

Reference – Cancellation of Part IV permission – Threshold conditions, failure to submit on 3 occasions form RMAR – Importance of compliance with submission of form; reference allowed in consideration of particular personal circumstances and undertakings to the extent that FSA directed to substitute monetary penalty with other conditions failing compliance with which directed to cancel Applicant’s Part IV permission

FINANCIAL SERVICES AND MARKETS TRIBUNAL

SALMAN KHAN T/A SALMAN A KHAN

Applicant

- and -

FINANCIAL SERVICES AUTHORITY

The Authority

**Tribunal: T GORDON COUTTS, QC
MR P V BURDON
MR J PARSLOE**

Sitting in public in London on 18 January 2008

Salman Khan, for the Applicant

Simon Gerrish (in-house Counsel) for the Authority

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DECISION

1. This is a reference by the Applicant of the decision by the Authority dated 19
5 September 2007 cancelling the permission given to Salman A Khan. The Authority
took that decision under the power granted by Section 45 of the Financial Services
and Markets Act 2000 (“the Act”). The permission gave authority to undertake
certain regulated activities. The reason given for the withdrawal was given as
failures, described by the Authority as “repeated failures”, to submit at the due time a
10 Retail Mediation Activities Return (RMAR).

2. On 8 October 2007 the Applicant wrote to the Tribunal a letter which was
taken by the Tribunal and the Authority as a reference by him.

3. The Tribunal heard evidence from Stephen Bland, the Director of the Small
15 Firms Division of the FSA a John Kirby, a manager of the Enforcement Division of
the FSA who spoke on policy, and had in front of it a witness statement by Martin
Badcock an Associate in the Enforcement Division of the FSA to which no objection
was taken by the Applicant. Mr Gerrish for the Authority in the course of its conduct
20 of the case also made various statements to the Tribunal.

4. Mr Khan, the Applicant, gave evidence on oath. In addition a quantity of
documents were produced to the Tribunal detailing the background.

5. There was little dispute about the factual background. With regard to the
25 Applicant’s duty to submit the various forms RMAR, the position we find in fact, was
as relied on by the Authority which was as follows:

The Authority has given the Applicant;

- 30
- (a) a number of warnings as to the importance of the timely submission of
the RMAR Form;
 - (b) a number of warnings as to the potential consequences of the failure to
submit the Form RMAR;
 - 35 (c) the history of the Applicant’s RMAR compliance is:

RMAR PERIOD END	RMAR DUE DATE	SUBMISSION DATE	DAYS LATE
1 October 2005	11 November 2005	27 March 2006	136
1 April 2006	17 May 2006	24 October 2006	160
1 October 2006	10 November 2006	31 July 2007	263
1 April 2007	16 May 2007	31 July 2007	76
1 October 2007	12 November 2007	29 November 2007	17

Notwithstanding, the Applicant twice allowed matters to progress to a stage
40 where the Authority issued a Warning Notice that it proposed to cancel the
Applicant’s permission before submitting the RMAR Form. The Authority has
discontinued its proposal to cancel the Applicant’s permission on two separate
occasions.

5 The completion of the RMAR Form and the payment of regulatory fees are the minimum supervisory requirements for the Applicant and also for many other small firms. The RMAR Form is often the only point of supervisory contact with the many small firms who do not have a designated supervisor. The form is designed to enable the Authority to conduct a desk based review to assess whether a firm meets the minimum statutory requirements.

10 The Authority attaches very considerable importance to the information provided in Form RMAR and its timely submission.

6. The Applicant was bound to submit a Form RMAR twice yearly in respect of the questions therein asked and the matters to be certified, six weeks after the end of the six month period into which its year was divided.

15 7. Mr Khan in evidence drew attention to the various reasons he had given in the documents for non-timeous submission of the form. These reasons were accepted by the Authority as sufficient to cause withdrawal of its proposal to cancel the Applicant's permission. The Tribunal also accepted that the Applicant had been the victim of a number of unfortunate events. He had had to deal with the aftermath of a family bereavement which involved his absence in Pakistan from time to time, he had had various physical troubles with the office in which he had been operating including a catastrophic flood from the upstairs premises which destroyed his computer. He had also other troubles with the tenants above his office.

25 8. More particularly however the Tribunal thought that Mr Khan who was a somewhat anxious individual, may have become overwhelmed by the regulatory requirements and the submission of the form. The guidance given, admittedly and admirably, by the Authority did not appear to enable him properly to concentrate upon the matter of the completion of the forms. They were however ultimately completed and no question was taken about them. It could have been, because it was apparent to the Tribunal on an examination of the forms that the Applicant's capital requirements were deficient. This appeared on the face of the forms but no comment was made by the Authority about that nor any action taken although a serious deficiency continued for many months.

30 9. For the future the Applicant's evidence was firstly, that he had now got his office properly organised, that his difficulties family and otherwise were behind him, that he now employed a secretary and that he was now fully able to cope with the smaller part of his business that involved regulatory activities. He told the Tribunal that he was in a position to fulfil the financial requirements immediately and that, although the minor part of his business, conducting regulated activities was very important to him.

45 10. The Tribunal was of the view that the RMAR Form was not particularly complicated and that most small firms would readily be able to cope with it.

11. In the situation in which this particular reference arises the law is not complicated nor was it in issue.

12. Section 45 of the Financial Services and Markets Act 2000 enables the Authority to exercise its power in relation to an authorised person if it appears to it that the authorised person is failing or is likely to fail to satisfy the threshold conditions and provides that the Authority may vary a Part IV permission or cancel it.

13. Schedule 6 of the Act provides that the person concerned must satisfy the Authority that he is a fit and proper person having regard to all the circumstances, including ... the nature of any regulated activity that he carries on and the need to ensure that his affairs are conducted soundly and prudently.

14. The Authority has issued rules and guidance in its handbook. COND 2.5.4G sets out some of the matters the Authority will take into account in considering whether a firm meets and is likely to continue to meet threshold condition 5. The relevant module of the handbook is referred to as COND. COND 2.5.4G provides:

“(1) When determining whether the firm will satisfy and continue to satisfy threshold condition 5, the FSA will have regard to all relevant matters, whether arising in the United Kingdom or elsewhere.

(2) Relevant matters include, but are not limited to, whether a firm:

- (a) conducts, or will conduct, its business with integrity and in compliance with proper standards;
- (b) has, or will have, a competent and prudent management; and
- (c) can demonstrate that it conducts, or will conduct, its affairs with the exercise of due skill, care and diligence.

(3) The FSA will take into account relevant matters only to the extent that they are significant (see COND 1.3.3G). In determining whether relevant matters are significant to the firm, the FSA will consider significance in the context of the suitability of the firm, having regard to the regulatory objectives in section 2 of the Act (The FSA’s general duties); a series of matters may be significant when taken together, even if each of them in isolation may not be significant.

(4) In making its assessment, the FSA will, therefore, consider the individual circumstances of each firm on a case-by-case basis”.

COND 2.5.6G entitled “Conducting business with integrity and in compliance with proper standards” provides (in part):

“In determining whether a firm will satisfy, and continue to satisfy, threshold condition 5 in respect of conducting its business with

integrity and in compliance with proper standards, the relevant matters, as referred to in COND 2.5.4G (2), may include but are not limited to whether:

5 (1) the firm has been open and co-operative in all its
dealings with the FSA and any other regulatory body (see
Principle 11 (Relations with regulators)) and is ready, willing
and organised to comply with the requirements and standards
10 under the regulatory system and other legal, regulatory and
professional obligations; the relevant requirements and
standards will depend on the circumstances of each case,
including the regulated activities which the firm has
permission, or is seeking permission, to carry on; ...”

15 15. The supervision module (SUP) provides for timely reporting and in relation to
the consequences of a failure to submit reports provides:

SUP 16.3.14R provides:

20 “Failure to submit reports

(1) If a firm does not submit a complete report by the date on
which it is due in accordance with the rules in, or referred to in, this
chapter or the provisions of relevant legislation and any prescribed
25 submission procedures, the firm must pay an administrative fee of
£250.

(2) ...”

30 SUP 16.3.14A G provides, insofar as is relevant:

“Failure to submit a report in accordance with the rules in, or referred
to in, this chapter or the provisions of relevant legislation may also
lead to the imposition of a financial penalty and other disciplinary
35 sanctions (see ENF 13.5 [below]) ...”

15. The Enforcement section of the Handbook, read shortly provides for the
Authority bringing disciplinary action and enforcement action and in an enforcement
guide (EG) provides at 8.5:

40 “Circumstances in which the FSA will consider varying a firm’s Part IV
permission in support of its enforcement function include those where it has
serious concerns about a firm, or about the way in which its business is being
or has been conducted. Examples of these circumstances are where:

45 (1) in relation to the grounds for exercising the power under
section 45(1)(a) of the Act, the firm appears to be failing, or appears

likely to fail, to satisfy the threshold conditions relating to one or more, or all, of its regulated activities, because for instance:

- 5 (a) ...
- (b) the firm appears not to be a fit and proper person to carry on a regulated activity because:
 - 10 (i) ...
 - (ii) ...
 - (iii) It has breached requirements imposed on it by or under the Act (including the principles and the rules), for example in respect of its disclosure or notification requirements, and the breaches are material in number or in individual seriousness ...

15 EG continues at 8.14

20 "... Examples of the types of circumstances in which the FSA may cancel a firm's Part IV permission include ...

- (4) non-submission of regulatory returns, or repeated failure to submit such returns in a timely fashion ..."

25 16. Further the provisions of the Principles for Businesses which have a status of rules and are made pursuant to Section 138 of the Act provides by PRIN 2.1.1R:

30 "1.1 Relations with regulators: a firm must deal with its regulators in an open and cooperative way, and must disclose to the FSA appropriately anything relating to the firm of which the FSA would reasonably expect notice".

17. It was submitted for the Authority:

- 35 (a) a single continued failure to submit a Form RMAR may amount to a breach of threshold condition 5.
- (b) that the repeated failure to submit Form RMAR on time is likely to mean that a firm is in breach of threshold condition 5.
- (c) that where the failures continue over more than 12 months (i.e. more than two RMAR forms are late for a firm that is required to submit RMAR forms on a half yearly basis), means save in wholly exceptional circumstances, that a firm is failing to meet threshold condition 5, and that it is likely to continue to fail to meet threshold condition 5.
- 40 (d) on the facts it was submitted that the Applicant has been very significantly late in submitting the Form RMAR; therefore was repeatedly in breach of Rule SUP 16.3.13R and that despite matters having progressed to the Authority's giving a Warning Notice, the
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Applicant is still not ready or able to comply with the minimum regularly standards, and rules.

- (e) Accordingly the Tribunal was invited to dismiss the Reference and to direct the Authority to cancel the firm's Part IV permission; and to consider issuing guidance for the determination of future cases relating to the late submission of RMAR Forms.

18. The submission by the Applicant might reasonably be described as a plea for understanding and leniency in the circumstances. He said that the admitted defaults would not happen again. He pointed to the improvement in the level of lateness but said he understood that that was still unsatisfactory. He said that he had reorganised his business, that he had got appropriate premises and equipment and now had a secretary who helped with administration. He pointed out that there had been no complaint by any customer which had not been immediately resolved, and that his conduct was not described anywhere as being dishonest. He felt that it was too harsh at this stage to deprive him of his regulated business.

19. The Tribunal anxiously considered the proper course in this particular case. They were aware of the obligation under s.133(4) of Financial Services and Markets Act 2000 to consider the whole matter of new. They do not feel that they can or indeed should attempt to lay down any particular guidelines in matters of this kind. Each case must depend on its individual circumstances. So, for example, where there was any question of dishonesty or complaint by customers or other matters affecting consumer confidence there might be no other course but to withdraw permission. At the other end of the scale simple administrative failures may or may not be significant. In the present case the Authority did not find any financial impropriety or shortfall; had it done so the situation might be regarded as more serious.

20. Where the Authority have as here a range of penalties, and the Tribunal heard evidence that a financial penalty could have been imposed instead of purported withdrawal, then as a matter of general principle the most draconian punishment should be reserved for the most serious cases. The Tribunal by the following decision is not intending to undermine the general policy adopted by the Authority in such matters or to devalue the importance of proper reporting to provide an economical method of checking-up on small firms. On the other hand simply because it is difficult for the Authority to keep track of the many firms it has to regulate should not mean that a particular reporting requirement requires to be enforced without regard to individual circumstances. It will usually be the case that the appropriate progression of sanction would be warning, financial penalty, withdrawal of permission and to skip from one to three may not be appropriate.

21. Accordingly the Tribunal finds that it is appropriate in this case that a Direction be given to the Authority because it is plain that the Applicant has fallen short of the requirements upon him and in any event will require to make good his capital resource position before being allowed to continue.

22. The Tribunal Directs the Authority to impose a financial penalty upon the Applicant of £2,000, in addition to the £250 administration fee he is bound to pay when late in submitting returns and that the Applicant satisfy the Authority that his capital resource position is in good order and all that within 28 days of the issue of this Decision. Failing implementation by the Applicant of the about matters to the satisfaction of the Authority it is Directed in that event to withdraw the Applicant's Part IV Permission.

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T GORDON COUTTS, QC
CHAIRMAN

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