[2016] UKUT 0447 (TCC)

Appeal number: FS/2015/0019

FINANCIAL SERVICES -Prohibition Order -decision to prohibit applicant from performing compliance oversight and money laundering reporting functions -extent of Tribunal's jurisdiction-whether matter should be remitted for reconsideration in the light of Tribunal's findings-no-reference dismissed- ss 56 57 and 133 FSMA 2000

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

TARIQ CARRIMJEE	**Applicant**
- and -	
THE FINANCIAL CONDUCT AUTHORITY	**The Authority**

TRIBUNAL: Judge Timothy Herrington
Gary Bottriell
Sandi O'Neill

Sitting in public at The Royal Courts of Justice, Strand, London WC2A 2LL on 14 September 2016

Andrew George QC and Daniel Cashman, Counsel, instructed by Clifford Chance LLP, for the Applicant

Paul Stanley QC, instructed by the Financial Conduct Authority, for the Authority

DECISION

Introduction and background

1. The Applicant, Tariq Carrimjee ("Mr Carrimjee") has by a reference notice dated 21 December 2015 referred to this Tribunal a further decision notice given by the Authority on 26 November 2015 (the "Further Decision Notice").

2. In summary, in the Further Decision Notice the Authority decided to prohibit Mr Carrimjee, pursuant to s 56 of the Financial Services and Markets Act 2000 ("FSMA"), from performing the compliance oversight (CF10) and the money laundering reporting (CF11) significant influence functions in relation to any regulated activity carried on by any authorised or exempt person or exempt professional firm.

3. The background to the Further Decision Notice was as follows.

4. On 26 March 2013 the Authority gave Mr Carrimjee a decision notice (the "Decision Notice") which notified him that the Authority had decided to:

(1) withdraw Mr Carrimjee's individual approvals pursuant to s 63 FSMA;

(2) make an order pursuant to s 56 FSMA prohibiting Mr Carrimjee from performing any function in relation to any regulated activity carried on by any authorised or exempt person or exempt professional firm; and

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

5. The Authority decided to take this action because, as set out in the Decision Notice, it contended that it had 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 [Authority] 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."

6. Mr Carrimjee disputed those allegations and referred the matter to this Tribunal. We refer to that reference as Mr Carrimjee's first reference. On 4 March 2015 the Tribunal released its decision on Mr Carrimjee's first reference. That decision, which we refer to as the Tribunal Decision, is cited as [2015] UKUT 0079 (TCC). The Tribunal decided that the Authority had not made out its case that Mr Carrimjee acted without integrity. It did not find 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. However, the Tribunal decided that Mr Carrimjee failed

to act with due skill, care and diligence in breach of Statement of Principle 2 because he should have been aware of the risk that Mr Goenka might be seeking to engage in price manipulation. The Tribunal found that there was a failure on his part 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 him: see [311] of the Tribunal Decision. The Tribunal regarded that as a serious failure because the consequence may have been that the closing price of a security was manipulated with a knock on effect on many market participants: see [310] of the Tribunal Decision.

7. In the light of those findings, the Tribunal directed the Authority to impose a penalty on Mr Carrimjee of the same amount set out in the Decision Notice, namely £89,004. In relation to Mr Carrimjee's reference of the decisions to withdraw his approvals and prohibit him, in accordance with the provisions of s 133 (6A) FSMA, the Tribunal remitted the matter to the Authority with a direction to reconsider those decisions in accordance with the Tribunal's findings that Mr Carrimjee did not act in breach of Statement of Principle 1 (in that the Authority did not satisfy the Tribunal that he failed to act with integrity) but that he did act in breach of Statement of Principle 2 for the reasons described above. The Tribunal made the following observations as to the matters that the Authority may wish to consider in reconsidering its decisions at [340] and [341] of the Tribunal Decision:

> "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."

8. The Further Decision Notice was preceded by a draft decision notice on which Mr Carrimjee made oral and written representations to the Regulatory Decisions Committee of the Authority ("RDC"). It is clear from paragraph 4 of the Further Decision Notice that the Authority considered, in the light of the observations made by the Tribunal at [340] and [341] of the Tribunal Decision, that the only further decision which it would be appropriate for it to make was whether or not to impose a prohibition order in respect of the compliance oversight and money laundering reporting significant influence functions.

9. The Authority decided, as recorded at paragraph 5 of the Further Decision Notice, that, in light of the Tribunal's findings in respect of Mr Carrimjee's failure to act with competence and capability, and having regard to the Tribunal's conclusions

on the extent of such failure, a prohibition order in relation to the compliance oversight and money laundering reporting significant influence functions was appropriate in order to further the Authority's objectives of protecting consumers and the integrity of the UK financial system.

10. At paragraph 12 of the Further Decision Notice the Authority gave the following summary of its reasons for its decision:

> "(a) Mr Carrimjee is not a fit and proper person by reason of lacking competence and capability. More particularly, as set out in the Decision, Mr Carrimjee either failed to appropriately identify the risk of market abuse or did nothing to allay his concerns about potential market abuse other than to seek inadequate reassurances from Mrs Parikh. This was a serious failure and it is compounded by the fact that the Authority relies on those who hold the compliance oversight (CF10) function to provide it with market intelligence in order to identify and prevent market abuse. The Authority's reasoning in relation to this issue is more fully developed in paragraphs 2.2 to 2.3 of Annex B;
>
> (b) While Mr Carrimjee submitted that he had learnt his lessons, and that he would not repeat his mistake, the Authority does not agree. Although the Authority is satisfied that he would not repeat the mistakes of April 2010 – were the same facts to arise – the Authority considers that Mr Carrimjee lacks the fundamental skills and judgment to discharge the compliance oversight (CF10) function effectively were he to be faced with novel and unfamiliar circumstances. The Authority's reasoning on this point is more fully developed in paragraph 3.3 of Annex B;
>
> (c) Notwithstanding the fact that Mr Carrimjee has relinquished the compliance oversight (CF10) and money laundering reporting (CF11) functions a prohibition order would still serve a lawful purpose. More particularly prohibition orders act as an important deterrent promoting the Authority's consumer protection and integrity objectives. Further, the fact that Mr Carrimjee has employed a compliance officer is to his credit but it is not a basis for the Authority to conclude that he has, or has gained, the capability and competence that is necessary for him to properly discharge the compliance oversight (CF10) and money-laundering reporting (CF11) functions without posing a risk to consumers or to integrity in the market were he to continue to perform those functions. The Authority's reasoning on this point is more fully developed in paragraph 4.3 of Annex B;
>
> …"

11. Mr Carrimjee disputes those findings. He invites the Tribunal to determine as a matter of fact that (contrary to the Authority's findings of fact) he has the fundamental skills and judgment to discharge the relevant controlled functions effectively, has learned from his mistake, and would not repeat his mistake. Mr Carrimjee requests that the matter should then be remitted to the Authority for the relevant decision to be taken in the light of the Tribunal's factual findings. Further, or alternatively, Mr Carrimjee contends that the Authority erred in law in that the Authority took into account improper considerations in imposing a non-disciplinary sanction by taking into account matters relating to the Authority's desired "messaging" to the financial

services industry and relating to imposing a "deterrent" and/or the Authority reached an irrational decision. In the light of that contention, Mr Carrimjee contends that the matter should be remitted to the Authority for the decision to be taken on a correct legal basis.

Relevant Law and Guidance

12. The power to make a prohibition order is contained in s 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-
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> (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 that 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 a 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."

13. Section 57 (5) FSMA provides that a person against whom a decision to make a prohibition order is made may refer "the matter" to the Tribunal.

14. Section 133 FSMA contains some general provisions regarding proceedings before the Tribunal.

15. Section 133 (4) FSMA 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. It is well understood that a reference is not an appeal against the Authority's decision but a complete rehearing of the issues which gave rise to the decision.

16. Section 133(5) to (7) FSMA 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 considers appropriate for giving effect to its determination.

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

(a) dismissing it; or

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

(6A) The findings mentioned in subsection (6)(b) are 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."

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

18. It is common ground that this reference is not a "disciplinary reference" and accordingly the Tribunal's powers in determining the reference are limited to those prescribed by s 133 (6) and (6A) FSMA.

19. That part of the Authority's Handbook known as FIT sets out the factors to which the Authority will have regard when assessing the fitness and propriety of a person to perform a particular controlled function.

20. FIT 1.3.1B states that in the Authority's view, the most important considerations will be the person's:

> honesty, integrity and reputation;
>
> competence and capability; and
>
> financial soundness.

Clearly, in this case the relevant consideration is Mr Carrimjee's competence and capability to perform the compliance oversight and money laundering reporting significant influence functions.

21. FIT 2.2.1 gives further guidance on the matters to which the Authority will have regard in determining a person's competence and capability. This provision states that relevant matters will include but are not limited to:

> (1) whether the person satisfies the relevant training and competence requirements prescribed by the Authority in relation to the controlled function the person performs or is intended to perform;
>
> (2) whether the person has demonstrated by experience and training that they are suitable, or will be suitable if approved, to perform the controlled function;
>
> (3) whether the person has adequate time to perform the controlled function and meet the responsibilities associated with that function.

22. At paragraph 9.4 of its Enforcement Guide the Authority makes it clear that it has the power to make a range of prohibition orders depending on the circumstances of each case and the range of regulated activities to which the individual's lack of fitness and propriety is relevant. Of particular relevance to this case is the statement in this paragraph that the Authority may, as it seeks to do in this case, seek to limit the prohibition order to specific functions in relation to specific regulated activities.

23. We heard significant argument in this case as to the extent of the Tribunal's jurisdiction in relation to a non-disciplinary reference and the standard of review of the Authority's decision that the Tribunal may conduct. We also heard argument on the related question as to the extent to which new evidence which has arisen since the Authority's decision was made may be considered by the Tribunal in relation to a non-disciplinary reference.

24. In relation to the second of these two issues, Mr Stanley submits that the power contained in s 133 (4) FSMA to consider evidence relating to the subject matter of the reference, whether or not it was available at the material time that the decision was made, only applies if there is an "issue of fact" which the Tribunal can consider. Mr Stanley submits that the fact found by the Authority in the Further Decision Notice

(being the only fact so found, all the other facts being matters found by this Tribunal in the Tribunal Decision) was that Mr Carrimjee had not at the date of his meeting with the RDC to consider his oral representations received any additional training. The new evidence which Mr Carrimjee seeks to adduce on this reference bears on a different fact, namely that after the Authority's decision, Mr Carrimjee has received additional training. Mr Stanley submits that this is not "new evidence" that goes to any fact on which the decision was based, it is a new and changed circumstance and cannot call into question the validity of the basis on which the Authority acted. He submits that the proper course to take, if Mr Carrimjee wishes this fact to be considered, is for him to apply for revocation of the prohibition order, an application that must be made to the Authority in the first instance (subject to a right to refer to the Tribunal).

25. We reject those submissions for the following reasons. Section 57(5) FSMA, which has not been altered since originally enacted, permits a person against whom a decision is made to issue a prohibition order to refer "the matter" to the Tribunal. In our view it is clear that in this context "the matter" in question is whether Mr Carrimjee is a fit and proper person to perform the significant influence functions of compliance oversight and money laundering reporting because of a lack of competence and capability. Consequently, the extent of what the Tribunal may examine in considering the matter referred will be prescribed by the issues raised in the pleadings and the evidence sought to be adduced to support the competing contentions made by the parties in those pleadings.

26. In this case, in his Reply, Mr Carrimjee has pleaded that he has learned his lessons, would not repeat his mistakes and has the fundamental skills and judgment, competence and capability to perform the relevant functions. In our view there is nothing in FSMA which indicates that Mr Carrimjee may only rely on the circumstances which prevailed at the time the Authority gave him the Further Decision Notice, and in particular nothing to suggest that s 133 (4) should be limited in its scope in the manner in which Mr Stanley submits. In support of his contentions in his Reply, Mr Carrimjee filed a witness statement and provided further evidence in relation to the further training that he had undertaken since the issue of the Further Decision Notice.

27. In our view there is nothing in principle that would prevent us taking that evidence into account in coming to a decision as to whether or not to remit the matter back to the Authority in the light of the findings that we make in relation to that evidence. In our view to take this course is entirely consistent with the wording of both s 57 (5) and s 133 (4) FSMA. It is also consistent with the approach taken by this Tribunal in the case of *Stephen Robert Allen v The Financial Services Authority* (2013) FS/2012/0019 where the Authority sought to substitute new and distinct allegations which it contended established that Mr Allen was not a fit and proper person from those originally contained in its decision notice. The Tribunal said this at [19] of its decision:

> "The allegation in the Decision Notice was that Mr Allen is not a fit and proper person to perform any function in relation to regulated activities generally

> because he lacks honesty and integrity. Any evidence that relates to Mr Allen's honesty and integrity, whether or not it was available to the Authority at the time of the Decision Notice, may be considered by the Upper Tribunal."

Although this decision pre-dates the coming into force of s 133 (6) and (6A) FSMA we see nothing in the new provisions which would affect it.

28. If Mr Stanley were right, then the effect would be further unnecessary delay in determining this matter in that the whole RDC process would have to be undertaken again. If the RDC declined to lift the prohibition order, then it is likely that the matter would be referred to the Tribunal and the Tribunal process would have to start afresh. That would clearly not be in the interests of justice in circumstances where the matter is before the Tribunal in any event, a consideration which clearly influenced the decision in *Allen*.

29. We therefore proceed on the basis that it is open to the Tribunal to consider the further evidence that Mr Carrimjee has provided which was not available to the RDC in support of the contentions that he made in his Reply to the Authority's Statement of Case and make findings of fact on it. If, in the light of those findings, the Tribunal decided to remit the matter to the Authority, then the Authority would then be bound to take those findings into account in reconsidering its decision.

30. In relation to the second of these two issues, Mr George submits that the Tribunal has full jurisdiction to determine, on the basis of the evidence adduced before it, whether as a matter of fact, Mr Carrimjee has learnt his lessons from the mistakes he made in his dealings with Mr Goenka which were the subject of the first reference, would not repeat those mistakes and has the fundamental skills and judgment and competence and capability to discharge the relevant functions effectively. Mr Stanley submits that the Tribunal's jurisdiction is more limited and that its role is to determine matters of fact and law, including factors relevant to a discretionary decision. But, he submits, it is not for the Tribunal to determine how that discretion should be exercised provided that it is exercised lawfully in the sense of not being irrational or perverse. He submits that Mr George is in effect inviting the Tribunal to decide whether it considers, based on the evidence available to it, Mr Carrimjee should be prohibited. Mr Stanley submits that this approach effectively strips the standard of review set out in s 133 (6A) FSMA of any effect in practice when contrasted with s 133 (5) FSMA.

31. We were referred to the Explanatory Notes to the Financial Services Bill which explained the changes made to the Tribunal's jurisdiction which are now contained in s 133 (6A) FSMA. Note 249 gave an example of how the scope of the determinations which may be made by the Tribunal in relation to non-disciplinary references was more limited as follows:

> "….. [I]n relation to a decision by the PRA to vary a person's permission to carry on regulated activities, the Tribunal will no longer be able to reach its own view as to the precise nature of the variation which should be made by the PRA. Instead, if the Tribunal were not to uphold the PRA's decision, the Tribunal would be required to remit the matter to the PRA with a direction to reconsider

> the matter and reach a decision in accordance with the findings of the Tribunal. Such findings may only concern certain matters (listed in the new subsection (6A)) such as issues of fact or law. This distinction is drawn between "disciplinary" and other measures, as in line with the new judgement-based approach to supervision, the FCA the PRA and the Bank are best placed to form a view as to the precise nature of supervisory action taken in pursuance of wider public-policy aims such as financial stability in the case of the PRA and the Bank or consumer protection, market integrity and competition in the case of the FCA."

32. Mr Stanley also referred us to HM Treasury's policy document issued in June 2011 which set out its "blueprint for reform" of the financial services regulatory system. Under the heading "Judgement-led regulation" the document said this at paragraph 2.66:

> "…. the Government will promote judgement-led decision-making by limiting the course of action available to the Tribunal in the event it chooses not to uphold the relevant regulator's decision. With the exception of disciplinary matters and those involving specific third-party rights, the Tribunal will not be able to substitute its opinion for that of the regulator as to the regulatory action which should be taken by the regulator. The Tribunal will instead be required to remit the decision back to the regulator with such directions as it considers appropriate in relation to a range of findings. For example, in relation to a decision by the PRA to vary a person's permission to carry on regulated activities, the Tribunal will not be able to reach its own view on the variation which should be made by the PRA. Instead, in the event the Tribunal were not to uphold the PRA's decision, the Tribunal will be required to remit the matter to the PRA with a direction to reconsider the matter and reach a decision in light of the findings of the Tribunal."

33. The approach to be taken in the exercise of these more limited powers has been considered in three previous references to this Tribunal.

34. First, in relation to Mr Carrimjee's first reference, the Tribunal said this at [57] and [58] of the Tribunal 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.
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> 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."

35. In our view it is clear from these passages that the Tribunal approached its jurisdiction on the basis that ultimately the decision it would be required to make was whether the decision made by the Authority to impose a prohibition order was one which was within the range of reasonable decisions open to it. The Tribunal will make that assessment in the light of the evidence put before it on the reference and any findings of fact and law that it makes in relation to that evidence. So, in relation to the Tribunal Decision, the Tribunal decided that in the light of its finding that Mr Carrimjee had not acted without integrity the decision that he should be prohibited on that basis could no longer be within the range of reasonable decisions open to the Authority. The Tribunal therefore had to remit the decision to prohibit to the Authority for further consideration in the light of the Tribunal's findings that, in relation to his dealings with Mr Goenka, Mr Carrimjee had failed to act with due skill, care and diligence and that those failings were serious.

36. The Tribunal did not seek to make any assessment of its own as to whether Mr Carrimjee was fit and proper to perform any particular function and indeed it could not do so because the question as to whether Mr Carrimjee lacked fitness and propriety in the light of his failure to act with due skill, care and diligence on the particular occasions which were the subject of the Tribunal Decision was not a matter before the Tribunal.

37. That question is now squarely before the Tribunal as a result of the decision made by the Further Decision Notice. The passages from the Tribunal Decision that we have quoted above indicates that the correct approach for us to take in relation to that question is to consider whether the decision to prohibit Mr Carrimjee from performing the significant influence functions of compliance oversight and money laundering reporting is one that falls within the range of reasonable decisions that it was open to the Authority to make.

38. If, having reviewed all the evidence and the factors taken into account by the Authority in making its decision, and having made findings of fact in relation to that evidence and such other findings of law that are relevant, the Tribunal concludes that the decision to prohibit is one that is reasonably open to the Authority then the correct course is to dismiss the reference.

39. Alternatively, if the Tribunal is not satisfied that in the light of its findings that the decision is one that in all the circumstances is within the range of reasonable decisions open to the Authority, the correct course is to remit the matter with a direction to reconsider the decision in the light of those findings. For example, that course would also be necessary were the Tribunal to make findings of fact that were clearly at variance with the findings made by the Authority and which formed the basis of its decision. That course would also be necessary had there been a change of circumstance regarding the applicant which indicated that the original findings made on which the decision was based, for example as to his competence to undertake particular activities, had been overtaken by further developments, such as new evidence which clearly demonstrated the applicant's proficiency in relation to the relevant matters. Such a course would not usurp the Authority's role in making the overall assessment as to fitness and propriety but would ensure that it reconsidered its decision on a fully informed basis. In our view such a course is consistent with the policy referred to at [31] and [32] above as it leaves it to the Authority to make a judgment as to whether a prohibition order is appropriate.

40. Secondly, in *Bayliss & Co (Financial Services) Ltd and Clive John Rosier v FCA* [2015] UKUT 0265 (TCC) one of the issues referred to the Tribunal was whether it was appropriate to prohibit Mr Rosier from performing significant influence functions in the light of a number of significant findings that the Tribunal had made regarding Mr Rosier's failure to take reasonable steps to ensure, as sole director of his regulated firm, that the firm complied with the relevant regulatory standards. The Tribunal had to consider whether the findings that the Tribunal made in that regard merited the question of the prohibition order being remitted to the Authority for further consideration.

41. The Tribunal considered whether in the course of the hearing Mr Rosier had demonstrated that he had learned any lessons from the matters which were the subject of the reference. The Tribunal said at [286] of its decision:

> "In our view it would not be appropriate to withdraw Mr Rosier's approval to act in a significant influence function or to prohibit him from performing such functions if we were satisfied that he had learned lessons from his failures and would not make the same mistakes were he to continue in such a role."

42. The Tribunal found that lessons had not been learned and therefore decided that the only course to take was to dismiss the reference. In our view the Tribunal would have gone too far had it determined whether or not it was appropriate to make a prohibition order. However, had the Tribunal made findings which indicated that Mr Rosier had learned lessons from his failures which were relevant to the question as to whether he would repeat the same mistakes again, in our view the appropriate course for the Tribunal to have taken would be to have remitted the matter to the Authority to reconsider its decision as to whether it was appropriate to make a prohibition order in the light of the Tribunal's findings.

43. Thirdly, in *Timothy Roberts & Andrew Wilkins v FCA* [2015] UKUT 0408 (TCC) the Tribunal remitted to the Authority the question as to whether Mr Wilkins

should be made the subject of a prohibition order in circumstances where the Authority contended that Mr Wilkins lacked integrity, a finding which the Tribunal held had not been made out. The Tribunal found that the matters complained of "do not show that Mr Wilkins lacked competence": see [9] of the additional reasons for determination released on 8 September 2015. The Tribunal then said this at [10] of those additional reasons:

> "We note that the Authority is asserting that the Tribunal did not make an overall finding that Mr Wilkins is fit and proper. We dismiss the allegation that Mr Wilkins is not fit and proper including the allegation of lack of competence. The burden of proof is on the authority to prove that he is not fit and proper and not competent. The Authority failed to satisfy the Tribunal in relation to that allegation."

44. With respect to the Tribunal, in our view it was not open to the Tribunal to make an overall finding of fitness and propriety. A prohibition order may only be made pursuant to s 56 FSMA "if it appears to [the Authority] that an individual is not a fit and proper person to perform functions in relation to a regulated activity…". Were the Tribunal itself to make a finding as to whether an individual is fit and proper, it would be making the very judgment which has been reserved to the Authority by virtue of the amended provisions of s 133 FSMA. Although the question of whether an individual is "fit and proper" can be regarded as a question of law it cannot be the case that the powers given to the Tribunal in s 133 (6A) FSMA to make findings of law extend so far to enable it to make a finding as to whether the individual concerned is overall "fit and proper". The use of the phrase "if it appears ..." clearly indicates that the section gives the Authority a discretionary power to determine whether an individual is "fit and proper" which is only subject to a supervisory review by the Tribunal and not to a full merits jurisdiction.

45. It is not apparent that the Tribunal in *Wilkins* considered the Tribunal Decision made in respect of Mr Carrimjee's first reference before making its decision. In our view the Tribunal fell into error in failing to do so and we therefore decline to follow the approach taken in *Wilkins*.

46. However, in our view it is within the scope of the Tribunal's jurisdiction to make findings of fact in relation to Mr Carrimjee's competence and capability to perform the functions which are the subject of this reference. As Mr George correctly observed, in determining Mr Carrimjee's first reference the Tribunal made findings on the question as to whether Mr Carrimjee had acted with integrity or with due skill, care and diligence in his dealings with Mr Goenka. Those were mixed findings of fact and law which the Authority was bound to take into account when considering whether a prohibition order was appropriate, and if so the extent of the order, following the remission of the matter to the Authority.

47. It is clear from the Further Decision Notice that the Authority decided that a prohibition order in relation to the relevant functions was justified on the basis that Mr Carrimjee's failings in relation to his dealings with Mr Goenka were sufficiently serious notwithstanding that the failure could be regarded as a "one-off" occurrence. In that regard the Authority gave significant weight to the fact that those with

compliance oversight functions are an important source of intelligence for the Authority in relation to the prevention of market abuse so that it is particularly important that suspicions are reported appropriately.

48. On the assumption that no further evidence was available to the Tribunal beyond that available to the RDC, the task for the Tribunal on this reference would be confined to considering whether the decision to prohibit Mr Carrimjee from performing the relevant functions on the basis of the reasoning in the Further Decision Notice was within the range of reasonable decisions that the Authority could have made, in other words there was nothing irrational or perverse in the Authority deciding that Mr Carrimjee was not fit and proper to exercise the relevant functions in the light of his dealings with Mr Goenka in April 2010. Were the Tribunal to conclude that the decision was irrational or perverse then the Tribunal would remit the matter to the Authority again, but in light of such findings there would be no course of action open to the Authority in practice other than to discontinue its action against Mr Carrimjee. Were the Tribunal to conclude that the decision was one within the reasonable range of decisions open to the Authority on the evidence before it then the proper course would be to dismiss the reference.

49. In this case, we have concluded that it is open to us to consider matters which have occurred since the Further Decision Notice was given to Mr Carrimjee. Those matters include Mr Carrimjee's own evidence contained in his witness statement, on which he was cross-examined, and the evidence from his further witness on the training that he has undertaken recently in order to address the failings which occurred in 2010. In our view, our role in relation to that further evidence is to make such findings of fact on it as are relevant to the question of Mr Carrimjee's competence and capability in performing the significant influence functions of compliance oversight and money laundering reporting. It follows that it is open to us to make findings as to the degree of competence and capability Mr Carrimjee possesses which is relevant to the significant influence functions in question.

50. In our view those are clearly findings of fact which s 133 (6A) FSMA envisages may be made by the Tribunal. In undertaking that exercise we would not be exercising any degree of judgment which the legislation reserves to the Authority. The passages from the policy material relied on by Mr Stanley indicate that what the Tribunal cannot do is substitute its opinion for that of the regulator as to the regulatory action which should be taken and reach its own view as to the "precise nature" of the decision that should be made by the Authority. It will still be for the Authority to decide whether it is appropriate to make a prohibition order and, if so, the extent of that order, once it has considered the findings made by the Tribunal, should the Tribunal be of the view that its findings on the competence and capability issue merit the Authority reconsidering its decision.

51. Mr Carrimjee invites us to make findings on the question as to whether he has the fundamental skills and judgment to discharge the relevant controlled functions effectively, has learned from his mistake, and would not repeat his mistake. In our view all of those matters relate to the question of the degree of competence and capability that Mr Carrimjee possesses which is relevant to the functions in question.

The Tribunal may make that assessment and then decide whether its findings merit the matter being remitted to the Authority for its further consideration. This approach in no respect strips the standard of review set out in s 133(6A) FSMA of any effect and to that degree we reject Mr Stanley's submissions. The making of that assessment in our view does not result in the Tribunal deciding how the Authority should exercise its discretion in determining the question as to whether it appears to the Authority that Mr Carrimjee is not fit and proper to undertake the relevant functions.

52. We shall therefore proceed to consider the evidence and make our determination on the basis outlined at [49] to [51] above. We understand it to be common ground that in resolving the issues arising in this reference the burden of proof is on the Authority.

Evidence

53. We had a witness statement from Mr Carrimjee on which he was cross-examined. Mr Carrimjee also answered questions from the Tribunal. Mr Carrimjee's evidence dealt largely with what he described as the lessons that he has learnt from the events that took place in April 2010 and which form the subject matter of his first reference. We have no concerns with the truthfulness of Mr Carrimjee's evidence although, as we observe below, many of his answers in his oral evidence were vague and lacking in detail.

54. In July 2016, after the time limit set by the Tribunal for the filing of witness evidence had expired, Mr Carrimjee applied successfully to the Tribunal for consent to file evidence in the form of a witness statement from Mr Ben Goh, the Managing Director of Financial Services Compliance Limited, a firm which, among other things, provides bespoke compliance and anti-money laundering training. Mr Goh's evidence describes the bespoke training course that his firm provided to Mr Carrimjee in June 2016. The training course included a practical case study comprising a number of scenarios during which Mr Carrimjee played the part of a compliance officer or money laundering reporting officer and was required to answer a number of questions regarding the scenarios which were designed to test him on his ability to apply his knowledge and skills in dealing with the problems identified in the scenarios. Mr Goh's evidence therefore also dealt with his assessment of Mr Carrimjee's performance in relation to those scenarios. Mr Goh's evidence was unchallenged and accordingly we accept it.

55. We have also relied on the findings in the Tribunal Decision, in particular the findings at [309] to [318] of the Tribunal Decision which set out the Tribunal's conclusions as to why it found that Mr Carrimjee acted without due skill, care and diligence in relation to his dealings with Mr Goenka in respect of the Gazprom trades in April 2010. We do not repeat all of those findings here, although we do refer to some of them as relevant below, and accordingly this decision should be read in conjunction with the Tribunal Decision.

56. In addition, we were provided with the transcripts of Mr Carrimjee's meeting with the RDC on 28 September 2015 at which he made his oral representations in relation to the draft Further Decision Notice.

Findings of Fact

57. We set out below our findings of fact on the basis of the evidence detailed above.

58. We start with some findings regarding events which took place with regard to the business of Somerset Asset Management LLP ("SAML") following the commencement of the Authority's investigation in 2011 into Mr Carrimjee's role in relation to what the Authority found to be a plan by Mr Carrimjee's client, Mr Goenka, to manipulate the closing price of Gazprom GDRs in April 2010 and Reliance GDRs in October 2010.

59. As was found in the Tribunal Decision, Mr Carrimjee began his career in financial services 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.

60. On 9 January 2006, having left UBS a few months earlier, Mr Carrimjee founded SAML. He was the firm's senior partner as well as acting as fund manager and investment adviser. At the time of the events which were the subject of Mr Carrimjee's first reference Mr Carrimjee held a number of controlled functions in respect of which he was an approved person, namely Chief Executive, Partner, Compliance Oversight, Money Laundering Reporting and Customer Function.

61. On 16 August 2012 Mr Carrimjee relinquished the Compliance Oversight and Money Laundering Reporting functions. At the same time, SAML hired a separate compliance officer to perform these functions, reporting to Mr Carrimjee as CEO. Mr Carrimjee had previously explained this decision to the RDC when making his representations in relation to the Decision Notice that over 2 years of "many sleepless nights" he concluded that holding the compliance oversight function alongside his other significant influence functions did not offer a sufficient challenge to the "analysis process to the extent that maybe it should have." Mr Carrimjee clarified these reasons in both his witness statement and oral evidence on this reference. He said that the change came about because he recognised that one of the reasons the situation in April 2010 occurred was due to an insufficient separation between SAML's business and compliance functions. He said that the appointment of a separate compliance officer allowed him to concentrate on forming a more informed view of trading activities and to scrutinise carefully everything going on at the firm.

62. Mr Carrimjee accepted that he undertook no specialist training in relation to compliance matters of the type that he undertook in June 2016 during the two-year period from the occurrence of the events in April 2010 up to his decision to relinquish

the compliance role, although he received assistance with compliance matters, including some ad hoc training from external compliance consultants during that period. This training and assistance was in substance no different to the training and support that he had received prior to the events in April 2010.

63. In September 2012, SAML's sole client, The Harrington Master Trust ("the Trust"), terminated its management contract with SAML. As explained in the Tribunal Decision, SAML was the asset manager of the Trust, which contained a series of sub-funds, separate segregated sub-funds being created to hold the assets of each individual client who placed their assets in the Trust in order to be managed by SAML.

64. SAML looked for further clients to replace the Trust but this proved difficult, particularly after the publication of the Decision Notice. Mr Carrimjee then devoted most of his time to the Authority's investigation and the subsequent Tribunal proceedings. The decision was therefore taken to wind up SAML.

65. Accordingly, since September 2012 the only significant activity of SAML has been to act as a consultant to the new manager of the Trust in facilitating a smooth transition to the new manager. In answers to questions from the Tribunal, Mr Carrimjee confirmed that during this transitional period SAML undertook no trading activity or the placing of orders on behalf of the Trust.

66. The transitional period has now ended and in April 2015 the firm's authorisation with the Authority was cancelled.

67. It is therefore clear that since September 2012 Mr Carrimjee has had no practical experience of compliance issues that might arise in relation to trading activities and, in particular, how he as CEO would interface with the compliance officer on trading matters. Although Mr Carrimjee asserted that he did challenge his compliance officer on particular occasions, he was unable to give any specific examples.

68. In relation to his future plans, Mr Carrimjee wishes to set up his own firm again, with a focus on launching and managing an investment fund for clients. He said that in so doing he would need to partner with the right team to support him and that compliance oversight and money laundering reporting would need to be an independent function in order to challenge the processes in the firm.

69. Mr Carrimjee was asked by the Tribunal how he, as CEO, would relate to the compliance officer and whether he had thought of processes and techniques he would need to put in place in order that they would work effectively together. He was also asked whether he could give examples of how he as compliance officer or CEO might be able to monitor how effectively the processes were working in practice. Mr Carrimjee's answers on these points were very general; whilst he recognised that the compliance officer needed to be given sufficient authority to achieve his goals he accepted that he had not in detail considered the processes and procedures necessary to make the relationship work. He said he had learned from the specialist training

which is described below how a compliance officer could use soft skills to extract information and keep senior management in the loop on how to educate employees to do things in the correct way. When asked how he might pick up suspicious trades he answered that there was a need for there to be strong record-keeping and that he would try to understand the logic and rationale for the trading in question.

70. Mr Carrimjee candidly accepted that his behaviour in April 2010 fell below the standard expected of him in his position and that he had had many years to reflect on it and to consider what went wrong. He says that he has taken steps to ensure that he has learned from experience and to ensure that such an incident is never repeated. He says that he has been careful to ensure that he takes a much more probing approach, so that he satisfies himself concerning the regulatory compliance of each and every financial transaction. In his view, as the Tribunal Decision relates, his failings arose directly as a result of his undue reliance on Mrs Parikh, a close family friend with much experience in the markets which meant that he was not as vigilant as he should have been.

71. Mr Carrimjee said that the realisation that things had gone wrong did not happen at any particular point but was a process which took place over a period of time. He had said, in his representations to the RDC, that after the Tribunal Decision he could confidently say that from that point in time "a lot of reasons have become clear to me to understand and I can see what I should have done differently…". In his oral evidence, although he accepted that the Tribunal Decision was an important event in the process, he stated that the process had in fact started when he was first contacted by the Authority and continued with various learning steps in the period up to the present time.

72. We cannot see any evidence of any positive steps taken by Mr Carrimjee in response to the investigation and the regulatory proceedings which indicate acceptance on his part of having failed to behave to the required standard other than the appointment of a separate compliance officer in 2012, some two years after the events in question. In our view the evidence leads to the conclusion that Mr Carrimjee did not begin to think seriously about what his response to the events should be in terms of how he should change his approach in performing his controlled functions until after the Tribunal Decision. This may well be partly due to the fact that since SAML was being run down after 2012 he did not have much opportunity in practice to show how he had learned lessons from his experience of the events in April 2010. There is certainly no evidence that he gave any thought to how to conduct himself in performing the compliance oversight and money laundering reporting significant influence functions because, on his own admission, he was no longer expecting to fulfil those roles having passed responsibility to a separate compliance officer. It is also fair to say, as Mr George observed, that the question of his competence and capability to perform the compliance function was not the issue before the RDC and the Tribunal in respect of his first reference, where the case put by the Authority was one of a lack of integrity on his part.

73. Mr Carrimjee does not accept that his failings in 2010 arose because of a lack of adequate training. Neither does he accept that the failings were due to anything in his

character rather than because of a lack of adequate training. He blames himself for not being more challenging in the face of suspicious circumstances and that his skills were not as sharp as they needed to be in recognising those circumstances at that time.

74. Although he has now accepted that further training could assist in sharpening those skills, he had not undertaken any additional training by the time of his oral representations to the RDC in relation to the draft Further Decision Notice in September 2015. In the Further Decision Notice the RDC noted that "Mr Carrimjee despite having ample time, has not undergone any further compliance training, acquired or refreshed his expertise or otherwise taken steps to establish that he now has the judgment to identify and properly respond to compliance risks". In his witness statement in relation to this reference Mr Carrimjee expressed surprise that the RDC relied on the fact that he had not undergone further training in support of the imposition of a prohibition order. He expressed the view that at the point that he was approved by the Authority to hold the compliance oversight and money laundering reporting significant influence functions he had undertaken sufficient training to satisfy the Authority that he possessed sufficient knowledge and judgment for those roles and at the time of the RDC oral representations meeting, he was neither performing those relevant functions, nor intending to apply for approval to do so.

75. Mr Carrimjee said that he did not know that the RDC would have asked questions designed to establish whether he had the necessary skills to discharge the functions in question but accepted that it was logical that they would do so. In his view the steps he took in resigning from the compliance position, appointing a compliance team and carrying out the soul-searching he did as to what went wrong was an adequate response.

76. It is therefore clear that Mr Carrimjee only came to the view that further training could help to sharpen his skills, as he put it, after he received the Further Decision Notice and he admitted that to be the case in his witness statement.

77. We accept Mr Carrimjee's evidence that he now understands the seriousness of what happened in April 2010. He says that he has adopted a proactive approach in order to ensure that he learns the relevant lessons from it and as a result is confident in his ability to perform the relevant functions notwithstanding that he has no current intention in the future to perform those functions. Aside from the training courses, which we deal with below, Mr Carrimjee was unable to provide any further specific examples of the steps that he had taken to support his assertion that he was now confident in his ability to perform the relevant functions.

78. It is clear to us from Mr Carrimjee's evidence that the reason he is contesting the prohibition order, notwithstanding the fact that he does not wish to perform the functions in future, is that he regards it as a stigma because it appears to suggest that he has been involved in some way with money laundering or a failure to report money laundering neither of which, we accept, has ever been alleged. Mr Carrimjee is of the view that this perception will be a significant barrier to the development of the business of any future firm he wishes to establish.

79. Since the giving of the Further Decision Notice Mr Carrimjee has undertaken a number of training courses.

80. On 24 March 2016, Mr Carrimjee completed the International Compliance Association's course on Money Laundering Risk in Capital Markets. We were told the course addressed key anti-money laundering issues, including identifying suspicious activity and undertaking customer due diligence, and counterterrorist financing concepts, and the practical issues encountered within the capital markets environment. At the end of the course, Mr Carrimjee completed an examination and was awarded a certificate.

81. Between February and April 2016, Mr Carrimjee completed the Euromoney Learning Solutions Compliance Essentials e-Learning programme. This programme consisted of eight individual courses including anti-money laundering, addressing the fundamental anti-money laundering concepts and involving a series of case studies and a market abuse course, which included a series of interactive exercises testing knowledge and understanding of the application of the rules. Mr Carrimjee was awarded separate certificates in relation to each of the eight courses.

82. On 20 April 2016, Mr Carrimjee attended the CCL Academy's Anti-Money laundering Awareness Training course. This course covered the legal framework surrounding anti-money laundering, the specific criminal offences relating to money laundering, and employees' personal responsibilities as well as a firm's responsibility to implement adequate systems and controls following a risk based approach. At the end of the course Mr Carrimjee was awarded a certificate.

83. We were not given any detailed information as to the content of those courses, how challenging they would have been and the extent to which they were designed specifically to address the skills required of those performing the compliance oversight and money laundering reporting significant influence functions. From the descriptions we were given in Mr Carrimjee's evidence and what Mr Goh says about it in his evidence, we think it likely that these courses will have given good general knowledge of the relevant areas rather than focusing on the specific skills required by those needing further training in relation to performing the significant influence functions mentioned above.

84. Subsequently, in June 2016, Mr Carrimjee undertook a bespoke training programme delivered by Financial Services Compliance Limited ("FSC"). Mr Goh in his witness statement deals in some detail with the content of the programme and we have seen copies of the course materials. It appears from Mr Goh's evidence that the initiative for the undertaking of this course arose as a result of the preparation of his case on this reference. It also appears from Mr Goh's evidence that the programme was designed, in the light of the Tribunal Decision, to address Mr Carrimjee's:

(1) Competence and ability to challenge information which he had received;

(2) Ability to recognise when further information should be sought;

(3) Readiness to probe for further information as required in difficult circumstances; and

(4) Awareness of when it is appropriate to seek and rely on the judgment and expertise of others.

85. The course involved Mr Carrimjee undergoing a nine module training plan over three days, covering the regulatory regime, financial crime, conduct risk, compliance management and practice (building and maintaining constructive relationships with senior management, business areas and regulators), compliance management and practice (the evolution of the regulatory landscape and the compliance function) and three case study modules.

86. We accept from the material that we have seen that the course was rigorous. The case studies were relevant to Mr Carrimjee's circumstances and appear to be sufficiently challenging to address appropriately the objectives set out at [84] above. We do not know, however, the extent to which the case study discussions dealt with how someone like Mr Carrimjee at the time of the events in April 2010, who had both a customer facing and compliance oversight function, should deal with the conflicts that might arise in dealing with both functions.

87. Mr Goh gave some overall conclusions in his evidence on how Mr Carrimjee performed on the course, largely derived from his assessment of Mr Carrimjee's performance on the case studies. Mr Goh was ultimately satisfied that Mr Carrimjee had a good understanding of the relevant compliance and anti-money laundering concepts and that Mr Carrimjee demonstrated appropriate skills and behaviour in identifying and addressing issues, and generally responding to the case study, although he gave no further detail as to how that was demonstrated.

88. Mr Clive Briault, a senior consultant with extensive experience in financial services regulation and supervision, including ten years spent at the Authority in senior positions, observed Mr Carrimjee's performance on the final practical case study, which comprised five main scenarios during which Mr Carrimjee played the part of the compliance officer and money laundering reporting officer of a fictitious company regulated by the Authority that specialised in managing the investments of high net worth individuals.

89. We have seen an email from Mr Briault to Mr Carrimjee's solicitors in which he summarises the feedback he gave to Mr Carrimjee and Mr Goh immediately after Mr Carrimjee had finished the exercise he observed.

90. Mr Briault's assessment was that overall, Mr Carrimjee identified the key issues in each part of the case study. He went on to say:

> "I provided some additional feedback to Mr Carrimjee on the advantages of structuring his answers around the relevant legislation and regulatory rules and guidance, so that he could identify more precisely what further information or monitoring might be necessary to establish whether an offence or breach of regulatory requirements might have been committed, and what this implied in

terms of internal reporting and actions and external reporting obligations. I also observed that Mr Carrimjee should remain alert to the need to ensure that the firm and its staff were not in breach of any requirements in terms of the advice given to clients and the information available to the firm from executing client orders."

91. Unfortunately, neither Mr Goh nor Mr Briault gave oral evidence so we were unable to follow up with a number of detailed questions we would have had as to Mr Carrimjee's performance on the scenarios. Reading between the lines of Mr Briault's assessment we regard it as being somewhat cautious in its conclusions and indicates to us that it was considered that there were still some developmental needs around Mr Carrimjee's understanding of the relevant legislation and regulation rules and guidance and his understanding of the relevant requirements in terms of advice given to clients and the use of information available to the firm from executing client orders.

92. The absence of oral evidence from Mr Goh and Mr Briault also meant that whilst the material we saw on the compliance management and practice module regarding monitoring for potential market abuse and insider dealing was sufficiently comprehensive at a high level, we do not know whether Mr Carrimjee was taken to examples of "best practice" in terms of data capture on clients and especially trades which would provide the "red flags" that a CEO and a compliance officer would need to identify the issues that required investigation.

Discussion

93. In the light of our findings of fact we now turn to the issues that we need to determine on this reference. As we recorded at [11] above, Mr Carrimjee contends that the matter should be remitted to the Authority for reconsideration on the following grounds:

(1) Mr Carrimjee has the fundamental skills and judgment to discharge the relevant controlled functions effectively, has learned from his mistake and would not repeat his mistake (the competence and capability issue); and

(2) Further or alternatively, the Authority erred in law in that it took into account improper considerations in imposing a non-disciplinary sanction by taking into account matters relating to the Authority's desired "messaging" to the financial services industry and relating to imposing a "deterrent" and / or the Authority reached an irrational decision (the improper considerations issue).

94. We shall deal with each of these issues in turn.

The competence and capability issue

95. The essence of Mr Carrimjee's case on competence and capability is that the Authority relies exclusively on a one-off incident which occurred nearly 6 ½ years ago whereas there is a wealth of evidence since that time to support his competence to perform the relevant functions. Mr George submits that while it might exceptionally be possible for a single historical event to be of such gravity that it still demonstrates a general underlying lack of competence and capability 6 ½ years later despite

extensive further training, that does not reflect the present facts. He submits that Mr Carrimjee's mistake arose in highly specific circumstances, involving over-reliance on an expert who was personally known to Mr Carrimjee. This is a mistake that Mr Carrimjee can learn, and has, learned from, and does not indicate the sort of grave incapacity that would be needed to justify a factual finding of irremediable incompetence and incapability.

96. In our view the submissions greatly underestimate the seriousness of Mr Carrimjee's failing in April 2010, as found in the Tribunal Decision. The seriousness of that failing cannot be diminished by describing it as a one-off incident. It arose out of dealings and discussions which took place over a number of days during which Mr Carrimjee had adequate time to reflect and consider whether his concerns should be escalated. His failings therefore cannot fairly be characterised as a momentary lapse of judgment. Mr Carrimjee was at the time performing the function of compliance oversight. Not to have noticed the clear warning signs of the possibility of market manipulation is a fundamental and basic error not to be expected of any reasonably competent compliance officer and any such reasonably competent compliance officer would have known that it was not reasonable in the situation that Mr Carrimjee found himself to have relied on a third party. Indeed, because the third party was also a personal friend there was even more reason why Mr Carrimjee should have sought objective advice on the situation from an independent external source if he was not confident himself in dealing with the matter.

97. As was observed at [310] of the Tribunal Decision, 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 and such a failure was regarded as serious in that case because of the potential for Mr Goenka's trading to have manipulated the closing price of a security with a knock on effect on many market participants. There is a clear risk to market integrity and confidence if those who perform compliance oversight functions do not display the necessary competence to identify clear warning signs of potential market abuse. As Mr Stanley correctly submitted, it is in the nature of compliance responsibilities that those who exercise them need to be able to respond to circumstances which are rare and unusual. It is therefore no answer to say that the failure arose in the context of "highly specific circumstances" when it is precisely the ability to identify and respond to those circumstances that are the skills required to discharge those functions effectively.

98. Therefore, in our view, Mr Stanley was correct to characterise the findings of fact made in the Tribunal Decision as to Mr Carrimjee's failure to spot the warning signs as occurring either as a result of a lack of ability on his part to identify and understand the issues with which he was confronted or an inability to understand what he should appropriately do when faced with those issues. We agree with Mr Stanley that in either event, the failure was basic, fundamental and serious.

99. In those circumstances and as matters stood following the Tribunal Decision, a decision by the Authority to impose upon Mr Carrimjee a limited prohibition order in relation to the compliance oversight and money laundering reporting significant

influence functions, in the absence of strong evidence that Mr Carrimjee had adequately addressed the failings found in the Tribunal Decision was, in our view, clearly a decision that fell within the range of reasonable decisions open to the Authority in the light of the findings in the Tribunal Decision. The Tribunal indicated at [341] of the Tribunal Decision that the imposition of a prohibition order in relation to the compliance oversight and money laundering reporting significant influence functions was a matter that the Authority should consider in reconsidering its decision on the question of prohibition.

100. The question for us now, in the light of both the findings in the Tribunal Decision and our further findings of fact on the steps that Mr Carrimjee has taken to address the failings found in the Tribunal Decision, is whether that decision remains one that falls within the range of reasonable decisions open to the Authority, or whether our further findings are such that we should remit the matter to the Authority for further consideration.

101. It may be the case that Mr Carrimjee has learned how to deal with similar circumstances to those that his dealings with Mr Goenka involved in 2010. It is of course relatively easy for a person to learn how not to repeat the last mistake that he made. However, we now need to be satisfied that Mr Carrimjee would deal appropriately with equally challenging but different circumstances. Had Mr Carrimjee, for example, in his evidence indicated specifically how he would have applied the skills he has subsequently acquired through his training in dealing differently with the situation he found himself faced with in April 2010 and the behaviours he exhibited at that time that may have given us confidence that he had "sharpened his skills". For example, he could have told us how he would now deal with a client who wished an important conversation to take place on an unrecorded telephone line.

102. We understand the difficulties that Mr Carrimjee has of demonstrating his competence to undertake the functions in question when he has not had much opportunity to test his skills in practice and training can only take a person so far. However, even taking account of those factors our overall conclusion is that the evidence does not give us the confidence that Mr Carrimjee now possesses the fundamental skills which are necessary for him to undertake the role of compliance oversight and money laundering reporting officer for the following reasons.

103. As regards how Mr Carrimjee has reacted to the events that occurred in April 2010, the first tangible step on which we have evidence is his decision in August 2012 to relinquish the relevant functions. Although he was clearly correct to recognise the benefits of separating the functions, the action is also consistent with the recognition on his part that the failings demonstrated that he did not have the necessary skills to perform the role in challenging circumstances and that was a lesson that Mr Carrimjee had learned from the experience. Those factors informed the Tribunal in the conclusions it made at [341] of the Tribunal Decision.

104. The next relevant event was Mr Carrimjee's meeting with the RDC in September 2015. It is clear that he went to that meeting unprepared to deal with the

obvious question as to what steps he had taken since the Tribunal Decision which would satisfy the Authority that he had the necessary skills to discharge the functions in question. As he now accepted before us on this reference, it was logical that they would do so and it is clear from his evidence before us that he went to the RDC meeting believing that the steps he took in resigning from the compliance position and his own self enquiry as to how he should approach his role was sufficient at that point to "sharpen his skills". He had not at that stage recognised that he had failings that could be addressed by specialist training.

105. Mr Carrimjee relied, both before the RDC and to a large extent before us, on the fact that he regards himself as more rigorous and meticulous in the way he seeks to understand situations and express his own views rather than rely on others. Unfortunately, he was unable to give specific meaningful examples to back up that assertion.

106. He was also vague in his answers as to how he would interact with the compliance function and what procedures and processes he would put in place to make the relationship work. These were clearly matters covered by the training course he undertook with FSC and Mr George took us to the relevant course material. It did not appear to us that Mr Carrimjee had absorbed that material to the extent that he could apply it in practice because had he done so in our view he would have given more substantive answers to the Tribunal's questions on this issue.

107. The final step Mr Carrimjee took was to undertake specialist training. This came very late in the day and there is much force in Mr Stanley's submission that Mr Carrimjee's decision to undertake this training was a tactical one designed to improve his prospects before the Tribunal and is indicative of an approach which entails him waiting for somebody else to point out a problem in his approach before he takes appropriate steps to address it. It is not indicative of the proactive approach required of someone wishing to exercise the relevant functions which are the subject of this reference. If, as Mr Carrimjee said to us, he felt that he needed to sharpen his skills then undertaking rigorous training courses was an obvious way to address the issues and he should have taken the necessary steps at a much earlier stage. These considerations have led us to place less weight on the fact that Mr Carrimjee has undertaken this specialist training than would have been the case had he taken the initiative himself to undertake it much earlier in the process.

108. For all these reasons, none of the developments since the Further Decision Notice in our view cast any doubt on the reasonableness of the Authority to prohibit Mr Carrimjee from exercising the relevant functions.

109. We understand that the purpose behind Mr Carrimjee's reference is that what he regards as the stigma of a prohibition order will be a significant barrier to the development of the business of any future firm he wishes to establish. However, not all CEOs of small firms also perform the compliance oversight and money laundering reporting significant influence functions and if in a new business Mr Carrimjee, as CEO, was supported by a strong compliance function, there is no reason to believe that his clients cannot be confident that their affairs will be dealt with appropriately

and with due regard to their interests. In particular, there can be no suggestion that just because Mr Carrimjee has been prohibited from performing the money laundering reporting function that there is a concern that he has been involved in some way with money laundering or a failure to report money laundering. As far as we are aware, no such allegations have ever been made. Furthermore, there is nothing to prevent Mr Carrimjee applying to lift the prohibition order in the future if he demonstrates that through further experience of working in the industry he has acquired the necessary capability to perform the relevant functions.

The improper considerations issue

110. The essence of Mr Carrimjee's case on this issue is that the Further Decision Notice erred in law by taking into account the Authority's desire to send a "message" to the industry and for the prohibition order to act as a deterrent.

111. Mr George referred us to paragraph 12 (c) of the Further Decision Notice which stated that "prohibition orders act as an important deterrent promoting the Authority's consumer protection and integrity objectives." He also referred us to the Authority's more detailed reasoning on this point which was set out in paragraph 4.3 of Annex B to the Further Decision Notice as follows:

> "Notwithstanding the fact that Mr Carrimjee has relinquished the compliance oversight (CF10) and money laundering reporting (CF11) functions the Authority is of the view that a prohibition order is appropriate for the following reasons (having regard to the matters set out in Annex A and in particular EG 9.9):
>
> (1) As noted above compliance oversight (CF10), together with money laundering reporting (CF11), plays an important part in how the Authority fulfils its consumer protection objective. Prohibition orders send an important message to the financial services industry namely that those that are not fit and proper will be prevented from performing certain (or all) functions in relation to regulated activities. This deterrent helps to maintain high standards within the industry for the benefit of consumers;
>
> (2) Prohibiting those that are not fit and proper also gives consumers the confidence that those operating in the financial services industry will provide them with appropriate levels of care;
>
> (3) While it is correct that – having relinquished the compliance oversight (CF10) and money laundering reporting (CF11) roles – Mr Carrimjee is now subject to the approvals regime, that regime does not achieve the deterrent effect of (1) & (2) above;
>
> (4) The Authority, for the reasons set out more fully in paragraph 2 above, considers Mr Carrimjee's lack of competence and capability to be so manifest (albeit in relation to a single incident) that he ought to be prohibited for the overall protection of consumers and the integrity of the market;
>
> (5) The fact that Mr Carrimjee has been fined is not by itself sufficient protection for consumers or the integrity of the market. For the reasons set out above only a

> prohibition order will secure the appropriate degree of protection for consumers and the integrity of the market."

112. Mr George submits that the power to exercise disciplinary powers under s 66 FSMA following misconduct, including the power to impose a financial penalty, is a distinct power from the ability to impose a non-disciplinary prohibition order under s 56 FSMA if it appears to the Authority that the person concerned is not fit and proper. The powers sit side-by-side in the legislative framework and are not to be seen as alternatives to each other, but perform entirely distinct functions. There is a line of Tribunal cases which recognise this distinction; prohibition orders are designed to protect the public from persons who are not found to be fit and proper from performing controlled functions whilst the imposition of a financial penalty is designed to mark disapproval of the person's conduct and to deter others from similar actions.

113. Accordingly, Mr George submits that it follows that the motivation to punish the individual for misconduct and to deter others from carrying out such misconduct is legitimate in relation to disciplinary sanctions. This appears from paragraph 6.1.2 G of the Authority's Decision Procedure and Penalties Manual which provides as follows:

> "The principal purpose of imposing a financial penalty or issuing a public censure is to promote high standards of regulatory and/or market conduct by deterring persons who have committed breaches from committing further breaches, helping to deter other persons from committing similar breaches, and demonstrating generally the benefits of compliant behaviour…."

Accordingly, the significant financial penalty that was imposed on Mr Carrimjee was primarily to act as a deterrent. By way of contrast, a prohibition order, as a non-disciplinary sanction, must never be used to punish, discipline or deter. If a prohibition order were imposed in order to achieve a purpose of a disciplinary sanction, such as to deter others, it would be unlawful.

114. Mr George submits that this is exactly what the Authority has done in this case. The sole purpose that the Authority identifies in the Further Decision Notice for imposing a prohibition order on Mr Carrimjee, as shown by the passages from it quoted at [111] above, is for it to have a "deterrent effect" and to "send an important message to the financial services industry". Mr George therefore submits that the Authority's decision to impose a prohibition order was materially determined by an irrelevant consideration and the decision should be remitted to the Authority for the decision to be taken on a correct legal basis, including a direction to the Authority not to take deterrence into account as the actuating purpose for the imposition of a prohibition order. Had the Authority paid proper regard to the consideration as to whether its statutory objectives were achieved adequately by the imposition of the financial penalty in this case, it would have concluded that its desire to deter others from a failure to escalate compliance concerns had been achieved by the financial penalty imposed.

115. We agree with Mr George that the cases in this Tribunal demonstrate that where misconduct is found to have occurred and sanctions are considered the decision maker must have regard to the purpose for which the relevant sanctions are being imposed. As the observations by the Tribunal in the cases referred to by Mr George demonstrate, namely *Visser v FSA* FS/2010/0001 at [107], and *Khan v FCA* FS/2013/002 at [91], disapproval of past misconduct, punishment of the wrongdoer and deterrence of others is primarily achieved through the imposition of a financial penalty. If the seriousness of the misconduct is such that the public must be protected against the risk of future misconduct, then the appropriate sanction is the imposition of a prohibition order in appropriate terms and there is no need to take one into account when imposing the other. So as in *Khan*, a financial penalty set at the appropriate level in order to achieve credible deterrence is not to be reduced because it is also appropriate to impose a prohibition order. Likewise, where the financial penalty has been set at the appropriate level to achieve credible deterrence, which the Tribunal held to have occurred in this case on the determination of Mr Carrimjee's first reference, it would be an improper exercise of the power to impose a prohibition order as a means of further punishment when it was not necessary to do so in order to protect the public. That would be disproportionate.

116. Nevertheless, as Mr Stanley submitted, there is a difference between the notions of punishment and deterrence. If the fact of a prohibition order is publicised, as it usually is, then the fact that it becomes known by other financial services professionals that behaviour of the kind identified in the relevant notice may result in a prohibition order then inevitably the fact of that prohibition is likely in practice to act as a deterrent to others and will therefore serve the legitimate purpose of sending a message to both financial services professionals and the public at large as to the possible consequences of such behaviour. This will serve to strengthen public confidence in the regulatory system and in our view statements in the relevant notice that draw attention to the deterrent effect of the order and the message that it sends are perfectly legitimate. Such statements are also helpful in clarifying in a particular case that the decision-maker is of the view that simply leaving the individual subject to the prior approvals regime does not have the same effect.

117. This legitimate purpose was recognised by the Court of Appeal in *R (Davies) v FSA* [2004] 1 WLR 185 which considered whether it was lawful to impose a prohibition order in circumstances where disciplinary action under s 66 FSMA was time-barred. Mummery LJ said at [28]:

> "The authority was not simply seeking to continue time-barred "disciplinary proceedings" by different means. Like the SFA, the authority was seeking expulsion on the ground that the claimants were not fit and proper persons. Section 56, not section 66, of the 2000 Act was the appropriate procedure available to the authority to take action, which involved virtually identical charges brought with the same objective. The same considerations applied to both. I would add that, although it is true that there are different statutory criteria for making prohibition orders and for taking disciplinary action, both are available to the authority in order to send out messages to the financial services industry and to the public about unacceptable conduct in the financial markets and in order to deter others."

118. In our view the passages in the Further Decision Notice set out at [111] above, do not in any respect indicate that the Authority has in this case decided to exercise the power to prohibit for an improper purpose. Sub-paragraph (1) records, accurately in our view, that prohibition orders will give an important message to participants in the financial services industry that if they are guilty of serious misconduct then they will be prevented from performing specified functions and that such a message will have a deterrent effect. This paragraph is closely followed by sub-paragraph (2) which clearly indicates that the Authority has decided to exercise the power in order to give consumers confidence. Taken together, these paragraphs cannot be read as giving any indication that the powers are being exercised as a form of punishment. This is reinforced by the provisions of subparagraphs (4) and (5) which when read together make it clear that the overall purpose of the exercise of the power is protection of consumers and the integrity of the market and that the financial penalty by itself cannot achieve that objective. This recognises that the financial penalty is designed to deal with the past misconduct and that the purpose of the prohibition order is to prevent further misconduct.

119. Accordingly, in our view there is nothing in the way the Further Decision Notice is drafted which indicates that the prohibition order is being imposed as an additional punishment on Mr Carrimjee. We therefore conclude that the decision to issue the prohibition order was not materially determined by an irrelevant consideration and we see no reason to remit it for further consideration by the Authority on that ground.

120. Mr George also made submissions to the effect that in any event it was simply irrational or perverse to prohibit Mr Carrimjee on the basis of the evidence before it. As a result of our conclusions in respect of that evidence, as set out above, those submissions are unsustainable and we reject them.

Disposition

121. As we have concluded that the Authority's decision to impose a limited prohibition order on Mr Carrimjee was not affected by any improper considerations and the decision was one which it was reasonably open to the Authority to make, we dismiss the reference. Our decision is unanimous.

TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE

RELEASE DATE: 20 October 2016