COSTS – FS&MA 2000 Sch 13 paragraph 13 – Test of reasonableness - Whether costs to be awarded under paragraph 13(2) on ground that decision of FSA was unreasonable – No – Whether relevant conduct under paragraph 13(1) limited to conduct in the course of the proceedings – No – Whether costs to be awarded under paragraph 13(1) on ground of unreasonable conduct prior to proceedings - No

FINANCIAL SERVICES AND MARKETS TRIBUNAL
Case No FIN/2005/0011

(1) TIMOTHY EDWARD BALDWIN
(2) WRT INVESTMENTS LIMITED

Applicants

-and-

FINANCIAL SERVICES AUTHORITY

Respondent

Tribunal: **Andrew Bartlett QC (Chairman)**
N W Douch
T C Carter

Sitting in public in London on 22 March 2006
Date of written decision: 5 April 2006

For the Applicants Jason Mansell

For the Respondent James Eadie

DECISION

INTRODUCTION

1. The applicants were accused of market abuse. After a three day hearing we decided in favour of the applicants that they were not guilty of market abuse and that no penalty should be imposed. Our written reasons were issued on 24 January 2006.

2. We reserved any possible arguments on costs for later consideration. The applicants have now sought an award of costs in their favour.

THE POWER TO AWARD COSTS

3. The Tribunal's power to award costs is contained in the Financial Services and Markets Act 2000 Schedule 13 paragraph 13:

> "*(1) If the Tribunal considers that a party to any proceedings on a reference has acted vexatiously, frivolously or unreasonably it may order that party to pay to another party to the proceedings the whole or part of the costs or expenses incurred by the other party in connection with the proceedings.*
>
> *(2) If, in any proceedings on a reference, the Tribunal considers that a decision of the Authority which is the subject of the reference was unreasonable it may order the Authority to pay to another party to the proceedings the whole or part of the costs or expenses incurred by the other party in connection with the proceedings.*"

4. This statutory wording gives rise to a number of questions. In particular, it is not immediately clear whether the vexatious, frivolous or unreasonable conduct referred to in paragraph 13(1) is limited to conduct during and in connection with the proceedings on the reference. If so, such conduct would not include the making of the decision which precedes the reference. On that basis, the purpose of paragraph 13(2) would be to extend the Tribunal's powers. If, on the other hand, the conduct in paragraph 13(1) may include

conduct prior to the reference, the purpose of paragraph 13(2) would be to make explicit that one of the circumstances in which costs may be awarded is where the FSA's decision was unreasonable. We refer to these issues further below.

5. The appropriate test of unreasonableness also requires to be mentioned. Before us both counsel made reference to 'Wednesbury unreasonableness'. This was an allusion to Associated Provincial Picture Houses Limited v Wednesbury Corporation [1948] 1 KB 223, CA. A decision is 'Wednesbury unreasonable' if it is "*so unreasonable that no reasonable authority could ever have come to it*": see per Lord Greene MR at [1948] 1 KB 230. This test was formulated for the purpose of determining whether a public authority had acted outside its statutory powers.

6. Mr Eadie reminded us of Lord Diplock's vivid explanation, in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 410, that 'Wednesbury unreasonableness'

> "*applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.*"

As was said by Lord Greene MR in the Wednesbury case itself, the Wednesbury test requires that a decision

> "*must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether*" [1948] 1 KB 230 [emphasis added in final sentence].

7. We do not consider that reference to the Wednesbury test is appropriate, helpful or conducive to clarity in the present context. The Tribunal, unlike the court in the Wednesbury case, is expressly directed by paragraph 13 to make its own judgment of what is reasonable: "*(1) If the Tribunal considers that a party ... has acted ... unreasonably" ... (2) If ... the Tribunal considers that a decision of the Authority ... was unreasonable*".

8. We were also referred to Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014, HL. That case was concerned with the lawfulness of the Secretary of State's approach to deciding whether a local education authority was acting unreasonably. The issues were far removed from the nature of the exercise which we have to undertake under paragraph 13. We derive from this authority only a reminder that judging whether something is reasonable or unreasonable is wholly distinct from judging whether it is right or wrong: a decision may be wrong without being in the slightest degree unreasonable.

9. The application for costs was based primarily on paragraph 13(2), on the basis that the FSA's decision was unreasonable, with paragraph 13(1) as a fall-back.

THE APPLICATION UNDER PARAGRAPH 13(2)

10. The FSA's powers in relation to market abuse extend over the population as a whole, not just the regulated sector. Mr Mansell's submissions commenced with an emphasis on the unfairness to the applicants of having had to expend considerable sums in order to defend themselves against an unjustified allegation of market abuse, and on the hardship which Mr Baldwin has suffered both financially and personally as a result of the allegation. Whilst we have every sympathy with these concerns, our ability to redress them is constrained by the terms of paragraph 13. The Tribunal has no general power to award costs to exonerated parties. The hardship suffered by Mr Baldwin might impel us towards exercising our discretion in his favour, but the discretion only arises if we first find that there was unreasonableness in the relevant sense.

11. The central thrust of Mr Mansell's submissions on behalf of the applicants was that the decision was unreasonable because the Authority had not fairly assessed the available evidence. His most forceful points were that the investigation team had wrongly characterised Mr Nolan's evidence as consistent, had unfairly criticised Mr Baldwin's evidence as ambivalent, and had not seen the significance of the peculiarity that a telephone call which was said to have been initiated by Mr Baldwin as a routine call had supposedly

been made from an untraceable telephone; perhaps most strangely of all, the team had not considered the possibility that Mr Nolan was mistaken about the telephone call, having considered only the possibility of deliberate invention. At the conclusion of the investigation, no hard evidence of the telephone call having been found, the team had expressed themselves to be "*surprised and frustrated*" at their inability to find telephone record evidence, without appreciating that their very surprise ought perhaps to have prompted a reconsideration of their firm belief in Mr Baldwin's guilt.

12. Mr Eadie's riposte on the facts was that if (which he did not accept) the approach or reasoning of the investigation team were relevant and were defective, any such defects were cured by the proceedings before the Regulatory Decisions Committee. The team correctly identified to the RDC that the central issue was whether the RDC accepted the evidence of Mr Nolan or the evidence of Mr Baldwin. Moreover, the possibility of mistake, as an explanation of Mr Nolan's evidence concerning the telephone call, was expressly raised in the representations made to the RDC on Mr Baldwin's behalf, and was expressly considered by the RDC in the Decision Notice.

13. To support the conclusion that the FSA's decision was not unreasonable, Mr Eadie observed that the Tribunal had expressed the view, in response to a proposed submission of no case to answer, that there was no clear cut defect in the Authority's case (paragraph 28 of our decision), that the Tribunal's assessment of Mr Baldwin's live evidence had been pivotal to the Tribunal's decision (paragraph 29), and that the Tribunal had acknowledged in its reasons the various points in support of Mr Nolan's account and the Authority's case. In summary, the Tribunal had faced the same question as the RDC – whether to believe Mr Nolan or Mr Baldwin – and, with the aid of a full hearing over three days, with live evidence and cross-examination, having weighed up the points made on both sides, had arrived at a different answer. That did not demonstrate that the decision of the RDC was unreasonable.

14. Mr Eadie submitted that, since it was the RDC who made the decision which was alleged to be unreasonable, we should concentrate on the conduct of the RDC, not the conduct of the investigating team. Mr Mansell countered that the

decision was a decision of the FSA and that it was wrong to divide up the FSA for this purpose into its constituent parts. Moreover the RDC's decision was in any event based on the material supplied to it by the investigating team.

CONCLUSIONS UNDER PARAGRAPH 13(2)

15. Under paragraph 13(2) we are required to focus on the decision itself. In our judgment the right approach is to ask ourselves whether we consider that the Authority's decision was unreasonable, given the facts and circumstances which were known or ought to have been known to the FSA at the time when the decision was made. In taking this approach, we remind ourselves that the process leading to the FSA's decision was not a full judicial hearing of the kind conducted by the Tribunal. As the Tribunal said in the case of Legal and General Assurance Society Ltd: "*When dealing with a large volume of regulatory matters informally and speedily, FSA should not be expected or compelled to follow procedures, or express its conclusions, as required of a court*" (paragraph 29).

16. Applying this approach, we do not find ourselves able to conclude that the Authority's decision was unreasonable.

17. At heart the decision turned on whether Mr Nolan's or Mr Baldwin's evidence concerning the disputed telephone call was to be preferred. We have been troubled by some features of the reasoning disclosed by the Decision Notice, in particular the somewhat optimistic description of Mr Nolan's evidence as consistent and clear (paragraph 25 of the Notice) and the failure to address expressly the possible significance of Mr Metcalfe's evidence in putting the relevant call in September rather than in July. But the assessment of Mr Nolan's evidence was to a considerable extent a matter of judgment, and we are conscious of the very minor role which the evidence of Mr Metcalfe played in our own decision (paragraph 61 of the Tribunal's decision). Recalling our own thought processes, until we had heard Mr Baldwin give evidence and be cross-examined, we were unsure what our decision should be. While it is clear to us that the Authority's decision was wrong, we do not find ourselves able to say that it was unreasonable, given the facts and

circumstances known (or which ought to have been known) to the Authority at the time.

18. That conclusion means that the application fails under paragraph 13(2).

THE APPLICATION UNDER PARAGRAPH 13(1)

19. Mr Mansell relied in the alternative on the conduct of the investigating team as unreasonable under paragraph 13(1). Such reliance was with limited enthusiasm, because of the possibility that paragraph 13(1) was to be construed as applying only to conduct during and in connection with the proceedings on the reference.

20. Mr Eadie submitted that the terms of paragraph 13(2) were critical to the proper construction of paragraph 13(1), and that paragraph 13(1) read in its context was limited to conduct within the proceedings following a reference. The essence of his argument was that the very existence of paragraph 13(2) indicated that there was an implied limitation on paragraph 13(1) which prevented it from applying to the FSA's decision (made prior to the commencement of the reference).

21. We do not find this argument compelling. It could equally be the case that paragraph 13(2) was inserted out of a desire, in the face of concerns about the extent of the Authority's powers, to highlight that there could be a sanction in costs if the FSA's decision was unreasonable.

22. We are not aware of any binding authority directly in point. In Cartiers Superfoods Ltd v Laws [1978] IRLR 315 the relevant rule in a different statutory context referred to awarding costs where a party had acted frivolously or vexatiously, and the Employment Appeal Tribunal took account of pre-proceedings conduct. The statutory wording was not identical to that used in paragraph 13(1), and there was no equivalent of paragraph 13(2). The rule was later changed to refer expressly to "*conduct in bringing or conducting the proceedings*", as considered in Davidson v John Calder [1985] ICR 143. This express limit was continued in the Employment Appeal Tribunal Rules 1993. Other procedural rules for tribunals have used a variety of verbal

formulae: for example, the Competition Commission Appeal Tribunal Rules 2000 rule 26(2) (expressly referring to conduct in relation to the proceedings), the Special Educational Needs Tribunals Regulations 1994 regulation 34(1) (referring to acting frivolously or vexatiously, without any express limitation), and the Special Commissioners (Jurisdiction and Procedure) Regulations 1994 regulation 21(1) (referring to wholly unreasonable actions in connection with the hearing in question).

23. Given the range of formulae which the draftsman could have used, we consider that, if there had been an intention to limit the conduct referred to in paragraph 13(1) to conduct in the course of the proceedings, the statutory wording would have said so expressly. We therefore conclude that under paragraph 13(1) we are entitled to take account of conduct which took place before the reference was made and the proceedings commenced.

24. We have reached this conclusion without any consideration of the material from Hansard which was placed before us de bene esse.

25. We do not consider that paragraph 13(1) is ambiguous or obscure. If we are wrong about that, and the meaning proposed by Mr Eadie on behalf of the FSA is a serious contender, then we are entitled to have regard to Hansard under the rules in Pepper v Hart [1993] AC 593, 634. In Committee the Secretary of State explained at some length the thinking behind the Government's amendment which became paragraph 13. The original wording in the Financial Services and Markets Bill had contemplated a very broad discretion as to costs. It is clear that an aim of the amendment was to limit the power to award costs because of a fear that it could be an undue deterrent to applicants. We infer that a considered choice was made concerning the precise extent of the limit to be imposed, and we note that the promoter of the Bill did not choose to express the limit by reference to conduct during the proceedings. It is also apparent from the Minister's remarks that the aim of the text that became paragraph 13(2) was to make it explicit that one of the circumstances in which costs might be awarded was when the Tribunal considered that the FSA's decision giving rise to the reference was unreasonable. There is no suggestion that this was an extension to the scope of the power in paragraph

13(1). Accordingly, if it is permissible for us to take account of Hansard, we arrive at the same conclusion as before.

26. This conclusion does not mean that conduct prior to the proceedings is necessarily relevant to the incidence of costs. In our judgment, to be relevant under paragraph 13(1), it must have some bearing on the proceedings. It follows from the very nature of the decision to be taken on costs that our judicial discretion must be exercised on the basis of facts connected with or leading up to the proceedings, as contrasted with conduct wholly unconnected with the proceedings.

27. Taken analytically item by item, and with the wisdom of hindsight, it might be possible to characterise some of the elements of conduct which we have referred to at paragraph 11 above as unreasonable. But we think it is important in this case to keep in mind also the broader picture and not to over-emphasize the significance of any individual feature of the investigation. We also remind ourselves again that a wrong view or approach is not necessarily an unreasonable view or approach. Within the bounds of reasonableness, prior to the Tribunal hearing more than one assessment of Mr Nolan's evidence was possible. Albeit with some hesitation, we do not find the actions which constituted the investigation to have been unreasonable.

28. Moreover, there is force in Mr Eadie's submission that, as regards the reasonableness of the Authority's conduct, the defects in the investigation were cured by the deliberations of the RDC, who expressly addressed the possibility of mistake and had to make a not altogether easy decision between two conflicting accounts of the material facts. While the investigation was part of what led to the proceedings, it was the RDC's decision which was critical. Having found that the Authority's decision was not unreasonable in the circumstances identified in paragraph 17 above, we do not consider it would be right on the present facts to award costs against the Authority on the basis of the criticisms of the investigation which preceded that decision.

29. Accordingly the application under paragraph 13(1) also fails.

30. We should not wish it to be thought that we intend to lay down any general rule to the effect that no award of costs will be based on conduct prior to the FSA's decision, where the decision itself was reasonable. There may very well be cases where the nature of such conduct and its significance in relation to the proceedings would justify such an award.

31. Our decision is unanimous.

Andrew Bartlett QC

Chairman