

*TRIBUNAL – Jurisdiction – Matter referred – Decision to fine Applicant for market abuse and breaches of Principles 2 and 3 – Decision referred to Tribunal – Authority’s statement of case contends that Tribunal should determine as appropriate action the withdrawal of Applicant’s approval or the prohibition of the Applicant – Whether Authority’s contention as to the appropriate action relates to the “matter referred” – Yes – Financial Services and Markets Act 2000, s.133*

**FINANCIAL SERVICES AND MARKETS TRIBUNAL**

**PHILIPPE JABRE**

**Applicant**

**- and -**

**FINANCIAL SERVICES AUTHORITY  
(Decision on Jurisdiction)**

**The Authority**

**Tribunal: STEPHEN OLIVER QC  
IAN ABRAMS  
SANDI O’NEILL**

**Sitting in public in London on 10 July 2006**

**Charles Flint QC, and Ben Jaffey, counsel, instructed by Kingsley Napley, solicitors, for the Applicant**

**Michael Brindle QC and Andrew George, counsel, instructed by the Financial Services Authority, for the Respondents**

**© CROWN COPYRIGHT 2006**

## DECISION

1. This is a preliminary hearing listed under rule 13 of the Tribunal Rules to  
5 determine whether the Tribunal has jurisdiction to entertain the matters raised in  
paragraphs 45 and 46 and 48.2 and 48.3 of the Authority's Statement of Case. Shortly  
stated the relevance of the issue is this. The Applicant, Mr Philippe Jabre, has  
referred to the Tribunal a decision that he be fined for market abuse and for breaches  
of Principles 2 and 3. The Authority's statement of case contends that the Tribunal  
10 should determine and direct, as the appropriate action for the Authority to take, the  
withdrawal of Mr Jabre's approval or his prohibition. The question is whether that  
action relates to the matter referred. Unless it does, a determination and direction on  
the lines sought by the Authority will be outside our jurisdiction.

### 15 **Background**

2. Mr Jabre was a senior trader, employed by and a managing director of the  
hedge fund managers, GLG Partners LP ("GLG"), one of the largest hedge fund  
managers in Europe. Mr Jabre had over 20 years experience investing in international  
20 markets and was a specialist in the Japanese markets and convertible arbitrage  
strategies.

3. Mr Jabre had been approved by the Authority pursuant to section 59 of the  
Financial Services and Markets Act 2000 (all statutory references in this Decision are  
25 to that Act) to carry on the following controlled functions on behalf of GLG: Director  
(CF1), Investment Adviser (CF21), Customer Trading (CF26) and Investment  
Manager (CF27).

4. In order to grant such approval to an individual, the Authority must, pursuant  
30 to section 60, be satisfied that the person in respect of whom the application is made  
is a fit and proper person to perform the function to which the application relates.

5. As an approved person, Mr Jabre was required to comply with the Statements  
of Principle issued by the Authority, pursuant to section 64, with respect to the  
35 conduct of approved persons. Principle 2 requires an approved person to act with due  
skill, care and diligence in carrying out his controlled function. Principle 3 requires  
an approved person to observe proper standards of market conduct in carrying out his  
controlled function.

6. On 11 February 2003, Mr Jabre was telephoned by a Mr Rustum, a salesman  
40 at Goldman Sachs and was "wall-crossed" or "restricted". Mr Jabre's reply says that  
"[Mr Jabre] understood that unless the restriction was lifted, or an issue was  
announced, he would not be able to make any trades based on any confidential  
information given to him during the call." Mr Rustum thereafter provided  
45 information to Mr Jabre about a proposed issue of securities by the Japanese bank,  
Sumitomo Mitsui Financial Group Inc ("SMFG"). There is a dispute about the  
significance of the information which Mr Jabre received. There is a further dispute

about what Mr Jabre asked Mr Rustum at the end of the telephone conversation and what Mr Rustum said to Mr Jabre in a subsequent conversation between them. Mr Jabre says that (1) he informed Mr Rustum that he had “already been borrowing and shorting SMFG stock”; (2) he asked Mr Rustum “about the effect of their discussion on his existing trading pattern”; and (3) Mr Rustum subsequently telephoned him back, and informed him that “he was free to keep his existing trading pattern”.

7. The case for the Authority in relation to the issues generally is that (1) Mr Jabre informed Mr Rustum that he had made requests to borrow shares in the four major Japanese banks; (2) Mr Jabre asked Mr Rustum what he should do with his existing requests to try to borrow shares in the four major Japanese banks and (3) Mr Rustum subsequently telephoned him back and said that Mr Jabre should not initiate any new requests to locate or borrow SMFG stock but that he did not have to, and indeed was not to, cancel the pre-existing orders which were already in place.

8. The e-mail advice which Mr Rustum received from his compliance department prior to his second conversation with Mr Jabre has been disclosed by Goldman Sachs. It states, among other things, “[Mr Jabre] cannot put out any new orders or trade [SMFG] at all”. After his second conversation with Mr Jabre, Mr Rustum e-mailed his compliance department and wrote, “I spoke to [Mr Jabre] just now and he understands.”

9. On 12, 13 and 14 February 2003, Mr Jabre conducted a significant number of short sales in SMFG shares. As a result of the heavy fall in the SMFG share price following the announcement of the issue, Mr Jabre was able to make a substantial profit.

10. The essence of the Authority’s case is that the short sales were based on the confidential information Mr Jabre had received from Mr Rustum and amounted to market abuse and a breach of Principles 2 and 3 (set out above).

### **The Authority’s Notices**

11. The Warning Notice issued on 8 April 2005 had sought a withdrawal of approvals granted under section 59 on the grounds that Mr Jabre had committed breaches of Principles 1 and 3, had engaged in behaviour constituting a deliberately conceived plan to abuse the market and was therefore not fit and proper. The Warning Notice expressly sought a withdrawal of approvals on the grounds that Mr Jabre was not fit and proper:

“101. On the basis of the evidence presently available, the FSA believes that Mr Jabre poses a significant risk to confidence in the financial system and that he is not fit and proper. The FSA considers that a withdrawal of the approvals which Mr Jabre currently holds to perform controlled functions for GLG is necessary to maintain market confidence in the hedge fund industry, particularly the convertible arbitrage segment of it, and is the most appropriate sanction in all the circumstances.”

12. The Decision Notice followed an oral hearing before the Regulatory Decisions Committee of the FSA. FSA Enforcement and Mr Jabre were represented and made submissions. So far as relevant, the Decision Notice provides as follows:

5 “1.1 For the reasons set out below ... the FSA has decided to impose a financial penalty of £750,000 on Mr Jabre because:

(a) Mr Jabre has committed market abuse contrary to section 118 of FSMA;

10 (b) Mr Jabre has breached Principles 2 (Due Skill, Care and Diligence) and 3 (Market Conduct) of the FSA’s Statements of Principle for Approved Persons.

15 ...

3.15 In the light of these various submissions and of the findings and other material summarized in this Notice, the FSA makes no findings that Mr Jabre breached Principle 1 (Integrity) of the Principles for Approved Persons ...”

## 20 **Mr Jabre’s Reference Notice**

13. On 27 March 2006, Mr Jabre filed a reference notice with the Tribunal. The Notice referred the following matters only:

25 “The Tribunal is asked to consider the decision of the FSA as set out in the Decision Notice that Mr Jabre has committed market abuse contrary to section 118 of FSMA and has breached Principle 3 of FSA’s Statements of Principle for Approved Persons. The findings set out in the Decision Notice are wrong; Mr Jabre has not committed market abuse or breached Principle 3. Further, and in any event, the fine imposed on Mr Jabre is excessive and disproportionate.”

## **Authority’s contentions in statement of case**

14. The FSA’s statement of case advances the following contentions:

35 “Not fit and proper

45 Pursuant to section 63 ... , the Authority may withdraw an approval given under section 59 if it considers that the person in respect of whom it was given is not a fit and proper person to perform the functions to which the approval relates. Pursuant to section 56 ... , 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 carried on by an authorized person, it may make a prohibition order.

46. Mr Jabre is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorized person ...

Particulars

50 46.1 ...

46.2 In the premises, Mr Jabre deliberately and knowingly committed market abuse and/or deliberately and knowingly failed to observe proper standards of market conduct.

5

46.3 Mr Jabre's actions were particularly serious in the light of the fact that ... he abused the "wall-crossing" procedure in which he had agreed to participate, and the trust which had thereby been placed in him by Goldman Sachs."

10 Under the heading "Sanction" the statement of case states:

"48. It is the Authority's case that the Tribunal should

48.1 direct the Authority to impose a substantial financial penalty on Mr Jabre for the market abuse and/or misconduct set out above; and

15

48.2 in the event that Mr Jabre is approved under section 59 ... to perform controlled functions as at the date of disposition of the reference, direct the Authority to withdraw that approval

20

48.3 in the event that Mr Jabre is not approved under section 59 ... to perform controlled functions as at the date of disposition of the reference, direct the Authority to make a prohibition order on such terms as the Tribunal thinks fit".

25

### **Summary of the positions of the parties**

15. The Authority contends that the Tribunal should conclude, in the light of the matters summarized in the Decision Notice, that Mr Jabre is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorized person; the Tribunal should therefore direct that (1) his approval should be withdrawn; alternatively (2) in the event that, as at the date of the Tribunal's determination, Mr Jabre does not have any such approval, Mr Jabre should be subject to a prohibition order.

30

16. For Mr Jabre it is contended that the Tribunal has no jurisdiction to entertain the Authority's contentions either that Mr Jabre's approval should be withdrawn on the grounds that he is not a fit and proper person to perform the regulated functions or that he should be subject to a prohibition order. Because the Authority decided to take no action to withdraw Mr Jabre's approval under section 63(1) (withdrawal of approvals), there was no Decision Notice issued under section 63(4). The Decision Notice was given under section 67 and section 127(1) (market abuse), neither of which provisions refer to fitness and propriety. As a result Mr Jabre has no right to make a reference under section 63(5) which covers fitness and propriety. It follows, it is argued, that the Tribunal cannot entertain any matter arising under section 63(1).

35

40

45

## The statutory framework

17. The powers and actions of the Authority to which this Preliminary Issue  
5 relates are all found in Part V of the Act which is headed “Performance of Regulated  
Activities”. These are activities of “individuals” as distinct from those of “authorized  
persons”, i.e. firms, which are covered by Parts II-IV.

18. Section 56 gives the Authority power to make a prohibition order if an  
10 individual is not a fit and proper person to perform functions in relation to a regulated  
activity carried on by an authorized person. Section 57 requires the Authority to give  
a Warning Notice setting out the terms of the prohibition where it proposes to make a  
prohibition order. If the Authority then decides to make a Prohibition Order it is  
required to issue a Decision Notice. Section 57(5) provides that:

15 “A person against whom a Decision Notice to make a Prohibition Order is made may  
refer the matter to the Tribunal”.

Section 63 gives a separate power to the Authority to withdraw an approval if the  
20 Authority considers that a person is not a fit and proper person to perform the function  
to which the approval relates. Section 63 is framed on the basis that both the  
individual and the firm for which he works are “interested parties” in relation to the  
approval. It provides, among other things, that:

25 “(2) When considering whether to withdraw its approval, the Authority may take  
into account any matter which it could take into account if it were considering an  
application made under section 60 in respect of the performance of the functions to  
which the approval relates.

30 ...

(5) If the Authority decides to withdraw its approval, each of the interested  
parties may refer the matter to the Tribunal.”

35 Section 66 comes under the specific heading “Conduct” and is described in the rubric  
as “Disciplinary powers”. It enables the Authority to “take action against a person” if  
he is guilty of misconduct in the sense that he has breached the statements of  
principle. For present purposes the relevant principles established in pursuance of  
section 64 are:

40 Principle 1 : An approved person must act with integrity in carrying out his controlled  
function.

45 Principle 2: An approved person must act with due skill, care and diligence in  
carrying out his controlled function.

Principle 3: An approved person must observe proper standards of market  
conduct in carrying out his controlled function.

By section 66(3) the action the Authority may take is either to impose a penalty on the person in question or to publish a statement of his misconduct.

5 19. Section 67 sets out the procedure (involving warning notices and decision notices) and provides that:

(7) If the Authority decides to take action against a person under section 66, he may refer the matter to the Tribunal.”

10

20. Part IX is headed “Hearings and Appeals”. Section 132 constitutes the Tribunal as follows:

15 “(1) For the purposes of this Act, there is to be a tribunal known as the Financial Services and Markets Tribunal (but referred to in this Act as “the Tribunal”).

(2) The Tribunal is to have the functions conferred on it by or under this Act .

20 (3) The Lord Chancellor may by rules make such provision as appears to him to be necessary or expedient in respect of the conduct of proceedings before the Tribunal.

...”

25 Section 133 provides, under the rubric “Proceedings: general provision”:

“(3) 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 Authority at the material time.

30

(4) 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.

35 (5) On determining a reference, the Tribunal must remit the matter to the Authority with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination.

40 (6) In determining a reference made as a result of a decision notice, the Tribunal may not direct the Authority to take action which the Authority would not, as a result of section 388(2), have had power to take when giving the decision notice.

45 (7) In determining a reference made as a result of a supervisory notice, the Tribunal may not direct the Authority to take action which would have otherwise required the giving of a decision notice.

...”

(9) The Authority must not take the action specified in a decision notice –

50 (a) during the period within which the matter to which the decision notice relates may be referred to the Tribunal

...”

21. Section 123 gives the Authority power to impose financial penalties for  
5 market abuse. A right of reference to the Tribunal in respect of that matter is  
conferred by section 127(4).

22. Section 388 governs decision notices. It provides, in subsection (1), among  
10 other things, that a decision notice must give the Authority’s reasons for the decision  
to take the action to which the notice relates and whether access is available to  
material in the Authority’s hands. The section continues:

“(2) If the decision notice was preceded by a warning notice, the action to which  
15 the decision notice relates must be action under the same Part as the action proposed  
in the warning notice.

(3) The Authority may, before it takes the action to which a decision notice (“the  
20 original notice”) relates, give the person concerned a further decision notice which  
relates to different action in respect of the same matter.”

## Conclusions

23. The statutory function of the Tribunal “on a reference” is to “consider any  
25 evidence relating to the subject-matter of the reference”, to “determine what (if any) is  
the appropriate action for the Authority to take in relation to the matter referred to it”  
and, on determining it, to “remit the matter to the Authority with directions  
appropriate for giving effect to its determination”. Those phrases are taken from  
section 133.

30 24. The Tribunal is not an appeal tribunal. It neither hears appeals from decisions  
of the statutory authority nor does it sit in an appellate role to hear appeals against  
decisions of tribunals of first instance. Instead it has been created to function as part  
of the regulatory process. It is there to consider the relevant evidence and to  
35 determine what is the appropriate action for the Authority to take in relation to the  
matter referred.

25. The Tribunal’s function and jurisdiction are defined by “the matter referred to  
it”. Bearing in mind the absence of a decision of the Authority to take action to  
40 withdraw Mr Jabre’s approval on grounds that he was not a fit and proper person (see  
section 63(1)), the critical question is whether the issue of Mr Jabre’s fitness and  
propriety falls within the scope of the expression in section 133(4) “the matter  
referred to” the Tribunal. Only if it does may the Tribunal determine that the  
appropriate action is a sanction, such as withdrawal of approval, that is occasioned by  
45 a lack of fitness and propriety.

26. While recognizing that the Tribunal functions as part of the regulatory process  
rather than as an appeal tribunal, Mr Jabre contends that the matter referred must  
comprise the legal issue as defined by the action stated in the decision notice and the



reasons for that action. The requirement for reasons for the decision to take the action is contained in section 388(1); so also is the obligation for the decision notice to inform the person in question of the “right” to have the matter referred to the Tribunal. Here the decision notice made no finding of any breach of Principle 1 (integrity) and did not call into question Mr Jabre’s fitness and propriety under section 63. There was therefore no legal issue dependent upon Mr Jabre’s fitness and propriety. Consequently Mr Jabre’s fitness and propriety did not figure as reasons for the action decided upon by the Authority. There was thus no right to have that matter referred to the Tribunal. The result, so the argument for Mr Jabre goes, is that the matter of withdrawal of his approval on fitness and propriety grounds is not “the matter referred to” the Tribunal as those words are used in section 133(4). The matter actually referred arises from the exercise by Mr Jabre of his right, in section 67(6), to refer the decision to impose the penalty of £750,000.

27. Is it correct as a matter of principle that the Authority, acting through its Enforcement department, can seek to persuade the Tribunal that its own decision, reached by its own decision-making body, was too lenient and can ask the Tribunal to direct a more severe sanction? In this Preliminary Issue we are concerned only with the facts and circumstances as disclosed in the warning notice and the decision notice; it is not open to Mr Jabre at this hearing to question the motives of the Authority behind their allegations in the statement of case. Nonetheless the consequence of those allegations is that Mr Jabre, by pursuing these reference proceedings, is exposing himself to what might for him be the most severe sanction of all, i.e. being deprived of the right to carry on his career in the hedge fund industry. If that is what the Act allows, the consequence must follow. However, before acceding to the Authority’s contentions, we would need to be sure that the Act was clear on the point; any ambiguity should be resolved in the applicant’s favour.

28. The meaning of the expressions “the matter referred”, or “the subject-matter of the reference” in section 133 has to be derived from their context. The first point relevant to this is the Tribunal’s function. It provides a stage in the regulatory process to “determine” what is the appropriate action for the Authority to take having considered any evidence relating to the subject-matter of the reference. As the Tribunal’s role is not to adjudicate on the rightness or otherwise of the decision as expressed in the decision notice, the decision itself is not strictly a relevant consideration for the Tribunal to take into account. Instead it is the allegations made in the decision notice and the circumstances on which these are based that fall to be considered and evaluated. They comprise the matter referred. It is in relation to those circumstances and any further relevant evidence that was not available to the Regulatory Decisions Committee that the Tribunal’s function is to determine the appropriate action for the Authority to take. The indications, so far, are that the circumstances, the evidence and the allegations before the Regulatory Decisions Committee, and not the decision, are “the subject-matter of the reference”.

29. The second point is that in the present case the facts and circumstances on which the Authority relies in its statement of case were before the Regulatory Decisions Committee. They are either set out within the decision notice or are

recorded in the decision notice as matters on which the Regulatory Decisions Committee did not reach a concluded factual finding. In this respect it can be said that the facts and matters before the Regulatory Decisions Committee are the facts and matters relied upon by the Authority for the purposes of the present reference. This is not a case such as that considered in *Parker v FSA* (an unreported decision on a preliminary issue) where a new allegation unconnected with the factual context that gave rise to the original decision was sought to be raised. Nor is the present situation comparable to that found in *Ryder (No.2)* (2006), a Pensions Regulator Tribunal reference. There the matter that Mr Ryder had sought to raise related to factual issues that had not been in front of the Determinations Panel of the Pensions Regulator and therefore formed no part of the body of facts to which the determination notice related.

30. Looking further at the wording of section 133 we observe, as our third point, that subsections (6) and (7) of section 133 contain a strong implication that the “matter” which the Tribunal is required to “determine” is not and cannot be restricted to the specific decision contained in the decision notice. Section 133(6), as already noted, provides that in determining a reference the Tribunal may not direct the Authority to take any action which the Authority would not, as a result of section 388(2), have had the power to take when giving the decision notice. Section 388(2) directs that the action to which the decision notice relates must be action in the same Part as the action proposed in the warning notice. Then section 133(7) provides that in determining a reference as a result of a supervisory notice, the Tribunal may not direct the Authority to take action which would otherwise have required the giving of a decision notice.

31. These provisions set out what seems to us to be a clear code as to the Tribunal’s jurisdiction which enables it to depart from the Authority’s decision when determining the matter referred to it. Any direction given by the Tribunal to the Authority to take action must, in the first place, be under the same part of the Act as the decision set out in the original warning notice; and, in the second place, the Tribunal’s direction must not involve substituting a statutory remedy for which a decision notice is required for one for which a supervisory notice is required. It must, we think, follow that the Act expressly contemplates the Tribunal determining, as appropriate action for the Authority to take, an action of a different nature to that covered by the decision notice.

32. In this connection we refer to Mr Jabre’s construction of the term “the matter” in section 133; this is the matter in respect of which the Tribunal has jurisdiction in any particular case. The Tribunal’s power to give directions under section 133(5) is circumscribed by section 133(6). The latter provision does not, it is argued, enlarge or alter the jurisdiction of the Tribunal in respect of the matter referred; it makes clear that the Tribunal is not to have a greater power than the Authority had at the decision notice stage. We agree with the Authority that if Mr Jabre’s construction of the word matter were correct, these provisions would be otiose as the Tribunal’s jurisdiction would in all the circumstances be limited to the specific section of the Act under which the decision contained in the decision notice had been taken. The statutory

remedies in the different sections of Part V contain a range of sanctions that may be imposed on an individual following a failure appropriately to perform regulated functions. Thus, when the Tribunal addresses its statutory function in section 133(4) of determining what is the “appropriate action” it must be free, subject to the limited constraints in subsections (6) and (7), to impose the appropriate sanction in Part V.

33. The argument from Mr Jabre then focuses on the Tribunal’s rules. These, it is contended, prevent the Authority from introducing matters outside the scope of its own decision notice. Reference is made to Rule 5 which sets out the proper content of the statement of case as follows:

“(1) The Authority shall file a written statement (“the statement of case”) in support of the referred action ...

(2) The statement of case shall –

- (a) specify the statutory provisions providing for the referred action;
- (b) specify the reasons for the referred action;
- (c) set out all the matters and facts upon which the Authority relies to support the referred action ... .”

The “referred action” is defined in Rule 2 as meaning “the act (or proposed act) on the part of the Authority that gave rise to the reference”.

34. The argument for Mr Jabre on the wording of the Tribunal rules runs as follows. Here the “referred action” is that set out in the decision notice. The referred action plainly does not include action which the Authority considered taking but decided not to. The statutory provisions providing for the referred action (i.e. the proposed act that gave rise to the reference) were the Authority’s decisions under section 133 (market abuse) and section 66 (principles), not section 63 (fitness and propriety) nor section 56 (prohibition order). There was no “referred action” to withdraw approvals or make a prohibition order. It follows therefore that any attempt by the Authority to plead matters that go beyond supporting “the referred action” are an abuse of process and should be struck out.

35. We cannot accept this. In the first place, whatever the meaning of the Rules, they do not define the jurisdiction of this Tribunal. This is covered by section 133. Rule 5(1) deals with the contents of the statement of case and not the jurisdiction of the Tribunal. In the second place the Authority’s statement of case does support the referred action in that it proposes, consistently with the decision notice, that action be taken by the Tribunal under Part V of the Act for Mr Jabre’s failure to perform his regulated activities and under Part VIII for market abuse.

36. Could there, on some more general principle, be an abuse of process on the part of the Authority? We think not. Any suggestion that there could be is based on a confusion as to the respective roles of the Regulatory Decisions Committee and of the Tribunal. Once the formal process governing the making of decisions as released in the warning and decision notices has been completed and the relevant matter has been

referred, that formal process gives way to the Tribunal's statutory "determination" function and the Tribunal's rules of engagement take over. The Tribunal Rules reflect its different function and its different procedure, at least so far as concerns the evaluation of evidence. The prescribed steps in the process leading to the hearing, i.e. the reference notice, the statement of case and the reply, coupled with the rules of natural justice, are there to enable the Tribunal to determine what is the appropriate action in a fair and just manner.

37. It follows, we think, that the points taken by the Authority in their statement of case do not constitute an abuse of process in relation to the reference to the Tribunal. The action amounts to a statement of what the Authority sees to be the appropriate action for the Tribunal to take. The matters raised in the statement of case are consistent with the Tribunal's rules of procedure and with the Tribunal's statutory function. Mr Jabre has the opportunity to respond to those points and to confront them with his own evidence.

38. We are satisfied, for the reasons given above, that the Tribunal has jurisdiction to entertain the relevant matters in the Authority's statement of case. We rule accordingly.

**STEPHEN OLIVER QC**  
**CHAIRMAN**

FIN 2006/0006