Reference number: FS/2010/0024

Financial services – prohibition order – s 56 FSMA – matter remitted to Tribunal by Court of Appeal to address the question whether, even if applicant was not guilty of market abuse, his lying, which in earlier proceedings the Tribunal had found as a fact, demonstrated that he was not a fit and proper person – whether a prohibition order was appropriate in circumstances where applicant had not worked in financial services for a considerable period and gave evidence that he did not intend to do so

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

DAVID JOHN HOBBS **Applicant**

- and -

THE FINANCIAL CONDUCT AUTHORITY **Respondent**

TRIBUNAL: JUDGE ROGER BERNER
SANDI O'NEILL (Tribunal Member)
PETER BURDON (Tribunal Member)

Sitting in public at 45 Bedford Square, London WC1 on 26 November 2013

Ben Jaffey, instructed by WilmerHale, for the Applicant

Andrew Hunter QC, instructed by the Financial Conduct Authority, for the Respondents

DECISION

1. In June and July of 2013 we heard the reference of the Applicant, Mr David Hobbs ("Mr Hobbs"), of the decision of the Financial Services Authority, the predecessor of the Respondent, now the Financial Conduct Authority ("the Authority"), in respect of the Authority's decision, by decision notice dated 23 July 2010:

> (1) that conduct by Mr Hobbs on 15 August 2007 constituted market abuse under s 118 of the Financial Services and Markets Act 2000 ("FSMA"), and that a financial penalty of £175,000 should be imposed on Mr Hobbs in respect of that conduct pursuant to s 123 FSMA; and
>
> (2) to impose a Prohibition Order on Mr Hobbs pursuant to s 56 FSMA on the ground that he is not a fit and proper person.

2. We released our decision on 22 November 2012. We found, as regards (1), that Mr Hobbs did not engage in market abuse within s 118(5) FSMA (decision, at [242]). As regards (2), our finding was as follows (at [243]):

> "The Authority's case on whether Mr Hobbs was a fit and proper person for the purpose of s 56 FSMA rested on a combination of his alleged conduct in committing market abuse and then lying about it. We have found that Mr Hobbs' assertions that he was engaged in a strategy of confusion were false, but that he was not engaged in market abuse. In those circumstances, we are not satisfied that the Authority has made its case that Mr Hobbs is not a fit and proper person."

3. The Authority appealed our determination in respect of Mr Hobbs' fitness and propriety (but not our finding on the market abuse issue) to the Court of Appeal. By his judgment handed down on 29 July 2013, Sir Stanley Burnton (with whom Ryder and Rimer LJJ agreed), allowing the Authority's appeal, held (at [39]) that it was incumbent upon the Tribunal to address the question whether, even if Mr Hobbs was not guilty of market abuse, his lying, which it found as a fact, demonstrated that he was not a fit and proper person. Having concluded that the Tribunal had erred in law in failing to do so, the Court remitted the matter to this Tribunal to consider what order to make in the light of the judgment of the Court of Appeal.

4. The basis for the conclusions reached by the Court of Appeal can be found in [38] of the judgment of Sir Stanley Burnton. He held that it is important for the Tribunal to consider all the facts and evidence put before it on a reference under s 57 FSMA. The Tribunal's consideration of a reference is not ordinary civil litigation, and there is a public interest in ensuring, so far as possible, that persons who are not fit and proper persons to perform functions in relation to a regulated activity are precluded from doing so. A narrowing of the enquiry by the Tribunal that excludes relevant material from its assessment of an applicant is to be avoided, provided that the applicant is given a fair opportunity to address the Authority's case.

5. It was not suggested before the Court of Appeal in Mr Hobbs' case, and Sir Stanley Burnton found that it could not be suggested, that Mr Hobbs did not have a fair opportunity to address the allegations that he had been guilty of repeated and persistent lying. However, at the time of the hearing before us, and when we reached our decision, we do not consider that, without more, we would ourselves have been in a position to determine the question of the fitness and propriety of Mr Hobbs on the basis only of our own findings as to his lying. As we explained in our decision, the case had been put on the basis of a combination of the market abuse alleged against Mr Hobbs and the story he had, as we found, manufactured to explain his conversations with his broker. Part of Mr Hobbs' case had been that he had engaged in a "strategy of confusion" to prevent his broker from appreciating the extent of Mr Hobbs' short position and the trading limits to which he was subject. Having found that he was not engaged in market abuse, but that the "strategy of confusion" explanation was false, we would not ourselves have considered that Mr Hobbs would have had a proper opportunity to address a case based solely upon his falsehoods.

6. Having now had the benefit of the Court of Appeal's judgments, we consider that the right course for us, having reached our own conclusions in our decision, would have been to adjourn the question of the prohibition order on the independent basis that Mr Hobbs' conduct in lying to the Authority and to the Tribunal was such that, even given our finding that he had not been engaged in market abuse, he was not a fit and proper person. That would have given Mr Hobbs the opportunity, which we would not have considered he would have had at the original hearing, to address that question in the context of our findings. With the remittal of the matter to this Tribunal, and this hearing, that opportunity has now been afforded to Mr Hobbs.

The jurisdiction of the Tribunal

7. As the parties were agreed as to the extent of our jurisdiction, we need not dwell on this issue. It arises because, since the date of our original decision, there have been changes to s 133 FSMA, which sets out the powers of the Tribunal on a reference of this nature. Those changes were introduced with effect from 1 April 2013 by the Financial Services Act 2012, and introduce a distinction between what is termed a "disciplinary reference", together with a reference under s 393(11) FSMA (third party rights), and any other reference.

8. Section 133(5) to (7), before the amendments, read as follows:

> "(5) The Tribunal must determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter referred or appealed to it.
>
> (6) On determining the reference or appeal, the Tribunal must remit the matter to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination.
>
> (7) The decision-maker must act in accordance with the determination of, and any direction given by, the Tribunal."

9. The 2012 Act substituted new s 133(5) – (6A) and inserted s 133(7A):

"(5) In the case of a disciplinary reference or a reference under section 393(11), the Tribunal—

(a) must determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter; and

(b) on determining the reference, must remit the matter to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination.

(6) In any other case, the Tribunal must determine the reference or appeal by either—

(a) dismissing it; or

(b) remitting the matter to the decision-maker with a direction to reconsider and reach a decision in accordance with the findings of the Tribunal.

(6A) The findings mentioned in subsection (6)(b) are limited to findings as to—

(a) issues of fact or law;

(b) the matters to be, or not to be, taken into account in making the decision; and

(c) the procedural or other steps to be taken in connection with the making of the decision.

(7) The decision-maker must act in accordance with the determination of, and any direction given by, the Tribunal.

(7A) A reference is a "disciplinary reference" for the purposes of this section if it is in respect of any of the following decisions—

(a) a decision to impose a penalty under section 63A;

(b) a decision to take action under section 66;

(c) a decision to take action under section 87M;

(d) a decision to take action under section 88A;

(e) a decision to take action under section 89K;

(f) a decision to take action under section 89Q;

(g) a decision to take action under section 91;

(h) a decision to take action under section 123;

(i) a decision to take action under section 131G;

(j) a decision to take action under section 192K;

(k) a decision to publish a statement under section 205, impose a penalty under section 206 or suspend a permission or impose a restriction under section 206A;

(l) a decision to take action under section 249 or 261K;

(m) a decision to publish a statement under section 312E or impose a penalty under section 312F;

(n) a decision to take action under section 345 or 345A."

10. A reference in respect of a prohibition order under s 56 FSMA is not within the category of disciplinary reference. The power of the Tribunal in such a respect under the newly-constituted s 133 is accordingly different from the power under the former provision. Instead of the Tribunal determining the appropriate action for the decision-maker to take and remitting the matter with directions for giving effect to the Tribunal's determination, the Tribunal, if not dismissing the reference, can only remit the matter to the decision-maker with a direction for the decision-maker to reconsider and reach a decision in accordance with those of the findings of the Tribunal as are specified in s 133(6A).

11. However, the change made by the 2012 Act does not affect this reference. Paragraph 12 of the Financial Services Act 2012 (Transitional Provisions) (Miscellaneous Provisions) Order 2013 effectively applies the provisions of the former s 133 in cases where the reference was made to the Tribunal before 1 April 2013 and had not been determined by the Tribunal before that date. As the effect of the Court of Appeal judgment was to remit the issue of the prohibition order to this Tribunal for determination, para 12 applies to this reference, and our powers in respect of it are those which applied before s 133 was re-cast. This was the position agreed by the parties.

The facts

12. Mr Hobbs sought to explain his conversations with his broker to the effect that his trade was to manipulate the price of coffee futures as a "strategy of confusion", which he said was designed to conceal from the broker the true state of his trading book, and in particular his risk limits. We considered this in detail in our decision, at [196] to [212]. We rejected Mr Hobbs' evidence in this respect, and in so doing we found that the strategy of confusion story was false. We summarised our conclusions at [241]:

> "… Mr Hobbs emerged from these proceedings with very little credit. We have already referred to the unsatisfactory nature of the evidence he gave to us. We have, as we have described, found that his assertions that he was engaged in a strategy of confusion were false. That is a serious matter. We can only surmise as to why, in the light of our own findings, Mr Hobbs thought fit to develop and persist with such a story. We can only think that he did so as a desperate attempt to explain what he feared might otherwise be inexplicable, namely what we have concluded, on balance, were his rambling and nonsensical conversations with Mr Kerr. That was a grave error. Not only did it cast Mr Hobbs in a very poor light. It could very easily have led to his words being taken at face value, with a different conclusion to this reference."

13. Mr Hobbs had maintained the strategy of confusion story in the course of the Authority's investigation. It had first appeared, in a letter from Mr Hobbs' then solicitors, as a process of reconstruction whereby Mr Hobbs believed that he had used certain phrases in an attempt to obscure his difficult risk position, and resulting lack

of flexibility, from other market participants. It had been maintained, and enlarged upon, during the subsequent part of the Authority's investigation, the decision of the RDC, and through the Tribunal proceedings.

Witness statement of Mr Hobbs

14. Mr Hobbs provided a witness statement to us, but was not called for cross-examination. His statement can therefore be accepted. In that statement he referred to the witness statement he had provided for the purpose of the proceedings before the Court of Appeal, and expanded on the consequences of these proceedings on himself and his family. From these statements we find the following facts:

(1) Mr Hobbs' financial position is precarious, and the family is reliant upon the earnings of Mrs Hobbs and support from other members of the family.

(2) Since being dismissed by Mizuho, and apart from some day trading on his own account for a short period immediately thereafter, Mr Hobbs has not applied for nor done any work relating to financial services. He has no intention of working in an industry regulated by the Authority in the future.

(3) Since 2011 he has been helping out part-time in a business started by his family. The business is yet to make a profit or provide him with any income.

Prohibition order: law and guidance

15. Under s 56 FSMA, the Authority may make a prohibition order if it appears to it that an individual is not a fit and proper person to perform functions in relation to a regulated activity. That activity may be carried on by an authorised person, by a person who is an exempt person in relation to that activity or a person to whom the general prohibition (on persons other than those authorised or exempt carrying on a regulated activity in the UK: s 19 FSMA) does not, as a result of Part 20 FSMA, apply in relation to that activity.

16. The Authority's FIT Handbook provides guidance in respect of the test of fitness and propriety. Among the factors to be considered, and which are relevant to our determination, are "honesty, integrity and reputation". The Tribunal has considered this expression, in particular the import of "integrity" on a number of occasions. Most often cited with approval is what the Financial Services and Markets Tribunal (the precursor of this Tribunal) said in *Hoodless and Blackwell v Financial Services Authority* (3 October 2003): "in our view 'integrity' connotes moral soundness, rectitude and steady adherence to an ethical code. A person lacks integrity if unable to appreciate the distinction between what is honest and dishonest by ordinary standards".

17. FIT 2.1 contains guidance on the factors relevant to an assessment of a person's honesty, integrity and reputation. In particular, FIT 2.1G(13) provides that one of the matters to which the Authority will have regard is:

> "whether, in the past, the person has been candid and truthful in all his dealings with any regulatory body and whether the person

> demonstrates a readiness and willingness to comply with the requirements and standards of the regulatory system and with other legal, regulatory and professional requirements and standards."

Prohibition order: relevant factors

18. As the making of a prohibition order is a matter of discretion, it is necessary to consider all relevant factors, and to leave out of account those matters that are irrelevant.

19. For the Authority, Mr Hunter made the following observations:

(1) It is the statutory responsibility of the Authority to use its powers in a way that is compatible with its strategic objective (of ensuring that the relevant markets function well: see s 1B(2) FSMA) and so as to advance one or more of its operational objectives. The operational objectives include, amongst others, its consumer protection objective (s 1C) and its integrity objective (s 1D). As to the former, it is an important part of the Authority's role to protect consumers by preventing unfit individuals from assuming roles in the financial services sector. In relation to the latter, s 1D(2)(a) provides that integrity of the UK financial system includes "its soundness, stability and resilience"; and the Authority's publication 'Approach to Advancing our Objectives' identifies the need to ensure trust and confidence being a prerequisite for "soundness and stability".

(2) Accordingly, in determining whether to make a prohibition order, the Authority must consider (a) the need to maintain the soundness of the UK financial system; (b) the need to protect consumers from the activities of unfit and improper persons in relation to regulated activities; and (c) achieving credible deterrence against conduct which is unfit and improper (as a means of advancing its operational objectives).

20. We accept that these are relevant criteria to be considered by the Authority in determining whether to make a prohibition order, and that they are equally apt to the Tribunal's determination of a reference in that respect. We did not detect from Mr Jaffey any argument to the contrary.

21. Mr Hunter referred us to *Stephan Chaligné and others v Financial Services Authority*, Upper Tribunal, 28 September 2012. That case is relevant, in our view, not in relation to its specific facts, but for the principles applied by the Tribunal. Understandably, both the Authority and Mr Hobbs sought to find parallels in the facts of other cases. But except where principles may be identified from previous authorities, we do not regard that exercise as having any material value. As the Tribunal in *Michael Lee Thommes v Financial Services Authority*, 12 December 2012, observed at [126], each case must be determined according to its own facts and circumstances.

22. Having said that, we do consider that the observations of the Tribunal in *Chaligné* are of some assistance in identifying certain characteristics of behaviour that should be considered by both the Authority and the Tribunal in determining whether a

prohibition order should be made. In that case, the Tribunal referred, at [97], to the "calculated, repeated conduct by persons who knew, or should have known, that what they were doing was wrong", and to the lack of remorse or recognition of wrongdoing that had been exhibited. At [104] it analysed the behaviour of a person who is fit and proper by referring to a person who "can be trusted, whatever the pressures on him, to respect the law and the rules of the market, and commented that prohibition was "not a form of punishment, but for the protection of other market users" and the need to indicate that conduct of the type in question is unacceptable.

Discussion

23. Mr Hunter submitted that, on the facts as found by the Tribunal, Mr Hobbs represents a serious ongoing risk to the Authority's operational objectives were he to re-enter the sphere of regulated activities. He is an individual who has behaved dishonestly over a sustained period, improperly preferring his own interests over his regulatory responsibilities throughout that time. He has shown no recognition that what he did was wrong, and there is nothing subsequent to his misconduct to suggest that he has reformed. He is not a person who can be trusted to act openly, honestly and in accordance with the regulatory and legal standards of the market. He accordingly represents a continuing risk to consumers and market participants were he to be permitted to participate in activities in the financial services sector.

24. On this basis, Mr Hunter argued that it was appropriate for the Tribunal to direct the imposition of a prohibition order in order to protect consumers and to protect and enhance the integrity of the financial system.

25. Furthermore, Mr Hunter submitted that it is also appropriate for the Tribunal to impose such an order so as to achieve credible deterrence against conduct of the sort perpetrated by Mr Hobbs. If no action were to be taken in the face of such serious and dishonest conduct, that would undermine the important message that it is not acceptable for regulated individuals to mislead the regulator, and subsequently the Tribunal, and to behave dishonestly.

26. Mr Jaffey submitted that in the form sought by the Authority in this case, a prohibition order would prevent Mr Hobbs from working, in any capacity whatsoever, for a regulated financial services firm, without limit of time. He submitted that, in the circumstances of this case, such an order was neither necessary nor proportionate. He argued that prohibition is the sanction of last resort, which is used to deal with the most dangerous rule-breakers in the financial services industry. It is a protective order used to make it a crime (by s 56(4) FSMA) to have any involvement in an authorised financial services firm, no matter how minor. Like any sanction, Mr Jaffey submitted, a prohibition order is not to be made unless it is necessary.

27. We do not consider that it is appropriate to seek to set a threshold for the application of a prohibition order by reference to the level of danger posed by a particular individual. That is a relevant consideration, but it does not provide a proper test. The test is simply one of fitness and propriety. The sanction of prohibition is a serious one; but lack of fitness and propriety is a serious matter.

28. Mr Jaffey sought to argue that the Tribunal's findings in rejecting Mr Hobbs' story of the strategy of confusion were more subtle than had been characterised by the Authority. We reject that submission. Although the Tribunal referred, at [208], to the answer to the question whether there had been a strategy of confusion being more subtle than a straightforward question of whether or not the evidence of Mr Hobbs was to be believed or not, the Tribunal made a clear finding that Mr Hobbs' assertions in this respect were false, and that this was a serious matter.

29. We have no doubt that, viewed independently of the Tribunal's findings in respect of market abuse, the conduct of Mr Hobbs in, as the Tribunal found, lying repeatedly to the Authority and in evidence before the Tribunal is such that renders him as lacking in integrity, and consequently as not fit and proper to perform functions in relation to a regulated activity. Unless relevant factors can be demonstrated against the imposition of a prohibition order, or which go to show that a limited prohibition or some other sanction would be more appropriate, we consider that a full prohibition of the nature put forward by the Authority will be apt.

30. Mr Jaffey argued that the intention of Mr Hobbs not to return to the financial services industry is a factor to be taken into account. He referred us in this respect to the fact that this factor was the reason why the Court of Appeal had not itself imposed a prohibition order, but had instead referred the matter back to the Tribunal. Sir Stanley Burnton had said, at [40]:

> "[The submission of the Authority that the Court of Appeal should decide itself to impose a prohibition order on the basis that, given the Tribunal's findings as to Mr Hobbs' lies, no other outcome was possible] might have found favour with me if Mr Hobbs was continuing to perform a function in relation to a regulated activity. However, he is not and has not been doing so since he was dismissed by Mizuho following his trading in August 2007. I think that the Tribunal should consider whether a prohibition order is appropriate in these circumstances."

31. We agree that, according to the judgment of Sir Stanley Burnton, the circumstances concerning Mr Hobbs' withdrawal from the financial services industry is a relevant factor. However, we do not accept that the judgment gives this Tribunal a steer in any particular direction as to what the consequence will be of taking those circumstances into account. We say that both in relation to Mr Jaffey's submissions and those, to the opposite effect, of Mr Hunter. The role of the Tribunal is to consider afresh the matter remitted to it by the Court of Appeal in the light of that Court's findings as to the proper approach to be adopted in law, and not to seek to discern from the judgment how the Court have Appeal might have decided the question referred back, if it had itself made such a determination.

32. In this case, as we have found, the conduct of Mr Hobbs was such as to demonstrate a lack of integrity. In these proceedings Mr Hobbs has had an opportunity to address the findings made by the Tribunal. He has, however, failed to acknowledge any wrongdoing in relation to his discredited story of the strategy of confusion, and the lies the Tribunal found that he told in this respect both to the

Authority and to the Tribunal. We were told only by Mr Jaffey that Mr Hobbs continues to disagree with certain of the Tribunal's findings. We regard with concern the failure by Mr Hobbs, even at such a remove from the original decision of the Tribunal, to acknowledge his lack of integrity in concocting the strategy of confusion story, and in persisting with it during these proceedings. We agree with Mr Hunter that this gives rise to a significant risk to the market were Mr Hobbs ever to seek to re-enter it.

33. It is in that context that the expressed intention of Mr Hobbs not to return to the financial services industry falls to be regarded. Although Mr Hobbs may have no such present intention to return, his intentions may change in the future, and it would be necessary at that time to have in place an appropriate mechanism to enable the Authority to assess whether to allow Mr Hobbs to play any role, whether authorised or not, within the regulated industry. A full prohibition order is such a mechanism, and is in our view, in the circumstances of this case, both justified and proportionate. Should Mr Hobbs desire to return to the industry in any capacity, it will be possible for him to apply, under s 56(7) FSMA, for the prohibition order to be varied or revoked.

34. We should add only that Mr Jaffey sought to argue that the change to the powers of the Upper Tribunal, in s 133 FSMA, in relation to such variation or revocation applications, would restrict the safeguards available to an applicant. As we discussed earlier, after 1 April 2013 any reference of a decision of the Authority on an application under s 56(7) will be outside the category of "disciplinary reference", and so the findings of the Tribunal to be taken into account on a referral back to the Authority are limited to those in s 133(6A). We do not accept that this change can provide any reason for not imposing a prohibition order. The making of such an order, which will continue to be revocable or subject to variation under s 56(7), must be on the basis of the circumstances applicable at the relevant time, and not by reference to the prospects of the order being revoked or varied in the future; still less to the powers of the Tribunal on a reference following an adverse decision of the Authority in that respect.

35. Finally, Mr Jaffey argued that, if Mr Hobbs wished to return to the financial services industry in a controlled function capacity, he would have to apply to the Authority for authorisation. In any other case, it had to be borne in mind that the publicity given to the Tribunal's original decision had been such as itself to impose an impediment to Mr Hobbs' return. He submitted that, if a prohibition order were to be imposed, it would be sufficient to limit it to the carrying out of controlled functions, in addition to any other safeguards that the Tribunal considers appropriate to tailor the order to the present case. At a late stage in the proceedings, he suggested that an undertaking might be sought from Mr Hobbs to notify the Authority if he formed any subsequent intention to return to the industry.

Conclusion

36. Having considered what order to make in light of the judgments of the Court of appeal, we are satisfied that a prohibition order should be made against Mr Hobbs.

We consider that such a sanction is justified in the circumstances of this case, and having considered all the alternatives suggested by Mr Jaffey, that prohibition is the most proportionate and appropriate approach. In our view, no alternative approach would provide the necessary protection or message to the market. We consider that Mr Hobbs' lack of integrity, and his continued failure to acknowledge his wrongdoing, renders him not a fit and proper person to perform functions in relation to a regulated activity, and that in those circumstances there is no reason to limit the scope of the prohibition.

Determination

37. We accordingly determine that the appropriate action of the Authority is to make an order pursuant to s 56 FSMA prohibiting Mr Hobbs from performing any function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm.

38. We remit this matter to the Authority with the direction to give effect to our determination.

ROGER BERNER

TRIBUNAL JUDGE
RELEASE DATE: 13 DECEMBER 2013