

Compliance Monitor

The monthly briefing service for compliance specialists

Parker v FSA: a big fine but will it be paid?

In August, the Financial Services and Markets Tribunal published its decision in the market abuse case of Parker v FSA. Andrew Hart and Oliver Kerridge of Freshfields review the findings.

Mr Parker was employed as credit risk and treasury manager by Pace Micro Technology plc, a company listed on the London Stock Exchange. One of Pace's major customers was NTL. During late 2001 and early 2002, serious financial difficulties at NTL were causing problems for Pace. Mr Parker was closely involved with the developing situation. In addition, talks with a much larger American competitor about the possibility that it might make an agreed takeover bid for Pace were abandoned in early 2002. Ultimately it became apparent that Pace would need to issue a profit warning (and Pace was separately fined £450,000 for committing Listing Rule breaches in connection with the profit warning).

The FSA found that Mr Parker sold holdings of shares in his and his wife's names, adjusted spread bets and placed new spread bets on learning that the takeover talks had been abandoned and that Pace was likely to issue a profit warning imminently. The FSA also found that the information was not generally available and that Mr Parker acted on that information to his benefit.

Mr Parker argued that the relevant information was in the public domain, and that in any event he had a defence because his transactions were part of a pre-conceived strategy of hedging shares.

The Tribunal upheld the FSA's decision that Mr Parker had engaged in market abuse. Although Pace's dependence on NTL and NTL's financial difficulties were well known in the market, Pace had been less than candid about its trading relations with NTL and about the withdrawal of related credit insurance. Also, no-one outside Pace, apart from its professional advisers, knew that a profit warning was imminent before it was made. Had the takeover of Pace proceeded, the prospects of a

profit warning would have been of limited importance. However, Mr Parker would have been aware that without the contrary effect of the takeover, a drop in share price was highly likely.

The Tribunal found that the transactions carried out by Mr Parker were not consistent with his previous trading strategy. Mr Parker entered into a number of transactions within a very short time of learning that the takeover had been abandoned and that a profit warning was likely without seeking, or obtaining, permission to deal. The Tribunal also found that his position changed from one mildly favouring a rise in Pace's share price to one distinctly favouring a fall.

However, Mr Parker persuaded the Tribunal that the penalty of £300,000 imposed on him by the FSA was excessive and based on an inflated perception of his profits, and the Tribunal reduced the aggregate penalty to £250,000.

Commentary

This is the first substantive market abuse decision by the Tribunal since the FSA's defeat by the Plumber in Paul Davidson and Ashley Tatham v FSA [1].

Standard of Proof

The Tribunal again considered what standard of proof should apply when enforcement action is contemplated. Referring back to its decision in Arif Mohammed v FSA, the Tribunal stated that a "sliding scale" should apply. According to the "sliding scale", the more serious the allegation, the more cogent the evidence would need to be. The FSA's proposal to fine Mr Parker £300,000 was a "very grave charge" and therefore meant that the standard of proof would need to be very close to the criminal standard – beyond reasonable doubt.

Size of Penalty

In Paul Davidson and Ashley Tatham v FSA [1], the Tribunal commented that had Mr Davidson and Mr

Tatham been found to have engaged in market abuse, the appropriate penalty would have been a censure and not a fine. This was because: both individuals had cooperated; no remedial action was required; there was no precedent for a fine; and the other placees were institutional investors and unlikely to have suffered losses.

In this case, the Tribunal considered the comments made in *Paul Davidson and Ashley Tatham v FSA* but decided that Mr Parker should be given a fine of £250,000. £100,000 of the fine consisted of the abusive profits made by Mr Parker as a result of the market abuse as well as losses that he had clearly avoided. The other £150,000 of the fine functioned to punish and deter. The Tribunal considered that it was correct for the fine to have a punitive/deterrent element because: this was a calculated course of conduct; the spread bets were taken out with the aim of incurring a substantial profit at the expense of the company which took them; there was an abuse of a position of trust; and Mr Parker showed no remorse nor did he make any attempt to return his profits. When calculating the size of the punitive/deterrent element of a fine, the Tribunal stated that the advantage that was achieved should act as a guide. Going forward, this may lead to the FSA imposing larger fines on individuals.

Finally and possibly in an attempt to assuage fears following its ruling in *Jabre v FSA* [2], the Tribunal stated that it should only rarely increase a penalty beyond that proposed by the Regulatory Decisions Committee (RDC) at Decision Notice stage because if this were to become a regular occurrence, it might act as a disincentive to meritorious references. However, penalties could be increased where the RDC had plainly misdirected itself.

It is unclear whether the fine will be paid since Mr Parker declared himself bankrupt prior to the Financial Services and Markets Tribunal decision. As of the date of writing, the Final Notice in the case had not been issued by the FSA.

Notes

- 1 See 'Knocking in the pipes', page 1, *Compliance Monitor* June 2006.
- 2 See 'FSA v Jabre – the end of a long saga', page 13 *Compliance Monitor* September 2006.

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