Reference numbers: FS/2011/0002

MARKET ABUSE — share price manipulation — penalty already determined — whether hardship made out — no — penalty not to be adjusted

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

PATRICK SEJEAN **Applicant**

- and –

THE FINANCIAL SERVICES AUTHORITY **The Authority**

Tribunal: Judge Colin Bishopp
Miss Sandi O'Neill
Mr Christopher Chapman

Sitting in public in London on 26 September 2012

The Applicant appeared in person

Mr Andrew Mitchell QC appeared for the Authority.

DECISION

1. The Applicant, Mr Patrick Sejean, was one of three applicants whose references were determined by us in a decision released following a hearing in April 2012. Our finding, in respect of Mr Sejean, was that he had engaged in market abuse on two occasions, in December 2007 and January 2008, by manipulating the prices of certain securities. We took the view that although his conduct was prompted by the instructions he received from his client, one of the other applicants, it was particularly serious because he made no attempt to deflect the client from a course of action which Mr Sejean knew was wrong, because on the first occasion he enlisted the help of others, more junior to himself, and because it was repeated. There was only modest immediate financial gain, but the prospect of longer-term gain, by his retention of the client. We detected little remorse, and an unwillingness or inability on his part to understand fully why his conduct was wrong.

2. In the light of those findings we came to the conclusion that the RDC had been right to prohibit Mr Sejean in accordance with s 56 of the Financial Services and Markets Act 2000, and to withdraw his approvals; Mr Sejean did not challenge those parts of the RDC's decision. We decided also that the penalty to be imposed on him should be £650,000, an increase above the £550,000 imposed by the RDC. However, the RDC had not found the January 2008 market abuse allegation made out, whereas we did, and that difference between our conclusions and those of the RDC accounted for some of the increase, while the remainder was attributable to our view that the RDC had been too lenient.

3. We directed in addition that the figure on which we had decided was to be the subject of adjustment if Mr Sejean was able to demonstrate to our satisfaction that its imposition would cause him significant hardship, and a further hearing was fixed for that purpose. Mr Sejean attended and represented himself; the Authority was represented, as before, by Mr Andrew Mitchell QC. The other applicants, who had no interest of their own in the outcome of the hearing, did not attend and were not represented. The evidence available to us about Mr Sejean's current financial circumstances came from Mr Sejean himself, and from Mr Steven Clark, a member of the Authority's staff who had made enquiries into the information Mr Sejean provided about his means.

4. The starting point for considering whether or not adjustment is appropriate is (or at the relevant time was) the section of the Authority's Handbook entitled Decision Procedure and Penalties Guide, or DEPP. That is not because we are bound by the guidance set out there, or by the Authority's policy more generally, but because those subject to disciplinary measures should be entitled to rely on published guidance, and the tribunal consequently should depart from that guidance adversely to an individual only when it is plain the guidance is wrong, and there is compelling reason. No such limitation is appropriate or necessary when the tribunal differs from the published guidance but in the individual's favour; but even here there is a public interest in consistency of application.

5. The relevant passages appear in section 6.5.2 of DEPP which, in the version current at the relevant time, began "The following factors may be relevant to determining the appropriate level of financial penalty to be imposed on a person

under the Act". The text relates, first, to what we described in our earlier decision as the "headline" penalty, and we do not need to deal with those parts here. On adjustment in an individual case DEPP said this:

> "(a) The FSA may take into account whether there is verifiable evidence of serious financial hardship or financial difficulties if the person were to pay the level of penalty appropriate for the particular breach. The FSA regards these factors as matters to be taken into account in determining the level of a penalty, but not to the extent that there is a direct correlation between those factors and the level of penalty.
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> (b) The purpose of a penalty is not to render a person insolvent or to threaten the person's solvency. Where this would be a material consideration, the FSA will consider, having regard to all other factors, whether a lower penalty would be appropriate. This is most likely to be relevant to a person with lower financial resources; but if a person reduces its solvency with the purpose of reducing its ability to pay a financial penalty, for example by transferring assets to third parties, the FSA will take account of those assets when determining the amount of a penalty."

6. The principles to be drawn from that guidance and relevant in this case are: (1) that the financial hardship or difficulties must be "serious"—that is to say, such as to cause hardship materially beyond that which is the inevitable (and intended) consequence of a financial penalty; (2) that it is for the person concerned to produce the necessary evidence of hardship; and (3) that a person cannot establish hardship by dissipating his assets. Those principles are in our view sound, and we do not propose to depart from them, whether favourably or adversely to Mr Sejean. We add that although there are some cases in which insolvency may be the result of the imposition of a penalty (see what was said by the tribunal in *Atlantic Law LLP and Andrew Greystoke v the Authority* at para 110), we do not think this is a case in which the possible insolvency of Mr Sejean is an immaterial consideration.

7. We recorded in our earlier decision that as a result of the relevant conduct Mr Sejean had lost his employment, and with it the substantial earnings he had enjoyed, and we took those factors into account in determining the "headline" penalty, since they are the consequences of the conduct rather than matters peculiar to Mr Sejean, independent of his conduct. Of course, the fact that Mr Sejean's source of income was removed from him has a continuing effect on his means, and that is a factor relevant to assessment of the degree of hardship he will suffer.

8. We learnt at the resumed hearing that Mr Sejean had secured alternative employment, in Switzerland (where he now lives), with Makor Capital Markets SA ("Makor"), a company of which it seems he was a director. It also seems that it was a very small company consisting of, essentially, himself and a former colleague. However, although Mr Sejean insisted that his position with Makor was precarious, and that he would be leaving it at the end of September 2012, it was clear that he had not been entirely forthcoming about his relationship with the company, in particular by understating his role—he claimed to be a consultant or employee, and said nothing in the course of Mr Clark's enquiries about his being a director, despite his having been asked a direct question about any directorships

he held. It emerged that Mr Sejean had been working with Makor as a sales trader, and that his estimated commission for the year to April 2013 was about US$250,000. That information came, however, from a telephone enquiry by Mr Clark of Mr Sejean's fellow-director, and it is impossible to treat it as wholly reliable.

9. Mr Sejean's evidence was that he had been drawing 12,000 Swiss francs (at the current exchange rate a little more than £8,000) per month on account of that commission. He emphasised that he had no other source of earned income, and that he received no salary from Makor—he was entitled only to commission. He explained that he was no more than a nominal director; as he had a Swiss work permit he was able to act as a director, whereas his colleague could not until he had himself secured a work permit. It was the colleague who owned the company; Mr Sejean had no shareholding.

10. Mr Clark had concluded that, if the information produced by Mr Sejean could be taken at face value, his available resources (available, that is, to pay a penalty) amounted to little more than £7,000. As Mr Sejean accepted that figure, there is little to be gained by our setting out the calculations which led to it. The real question is whether the information Mr Sejean has provided can be taken at face value, which the Authority says it cannot.

11. The thrust of its argument on that score is that Mr Sejean has produced information late and with reluctance, that it is inadequate (it points in particular to his only partial disclosure of correspondence with his former employer, Cantor Fitzgerald, and of details of his interest in a family trust fund), and that when information he has provided, for example that relating to Makor, is checked, it is often found to be incomplete or inaccurate. There is merit in those arguments, which Mr Sejean was unable to counter: they were well demonstrated by Mr Clark's evidence.

12. The Authority places considerable reliance too on the fact that Mr Sejean has made no attempt to put money aside to meet any penalty which might be imposed on him. Before the relevant events, he lived in accommodation provided for him by his employer, and received salary and commission. As he readily concedes, he spent all or virtually all of his income as it came in. In his last full year of employment before he was dismissed he earned £436,150 gross; none of it was saved. He has, as he accepts, continued to spend all of his net income since losing that employment, albeit the amount of his disposable income has been less. Mr Sejean's response to the Authority's case that his profligacy disentitles him to claim hardship was simply that he had earned the money honestly, and he did not see why he should not spend it. He added that the amount spent was less than the amount of the penalty, an observation which in our view misses the point.

13. We indicated at para 6 above that there are three essential considerations. Putting them an a slightly different way, we have to ask ourselves whether Mr Sejean has satisfied us that he would suffer excessive hardship if he were subjected to the "headline" penalty of £650,000, and that such hardship as he may suffer is not attributable to his dissipation of his assets.

14. There was some information available to us, as it had been available to Mr Clark, which supported the conclusion that, as matters now stand, Mr Sejean

would not merely suffer hardship, but be quite unable to pay such a penalty. He gave some details about his income since his dismissal by Cantor Fitzgerald, of his debts and limited assets, and of his interest in the family trust we have mentioned. But we have to agree with the Authority that the disclosure was partial and incomplete, and for those reasons unreliable. We could not be satisfied that Mr Sejean had provided a complete and wholly truthful account of his assets and liabilities, and in consequence could also not be satisfied that he had established hardship. Even had he been able to show *some* hardship, it would be tempered by the profligate spending we have described; though he may be right that he has spent less than the amount of the penalty, his extravagance is a further indication of Mr Sejean's unwillingness to take responsibility for his actions.

15. We made it clear in our original decision that we took a very serious view of Mr Sejean's conduct. Severe punishment is appropriate in the case of such conduct, and the severity of that punishment should be reduced only in the face of clear evidence of excessive hardship. We have no such clear evidence, but are left with the impression that Mr Sejean has attempted to conceal his true worth, and has done nothing to augment the fund from which he might make some amends for his wrongdoing. It follows that there is no proper ground on which we could reduce the penalty, and it will accordingly remain at £650,000. It will be unfortunate if that should lead to Mr Sejean's insolvency, but if it does he should recognise that it is his own lack of candour which has caused it.

16. Our decision is unanimous.

Colin Bishopp
Upper Tribunal Judge

Release date: 04 December 2012