Case number FS/2011/0020

FINANCIAL SERVICES - whether financial penalty appropriate in this case - yes whether amount of penalty should be increased, reduced or confirmed – amount confirmed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

MARK ANTHONY FINANCIAL MANAGEMENT
and
MARK ANTHONY HURST AINLEY

Applicants

- and –

THE FINANCIAL SERVICES AUTHORITY

The Authority

TRIBUNAL: JUDGE GREG SINFIELD
CHRISTOPHER CHAPMAN
NICK DOUCH

Sitting in public in London on 22 November 2012

Mr Marshall Pont, representative for the Second Applicant

Mr Sharif Shivji, counsel, instructed by the Financial Services Authority, for the Authority

DECISION

Introduction

1. This is the second decision of the Tribunal in relation to a joint reference by Mark Anthony Financial Management ("MAFM") and Mr Mark Ainley of various decisions made by the Financial Services Authority ("the Authority"). In summary, the Authority alleged that Mr Ainley submitted mortgage applications on his own behalf and, as MAFM, on behalf of clients on several occasions and that the applications contained false and misleading information which Mr Ainley either knew to be false or misleading or was reckless as to whether such information was true and complete. On the basis of the alleged misconduct, the Authority decided to:

> (1) withdraw Mr Ainley's approval to perform controlled functions under section 63 of the Financial Services and Markets Act 2000 ("the Act");
>
> (2) prohibit Mr Ainley from performing any function in relation to any regulated activity under section 56 of the Act;
>
> (3) impose a financial penalty of £150,000 on Mr Ainley under section 66 of the Act; and
>
> (4) cancel MAFM's permission to carry on regulated activities under Part IV of the Act under section 45 of the Act.

2. The hearing of the issues which gave rise to the Authority's allegations of dishonesty and lack of integrity took place on 26, 27 and 28 March 2012. At the hearing, it was agreed that the Tribunal would make findings only in relation to the Authority's allegations of misconduct and any decision as to the appropriate financial sanction to be imposed on Mr Ainley would be reserved to be decided, if necessary, at a further hearing.

3. The first decision, [2012] UKUT B17 (TCC), was released on 13 July 2012. That decision recorded the Tribunal's findings of fact in detail and they are not set out further in this decision. In summary, we concluded that Mr Ainley had made mortgage applications on his own behalf and on behalf of his clients that contained information that he knew to be false and misleading and that he also made false and misleading statements to the Authority.

4. The hearing in relation to the appropriate financial penalty took place on 22 November 2012. Mr Ainley did not attend the hearing on the advice of his doctors but he was represented by Mr Marshall Pont. The Authority was represented by Mr Sharif Shivji. At the conclusion of the hearing, the Tribunal announced its decision which was that the penalty of £150,000 was confirmed and said that written reasons would be provided in due course. These are those reasons.

Role of the Tribunal

5. Section 133(5) of the Act provides that, on a reference, the Tribunal must determine what (if any) is the appropriate action for the Authority to take in relation

to the matter referred to it, namely Mr Ainley's misconduct. This is not an appeal against the Authority's decision to set the financial penalty at £150,000 but a new hearing to determine what (if any) is the appropriate financial penalty. Under section 133(4) of the Act, the Tribunal reviews the appropriateness of the penalty taking into account Mr Ainley's circumstances at the time of the hearing, not at the time that the misconduct occurred. Section 133(6) and (7) provide that the Tribunal must remit the matter to the Authority with such directions as the Tribunal considers appropriate for giving effect to its determination and the Authority must act accordingly.

The issue

6. In the first decision, at [94], the Tribunal stated that we considered that behaviour such as that of Mr Ainley clearly requires that a substantial financial penalty should be imposed. Mr Ainley has claimed that payment of a penalty of £150,000 would cause him to suffer serious financial hardship. The issue for the Tribunal to decide, in these proceedings, is what is the appropriate level of penalty for the conduct as found by the Tribunal in the first decision and what amount, which may be higher or lower, should be imposed on Mr Ainley.

Evidence

7. Mr Ainley submitted a letter dated 9 August 2012 and statement of means, with documentation, in support of his claim that he would suffer serious financial hardship if required to pay a penalty of £150,000.

8. A witness statement, dated 28 September 2012, was produced by Ms Rebecca Irving, on behalf of the Authority, which contained an analysis of Mr Ainley's financial position, as set out in the statement of means, and whether he would suffer serious financial hardship if required to pay the penalty. Mr Ainley wrote a letter, dated 17 October, in response to Ms Irving's first witness statement, pointing out some errors in the calculation of the value of his interest in certain properties and making other comments. Ms Irving produced a supplementary witness statement, dated 9 November, correcting the calculation errors and making further points in response to Mr Ainley's letter.

9. The Authority provided a skeleton argument and bundles of documents one week before the hearing. Mr Ainley submitted a response to the Authority's skeleton argument on the day before the hearing.

10. At the hearing, Ms Irving's witness statements were admitted as evidence in chief and she was cross-examined by Mr Pont. As explained above, Mr Ainley did not attend. There were no witnesses on behalf of Mr Ainley.

Facts

11. We set out below the facts as we have found them on the basis of the evidence that was before us.

12. In his letter of 9 August 2012, Mr Ainley said that the joint monthly outgoings for him and his wife were between £8,500 and £11,700. He stated that his monthly income from commission on renewals averaged £1,500 - £3,000 and he also received £700 from client standing orders that he expected would cease in the coming months. As to savings, Mr Ainley had approximately £30,654 in three bank accounts but that would be reduced to £24,500, after repayment of loans to MAFM, fees for work done in relation to the FSA proceedings and bills or credit cards. As his income was less than his outgoings by some £4,800 - £9,300, Mr Ainley said that he was living on capital.

13. The statement of means also showed that, between 29 and 31 July 2012 (ie two weeks after the release of the first decision), Mr Ainley transferred £50,000 to his wife. Of that amount, £40,000 was expressed to be a repayment of loans by Mrs Ainley and £10,000 was expressed to be to pay fees for services provided by Mr D Peach. The only evidence of loans by Mrs Ainley was a letter from her, dated 7 August 2012, stating that she provided Mr Ainley with an interest free loan of £10,000 to enable him to start his business in 1991 and a further interest free loan of £30,000 to MAFM in 1997. No other evidence of the loans or the payments by Mrs Ainley to her husband or MAFM was provided. Mr Ainley provided an email from Mr Peach, dated 9 August 2012, to show that the amount of £10,000 was transferred to meet an obligation to pay Mr Peach's fees. The email states that fees of £10,065 for "administration services, expenses and investigation" are due at the conclusion of the case. No contract or invoices or other documents have been provided to support the claim that Mr Ainley owed fees of £10,000 to Mr Peach. The fees were not due and had not been demanded at the time that Mr Ainley transferred the money to his wife's bank account.

14. In the absence of any independent evidence to support the existence of any loans by Mrs Ainley or an obligation to pay fees to Mr Peach, we do not accept that such loans were made or that there was a genuine obligation to pay fees to Mr Peach. We consider that the timing of the payments indicates that Mr Ainley sought to reduce the value of his assets in order to assist him to argue that he would suffer serious financial hardship. We are reinforced in this conclusion by the admission by Mr Ainley in a letter dated 12 September to the Authority in which he stated that the money was transferred to his wife to ensure that Mr Peach would be paid "in the event of something happening to me" and that the final invoice from Mr Peach would be in excess of £10,000. If that were the case, we do not understand why Mr Ainley did not simply pay Mr Peach an amount of £10,000 on account. We consider that the amount of £50,000 should be included in Mr Ainley's assets.

15. As to property assets, Mr Ainley's statement of means showed that he had a 50% share in the family home which he valued at £400,000 subject to a mortgage of £150,000 ie an equity interest worth £125,000. The statement of means also showed that he owned seven "buy to let" properties. These had been the subject of the first decision which found that they were sale and rent back ("SRB") properties. There was considerable debate in the correspondence and at the hearing about the realisable value of the SRB properties. On Mr Ainley's own evidence, his equity interest in the

SRB properties was worth between £134,154 and £153,168. Mr Ainley also stated that he had two vehicles with a combined value of £7,400.

16. Mr Ainley submitted that the imposition of a financial penalty would have a serious impact on his health and his family. Mr Ainley set out the impact of the Authority's investigation on his mental health which has meant that he is not fit enough to work. Mr Ainley also claimed that the proceedings had caused emotional trauma and stress to his wife and his children, aged 10 and 13, whose work at school had been affected. One child required personal counselling as a result of the first decision of the Tribunal. In addition, Mr Ainley's brother, who is mentally ill, and his mother, who has cancer, are both reliant on him for emotional and financial support. The Authority disputed that Mr Ainley was not fit to work. We do not consider that we need to determine the exact state of Mr Ainley's health and, although he provided some doctors' reports to justify his non-attendance, we do not feel that we are able to make any findings without more evidence. For the purposes of these proceedings, we are prepared to accept that Mr Ainley has experienced stress which has had an adverse impact on his mental health impairing his ability to work.

17. Ms Irving's evidence was that Mr Ainley had capital of £382,335 (including the £50,000 that had been transferred to Mrs Ainley). In calculating that figure, Ms Irving looked at the value of Mr Ainley's home and the seven SRB properties. The evidence of Ms Irving was that the value of Mr Ainley's interest in the SRB properties was £159,063. After paying off the outstanding mortgages and taking account of any property interest to which Mrs Ainley was entitled, Ms Irving calculated that Mr Ainley had property assets with a value of £302,707. We note that Ms Irving is not (and did not pretend to be) a professional property valuer and used property valuation websites to determine the value of each property. We treat the values derived from such websites, with no inspection or even knowledge of the properties, with considerable scepticism. We note however that, even on Mr Ainley's own figures, the value of his property assets is between £259,154 and £278,168. In our view, the value of Mr Ainley's property assets probably lies somewhere between £260,000 and £300,000 but it is not necessary for us to determine the precise value of those assets in order to decide on the appropriate penalty.

18. The evidence showed that Mr Ainley's income, before tax, in April, May and June 2012, ie immediately after the first hearing, was approximately £20,500. Of that income, £8,227 was received from Black Swan, a company to which Mr Ainley had transferred the servicing rights of MAFM's clients in return for which he received a percentage of future commission. The balance was made up of payments of commission from other companies. The Black Swan commission payments would continue for the duration of the products in respect of which the introductions were made although they would decline over time as the products came to an end.

19. Ms Irving confirmed that, as at 7 August 2012, Mr Ainley had £30,655.78 in three bank accounts. Ms Irving also took into account the £50,000 that Mr Ainley transferred to Mrs Ainley at the end of July 2012 as she did not accept that the amounts were transferred for the reasons given by Mr Ainley. As discussed above, we have concluded that the amounts were probably not made to repay loans by Mrs

Ainley or to pay fees due to Mr Peach and we consider that those amounts should be regarded as part of Mr Ainley's capital.

20. After certain deductions from the capital, Ms Irving calculated that Mr Ainley had £358,190 available to pay the penalty. Even if, as we have found, the value of the seven SRB properties is likely to be less than the value attributed to them by the Authority, we find that Mr Ainley should be able to pay the full amount of the penalty from his capital without having to dispose of the family home and without using any income. We note that Mr Ainley's ability to pay is dependent on him finding a suitably regulated buyer or buyers for the SRB properties in what is, at the time of this decision, a difficult market for residential property sales. Mr Ainley refers in his skeleton to the difficulties in finding a regulated buyer and that one such potential buyer was only prepared to give a maximum of 75% of the value. The Authority suggested that it would be open to Mr Ainley to re-negotiate the agreements with the original vendors, now tenants, of the SRB properties to enable them to be sold. We also note that one of the properties is no longer occupied by the vendor and so there is no restriction on its sale. We consider that Mr Ainley should be able to sell the properties but that he should be allowed a reasonable period of time to pay that part of the penalty which must be funded by the disposal of the SRB properties.

Submissions

21. In his letters, Mr Ainley submitted that the penalty is wholly disproportionate to the gravity of his failings and his means. His argument, in essence, was that prohibition was, in itself, a severe sanction, and that the imposition of a financial penalty in addition on a man deprived of his livelihood and of limited means was excessively severe.

22. Mr Shivji, on behalf of the Authority, submitted that Mr Ainley's conduct is of a very serious kind and merits the imposition of a severe penalty. The Authority's position was that the minimum penalty for mortgage fraud should be £100,000 and the penalty for misleading the Authority in this case should be £50,000 which should be in addition, making a total of £150,000. The Authority referred us to previous decisions of the Authority and the Tribunal which imposed penalties for mortgage fraud of between £100,000 and £200,000 and of between £25,000 and £100,000 for misleading the Authority. The Authority contended that, taking all matters into account, £150,000 is the appropriate level of penalty for Mr Ainley's misconduct. The Authority did not accept that Mr Ainley had presented any verifiable evidence that he would suffer serious financial hardship if the penalty of £150,000 were imposed. Further, the Authority considered that Mr Ainley has sufficient assets to pay a penalty of £150,000 and there is no reason why Mr Ainley should not be required to pay that amount.

23. Mr Pont, appearing on behalf of Mr Ainley, stated that Mr Ainley still maintained that he was completely innocent of the misconduct which the Tribunal had found that he had committed. Mr Ainley had difficulty in understanding how he would be able to sell the SRB properties in the current market. Unless the properties can be sold then Mr Ainley would suffer severe financial hardship.

24. Mr Pont correctly reminded us that every case turns on its own merits and must be considered individually. He urged us to be cautious when looking at the cases referred to by the Authority as showing that the appropriate level of penalty was at the same level or higher than the penalty the Authority sought from Mr Ainley. We could not know, he said, what the details of the cases were that led the Tribunal to confirm particular amounts as penalties. We agree that the cases are not models to be followed but they can serve as guides in determining what amount is appropriate in cases of a particular type.

25. Mr Pont emphasised the impact that a large financial penalty would have on Mr Ainley's family. Mr Ainley was married with two children. His mother had recently been diagnosed with cancer and his brother suffered from mental illness.

26. Mr Pont also reminded us that Mr Ainley, now 50 years old, would find it impossible to find work in the financial services industry, in which he had worked all his life, now that he had been found guilty of misconduct. Further, it was not clear what Mr Ainley would or could do as he had no experience in any area other than financial services and the effect of the Tribunal proceedings and the first decision was to cause Mr Ainley to suffer a complete loss of self-esteem, causing depression. Although the evidence showed that Mr Ainley's income, before tax, in the three months after the first hearing was approximately £20,000, Mr Pont submitted that his income would be substantially reduced going forward. It was in that light, Mr Pont suggested that Mr Ainley had transferred the sum of £50,000 to Mrs Ainley in order to safeguard the family's interests.

27. Mr Pont said that Mr Ainley was willing to sell the SRB properties if it could be done. The Authority had not established that selling the SRB properties would raise a sufficient amount to pay the penalty which meant that Mr Ainley would have to top up whatever sum was obtained from other sources such as selling the family home.

Discussion

28. *Is a financial penalty appropriate?* In our view, there can be no doubt that mortgage fraud is a very serious matter. We agree with the comments of the Tribunal in *Curren v FSA* [2011] UKUT B32 (TCC), at [34], that:

> "The submission to lending institutions of dishonest mortgage applications is, in our view, a very serious matter … If, as we consider has been established, he knowingly submitted dishonest applications, his conduct merits a severe penalty; it amounts to a breach of trust."

29. In the first decision, we found that Mr Ainley was guilty of serious and deliberate misconduct over a number of years in that he deliberately submitted mortgage applications, on his own behalf and on behalf of clients, knowing them to contain false information. As stated in that decision, we consider that such behaviour clearly requires that a substantial financial penalty should be imposed. There is nothing in the written submissions and other material provided by Mr Ainley or the submissions made at the second hearing by Mr Pont, on his behalf, to dissuade us from that view or persuade us to reduce the amount of the penalty to nil. The object

of Mr Ainley's misconduct was to obtain a financial advantage for him and for his clients and it seems to us to be entirely appropriate that the sanctions for such behaviour should include a financial penalty.

30. *What is the appropriate amount of the penalty for the misconduct?* Section 66 of the Act provides that, where a person is guilty of misconduct, the Authority can impose a financial penalty of such amount as it considers appropriate. The legislation does not provide any guidance on what is an appropriate amount for a financial penalty.

31. The Authority considers that the minimum penalty for mortgage fraud should be £100,000 and it should be £25,000 for misleading the Authority. In this case, the Authority considered a penalty of £150,000 to be appropriate. The Authority referred us to its own decisions and to decisions of the Tribunal to show that similar penalties had been imposed in similar cases. We agree with Mr Pont that the cases and decisions to which we were referred by the Authority do not bind us to impose any particular amount by way of penalty but they serve as useful guides in establishing the appropriate amount for a particular type of misconduct.

32. In considering the appropriate level of a penalty we are not bound by the Authority's tariff for particular misconduct, or even the factors the Authority takes into account, but may reduce or increase a penalty which is the subject of a reference on any grounds we think fit, within the parameters of the proper exercise of judicial discretion. In practice, the Tribunal respects the Authority's tariff, in the interests of consistency between applicants, while departing from it in an appropriate case. We note that in *Curren*, a case that also involved mortgage fraud and misleading the Authority, the Tribunal found themselves, at [35], "unable to say that a starting point of £150,000 for failings of the gravity we have described is too severe".

33. We consider that the amount of the penalty should be set at a level that both punishes Mr Ainley for his misconduct and deters others from similar misconduct. In determining what amount of penalty would act as a punishment for submitting mortgage applications, knowing them to contain false information, we start by considering the financial benefit gained by the misconduct. In our view, the appropriate starting point for a penalty should be higher than the amount gained by the misconduct. Mr Ainley benefited financially from his misconduct in that:

> (1) he obtained amounts of commission in respect of the mortgage applications submitted on behalf of Mr and Mrs G; and
>
> (2) he acquired seven SRB properties in which, on Mr Ainley's own evidence, he has an equity interest worth between £134,154 and £153,168 and in respect of one of the properties Mrs Ainley also has an interest with a value of £11,500.

34. In our view, the evidence considered in relation to the first decision and the evidence submitted by Mr Ainley in relation to his means shows that he had obtained a financial benefit materially in excess of £150,000 by his misconduct in relation to

the mortgage applications. It follows that, in order to be an effective punishment, the penalty for that misconduct should be set at a level higher than £150,000.

35. We regard Mr Ainley's misleading of the Authority as a separate example of misconduct that merits an additional penalty. We accept that the cases show that there is a wide variation in penalties for such misconduct, as there must be, given that it can take many varied forms. Our view is that the amount of £50,000 attributed by the Authority to this misconduct cannot be described as inappropriate.

36. We take the view that a penalty of £150,000 or more is a significant amount and would be an effective deterrent to others.

37. Our conclusion is that a penalty substantially in excess of £150,000 is an appropriate starting point in this case. It does not follow that the penalty actually imposed will be higher than £150,000 as the Tribunal, having taken into account all the circumstances of the case and Mr Ainley's situation, may determine that the penalty should be higher or lower than the appropriate starting point.

38. *Should the penalty be increased?* The Authority did not ask us to impose a penalty greater than £150,000 and, even though we might have set the penalty at a level substantially higher than that amount, we have decided not to do so. We are reluctant to increase penalties save in clear cases, such as where the evidence before the Tribunal reveals the misconduct to be more serious than was known to the Authority when it set the penalty, since doing so may deter those with meritorious appeals from pursuing them for fear that the penalty might be increased.

39. *Should the penalty be reduced?* A penalty might be reduced below what would otherwise be the appropriate level, where there are mitigating factors and also where paying that level of penalty would cause the person serious financial hardship or financial difficulties. The fact that a person will experience serious financial hardship does not necessarily mean that a penalty should be reduced. We agree with the observations of the Tribunal in *David John Bedford v FSA* [2011] UKUT B42 (TCC), at [36], that:

> "It is inevitable that the imposition of only a modest penalty because of the personal circumstances of the offender will diminish the deterrent effect, since the amount finally determined becomes the “headline” figure."

40. In this case, Mr Ainley did not put forward any mitigation in relation to his misconduct but continued to maintain that he was not guilty of any misconduct. Having considered the evidence, we cannot find any mitigating factors that would justify any reduction in the penalty.

41. The main thrust of the submissions made by Mr Ainley and on his behalf was that he and his family would suffer serious financial hardship if he were required to pay the penalty of £150,000. The Authority's guidance on this issue is contained in DEPP 6.5.2G(5) which provides:

"(a) The FSA may take into account whether there is verifiable evidence of serious financial hardship or financial difficulties if the person were to pay the level of penalty appropriate for the particular breach. The FSA regards these factors as matters to be taken into account in determining the level of a penalty, but not to the extent that there is a direct correlation between those factors and the level of penalty.

(b) The purpose of a penalty is not to render a person insolvent or to threaten the person's solvency. Where this would be a material consideration, the FSA will consider, having regard to all other factors, whether a lower penalty would be appropriate. This is most likely to be relevant to a person with lower financial resources; but if a person reduces its solvency with the purpose of reducing its ability to pay a financial penalty, for example by transferring assets to third parties, the FSA will take account of those assets when determining the amount of a penalty…."

We consider that there must be verifiable evidence of serious financial hardship before it can be accepted as justifying a reduction in a penalty. We also agree that if a person has transferred assets to another in an attempt to take those assets out of consideration for the purposes of a penalty then that transfer should be disregarded.

42. The burden of proving that he would suffer serious financial hardship falls on Mr Ainley and the submissions must be supported by independent and verifiable evidence. We have described the evidence on this issue and our findings above. Our view is that Mr Ainley has not established on the balance of probabilities that he would suffer serious financial hardship. We have concluded that paying the penalty should not require Mr Ainley to sell the family home. Further, the evidence shows that Mr Ainley should have a reduced but still adequate income for the immediate future. On the evidence that we have seen, we are not persuaded that Mr Ainley would suffer serious financial hardship. Our view is that the penalty should remain at £150,000.

43. *Time for payment of the penalty*. We accept that Mr Ainley is not able to pay the penalty of £150,000 immediately as he will be required to make arrangements to dispose of the seven SRB properties. We consider that Mr Ainley should be able to pay an amount of £50,000, ie the amount that he transferred to Mrs Ainley shortly after the release of the first decision, towards the penalty within one month of the date of the Authority issuing a Final Notice to him. We consider that Mr Ainley should pay the balance of £100,000 over the course of the next 12 months during which time he should be able to sell the SRB properties. For the avoidance of doubt, we are not saying that the payment of the balance of £100,000 is dependent on or linked to the sale of the SRB properties. It is, of course, for Mr Ainley to determine how his assets should be re-ordered or deployed to meet the penalty but, as the SRB properties are a significant part of those assets, we consider that the time limit for paying the balance of the penalty should reflect the time that we believe it might take to dispose of those properties.

Decision

44. The amount of the financial penalty is confirmed as £150,000. Mr Ainley must pay the Authority £50,000 towards the penalty within one month of the date of the Authority issuing a Final Notice to him. Mr Ainley must pay the Authority the balance of £100,000 during the 12 months following the date of Authority issuing a Final Notice to him at a time or times to be agreed with the Authority.

Costs

45. On 15 October 2010, the Authority issued a supervisory notice in relation to the SRB properties which was withdrawn with effect from 6 March 2012 so that a reference by Mr Ainley was no longer necessary. At the time, Mr Ainley reserved his right to apply for costs in relation to that supervisory notice. By order of the Tribunal dated 19 March 2012, the question of costs was reserved until the conclusion of these proceedings. Mr Pont did not have any instructions in relation to the costs and was not in a position to make any application. We direct that if Mr Ainley wishes to make an application for his costs in relation to the supervisory notice, then he must do so in writing within 14 days of the date of the penalty hearing ie by no later than 5:00 pm on 6 December 2012.

46. The Authority did not make any application for costs at the conclusion of the hearing but reserved its position so that it might make such an application, if it thought it appropriate, in the light of any application to be made by Mr Ainley. We direct that the Authority should make any application for costs within 21 days of the date of the hearing ie by no later than 5:00 pm on 13 December 2012.

GREG SINFIELD
JUDGE OF THE UPPER TRIBUNAL

RELEASE DATE: 07 DECEMBER 2012