PROHIBITION ORDER – Revocation or variation – Circumstances relevant to application to revoke or vary – Whether circumstances present in Applicant's reference to require variation of order – No – Reference dismissed

FINANCIAL SERVICES AND MARKETS TRIBUNAL

RAFIQ AHMED PETKAR **Applicant**

- and -

FINANCIAL SERVICES AUTHORITY **The Authority**

Tribunal: STEPHEN OLIVER QC
CHRISTOPHER BURBIDGE
TERENCE CARTER FCA

Sitting in public in London on 6 September 2006

The Applicant appeared in person

Adrian Berrill-Cox, counsel, for the Authority

DECISION

1. Mr R A Petkar, the Applicant, has referred a Decision in a Decision Notice issued by the Authority on 1 April 2006.

The Reference

2. By a Notice dated 29 June 1999 the Financial Services Authority ("the Authority"), pursuant to s.59(4) of the Financial Services Act 1986 ("the 1986 Act"), notified Mr Petkar of its intention to make a direction against him disqualifying him from being employed in connection with investment business of any kind whatsoever by any authorized or exempted person or by any European Institution or European investment firm carrying on home-regulated invested business in the United Kingdom without the written consent of the Authority. The disqualification direction under s.59 of the 1986 Act was made on 24 August 1999.

3. On 1 December 2001 the 1986 Act was largely repealed and replaced by the Financial Services and Markets Act 2000 ("the Act"). As a consequence of Article 79 of the Financial Services and Markets Act 2000 (Transitional Provisions) (Authorized Persons etc) Order 2001 (SI 2001/2636) the disqualification direction was effectively novated into a prohibition order under s.56 of the Act.

4. On 4 November 2005 Mr Petkar made a formal application to the Authority to revoke or vary the Prohibition Order placed against him. The Authority, having considered the matter, reached the view that it would not be appropriate to vary or revoke the Prohibition Order and therefore, proposing to refuse the application, issued a Warning Notice to the Applicant on 31 January 2006.

Mr Petkar took the opportunity to make oral representations to the Regulatory Decisions Committee ("RDC") at the Authority on 14 March 2006. Having heard these representations the Authority decided to refuse the Applicant's application to have the Prohibition Order revoked or varied and issued a Decision Notice dated 22 March 2006 to this effect.

6. On 1 April 2006 Mr Petkar referred the Authority's Decision Notice to the Tribunal on the following basis:

> "FSA being unfair – not prepared to vary order even after "my offer of full supervision of all activities" directly to FSA. Believe that without FSA approval then would have to consider alternative options to earn a living."

The law

7. S.59 of the 1986 Act provides, in essence, that the Authority may direct that any person whom it appears to it to be not a fit and proper person to be employed in connection with investment business may not be employed without the Authority's written consent. Disqualification directions under s.59 were "grandfathered" into

being Prohibition Orders by Article 79 of the Financial Services and Markets Act 2000 (Transitional Provisions) (Authorized Persons etc) Order 2001 (SI 2001/2636).

8. S.56 of the Act provides that the Authority may make a Prohibition Order prohibiting an individual from performing regulated activities where that person is not fit and proper to perform functions in relation to regulated activities.

9. Section 58 of the Act deals with Warning Notices and Decision Notices and provides that a Decision Notice may be referred to this Tribunal.

10. Further guidance as to the way in which the Authority exercises its powers under the Act is set out in the FSA Handbook and, in particular, Chapter 8 of the Enforcement Manual ("ENF") applies to the prohibition of individuals.

11. The power to prohibit individuals who are not fit and proper from carrying out functions in relation to regulated activities assists the Authority in working towards its regulatory objectives. These are market confidence, public awareness, the protection of consumers and the reduction of financial crime.

12. ENF 8.9 provides guidance specific to applications for variation or revocation of Prohibition Orders. In particular ENF 8.9.2G provides:

> "When considering whether to grant or refuse an application to revoke or vary a prohibition order the Authority will consider all the relevant circumstances of a case. These may include, but are not limited to:
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> (1) the seriousness of the misconduct that resulted in the order;
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> (2) the amount of time since the original order was made;
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> (3) any steps taken subsequently by the individual to remedy the misconduct;
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> (4) any evidence which, had it been known to the Authority at the time, would have been relevant to the Authority's decision to make the prohibition order;
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> (5) all available information relating to the individual's honesty, integrity or competence since the order was made, including any repetition of the misconduct which resulted in the prohibition order being made;
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> (6) where the Authority's finding of unfitness arose from incompetence rather than from dishonesty or lack of integrity, evidence that this unfitness has been or will be remedied; for example, this may be achieved by the satisfactory completion of relevant training and obtaining relevant qualifications, or by supervision of the individual by his employer;
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> (7) the financial soundness of the individual concerned; and

(8) whether the individual will continue to pose the level of risk to consumers or confidence in the financial system which resulted in the original prohibition if it is lifted."

13. ENF 8.9.4 provides:

> "The Authority will not generally grant an application to vary or revoke a prohibition order unless it is satisfied that the proposed variation will not result in a re-occurrence of the risk to consumers or confidence in the financial system that resulted in the order being made. Equally, the Authority will not revoke a prohibition order unless it is satisfied that the individual is fit to carry out functions in relation to regulated activities generally, or to those specific regulated activities in relation to which the individual has been prohibited."

14. FIT 2.1.3G provides that in considering a person's honesty, integrity and reputation the Authority will consider whether in the past the person has been convicted of any criminal offence and:

> "Whether, in the past, the person has been candid and truthful in all his dealings with any regulatory body and whether the person demonstrates a readiness and willingness to comply with the requirements and standards of the regulatory system and with other legal regulatory and professional requirements and standards".

Factual background : Mr Petkar's unauthorized investment business

15. From April 1993 Mr Petkar and a Mr L traded as Lawson-Petkar. From 16 February 1995 the Applicant was a director of Magenta Forex Limited and Magenta Security Services Limited and from 17 September 1997 Mr Petkar was a director of Graceland Investments Limited (resigning in March 1999). Clients of Lawson-Petkar were offered a structured currency trading investment programme and were informed that "there is no risk in this transaction as both the currency and the USD are covered for all parties concerned". Prospective clients also received a document entitled "Structured Investment programme" which disclosed, inter alia, an "investment programme monthly return schedule" forecasting a return of US $24 million over 12 months when investing $400,000 each month. None of these activities was authorized under the relevant legislation. Graceland was described in a document provided to NatWest Bank as a "financial services/derivative specialist" which did not require authorization. NatWest confirmed that Graceland's account received a payment of nearly $500,000 from a Mr Z. The NatWest corporate opening form for the Graceland account was signed on 30 November 1998, stated that Graceland carried on the business of "Financial services/derivative specialists" and that its expected annual turnover would be £2 million. Mr Petkar told NatWest that he had been in this line of business for 18 years. On 11 December 1998 Mr Petkar supplied NatWest with copies of trades done by Graceland through Refco Capital Markets Limited indicating that between 25 and 30 September 1998 he entered into 44 foreign exchange contracts to a total value of US $92 million making a profit of US $824,000 in three days. Mr Petkar opened the corporate US dollar account for Graceland with a deposit of $500,000 the signatories being Mr Petkar and Mr Z who had provided the $500,000, Mr Petkar stated, for an investment in futures.

16. NatWest froze the Graceland account at NatWest on 10 December 1998 and on 15 December 1998, in a series of conversations with the Authority, Mr Petkar was informed that this purported activity of taking money from other people and speculating on their behalf was likely to require authorization. In discussions with the Authority on 15 December 1998 Mr Petkar confirmed that he had first traded with client monies in 1990 and that he had a number of clients on behalf of whom he would undertake investments in currency exchange, interest rates and general derivatives. A total of six clients were owed $280,000. Mr Petkar told the Authority that he had prospective clients calling in from around the world in relation to various schemes involving bank guarantees and certificates of deposits and had become involved in an attempt to establish an investment programme involving a prime bank guarantee which was to be issued by the Philippine National Bank. In the course of discussions with the Authority, on 15 December 1998 Mr Petkar agreed to supply the Authority with a complete list of all of his clients, their contract details and client balances together with copies of the Refco and other trading account documentation. This was not provided.

Factual background : representations to potential counterparties

17. On 27 October 1997, using Graceland headed writing paper, Mr Petkar wrote to Salomon Brothers stating inter alia, "we are presently worth approximately US $60 million plus" and "as I advised you we have over 100 plus similar transactions to do". On 18 May 1998, on Graceland headed writing paper, Mr Petkar wrote to Goldman Sachs stating "we are a new company, incorporated in 1997. We do not currently have audited accounts as we are still in the process of opening trading accounts in order to execute our projective business. We can supply you with a bank reference from Barclays Bank in London and furthermore we can show you when requested that we do have access to over £5 million that we could deposit with you in order to obtain the trading facility that we are requesting. We are an experienced company with over 18 years of experience … we anticipate that a single trade would be in the range of £5 million … we also believe we can trade up to 10-30 transactions a week". It appears that none of these representations were true.

Factual background : criminal offences

18. Between April 1995 and 30 October 1998 Mr Petkar had worked as a sub-contractor for the Industrial Bank of Japan ("IBJ") in its swap support and middle office departments. On 27 November 1998 £420,000 was transferred from IBJ to Graceland's bank account with Barclays which sums were returned on the closing of Graceland's account with Barclays. On 30 November 1998 £420,000 was re-transmitted from IBJ to Mr Petkar's personal account with Halifax. IBJ was never a client of Graceland's. On 1 December 1998 certain payments were made from Mr Petkar's Halifax account. These included £100,000 in cash (explained to the staff at the Halifax branch at Cheapside by Mr Petkar as required for developing a jewellery business), a cheque for £100,000 payable to Graceland and four other cheques for £25,000 each and withdrawals of £42,000 in cash. A Mr Farquhar had been

employed by IBJ from mid-July 1998 until 9 December 1998 as a clerk in the cash management. Mr Farquhar had left IBJ on 9 December 1998. On 31 December 1998 Mr Petkar was arrested by the Metropolitan Police Fraud Squad in connection with the later IBJ transaction and on 13 April 1999 he was charged with conspiracy to steal and handling stolen goods in relation to that transaction.

19. While being questioned by police in 1998 on the dispersal of the funds received into his personal account at Halifax from IBJ Mr Petkar had told them that he had returned all the funds to Mr Farquhar. He subsequently rescinded this statement and accepted at his trial that he had spent or transferred £198,000 to a trading account of which £33,000 had been used to fund margin losses he had previously incurred. The majority of the £310,000 withdrawn from the Halifax account was in fact used to pay gambling casinos explained by Mr Petkar as a device to enhance his credit particularly with potential clients. In April 2000 the police were provided with a copy of a written contract dated 30 November 1998 between Mr Petkar and Mr Farquhar showing the funds Mr Petkar had received for investment purposes. Following Mr Petkar's conviction a previously undisclosed personal account was identified and a review of transactions on that account showed that during October 2000 and June 2002 the sum of £177,000 had passed through it.

20. On 28 June 2002 Mr Petkar was sentenced to five years imprisonment (reduced by the Court of Appeal by six months). The Applicant served 2¼ years in prison and completed a probation period of 13 months; he remains on licence until December 2006.

21. The Authority relies on a number of the comments made by the Court of Appeal in considering Mr Petkar's case. In particular:

> "The evidence against the Appellant was overwhelming and we are satisfied that on the whole of the facts and with correct directions of law the only reasonable and proper verdict would have been one of guilty.
>
> The whole transaction, could not fall far short of half a million pounds, is done in the most unbusinesslike of ways, and without any documentation – other than may be found in the contract, whose terms are never carried out, and about which Petkar admits lying in his interviews. In addition to that lie, there was the lie about having returned all the money to Farquhar, repeated to the Halifax, IBJ and the police."

Factual background : Evidence of rehabilitation

22. The Authority has formed the view that Mr Petkar has not accepted the seriousness of his previous offending and has not shown the necessary remorse for it; he has not taken steps to rehabilitate himself. In this connection, Mr Petkar's failure to accept that he is guilty of the offences for which he was committed appears in his letter of 4 November 2005. This states:

> "I request you to consider such order because I feel that since the order was placed I have gone through major life changing situations. In addition I have been convicted for something that I have not done. I have served 2.25 years in an open prison, I have

successfully completed a probation period of 13 months and I remain on licence for the remaining time until December 2006.

I reaffirm that I had no hand in the theft that took place at IBJ International Bank, London."

And:

"With so many markets now being regulated it is impossible to avoid the FSA in any form, therefore in any transaction where money is involved the market is being regulated and therefore no matter what project I try to do it will result in communication with the FSA."

In his representations at the hearing before the RDC Mr Petkar said:

"How can I show remorse if I haven't done anything? I was convicted of a crime I haven't done. I was in a situation where I received the money. I put my hands up yes I received it, but I never knew it was stolen."

23. The denial continues in Mr Petkar's response to the Statement of Case:

"At this stage I did not know that the funds that I had received from Martin Farquhar had come from IBJ International and that he had stolen the funds from there."

And Mr Petkar has continued to maintain that he did not know that the funds were stolen from IBJ on a number of other occasions in the response to the Authority's Statement of Case.

"I disagree with the outcome of the trial, I to this date state I was not party to theft, I received the funds, I did not know they were stolen, I used the funds as my own because I believed that I could replace them with the profits from other trades.

And:

"Why should I accept something I have not done, if the FSA feel I should show remorse, then maybe this is a waste of time. I will never accept responsibility of something I have not done."

24. Mr Petkar expressed the same views at the hearing before us.

Factual background : contemplation by Mr Petkar of further offending

25. The concerns expressed by the Authority arising from Mr Petkar's failure to acknowledge his guilt have, they say, been compounded by a number of remarks made by him tending to indicate that he has not entirely ruled out the possibility of further offending and which impact on both his honesty and integrity and also the likelihood of his posing a future risk to consumers and financial markets in the future. Mr Petkar's letter of 4 November 2005 states:

> "The three choices I have are: (1) to work with the FSA and obtain employment/income streams; (2) to die; (3) to enter a criminal world and suffer the consequences.
>
> I don't want to enter the third option but desperation and lack of assistance will leave me no choice as I will be helpless if I can't eat, live then, then I may have to consider such an option."

26. Mr Petkar made consistent remarks in the course of his oral representations before the RDC:

> "And I wrote in my letter that I had three options, and the three options I said was, 'Work with the FSA, even supervised to see if I can put my life back together. Drop dead and just forget about everything or go into the criminal route, and meet all those I met in prison to go to the law, they come to me and say, they want to do this and I should just do it."

And:

> "And if you can't do that or if you don't allow me to do that, then I'll just have to work out a different way of living. And I don't want to go down the criminal road because that's not me. I mean, I've learnt what trades are I know who's – running a scam, I know who's trying to pass a bad bond."

27. Similar comments are made in Mr Petkar's response to the Authority's Statement of Case. In particular:

> "If the FSA don't allow me to work then I will have to find other ways of earning a living, and I am serious I will have no options but to enter the financial industry under different terms and suffer the consequences."

28. Mr Petkar's response to paragraph 33 of the Authority's Statement of Case which refers to the Authority's concerns arising from Mr Petkar's failure to accept or acknowledge his previous misconduct and his contemplation of the possibility of further criminal conduct, states:

> "If the FSA cannot and will not allow me to work supervised then I have to live, if you force my hand then that is fine … I have limited options, if the FSA don't allow me to work, then I will have to consider other options. One of those is not to work in McDonalds … ."

29. Notwithstanding that these are phrased as denials of any intention to become involved in future criminal activity, the Authority regards those remarks as indicating that such activity is within Mr Petkar's contemplation and that, in his view, should he resort to them, would not be the one to blame. When giving evidence before us Mr Petkar regretted that he had made the remarks summarized under this heading. On each occasion they had been made in the heat of the moment.

Mr Petkar's case

30. Mr Petkar claims that he is in all relevant respects fit to be employed in carrying on "investment business". He has built up a wide expertise from his long experience of the financial services industry. If authorized again, he would be able to generate an income from back-to-back currency transactions that, he claims, afford no risk to anyone. The effect on him of the present Prohibition Order is, for all practical purposes, to prevent him from obtaining the requisite facilities from banks and other financial institutions to enable him to embark on such transactions.

31. Mr Petkar stressed that the circumstances in which he was convicted and sentenced to the five year term of imprisonment had been a further learning experience and had enhanced rather than damaged his fitness. He has repaid his debt to society.

32. Properly understood, Mr Petkar alleged, his involvement in the events leading to the conviction and sentence did not demonstrate a lack of integrity on his part. He had, he said, had no hand in the theft of the money from IBJ. He had not, he said, known that the funds passed to him by Mr Farquhar had been stolen. He had returned the money when the police investigation had started and, he said, he had told the police the truth; and when the case eventually came on for trial he had been convicted on the basis of a cut-throat defence.

33. Mr Petkar asked for the prohibition order to be varied such that he was placed under supervision for a period. He asked that the Authority should provide the supervision. If the proposed course did not work out, either party, he suggested, could end it. That way he would be able to demonstrate his integrity.

34. Mr Petkar recognized that he had not shown remorse or in any other way evidenced his rehabilitation. He could not, he said, show remorse for something that he had not done. As already noted, Mr Petkar conceded that the remarks that he had made to the effect that, if the prohibition order were not lifted he would either die or turn to a life of crime had been stupid and should not therefore be taken into account.

Conclusions

35. Before drawing conclusions from the information before us, we need to make two preliminary points. The first is that the conviction of Mr Petkar before the Crown Court at Middlesex in 2002 is admissible evidence of his fitness and propriety (or the lack of it). The Authority can therefore rely on the circumstances on which the conviction was based without the need to reprove each and every allegation.

36. The second preliminary point is that, however beneficial a period of close supervision by the Authority of Mr Petkar's activities might appear to him, such a course is no part of the Authority's regulatory function. Its role is to regulate and how it exercises that function is for it to decide. In particular the Authority does not monitor applicants during a probationary period. It authorizes or approves on the

strength of the particular applicant's credentials and record. Bringing a potential applicant to a state of fitness and propriety is the applicant's business, not the Authority's responsibility. For that reason we do not think that we could properly determine the present reference by directing the Authority to place Mr Petkar under supervision or on probation for a six month period. In saying this we recognize that Mr Petkar suggested it in all seriousness and, possibly, as his only means of re-entry into an activity that he sees as really suiting his abilities.

37. We turn now to our conclusions which we express by reference to the guidance points in ENF 8.9.2G. Those points are, we think, entirely appropriate to the determination that we are required to make and we have adopted them as relevant considerations.

38. The first guidance point concerns the seriousness of the relevant misconduct. It seems to us that the conduct which led to the making of the disqualification direction in respect of Mr Petkar, most particularly the conducting of unauthorized investment business causing loss to his clients and his conduct in the course of the ensuing investigation by the Authority, was of itself and remains sufficiently serious that it is not appropriate to vary or revoke the prohibition order.

39. The next guidance point relates to the amount of time since the original order was made. Here the disqualification direction was made some seven years ago. The reasons for the making of that order continue in being. In this connection we take account of Mr Petkar's conviction in 2002 of the serious criminal offences arising from dishonest conduct for which he remains on licence. Moreover, nothing that has happened since the issuing of disqualification direction alters the justifiable concerns that we think exist in respect of Mr Petkar's honesty and integrity.

40. A further guidance point concerns the steps subsequently taken by the particular individual to remedy the misconduct. Here we can detect no steps taken by Mr Petkar to remedy his earlier misconduct. Indeed he appears unwilling to do so. This, we think, is compounded by his failure to recognize the seriousness of the past misconduct and, despite his regrets at having made the remarks suggesting to the contrary, we cannot rule out Mr Petkar's contemplation of similar misconduct in the future.

41. In essence, all of the information presented to us indicates an overwhelming basis for considerable concern as to Mr Petkar's honesty and integrity.

42. Is there a risk of repetition of the misconduct which originally resulted in the disqualification direction being made? We cannot be satisfied that any proposed variation of the prohibition order would not result in a reoccurrence of the risk to consumers or confidence in the financial system that resulted in the original disqualification direction being made. Mr Petkar's statements and conduct subsequent to the making of the disqualification direction have tended to emphasize the risk of repetition rather than address the past misconduct. Further, in common with the Authority, we cannot be satisfied that Mr Petkar is now fit to carry out functions in

relation to regulated activities. He has not been candid and truthful in all of his dealings either with the Authority or with other investigating bodies or indeed with the Tribunal where he has persevered with his accounts and explanations that were rejected by the Court.

43. This is not a case where the original finding of unfitness arose from incompetence rather than from dishonesty or lack of integrity. To the extent that the events relied upon by the Authority in imposing the disqualification direction were based on incompetence, we cannot be satisfied that any change has taken place. Mr Petkar misled the Authority and the police and his proposal that he should operate under close supervision by the Authority in the future, however sensible it might appear to Mr Petkar, all show a failure to understand the regulatory regime.

44. We heard no evidence as to Mr Petkar's financial soundness. In the past his activity of trading in high value transactions appears to have been carried out with inadequate resources but based on an assertion that resources were available to him. Mr Petkar's present proposals to embark on back-to-back currency transactions call for an acceptable level of resources to enable banks and other third parties to do business with him. We cannot see that they are risk-free, as Mr Petkar suggested. On that basis his financial soundness appears to be non-existent.

45. Finally the question is whether Mr Petkar will continue to pose a level of risk to consumers or confidence in the financial system if the prohibition is lifted. Our conclusion from the evidence and information before us is that there is a clear possibility that the risk will remain. And for all those reasons we think that it would be inappropriate for us to vary or revoke the Authority's Decision Notice.

46. The reference is dismissed.

STEPHEN OLIVER QC
CHAIRMAN

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