and Mr Livingston represented to BMS that they were partners and that they were contributing £100,000 from their own resources. They did not reveal, at that stage, that £100,000 was to be contributed by LACU. It was not a term of the loan that the proceeds of the loan could only be applied for the purposes of developing the Property. Rather BMS would allow funds to be drawn down upon being satisfied that the Property was of sufficient value to provide adequate security and that the works were of satisfactory standard.
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33. Completion of the purchase appears to have taken place on or about 10th May 2001, at a price of £270,000 (plus interest of £1,677 for late completion), funded principally by the £100,000 from LACU and £158,667 advanced by BMS.
34. There seem to have been other minor advances provided via Dr Waite but it seems
5 that these additional monies were not, or were not wholly, Dr Waite's own funds, but included (for instance) £10,000 from Mrs Daytes, a member of LACU who was a retired council cleaning supervisor.
35. The property was registered in the joint names of Livingston and Waite
36. The BMS charge is dated 4 June 2001.
- 10 37. On 17th August 2001 Dr Waite and Mr Livingston signed an authority to BMS dated 10th August 2001 which authorised it to release funds under the loan agreement to either of them upon the sole instruction of either of them; the effect of this authorization was that it enabled Mr Livingston to draw down funds under the BMS facility secured on the Property without supervision by Dr Waite.

15 **The position of LACU and Dr Waite shortly after the purchase of the Property completed**

38. After the purchase of the Property completed the position appears to be as follows:
- 20 38.1. LACU had parted with £100,000 and that money had been applied towards the purchase of the Property. BMS had a first (and the only) charge over the Property. BMS had been authorised to advance funds to Mr Livingston upon Mr Livingston's sole authority. LACU had no security in its name. It may be that on a proper analysis Dr Waite held all or part of his interest in the Property on trust for LACU but that afforded LACU no
25 protection or priority over BMS
- 38.2. Precisely who was obliged to repay the £100,000 to LACU is not entirely free from doubt. There is no evidence that Dr Waite has indicated to

LACU that he accepts a personal liability to repay. Mr Livingston appears to acknowledge a liability to repay;

38.3. If the development went according to “plan” LACU stood to recover its £100,000 and to gain a further £20,000;

5 38.4. LACU may have obtained some sort of option over one of the flats but (a) use of a flat as an office would have breached planning permission and (b) the enforceability of any such option is highly questionable since no terms were agreed as to price of the flat or timing;

10 38.5. Dr Waite made a modest contribution to the purchase price and was under an obligation with Mr Livingston to repay the monies borrowed from BMS;

38.6. If the development went according to “plan” Dr Waite stood to gain £55,000 in addition to repayment of any advances he himself had made.

Events after the Purchase

15 39. Between the spring of 2001 and mid 2002 Dr Waite and Mr Livingston fell out and a dispute developed. There appear to be two causes of the dispute.

40. The first is that Dr Waite became unhappy with the amount of monies advanced by BMS to Mr Livingston. Dr Waite apparently considered that BMS had advanced Mr Livingston sums in excess of those contemplated by the original
20 funding agreement. That may have arisen in part because a decision was taken to convert the building to a higher specification than was originally contemplated (and in particular to provide a study in each flat), and in part because it seems that some of the monies drawn down against the security of the Property were used to finance other projects. Ultimately it seems that this may have led to Mr Livingston
25 being in a position where he is now unable to refund LACU or pay Mr Waite.

41. The second cause is that Dr Waite took the view that the development had been more profitable than had originally been contemplated, and considered himself to

be in partnership with Mr Livingston; he claimed that he should therefore be entitled to a greater return than the £55,000 agreed with Mr Livingston. Dr Waite therefore declined to consent to the sale of flats unless Mr Livingston paid him an increased profit element; eventually that led to BMS taking possession of the flats under its charge.

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42. On 11th February 2002, Dr Waite wrote to Mr Livingston seeking Mr Livingston's proposals for a "revised split" on the profit to be made in the Property. Part of Dr Waite's justification was, he said, that he stood "the major financial risk" and wrote that he believed that he and Mr Livingston had agreed that as the selling price of each flat had been increased the "split" of profit needed to be revised. He asked Mr Livingston to make a proposal for a revised split. Mr Livingston's evidence is to the effect that Dr Waite was seeking an increase of £45,000 to take his payment up to £100,000.

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43. At a sparsely attended "ad hoc meeting" of the LACU Board on 10th March 2002 it was apparently resolved that Dr Waite should receive an increase in administrative expense of £1,500, and "that 10% of any profits, after tax, of any investment is paid to any member who initiate (sic) and monitor that investment to fruition."

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44. On 14th April 2002 Dr Waite is recorded in a minute of a meeting of a LACU general meeting under the heading administration reporting that "the investment is on line and the money should be back in CU account within the next two months"; the meeting also resolved that "Investment initiative: any member who can initiate an investment to fruition will be able to earn 10% of that investment profit."

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45. On 16th April 2002 Dr Waite wrote to the solicitors acting on the sale of the flats at the Property, Messrs Norman Barnet. He noted that the proceeds of all the flats should go first to discharge indebtedness to BMS, and then to LACU. He suggested that the agreement between himself and Livingston was being revised and asked them to wait for the new joint agreement "which has been in progress now for several months, before settlement". He said that no payments other than

to BMS and LACU, should, for the time being, be made from the proceeds without a joint agreement by himself and Mr Livingston “dated after today”.

46. On 2nd May he wrote to BMS noting that on 12th April 2002 a total of £771,620.67 was owed to BMS and seeking an explanation in relation to the draw downs.

5 47. On 9th May 2002 Mr Livingston wrote to Mr Waite. He made plain that he wished to meet his obligations to pay £100,000 “plus agreed interest” to LACU and £55,000 to Dr Waite and seeking instructions as to where the funds should be remitted.

10 48. Dr Waite’s reply of 14th May 2002 urged Mr Livingston to pay LACU (and Mrs Daytes the sum of £11,500) but threatened legal proceedings about Dr Waite’s enhanced profit element.

15 49. On 1st July 2002 Mr Livingston wrote a letter to Dr Waite to say that funds were available to repay LACU and to pay what was due under the 11th April 2001 agreement with Dr Waite (i.e., the £55,000) and asking Dr Waite to sign the transfer documents to allow the flat sales to proceed. He also stated that as he was in a position to pay LACU interest would cease to accrue on the monies owed to LACU as at 30th June 2002 By a letter of the same date Mr Livingston wrote to similar effect directly to the Secretary of LACU at its office. He did so because he was frustrated by Dr Waite’s attitude and wanted to stop interest accruing on the LACU monies. The likelihood (given what happened later in the form of an offer from BMS) is that had that offer been accepted, Mr Livingston would have been in a position to meet his side of the bargain, Dr Waite would have received £55,000 and LACU would have recovered its investment.

25 50. By a letter dated 2nd July 2002 Dr Waite refused to sign transfer documents relating to the flats and tried to persuade Mr Livingston to pay LACU but without removing his name from the registered title to the Property.

51. On 14th July 2002 Mr Livingston wrote to the Secretary of LACU reiterating that he was ready to pay LACU and that he required confirmation that upon that

payment LACU had no claim to an interest in the freehold. He also alluded to Dr Waite's claim to £100,000 (as opposed the £55,000 provided for in the agreement).

52. At a board meeting of LACU on 14th July 2002 at which the letter dated 14th July 2002 was discussed, Dr Waite attempted to blame Mr Rodney's interference and communication with Mr Livingston for causing the impasse over payment. The letter dated 14th July 2002 had been hand delivered to Mr Rodney.

53. On 15th July 2002 Dr Waite asked BMS not to make any further advances to Mr Livingston until a new joint arrangement was made.

10 54. On 22nd July 2002 Mr Livingston wrote to LACU to say that he would not be paying LACU anything until Dr Waite signed a transfer of his (or LACU's) interest in the Property and that he would release £55,000 to Dr Waite after hearing from LACU that they have carried out an enquiry into the matter.

15 55. On 20th August 2002 Dr Waite replied in his capacity as Chairman of LACU, seeking repayment of £100,000 plus interest to LACU. The letter did not deal with the question of Dr Waite signing transfer documentation. The letter stated that "The Board wishes to dissociate itself from your private dealings with Dr Waite, where they do not impinge on the Credit Union's investment".

20 56. On 6th September 2002 Dr Waite instructed Norman Barnett, solicitors handling the sales, that the sales were to be completed without delay but that no money from the receipts were to be paid to BMS. The instructions did not explain how sales could be completed without the cooperation of BMS as mortgagee. By a further letter of the same date he told them not to send him any contracts relating to the sale of the remaining three flats as he would not sign them until he had resolved his differences with Mr Livingston and BMS.

25 57. Both Dr Waite and BMS instructed solicitors. On 16th September 2002 BMS threatened to institute proceedings in relation to its charge.

58. On 25th September 2002 solicitors for Dr Waite wrote to Mr Livingston asserting that Dr Waite and Mr Livingston were in partnership in relation to the Property.

59. Butcher Burns, solicitors for BMS, wrote on 17th October 2002. They were responding to complaints from Dr Waite's new solicitors (Ajaz and Anderson) that BMS had improperly continued to make advances when the Property was complete. In the letter BMS made the following offer:

10 In this regard we are instructed that, subject to agreement on all other matters, [BMS] would be willing to immediately account to your client for his expected share of £55,000 and to remit to [LACU] the sum of £120,000 plus a measure of accrued interest pending redemption of the charge over Chingford Road and any post-completion accounting.

15 Mr Samuels, a director of BMS gave evidence in his witness statement that at that time there was enough equity in the Property to make these payments but that BMS were unable to make these payments because Dr Waite held out for an additional £45,000 to take his payment to £100,000.

60. The position was therefore that, even at this relatively late stage, LACU could have had back its £100,000 with at least a £20,000 return. Dr Waite could also have received the £55,000. The offer does not seem to have depended on Mr Livingston in any way.

20 61. There is no evidence that Dr Waite reported this offer to the LACU Board, and certainly there does not seem to be any minuted discussion of it, or whether or how, LACU should respond.

62. Dr Waite did not accept the BMS offer.

25 63. On or before 29th October 2002 BMS took possession of the three remaining flats, and thereafter proceeded to sell them (in February and March 2003, and June 2004).

64. By the end of 2002 Butcher Burns were instructed by BMS, Clyde and Co by Mr Livingston, and Field Seymour Parkes (FSP) by Dr Waite.

65. FSP wrote to Clyde and Co on 17th December 2002. The gist of that letter was that Dr Waite was still insisting on a profit share in excess of £55,000. Dr Waite made no attempt to ensure that LACU was separately represented in these negotiations.

5 66. On 31st March 2003 Butcher Burns (BMS) repeated to FSP (Waite) an offer to pay £120,000 to LACU and £55,000 to Dr Waite with a suggestion that BMS might be willing to “chip in” a little more.

67. At the end of the day:

67.1. No agreement was reached between Dr Waite and Mr Livingston;

67.2. There is litigation between Dr Waite and Mr Livingston;

10 67.3. At the date of the hearing before the Tribunal LACU has not recovered any part of its £100,000 and it appears that, absent litigation, it will not recover any part of the monies and is unlikely to recover the full amount – at least from Mr Livingston.

15 68. The effect of the uncertainty led to LACU’s accounts to 30th September 2002 being qualified, rendered it insolvent in a sum of approximately £20,000, and accordingly in breach of the requirement in CRED 8.3.1 that a credit union maintain a positive amount of capital at all times.

The Voluntary Variation of Permission (“VVOP”), the new Board, and the FSA’s investigations

20 69. The discovery of the circumstances surrounding the payment of the £100,000 led one of the members of LACU to report the matter to the FSA. The realisation that LACU was not likely to recover its £100,000, and the involvement of the FSA following the appointment of FSA investigators on 22nd August 2003 led, first, to a voluntary suspension of most of LACU’s activities by way of a voluntary variation of permission (VVOP) effective from 29th November 2003, and then to
25 the removal of the “old” Board and the election of a “new” Board at a meeting on 11 July 2004.

70. The effect of the VVOP is that LACU (whilst the VVOP remains in place) may not without the written consent of the FSA carry on its regulated activity of accepting deposits, dispose, deal with or diminish the value of assets, borrow money, sell shares, repay capital or lend monies. The restraints on LACU's activities will have hit certain of its members hard.

Dr Waite's duties of disclosure and his attitude to disclosing the full details of the Property transaction and his involvement in it.

71. LACU is established under the CUA 1979 and the Industrial and Provident Societies Act 1965 ("IPSA"). As such it is a body corporate: section 3 of IPSA. As a director and Chairman of LACU Dr Waite was under a duty to act in good faith in the interests of LACU and not for any collateral purpose: see **Re Smith & Fawcett Ltd** [1942 Ch 304. As a fiduciary Dr Waite was under an obligation not to place himself under a conflict of interest. LACU's Rules (Rule 80 (d)) provides that:

No director, committee member or employee of the credit union shall in any manner, directly or indirectly, participate in the deliberation upon or in the ultimate decision on any question affecting his/her pecuniary interest or the pecuniary interest of any person in which he/she has a direct or indirect interest. Such person shall withdraw from the meeting considering the matter. His/her withdrawal shall not make the meeting inquorate.

72. In the light of this provision it was not open to Dr Waite to attend the extraordinary board meeting of 25th March 2001 when the Board of LACU resolved to transfer the £100,000 "as a deposit on the option of purchasing a ground floor apartment" at the Property. Dr Waite did not vote in favour of the resolution but he was present when the matter was considered. Dr Waite, on one view of his involvement in the transaction, had a pecuniary interest in the transaction as he was to receive £55,000 from Mr Livingston and was going to be liable under the BMS facility. On Dr Waite's interpretation of his involvement, he was a partner in the partnership receiving the monies from LACU (with a minimum expected personal return of £55,000), the partnership was granting an option to purchase a flat to LACU for £100,000, and if the option could be and

was exercised, selling a flat to LACU. As a result, full disclosure to the Board would not of itself have absolved Dr Waite of his duties as a fiduciary not to place himself in a position of conflict of interest. Dr Waite would have needed to absent himself from the Board meeting and any consideration of the issue whether to pay
5 the £100,000.

73. However from the regulatory context, albeit a breach of Rule 16(d) is serious, it may be more serious if a director has failed to make full disclosure of his pecuniary interest in a transaction. We emphasise full disclosure because full disclosure is what is required of a fiduciary.

10 74. Having reviewed the evidence in this case we are satisfied that at the board meeting of 25th March 2001 Dr Waite made no disclosure relating to his interest in the development of the Property. We conclude that that was the case for a number of reasons:

15 74.1. The minute of the meeting signed by Dr Waite records no disclosure by him;

74.2. As at the date of the board meeting on 21st March 2001 Dr Waite had not finalised the terms of his involvement in the Property. Those terms changed as recorded in letters dated 2nd April 2001 and 10th April 2001 and the agreement made on 11th April 2001. For example, between 2nd and 10th
20 April 2001 the fee to be paid to Dr Waite increased by £10,000 and the formula set out in the paragraph 4 of the letter dated 2nd April 2001 was removed;

74.3. The witness statements served on behalf of Dr Waite of Mr Scantlebury, and Mr Moore do not suggest that there was full disclosure. The
25 witness statement of Mr Moore does not suggest full disclosure was made; it states that the Property “was brought to the attention of the Board by Dr Waite a joint proposition with Mr Livingston, as they dealt with property for public use”. Even had disclosure of that nature been made it fell far short of

full disclosure. We are satisfied that there was no such disclosure at the meeting;

5 74.4. Mr Waite in his Statement of Case and in his witness statement states that at a meeting of members Mr Rodney asked Dr Waite if his name was on the title deeds and that Dr Waite answered “Yes. It is a joint project between Mr Livingston and myself”. That interchange may have taken place at some subsequent time. Mr Rodney was away on holiday on 25th March 2001 and states that he was wholly unaware of any interest of Dr Waite in the development at the time, i.e., March or April 2001. He found out about Dr Waite’s interest subsequently.

15 74.5. Dr Waite, when interviewed by the FSA, started that he did not think he would have told the Board of his £55,000 fee because he saw that as private and separate from LACU’s deal and it was not linked to it; furthermore he saw no conflict of interest between LACU’s interest and his own;

20 74.6. Mrs Daytes whose witness statement consisted of a transcript of her interview with the FSA, and who attended the board meeting of 25th March 2001, explained that she had decided to invest after knowing that LACU was to invest, and after Mr Rodney had visited the Property, which was well after that meeting. She then discussed her investment with Dr Waite privately and he told her that his name was “on the deeds”. We refer to the transcript of the interview with her at pages 18 to 21.

25 74.7. Accordingly we conclude that Dr Waite did not make full disclosure at the board meeting of his pecuniary interest in the transaction which was being considered by LACU’s Board on 21st March 2001.

75. We also hold that he did not disclose the terms of the 11th April 2001 Agreement to the Board voluntarily. The terms came to light as a result of Mr Livingston giving Mr Rodney a copy of it in July 2002.

76. It is also clear from the evidence that Dr Waite did not welcome inquiries into the transaction and his involvement in it, and did not keep the LACU Board or members fully informed as to matters affecting the transaction into which LACU had entered. We refer to the following matters as examples:

5 76.1. Mr Morris Gordon describes in his witness statement the nature of Dr Waite's response when Mr Livingston started to write to members of the Board. Dr Waite would state that Mr Livingston could not be trusted and when Mr Gordon raised the matter directly with Dr Waite, and asked why the investment was being written off, he received "a barrage of words" and was
10 told that he should "go and look in the books, as its all in the books" or "everything is in the books". Dr Waite did not encourage discussion of the transaction at board meetings but would pass quickly on to other topics; furthermore Dr Waite would try to take action against members (such as Miss Deborah Harris) who persisted in asking questions.

15 76.2. Dr Waite did not respond properly to questions raised by Mr Martin Rodney relating to the transaction. When Mr Rodney raised the question of Dr Waite's personal interest in the transaction Dr Waite's response was to tell Mr Rodney to ask Mr Livingston how much he, Mr Livingston, was getting out of the development of the Property. When Mr Rodney tried to raise the
20 matter at board meetings Dr Waite diverted the attention of the Board from the issue and accused Mr Rodney of wasting the Board's time; at a board meeting on 14th July 2002 Dr Waite tried to blame Mr Rodney's interference for the impasse over repayment. Furthermore at a LACU AGM when Dr Waite was asked to explain what a VVOP was he tried to attribute the deficit
25 in LACU's assets to defaulting members as opposed to the loss of the £100,000 and refused to let the members see the letters from the FSA. In order to discourage Mr Rodney raising matters relating to the transaction he tried to take disciplinary action against Mr Rodney for purportedly revealing confidential information; and threatened him in a letter dated 30th April 2003
30 with being personally responsible for any shortfall in the recovery of the £100,000 which he purported to attribute in part to Mr Rodney's activities.

76.3. Miss Deborah Harris, a Chartered Accountant, a member of LACU, became concerned about LACU's affairs when she saw the accounts to 30th September 2002 and read the qualification relating to the £100,000. She attended a members meetings in March and April 2003 and tried to raise the matter with Dr Waite who told her not to worry about the matter and that the money was safe. At a meeting on 11th May 2003 when Miss Harris sought to raise a series of detailed questions relating to the investment, Dr Waite did not answer the questions, and threatened Miss Harris with reporting her to the Institute of Chartered Accountants in England and Wales, accusing her of unprofessional behaviour, and said he would seek to get her "struck off" or removed as a Chartered Accountant. We should state that we are satisfied that Miss Harris had acted with complete propriety and Dr Waite's attack upon her was an attempt to intimidate her into refraining from pursuing her questions relating to the transaction..

76.4. Dr Waite was careful to ensure that he retained responsibility within LACU for sorting the matter out with Mr Livingston when matters started to go wrong for as long as possible.

76.5. Matters were only eventually brought to the attention of the Board as a result of Mr Livingston contacting members of the Board directly.

77. In the light of the above matters we are satisfied that:

77.1. Dr Waite was the moving force behind LACU's decision to invest £100,000 in the Property and strongly recommended that decision to the Board of LACU;

77.2. the payment away of £100,000 of LACU funds was not an authorised investment; the payment was not made for investments falling within the terms of the Authorised Investment Order and the flat, the subject of the option, did not have permission for use as an office and therefore could not be occupied by LACU for the purposes of its business. Accordingly we consider that even if LACU acquired an effective option to purchase under the

agreement dated that agreement did not fall within the power conferred by section 12 (1) of the CUA 1979;

5 77.3. the documentation intended to evidence LACU's interest in the Property and its right to recover its £100,000 was wholly inadequate; Dr Waite took no proper steps to ensure that LACU's interests were safeguarded by ensuring that LACU took separate legal advice prior to entering into the transaction;

10 77.4. LACU had no adequate security to protect it to secure repayment of the £100,000 or the interest thereon; Dr Waite had charged the Property to BMS to secure the BMS facility and authorised it to advance funds to Mr Livingston at Mr Livingston's sole request. The fact that Dr Waite was one of the registered proprietors to the Property did not, in view of the terms of the BMS facility, and his own conflicting interest in the Property, afford LACU any adequate security;

15 77.5. in acting in relation to the transaction Dr Waite failed to exhibit the degree of competence which one would expect of a chairman of a credit union;

20 77.6. under the terms of the Livingston/Waite agreement, Dr Waite stood to benefit from the development of the Property by receiving at least £55,000 from the sale proceeds. On Dr Waite's case he was a partner with Mr Livingston and entitled to a greater share of the proceeds amounting to £100,000;

25 77.7. at the time when the decision to invest £100,000 was made, Dr Waite did not disclose to the LACU Board his own interest in the development of the nature of his agreement with Mr Livingston, the fact that he was one of the borrowers of monies secured on the Property, and should have done so fully both then and when the Livingston/Waite agreement was signed; he also should not have attended board meetings whilst the decision to enter into the

option agreement relating to Property was discussed, or indeed whilst the recovery of the £100,000 was being considered;

5 77.8. one of Dr Waite's motivations in recommending and supporting the £100,000 LACU investment was the benefit he personally would receive assuming the project was successful;

10 77.9. there was from the outset a conflict of interest between LACU and Dr Waite; LACU's interest was in obtaining office accommodation, and if it was going to do that, to do so with the minimum of risk; it was in Dr Waite's interest to secure the initial unsecured funding of £100,000 for the development of residential accommodation in order to facilitate the BMS facility which had to be secured by a first charge. It was in LACU's interest to have as much security as possible for repayment of the £100,000 (and interest). Instead it went into a transaction with wholly inadequate security (if registration of title to the Property in Dr Waite's name can be regarded as
15 security).

77.10. BMS were told that in the loan application that the £100,000 was contributed by Dr Waite and Mr Livingston. That was untrue.

20 77.11. during the negotiations between Dr Waite, Mr Livingston, and BMS for the repayment of the £100,000, Dr Waite's personal interest and those of LACU were in conflict and Dr Waite

77.11.1. placed his own interests above those of LACU as a result of which LACU did not receive repayment of the £100,000 and interest thereon from Mr Livingston or BMS;

25 77.11.2. unreasonably rejected offers of compromise and unreasonably insisted on payment to him greater than £55,000;

77.11.3. failed to report fully or adequately to the LACU Board on the nature of those negotiations, and failed to ensure that LACU was separately advised and represented;

77.11.4. should have ensured that a member of the Board of LACU other than himself took responsibility for recovering LACU's monies;

77.11.5. tried to put off and hinder the investigations by members of LACU who tried to investigate the circumstances surrounding the investment of £100,000 and Dr Waite's involvement in the Property and its development;

77.12. as a result of the investment of £100,000, LACU breached the capital requirements of CRED 8.3.1 and LACU had to apply for a VVOP which has had serious repercussions on its activities and adverse consequences for its members;

78. As at the date of the hearing Dr Waite could still not understand that LACU's interest and his own conflicted. Dr Waite contends in his Statement of Case that his relationship with Mr Livingston was one of partnership (paras 25 to 31). and "had nothing to do with [him] representing the interests of the LACU in his capacity as Chairman".

79. In the light of the above matters we are satisfied that Dr Waite is not a fit and proper person to perform any function in relation to any regulated activity carried on by a Credit Union.

80. Accordingly the reference is dismissed. The Tribunal's decision is unanimous.

81. The FSA should proceed to make the order prohibiting Dr Waite from performing any function in relation to any regulated activity carried on by a Credit Union as notified in its Decision Notice addressed to Dr Waite and dated 27th October 2004.

**TERENCE MOWSCHENSON QC
CHAIRMAN**

RELEASED:

FIN 04/0033