Reference number FS/2011/0015

DISCIPLINARY POWERS – Misconduct – Financial Penalty – Whether misconduct proved – FSMA 2000 s.66

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
FINANCIAL SERVICES

RAYMOND WAGNER **Applicant**

- and -

THE FINANCIAL SERVICES AUTHORITY **Authority**

TRIBUNAL: SIR STEPHEN OLIVER QC
ANDREW LUND
KEITH PALMER

Sitting in public in London on 16 July 2012

The Applicant in person

Martin Watts for the Authority

DECISION

1. Mr Raymond Wagner, the Applicant, has referred a Decision Notice issued by the Authority ("the FSA") on 14 April 2011. The Decision Notice informed him of the FSA's decision to make a prohibition order on him and to impose a financial penalty of £100,000.

2. The Reference itself disputed the substantial findings of the FSA. The first of those findings was that Mr Wagner had knowingly inflated his income to obtain a residential mortgage in May 2005. The second finding was that he had deliberately allowed false and inflated income figures to be submitted on his behalf in order to obtain four buy-to-let mortgages between May 2006 and July 2007. The FSA had also found that Mr Wagner had failed to have in place proper systems and controls and, as a result, two employees of Ambergate Business Services Limited ("Ambergate") had been able to submit mortgage applications containing false information.

3. In a letter of 21 July 2011, Mr Wagner notified the FSA that his reference was amended. He accepted the prohibition order but limited the reference to challenging whether it was appropriate to impose a financial penalty and, if so, the level of that penalty.

PRELIMINARY POINT

4. Mr Wagner challenges the FSA's power to impose the penalty. The alleged misconduct, he notes, took place in May 2005. Until June 2008, however, it had not been FSA policy to impose financial penalties on individuals for knowing involvement in mortgage fraud. Instead the individual in question had been prohibited pursuant to section 56 of Financial Services and Markets Act 2000 ("FSMT"). That alleged policy had, he said, been based on section 206(2) FSMT and had been published in Chapter 13 of ENF. The FSA should be bound by their stated policy. They should adhere to Article 7.1 of ECHR which provides that – *No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*

5. That objection is, we think, misplaced. It is correct that Part XIV is headed "Disciplinary Measures" and that section 206(1) enables the FSA to impose a penalty on an authorised person in respect of a contravention of a requirement imposed on him; and subsection (2), in the form that it took until the change in the law under FSMA 2010, excluded the FSA from both requiring an authorised person to pay a penalty and withdrawing his authorisation under

section 33. However, the present penalty is imposed in pursuance of the "Disciplinary Powers" provisions of section 66 of FSMA. Section 66 is directed at "approved persons". There is no equivalent to section 206(2) in section 66 that could apply to approved persons such as Mr Wagner.

6. Regarding Mr Wagner's objection based on the alleged change of policy in 2008, two things are in point. First, there never has been any relevant Statement of Policy in either ENF or DEPP that has, or could have had, the effect alleged by Mr Wagner. Second, it is a fact that, prior to July 2008, the FSA did not seek to impose penalties on individuals for knowing involvement in mortgage fraud. Those individuals were prohibited in pursuance of section 56. The subsequent change of approach was explained in the unchallenged evidence of Tom Spender (Head of Department in the Retail 3 Enforcement and Financial Crime Division of the FSA).

7. Mr Spender explained that, prior to July 2008, the approach of the FSA had been to not impose financial penalties on individuals for knowing involvement in mortgage fraud, but the individuals were prohibited. That approach had been adopted for two reasons. Many individuals involved in mortgage fraud were found to have been sole traders and until the change in the law in 2010 the FSA were, as mentioned above, constrained by section 206(2) FSMT. The other reason was that, by not imposing a penalty on individuals in mortgage fraud cases, the FSA found they could achieve quicker outcomes (at a time when Enforcement were investigating a significant number of mortgage fraud cases with limited resources). That limited enforcement was perceived, in 2008, not to be a credible deterrent. Basing their approach on the guidance in DEPP, the FSA developed it such that, in respect of individuals who had been knowingly involved in mortgage fraud and so had failed to comply with Statement of Principle 1 (Integrity) in APER, the FSA would be likely (following consideration of relevant factors) to prohibit them under section 56 FSMT and to impose financial penalties of £100,000 or above to achieve specific and general deterrence purposes. Moreover, Mr Spender said, such a financial penalty would be imposed despite verifiable evidence that it would cause the individual to suffer serious financial hardship of to become insolvent. (He referred to a press release of 7 July 2008.)

8. We do not consider that the change of approach explained by Mr Spender gives any support to Mr Wagner's case that, because his alleged violation of Principle 1 took place before 7 July 2008, the FSA were barred from applying section 66 and imposing a financial penalty on him. There was no change in the law, merely a change in approach necessitated by the need to deter. There was no Statement of Principle on which he might base a legitimate

expectation. Assuming in Mr Wagner's favour that the relevant penalty provisions are of a criminal nature for the purposes of Article 7.1 ECHR, a £100,000 penalty could lawfully have been imposed when the violation took place. The change in approach by the FSA has not constituted a change in the law applicable at the time of the violation.

9. For those reasons we are against the preliminary objection taken by Mr Wagner.

THE SUBSTANTIVE ISSUE

10. The issue then before the Tribunal was whether, as Mr Wagner disputed, the evidence sustained the FSA's case that he had been knowingly involved in mortgage fraud by submitting a residential mortgage application which contained false and misleading information through Ambergate for his own benefit. Neither the Tribunal nor the FSA were, in the light of Mr Wagner's letter of 21 July 2011 (referred to in paragraph 3 above) amending the reference, in a position to do justice to Mr Wagner's challenge to the FSA's case on the evidence. Following observations from the Tribunal as to the state of the evidence available to it, the hearing was adjourned. The FSA gave further consideration to the matter and Mr Wagner sought and obtained legal advice. The outcome was that the parties agreed, subject to the consent of the Tribunal, that the reference should be determined on the basis summarised in paragraphs 11 and 12 below.

11. The FSA has expressed itself satisfied that, whilst Mr Wagner recklessly allowed a regulated mortgage application which contained false and misleading details about his income to be submitted to a lender, his conduct was not deliberate and he did not deliberately mislead the lender. Mr Wagner had failed to check the income details on the residential mortgage application or at all; by disregarding the importance of this information and failing to consider the risks that the application was fraudulent his conduct was reckless. On that basis, the FSA took the view that, as an approved person, Mr Wagner had failed to act with integrity contrary to Statement of Principle 1 of the FSA's Statements of Principle for Approved Persons.

12. The determination sought from the Tribunal is agreed by the parties to be that:

(i) no financial penalty shall be imposed on Mr Wagner;

(ii) the prohibition order shall stand; and

(iii) no order for costs shall be made.

13. To be effective, the application summarised above requires the consent of the Tribunal under rule 39 of The Tribunal Procedure (Upper Tribunal) Rules 2008. The Tribunal has considered the matter in the light of the information available to it and has taken the view that the reference would fairly and justly be determined in the manner agreed between the parties. It is appropriate therefore to consent to the reference being disposed of on the terms set out in the Directions that follow.

DIRECTIONS

WITH THE AGREEMENT OF THE PARTIES IT IS DIRECTED as follows:

(1) The Final Notice shall be issued by the Authority on the basis that the Decision Notice has been amended to state the following:

(2) *While Mr Wagner recklessly allowed a regulated mortgage application which contained false and misleading details about his income to be submitted to a lender, his conduct was not deliberate and he did not deliberately mislead the lender. Mr Wagner failed to check the income details on the residential mortgage application form properly or at all; by disregarding the importance of this information and failing to consider the risks that the application was fraudulent, his conduct was reckless. On that basis, Mr Wagner, as an approved person, failed to act with integrity contrary to Statement of Principle 1 of the Authority's Statements of Principle for Approved Persons.*

(3) No financial penalty is to be imposed on Mr Wagner.

(4) The Prohibition Order is to stand.

(5) Neither party will seek an order for costs.

SIR STEPHEN OLIVER QC
JUDGE OF THE UPPER TRIBUNAL
RELEASE DATE: 15 October 2012