[2015] UKUT 0079 (TCC)
Reference number: FS/2013/0003

MARKET ABUSE–Whether applicant knew or suspected that there was a risk his customer intended to engage in market abuse through share price manipulation in breach of Statement of Principle 1-no-whether applicant failed to exercise due skill care and diligence in relation to the issue in breach of Statement of Principle 2-yes

Financial Penalty-s66 (3) FSMA-withdrawal of approval-s63 FSMA-Prohibition Order-s56 FSMA

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

TARIQ CARRIMJEE **Applicant**

- and -

THE FINANCIAL CONDUCT AUTHORITY **The Authority**

TRIBUNAL: **Judge Timothy Herrington**
Gary Bottriell (Tribunal Member)
Christopher Chapman (Tribunal Member)

Sitting in public at 45 Bedford Square, London WC1 on 15 to 17 September 2014

Andrew Hunter QC and Andrew George, Counsel, instructed by Clifford Chance LLP for the Applicant.
Paul Stanley QC, instructed by the Financial Conduct Authority for the Authority.

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DECISION

Introduction

1. The Appellant, Tariq Carrimjee ("Mr Carrimjee") has by a reference notice dated 23 April 2013 referred to this Tribunal a Decision Notice issued by the Authority under its former name of the Financial Services Authority (the "Authority") on 26 March 2013 (the "Decision Notice").

2. In summary, in the Decision Notice the Authority decided to take the following action against Mr Carrimjee:

(1) To withdraw his individual approvals pursuant to section 63 of the Financial Services and Markets Act 2000 ("FSMA");

(2) To prohibit him, pursuant to section 56 FSMA, from performing any function in relation to any regulated activities carried out by any authorised or exempt person or exempt professional firm; and

(3) To impose on Mr Carrimjee a financial penalty of £89,004 pursuant to section 66 FSMA, for breaching Statement of Principle 1.

3. The Authority decided to take this action because, as set out in the Decision Notice, it contends that it has found that:

> "…Mr Carrimjee failed to act with integrity in breach of Statement of Principle 1 when he recklessly assisted his client, Mr Rameshkumar Goenka, in Mr Goenka's plan to manipulate the closing price of Gazprom GDRs in April 2010 and Reliance GDRs in October 2010. In making this finding, the [FCA] considers that Mr Carrimjee suspected that market manipulation was the goal of his client and Mr Carrimjee suspected that Mr Goenka held structured products which were related to the intended manipulation, yet he turned a blind eye to the risk of Mr Goenka's planned market abuse and recklessly assisted his client in his attempt to achieve that goal."

Mr Carrimjee disputes all the allegations made by the Authority. He contends that he was not aware of any plan by his client Mr Rameshjumar Goenka ("Mr Goenka") to commit market abuse by manipulating prices in respect of either Gazprom or Reliance GDRs nor, he contends, did he turn a blind eye to the risk of such market abuse.

Applicable legal and regulatory provisions

4. The Authority's regulatory objectives are set out in section 1B FSMA and include securing an appropriate degree of protection for consumers and protecting and enhancing the integrity of the UK financial system (and, specifically, ensuring that it is not being used for the purposes of financial crime).

5. Section 66 FSMA provides that the Authority may take action to impose a penalty on an individual of such amount as it considers appropriate where it appears to the Authority that the individual is guilty of misconduct and is satisfied that it is appropriate in all the circumstances to take action.

6. Misconduct includes failure, while an approved person, to comply with a Statement of Principle issued under section 64 FSMA or to have been knowingly concerned in a contravention by the relevant authorised person of a requirement imposed on that authorised person by or under FSMA.

7. In exercising its power to impose a financial penalty, the Authority must have regard to relevant provisions in the Authority's Handbook of rules and guidance. The main provisions relevant to the action specified above are set out below.

8. APER sets out the Statements of Principle as they relate to approved persons and descriptions of conduct which, in the opinion of the Authority, do not comply with a Statement of Principle. APER further describes factors which, in the opinion of the Authority, are to be taken into account in determining whether or not an approved person's conduct complies with a Statement of Principle.

9. The Statements of Principle relevant to this reference are:

(1) Statement of Principle 1, which provides that an approved person must act with integrity in carrying out his controlled function; and

(2) Statement of Principle 2, which provides that an approved person must act with due skill, care and diligence in carrying out his controlled function.

10. APER 3.2.1 provides that in determining whether or not the particular conduct of an approved person within his controlled function complies with the Statements of Principle, whether that conduct is consistent with the requirements and standards of the regulatory system relevant to his firm is to be taken into account.

11. APER identifies no specific factors to be taken into account in relation to behaviour that may be found to be reckless or in determining whether conduct of the type which is the subject of this reference complies with Statement of Principle 2. APER 3.1.6 provides that the specific examples which may be in breach of a generic description of conduct in APER are not an exclusive list of types of conduct that may contravene the Statements of Principle. APER 3.1.3 makes it clear that all the circumstances of a particular case must be considered. Account is taken of the context in which a course of conduct was undertaken, including the precise circumstances of the individual case, the characteristics of the particular controlled function and the behaviour to be expected in that function.

12. Under section 66(3) FSMA the Authority may impose a financial penalty on any approved person if it is satisfied that he has failed to comply with a Statement of Principle.

13. The Authority's policy on imposing a financial penalty states that the principal purpose of imposing a financial penalty is to promote high standards of regulatory and/or market conduct by deterring persons who have committed

breaches from committing further breaches and helping to deter other persons from committing similar breaches, as well as demonstrating generally the benefits of compliant business.

14. The Authority now applies a five-step framework to determine the appropriate level of financial penalty. In cases such as this the five-step framework operates as follows:

Step 1: *Disgorgement*

The Authority seeks to deprive an individual of the financial benefit derived directly from the breach where it is practical to quantify this.

Step 2: *The seriousness of the breach*

The Authority will determine a figure that reflects the seriousness of the breach which is based on the percentage of the individual's relevant revenue from the employment connected to the breach, being the relevant income earned by the individual in the twelve months preceding the end of the breach. The percentage to be applied depends on the seriousness of the breach which will be assessed on a scale of 1 (least serious) to 5 (most serious) depending on the impact and nature of the breach and whether it was committed deliberately or recklessly.

Step 3: *Mitigating and aggravating factors*

The Authority may increase or decrease the amount of financial penalty arrived at after step 2, to take into account factors which aggravate or mitigate the breach. Any such adjustment will be made by any of a percentage adjustment to the figure defined at step 2.

Step 4: *Adjustment for deterrence*

If the Authority considers that the figure arrived at after step 3 is insufficient to deter the individual who committed the breach, or others, from committing further or similar breaches then the Authority may increase the penalty through the application of a multiplier to the figure arrived at after step 3.

Step 5: *Settlement Discount*

This step is not relevant in this case as the matter has not been settled by agreement with the Authority.

15. The Tribunal is not bound by the Authority's policy when making an assessment of a financial penalty on a reference but it pays the policy due regard when carrying out its overriding objective of doing justice between the parties. In so doing the Tribunal looks at all the circumstances of the case.

16. Pursuant to section 63 FSMA, the Authority may withdraw an approval given to a person under section 59 FSMA if the Authority considers that the

approved person is not a fit and proper person to perform the controlled function to which the approval relates.

17. The power to make a prohibition order is contained in section 56 FSMA which so far as relevant provides as follows:

> (1) The FCA 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 carried on by-
>
> (a) an authorised person,
>
> (b) a person who is an exempt person in relation to that activity,or
>
> (c) a person to whom, as a result of Part 20, the general prohibition does not apply in relation to that activity.
>
> (1A) ……
>
> (2) A "prohibition order" is an order prohibiting the individual from performing a specified function, any function falling within a specified description or any function.
>
> (3) A prohibition order may relate to-
>
> (a) a specified regulated activity, any regulated activity falling within a specified description or all regulated activities;
>
> (b) all persons falling within subsection (3A) or a particular paragraph of that subsection or all persons within a specified class of person falling within a particular paragraph of that subsection.
>
> (3A) A person falls within this subsection if the person is-
>
> (a) an authorised person,
>
> (b) an exempt person, or
>
> (c) a person to whom, as a result of Part 20, the general prohibition does not apply in relation to a regulated activity,
>
> (4) An individual who performs or agrees to perform a function in breach of a prohibition order is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.
>
> (5) In proceedings for an offence under subsection (4) it is defence for the accused to show that he took all reasonable precautions and exercised all due diligence to avoid committing the offence.
>
> (6) A person falling within subsection (3A) must take reasonable care to ensure that no function of his, in relation to the carrying on of a regulated activity, is performed by a person who is prohibited from performing that function by a prohibition order.
>
> …..
>
> (9) "Specified" means specified in the prohibition order.

18. For completeness, we refer to the relevant provisions regarding market abuse set out in FSMA and the relevant provisions in the Authority's Handbook regarding the reporting of suspicious transactions.

19. Section 118(5) FSMA describes a form of behaviour amounting to market abuse where an individual engages in behaviour (in relation to qualifying investments on a prescribed market) otherwise than for legitimate reasons and in conformity with accepted market practices which:

a) Gives or is likely to give a false or misleading impression as to the supply of, or demand for, or as to the price of, one or more qualifying investments, or

b) Secures the price of one or much such investments at an abnormal or artificial level.

Mr Goenka's Final Notice finds that he committed market abuse falling within this provision.

20. In that part of the Authority's Handbook known as SUP there are provisions relating to the reporting of suspicious transactions. In particular SUP 15.10.2 provides:

> "A firm which arranges or executes a transaction with or for a client in a qualifying investment admitted to trading on a prescribed market and which has reasonable grounds to suspect that the transaction might constitute market abuse must notify the [Authority] without delay."

The London Stock Exchange is a "prescribed market" and a security traded on that market is a "qualifying investment".

21. SUP 15 Ann 5 gives examples of indications of possible suspicious transactions. In relation to possible signals of market manipulation it gives the following example:

> "An order will, because of its size in relation to the market in that security, clearly have a significant impact on the supply of or demand for or the price or value of the security, especially an order of this kind to be executed near to a reference point during the trading day-e.g. near the close."

Principles to be applied in characterising behaviour

22. The Authority contends that Mr Carrimjee acted without integrity in breach of Statement of Principle 1.

23. The question as to whether in particular circumstances a person has acted without integrity has been considered on many occasions in this Tribunal and its predecessors. The Tribunal has recently summarised the principles to be applied in *Batra v The Financial Conduct Authority* [2014] UKUT 0214 (TCC). We do not believe we can improve on this summary (as set out in paragraphs 13 to 15 of the Decision) so we quote it in full as follows:

"13. The meaning of integrity was considered by the Tribunal in *Hoodless and Blackwell v FSA* (2003). The tribunal observed at [19]:

"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 or dishonest by ordinary standards. (This presupposes, of course, circumstances where ordinary standards are clear. Where there are genuinely grey areas, a finding of lack of integrity would not be appropriate.)"

14. While the passage quoted above is useful guidance as to the meaning of the concept, the second sentence is clearly not the only circumstance in which a person can be said to lack integrity. In the subsequent cases of *Vukelic v FSA* (2009) at [23] and *Atlantic Law LLP and Greystoke v FSA* [2010] UKUT B30 (TCC) at [96], the Tribunal has cautioned against attempting to formulate a comprehensive definition of integrity. As the Tribunal in *Vukelic* observed, integrity remains a concept "elusive to define in a vacuum but still readily recognisable by those with specialist knowledge and /or experience in a particular market."

15. The Tribunal in *First Financial Advisors Limited v FSA* [2012] UKUT B16 (TCC) agreed with the observation in *Vukelic* and endorsed the guidance in *Hoodless and Atlantic Law*. At [119], the Tribunal observed:

"Even though a person might not have been dishonest, if they either lack an ethical compass, or their ethical compass to a material extent points them in the wrong direction, that person will lack integrity."

1. We agree. A lack of integrity does not necessarily equate to dishonesty. While a person who acts dishonestly is obviously also acting without integrity, a person may lack integrity without being dishonest. One example of a lack of integrity not involving dishonesty is recklessness as to the truth of statements made to others who will or may rely on them or wilful disregard of information contradicting the truth of such statements. Such behaviour was found to be evidence of a lack of integrity by the Tribunal in *Vukelic* at [119]:

"It may be that Mr Vukelic was not dishonest on this transaction in the sense of deliberately participating in a scheme to deceive and we are prepared to accept that he was not. But he turned a blind eye to what was obvious and failed to follow up obviously suspicious signs. We do not believe that an educated professional in a senior position could have been oblivious to the signs that the transaction depended on concealment for its success. It is possible, but unlikely that Mr Vukelic simply failed to spot what should have been obvious to a person in his position. But if that had been so it would have resulted from an inexcusable failure to ask obvious questions."

24. It is clear from the above passages that acting recklessly is one example of acting without integrity. The passage from *Vukelic* referred to above indicates that a person acts recklessly when he turns a blind eye to what was obvious to a person in his position.

25. In our view such a formulation results from no more than an application of the authoritative formulation of the concept of recklessness by Lord Bingham of Cornhill at page 1057 of the opinion of the House of Lords in *R v G* [2004] 1 AC 1034 where he stated that a person acts recklessly when he acts with respect to (i) a circumstance when he is aware of a risk that exists or will exist and (ii) a result when he is aware of a risk that it will occur; and it is in the circumstances known to him, unreasonable to take the risk. This formulation was recently adopted by this Tribunal in *Amir Khan v The Financial Conduct Authority* FS 2013/002 (January 2014).

26. The Authority in this case alleges that Mr Carrimjee lacked integrity because he knew or suspected there was a risk that Mr Goenka was engaging in market abuse and turned a blind eye to it. If that were shown to be the case, then we agree that would demonstrate a lack of integrity in the manner in which the test was formulated in *Vukelic*.

27. We therefore approach our determination as to whether Mr Carrimjee's behaviour can be characterised as lacking integrity by applying the test set out in Paragraph 25 above.

Burden of Proof and Standard of Proof

28. In resolving the issues arising in this reference it is common ground that the burden of proof is on the Authority.

29. There is now a long line of cases in the Tribunal and its predecessors to the effect that the standard of proof is on the normal civil standard of the balance of probabilities, following the dicta of Lady Hale in the judgment of the Supreme Court in *Re S-B (Children) Care Proceedings: standard of proof [2010]* 1 AC 678, and in particular her statement, in paragraph 11, approving the statement of Lord Hoffmann in *Re B* [2009] 1 AC 11, paragraph 13 that except in relation to a category of cases identified by Lord Hoffmann in that case which the law classed as civil but for which the criminal standard was appropriate "the time has come to say, once and for all that there is only one civil standard of proof and that is proof that the fact is issue more probably occurred than not."

30. Consequently, this Tribunal has taken the view that in determining both disciplinary references and those involving assessments of fitness and propriety (such as where the Authority as in this case seeks withdrawal of approvals or prohibition) that the normal civil standard is to be applied. This is on the basis that such cases do not fall within that category of cases identified by Lord Hoffmann in *Re B* as being in effect "quasi-criminal" and, although classed as civil cases, the application of the criminal standard of proof is appropriate because of the "serious consequences of the proceedings": see Lord Hoffmann in *Re B* at paragraph 5.

31. Mr George, who made submissions on this issue, invited us to conclude that in the light of the remarks of this Tribunal in the recent case of *Hannam v*

Financial Conduct Authority [2014] UKUT 0233 (TCC) this approach should no longer be regarded as correct. He contends that in references which involve the potential withdrawal of approvals or imposition of a prohibition order the criminal standard of proof, namely that allegations need to be proved beyond reasonable doubt, should be applied.

32. In *Hannam* the Tribunal reviewed in detail the relevant authorities which could be said to fall within that category of cases that Lord Hoffmann indentified in his speech in *Re B* at paragraph 5 where the courts have thought that the criminal standard or something like it, should be applied because of the serious consequences of the proceedings.

33. It is important to emphasise that in so doing the Tribunal was dealing purely with submissions that allegations of market abuse have serious consequences and therefore should fall within the category of cases identified by Lord Hoffmann where the criminal standard should be applied. The Tribunal was not seeking to lay down principles applicable to FSMA cases generally, or in particular, cases involving withdrawal of approval or prohibition and indeed if it did go further its remarks would be *obiter*.

34. The Tribunal in *Hannam* reviewed a number of cases where the criminal standard had been applied, all of which involved deprivation of fundamental liberties, such as cases involving detention and removal of an immigrant and a sex-offender and anti-social behaviour orders: see paragraphs 157 to 159 of the decision. It also reviewed a number of cases where the standard of proof had been considered in FSMA cases in this Tribunal and its predecessor, in observing that some of these the Tribunal was applying the now discredited "sliding-scale" approach which allowed the civil standard to be varied according to the seriousness of what has to be proved, and in others either it was accepted as common ground that the civil standard applied or the point was not fully argued.

35. In answering submissions that: (1) Lord Hoffmann in *Re B* was not laying down an exhaustive categorisation of the types of case where it would be appropriate to apply the criminal standard; (2) such cases did not have to concern fundamental liberties, and (3) consequently allegations of market abuse being serious and involving serious consequences in the form of a substantial penalty, should be regarded as falling within the exceptional category, the Tribunal in *Hannam* said at paragraphs 180 to 182:

> "180. We agree that the cases which Lord Hoffmann used to illustrate the exceptional nature of the case required before the criminal standard is adopted are not exhaustive of the type of case which is covered. We also agree that deprivation of fundamental liberties is not a necessary ingredient. This is demonstrated by reference to in *Re a Solicitor* [1993] QB 69 where the criminal standard was applied to solicitors' disciplinary proceedings. Although the remarks of Lord Lane CJ in that case were addressed to a case which he described as "tantamount to a criminal offence", the case can be taken as authority for the proposition that the criminal standard is applicable in

all disciplinary proceedings against lawyers: see the Privy Council case of *Campbell v Hamlet* [2005] UKPC 19, [2005] 3 All ER 1116, at [16] *per* Lord Brown of Eaton-under-Heywood. We would add that he interpreted *Re a Solicitor* as warranting the Law Society Disciplinary Committee applying the criminal standard in all cases and not only in those where what is alleged is tantamount to a criminal offence. Whether *Campbell v Hamlet* remains the law in relation to solicitors is doubtful: the current Disciplinary Procedure Rules (see Rule 7.7) of the Solicitors Regulation Authority state that the "standard of proof shall be the civil standard."

181. It does not, however, follow that in all cases where an allegation is serious and has serious consequences for an individual that the allegation must be proved on the criminal standard. In some cases it will, in others it will not. On one side of the line, where the criminal standard is appropriate, are disciplinary proceedings relating to lawyers as we see from *Re a Solicitor* and *Campbell v Hamlet*. Cases the other side of the line where the ordinary civil standard has been applied include these:

a. *R v Provincial Court of the Church in Wales, ex p Williams*, 23 October 1998. Latham J applied the civil standard in a case which concerned the stripping of a priest of Holy Orders. The Judge explained *Re a Solicitor* as turning on the fact that the allegation against the solicitor amounted to a criminal charge. The standard of proof was "that described by Lord Nicholls in *Re H*." We do not think that Latham J, in saying that, can be taken as adopting the incorrect understanding of Lord Nicholls' description of the standard (that is to say the "sliding scale") rather than the correct understanding of that description as explained by Lord Hoffmann.

b. In *Greaves v Newham LB*, 16 May 1983, Browne-Wilkinson J (sitting in the Employment Appeals Tribunal) applied the civil standard in relation to findings made against the applicant notwithstanding that her livelihood was at stake.

182. In disciplinary cases relating to professionals other than lawyers, the ordinary civil standard is nearly always applied. In many cases, the rules of the relevant procedures expressly provide for a civil standard and, accordingly, decisions in these circumstances do not demonstrate what the answer should be in the absence of express provision. But the fact that disciplinary rules do provide, in may cases, for the civil standard does suggest to us that considerable caution must be exercised in relation to the submission made on behalf of Mr Hannam that cases of market abuse fall into Lord Hoffmann's category of exceptional cases because they are serious and carry serious penalties: the same is true in the field of discipline under professional rules of conduct….."

36. The Tribunal then referred in the same paragraph to disciplinary proceedings, which can involve the removal of the right to practice, concerning accountants and architects, where the civil standard is applied.

37. The Tribunal concluded on the issue in paragraph 191 with the following reasoning:

> "191. Drawing all of this together, we do not consider that market abuse falls within Lord Hoffmann's first category. We have already explained that we do not perceive allegations of market abuse as tantamount to allegations which constitute criminal offences. Although the consequence in the case of serious market abuse may be a large financial penalty, there is no other sanction (apart from censure) which the Authority can impose under the market abuse regime (in contrast with the sanctions it can impose on an approved person whom it considers is not "fit and proper" see sections 63 and 66 FSMA). In light of that, a person against whom allegations of market abuse are raised is not, it seems to us, entitled to the same sort of protection as a person whose fundamental liberties are at risk, any more than a person whose livelihood is at risk is entitled to such protection (as to which see *R v Provincial Court of the Church in Wales, ex p Williams* and *Greaves v Newham LB* referred to above). Further, it seems to us that if an analogy with another area is to be found, the closest analogy is a case of civil fraud falling in Lord Hoffmann's second category, such as *Hornal v Neuberger Products Ltd,* where the ordinary civil standard applies but where the inherent probability of the relevant event (eg the activities amounting to market abuse) may lead to the need for strong evidence to persuade the tribunal that the event occurred."

38. Mr George latches on to the remark in Paragraph 191 of *Hannam* that unlike "sanctions" that can be imposed on approved persons, reference being made to withdrawals of approval and prohibition, market abuse only carries the sanction of a financial penalty.

39. We observe that there is a degree of inexactitude in the wording referred to in that we assume the reference to Section 66 FSMA was intended to be to Section 56 (which deals with prohibition) and it is clear that orders withdrawing approvals and prohibiting persons working in the industry are not disciplinary sanctions; they are measures designed to protect consumers and the stability of the financial markets by preventing persons who are not fit and proper operating in the markets. That distinction is clearly recognised in the new scheme of Section 133 FSMA which we refer to below, which makes a distinction between the powers of the Tribunal on disciplinary and non-disciplinary references, action to withdraw approvals and impose prohibition orders falling into the latter category.

40. Mr George submits that in paragraph 191 of its Decision the Tribunal was expressly and deliberately leaving open the question of what the answer to the standard of proof question would be if you added into the mix of issues to be determined on a reference the ability to withdraw approval and prohibit. In support of his contention that the criminal standard should be applied in such cases he submits:

(1) In Paragraph 191 of its Decision in *Hannam* the Tribunal recognised that the position could be different where there were sanctions (in the broadest sense) going beyond a financial penalty. In particular, a prohibition order under Section 56 FSMA, involving as it does a complete ban from working in the

financial services industry, goes far wider than merely a professional body taking away a qualification which it conferred in the first place. Such a sanction should therefore be equated with the deprivation of a fundamental liberty;

(2) Arguing from first principles, it has been held that the criminal standard is applicable in all proceedings against lawyers and there is no reason why there should be any lesser protection afforded to financial services professionals; and

(3) There is nothing in FSMA which guides the Tribunal as to the standard of proof to be applied.

41. We have no doubt that the correct approach is to apply the normal civil standard of proof in relation to all the findings we need to make on this reference for the following reasons.

42. First, in paragraphs 181 and 182 of *Hannam* quoted above and again in paragraph 183, the Tribunal recognises that disciplinary cases involving the deprivation of livelihood do not attract the criminal standard, notwithstanding the serious consequences. The cases show that the only exception is lawyers and today not even solicitors are included following changes to the disciplinary rules of the Solicitors Regulation Authority. It is therefore the case today that barristers appear to be the outlier.

43. Mr George appeared to accept in argument that a withdrawal of approval case is more akin to the withdrawal of the right to practice a particular profession such as a priest, architect or accountant, which invariably appears to attract the civil standard, apart from the case of lawyers. If so his argument then suggests that a different standard should be applied in the case of prohibition orders under Section 56 to withdrawal of approval cases because they go much wider and can shut people out from performing any function at all in the financial services industry, which is much more fundamental.

44. In our view such a distinction makes no sense at all, either in principle or in practice. As we have emphasised above, the powers in both section 56 and section 63 are designed to protect the public. They do not depend on any element of misconduct to bring them into play, but merely provide the Authority the power to exercise them if it "appears to the Authority" that the individual concerned is not a fit and proper person. The circumstances in which they can be exercised is therefore identical in both cases. The circumstances that give rise to such a finding will be wide ranging. For example, the individual, through no fault of his own may be suffering from incapacity. The circumstances may result from incompetence or financial soundness; again the latter may not be the individual's

fault. It does not appear to be appropriate to apply the criminal standard in cases where no fault or any negligence is involved, so does a lack of that dictate confining the criminal standard only to cases involving allegations of a lack of integrity?

45. In addition, a prohibition order need not be, and often is not, absolute. It may be confined to the performance of certain specified functions, such as compliance or other significant influence functions. It is then effectively on all fours with a withdrawal of individual approval. It is considerations like these that has led the jurisprudence in question to the conclusion that generally the presumption is that the same civil standard applies in all cases.

46. We see no policy reason to treat financial services industry professionals differently to other professions. The wording of FSMA gives no indication that a criminal standard was expected in relation to any of the powers in question and we cannot envisage that Parliament intended that there should be different standards for different powers or according to the circumstances in which they are exercised.

47. In our view the aside in Paragraph 191 of *Hannam* that Mr George relies on does not lead anywhere near to a contrary conclusion. The Tribunal in *Hannam* had no argument on the point and, to be fair to Mr George, he did no more than invite us to consider the position in the light of that aside. We have done so, and in the familiar phrase, the time has come to say once and for all that the civil standard of proof applies in relation to all disciplinary and non-disciplinary references made to this Tribunal pursuant to FSMA. We agree with Mr Stanley that any attempt to distinguish between the two would be novel, unprincipled and unworkable.

Issues to be determined and the role of the Tribunal

48. This is the first case that the Tribunal has had to consider since its powers were restricted by the amendments made to FSMA by the Financial Services Act 2012. The restricted powers apply to Mr Carrimjee's reference because it was made after 1 April 2013 when the new limited jurisdiction came into effect.

49. Section 133 (4) FSMA has not been amended. It provides that, 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 decision-maker at the material time. This is not an appeal against the Authority's decision but a complete rehearing of the issues which gave rise to the decision.

51. Section 133(5) to (7) FSMA now provide as follows:

> "(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 consider 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 limiting 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."

52. "The decision-maker" in relation to this reference is the Authority.

53. It can be seen that there is now a distinction between the powers of the Tribunal on what is described as a "disciplinary reference" and other references. Pursuant to section 133 (7A) FSMA "disciplinary reference" includes a decision to take action under section 66 FSMA, that is to impose a financial penalty on an approved person. The term does not include a reference to withdraw approval under section 63 or impose a prohibition order under section 56.

54. Thus Mr Carrimjee's reference is effectively sub-divided. His reference of the decision to impose a financial penalty is a "disciplinary reference" and accordingly, as was the case in relation to all references made before 1 April 2013, the Tribunal has power to determine at its discretion what (if any) is the appropriate action for the Authority to take.

55. In relation to other references, which we shall refer to as "non-disciplinary references", the powers of the Tribunal as set out in section 133(6) are more limited. The jurisdiction may now be characterised as a supervisory rather than a full jurisdiction in that, unless the Tribunal believes the reference to have no merit and therefore dismisses it, its powers are limited to remitting the matter to the Authority.

56. It remains to be seen whether in practice this change makes a significant difference. Section 133(6A) FSMA makes it clear that the Tribunal in determining a non-disciplinary reference may make findings both of fact and of law, as well as findings on procedural issues and the matters to be take into account by the Authority in making its final decision.

57. Let us suppose that in this reference we were to find that Mr Carrimjee's behaviour was perfectly acceptable and did not constitute a breach of a Statement of Principle. In these circumstances it would be clearly open to the Tribunal to indicate that there was only one rational answer as to how the question of withdrawal of approval and imposition of a prohibition order should be determined because to prohibit and withdraw approvals in these circumstances would be unlawful as an irrational decision, and any further decision made by the Authority would be capable of being referred to the Tribunal.

58. The position is more complicated if the Tribunal were to decide that there was a degree of culpability on Mr Carrimjee's falling short of failing to act with integrity but that it constitutes a failure to act with due skill, care and diligence. In these circumstances, if the reference had been made before 1 April 2013, the Tribunal may have decided to impose a financial penalty, and would also decide whether it was appropriate to withdraw any approval under section 63 or make any kind of prohibition order under section 56 and, if so, the scope of such order. Now that decision can only be made by the Authority. However, in our view it would be open to the Tribunal to make a finding as to whether, in the light of the findings of fact it had made the withdrawal of any approval or the making of a prohibition order, or a prohibition order of limited scope, would be disproportionate; or was one that no reasonable authority, properly directing itself as to the law, could have made. This would be a finding of law which is open to the Tribunal under section 133(6)A. However, if the Tribunal was of the view that as a matter of law a withdrawal of approval or a prohibition order of a specified description was within the range of reasonable decisions which the Authority could make, then it is not open to the Tribunal itself to determine what the appropriate action is for the Authority to take, that is a matter for the Authority alone.

59. As we shall see, these considerations come into play on the current reference. It was common ground that even if we were to find that Mr Carrimjee's behaviour did not demonstrate a lack of integrity, it was open to us to make a finding as to whether his behaviour demonstrated breach of a Statement of Principle to a lesser degree. In this case therefore, it would be open to us, having made the relevant findings of fact, to make a finding that those findings demonstrated a failure to act with due skill care and diligence as required by Statement of Principle 2.

60. That course of action is open to us because a reference is not an appeal against the Authority's decision, it is a determination of what is the appropriate action to take in the circumstances falling within the subject matter of the reference, that is the circumstances that have been the subject of the prior regulatory proceedings, rather than the particular outcome as found in the Decision Notice.

61. We therefore approach the issues in this reference as follows:

(1) We shall first determine whether on the balance of probabilities Mr Carrimjee's conduct demonstrated a failure to act with integrity in breach of Statement of Principle 1;

(2) If the answer to the first issue is in the negative, we shall determine whether his conduct nevertheless demonstrated a failure to act with due skill care and diligence in breach of Statement of Principle 2;

(3) We shall then determine the appropriate financial penalty, if any, to be imposed; and

(4) Finally we shall make such further findings and directions as are necessary in relation to the non-disciplinary references.

Evidence

62. The Authority's case is based predominantly in its interpretation of what was said in a series of telephone calls involving Mr Carrimjee, Mr Goenka (on some calls) and Mrs Vandana Parikh ("Mrs Parikh"). Mrs Parikh is a broker at the firm of Paul. E. Schweder Miller and Co ("Schweder Miller"). Mr Carrimjee introduced Mr Goenka to Mrs Parikh with a view to Mr Goenka placing the trades and proposed trades which were the subject of Mr Goenka's alleged attempts to manipulate the market in Gazprom and Reliance GDRs.

63. We were provided with the transcripts of sixty telephone calls, and we were taken to a large number of them. We were also provided with a copy of recordings of these calls, some of which were played to us at the hearing.

64. Mr Hunter urged us to treat the transcripts of the telephone calls with caution. He drew our attention to the following observations of the Financial Services and Markets Tribunal in *Hoodless and Blackwell v Financial Services Authority* (2003) at paragraph 23:

> "It is easy to be misled by such transcripts, language is often used very loosely on the telephone with ungrammatical instructions, full stops left uncorrected, figurative usages and incorrect choices of words. Not everything said is intended to be taken literally or to be taken seriously…… Much depends on context on tone, and on the nature of the relationship between the speakers."

65. We accept the need for caution, and as suggested by Mr Hunter, have it at the forefront of our minds. We have therefore listened to all the relevant recordings in conjunction with reading the transcripts to get a fuller flavour of the conversations and their tone and the context in which they took place.

66. We have also been mindful of the fact, as observed by Mr Hunter, that Mr Carrimjee and Mrs Parikh (who have known each other for some years) speak to each other informally, often in Hindi (which has generally been translated in the transcripts) and using their own particular terminology from time to time. We have seen Mr Carrimjee, who was cross examined on his witness statement, but not Mrs Parikh, on whose absence we comment later. Consequently, our assessment of the conversations has been more challenging in circumstances where we have only been able to hear from one of the participants in most of the conversations. In these circumstances we have, wherever possible, looked at what Mrs Parikh had to say about the key conversations in her interview with the

Authority, bearing in mind we should place less weight on such evidence than would have been the case had she been available for cross-examination.

67. As indicated, in addition to the evidence of the telephone calls, we have also seen transcripts of the interviews that Mr Carrimjee and Mrs Parikh gave to the Authority. We have also been provided with documentation relating to the regulatory proceedings against Mr Carrimjee, Mrs Parikh and Mr Goenka including the Final Notices issued by the Authority against Mrs Parikh and Mr Goenka and also Mr David Davis, the compliance officer at Schweder Miller, who was also disciplined in relation to the matter.

68. Mr Carrimjee has been consistent in his explanations as to his state of mind and knowledge regarding Mr Goenka's intentions, from his interviews with the Authority, his representations to the Regulatory Decisions Committee and in his evidence to the Tribunal. We have taken that factor into account when assessing his evidence.

69. The position of Mrs Parikh, who was also subject to regulatory proceedings, was the subject of debate before us and requires some explanation, as does the position of Mr Goenka who was also the subject of enforcement action by the Authority.

70. The Authority's case against Mr Goenka was that he had engaged in market abuse contrary to section 118(5) FSMA by placing orders to trade which artificially inflated the closing price of Reliance GDRs, an instrument traded on the International Order Book ("IOB") of the London Stock Exchange ("LSE"), on 18 October 2010. It found that Mr Goenka arranged for a series of substantial and pre-planned trades in these securities executed in the final seconds of the LSE closing auction and that these orders were placed with the intention of increasing the closing price for Reliance GDRs above a certain level. At the time, Mr Goenka held a structured product in which the pay-out depended on the closing price of the Reliance GDRs that day, and by increasing the closing price, Mr Goenka was able to avoid a substantial loss in the structured product. The Authority considered that Mr Goenka's conduct was serious taking into account that it found that he planned to engage in similar behaviour in April 2010 (in relation to Gazprom GDRs) in relation to another structured product he held, involved considerable pre-planning, necessitated very substantial financial outlay and involved others. Consequently, the Authority imposed a financial penalty of US $6,517,600 on Mr Goenka.

71. Mr Goenka agreed to settle the regulatory proceedings brought against him by the Authority at an early stage, resulting in a 30% discount in the financial penalty he would otherwise have had to pay, and these agreed findings were set out in a Final Notice issued to Mr Goenka on 17 October 2011.

72. References were made in Mr Goenka's Final Notice to the roles performed by Mr Carrimjee and Mrs Parikh in relation to the Reliance trades and the planned Gazprom trades, although they were both anonymised. Mr Carrimjee's role was described as having been to introduce Mr Goenka to Mrs Parikh, as the broker who would transact the trades for Mr Goenka. Mr Goenka's Final Notice was broadly neutral as to the question as to whether Mr Carrimjee or Mrs Parikh knew

or suspected that Mr Goenka intended to manipulate the closing price of Gazprom and Reliance GDRs.

73. Separate regulatory proceedings were subsequently brought by the Authority against Mr Carrimjee and Mrs Parikh. The Authority's case against Mrs Parikh, as set out in the Warning Notice, was that Mrs Parikh provided extensive tutoring to Mr Goenka during April 2010 in relation to the means of manipulating prices in the closing auction of the International Order Book of the LSE and that she "willingly participated" in a plan to commit market abuse on 30 April 2010 in relation to Gazprom GDRs, which was not ultimately executed. With regard to the Reliance trades the Warning Notice alleged that Mrs Parikh was (at all material times) aware that the orders were being placed with the intention of increasing the closing price for Reliance GDRs above a certain level. Accordingly the Authority alleged that she acted deliberately, intending to manipulate the closing price of both Gazprom and Reliance GDRs and was guilty of market abuse.

74. The Authority's case against Mr Carrimjee, as set out in the Warning Notice, was that Mr Carrimjee assisted Mr Goenka to implement a plan to manipulate the closing price of Gazprom GDRs in April 2010 and Reliance GDRs, in October 2010, and that Mr Carrimjee knew that the objective of the plan was to secure the price of Gazprom and Reliance securities at a false or artificial level. As with Mrs Parikh, the Authority alleged that Mr Carrimjee's conduct was deliberate and that he intended to assist Mr Goenka's implementation of his plan to create an artificial price for both Gazprom and Reliance GDRs.

75. Mr Carrimjee and Mrs Parikh made representations to the Authority's Regulatory Decisions Committee ("RDC") on their Warning Notices and the Decision Notices which followed on from the RDC process were materially different to the Warning Notices.

76. In relation to Mrs Parikh her behaviour was characterised as being negligent rather than deliberate. There was no finding of market abuse, but she was found not to have exercised due skill care and diligence in breach of Statement of Principle 2 by engaging with and assisting Mr Goenka in the practicalities of auction trading despite speculating that Mr Goenka had an ulterior purpose for his interest in the auction.

77. The Authority found, as demonstrated by recordings and transcripts of contemporaneous telephone conversations, that Mrs Parikh should have been aware of the risk that Mr Goenka's objective was artificially to position the price of the relevant securities and that Mr Goenka intended to commit market abuse. The Authority found that at the very least Mrs Parikh should have properly challenged and made adequate enquiries, so as reasonably to satisfy herself that no such risk existed before continuing to engage with and assist Mr Goenka. The Authority decided to impose a financial penalty on Mrs Parikh but not to withdraw her approvals under section 63 FSMA or prohibit her under section 56 FSMA, a course that they were proposing in the Warning Notice.

78. The Authority's findings in that respect were set out in paragraph 58(a) of the Final Notice as follows:

> ["The Authority"] accepts Mrs Parikh's submission that her conduct must be assessed in the context of her actual knowledge at the relevant time and must not be viewed with hindsight. The Authority accepts that Mrs Parikh may have been the innocent victim of Mr Goenka's concealed intentions. However, the Authority considers that the recordings and transcripts of the telephone conversations involving Mrs Parikh provide strong contemporaneous evidence of Mrs Parikh's actual knowledge/awareness at the relevant time. Based on the contemporaneous recordings and transcripts of the telephone conversations involving Mrs Parikh, the Authority considers that Mrs Parikh should have been aware of the risk that Mr Goenka's objective was to trade in the Closing Auction in a manner such as to artificially position the price of Gazprom GDRs at the relevant time. Mrs Parikh discounted the possibility of market manipulation without making adequate enquiries. To the extent that Mrs Parikh was not aware of the risk that Mr Goenka intended to commit market abuse and failed to make reasonable enquiries, so as reasonably to satisfy herself that no such risk existed before continuing to engage with and assist Mr Goenka, she fell below the standard that is expected of an approved person in breach of Statement of Principle 2. The Authority has noted the written references which Mrs Parikh submitted as part of her representations attesting to her good character. However, the Authority has found that Mrs Parikh's long career at Schweder Miller and her asserted good character (supported by references) do not, in and of themselves, preclude the possibility that her conduct fell below the standard that is expected of an approved person in breach of Statement of Principle 2."

79. Mrs Parikh decided not to challenge these findings in the Tribunal and accordingly the Authority issued her with a Final Notice in the same terms as the Decision Notice on 6 August 2013.

80. In relation to Mr Carrimjee his behaviour was characterised as being reckless rather than deliberate. The Authority decided that Mr Carrimjee suspected that market manipulation was the goal of Mr Goenka and suspected that Mr Goenka held structured products which was related to the intended manipulation, yet he turned a blind eye to the risk of Mr Goenka's planned market abuse and recklessly assisted his client in his attempt to achieve that goal. That in essence is the case the Authority puts before the Tribunal on Mr Carrimjee's reference, although it was often the case that Mr Stanley put it to Mr Carrimjee that he knew what Mr Goenka's intentions were.

81. Thus it can be seen that the Authority's case theory changed from, at the Warning Notice stage, being one where Mr Carrimjee and Mrs Parikh with full knowledge of Mr Goenka's intentions worked together to assist him to manipulate the market, to, at the Decision Notice stage, one where there was no finding that Mr Carrimjee and Mrs Parikh worked together to assist Mr Goenka in achieving his objective, but where in the case of Mr Carrimjee suspicions were aroused and he turned a blind eye to them and in the case of Mrs Parikh, suspicions should have been aroused and further enquiries should have been made.

82. The question therefore arises as to what extent we should regard ourselves as being bound, on this reference, by the findings that the Authority has made in

relation to Mr Goenka and Mrs Parikh when considering the position of Mr Carrimjee.

83. There can be no question that had Mr Goenka and Mrs Parikh referred their Decision Notices to the Tribunal it would be open to the Tribunal to characterize their behaviour differently to that found by the Authority; that is the essence of a reference where the Tribunal looks at the matter afresh in the light of all the evidence available to it, and the Authority's Decision Notices are only relevant in the sense that they assist in delineating the scope of the matters referred to the Tribunal.

84. The question arises as to whether we should treat Mrs Parikh's and Mr Goenka's Final Notices in the same way as we do Mr Carrimjee's Decision Notice. Mr Stanley accepted that the fact that these notices were final and not capable of being reopened in any judicial proceedings as between the Authority and the recipient of the notice meant the position was different to Mr Carrimjee's Decision Notice. However, Mr Stanley suggested that it was simply a question as to what evidential weight the Tribunal gave to the Final Notices, and that it was not obliged to give them conclusive weight and fit its findings about Mr Carrimjee's behaviour around the findings in these notices. He submitted therefore that the Tribunal should not regard itself as bound by the decisions that the Authority had made in relation to proceedings against other parties, in the same way as it was not bound by the decision made in respect of Mr Carrimjee.

85. Mr Hunter did not go so far as to say we should regard the issues determined against Mrs Parikh as *res judicata*: it was common ground that the Authority's Decisions which relate to matters which have not been referred to the Tribunal are not judicial decisions, they are administrative decisions and therefore the Authority's findings are not capable of giving rise to an issue estoppel as a matter of law.

86. Nevertheless Mr Hunter submits that the position should be regarded as analogous to a situation where *res judicata* applies in respect of judicial decisions.

87. In his submission this situation arises because it is the Authority's public law duty to act rationally. Consequently, he submits, it must treat like cases alike; it should apply the same disciplinary approach consistently to all whom it regulates and it cannot advance inconsistent factual positions in different proceedings. It is no longer open to the Authority to challenge the findings in Mrs Parikh's Final Notice.

88. He cites as authority for this proposition the dicta of Lord Hoffmann in the Privy Council case of *Matadeen v Pointu* [1999] 1 AC 98 where at page 109 he said:

> "…..treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational."

Mr Hunter submits that the Authority is acting in breach of this principle in this case; in the Authority's statement of case against Mr Carrimjee (in paragraph 47(d)) it pleads that Mr Carrimjee and Mrs Parikh proceeded on the basis that

price manipulation was Mr Goenka's intention, yet in paragraph 6 of Mrs Parikh's Final Notice it concludes that Mrs Parikh did not recognise the risk that Mr Goenka intended to commit market abuse.

89. Consequently, in Mr Hunter's submission, the Authority cannot advance a case in the Tribunal that is in direct conflict with the case that it has set out in a public Final Notice, based as it is on the same facts and circumstances as the case it brings against Mr Carrimjee.

90. Aside from the public law point that Mr Hunter raises, he submits that in any event to plead, notwithstanding the Final Notice against Mrs Parikh, that she was aware that Mr Goenka's intention was price manipulation is unfair to Mrs Parikh when she has not been called as a witness to give her account of what she knew to the Tribunal and be subjected to cross-examination on it. In his submission, the Authority, on grounds of fairness, is not entitled to ask the Tribunal to find that she knew about an intention to manipulate the price without her being given an opportunity to defend the position as found in her Final Notice. The Authority having chosen not to call Mrs Parikh as a witness, must accept that position.

91. Finally, as a matter of evidence Mr Hunter submits, it is untenable for the Authority to contend for a position that is contrary to the findings of the Final Notice; the evidence on which the Authority found that Mrs Parikh's representations in her state of knowledge was credible is the same evidence before the Tribunal on Mr Carrimjee's reference and it is not credible now for the Authority to run a different case on the same evidence.

92. There is no question that Mr Stanley has presented the Authority's case largely on the basis that Mr Carrimjee and Mrs Parikh proceeded on the basis of a common assumption that Mr Goenka planned to manipulate the price of Gazprom and Reliance GDRs. In his cross-examination of Mr Carrimjee he put numerous questions to Mr Carrimjee to that effect.

93. Mr Stanley submits that he is perfectly entitled to advance a case which is inconsistent with the finding of Mrs Parikh's Final Notice that she did not suspect that Mr Goenka planned to engage in market manipulation. He submits that the Tribunal is entitled to put limited weight on the Final Notice because the RDC made its findings without the benefit of any of the relevant participants having been cross examined at all. It made its findings in relation to Mrs Parikh without having heard any evidence from Mr Carrimjee and without Mrs Parikh herself having been cross-examined. In contrast, Mr Carrimjee has been cross examined in the Tribunal. He characterises the RDC's findings as giving Mr Parikh the benefit of the doubt, but finding (as it stated in Paragraph 58 (a) of the Final Notice quoted in paragraph 78 above) that Mrs Parikh may have been the innocent victim of Mr Goenka's concealed intentions, rather than as a categoric finding that she was such a victim. He therefore submits that it is open to the Tribunal, having considered the other evidence before it, and in particular focusing on the position of Mr Carrimjee himself and the evidence he has given in the context of the various calls, that Mr Carrimjee and Mrs Parikh were aware of an intention on Mr Goenka's part to engage in price manipulation. He submits

that the Tribunal should be wary of assuming that the findings made against Mrs Parikh can determine the position of Mr Carrimjee.

94. We accept that we should not assume that because Mrs Parikh has been found not to have acted without integrity that we should find the same with regard to Mr Carrimjee. It is our task to assess Mr Carrimjee's state of mind with reference to all the evidence that we have seen and heard, including such evidence as relates to Mrs Parikh's role, which in the absence of any witness statement or oral evidence on her part is confined to the interviews, statements and representations she made in the course of her own proceedings and, most recently, the Authority's findings as set out in the Final Notice issued to her.

95. Nevertheless, in making that assessment in our view we should proceed on the basis that it is no longer open to the Authority to challenge the conclusion in Mrs Parikh's Final Notice that Mrs Parikh's degree of culpability went no further than a failure to act with due skill, care and diligence by reason of the fact that she failed to recognize the risk that Mr Goenka intended to commit market abuse and to make reasonable enquiries to satisfy herself that no such risk existed before continuing to engage with and assist Mr Goenka.

96. We do not accept Mr Stanley's characterisation of the Final Notice as being less than categoric in its findings. We have seen that Mrs Parikh made representations to the RDC on a Warning Notice which had sought to characterise her behaviour as lacking integrity on the basis that in knowledge of Mr Goenka's intentions, she tutored him in how to manipulate the price of the securities in question. The RDC clearly was not satisfied that such a case was made out and it made categoric findings in Paragraph 58(a) of the Final Notice that her conduct amounted to a failure to act with due skill, care and diligence and nothing more.

97. In our view it is not open to us to go beyond the Authority's findings in relation to Mrs Parikh, and we accept Mr Hunter's submissions that it is not open to us to do so by reason of legal principle, fairness and the weight of the evidence.

98. As far as legal principle is concerned, Mrs Parikh's Final Notice is not a judicial decision and the doctrine of *res judicata* accordingly does not apply. Nevertheless, a Final Notice reflects the final determination of the issues that were the subject of the relevant regulatory proceedings. The Authority can enforce any financial penalty imposed pursuant to it as if it were a debt due to it: see section 390(9) FSMA. Final Notices are generally published and often accompanied by press releases describing the outcome. A Final Notice may be issued once the time limit referred to the Tribunal of the relevant decision notice has expired: see Section 390 FSMA. Accordingly, it is not, subject to any extension of time that may exceptionally be granted pursuant to the Tribunal's procedure rules for the filing of a reference, capable of being challenged in any judicial proceedings.

99. Thus the statutory scheme gives strong indications that a Final Notice should be regarded as conclusive as regards the actions that it enables the Authority to take and the reasons given by the Authority as to why it is appropriate to take the action concerned.

100. It is important to note that a Final Notice can be a result of any one of three processes. First, it could be issued as a result of regulatory proceedings that the subject has decided to settle with the Authority, without invoking the RDC process, the RDC only dealing with contested regulatory action. That is the position with Mr Goenka's Final Notice. Secondly, it could be issued following contested proceedings before the RDC, which is the FCA's own internal decision maker, where the subject has made representations to the RDC which the RDC has taken into account before deciding to issue a Decision Notice. The RDC's decision will result in a Final Notice if the matters referred to in the decision notice are not challenged in the Tribunal. That is the position with Mrs Parikh's Final Notice. Finally, it can be issued following directions given by the Tribunal to the Authority on determination of a reference: see section 390(3) FSMA.

101. In our view whatever route is taken to the issue of a Final Notice, the notice has identical effect. It is binding on the Authority. In our view it would be invidious to suggest that a Final Notice should be regarded as being less authoritative simply because of the process that was followed that led to its issue. We therefore reject what is implicit in Mr Stanley's submissions, namely that a Final Notice that arose as a result of RDC proceedings should be regarded as less authoritative and less conclusive than one that was issued following the determination of a reference by the Tribunal.

102. Mr Stanley seeks to argue, in effect, that we should treat Mrs Parikh's Final Notice in the same way as we treat Mr Carrimjee's Decision Notice, or for that matter, Mrs Parikh's Decision Notice had she referred the matter to the Tribunal. In other words, he asks us to proceed on the basis that since our jurisdiction looks at the matter *de novo* we are not bound by any previous findings of Authority.

103. This argument fails to deal with the fundamental difference between a Decision Notice and a Final Notice that is apparent from our analysis of the circumstances of the latter. The Authority does from time to time find itself in the position where its enforcement arm regards a decision made by the RDC, the Authority's separate decision maker, as unduly lenient. It is well established that the Authority will get a "second bite of the cherry" if the subject of the Decision Notice decides to refer it. The Authority may renew before the Tribunal the case it originally presented to the RDC rather than a case based on the conclusion in the Decision Notice. However, in our view the position is entirely different once a Final Notice has been issued; the conclusions of that notice reflect the final word of the Authority on the determination of the issues in regulatory proceedings against the subject of the notice and the Authority must be held to these conclusions and not seek to undermine them in any subsequent proceedings, such as this reference, where they are relevant.

104. We therefore accept Mr Hunter's submissions, based on the dicta of Lord Hoffmann in *Matadeen v Pointu* that it would be a breach of the Authority's public law duty to act rationally were it to seek to advance a position which is factually inconsistent with the conclusions it had reached with regard to the behaviour of the subject of a Final Notice on the same evidence in respect of the same subject in that Final Notice.

105. Consequently, in our view, in assessing the evidence as to Mr Carrimjee's state of mind in relation to the subject matter of his reference, we should proceed on the basis that Mrs Parikh's state of mind was as described in Paragraph 58(a) of her Final Notice.

106. Even if we were wrong on that issue, we would come to the same view based on the other reasons advanced by Mr Hunter, namely fairness and the weight of the evidence.

107. With respect to the issue of fairness, Mrs Parikh has not been called as a witness in these proceedings. It would be unjust were the Tribunal to make findings to the effect that her knowledge of Mr Goenka's intentions was greater than that found in her Final Notice without Mrs Parikh having been given the opportunity of giving the Tribunal a full account of her actions and being available for cross-examination. In so doing the Tribunal would in effect have conducted a fresh hearing in relation to a matter on which she has the benefit of a decision by the Authority without her being able to participate in the hearing.

108. Indeed it is questionable whether merely enabling Mrs Parikh to be heard as a witness would be sufficient to enable her to be treated fairly. It may be considered necessary that she be added as an "interested party" to the proceedings pursuant to Rule 9 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and thus be able to make submissions as well as give evidence. In order to do so the Tribunal would have to have adopted a purposive construction of the definition of "interested party" contained in Rule 1 (3) of these Rules. The definition is confined to "any person other than the applicant who could have referred the case to the Upper Tribunal." That would not be the position with regard to Mr Carrimjee's decision, but it would be in respect of her own decision.

109. We shall not explore that issue any further as the matter is hypothetical, but it is quite clear to us that fairness dictates that we should not make findings inconsistent with the findings in Mrs Parikh's Final Notice and which are adverse to her in the absence of her having had the opportunity of participating in the proceedings in whatever way is appropriate.

110. With regard to the question of weight of evidence, in the absence of any witness evidence from Mrs Parikh in our view we should give very strong weight to the conclusions in the Final Notice. The evidence on which those conclusions was based is broadly the same as that before the Tribunal, namely the transcripts and recordings of the various telephone calls, the transcript of Mrs Parikh's interview with the Authority and the statement she produced following the interview and her representations to the RDC. In addition, we have had the benefit of Mr Carrimjee's evidence, but in our view it would be unsafe to draw conclusions adverse to Mrs Parikh on the basis of that evidence. If we were to make a different assessment of Mrs Parikh's state of mind to that reached by the RDC, we would be guilty of the very thing that Mr Stanley warns us against; relying on evidence that has not been tested in cross-examination. The most relevant evidence we have as to Mrs Parikh's state of mind are the RDC's conclusions as set out in the Final Notice. In the absence of hearing from Mrs Parikh directly and bearing in mind that the other evidence available to us was

also available to the RDC, in our view there is no rational basis on which we should not accept the RDC's findings as to how Mrs Parikh's behaviour should be characterised.

111. We therefore proceed on the basis that in assessing how to characterise Mr Carrimjee's behaviour we do so on the basis that Mrs Parikh was not aware of any intention on the part of Mr Goenka to manipulate the price of Gazprom and Reliance GDRs.

112. We turn now to the question of Mr Goenka's Final Notice and in particular, to what extent we should accept it as conclusive evidence that Mr Goenka did engage in market abuse in relation to the trades effected in Reliance GDR's in October 2010 and planned to do so in relation to Gazprom GDRs in April 2010.

113. Mr Hunter made it clear in his submissions that Mr Carrimjee did not accept that Mr Goenka had engaged in market abuse or intended to do so although he did not in his reply to the Authority's statement of case specifically deny it. Mr Hunter referred to the fact that notwithstanding the Final Notice, Mr Goenka's lawyer was reported in the Financial Times as having said that his client had agreed to settle the case to "avoid long and disruptive litigation" and that:

> "He does not accept that he has committed market abuse. His view is that he was hedging a position in which he was running a significant risk and simply replicating what banks do"

114. Mr Hunter submits that Mr Goenka's Final Notice is thin on evidence as to his intentions, merely outlining the features of the transactions themselves, and, in his submission, nothing further emerged in the evidence before the Tribunal that could have led to a conclusion that it would have been obvious, particularly to Mr Carrimjee, that Mr Goenka was intending to manipulate the price of Gazprom GDR's in April 2010 and Reliance GDRs in October 2010. Mr Hunter sees the Final Notice as representing swift settlement of a matter which Mr Goenka wished to dispose of without disputing the Authority's case, but, as is clear from his lawyer's remarks, not accepting it.

115. We accept Mr Hunter's submission that we do not have to refrain from looking behind the findings in Mr Goenka's Final Notice in the way he says we must in relation to Mrs Parikh's Final Notice. His submissions there were directed at a situation where the Authority was seeking to take a position which was inconsistent with its own previous findings. There is no suggestion that the Authority is seeking to advance a case which is inconsistent with the position it took with Mr Goenka in relation to Mrs Parikh.

116. Nevertheless, for the reasons we have given above, we should give considerable weight to what we regard as clear findings as to the basis on which Mr Goenka was found to have engaged in market abuse. Mr Goenka's Final Notice gives considerable detail as to the two structured products that Mr Goenka held and how the closing price on their maturity date of Gazprom GDRs in relation to the first of these products, and Reliance GDRs in relation to the second of these products was highly relevant to the final payment under those products. It was clear that it was in Mr Goenka's interest that the closing price of these securities be higher than the initial price of those securities.

117. The Final Notice then describes the proposed trades that Mr Goenka devised to effect what was described in the Final Notice as his approach "to the manipulation of the GDR price for Gazprom with a view to ensure it was above the closing price", and the trade that he effected in Reliance GDRs which, the Final Notice records, has the impact of increasing the closing price to the point that resulted in him receiving a payment under the second structured product.

118. The Final Notice concludes that the Reliance trades were not effected for legitimate reasons in conformity with accepted market practices, and resulted in the closing price being at an artificial level, that being Mr Goenka's sole purpose in trading in Reliance GDRs in October 2010. Consequently the Authority found that Mr Goenka had engaged in market abuse in so trading.

119. What the Final Notice does not do is deal with any alternative explanation that Mr Goenka may have had for his trading and explain why that explanation was rejected. It is not the practice of Final Notices that result from a settlement to do so in contrast to Final Notices that follow RDC proceedings. Mr Goenka's lawyer gave a hint of what might have been Mr Goenka's explanation, but no detail.

120. The fact of the matter is, however, that Mr Goenka did agree to the publication of a Final Notice which stated clearly the Authority's findings as to Mr Goenka's intentions in carrying out the trading. We have explained earlier that it is invidious to accord the conclusions of a Final Notice that has resulted from the settlement process less weight than one that followed the RDC process. Nevertheless, the question as to what Mr Goenka's intentions in trading were could, for the reasons we have stated above, properly have been the subject of debate before us and further evidence produced, including oral evidence from Mr Goenka himself, had it been thought helpful to call him as a witness.

121. However in the absence of any further evidence, the best evidence we have of Mr Goenka's intentions are those set out in the Final Notice he agreed to, to be considered alongside the evidence of the transactions themselves and Mr Bird's expert evidence which we refer to below.

122. In any event, in our view we can determine this reference whilst remaining neutral as to Mr Goenka's intentions and we have not found it necessary to make any findings in that regard. The issue we have to determine is the extent to which Mr Carrimjee suspected at the time of the events in question that there was a risk that Mr Goenka was engaging in market abuse, that is whether there were features about Mr Goenka's proposed trading which put Mr Carrimjee on enquiry and, if so, whether he acted appropriately in the way he dealt with the situation.

Expert Evidence

123. We had an expert witness report from Mr Simon Bird, who was cross-examined on his report. Mr Bird's evidence covered three areas:

(1) How the Closing Auction of the London Stock Exchange (LSE) operated in 2010;

(2) In the context of Mr Goenka's planned trading in Gazprom GDRs:

(a) Whether there is any reasonable explanation for the timing and volume of the proposed orders in relation to Gazprom GDRs;

(b) Whether (i) the effect of the timing and volume of the aborted orders in relation to the Gazprom GDRs had the prospect of achieving a Closing Price of Gazprom GDRs at a false or artificial level; and (ii) the effect of the orders in relation to the Gazprom GDRs (had they been placed) would have been to manipulate the market; and

(c) Whether Mr Carrimjee's assumptions and explanations in relation to the orders relating to the Gazprom GDRs in light of the manner in which the market operates and acceptable market practice, were reasonable.

(3) In the context of Mr Goenka's trading in the Reliance GDRs:

(a) Whether the effect of the timing and volume of the orders placed in relation to the Reliance GDRs was to achieve a closing price of Reliance GDRs at a false or artificial level.

(b) Whether the effect of the orders placed in relation to the Reliance GDRs was to manipulate the market.

124. We found Mr Bird to be a competent and knowledgeable witness with substantial expertise on the matters on which he gave his opinion. We found his explanation as to how the closing auction of the LSE operated helpful, and which we draw upon in our findings, but otherwise his evidence was of limited assistance to us in determining the key issue on this reference, namely whether Mr Carrimjee believed or suspected that Mr Goenka's intention was to manipulate the prices of Gazprom and Reliance GDRs.

Findings of Fact

125. We set out below our findings of fact on the basis of the evidence detailed above. There was in fact only a few areas of dispute on the principal findings of fact, the area of contention is the inferences that we should draw from these findings which we address later in this decision.

Background

126. Mr Carrimjee is a fund manager and investment adviser with nearly twenty years experience in the financial services industry. He began his career at ABN Amro in India in November 1995, leaving to join UBS in London in May 2000 to work in its wealth management division. He undertook responsibility at UBS for marketing its services to high net worth clients as well as relationship management activities, working his way up to the position of Associate Director.

127. On 9 January 2006, having left UBS a few months earlier, Mr Carrimjee founded Somerset Asset Management LLP ("SAML"). We were told, and accept, that SAML has no connection with a firm with a very similar name, Somerset Capital Management LLP.

128. Since founding SAML, Mr Carrimjee has built up its client base. He is the firm's senior partner as well as acting as fund manager and investment adviser. In

2010 SAML managed assets across 70 portfolios and had assets under management in excess of US $600 million.

129. At the time of the events which are the subject of this reference Mr Carrimjee held a number of controlled functions in respect of which he was an approved person for the purposes of APER, namely Chief Executive, Partner, Compliance Oversight, Money Laundering Reporting and Customer Function. On 16 August 2012 Mr Carrimjee relinquished the Compliance Oversight and Money Laundering Reporting functions to another individual, so as to create a clear separation between SAML's business and compliance functions.

130. Mr Carrimjee had received training in compliance matters, including in the market abuse regime while employed at UBS, and since founding SAML. At SAML, various seminars have been held on the subject of market abuse, staff discussed the Authority's briefings on the subject and an external compliance expert has given advice to SAML on the subject. Mr Carrimjee says that he has always been aware of the need to be vigilant to the possibility of potentially abusive behaviour.

131. Mr Carrimjee accepted in his oral evidence that if what Mr Goenka was intending to do was to trade simply to increase the price of the relevant securities that would amount to market abuse, and that he would not have allowed it to happen if he knew what was going on. He accepted that if he had suspicions that Mr Goenka was planning to manipulate prices he should have asked questions to satisfy himself that these suspicions were not justified.

132. At the time of the events which are the subject of this reference, Mr Carrimjee had known Mrs Parikh for approximately eight years and had become a close family friend. Since 1986 Mrs Parikh has been a broker at Schweder Miller which is a member of the LSE. Through the connection with Mr Carrimjee, Mrs Parikh had introduced SAML to Schweder Miller and SAML maintained an account with the firm through which SAML traded from time to time.

133. Mr Carrimjee and Mrs Parikh have different areas of expertise. Mr Carrimjee's focus is on maintaining and developing client relationships, usually acting as an investment advisor and manager, but where the client wishes to trade, Mr Carrimjee will arrange for the trading to be effected through a third party broker. Schweder Miller was such a broker and we accept Mr Carrimjee's evidence that he was not an expert on trading issues, particularly in relation to the practice of trading in closing auctions on the LSE, that being an area in which, we accept, Mrs Parikh had considerable experience and expertise.

134. Mr Goenka is a businessman of Indian origin who lives in Dubai. A note prepared by Mr Carrimjee in 2006 reveals that he has known Mr Goenka since his days at ABN Amro in 1995. It is common ground that Mr Goenka was, as Mr Carrimjee knew, a sophisticated investor with a high level of market expertise and knowledge. Mr Carrimjee's 2006 note records Mr Goenka as having a net worth in excess of US $500 million and that he was a "financial institution which deals in global securities." The note also says that Mr Goenka was "aggressive in his dealing style, and takes detailed efforts to learn about every product and market that he trades in."

135. Mr Carrimjee characterised the business relationship he had with Mr Goenka as largely one where he provided administrative assistance, rather than one where he provided strategic investment advice. Bearing in mind Mr Goenka's own expertise and manner of operating, and the direct relationship he grew with a number of financial institutions, we accept that Mr Carrimjee's role was not that of a traditional wealth manager where he had a role in keeping Mr Goenka's portfolio under review and making investment recommendations in that context. It is however, likely that from time to time Mr Carrimjee would be called upon to give ad hoc investment advice, but there is no evidence that he did so in relation to the matters which are the subject of this reference.

136. In his administrative support role, Mr Carrimjee explained that he would provide Mr Goenka with cash reconciliation, stock reconciliation, liquidity management and transactional support. In that role, for instance, SAML would carry out valuations on that part of Mr Goenka's portfolio that he administered. Those assets were held in a segregated fund, The Harrington Master Trust Fund. SAML was the asset manager of this fund, which had a series of sub-funds for different clients, two sub funds being created for Mr Goenka's assets. In respect of these sub-funds SAML merely carried out back-office tasks which arose as a result of Mr Goenka's instructions to deal with the assets concerned. The transactions to which this reference relates were therefore carried out in the name of The Harrington Master Trust Fund.

137. Although Mr Carrimjee did not provide Mr Goenka with strategic investment advice, Mr Goenka was an extremely important client to SAML. During 2010, Mr Goenka's assets in The Harrington Master Trust represented approximately 7-8% of SAML's assets under management and Mr Goenka accounted for 3% of SAML's fee income. Mr Goenka was charged a fee of 0.3% of the value of the assets held, in contrast to the clients who had a full advisory or investment management service who were normally charged 1%, reflecting Mr Goenka's status as essentially an execution-only client. Whether any particular trades were carried out or not would therefore have no impact on the level of SAML's fees save for a nominal administrative charge of US$50 for each trade settled.

138. It is clear to us that Mr Goenka could be a demanding client, and Mr Carrimjee would be keen to keep him happy when carrying out his instructions. Mr Carrimjee, in his first recorded conversation with Mrs Parikh regarding Mr Goenka on 22 April 2010, when he made the introduction, described Mr Goenka as "a bit of a pain," adding in response to a question from Mrs Parikh that he was "honest", but that he will "ask 600 questions to be comfortable." This reflected Mr Carrimjee's observation in his 2006 note referred to in paragraph 134 above that he wished to explore in detail every product and market that he trades in Mr Goenka could also be demanding when it came to fees; Mr Carrimjee commented in the same call that:

"He is very big and spoilt. He expects everyone to work for free."

139. The introduction to Mrs Parikh arose out of a courtesy meeting that Mr Carrimjee had with Mr Goenka in Dubai in March or April 2010. There is no note

of the meeting and Mr Carrimjee is unsure as to the precise date of the meeting, as he was in Dubai on two occasions during that period. It would be Mr Carrimjee's practice to try and have courtesy meetings with important clients a few times a year and he used the opportunity of him being in Dubai for other reasons to meet Mr Goenka.

140. Our only direct evidence as to what was discussed at the meeting comes from Mr Carrimjee's account of it contained in his witness statement, as clarified during his cross-examination. That evidence was to the effect that Mr Goenka explained to Mr Carrimjee that he would like to trade in Gazprom and Reliance GDRs and to do so in significant volume during the closing auction of the LSE at the end of the day's trading maturity. Mr Goenka explained to him that his intention in doing so was to absorb a large seller of the relevant security, the reason for that being that he wished to roll over an existing position. Mr Carrimjee's understanding of what was meant by a "roll over" in this context was that Mr Goenka had an exposure to a particular security (in this case Gazprom and Reliance) which he wished to continue by converting what was likely to be an expiring derivative position into a direct investment in the underlying securities, that being achieved through the absorption of a large seller in the market.

141. He gave as an example Mr Goenka holding an exposure to Gazprom through a derivative maturing at a price of US $100, but the trading price of Gazprom was US$99 on the maturity date. If Mr Goenka was bullish about Gazprom and he believed that he could hold the security and recover his loss, he would look to purchase Gazprom GDRs at the same time as a large seller was looking to sell, ultimately seeking to sell the holding acquired at a price higher that $100.

142. Mr Carrimjee was speculating here as to what Mr Goenka's intentions were behind his interest in trading Gazprom and Reliance. Mr Carrimjee's evidence was that Mr Goenka gave no reasons, other than his desire to achieve a roll-over, for wishing to do the trades. Mr Stanley invited us to reject Mr Carrimjee's account of this meeting on the basis that all the key conversations with Mrs Parikh which he relies on indicate that influencing the price of the securities was Mr Goenka's intention rather than absorbing a large seller to effect a roll over so that it was obvious that Mr Carrimjee did not believe that Mr Goenka's intentions were anything else than price manipulation. We return to that issue when assessing Mr Carrimjee's state of mind.

143. Mr Carrimjee's evidence was that he believed that Mr Goenka probably had some form of long derivative position in the relevant securities which he wished to convert on expiry into a real position in the GDRs. He speculated that one reason Mr Goenka was anticipating that there would be a substantial seller to absorb was that the counterparties to Mr Goenka's positions would be likely to have hedged their exposure by taking a long position in the underlying GDRs and such counterparties would be likely to unwind their long position by selling GDRs during the closing auction at the time of expiry of Mr Goenka's position.

144. In fact Mr Goenka did hold two structured products which were relevant to his trading.

145. The first (the "Gazprom Product") was a product issued in April 2007 with a face value of US $10 million and a final determination date of 30 April 2010. So far as relevant, the effect of this product so far as Mr Goenka was concerned was as follows:

(1) If Gazprom GDRs closed above US $35.86 on 30 April 2010, then Mr Goenka would receive US $10 million plus a premium.

(2) If Gazprom GDRs closed between US $23.91 and US $35.86 on 30 April 2010, then Mr Goenka would receive in full the US $10 million face value of the product, but no premium.

(3) If Gazprom GDRs closed below US $23.91 on 30 April 2010, then Mr Goenka would receive only the present value of USD 10 million worth of Gazprom GDRs purchased in April 2007, i.e. the value of 250,941 GDRs. So if, for instance, Gazprom GDRs closed at US $23.90 on that date, Mr Goenka would effectively have suffered a loss of just over US $4 million.

146. The second structured product ("the Reliance Product") was similar. It was an "Airbag Leveraged Laggard Note on Indian ADR" issued by ABN-AMRO on 31 October 2007. The nominal value was again US $10 million. The relevant GDR for present purposes was Reliance Industries Limited's London listed GDR, which was, as it turned out, the "laggard". The final valuation date was 18 October 2010. The practical effect was as follows:

(1) If the Reliance GDRs closed above US $69.50 on 18 October 2010, Mr Goenka would have earned a premium over the increased value.

(2) If the Reliance GDRs closed on 18 October 2010 at between US$ 48.65 and 69.50, then Mr Goenka would receive par value from the product, i.e. US $10 million.

(3) If the Reliance GDRs closed on 18 October 2010 below the "knock-in" price of US $48.65 then Mr Goenka would take delivery of GDRs equivalent to the purchase of US $10 million-worth on 31 October 2010. The practical effect of this was that if the Reliance GDRs closed at, say USD 47.94, then Mr Goenka would have received 143,884 Reliance GDRs and would have suffered a loss on the Reliance Product of US $3.1 million or thereabouts.

147. In all cases, the closing price for the GDRs on which the structured products was based was determined by the closing auction on the LSE's International Order Book on the maturity date.

148. We accept the Authority's contention that Mr Goenka had a motive to increase the price above the "knock- in" price on the relevant date and thus avoid a loss, if that could be achieved. We also accept that since Gazprom GDRs closed at US $23.42 on 22 April 2010, the day on which Mr Goenka was introduced to Mrs Parikh, it was unlikely that the price would rise above US$35.86 by 30 April 2010. We also accept that since Reliance GDRs traded at approximately US $48 on 18 October 2010 before the auction began on that date, they were unlikely to close above US $69.50.

149. The Authority does not contend that Mr Carrimjee knew the details of these products, but Mr Carrimjee accepted that Mr Goenka probably had some sort of long derivative position in both Gazprom and Reliance GDRs. This is shown by an exchange he had with Mrs Parikh on the telephone on 23 April 2010, following earlier discussions about Mr Goenka participating in the closing auction for Gazprom GDRs. In that conversation, Mr Carrimjee observed that Mr Goenka was only interested in "the official closing price of the stock on a particular date" and that "from reading between the lines I think he has got a structured product so he's got something." He then speculated that there was a trigger in the product if the closing price was above or below a certain price. Mrs Parikh responded that she understood Mr Carrimjee's observation.

150. At his meeting with Mr Goenka in April 2010, Mr Carrimjee realised that he would need to instruct a broker with specialist knowledge of how the closing auction of the LSE operated in order to assist Mr Goenka with his proposed trades. Mr Carrimjee stated, and we accept, that he was unable to provide the information. Mr Goenka was seeking information as to how the auction operated as he had only a rudimentary understanding of the process. Also, as we have seen, SAML did not execute trades in securities so that SAML would have to instruct a broker who was a member of the LSE with the requisite specialist knowledge to carry out the trades on Mr Goenka's behalf.

151. Accordingly, shortly after his meeting with Mr Goenka, Mr Carrimjee approached Mrs Parikh and invited her to provide broking services to Mr Goenka. In fact, the arrangements made were such that Schweder Miller's client was SAML, who had the necessary mandate over the assets of The Harrington Master Trust Fund, which would be used to fund the trades. Mr Carrimjee chose Mrs Parikh, not only because he knew her well, but he believed that she had substantial experience in LSE stocks and trading.

The LSE Closing Auction

152. It is helpful at this stage to explain how the LSE Closing Auction on the IOB operates. What follows is based on the description of the process contained in Mr Bird's expert report.

153. The securities which are the subject of this reference are traded on the IOB. Securities which can be traded on the IOB include foreign securities traded as global depositary receipts (GDRs). GDRs are securities which are represented by parcels of shares in a particular foreign company (for example Gazprom and Reliance which also trade in their unpackaged form on their home exchanges). GDRs are listed and traded on international exchanges separately from the underlying shares. On 30 April 2010 one Gazprom GDR was equivalent to four ordinary shares and on 18 October 2010 one Reliance GDR was equivalent to two ordinary shares.

154. The IOB trading day starts with an opening auction between 08:00 and 08:15, continuous trading operates between 08.15 and 15.30 and the day finishes with the closing auction between 15:30 and 15:40. We are only concerned with the process of the closing auction.

155. The two main purposes of the LSE closing auction are to:

- determine the closing price of a security; and
- match as many buy and sell orders as possible at the closing price.

These buy and sell orders can either be outstanding orders from the day's continuous trading, or new orders specifically entered into the auction.

156. The initial phase of the closing auction, known as the auction call phase, starts at 15:30 and lasts for 10 minutes. During this period LSE member firms can place, amend and delete buy and sell orders but no trades are completed. These orders are recorded by the LSE but do not result in a trade. However, they are used to calculate the theoretical closing price and the theoretical closing volume at that price. Member firms and some information systems can observe both of these figures in real-time during the 10-minute period. Orders can be entered as market orders which have no specific price attached or as limit orders which do have a price attached.

157. A limit order sets a maximum price on a buy order or a minimum price on a sell order. A market order is a buy or sell order at the best available price and guarantees execution as far as possible given supply or demand. Any order can be cancelled or amended during the auction call phase.

158. The theoretical closing price is known as the indicative uncrossing price (the "IUP"). This is the price at which the security would close and orders trade should no further orders be entered during the auction call phase. By allowing market participants the ability to see the IUP in real-time helps to create an efficient and transparent method by which the closing price of a security is determined.

159. The theoretical closing volume, known as the indicative uncrossing volume ("IUV") is the volume of securities which would trade in the closing auction should no further orders be entered during the auction call phase.

160. Each time an order is entered, dated or amended during the Auction Call Phase the IUP and IUV is re-calculated, and published in real-time and can be observed by those participants who are able to access them.

161. The IUP and IUV provide participants with transparency as to the likely uncrossing price and uncrossing volume throughout the auction call phase. By adding new orders, amending existing or cancelling existing orders, market participants can gauge in real-time what effect their actions are having on the IUP and IUV and thereby the final uncrossing price and uncrossing volume.

162. If during the auction call phase the indicative uncrossing price is more than 5% away from the last electronic trade then the closing auction would be halted and a new auction call phase restarted for another 10 minute auction call phase.

163. The next phase of the closing auction is known as the price determination or uncrossing phase. During this phase the exchange seeks to maximise the executable volume for all securities. During this stage of the auction, no orders can be changed, entered or cancelled.

164. The uncrossing phase occurs at a randomly determined time within 30 seconds of the end of the auction call phase at 15.40. Members may still enter orders during this period and before its end but, not knowing when the period will end, they run the risk that their orders will not be accepted. The purpose of the random close is to help prevent manipulation of the uncrossing price.

165. At the end of the uncrossing phase the LSE runs a matching algorithm which seeks to find a price at which the highest executable volume of securities is obtained. In other words, the purpose of the algorithm is to maximise the executable volume, minimise the surplus and unexecuted volume, and balance the pressure of those unexecuted orders so as to minimise the possible price movement in the next trading phase after the closing auction. The matching algorithm determines the price and matches the orders accordingly. The resulting price is called the uncrossing price.

166. Once the uncrossing price has been determined the LSE immediately informs the member firms of their trades which have been executed.

167. Mr Bird gave a helpful example of how the closing auction would operate. In his example in the auction call phase (15.30 to 15.40) 7 orders are entered at various prices as shown in the table below. At the uncrossing phase (after 15.40) the matching algorithm determines the uncrossing price.

168. In this example the uncrossing price is calculated at US$ 25 leaving 5 executed trades and 2 non-executable orders. US$ 25 is the price at which the highest volume can be executed with the minimum amount left unexecuted.

Direction	Size	Order Price (US$)	Execution Price (US$)
Sell	100	26	
Sell	150	25	25
Sell	100	24.5	25
Buy	50	Market Order	25
Buy	100	26	25
Buy	100	25	25
Buy	200	23	

The proposed trading in Gazprom GDRs

169. Against that background, we now turn to make findings regarding Mr Goenka's proposed trading in Gazprom GDRs in April 2010. At this stage of our decision we do not draw inferences as to Mr Carrimjee's state of knowledge of Mr Goenka's intentions which we will deal with in our discussion later.

170. At 14.18 on 22 April 2010 Mr Carrimjee had a call with Mrs Parikh, as he put it, in order to improve his understanding of the auction process. It appears that

there had previously been a call, of which we do not have a record, where Mrs Parikh would have learned something of Mr Goenka's intentions as the business end of the 14.18 call starts with Mrs Parikh saying "Now this auction."

171. The call reveals little of what Mrs Parikh had previously been told about Mr Goenka's objectives, but the following exchange took place:

> PARIKH: All right? Your only danger Tariq is that the other side is so large that you can't beat him. Or the stock is so illiquid that the other participant of the auction didn't even come.
>
> CARRIMJEE: Okay. In order to safe guard that, suppose there are two risks, right. One is the other side being large.
>
> PARIKH: Yeah.
>
> CARRIMJEE: See if you want the strategy to work, you have to have big muscle power.

172. That exchange referred to a risk of a seller coming with a very large position. Shortly thereafter Mrs Parikh and Mr Carrimjee discussed what the position would be if there was no liquidity, in the sense that nobody was wishing to sell in the auction in the following exchange:

> CARRIMJEE: Nobody comes to sell zero volume. If want it to be higher, I can always arrange to have one seller come and sell five hundred shares and buy five hundred shares.
>
> PARIKH: Not even five hundred. You can do it with just one."

173. There is further discussion on the call as to how the auction operated, and the importance of the indicative auction price (or indicative uncrossing price in Mr Bird's terminology) in the closing seconds of the auction. Mrs Parikh comments as follows:

> "The indicative auction price is the only one to look because there isn't enough time for you to constantly review how many people are selling what."

174. During the call Mr Carrimjee also reveals that the likely size of the trades Mr Goenka is contemplating is between US$20 to 30 million, with the SAML trades to be undertaken in the name of SAML and that the securities concerned are Reliance and Gazprom.

175. A further call took place between Mr Carrimjee and Mrs Parikh on 22 April 2010, at 15.46. Mrs Parikh gives a further explanation as to the pattern of trading at the end of an auction, and how the indicative auction price is very fluid towards the end of the auction (or in Mr Bird's terminology the end of the auction call phase). In that context the following exchange took place at the end of the call:

> "PARIKH: So other than that it's the last 40 seconds everybody has to be quick right? And by the time I tell him the prices it's marginally different so depending on how important it is to him sometimes it pays to be…err on the side of caution. So like if you wanted to end at 294 right? 295 [unclear], do you see what I mean?
>
> CARRIMJEE: Mm hm
>
> PARIKH: Just overpay you know on the buying side is what I'm trying to say. Because you know last minute [unclear] and I have to pull it out and put it back in

again and I'm speaking to him all the time. So you know it is…it might turn out that the first two/three of them will be hairy right? But as you do them you get a rhythm. Like you get of anything"

176. Following this call, a conference call took place at 16.56 on the same day. The participants were Mrs Parikh, Mr Goenka, Mr Carrimjee, Mr Tushar Parikh, (Mrs Parikh's husband and also a broker at Schweder Miller) and Mr Jay Dadia, a colleague of Mr Goenka. Mr Carrimjee largely played a passive role on this call which was primarily taken up by Mrs Parikh explaining to Mr Goenka how the auction operated and answering Mr Goenka's questions on the process.

177. In particular, Mrs Parikh explained limit orders, and the indicative auction price as the auction proceeds. She also had explained that a market order had priority so that at the end of the auction whoever had put in a buy order at the highest price would have his bid matched provided there was a seller. Mrs Parikh also stated that the indicative auction price "becomes all important." She also explained that in the last 30 to 40 seconds of the auction "you won't always be able to collate the volume." from which we assume she meant the total size of the orders in the system which are reflected in the indicative auction price.

178. There was then a discussion regarding the recent trading in Gazprom. Mr Goenka referred to the fact that in following that day's auction the price had closed at US $23.42. The following exchange with Mrs Parikh then took place:

"GOENKA: Today's closing: If I want to make it 23.45 [unclear] how can we do it?

PARIKH: You will have to clear everybody that was selling at 42 and for safety's sake, go all the way to somebody closing at 46. So, say suppose, there was 20,000 selling at 23.42, there was 3,000 selling at 23.44 and there was 5,000 selling at 23.45…

GOENKA: Yeah

PARIKH: ….yes? You would have to place an order that would clear, so it would be you would have to buy 28,500 or even 23,100 would close the order at 23.45.

GOENKA: Yeah

PARIKH: You don't have to take the whole of that size out. Do you see what I mean?

DADIA: Yeah [unclear]"

179. Mr Goenka at first did not understand the explanation, so Mrs Parikh gave another example, stating that in a situation where there were a number of orders at a price below 23.45 and one order at 23.45 in order to achieve a closing price of 23.45 in the cheapest way possible he would have to place an order at 23.45 in an amount exceeding the aggregate amount of the orders below 23.45 and one share at 23.45 thus avoiding the purchase of the whole order placed at 23.45.

180. Later in the call, Mr Goenka asks Mrs Parikh whether she had experience of where "people are just playing for two cents higher or lower." Specifically, in relation to Gazprom, the following exchange then took place:

"GOENKA: So, but I am just asking your opinion because you are very familiar and knowledgeable about the market, basically moving in the gas, five cents, ten cents is not an issue.

PARIKH: You know this is what I am saying. So like in Gazprom, I think it is not that easy.

GOENKA: Why?

PARIKH: You know it's quite active.

GOENKA: Yeah

PARIKH: Okay, So, you know, if it's, if it's, if is not an, if it is more volume that day in the auction then it is more expensive. Everything can be done; it is how much we want to spend in achieving it".

181. Finally, towards the end of this call, Mrs Parikh refers to the difficulty of being precise in the fast moving environment of the auction in the following terms:

"And then time is of the essence as well. So that's why I am saying that whilst on paper I can get you to move the price, by buying only one of that quantity, right, but in a real-live auction, will we be that exact? No."

182. There was a final call on 22 April 2010 at 17.15. Mr Carrimjee telephoned Mrs Parikh after the end of the conference call. It was a short call in which Mr Carrimjee observed that the conference call had gone smoothly and warned Mrs Parikh that Mr Goenka's "nature now is to push and get out of it as much as he can," but he also observed that Mrs Parikh had indicated on the call that "this is what I can do, this is what I can't do", to which Mrs Parikh responded "we don't give leeway-these are the rules abide or not abide because we can't carry the can."

183. There were a further four calls the following day, three between Mr Carrimjee and Mrs Parikh and one between Mrs Parikh and Mr Goenka.

184. In the first call, which took place at 8.11, Mrs Parikh telephoned Mr Carrimjee and started by explaining that she would try and arrange for Mr Goenka to see a live auction on screen. In particular, she mentioned that if he observed an auction then he would understand "the limitations of what he wants to achieve."

185. At 15.02 Mrs Parikh telephoned Mr Carrimjee again to say that she had set up a screen so that Mr Goenka could observe an auction at 15.15 that afternoon. Mrs Parikh and Mr Carrimjee then moved on to discuss Mr Goenka's proposed trading. Mrs Parikh observed that "if he doesn't react quick enough I cannot guarantee anything." There was speculation as to how large the trades might be. Mr Carrimjee doubted that he would trade with Mrs Parikh in an amount as large as $100 million. Mrs Parikh replied:

"Can I tell you I also don't think that for the kind of money he's talking he's going to be able to control these two stocks but that's not our lookout."

186. It appears that this comment was directed at the indication that Mr Carrimjee had given during their initial call the day before that Mr Goenka might be looking to trade in amounts of between US $20 to 30 million.

187. Mr Carrimjee responded to Mrs Parikh's comment by saying "That's not our lookout yes", but immediately afterwards the following exchange took place:

"CARRIMJEE: Okay and then while coming to work the only other thing I was thinking…

PARIKH: Yes.

CARRIMJEE:….is that technically if you…effectively no one should be able to point a finger and say that you were manipulating a price.

PARIKH: Listen how can we manipulate? It's a complete auction right?

CARRIMJEE: Understood

PARIKH: Free people are allowed to come and do it. If they think it's manipulating and it's a free…it's a wrong price come and flog the stock no?

CARRIMJEE: No understood but I'm just saying that I'm at some stage I'm going to ask him suppose the price is say $24 dollars.

PARIKH: Yes

CARRIMJEE: Okay, his goal is to take it to $25.50 cents, no big deal. But if his goal is to take it to $50 no…like above like a certain….

PARIKH: Listen can I tell you…..

CARRIMJEE:….he doesn't have the guts to do it.

PARIKH: Yes probably. It's not easy.

CARRIMJEE: And the other one also should not be easy no."

188. Mrs Parikh repeated her point that it was not possible to manipulate a price in an auction as follows:

"Because we're…you know the beauty is we're participating in an auction, it's all in sundry come there at the same time. You know if this man has money enough to move the price for a day well…."

Mr Carrimjee responded and the following exchange took place:

"CARRIMJEE: Good for him.

PARIKH: ….good luck to him and you know?

CARRIMJEE: And if anything the way I'm looking at it is something new.

PARIKH: Yes exactly

CARRIMJEE: I also [unclear] something interesting that he's talking about.

PARIKH: Completely. So you know it's like this HDFC I love it….

CARRIMJEE: Yes. And the thing is he's studying it properly, how the auction works….

PARIKH: Yes, yes, yes. And I don't want to find out too much to what end he wants to do it. I'm just there to execute it for them. I don't want to be banging my forehead.

CARRIMJEE: No, understood

PARIKH: You know….

CARRIMJEE: I'm just looking [unclear] thing we should also be on solid ground.

PARIKH: No no I agree we should be vigilant but you know these are two liquid scrips right?

CARRIMJEE: Correct, correct, point noted."

189. Mrs Parikh also reiterated the point that if someone was "trying to mess it" volume could come flooding in. Mr Carrimjee responded to that point by observing:

"And these sharks are sitting out there…The price is too much and they'all come and dump."

190. Mrs Parikh also observed that trading in the auction was sometimes linked to synthetic products. The following exchange then took place:

"PARIKH: At the end of the day it has to stack up.

CARRIMJEE: Mm hm,

PARIKH: To stack up, what are you going to do? You have to close them out in those things right?

CARRIMJEE: Mm hm,

PARIKH: And hence the auction.

CARRIMJEE: Ok I understand

PARIKH: Right and so if you're forcefully short your forcefully….you know it is a….

CARRIMJEE: It gives you that last exit opportunity."

191. At the end of the call they also briefly discussed Mrs Parikh's remuneration; she indicated that she would stick to what she regarded as appropriate to which Mr Carrimjee responded:

"Because you know what I'm telling you he has to do it…"

192. After this call concluded, Mr Goenka viewed an auction on screen in Dubai simultaneously with Mrs Parikh doing the same in London; we have a recording of the call in which they discussed what they were seeing on screen.

193. Following that call Mr Carrimjee called Mrs Parikh at 16.45, returning a call she had made earlier. It was during this call that Mr Carrimjee speculated that Mr Goenka would sell what he purchased in the auction the next day. He observed that Mr Goenka was only interested in the official closing price of the stock on a particular date and that

"from reading between the lines I think he has got a structured product so he's got something….There is a trigger if the closing is above or below a certain price."

194. Mr Carrimjee and Mrs Parikh also speculated that for Mr Goenka to undertake the trade the price he is targeting must be close to the price relevant for his structured product. Mr Carrimjee observed that "it was so far way he would have no hope" to which Mrs Parikh responded "No no hope it means it can be doable; it must be just a whisker away."

195. At the end of the call Mrs Parikh explained to Mr Carrimjee that she had warned Mr Goenka that he might not "meet his end" because he might be a little late in placing his order and that she had told him.

> "……So I told him that you, you have to be massively….you know, you can't be frugal and say….so he says "each time every price changes and I said, no, [unclear] is too…cutting it too fine you know? You have to keep a leeway of 25 to 30,000 shares."

196. A further set of calls took place on 26 April 2010. There are only two to which we need refer.

197. First, at 09.16 Mrs Parikh called Mr Carrimjee to inform him that in relation to the auction commencing at 15:30 that afternoon:

> "I am going to give them the opportunity…..to keep influencing the price till 3.35 so that they know that their maths is correct."

198. Mrs Parikh explained that the purpose of this was to demonstrate the way the price calculation works and how quickly Mr Goenka needed to move. She went on to say that the reason for this, was:

> "Because on the last day when they are doing it, I am not going to tell them the maths on this 'cause it's a timing affair….so he just has to do the calculation and tell me. So and you know 'cause they've never done it before I'll put the limits on the board to demonstrate to them, see, the mar….the price does move. I'll say to them "What do you want to achieve and …."

199. At the end of the call Mrs Parikh followed up the last point with the comment:

> "He's responsible to tell me how much the order to put to make the price happen…..

200. At 13.19 Mr Carrimjee called Mr Goenka. The call was primarily about other matters but they touched briefly on the proposed trades through Schweder Miller. Mr Carrimjee warned Mr Goenka of the importance of everybody being on the same wavelength on the trading day so there was "absolutely no confusion." They also discussed the mechanisms of the payment for the trade, which was to be effected in SAML's name on the basis that Mr Carrimjee would be put in funds in advance of settlement. There was also a short discussion regarding Mr Goenka's trading strategy as follows:

> "CARRIMJEE: Okay, now suppose you have $20 million of Gazprom. You get delivery on T plus three you potentially sell it on T plus four?
>
> GOENKA: I may not sell it. I might hold it for one week, and then tell her that again I will---maybe I can ask to do----then nothing wrong in holding in A39 or A [40] because we're still in September, Okay? I may hold for 1 month.
>
> CARRIMJEE: Understood.
>
> GOENKA: If I think the price is going up, I may hold for one or two months, then ask you to sell the same way I will sell through her, and she will pay you the money, T plus three, and I will ask the redemption."

201. Further calls of which we have a transcript took place on 29 April 2010. We only need to be concerned with two of them.

202. The first of these calls took place at 11:01 and was a conference call between Mrs Parikh, Mr Carrimjee and Mr Goenka. There was a conversation between Mrs Parikh and Mr Carrimjee before Mr Goenka joined the call. Mrs Parikh stated:

> "If we have to achieve a price or something, I am not in a position to guarantee anything like that."

Mr Carrimjee replied that it was for Mr Goenka to "run the strategy" following which the following exchange took place:

> "PARIKH: Yeah, it is for him to run the strategy. He just has to tell us, "Place this order," and within 30…..after 30 seconds you can't tell, right? ….Tell me we don't want to know what he wants to do, do we? Because, what. It's just one more headache, right? We don't want to know.
>
> CARRIMJEE: That's right
>
> PARIKH: Yeah?
>
> CARRIMJEE: Let's keep it that way…."

203: When Mr Goenka joined the call he asked a question about his ability to sell stock in the morning and buy it back in the auction as follows:

> GOENKA: Okay, What I would like to ask you is that if I sell in the morning and buy in the auction in the evening, would that work.
>
> PARIKH: Yes, that is not a problem.
>
> GOENKA: In the morning I short and in the afternoon I buy. No problem?
>
> PARIKH: That's not a problem the morning auction, as I see is not nearly as liquid as in the evening.
>
> GOENKA: No I'm not talking morning auction. I am talking [unclear] on Monday or tomorrow. Basically if I sell during the day, buy during the day and then clear my position in the auction.
>
> PARIKH: As long as at the end of every trading day you are level or long, I don't have a problem. You cannot be short at the end of a trading day. Is that clear?
>
> GOENKA: Cannot be short at the end of the trading day.
>
> PARIKH: That's right. You can be long, I have no problem.

204. Immediately after this call finished at 11.18, Mrs Parikh and Mr Carrimjee spoke again. The following exchange took place:

> PARIKH: We're all self, sorted. Why do you sound like such a happy bunny?
>
> CARRIMJEE: Huh?
>
> PARIKH: Why do you sound so cheerful?
>
> CARRIMJEE: Ok I'm doing my work nicely, peacefully without getting involved in all this.

PARIKH: Ultimately you will have to be. So we're done right? He didn't have any further questions?

CARRIMJEE: No not really.

205. From the calls that took place on 29 April, it was anticipated that Mr Goenka would be seeking to trade in the auction the next day, 30 April.

206. Mrs Parikh telephoned Mr Carrimjee at 9.50 to obtain confirmation from Mr Carrimjee that the trade could be in the region of US $50 million, presumably so as to ensure that Mr Carrimjee had been put in funds to that amount.

207. It appears that at some stage between 22 and 29 April Mrs Parikh had a conversation with Schweder Miller's compliance officer and senior partner, Mr David Davis, concerning Mr Goenka's proposed trading. This appears from the findings in Mrs Parikh's Final Notice and from written statements that both Mrs Parikh and Mr Davis submitted to the Authority following their interviews with the Authority. This evidence was not challenged and we accept it.

208. This evidence shows that it was long established practice within Schweder Miller that Mr Davis was notified in advance of any large or complex trade; Mr Davis explained in his statement that the main purpose of that requirement was to enable him to consider the risks that might attach to that trade and to ensure that matters of margin, delivery, payment, dealing facilities, finance etc are all agreed and satisfactory. Mr Davis said that this procedure also enabled him to consider whether there are any suspicious circumstances about the trade and any possibility of market abuse or manipulation which could be a factor, especially where clients wish to trade substantially in the less liquid stocks. He explained that where he had concerns that the dealer is unable to allay, he would generally speak to the client himself (with the dealer listening in) and until his concerns were satisfied the firm would not accept the instruction.

209. It appears from Mr Davis's statement that when referring the proposed trade to him, Mrs Parikh said that she had raised concerns about the settlement arrangements because of the potential size of the trade. Mrs Parikh informed Mr Davis sometime before 09:00 on 30 April that the order was expected that morning.

210. At approximately 14:30 Mr Davis saw Mrs Parikh in her office who informed him that she had received the orders by email a few minutes earlier. She said the size of the orders came to over US $60 million and she was surprised at the large number of orders, 30 in total. Mr Davis was concerned that the order had come directly from Mr Goenka whereas SAML was Schweder Miller's client and he did not wish there to be any misunderstanding about the trades and that they were authorised so he agreed with Mrs Parikh that they would be emailed to Mr Carrimjee, Mr Davis approving the text of the email.

211. The e-mail, which was sent at 14.39 said:

"These are the orders they have sent to us.

Pls advise if you think they are inappropriate for any reason.

> The consideration if we entered all might be a touch steep USD $66M well above the USD $50m you said.
>
> What should I do?"

212. The 30 orders were all orders to buy, each order being for a different amount of Gazprom GDRs, the amount varying from 75,400 GDRs to 103,700. The order can in effect be divided into three tranches of ten separate orders each, each tranche containing orders the lowest price of which has US$ 23.95 and the highest US $24.04, each order being one cent higher than the previous order in the tranche.

213. It appears that Mr Davis thought that it was appropriate to seek the confirmation that it was in order to proceed, not because of any concerns regarding market abuse but because the aggregate value of the orders was higher than expected.

214. Mrs Parikh's explanation in her statement to the Authority as to why she thought the trades were inappropriate was threefold:

(1) She was concerned that the trades could have an effect on the closing price in the auction. She stated that Mr Carrimjee had warned her of that possibility;

(2) For a client who it had appeared had a net worth of US $100 million to potentially buy stock of US $66 million did not seem appropriate; and

(3) She doubted the client's proficiency to carry out the trades considering he was just familiarising himself with the ropes of the closing auction.

215. In her representations to the RDC on her Warning Notice Mrs Parikh discounted any concerns about potential market manipulation at the time she wrote this email. She expressed the view that a perfectly rational explanation for the type of trading Mr Goenka was contemplating was that he was seeking to hedge a position; in relation to the previous conversations about moving a price from A to B she said to the RDC:

> "I naively thought he's talking about the mechanism so….you know, if a price had to move from A to B what needed to happen."

216. More or less simultaneously with Mrs Parikh sending the e-mail referred to in Paragraph 211 above she telephoned Mr Carrimjee, the call also being timed at 14.39. Mrs Parikh was clearly concerned at the size of the orders. The following exchange took place:

> PARIKH: The consideration comes to 66 million dollars.
>
> CARRIMJEE: Hmm
>
> PARIKH: Okay? You said a little bit more than 50. They haven't entered them all. I am not saying they have done them all but what I am saying is where do I stop it?
>
> CARRIMJEE: Okay. You do it. Do it and I'll phone them in the meantime.

217. Mrs Parikh then expressed concern that by entering all the orders in the heat of the auction things might go wrong. Mr Carrimjee reassured her by confirming it did not matter if all the orders were entered even up to US $66 million.

218. At 14.41 Mrs Parikh telephoned Mr Goenka and informed him that all the orders had been inputted into the system but they had not been released into the auction.

219. At 14.44 Mrs Parikh telephoned Mr Carrimjee, clearly concerned because Mr Goenka wished to communicate in relation to the trading by mobile telephone rather than on a recorded line. The following exchange took place:

> PARIKH: Tariq, he says that he'll ring on the mobile because client Somerset, he doesn't want his voice to be recorded. So, what do I do now?
>
> CARRIMJEE: But he has got a point, yeah.
>
> PARIKH: What do I do now? ….why we just take him at his value huh? I just hope he doesn't quarrel at the end."

220. Mr Carrimjee then reassures Mrs Parikh by telling her not to worry, and Mrs Parikh asks Mr Carrimjee to reply to her e-mail and "say this is just fine." When Mr Carrimjee agrees Mrs Parikh replies, "Okay, so the trail is there."

221. At 14.45 Mr Goenka called Mr Carrimjee, in response to a call Mr Carrimjee had made to him. They discussed both the confirmation that Mrs Parikh had sought regarding the size of the trade and the possible use of the mobile phone in the following exchange:

> "CARRIMJEE: This order that you're placing; she wants a confirmation from me for, that, some 60 million.
>
> GOENKA: Yes
>
> CARRIMJEE: So I'm going there and doing it, huh?
>
> GOENKA: Yes, yes but you know me, I will not do anything.
>
> CARRIMJEE: Ok, the other thing is now, you're calling her up on her mobile?
>
> GOENKA: No before I call on the landline, the mobile, I told her when I speak to her I'll call her on the mobile only. She say ok.
>
> CARRIMJEE: Why don't you do one thing, why don't you use your UK mobile
>
> GOENKA: UK mobile
>
> CARRIMJEE: Better no?
>
> GOENKA: Better, better. Correct, correct, correct, correct, correct, correct, correct
>
> CARRIMJEE: Why have any connection to this thing?
>
> GOENKA: Correct, correct, correct, correct.
>
> CARRIMJEE: Ok, the other thing is, and I'm being fully transparent with you. She not comfortable because she's saying that my mobile is not recorded. I said you don't worry, there is no possibility of a fight, erm, it has to be amicable because we all know in what interest we're doing this.
>
> GOENKA: What mobile not recorded….
>
> CARRIMJEE: Normally you know they will not take a client order on a mobile.
>
> GOENKA: Ok
>
> CARRIMJEE: They'll call back from a recorded landline.

GOENKA: Ok

CARRIMJEE: I said in this case you do it on my word

GOENKA: Yeah, yeah, yeah

CARRIMJEE: Because there's no point in her calling back on a recorded line. I said that you call me to confirm the order not him."

222. In fact as Mr Goenka indicated in the passage set out in paragraph 221 the contemplated trading in Gazprom GDRs did not take place. The price of Gazprom GDRs prevailing in the market at the time the list of potential orders were sent to Mrs Parikh was US $23.84, US$0.07 below the price at which Mr Goenka would receive in full the true value of the Gazprom product. However, shortly before the auction was due to commence, Russia's president, Vladimir Putin, made an announcement on Russian television about a proposed merger between Gazprom and the Ukranian gas company Naflogaz. The price of Gazprom GDRs fell on the news to US $23.38.

223. Mrs Parikh telephoned Mr Carrimjee at 16.09 to tell him this news. She commented that the fall in price to US$23.38 "makes our job…..much more difficult." Mr Carrimjee observed that this development "attracts that much more supply." Mrs Parikh also commented that "it really is bad luck."

224. At 15.18 Mr Goenka telephoned Mr Carrimjee to tell him that as a result of the Putin announcement he decided not to trade. Mr Goenka's comment was:

"We're not doing anything, we lost the game ok?"

He made reference to the fact that the price had fallen by two per cent on the announcement and then commented:

"Two per cent so we cannot do anything. If they are playing the game for five cents we can do it ok. Not worth it, ok."

225. At 16.58 Mrs Parikh telephoned Mr Carrimjee to discuss the events that had taken place. The following exchange took place:

"CARRIMJEE: And the thing is they've done a lot of homework, a lot of planning, a lot of liquidity management to get ready for all this and even till quarter to three seemed to be working in his favour.

PARIKH: No as soon as the announcement came in it started to tank right. Then I thought "hoh" he came and said you know Vandana now Putin ha, has you know, it will need much more money and it won't be worth it. My senior partner takes a completely different view. He thinks, thank God the announcement came before we stuffed more money in it, assume we pay our staff right, we'd be committed to this bloody thing but I don't know what's on the other side.

CARRIMJEE: No but, but that makes no difference.

PARIKH: Because he would have paid off the note you see.

CARRIMJEE: Exactly, it will, the game was all about the closing price."

The trading in Reliance GDRs

226. Mr Goenka held another structured product linked to the performance of Reliance GDRs which expired on 17 May 2010.

227. At 11.11 on 17 May 2010 Mrs Parikh telephoned Mr Carrimjee to inform him that Mr Goenka might trade in Reliance GDRs in the LSE Auction that day and asked Mr Carrimjee if he knew anything about it. Mr Carrimjee replied in the negative but reassured Mrs Parikh that Mr Goenka had funds available, so that Mrs Parikh should proceed to execute the trades but keep him informed. Mr Carrimjee, was however, aware in general terms of Mr Goenka's intention to trade in the LSE Auction in Reliance GDRs from their meeting in April.

228. Mr Goenka did trade in Reliance GDRs on 17th May 2010 in the LSE auction. After the trade Mrs Parikh telephoned Mr Carrimjee to inform him of the size of the trade, in order that Mr Carrimjee could deal with the mechanics of settlement.

229. The Authority has made no criticism of this transaction. It is clear that Mr Carrimjee has had no involvement in it beyond arranging settlement, as described above.

230. On 5 October 2010 Mr Carrimjee met Mr Goenka in Dubai on a courtesy call. Unlike the meeting he held in April, Mr Carrimjee made a note of what was discussed at the meeting. The note records Mr Goenka's expressed satisfaction with Mr Carrimjee's services and

> "…..an interest to trade in GDRs of leading Indian companies like Reliance Industries, Tata Motors etc. in the normal market and the auction segment. The strategy of the client would be to arbitrage or hedge his existing positions."

231. Mr Carrimjee subsequently had a conversation with Mrs Parikh concerning Mr Goenka's trading intentions generally, but he cannot specifically remember whether he mentioned possible trading in Reliance. On 11 October Mr Goenka alerted Mrs Parikh that he might be wishing to trade in up to US$50 million of Reliance GDRs and that Mr Carrimjee could confirm that this was the case. The essence of this conversation was repeated by Mr Goenka to Mrs Parikh in a conversation later in the day, and it appears that as Mr Carrimjee accepted in his evidence he and Mrs Parikh had by that time already spoken during which Mr Carrimjee confirmed that US$50 million was available to trade, although in his mind it was not exclusively earmarked for trading in Reliance.

232. At 12.08 on 15 October 2010 Mr Carrimjee called Mrs Parikh and they had a brief conversation about Mr Goenka's proposed trading. Mrs Parikh made a reference to the fact that the Reliance price had recently been falling and the conversation then continued as follows:

> "PARIKH: Huh. So I don't know what our mans position was but I think our man said that anything under 47 and he is uncomfortable.
>
> CARRIMJEE: Mmm.
>
> PARIKH: And it was 48 something and now it's 47.10 but I haven't heard from him.
>
> CARRIMJEE: But he's not sold anything so far?
>
> PARIKH: He hasn't done a thing. I don't think he can sell, he has to buy no?
>
> CARRIMJEE: I think he wants to be under 47.

PARIKH: No if it's under 47 he's got problems I think. That's how I understood it right.

CARRIMJEE: Oh so maybe he'll come to buy in the evening.

PARIKH: I think he might have to."

233. On 18 October 2010, the day of the trading in the Reliance GDR's took place and the day on which the Reliance Product expired, Mr Carrimjee was in Switzerland for most of the day on a business trip.

234. During the day prior to the trading taking place both Mrs Parikh and Mr Goenka tried to contact Mr Carrimjee without success. We assume that the purpose of these calls was to inform Mr Carrimjee that the trading was going to go ahead.

235. Mr Goenka succeeded in placing orders for Reliance GDRs in the LSE auction. As appears from a telephone call between Mr Goenka and Mrs Parikh at 15.19 Mr Goenka gave Mrs Parikh precise instructions as to the orders he wished to be placed, some of which were to be placed as soon as the auction commenced with more substantial orders being placed within six seconds of the end of the auction. If all these orders were filled in their entirety they would have required an expenditure of approximately US $10 million. Prior to Mr Goenka's final order being entered, the Reliance GDR indicative closing price was US $47.93, 72 cents below the price of US$48.65 at which Mr Goenka would receive par value for the Reliance Product. The closing price ended up at US$48.71.

236. At 15.45 Mrs Parikh called SAML and spoke to one of Mr Carrimjee's colleagues. She informed this colleague that Mr Goenka had traded in an amount of US $10 million, rather than the US $50 million envisaged, in Reliance GDRs in the LSE Auction. She also mentioned that the money to settle the trades would now be required.

237. It is not clear when Mr Carrimjee himself found out what had had happened. Mr Carrimjee's evidence, which we have no reason to doubt, was that it could have been the next day when he was back in the office. Mr Carrimjee said that when he spoke to Mrs Parikh, she conveyed the impression that Mr Goenka was satisfied with the outcome of the trading, notwithstanding the fact that he had only been able to fulfil partially the orders he had placed. Mr Carrimjee did not speak directly to Mr Goenka to discuss the outcome.

238. It appears, as with the proposed Gazprom trades, that Mrs Parikh referred the proposed trade to Mr Davis, particularly because she says, she was unable to discuss it with Mr Carrimjee. Mr Davis, in his statement said that Mrs Parikh was concerned about the possibility of an underlying structured product being involved, but that he came to the view that there were no signs of price manipulation and it appeared to be a simple wish to buy stock without moving the price, particularly as during the morning Mr Goenka had unsuccessfully failed to acquire stock in the market.

239. It appears therefore that the discussion as to whether it was acceptable to proceed with the trades centred on whether it was appropriate to do so without first speaking to Mr Carrimjee, but it was decided that it was as Mrs Parikh had

already been told a few days before that the funds were available. Mrs Parikh also reported a later call with Mr Goenka to Mr Davis in which she stated that Mr Goenka had told her that the stock purchase was to enable him to hedge a position, which Mr Davis says, reinforced his view that there was no intention to manipulate a price. Mr Davis emphasised in his statement that as Mr Goenka was not his firm's client, the responsibilities for ensuring the trades were "proper" remained with SAML.

240. Mrs Parikh has given various explanations as to why she was satisfied as to the propriety of the Reliance trades. In her statement after her interview she says she was reassured by the fact that the orders were left firm with her at 15.09 with an instruction to release a few seconds before the end of the auction, so that she felt sure that he was not reacting to events in the auction as they unfolded. In her written representations to the RDC she stated that the information Mr Goenka gave was only consistent with Mr Goenka carrying out legitimate activity which he expressly described as hedging. She also relied on the comfort she received from Mr Davis.

Issue 1: Whether Mr Carrimjee's conduct demonstrated a failure to act with integrity.

241. We have set out in detail the evidence relating to the discussions between the various participants concerning Mr Goenka's abortive trading in Gazprom GDRs in April 2010 and his actual trading in Reliance GDRs in October 2010. The reason for doing so is that in our view it is important that in assessing the extent of Mr Carrimjee's knowledge or awareness of Mr Goenka's intentions we should make inferences from the evidence as a whole in context without "cherry picking" particular exchanges which are said to give rise to an inference one way or the other.

242. As we discussed above, we approach the evidence on the basis that Mrs Parikh was not aware and did not suspect, if it were the case, that Mr Goenka's intentions were to manipulate the price of the relevant securities.

243. In the light of the following, in order to be satisfied that Mr Carrimjee knew or suspected that Mr Goenka intended to manipulate the price of the relevant securities, we need to be satisfied that the evidence demonstrates that to be the case notwithstanding that in relation to essentially the same evidence the position is that we cannot be satisfied that Mrs Parikh had such knowledge or suspicions.

244. Mr Hunter correctly identified some forty instances where during Mr Carrimjee's cross-examination Mr Stanley asserted or suggested that both Mr Carrimjee and Mrs Parikh were aware of Mr Goenka's intention to manipulate the relevant securities. We assess Mr Carrimjee's replies in cross-examination on the basis that it is his knowledge and suspicions alone that we are concerned with in making our assessment.

The aborted trading in Gazprom GDRs

245. In making our assessment of Mr Carrimjee's state of knowledge, we do so against an understanding of what might be regarded as acceptable behaviour in

terms of trading activity which has the effect of increasing a price of the relevant security.

246. Mr Bird in his evidence correctly identified where the dividing line between the acceptable and the unacceptable lay. It does not depend on the end result in terms of price but on what the trader is seeking to achieve. It is clear that if a trader is seeking to acquire a large tranche of a particular security then it is possible or even likely that the effect of placing such an order will be to increase the price. However, that is perfectly acceptable if the intention in placing the order is to acquire the instrument in question in the knowledge that by doing so the price of the security in question may increase. However, if the sole objective was to increase the price to obtain some other advantage not linked to the acquisition of the securities in question then the trader is engaged in illegitimate price manipulation, even if the result of his orders is that he ends up acquiring the securities in question. Mr Carrimjee in his evidence made it clear that he was fully aware of this distinction. What this case therefore boils down to is whether Mr Carrimjee knew or suspected that there was a risk that Mr Goenka was engaged in the latter activity; his consistent position is that in so far as he was aware at all of Mr Goenka's purpose in trading, he believed it to be legitimate in that it was represented to him by Mr Goenka that his purpose in trading was to absorb a large seller in order to roll over an existing position.

247. It was also common ground that Mr Carrimjee had a responsibility, as an approved person, to be alert to the possibility that his client, with whom he had a well established relationship, might potentially commit market abuse by the manner in which he proposed to trade. As Mr Stanley correctly submitted, even though Mr Carrimjee introduced Mr Goenka to Schweder Miller with a view to the trades concerned being effected through that firm, SAML was to be Schweder Miller's client for this purpose, not Mr Goenka. He therefore also had a responsibility to be alert that any trades placed in his firm's name may possibly result in market abuse being committed. Although Mr Carrimjee stressed the point that he was not an expert in auction trading and he was relying on Mrs Parikh's expertise in that regard, evidence that we do not have reason to doubt, that did not mean that he could, as Mr Stanley put it "wash his hands of the whole process."

248. Similarly, it was the responsibility of Mrs Parikh to be alert to the possibility that the trades could result in market abuse being committed, notwithstanding the fact that Mr Goenka was not her client, and that the orders were being placed through Schweder Miller on an execution only basis. In her statements to the Authority she said that she regarded it as being primarily Mr Carrimjee's responsibility to assess Mr Goenka's motives and alert her if there were any issues, a position that is self evident from the findings in her Final Notice, did not mean that she could escape her own responsibility to be alert to signs of possible market abuse.

249. Therefore, if either Mrs Parikh or Mr Carrimjee had suspicions as to Mr Goenka's trading strategy and that it might result in market abuse, it was their duty to make further enquiries as to the purpose of the trading in question and a failure to do so would, on the legal test we have identified, amount to a failure to

act with integrity. If such suspicions were not aroused, but should have been there may still be culpability on the part of the person concerned. That was found to be the case with Mrs Parikh, but, as we have previously identified, there could not be a finding there of a failure to act with integrity.

250. Mr Stanley submitted, correctly in our view, that in assessing Mr Carrimjee's state of knowledge our task is to examine the evidence from the transcripts of the calls alongside the explanations he gave in his evidence as to his interpretation of what was said by the various participants on the calls, and then come to an overall view as to whether his explanations are more likely than not unconvincing, which Mr Stanley submits they are. Mr Stanley submits that a very consistent picture emerges from the telephone calls, and the explanations that Mr Carrimjee gives. He submits that each explanation is improbable but when they are put together they become very highly improbable as an explanation of what was going on. He submits that the cumulative effect of these explanations when set against the alternative account leads to a clear conclusion that Mr Carrimjee's explanations are to be rejected.

251. However, in our view the process described above is not the end of the matter. We also need to take into account the other evidence available regarding Mr Goenka's intentions, in particular the meeting that Mr Carrimjee had with him in April 2010. We also need to bear in mind the Authority's findings and the other available evidence regarding Mrs Parikh and Mr Davis.

252. Mr Stanley invites us to draw the following five inferences from the evidence:

(1) That it was obvious to any reasonable person that Mr Goenka's objective was to affect or influence the price of the securities and not to roll over a position;

(2) That it was obvious to Mr Carrimjee and Mrs Parikh what Mr Goenka was doing from the beginning and all the way through;

(3) Mr Carrimjee's attitude was not at all to discover what was happening or to prevent it, but his concern was to avoid being caught;

(4) Mr Carrimjee did not believe that it was impossible that the trading could manipulate the price of the securities; and

(5) Mr Carrimjee had a motive for keeping quiet as to what Mr Goenka was up to, namely that Mr Goenka was an especially important client who he wished to keep happy.

253. In support of his first contention, Mr Stanley relies in particular on the following:

(1) The exchange between Mrs Parikh and Mr Goenka in the course of the conference call, in which Mr Carrimjee also participated, at 16.56 on 22 April which is set out in paragraph 178 above. In this passage, Mr Stanley submits, Mr Goenka is asking Mrs Parikh how to go about ensuring the closing price in the auction finishes at US$ 23.45, not hypothetically, but in relation to the Gazprom GDRs; Mr Stanley submits that this discussion is inconsistent with an intention to carry out a roll over, as opposed to merely wishing to achieve a particular price;

(2) The trial runs carried out on 26 April. Mr Stanley submits that the remark Mrs Parikh made to Mr Carrimjee in the call at 09.16 at that day, set out in paragraph 197 above, shows that the purpose of the trial runs was to show Mr Goenka how to influence the price;

(3) The large number of orders (30) that Mr Goenka submitted, and the manner in which they were structured, as described in Paragraph 212 above, showing a pattern of Mr Goenka constantly increasing the amount that he is willing to trade as a maximum amount, against a background of having previously been told in his discussions with Mrs Parikh that the way to influence the price was to have a large amount of money available. Mr Stanley submits that if Mr Goenka was looking to roll over his position, he would have known at a relatively early stage what his objective was in terms of the amount he was likely to want to roll over, but what was happening was a constantly increasing amount being put forward; and

(4) Mr Goenka's reaction to President Putin's announcement on 30 April which resulted in the Gazprom price falling. Mr Stanley submits that Mr Goenka's comment, set out in paragraph 224 above, that "we lost the game", is not the reaction of someone who wanted to bring volume in the auction, but demonstrated that the game was to increase the price by a small amount, about 5 cents, which had been put out of reach by a price fall of 2%.

254. In our view it is not particularly helpful in assessing Mr Carrimjee's state of knowledge to speculate as to whether objectively a reasonable person would have concluded from these passages that Mr Goenka's sole objective was to affect or influence the price and not to roll over a position. We accept that the signs could be so compelling without any countervailing factors that it would be obvious to anyone in Mr Carrimjee's position with his level of knowledge and experience that Mr Goenka's "game" was the manipulation of the auction closing price of Gazprom GDRs, so in a sense one can assume that Mr Carrimjee knew or suspected what was going on and therefore acted without integrity.

255. In our view the question as to whether it would have been obvious to any reasonable market participant is answered by the findings in Mrs Parikh's Final Notice. The RDC accepted that the fact of market manipulation was not obvious to her, but in effect concluded that her suspicions should have been aroused, but in terms that she should have been aware that there was a risk of market manipulation which merited a proper challenge and adequate enquiries.

256. The factors identified by Mr Stanley also cannot be considered in isolation. In testing whether they amounted to obvious signs of market manipulation they need to be considered in circumstances where the market participant concerned (here Mr Carrimjee) had received the following information about Mr Goenka's trading objectives:

(1) That he wished to absorb a large seller and roll over an existing position. Mr Stanley submits that this is not true, a submission we deal with later, but for the purposes of this discussion we assume this is what Mr Goenka told Mr Carrimjee at their meeting in April 2010;

(2) During the call at 13.19 on 26 April between Mr Goenka and Mr Carrimjee, as set out in paragraph 200 above, Mr Goenka indicated that he might hold the securities he acquired for one or two months, if he thinks the price is going up. Mr Bird accepted in his oral evidence that this statement was consistent with a legitimate intention to roll over an expiring exposure; and

(3) During the conference call between Mr Goenka, Mr Carrimjee and Mrs Parikh at 11.01 on 29 April 2010 as described in paragraph 203 above, Mr Goenka asked a question about his ability to sell stock in the morning and buy it back in the auction in the evening.

257. Because of the presence of these factors regarding what Mr Goenka said about his trading strategy, we cannot conclude that it was obvious from the passages that Mr Stanley relies on that Mr Goenka's sole objective was to manipulate the price of Gazprom GDRs. We have no doubt that the matters relied on by Mr Stanley would have indicated to a sufficiently alert market participant that there was a risk of market manipulation in what Mr Goenka was seeking to do so that his intentions should have been more fully explained and challenged, but that is as far as the evidence takes us on Mr Stanley's first contention.

258. In support of his second contention Mr Stanley relies in particular on the following:

(1) He submits that it can be seen from the very first conversation on the matter between Mrs Parikh and Mr Carrimjee that is recorded on 22 April 2010 that Mr Goenka's strategy was all about influencing the price; he relies on the exchange set out in paragraph 171 above. In this conversation Mrs Parikh identifies as the first problem which is a threat to Mr Goenka's strategy is that there is a very large volume bid for sale and Mr Carrimjee comments that "for the strategy to work you have to have big muscle power." Mr Stanley submits that large volume is not a problem if you are seeking to roll over; you simply need sufficient money to buy whatever stock you are seeking to roll over. The second problem that Mrs Parikh identifies is that nobody trades, as described in paragraph 173 above. The solution to this problem is described by Mr Carrimjee as an arrangement to sell five hundred shares and another trade to buy the same, to which Mrs Parikh replies that the same result can be achieved with a trade in one share alone. Mr Stanley submits that the only reasonable explanation for this suggestion is that if there is at least one trade in the auction a price can be fixed, and that this is corroborated by the exchange set out in paragraph 175 above where, Mr Stanley submits, Mrs Parikh indicates how to ensure the closing price ends at a particular level.

(2) Consequently, Mr Stanley submits, when the conference call takes place in the afternoon, and Mr Goenka is asking Mrs Parikh how the price can be moved to a particular level, as described in paragraph 172 above, nobody raises a concern about that being problematic because everyone is aware of what Mr Goenka's strategy is.

(3) In the long call that took place from 15.02 on 23 April 2010, in the exchange quoted in paragraph 187 above, Mr Carrimjee unequivocally refers to Mr Goenka's goal of moving the price and the difficulty of effectively doubling it to

US $50. Mr Stanley submits that if Mr Goenka's objective was to absorb a large seller a goal of taking the price to US$50 was absurd. This taken with the reference by Mrs Parikh earlier in the conversation, as quoted in Paragraph 186 above, to Mr Goenka's ability to "control these two stocks" and Mr Carrimjee's speculation that Mr Goenka had a structured product in the call that took place at 16:45 on the same day, as referred to in paragraph 185 above, leads in Mr Stanley's submission, to the conclusion that Mr Carrimjee believed that Mr Goenka was going to move the market and then as soon as possible the next day get rid of the stock that he did not really want to hold. This, he submits, is also consistent with the comment made by Mrs Parikh after the Putin announcement, quoted in paragraph 225 above, that "it will need much more money and it won't be worth it."

259. It follows from these submissions, as Mr Stanley accepted, that he is inviting us to find that what Mr Carrimjee has said about what Mr Goenka told him, that he was trying to absorb a large seller and deal as close as possible to roll over a position is just not true. It also follows, as Mr Hunter observed, that if Mr Stanley is right, everything that Mr Carrimjee has said, consistently throughout the Authority's investigation in his interview, in his representations to the RDC and before this Tribunal in both his written and oral evidence, regarding what Mr Goenka had told him and what his suspicions were regarding the proposed trading was untrue. Mr Hunter is therefore correct in his submission, that in the light of Mr Carrimjee's position as an individual with an unblemished professional record who came to the Tribunal and under oath consistently in the face of the prolonged and searching cross-examination by Mr Stanley maintained his position that he did not suspect Mr Goenka of intending to engage in price manipulation, we require cogent and compelling evidence before the Authority, on whom the burden lies, can satisfy us that it is more likely than not that what Mr Carrimjee has consistently said is untrue.

260. It also follows, if Mr Stanley is correct in his submission regarding what Mr Carrimjee was told by Mr Goenka, that before the first conversation between Mrs Parikh and Mr Carrimjee that was recorded in which they discussed the auction, that is the conversation referred to in paragraph 258(1) above, there had been a conversation between Mrs Parikh and Mr Carrimjee in which Mr Carrimjee had indicated that Mr Goenka's sole objective in trading the securities in question was to influence the price, without mentioning Mr Goenka's alleged stated intention to roll over an existing position by absorbing a large seller.

261. If that were the case it would also follow that Mrs Parikh would have been in no doubt as to what Mr Goenka's intentions were, which is of course inconsistent with the Authority's findings in respect of her state of mind.

262. In our view when looking at the evidence as a whole the correct inference to draw is that Mr Carrimjee's explanation as to what he was told by Mr Goenka at his meeting in April 2010 was correct and in so far as there was a conversation between Mrs Parikh and Mr Carrimjee prior to the first recorded call on 22 April 2010, which as we find in paragraph 171 above was the case, Mrs Parikh would have been given the same information.

263. This conclusion is consistent with the Authority's findings against Mrs Parikh. It is also in our view consistent with the profile of Mr Goenka that emerges from the evidence. Mr Goenka was a sophisticated investor and he did not routinely seek advice from Mr Carrimjee as to the merits of his trading. It would therefore be clear to Mr Carrimjee that Mr Goenka would be an execution only customer of SAML in relation to the proposed trading. Mr Goenka, as is apparent from the conversations he participated in relating to the auction process and the trading, kept his cards close to his chest and in the course of those sometimes quite lengthy conversations gave no further indications as to the purpose of his trading strategy. The proposed orders he submitted to Schweder Miller, both in relation to the aborted Gazprom trades and the Reliance trades, were developed by him on his own initiative after absorbing what Mrs Parikh has told him as to how the auction operated. We think it is therefore most likely that Mr Goenka would be as vague as he could be as to what his trading intentions were when obtaining from the professionals he instructed the information he needed to carry out his strategy. In our view he would follow this course in the knowledge that Mr Carrimjee would be unlikely to probe him as to the details of his strategy and what lay beneath it. We comment later on whether Mr Carrimjee's passive approach was appropriate, but the whole tenor of his relationship with Mr Goenka was not to get involved in giving advice unless asked and not therefore to regard it as his responsibility to question Mr Goenka as to the reasons why he wished to carry out any particular transaction. This is consistent with our findings in paragraphs 135 to 137 above.

264. It is also clear to us from the time of the conversation between Mrs Parikh and Mr Carrimjee at 16.45 on 23 April 2010, referred to in paragraph 193 above, that the speculation that Mr Carrimjee engaged in regarding whether Mr Goenka had a structured product was genuine and not contrived; it is inconsistent with a position that he knew all along what Mr Goenka's intentions were but consistent with him having been told that the purpose of the trading was to absorb a large seller to roll over a position.

265. The same is true of Mr Carrimjee's reflection on coming to work on 23 April that Mr Goenka might be seeking to manipulate the price, as recorded in the conversation between him and Mrs Parikh at 15.02 on that day, set out in paragraph 187 above. It comes across as spontaneous rather than a cleverly constructed stratagem designed to deceive Mrs Parikh as to what he already knew and it received a forceful response from Mrs Parikh that manipulation was not possible in the situation concerned. It is again consistent with Mr Carrimjee speculating as to the position in the absence of having been given any detailed information by Mr Goenka as to his strategy.

266. For these reasons we turn to Mr Carrimjee's explanations as to what he knew or suspected about Mr Goenka's trading on the basis that his account of what he was told at the meeting in April 2010 was true.

267. Mr Carrimjee's explanation as to what he understood by the risks identified by Mrs Parikh in the exchange between them quoted as in paragraph 171 above was as follows.

268. In relation to the first risk and his comment that "if you want the strategy to work, you have to have big muscle power" his explanation was that "if you want to absorb a large seller you need to have the equivalent financial power to absorb a large seller" and "she is just saying that if your requirement is to absorb a large seller you need correspondingly to be able to absorb the large amount of selling if that is what you want to do."

269. In relation to the second risk, a lack of liquidity, and Mrs Parikh's comment, set out in paragraph 172 above, that a bid for the purchase of one share can fix the closing price, Mr Carrimjee's explanation was that this was in the context of a very preliminary discussion about how auctions operated. He said that he did not focus on the issue of there being a lack of liquidity, as he was expecting the trading to be in very liquid stocks in a large amount.

270. Mr Carrimjee also explained, in relation to the exchange set out in paragraph 175 above, and the references for the need to "overpay" in order that the price closed at a particular point, that "the client always had an end point, after a certain point he did not want to buy the script. So if the client was placing a limit order, he said, "up to this price I want to buy, after this price I don't want to buy".

271. In relation to the exchange between Mr Goenka and Mrs Parikh, quoted in paragraph 178 above, Mr Carrimjee said that when Mr Goenka asked his question as to how to achieve a particular price it raised "certain flags in my head" which we take to be a concern as to whether the question indicated a possible intention to manipulate a price, but as the conversation went on, he saw it as a question designed to elicit knowledge as to how the auction worked, and in particular how he could read the order book and arrive at planning an order to buy at whatever level he wanted to buy at. In relation to the exchanges quoted in paragraph 180 above, and whether this was illustrative of people playing just for small changes in the price, again although Mr Carrimjee accepted that this "raised a flag in my head," at that point in time he was still learning about auctions, and saw the discussion as one about market depth, and how prices move. He accepted with hindsight, in the light of what happened, that it was clearly a discussion about how to move a price.

272. Mr Carrimjee explained that he reflected after this call as to what had been said in the exchange referred to above and that referred to in paragraph 180 above, as well as Mrs Parikh's comments quoted in paragraph 180 above in their last call of the day. As a consequence when they had their next call of substance at 15.02 on 23 April 2010, where Mrs Parikh also referred to Mr Goenka's ability to "control these two stocks" Mr Carrimjee made his comments, quoted in paragraph 187 above, that "nobody should be able to point a finger and say that you were manipulating a price".

273. Mr Carrimjee explained that at the time, although he says he now sees things differently, he was satisfied with Mrs Parikh's explanation having listened to two persons who were more expert than him on auctions and a sophisticated client, and where his knowledge of auctions was extremely low. He explained that he felt reassured that Mr Goenka could not control a price.

274. In relation to Mr Carrimjee's comment on the same call in relation to Mr Goenka's "goal" being to take the price to a certain level, Mr Carrimjee's explanation was that he was talking hypothetically, and was contemplating that in order to secure supply he might have to raise the price he was willing to pay; raising that price by a matter of cents would be consistent with that strategy, but being willing in effect to double the price would be unrealistic and would be "a flag."

275. In relation to his speculative comment that Mr Goenka had a structured product and would sell what he purchased in the auction the next day, Mr Carrimjee's explanation was given by way of an example. Say Mr Goenka had an exposure to Apple at US $100. If on the maturity date Apple closed at US $101, he might sell and not roll over. If it closed at US $99, he might not wish to take the loss, so he might seek to buy at US $99, and would then be in a position to sell at what he thought was his best case scenario, resulting in a break even price, or a small loss. Thus he explains why Mrs Parikh speculated that the trigger price in the structured product must only be a "whisker away" from the current price.

276. In relation to the discussion after the Putin announcement, Mr Carrimjee points to his comment that the price makes no difference, because of his belief that Mr Goenka would have executed a roll over if the price had been fairly close to the trigger price in the structured product, so that although as he later comments in the same exchange "the game was all about the closing price" it was not because he knew that Mr Goenka was seeking to manipulate that price, but about doing a roll over if the closing price was within the range that made it worth doing.

277. Our assessment is that overall Mr Carrimjee's explanations are consistent with what we have found to be the explanation given to him by Mr Goenka at his meeting in April 2010.

278. Mr Carrimjee's comments about the need to have big "muscle power" is consistent with the strategy being discussed being one of seeking to absorb a large seller; if that seller is selling too large a tranche of stock, the potential buyer may not have the financial resources to absorb it. That is what we take Mr Carrimjee to mean in his explanation recorded at paragraph 268 above.

279. His comment on the risk of illiquidity, taken in isolation, is unconvincing but viewed in the overall context of a preliminary discussion about the mechanics of an auction and how the closing price is determined it makes sense.

280. Likewise, Mr Carrimjee's comments about the client having a price at which he was willing to go to, is consistent with the comment that he might end up overpaying. It also fits in with the speculation he engaged in as to whether Mr Goenka had a structured product and would sell the next day after acquiring the securities. His speculation about Mr Goenka wishing to effect a roll over in the context of his holding a structured product is also consistent with the exchange he had with Mr Goenka on 26 April 2010, recorded in paragraph 200 above, where Mr Carrimjee put to Mr Goenka the very theory that he had developed, namely that he would sell the securities the day after acquisition and where Mr Goenka

replied that he may not sell immediately; he might continue to hold the security if the price is going up.

281. It is also consistent with Mrs Parikh's observations during the 15.02 call on 23 April, quoted in paragraph 190 above, that the trading might be linked to the holding of a structured product, and Mr Goenka's exit strategy in relation to that product, implicitly involving a roll-over and dealing in an auction where there is likely to be a sufficient volume of the security in question being traded. In light of the conclusions, it follows that we accept Mr Carrimjee's explanation as to what he meant, in the call after the Putin announcement, that the "game was all about the closing price."

282. We also place significant weight on Mr Carrimjee having raised the "flags" that he referred to with Mrs Parikh and receiving what he regarded as a reassuring answer from Mrs Parikh. We have found in paragraph 265 above that this was a spontaneous exchange; had he known all along what Mr Goenka's intentions were it would not have been necessary for him to have raised the point at all. Mr Stanley's position on this issue is in effect that nobody in Mr Carrimjee's position could possibly have been convinced by the explanation that was given. However, in our view following the initial answer Mr Carrimjee received as to whether Mr Goenka could possibly be manipulating the market, as set out in paragraph 187 above, he received further assurance in the passage set out in paragraph 188 above where Mrs Parikh refers to the fact that they should be vigilant but the stocks concerned were liquid.

283. We comment later on whether Mr Carrimjee should have been reassured following these exchanges. It may be the case that because of the importance of Mr Goenka as a client, and his knowledge that Mr Goenka was a sophisticated investor, Mr Carrimjee was less inclined to probe Mr Goenka's intentions but in the absence of any indications that he had actual suspicions about his motive the evidence is in our view insufficient to lead to a conclusion that Mr Carrimjee was turning a blind eye to what was obvious to someone in his position. Again, if that were the case we do not believe he would have raised the issue with Mrs Parikh in the way that he did. In our overall assessment of the evidence we conclude that Mr Carrimjee genuinely had concerns, raised those concerns and was reassured by what he heard. This taken with what limited information that Mr Carrimjee had been given regarding Mr Goenka's trading strategy leads us to conclude that Mr Carrimjee had no suspicions as to Mr Goenka's strategy after he received the reassurances from Mrs Parikh and the evidence emanating from the calls after that time is consistent with the position. Indeed it would appear that after Mrs Parikh's assurances Mr Carrimjee proceeded on the basis that he had undertaken his responsibility and was leaving the strategy for the execution of the trades entirely in the hands of Mrs Parikh and Mr Goenka.

284. Before coming to a final conclusion on Mr Carrimjee's state of mind, however, we need to consider whether it is correct to draw any adverse inferences from the three other contentions that Mr Stanley makes, and if so, whether they affect the position.

285. In support of this third contention, Mr Stanley relies in particular on the following:

(1) Mrs Parikh's insistence that it was Mr Goenka who placed the orders on the telephone to her as the auction continued, and not wishing to be the person who decided what the orders were that were going to be placed and when they were going to be placed;

(2) Mrs Parikh's comments in the call that took place at 11.01 on 29 April 2010 quoted in paragraph 202 above that it was Mr Goenka's responsibility to run the strategy and place the orders, and that she did not want to know what he wants to do, comments with which Mr Carrimjee agrees. Mr Stanley submits that Mrs Parikh and Mr Carrimjee did in fact know what Mr Goenka's strategy was but they did not want to ask the question and receive an answer which they already knew;

(3) Mr Carrimjee's comments in the call at 15.02 on 23 April 2010 in which he says he was reassured. Mr Stanley submits that the way he expressed his concern: "no one should be able to point a finger and say that you were manipulating a price" shows that his concern was about being caught assisting the manipulation, and Mrs Parikh's response has the flavour of because it is an auction, anybody can participate and it is going to be very hard to detect what is going on; and

(4) The conversation about the use of a mobile phone for Mr Goenka to communicate his orders, and Mr Carrimjee's acceptance of that in his conversation with Mr Goenka at 14.45 on 30 April quoted in paragraph 221` above with the comment "why have any connection to this thing?" There is, Mr Stanley submits, no rational explanation as to why somebody who previously had raised flags about the transaction should be encouraging his client not to use a recorded line to place the orders.

286. Mr Carrimjee's explanation as to these matters is as follows.

287. He explained that the reason for his agreement with Mrs Parikh that they did not wish to be involved in discussing Mr Goenka's strategy with him was that both of them were very clear that these were execution only trades, consequently, Mr Goenka's strategy was entirely a matter for him and was not something in which either Mrs Parikh or himself wanted to get involved with. He explained that neither of them wished to advise Mr Goenka as to when it was appropriate for him to place his trades, and take any responsibility if Mr Goenka was unable to achieve his objectives because of the timing of his orders. Mr Carrimjee's position was that following Mrs Parikh's explanation to Mr Goenka as to how the auction worked it was "purely for him to clinically tell her: "This is what I want to do, these are my orders", and we did not want to get involved in any terms of advice in terms of -she did not want to get involved in terms of any advice in terms of trading, I was not even qualified to do that."

288. Mr Carrimjee denied that the use of the phrase "no one should be able to point a finger and say you were manipulating a price" connoted a desire to escape being caught for something he knew was wrong; he was clear that he was looking

for reassurance that they were, as he put it on "solid ground" and vigilant to the possibility of market manipulation.

289. As regards the discussion regarding the use by Mr Goenka of a mobile phone in the order placing process, Mr Carrimjee denied that this was unusual or suspicious. He explained that it was important that the orders were seen to have come from SAML rather than Mr Goenka personally, as SAML was Schweder Miller's client and that the correct audit trail for confirmation of the trade was being maintained. He said that he did not focus on why Mr Goenka was concerned not to be recorded, but was satisfied in respect of the audit trail for the orders because Mr Goenka gave them all in writing to Mrs Parikh, and all Mr Goenka's conversations with Mr Carrimjee were on a recorded line. Consequently, when he asked Mr Goenka on their call at 14.45 on 30 April 2010 "why have any connection to this thing?" he wanted to ensure that from an audit trail point of view he was the single point who was leaving the orders so that on the "important recorded line" it was SAML who was giving the instructions to Schweder Miller and no confusion over that. Whilst he did not wish Mr Goenka to have a connection to the placement of the order in audit trail terms, in order to facilitate the split-second timing necessary in relation to the placing of the orders in the auction it was necessary for Mr Goenka to give the necessary instructions orally, and for Mr Carrimjee to confirm them on a recorded line after the orders had been placed.

290. In our view it is more likely than not that Mr Carrimjee's explanations reflect his thinking at the time rather than Mr Stanley's theory for the following reasons.

291. First, Mr Stanley's theory is based on Mrs Parikh being equally culpable with Mr Carrimjee in wishing to create a cover up for what Mr Stanley submits they both knew as regards Mr Goenka's trading strategy. This is of course inconsistent with the Authority's findings against Mrs Parikh so in that context we must accept that her comments as to not wanting to know what Mr Goenka was up to and her acquiescence in the use of the mobile phone do not indicate that she was party to the cover up.

292. On that basis, it makes Mr Carrimjee's explanation more likely to be true. We have already found that he had a genuine intention to be reassured by Mrs Parikh when he raised the possibility of market manipulation. We are not concerned by the use of a phrase "put a finger on" in the way that Mr Stanley suggests; we are mindful in this respect of the warnings given in *Hoodless and Blackwell* about interpreting literally what might, with hindsight, be regarded as somewhat loose language.

293. The comments as regarding the strategy being Mr Goenka's responsibility are consistent with the desire on the part of both Mr Carrimjee and Mrs Parikh to ensure that they performed a restricted role with regard to the placing of the orders whilst at the same time wishing to ensure that the correct audit trail was maintained. The fact that it was envisaged that Mrs Parikh would dutifully input the orders as directed by Mr Goenka without playing any role in deciding in what order they should be placed and at what point in the auction is clearly illustrated by the way in which the Reliance orders were placed, as described in paragraph

236 above. Mrs Parikh had a clear concern to avoid carrying any blame if the order inputting went wrong in any way or did not achieve Mr Goenka's objectives. Therefore Mr Carrimjee's and Mrs Parikh's desire to distance themselves from this risk explains the otherwise apparently suspicious comments in not wishing to learn more about Mr Goenka's strategy. This also explains Mr Carrimjee's reaction when he was asked why he was so cheerful in the call which took place at 11.18 on 30 April, as quoted in paragraph 204 above; he was happy not to be involved in the decisions as to the placing of the orders, and Mrs Parikh's responses that ultimately he would have to be involved we take as reference to his role in ensuring the funds would be available for settlement.

294. Indeed in relation to the latter point, Mrs Parikh's reaction when she received the 30 orders, as set out in her e-mail sent at 14.39 on 30 April quoted at paragraph 211 above and her request for Mr Carrimjee to indicate whether they were appropriate or not is to be seen in the context of her concerns that the funds were going to be available to meet the possible sums committed, which could be as much as much as US$ 66 million, some way beyond the US $50 million previously indicated as the maximum amount to be committed.

295. With regard to the conversation regarding the use of the mobile phone, with hindsight it looks extremely unwise. Indeed the basis on which Mr Carrimjee essentially lent Mr Goenka the use of SAML's account to do the trading on his own instructions could have led to difficulties and was not appropriate. It gave rise to potential risks for both Schweder Miller, who had the responsibility to settle the trades in the market, and SAML, who would be bound by whatever Mr Goenka did in their name without their express prior approval. That is certainly the case with regard to the Reliance trades which were effected entirely without Mr Carrimjee's knowledge as to the specific trades as he was uncontactable during his business trip to Switzerland.

296. However, that course of action having been adopted, Mr Carrimjee's desire not to muddy the audit trail and therefore suggest that Mr Goenka keep off the recorded line is plausible, although it does of course raise suspicions when looked at objectively.

297. If however, it was an attempt, encouraged by Mr Carrimjee, to cover up Mr Goenka's intentions it was a very ham-fisted one. All the conversations about the potential use of the mobile phone were recorded as had been Mr Goenka's previous discussions when he discussed the mechanics of the auction. As a cover up as to Mr Goenka's intentions it was therefore not very well concealed.

298. Mrs Parikh's reactions to the proposal to use the mobile phone in the conversation with Mr Carrimjee at 14.44 on 30 April, as recorded in paragraph 219 above, where she says "I just hope he doesn't quarrel at the end" shows that her concerns were because of the possible lack of clarity over what orders had been placed and the audit trail, and Mr Carrimjee's response quoted in paragraph 220 above is consistent with this. In the light of this, Mr Carrimjee's reaction in his later call with Mr Goenka "why have any connection with this thing?" is consistent with the focus that he and Mrs Parikh had on the audit trail.

299. We therefore find nothing in Mr Stanley's third contention that casts doubts on our conclusions in relation to Mr Carrimjee's state of mind as set out in paragraph 283 above.

300. In support of his fourth contention Mr Stanley submits that at no stage did Mrs Parikh indicate that it was impossible technically to manipulate a price in the auction and consequently Mr Carrimjee could not have believed that to be the case. We agree with Mr Stanley that the various discussions, particularly with Mr Goenka on 22 April, do not show Mrs Parikh indicating that achieving a movement in the price was impossible, as opposed to being very difficult in the context of a liquid stock. We also agree with Mr Stanley that even if it were impossible, that would not excuse Mr Carrimjee from raising these concerns if he believed or suspected that Mr Goenka intended to manipulate the price. In those circumstances, the trading would still not be legitimate.

301. In our view this point does not advance the discussion one way or the other and we regard it as completely neutral; the fact that Mr Carrimjee may or may not have thought that it was impossible to manipulate the price does not in our view have any impact on the findings that we have already made.

302. In support of this fifth contention Mr Stanley relies on the fact that Mr Goenka was a prominent and sophisticated client. He was a "feather in the cap" for Mr Carrimjee, who, Mr Stanley submits, is not a particularly heavy hitting investment manager but had this one special client who he charged much less. Nevertheless Mr Goenka was important because he worked with blue chip institutions and it was very much to Mr Carrimjee's advantage that he had him as a client. The implication is that Mr Carrimjee would be keen to help Mr Goenka in achieving his objectives; his main concern would have been whether or not he would get caught in doing so.

303. Mr Carrimjee agreed with Mr Stanley's characterisation of Mr Goenka and his importance to him. Mr Carrimjee denied that this would have influenced him if Mr Goenka came to him with a proposition that Mr Carrimjee believed could not be achieved as Mr Goenka would like. He denied that he would go along with a matter with which he was uncomfortable just to keep his client happy.

304. In our view undoubtedly keeping Mr Goenka happy would be at the forefront of Mr Carrimjee's mind because of the considerations Mr Stanley referred to. Subconsciously at least, his predisposition would be to be as helpful as possible to Mr Goenka and not ask him too many difficult questions. This coupled with Mr Carrimjee's attitude that Mr Goenka was devising his own strategies and was not looking to Mr Carrimjee for any advice on that meant in our view that Mr Carrimjee's predisposition was not to enquire too deeply into Mr Goenka's intentions but to take what he was told at face value and proceed accordingly. We do not, however, believe when we take this factor into account in the light of all the other evidence as to Mr Carrimjee's state of mind that factor causes us concern as to Mr Carrimjee's integrity. Had we found that there were strong indications that Mr Carrimjee knew or suspected what Mr Goenka's intentions were, the motivating factor would have tended to corroborate those indications but we do not believe it is sufficiently strong on its own, when taken

in the context of the essentially non-advisory relationship between Mr Carrimjee and Mr Goenka, to cast doubt on our conclusions in paragraph 283 as to Mr Carrimjee's state of mind.

305. Our conclusions in relation to the abortive Gazprom trading are therefore as follows:

(1) Mr Carrimjee's only knowledge of Mr Goenka's trading strategy was that he wished to roll over an existing position by absorbing a large seller at a price as close to the closing price in the auction as possible;

(2) In the light of that being the case Mr Carrimjee's explanations as to the discussions that took place in the various calls on and after 22 April 2010 are consistent with that knowledge and do not indicate that Mr Carrimjee knew or suspected that there was a risk that Mr Goenka intended to trade for the sole purpose of manipulating the price of Gazprom GDRs as opposed to wishing to carry out the trades for a legitimate purpose which may have the effect of influencing the price;

(3) In so far as he was concerned at certain points there may be suspicions of price manipulation, he raised the issue with Mrs Parikh and was reassured by her answers to the extent that his suspicions were then allayed; and

(4) In the circumstances we have not found cogent and compelling evidence that Mr Carrimjee knew or suspected that there was a risk that Mr Goenka was engaging in market abuse and turned a blind eye to it and therefore failed to act with integrity in relation to the aborted trading in Gazprom GDRs. Accordingly, the burden being on the Authority it has not made out its case on this issue.

The trading in Reliance GDRs

306. We can be very brief in our discussion of this issue. Mr Stanley accepted that the authority had little to connect Mr Carrimjee to what was happening in October 2010. On the day in question Mr Carrimjee was out of the country and he was only informed after the event as to what had happened. Mr Stanley accepted that if in relation to Gazprom our conclusion was that Mr Carrimjee was not aware of an intention on Mr Goenka's part to manipulate the price, he could not realistically say that something additional happened in relation to Reliance which gives him an indication of what was going on. We accept that had we made a finding that Mr Carrimjee had the requisite knowledge in relation to Gazprom then what happened in relation to Reliance would indicate that Mr Carrimjee was reckless in not challenging Mr Goenka when he became aware of the intention to trade.

307. On this basis, as we have found that Mr Carrimjee was not aware of, and did not suspect, an intention on the part of Mr Goenka to manipulate the price of Gazprom GDRs, our finding is that he had no such knowledge or suspicion in relation to the trading in Reliance GDRs.

Issue 2: Whether Mr Carrimjee's conduct demonstrated a failure to act with due skill, care and diligence.

308. As we have previously indicated, our finding that Mr Carrimjee did not fail to act with integrity in relation to the matters which are the subject of this reference is not the end of the matter.

309. All market participants, and in particular approved persons, have a responsibility to be alert to the possibility of market abuse when asked to trade or arrange a trade for a client in the relevant markets. The Authority has specific rules requiring a firm which arranges or executes a transaction for a client on markets such as the LSE to notify the Authority if he has reasonable grounds to suspect that a proposed transaction might constitute market abuse. The relevant provision is SUP15.10.2R which is set out in paragraph 20 above. The firm is expected to have procedures in place to enable individuals within the firm to recognise and report internally such suspicions in order that the firm might comply with its reporting obligations. Suspicious transaction reports are an important source of intelligence for the Authority in that they enable the Authority to pick up what is going on at the "coal face" and identify possible market abuse.

310. Consequently, an individual approved person who fails to report suspicions internally when he should have suspected the risk of market abuse will inevitably have failed to act with due, skill care and diligence in breach of Statement of Principle 2, and such a failure should be regarded as serious. In this case the consequence of Mr Goenka's trading in the Reliance GDRs may have been that the closing price of a security in the LSE's closing auction was manipulated with a knock on effect on many market participants.

311. In this case there was, in our view, a failure to escalate appropriately a risk that Mr Goenka might have been intending to engage in market manipulation and that risk should have been apparent to both Mr Carrimjee and Mrs Parikh.

312. In our view the most likely explanation as to why this state of affairs occurred is that each unreasonably relied on the other to detect and act upon any warning signals.

313. Mrs Parikh's attitude, as appears from the summary of her representations to the RDC which are recorded in her Final Notice, was that she was entitled to rely on Mr Carrimjee's assessment of Mr Goenka's intentions and in particular on Mr Carrimjee's view that Mr Goenka was honest. In effect, she felt that as she was only an execution only broker she was entitled to rely on Mr Carrimjee having carried out the necessary due diligence on Mr Goenka as she knew very little about his investment activity or expertise in markets. The RDC found that Mrs Parikh discounted the possibility of market manipulation without making adequate enquiries and that her submission that she was acting merely as an execution only broker failed to pay due regard to her obligations as an approved person.

314. Mr Carrimjee's attitude was the mirror image of this. In effect he took the view that he was entitled to rely on Mrs Parikh as the expert in auction trading and assume that if there were any concerns about Mr Goenka's strategy she would pick them up. He also placed undue weight on Mr Goenka's status as an execution only customer and these factors, and his previous experience of dealing

with him where he always found him to be honest, combined with his reluctance to ask Mr Goenka too many questions because of the nature of their relationship, meant that Mr Carrimjee was not sufficiently alert to the signs of possible market abuse.

315. We have placed significant weight in assessing Mr Carrimjee's state of mind on the fact that he was reassured by Mrs Parikh when he speculated with her as to whether Mr Goenka might be engaging in price manipulation. Although we found that his suspicions were allayed in our view this was an insufficient basis on which he could be satisfied as to the legitimacy of Mr Goenka's proposed trading.

316. A short conversation with Mrs Parikh consisting entirely of speculation formed an inadequate basis on which he could be satisfied as to Mr Goenka's intentions, and in our view, having had his suspicions aroused, Mr Carrimjee should have followed up with Mr Goenka and obtained more detail about what underlined his trading intentions. He was wrong simply to have taken at face value what he had been initially told by Mr Goenka and to continue to do so notwithstanding the flags raised as a result of the subsequent conversations.

317. The problem was compounded by the fact that as well as being client facing, Mr Carrimjee at the time was SAML's compliance officer. Unlike Mrs Parikh, who at least did consult Mr Davis (although the Authority also found that Mr Davis failed to deal adequately with the matter) Mr Carrimjee did not have anyone else to consult with internally. That is an unsatisfactory position, which could only have been addressed by Mr Carrimjee seeking external advice. It is clearly welcome that this position has now been addressed by Mr Carrimjee having appointed a separate compliance officer. He said that he had recognised that it was necessary to strengthen the separation between the business and the compliance function.

318. It was therefore the case that each of Mr Carrimjee and Mrs Parikh relied on the other unreasonably with the result that none of the further enquiries that should have been made were carried through.

319. Mr Stanley, in support of his contention that it was obvious to any reasonable person that Mr Goenka's object was to affect or influence the price of the securities and not to roll over a position, relied on the four factors set out in paragraph 253 above. We do not need to decide whether it was obvious that Mr Goenka's objective was price manipulation; on this issue the question for us is whether Mr Carrimjee should have suspected from the various signals that there was a risk of market abuse on the part of Mr Goenka. In our view in relation to the four factors identified by Mr Stanley, the first, the second and fourth of them should, to someone in Mr Carrimjee's position, have given grounds for suspicion which he should have followed up in the manner we have suggested above.

320. With regard to the third factor, Mr Bird's assessment was that the proposed method by which the Gazprom GDRs buy order was to be placed in the closing auction, by dividing it up into 30 limit priced slices, was not to try to achieve best execution by purchasing as much of the order as possible at the lowest price. His view was that the method lacked any commercial rationale and could have moved the uncrossing price to a price which was higher than any of the previous trades

that day. Mr Hunter and Mr Bird debated the question as to what a more appropriate number of slices would have been, Mr Bird's view being four or five would be sufficient to show the market that you have a relatively large amount to buy, but he did accept that it was a matter of judgement as to what the appropriate number was. When asked whether a list of 30 possible orders would have been so obviously suspicious that he would simply have stopped the matter in its tracks, Mr Bird replied that it would have "warranted a conversation with the client." On the basis of this, we do not think the list in itself shows an obvious intent to manipulate, but we agree with Mr Bird that a broker given such a list should have had a discussion with the client to understand the rationale before placing the order.

321. Mr Carrimjee's position was different, however. He had only had the list for six minutes before Mr Goenka indicated to him that the trading would not take place, and Mr Bird accepted, fairly, that Mr Carrimjee would not have been expected himself to make an assessment during that short period as to whether the structure of the order was inappropriate.

322. We therefore place no reliance on this particular factor as far as Mr Carrimjee is concerned. However, the fact that he did not in our view react appropriately to the other factors that were apparent to him are sufficient for us to conclude that Mr Carrimjee failed to act with due skill, care and diligence in breach of Statement of Principle 2 in the manner in which he dealt with the warning signs that we have identified.

Issue 3: The appropriate financial penalty, if any, to be imposed.

323. Mr Carrimjee's failings were serious. As we have indicated in paragraphs 309 to 310 above, the Authority relies on authorised firms and the approved persons who work for them to be vigilant as to suspicions of market abuse because of their position at the "coal face" in the market. If approved persons fail to meet the requirements market confidence can be damaged, financial crime can be facilitated and in this particular case, on the assumption that the trades concerned resulted or would have resulted in market abuse being committed, the impact on market participants could have been significant.

324. In these circumstances it is inevitable that a significant financial penalty should be imposed as a deterrent to both Mr Carrimjee from committing further breaches in the future as well as a deterrent to others. Mr Carrimjee did not seek to dispute that principle.

325. Mr Carrimjee did, however, submit that the penalty assessed by the RDC, in the context of a finding of lack of integrity, was excessive at an amount of £89,004. We had no submissions on what the appropriate level of penalty should be were we to find, as we have done, that Mr Carrimjee's behaviour demonstrated a lower level of culpability than that on which the penalty assessed by the RDC was based but we assume that Mr Carrimjee's position is that it should be reduced as a consequence.

326. The penalty assessed by the RDC was arrived at by application of the five-step framework described in paragraph 14 above. Mr Carrimjee is critical of the application of the framework in this case in the following respects:

(1) The seriousness of Mr Carrimjee's breach having been assessed at level 5, the most serious point on the scale, resulting in the application of a 40% multiplier in calculating the figure arrived set at step 2; and

(2) The application of a deterrence multiplier, in this case a multiplier of 4, to the figure arrived after at after step 2.

By our calculations, if Mr Carrimjee's submissions were accepted, and on the assumption that his breaches were considered at level 4 in terms of seriousness rather than level 5, the financial penalty would have been assessed at £16,688.

327. In our view, a financial penalty of this magnitude would be insufficient in relation to the seriousness of the breach and its potential impact. It is also well out of line with the penalties imposed on Mrs Parikh and Mr Davis, both of whom were found by the Authority to have a level of culpability at the same level as that we have found in respect of Mr Carrimjee. The seriousness of their breaches was found to be at level 4 in both cases, meaning a multiplier of 30% was applied to their relevant earnings. In Mr Davis's case, but not Mrs Parikh's, a multiplier of 4 was applied to the figure arrived at after step 2 in order, as the Final Notice states:

> "to deter misconduct of this sort and to demonstrate to approved persons the consequences of such actions."

The resulting penalty figures were £45,673.50 for Mrs Parikh and £94,816 for Mr Davis, reduced to £69,800 to reflect the usual 30% discount for early settlement. In our view, the comparative positions of Mrs Parikh and Mr Davis are relevant factors to take into account in assessing Mr Carrimjee's penalty as they are all related to the same matter and they are all approved persons, so the same considerations of seriousness of breach, market impact, and the need for deterrence in respect of conduct by approved persons should be applied consistently to all three of them. We believe Mr Goenka was in a different position, as he was not an approved person.

328. Looking at these penalties together, we can see no rational explanation as to why the deterrence multiplier was applied in relation to Mr Carrimjee and Mr Davis but not to Mrs Parikh. In our view Mr Carrimjee has a point when he says that no evidence has been produced to support the Authority's stated reason for applying the deterrence multiplier, namely that he had a small income but owned assets of a high value. Mr Carrimjee's income, on which the calculation was based, was £55,627.81 which, he submits, is not small.

329. We cannot help but conclude that in this case the Authority had in mind what it felt the appropriate penalty should be in respect of each of the three individuals, taking into account their role and actions in relation to the matters and finding that because of variations in the respective incomes of the three individuals, the calculations did not come out at what they thought was the appropriate penalty, they used the deterrence multiplier as a means of ironing out the anomalies caused by the differing levels of income. We do not mean to make that point pejoratively,

because what was done was to arrive at a result that is appropriate taking into account all the circumstances of the case.

330. As we indicated in paragraph 15 above, the Tribunal is not bound to assess the penalty by applying the five step approach adopted by the Authority; it is our duty to take into account all the circumstances of the case and do justice between the parties.

331. In our view a penalty of £16,688 would be completely inadequate in the circumstances, particularly when compared with the outcomes for Mrs Parikh and Mr Davis. In terms of the seriousness of the findings, we think Mr Carrimjee's are more serious than those of Mrs Parikh despite them having the same level of culpability because:

(1) Mr Carrimjee had the client relationship with Mr Goenka and therefore had the prime but not sole responsibility for carrying out the necessary due diligence on Mr Goenka's strategy and;

(2) Not only did he have a client facing role but he was also responsible for compliance at the time, which enhanced his level of responsibility.

These two factors would justify a significantly higher penalty than that imposed on Mrs Parikh.

332. It follows from this that Mr Carrimjee's position is more comparable to that of Mr Davis, who had responsibility for compliance at Schweder Miller. Because of his client facing role as well, and in particular his responsibility for the client relationship with Mr Goenka, it may be said that Mr Carrimjee had a higher level of responsibility than Mr Davis, which might indicate a higher level of penalty.

333. If we were to apply that logic then we should be considering increasing Mr Carrimjee's penalty from that assessed by the RDC, because that penalty is lower than that imposed on Mr Davis before the settlement discount.

334. However, as the Tribunal has indicated in a number of recent cases, it is reluctant to increase penalties, save in clear cases, such as where the evidence before the Tribunal reveals the conduct to be more serious than was known to the Authority when it set the penalty, since doing so may deter those with meritorious references from pursuing them for fear that the penalty may be increased.

335. Therefore in all the circumstances, we think the appropriate course is to impose a penalty of the same amount as that assessed by the RDC, namely £89,004.

Issue 4: Further findings and directions as are necessary in relation to the non-disciplinary references.

336. As we identified in paragraph 48 above, in relation to Mr Carrimjee's reference of the decisions to withdraw his approvals and prohibit him, our powers are limited. We need to apply the provisions of section 133(6A) FSMA, as set out in paragraph 51 above.

337. In relation to section 133(6A) as we have found that Authority has not made out its case on the question of integrity, we cannot dismiss the reference. We

therefore need to remit the matter to the Authority with a direction to reconsider its decisions to withdraw Mr Carrimjee's approvals and to prohibit him in accordance with our findings.

338. The relevant findings that the Authority must consider in this case are that as a matter of fact and of law we have found that Mr Carrimjee did not act in breach of Statement of Principle 1 in that the Authority has not satisfied us that he failed to act with integrity. We have found that Mr Carrimjee did act in breach of Statement of Principle 2 because in our view he should have been aware of the risk that Mr Goenka might be seeking to engage in price manipulation.

339. In our view the Authority should take into account the following matters in reconsidering its decision. Our findings are at the same level of culpability as those found in relation to Mrs Parikh and Mr Davis. The Authority did not withdraw Mrs Parikh's approvals or prohibit her. They did, however, withdraw Mr Davis's approval to perform the compliance oversight and money laundering reporting significant influence functions and prohibited him from exercising such functions in relation to any regulated activity carried on by any authorised or exempt person or exempt professional firm. This course was taken on the grounds of lack of competence and capability.

340. In our experience it is comparatively rare for the Authority to withdraw customer facing functions and all significant influence functions, or impose a full prohibition, in one off cases of failure to act with due skill, care and diligence. This factor and the treatment of Mr Davis and Mrs Parikh in this case suggest that it would be irrational and disproportionate if the Authority were to take that course in relation to Mr Carrimjee.

341. In relation to the compliance oversight and money laundering reporting functions, as we have observed, Mr Carrimjee has, sensibly in our view, given up these roles. The question of withdrawal of approval in this respect does not therefore arise. This still leaves open the question of prohibition in relation to these roles and it will be a matter for the Authority to take into account, when reconsidering its decision, whether Mr Carrimjee's failings indicate a failure to act with competence and capability to such an extent that a prohibition order in relation to these functions would be justified.

Conclusions

342. The disciplinary reference is allowed in so far as it relates to the question as to whether Mr Carrimjee failed to act with integrity in breach of Statement of Principle 1. The non-disciplinary references are remitted to the Authority for further consideration. Our decision is unanimous.

Directions

343. In relation to the disciplinary reference we determine that the appropriate action for the Authority to take is to impose on Mr Carrimjee a financial penalty of £89,004 pursuant to Section 66(3)(a) FSMA for failure to comply with Statement of Principle 2.

344. In relation to the non-disciplinary references we remit the matter to the Authority and direct them to reconsider and reach a decision in accordance with our findings as set out above.

345. We remit these references to the Authority with the direction that effect be given to our determinations.

TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE

RELEASE DATE: 04 MARCH 2015