**Reference number FIN/2009/0016**

***MARKET ABUSE – Insider dealing – Penalty – Appropriate amount – Whether verifiable evidence of serious financial hardship – Whether financial loss arising after the breach to be taken into account***

**UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)**
**FINANCIAL SERVICES**

**ANDRE SCERRI** **Applicant**

**- and -**

**THE FINANCIAL SERVICES AUTHORITY** **The Authority**

**TRIBUNAL: SIR STEPHEN OLIVER QC**
**SANDI O'NEILL**
**NICHOLAS DOUCH**

**Sitting in public in London on 25 August 2010**

**Richard Lee, British Legal Practice, Malta, for the Applicant**

**Andrew Hunter, counsel, for the Authority**

## DECISION

1. On 17 June 2010, we issued our decision notice on the question of whether the Applicant, Mr A J Scerri, had committed market abuse in the form of insider dealing. We found that he had. We therefore dismissed the reference and upheld the Authority's decision.

2. We left the penalty to be determined in the light of further evidence. We refer to paragraphs 32-36 of that Decision. We found that, as a minimum, Mr Scerri's profits of £46,062.50 should be "disgorged" by way of a financial penalty. We also noted that the Authority had sought to impose an additional penalty of £20,000 for misconduct. In paragraph 32 of our decision we stated:

> "The fact that Mr Scerri might not have resources to pay more [than £46,062.50] is the only circumstance that weighs against imposing a greater penalty."

We invited submissions from the Authority as to whether the information about Mr Scerri's means obtained following his application for legal assistance should be taken into account by the Tribunal in determining what the proper amount of the penalty should be.

3. Where lack of means has been raised, it is for the Applicant in question to establish by "verifiable evidence" that he lacks the means to pay what would otherwise be the appropriate penalty. We refer in this connection to paragraph 6.5.2G(5) of the Authority's "Decisions Procedure and Penalties Manual" the words of which are set out below.

4. Regarding Mr Scerri's means, we note that he submitted a statement of means to the Authority on 25 February 2009. In this he stated that, other than €1868 per month pay from his employment, he had no other sources of income and no one supporting him financially or making resources available to him. There was no reference to a 50% shareholding in a company called Harruba Estates, to which reference will be made later, in the list of his investments. He stated that the selling of other shares of his would enable him to repay only one-half of his then existing indebtedness.

5. During the course of the hearing Mr Scerri produced a schedule of cash movements on his dealing accounts which, he said, showed he was financially "finished". This showed (a) that Mr Scerri had, since February 2009, "invested" some £324,000 (representing in part the proceeds of sale of Amerisur investments or contracts) in CFDs or the like and (b) that he had raised further loans amounting to some £126,000.

6. The Authority say, on the strength of that information, that even after Mr Scerri had claimed in the statement of means to have been impecunious he still had

funds available to him of some £200,000 produced by realisations on share-related transactions and a further £126,000 from loans. It followed that the statement of means had been misleading. The Warning Notice of 29 October 2008 had informed Mr Scerri of the intended penalty of some £66,000 (i.e. £46,000 relating to his profit from using insider information and £20,000 in relation to misconduct). But with the funds available to him, say the Authority, he should have been in a position to pay the full fine of £66,062.

7. We note that a holding of a 50% stake in Harruba Estates came to light only when the Legal Services Commission's letter of 18 May 2010 to the Tribunal (summarising findings of Mr Scerri's income, assets and liabilities) was disclosed in the course of the hearing. Harruba Estates, it appears, owned properties said to have a value of €1,227,782 which were mortgaged to secure a loan of €1,328,022 in June 2008. This had not been mentioned in Mr Scerri's statement of means. Mr Scerri informed us that he had assumed that the question in the statement of means document is related only to quoted shares.

8. Reviewing the position so far, we are not satisfied on verifiable evidence that Mr Scerri would have suffered serious financial hardship had the penalty been £66,000. The statement of means of February 2009 was misleading in that it stated that Mr Scerri was impecunious and specifically that it omitted to say that he had a 50% holding in the shares of Harruba Estates. Moreover, although we note from the accounts of Harruba Estates that the value of the properties in 2009 was balanced by the amount of the loan, there is no reliable valuation of the properties. This last point is relevant because some development had taken place of Harruba's properties and at least two residential premises had been realised.

9. We turn now to Mr Scerri's dealings and financial position after he had been notified of the proposed penalty of £66,000 in the Warning Notice and after he had produced his statement of means. Starting in November 2009 and ending in April or May 2010 (with the hearing of the reference only a month off) Mr Scerri lost some £324,000 through hundreds (and possibly thousands) of trades in indices and currencies. During that period Mr Scerri sold his remaining holdings relating to Amerisur shares and managed to borrow further amounts from friends and relations. He then ventured the £324,000 in those trades in the hope, we were told, of making enough profit to enable him to pay off his accrued debts. Mr Scerri's Barclays CFD account of 13 May 2010 (nine days before the hearing) showed him to have lost everything with the account then standing at £2,041 in debit. The outcome appears to be that Mr Scerri now owes €212,000 to family and friends and a further €268,000 to the banks.

10. None of Mr Scerri's present creditors are, we were told, prepared to lend him any money and he has no other sources of finance. This is not entirely surprising but we have no evidence of this other than an assertion in his written submissions.

11. We think that an additional penalty of £20,000 is the right amount to penalise Mr Scerri for the market abuse in the form of the insider dealing that we found, in our

decision of 17 June 2010, to have taken place. His conduct of knowingly taking advantage of insider information is serious; and simply to require him to "disgorge" the profits resulting from the abuse would achieve nothing and deter no one. £20,000 is a realistic, if not rather modest, penalty.

12. Has Mr Scerri provided verifiable evidence of serious financial hardship such that we should reduce the penalty? Leaving aside for the moment the outcome of Mr Scerri's catastrophic investment behaviour during the months leading up to the hearing, we would not (as already observed) have been satisfied that he lacked the resources to pay the £66,000 penalty. He was evidently in a position to raise the £320,000 to finance the trades and was in no sense "finished". We do not have verifiable evidence of the current position of Harruba Estates. We know that the statement of means provided by Mr Scerri in February 2009 was inaccurate and that it did not reflect his evident capacity to raise loans from friends, family and banks. Thus, for the reasons we have given more fully in our summary of his financial position, we would not be satisfied, on the strength of verifiable evidence, that a £66,000 penalty would have resulted in severe financial hardship.

13. Over the five months to May 2010 Mr Scerri destroyed his resources by gambling them away through trading in indices and currencies. By May 2010 he was left heavily in debt to his family, his friends and the banks.

14. Our function is to "consider any evidence relating to the subject matter of the reference, whether or not it was available to the Authority at the material time" and to "determine what (if any) is the appropriate action for the Authority to take in relation to the matter referred to" us. See Financial Services and Markets Act 2000 Section 133(3) and (4). The subject matter of the reference covers both the question of whether Mr Scerri was guilty of market abuse in May 2007 and what the appropriate penalty should be. Should we take account of the fact that Mr Scerri's recent trading has ruined his finances?

15. The Authority's power to impose a penalty where a person has engaged in market abuse is found in section 123(1). The penalty is to be "of such amount as is appropriate".

16. The Authority's policy expressed in "Decisions Procedure and Penalties Manual, paragraph 6.5.2G(5) reads as follows:

> "The size, financial resources and other circumstances of the person on whom the penalty is to be imposed:
>
> > (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 regard 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."

17. It will be recalled that the conduct amounting to market abuse took place in May 2007, the Warning Notice warning Mr Scerri of a £66,000 penalty was in October 2008 and the Decision Notice determining the penalty at £46,000 was in July 2009. Mr Scerri, we understand, owns his home and his business, the combined values of which come to some €295,000.

18. We have already expressed the view that the penalty of an amount that merely covers the insider information profit is inappropriate; it does not penalise the abuse of breach. £20,000 is, as we have explained, an appropriate amount for that purpose.

19. For reasons we have also explained we are not satisfied that there is verifiable evidence of serious financial hardship or financial difficulties as things stood at the time of the breach or when the Warning Notice was issued or indeed when the Decision Notice was issued.

20. The events of the five months leading to the hearing produced a financial disaster of Mr Scerri's own making. That disaster had nothing to do with the issue of whether Mr Scerri's behaviour in May 2007 amounted to market abuse. While the outcome of the trades in indices and currencies will have seriously affected Mr Scerri's solvency, we do not consider this to be a material consideration in the present case. Absent the impact of those trading losses, Mr Scerri should have been able to weather a £66,000 penalty without undue hardship. We see those trades and the losses caused by them as too remote. We see them and their outcome as self-induced damage to Mr Scerri's state of solvency. We think the right penalty is £66,000 and that that should be imposed irrespective of those recent trading losses.

21. For the reasons given above we direct that the appropriate penalty is £66,062.50.

**SIR STEPHEN OLIVER QC**
**JUDGE OF THE UPPER TRIBUNAL**

**RELEASE DATE:**