

---

**FINAL NOTICE**

---

**To: Andrew Charles Kerr**

**Of: 23 Pantile Road, Weybridge, Surrey KT13 9PY**

**FSA**

**Reference**

**Number: ACK01021**

**Date: 1 June 2010**

**TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS ("the FSA") gives final notice that it has taken the following action.**

**1. ACTION**

1.1 The FSA gave Andrew Charles Kerr ("Mr Kerr") a Decision Notice on 28 May 2010 which notified Mr Kerr that it had decided to impose on him:

1.1.1. a prohibition order, pursuant to section 56 of the Act, prohibiting Mr Kerr from performing any function in relation to any regulated activity carried on by any authorised or exempt person or exempt professional firm on the grounds that he is not a fit and proper person ("the Prohibition Order"); and

1.1.2. a financial penalty of £100,000 pursuant to section 123(1) of the Financial Services and Markets Act 2000 ("the Act") for engaging in market abuse. This penalty is discounted by 20% pursuant to Stage 2 of the early settlement discount scheme. Were it not for this discount the FSA would have imposed a financial penalty of £125,000.

1.2 Mr Kerr confirmed on 26 May 2010 that he will not be referring the matter to the Upper Tribunal (Tax and Chancery Chamber).

1.3 Accordingly, for the reasons set out below, the FSA imposes a financial penalty on Mr Kerr in the amount of £100,000 and prohibits him from performing any function in relation to any regulated activity carried on by any authorised or exempt person or exempt professional firm on the grounds that he is not a fit and proper person.

## **2. REASONS FOR THE ACTION**

### **Introduction**

- 2.1. On 15 August 2007, Mr Kerr, on the instruction of Client A, a proprietary trader employed by Firm B, deliberately manipulated the market in London International Financial Futures and Options Exchange (“LIFFE”) traded coffee futures and the related coffee futures options. While Client A instigated the plan that led to the market abuse, Mr Kerr was a willing participant in the market manipulation and actively encouraged Client A. Mr Kerr’s financial benefit from the market manipulation was limited to his commission on trades that he executed at the behest of Client A (although Mr Kerr was doubtless motivated by a desire to attract further business from Client A in the future).
- 2.2. The FSA regards this as a serious case of market abuse, notwithstanding the lack of actual profit achieved by Client A and the rather limited financial benefit to Mr Kerr, for the following reasons:
  - 2.2.1. in the one minute period during which the options reference price would be determined, Mr Kerr executed an order to trade which moved the coffee futures price from \$1,745 to \$1,757 and, as a consequence, moved the corresponding options reference price from \$1,745 to \$1,752. These price movements gave a false or misleading impression as to the price of coffee futures and options and positioned the price of coffee futures and options at an abnormal or artificial level;
  - 2.2.2. Mr Kerr’s conduct was deliberate and was undertaken to achieve a profit;
  - 2.2.3. his conduct was potentially detrimental not only to other market participants’ financial interests but also to the financial interests of participants in the wider market in coffee;
  - 2.2.4. conduct of this sort undermines confidence in the coffee futures and options markets, and, in extreme cases, in the wider derivatives markets, and has the potential to discourage new participants from entering those markets; and
  - 2.2.5. the conduct was undertaken in concert with another market participant.
- 2.3. At the time of the trading on 15 August 2007 Mr Kerr was an FSA approved person (CF21 – Investment Advisor) employed as a commodity broker by Sucden Limited (“Sucden”).
- 2.4. At the start of the day, Client A, who was one of Mr Kerr’s clients, held positions in LIFFE traded September 2007 Robusta coffee futures (“coffee futures”) and the related September 2007 coffee futures options (“coffee options”), with a strike price of \$1,750. In particular, Client A held a large position (2000 contracts) in the September \$1,750 coffee put options (“coffee put options”).

- 2.5. Whether Client A's coffee put options would finish in the money ("ITM") or out of the money ("OTM") was determined by the coffee options reference price ("CORP"). The CORP is calculated by reference to the volume weighted average price ("VWAP") of coffee futures trading between 12:29 and 12:30 on the third Wednesday of the preceding month. With respect to the coffee options that expired in September 2007, the CORP was to be determined on 15 August 2007.
- 2.6. In the one minute prior to 12:29 on 15 August 2007, coffee futures had been trading at \$1,745 and the VWAP was below \$1,750. Accordingly it appeared that Client A's coffee put options would expire ITM.
- 2.7. Shortly before 12:29 on 15 August 2007, at approximately 12:26, and pursuant to a plan developed during a series of telephone conversations between Mr Kerr and Client A which commenced on 14 August 2007, Client A instructed Mr Kerr to time a 600 contract (or "lot") coffee futures buy order to be entered seconds before 12:30. Client A made it clear to Mr Kerr that the order must be executed prior to 12:30 and that his intent in placing the order was to manipulate the coffee futures price so that the CORP would close above \$1,750 and the coffee put options would expire OTM. Indeed, prior to giving Mr Kerr the final instruction, Client A asked Mr Kerr how many coffee futures he would need to buy in order to increase the price above \$1,750 at 12:30. In response, Mr Kerr provided Client A with the market depth.
- 2.8. Mr Kerr executed Client A's order as instructed and, as a direct result, the price of coffee futures rose to \$1,757 at 12:30 and the CORP was set at \$1,752 shortly thereafter.
- 2.9. Accordingly, Mr Kerr executed a transaction which:
  - 2.9.1. gave or was likely to give a false or misleading impression as to the price of coffee futures and the CORP; and
  - 2.9.2. secured the price of coffee futures and the CORP at an abnormal or artificial level.
- 2.10. Mr Kerr's behaviour constituted deliberate market abuse in breach of section 118(5) of the Act. The FSA considers that this conduct alone warrants the imposition of a significant financial penalty and a prohibition order.
- 2.11. Mr Kerr subsequently provided false and misleading information to those investigating his actions (i.e. LIFFE and the FSA), further demonstrating that he lacks the integrity required of a fit and proper person and that he poses a substantial risk to the FSA's statutory objectives of maintaining confidence in the financial system.

### **3. MARKET ABUSE: RELEVANT STATUTORY PROVISIONS**

- 3.1. The relevant statutory and regulatory provisions are set out in Appendix 1.

#### **4. FACTS AND MATTERS RELIED ON**

##### **The LIFFE coffee futures and options market**

- 4.1. The coffee futures and options market is a small but important LIFFE market with a relatively small number of specialist participants. LIFFE coffee futures contracts are sometimes physically settled.
- 4.2. Producers and larger consumers in the underlying market in coffee use futures and options contracts to protect the price of coffee produced and consumed by them. This activity, known as hedging, is important to the stability of the underlying market in coffee and to the protection of the underlying price of coffee.
- 4.3. Speculative market participants, such as Client A, seek to make a profit from changes in the price of coffee. They have no interest in taking delivery of the underlying product. Speculative traders are, however, important market participants since their trading activity provides liquidity to the marketplace.
- 4.4. The price of coffee futures and the price of physical coffee are fundamentally linked. Accordingly, movements in the price of futures can have a direct effect on the price of underlying coffee and vice versa. Accordingly, manipulation of the market in coffee futures has the potential to affect the wider coffee market.
- 4.5. The relatively small size of the coffee futures market means that it is particularly vulnerable to price manipulation. Successful price manipulation has the potential to damage a large percentage of participants in the market at once. Further, where a market has a small number of participants, two participants acting in concert to manipulate the price have the potential to have a greater impact than might otherwise be the case.
- 4.6. Aside from direct financial damage to existing market participants and the direct impact on the wider coffee market, manipulation of the market in coffee futures and options may have other potentially damaging effects. First, it might discourage participants from trading on LIFFE's coffee market (coffee futures and options are traded on numerous exchanges worldwide). Second, it might discourage new entrants from entering the market and, therefore, hinder the liquidity benefits that participants bring. Third, it could undermine confidence in the coffee futures and options markets and, in extreme cases, the wider derivatives markets.

## **Coffee futures and options**

- 4.7. A futures contract is an agreement to buy or sell a standard quantity of a specified asset on a fixed date at a predetermined price. The buyer of a futures contract assumes an obligation to buy on a specified date. The seller of a futures contract is required to sell on a specified date. Buying futures is known as going long of the futures or simply going long. Selling futures is known as going short of the futures or simply going short.
- 4.8. A coffee future gives the buyer/seller the obligation to receive/deliver a specified amount (five tonnes at all times of relevance to this case but currently 10 tonnes) of LIFFE deliverable Robusta coffee in a specified period (the delivery month). The contract is priced in US dollars and the minimum tick size (the minimum increment by which LIFFE permits a futures contract to rise or fall in price) is \$1 per tonne, thus a \$1 price move would give rise to a \$5 change in the value of each futures contract.
- 4.9. An option is a contract that confers the right, but not the obligation, to buy or sell an asset at a given price on or before a given date. The right to buy is a call option and the right to sell is a put option. The person selling the option is known as the writer of the option. The option comes to the end of its life at its expiry date. After this time it cannot be exercised or traded. An American option can be exercised at any time on or before its expiry date. A European option can be exercised only upon expiry. The price at which the options contract gives the right to buy in the case of a call or sell in the case of a put is the exercise or strike price.
- 4.10. A coffee option gives the buyer the right, but not the obligation, to buy (in the case of a call) or sell (in the case of a put) one coffee future at the strike price. The option is an American style option.
- 4.11. The exercise of a long coffee call option will result in a long coffee futures position. The exercise of a long coffee put option will result in a short coffee futures position. If the futures price increases, the value of the call option will increase and the value of the put option will decrease. If the futures price decreases, the value of the call option will decrease and the value of the put option will increase.

## **The CORP**

- 4.12. As stated above, the CORP is determined on the third Wednesday of the calendar month preceding the expiry of the relevant futures contract. It is derived by taking the VWAP of all trades done in the time period 12:29:00-12:30:00 on the relevant Wednesday.
- 4.13. The CORP determines whether a coffee option is classified as ITM or OTM. Unless option holders specify that they wish to exercise their options manually, the Clearing House will automatically exercise ITM options and abandon OTM options. The exercise of the coffee option will result in a position in coffee futures.

### **The relevant positions**

- 4.14. While Client A had both long and short positions in coffee futures and options across various months, he was short at the start of 15 August 2007. As stated above, Client A held a large position (2000 contracts) in the coffee put options. He also held a small position (150 contracts) in the September \$1,750 coffee call options (“coffee call options”).
- 4.15. Whilst Mr Kerr did not know the full detail of Client A’s positions, he understood that:
- 4.15.1. Client A was predominately short coffee futures going into trading on 15 August 2007; and
- 4.15.2. Client A was a large holder of the coffee put options.

### **The order**

- 4.16. Shortly before 12:29 on 15 August 2007, during a telephone call that commenced at 12:06, Client A asked Mr Kerr how many coffee futures he would need to buy in order to cause the price to finish above \$1,750. Mr Kerr informed Client A that he would need to buy 330 lots. Client A then instructed Mr Kerr to place an order to buy almost double this amount (i.e. 600 coffee futures) up to a price of \$1,757.
- 4.17. The order was entered into the market by Mr Kerr at approximately 12:29:58. At the time, the coffee futures market was \$1,744 bid for 27 lots, with six lots offered at \$1,746.
- 4.18. Client A’s 600 lot buy order was filled at 12:29:59, at various price levels between \$1,746 and \$1,757. The transactions associated with this order accounted for over 95% of the volume in the time period 12:29:00-12:30:00 and caused the price of coffee futures to rise from \$1,745 to \$1,757 during the last two seconds before 12:30.
- 4.19. By contrast, in the period after 12:29:00, and before the execution of Client A’s order at 12:29:58, only 20 coffee futures contracts had traded. These 20 futures all traded at a price of \$1,745 and the VWAP was, therefore, below \$1,750. As a direct result of Mr Kerr’s execution of Client A’s buy order, the price of coffee futures rose to \$1,757 and the VWAP in the period between 12:29 and 12:30 rose to \$1,752. In the absence of this trading, the CORP would almost certainly have closed at \$1,745.
- 4.20. Instead, as a result of Client A’s order, executed by Mr Kerr, the CORP was published, at approximately 12:45, at \$1,752. This caused the \$1,750 put options to finish unexpectedly OTM and the \$1,750 call options to finish unexpectedly ITM.

### Telephone conversations between Client A and Mr Kerr

- 4.21. Client A and Mr Kerr had several telephone conversations on 14 and 15 August 2007, in the course of which the trading strategy to be adopted on 15 August was discussed and refined.
- 4.22. On the evening of 14 August 2007, Mr Kerr and Client A discussed the possibility of placing a large trade to catch other market participants off guard at the coffee options expiry the following day.
- 4.23. At 9:51 the following morning, when recapping Client A's trading so far that day, Mr Kerr suggested to Client A that he should buy 1,000 coffee futures at a low price and then "ram" the coffee futures price "up through" \$1,750. Mr Kerr suggested to Client A that the market makers would then have to "cover", resulting in Client A being able to sell his futures at a price of \$1,760.
- 4.24. The 600 lot order was placed by Client A with Mr Kerr during a call that commenced at 12:06 and terminated seconds after 12:30. During the course of this conversation:
  - 4.24.1. Client A indicated to Mr Kerr that he wished to buy a large amount of coffee futures shortly before 12:30: "*on the close, just before the close, lift everything*";
  - 4.24.2. Client A discussed with Mr Kerr how, by doing so, he hoped that the holders of the coffee put options would cover their positions (by buying coffee futures) and that he could then sell coffee futures as the price rose, before then exercising his own coffee put options;
  - 4.24.3. Client A stated that the timing of the trade was important: "*...we cannot afford to have any F-ups on the timing today ok*";
  - 4.24.4. Client A asked Mr Kerr how many coffee futures he would need to buy in order to position the price above \$1,750 at 12:30: "*if I want to get this thing to finish through 50 [\$1750], how many lots do I need to buy?*";
  - 4.24.5. Mr Kerr advised that he would need to buy 330 coffee futures in the next four minutes to achieve this;
  - 4.24.6. Client A then instructed Mr Kerr to buy 600 coffee futures up to a price of \$1,757 at or shortly before 12:30, making it clear that his intention was to increase the price: "*Ok I want you to on the close, this is the idea, that it finishes obviously higher than 1750. I want you to buy 600 lots of September up to 1757*";
  - 4.24.7. Mr Kerr called a speaking clock so that both he and Client A could listen to the clock count down to 12:30;

- 4.24.8. Client A insisted to Mr Kerr three times that that the order must be executed before 12:30; not after; and
- 4.24.9. immediately following the execution of Client A's order, Mr Kerr expressed concern that a trade had been executed at a price of \$1,750. He then reassured Client A that the last trade was at a price of \$1,757.
- 4.25. Following execution of the transaction, in a call that commenced at 14:11, Client A confirmed to Mr Kerr that, by buying 600 lots of coffee futures just before 12:30, he had "*created a false impression*".
- 4.26. Mr Kerr was aware of Client A's intent to manipulate the price above \$1,750, he understood how Client A hoped to profit as a result, and he actively encouraged Client A to pursue the plan to manipulate the market.

#### **Concerted action and the position as between the offending parties**

- 4.27. While Client A was the instigator of this deliberate and successful plan to manipulate the market in coffee futures, he achieved his initial goal of artificially inflating the CORP on 15 August 2007 in concert with Mr Kerr, who both assisted and encouraged his abusive behaviour.
- 4.28. While Client A's behaviour was more egregious than that of Mr Kerr, Mr Kerr was a willing and enthusiastic participant.

#### **Profit**

- 4.29. Although Mr Kerr's personal profit (in the form of standard commission) from his market manipulation was not large, Client A was an important client to him and he perhaps acted with a view to obtaining a larger share of Client A's future business.
- 4.30. In any event, for the reasons stated at paragraphs 2.2 and 4.6 above, the fact that Mr Kerr did not benefit substantially in terms of immediate financial reward diminishes neither his culpability nor the seriousness of this market abuse.

#### **Mr Kerr's conduct following his manipulation of the market in coffee futures and options**

- 4.31. Mr Kerr attended an interview with LIFFE on 20 December 2007 but provided false and misleading information during that interview.
- 4.32. Mr Kerr voluntarily attended an interview under caution at the offices of the FSA on 15 October 2008. He declined to answer questions but proffered a written statement that contained false and misleading statements.
- 4.33. Mr Kerr has continually denied any wrongdoing and has, instead, provided those investigating him with false and misleading information regarding his understanding of Client A's trading strategy on 15 August 2007, the purpose of the 600 lot order,

and the content of his telephone conversations with Client A on 14 and 15 August 2007. Specifically, Mr Kerr has indicated that he believed Client A to be solely motivated by a desire to reduce his short position. This assertion is not credible given the facts.

- 4.34. Mr Kerr has failed to deal openly and honestly with an exchange and with his regulator.
- 4.35. Sucden suspended Mr Kerr pending the outcome of the FSA's investigation and cooperated fully with that investigation. Mr Kerr resigned from Sucden following his suspension.

## **5. ANALYSIS OF BREACHES**

- 5.1. The FSA is satisfied that, on 15 August 2007, Mr Kerr engaged in market abuse by executing an order to trade that:
  - 5.1.1. gave a false or misleading impression as to the price of qualifying investments, namely the coffee futures and the CORP, in violation of section 118(5)(a) of the Act; and
  - 5.1.2. secured the price of the coffee futures and the CORP at an abnormal or artificial level, in violation of section 118(5)(b) of the Act.
- 5.2. The transaction was not effected for legitimate reasons and was not in conformity with accepted market practices.
- 5.3. It is the view of the FSA that Mr Kerr's conduct on 15 August 2007 constituted deliberate market abuse. As set out above:
  - 5.3.1. Mr Kerr spoke with Client A on the evening of 14 August 2007 and discussed the possibility of placing a large trade the next day;
  - 5.3.2. at 9:51 on 15 August 2007, Mr Kerr suggested to Client A that Client A should buy 1,000 lots at a low price and get the coffee futures price above \$1,750 on the options expiry;
  - 5.3.3. when placing his order with Mr Kerr, shortly before 12:30 on 15 August 2007, Client A explained clearly to Mr Kerr that the purpose of the trading was to ensure that the price finished above \$1,750 at 12:30; and
  - 5.3.4. Mr Kerr was concerned when it appeared that the price of coffee futures might not be above \$1,750 at 12:30.
- 5.4. Mr Kerr understood that the purpose of the trading was to manipulate the market and that Client A proposed to profit therefrom, to the detriment of other market participants.

5.5. By deliberately committing market abuse, and failing thereafter to acknowledge any wrongdoing, Mr Kerr has clearly demonstrated that he lacks honesty and integrity and, therefore, is not fit and proper to perform any function in relation to any regulated activity carried on by any authorised or exempt person or exempt professional firm.

## **6. SANCTION**

6.1. The FSA considers the misconduct summarised above to be particularly serious because Mr Kerr deliberately pursued a course of conduct which, as an approved person, he knew to be contrary to regulatory standards.

### **Financial Penalty**

6.2. The FSA's general approach in deciding whether to take action and determining the appropriate level of financial penalties is set out in Chapter 6 of the Decision Procedure and Penalties Guide ("DEPP"), which is part of the Handbook of Rules and Guidance. The FSA has also had regard to the provisions of the Enforcement Manual ("ENF"), which were in force for the early part of the Relevant Period.

6.3. The principal purpose of imposing a financial penalty is to promote high standards of regulatory conduct by deterring firms and approved persons who have breached regulatory requirements from committing further contraventions, helping to deter other firms and approved persons from committing contraventions and demonstrating, generally, to firms and approved persons, the benefit of compliant behaviour (DEPP 6.1.2G).

6.4. In enforcing the market abuse regime, the FSA's priority is to protect prescribed markets from any damage to their fairness and efficiency caused by the manipulation of shares in relation to the market in question. Effective and appropriate use of the power to impose penalties for market abuse will help to maintain confidence in the UK financial system by demonstrating that high standards of market conduct are enforced in the UK financial markets. The public enforcement of these standards also furthers public awareness and the FSA's protection of consumers objective, as well as deterring potential future market abuse.

6.5. In determining whether a financial penalty is appropriate and proportionate, the FSA considers all the relevant circumstances of the case. DEPP 6.5.2G sets out a non-exhaustive list of factors that may be of relevance in determining the amount of a financial penalty. In deciding the appropriate penalty, the FSA considers the factors outlined below to be particularly relevant:

#### *Deterrence: DEPP 6.5.2G (1)*

6.6. In determining the appropriate level of penalty, the FSA has had regard to the need to promote high standards of regulatory conduct by deterring those who have committed

breaches from committing further breaches and to help to deter others from committing similar breaches.

*The nature, seriousness and impact of the breach: DEPP 6.5.2G (2)*

- 6.7. Although Mr Kerr's misconduct was a one-off incident, it had an adverse effect on the coffee futures and coffee options markets, both in terms of the orderliness of the markets and confidence in the markets. As a result of Mr Kerr's 600 lot trade, the price of coffee futures rose from \$1,745 to \$1,757 during the last two seconds before 12:30. This caused the CORP to be set above \$1,750, which in turn resulted in the coffee put options finishing unexpectedly OTM and the coffee call options finishing unexpectedly ITM. This had potentially serious repercussions for the holders of the coffee options, who may have hedged their positions on the assumption that the CORP would be set below \$1,750.

*The extent to which the breach was deliberate or reckless: DEPP 6.5.2G (3)*

- 6.8. Mr Kerr's actions were deliberate.

*Whether the person on whom the penalty is to be imposed is an individual: DEPP 6.5.2G (4)*

- 6.9. The FSA has had regard to the fact that Mr Kerr is an individual and so the penalty will have a substantial impact upon him.

*The size, financial resources and other circumstances of the person on whom the penalty is to be imposed: DEPP 6.5.2G (5)*

- 6.10. The FSA has no verifiable evidence that the proposed penalty will cause Mr Kerr serious financial hardship.

*Disciplinary record and compliance history: DEPP 6.5.2G (9)*

- 6.11. Mr Kerr has no adverse previous disciplinary record or compliance history.
- 6.12. Having had regard to all the factors outlined above the FSA has imposed a financial penalty of £100,000. This penalty has been reduced by 20% from a proposed penalty of £125,000 pursuant to Stage 2 of the early settlement discount scheme.

### **Prohibition**

- 6.13. The facts and matters described in section 5 above lead the FSA to conclude that:
- 6.13.1. Mr Kerr has failed to act with integrity and has acted dishonestly by deliberately engaging in market abuse and subsequently providing false and misleading information to those investigating him;
- 6.13.2. this deliberate course of conduct directly impugns Mr Kerr's honesty, integrity and reputation and demonstrates that he is not a fit and proper person to

perform any function in relation to any regulated activity carried on by any authorised or exempt person;

6.13.3. these findings directly relate to the performance by Mr Kerr of his controlled functions; and

6.13.4. this conduct demonstrates that Mr Kerr presents a risk to the FSA's statutory objective of market confidence, particularly in relation to the activities of LIFFE and investors in that market.

6.14. As a result, the FSA has decided to make an order prohibiting Mr Kerr from performing any function in relation to any regulated activity carried on by any authorised or exempt person or exempt professional firm.

## **7. DECISION MAKERS**

7.1 The decision which gave rise to the obligation to give this Final Notice was made by the Settlement Decision Makers on behalf of the FSA.

## **8. IMPORTANT**

8.1 This Final Notice is given to Mr Kerr in accordance with section 390 of the Act.

### **Manner of and time for payment**

8.2 The financial penalty must be paid in full by Mr Kerr to the FSA by no later than 29 June 2010, 28 days from the date of the Final Notice.

### **If the financial penalty is not paid**

8.3 If all or any of the financial penalty is outstanding on 30 June 2010, the FSA may recover the outstanding amount as a debt owed by Mr Kerr and due to the FSA.

### **Publicity**

8.4 Sections 391(4), 391(6) and 391(7) of the Act apply to the publication of information about the matter to which this notice relates. Under those provisions, the FSA must publish such information about the matter to which this notice relates as the FSA considers appropriate. The information may be published in such manner as the FSA considers appropriate. However, the FSA may not publish information if such publication would, in the opinion of the FSA, be unfair to you or prejudicial to the interests of consumers.

8.5 The FSA intends to publish such information about the matter to which this Final Notice relates as it considers appropriate.

### **FSA contacts**

8.6 For more information concerning this matter generally, you should contact Steven Clark (Tel: 020 7066 2172) of the Enforcement and Financial Crime Division of the FSA.

**Tracey McDermott  
Head of Department  
FSA Enforcement and Financial Crime Division**

## APPENDIX 1

### RELEVANT STATUTORY AND REGULATORY PROVISIONS

#### Market abuse

1. Market abuse is defined under section 118(1) of the Act as behaviour (whether by one person alone or by two or more persons jointly or in concert) which occurs in relation to qualifying investments admitted to trading on a prescribed market and falls within any one or more of the types of behaviour set out in subsections 118(2) to (8).
2. Under section 118(5) of the Act market abuse is:

*“where the behaviour consists of effecting transactions or orders to trade (otherwise than for legitimate reasons and in conformity with accepted market practices on the relevant market) which –*

  - (a) *give, or are likely to give, a false or misleading impression as to the supply of, or demand for, or as to the price of, one or more qualifying investments, or*
  - (b) *secure the price of one or more such investments at an abnormal or artificial level.”*
3. Section 123(1) of the Act provides as follows:

*“(1) If the Authority is satisfied that a person ("A")-*

  - (a) *is or has engaged in market abuse...*

*it may impose on him a penalty of such amount as it considers appropriate.”*
4. Section 123(3) of the Act continues:

*“(3) If the Authority is entitled to impose a penalty on a person under this section it may, instead of imposing a penalty on him, publish a statement to the effect that he has engaged in market abuse.”*
5. The FSA has issued the Code of Market Conduct ("**MAR**") pursuant to section 119 of the Act. Under section 122 of the Act, MAR may be relied upon in so far as it indicates whether or not particular behaviour should be taken to amount to market abuse. Guidance within MAR 1.6 (which deals with behaviour constituting manipulating transactions) has particular relevance to this case.
6. MAR 1.6.2E states that the following behaviour is representative of market abuse (manipulating transactions) of a type involving false or misleading impressions:

*“(1) buying or selling qualifying investments at the close of the market with the effect of misleading investors who act on the basis of closing prices, other than for legitimate reasons.”*

7. MAR 1.6.5E and MAR 1.6.6E set out factors to be taken into account when considering whether behaviour is for legitimate reasons. Of relevance is MAR 1.6.5E which states:

*“In the opinion of the FSA the following factors are to be taken into account when considering whether behaviour is for “legitimate reasons”, and are indications that it is not:*

- (1) if the person has an actuating purpose behind the transaction to induce others to trade in, or to position or move the price of, a qualifying investment;*
- (2) if the person has another, illegitimate reason behind the transactions or order to trade;*
- (3) if the transaction was executed in a particular way with the purpose of creating a false or misleading impression.”*

8. MAR 1.6.9E sets out a series of factors to be taken into account in determining whether or not a person’s behaviour amounts to market abuse (manipulating transactions) of a type involving false or misleading impressions. Of relevance to this case are the following extracts:

*“(1) the extent to which orders to trade given or transactions undertaken represent a significant proportion of the daily volume of transactions in the relevant qualifying investment on the regulated market concerned, in particular when these activities lead to a significant change in the price of the qualifying investment ;*

*(2) the extent to which orders to trade given or transactions undertaken by persons with a significant buying or selling position in a qualifying investment lead to significant changes in the price of the qualifying investment or related derivative or underlying asset admitted to trading on a regulated market ;*

...

*(5) the extent to which orders to trade given or transactions undertaken are concentrated within a short time span in the trading session and lead to a price change which is subsequently reversed;*

...

*(7) the extent to which orders to trade are given or transactions are undertaken at or around a specific time when reference prices, settlement prices and valuations are calculated and lead to price changes which have an effect on such prices and valuations.”*

9. MAR 1.6.10E sets out a series of factors to be taken into account in determining whether or not a person’s behaviour amounts to market abuse (manipulating transactions) which secures an abnormal or artificial price level (118(5)(b)). Of relevance to this case are the following factors:

- “(1) *the extent to which the person had a direct or indirect interest in the price or value of the qualifying investment or related investment;*
- (2) *the extent to which price, rate or option volatility movements, and the volatility of these factors for the investment in question, are outside their normal intra-day, daily, weekly or monthly range; and*
- (3) *whether a person has successively and consistently increased or decreased his bid, offer or the price he has paid for a qualifying investment or related investment.”*

10. Finally, MAR 1.6.15E sets out examples of market abuse (manipulating transactions). The following example is relevant:

*“(2) a trader buys a large volume of commodity futures, which are qualifying investments, (whose price will be relevant to the calculation of the settlement value of a derivatives position he holds) just before the close of trading. His purpose is to position the price of the commodity futures at a false, misleading, abnormal or artificial level so as to make a profit from his derivatives position”...*

### **Prohibition and Withdrawal of Approval**

1. The FSA’s statutory objectives, set out in section 2(2) of the Act are: market confidence; public awareness; the protection of consumers; and the reduction of financial crime.
2. The FSA has the power, pursuant to section 56 of the Act, to make an order prohibiting an individual from performing a specified function, any function falling within a specified description, or any function, if it appears to the FSA that that individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person, exempt person or exempt professional person.
3. Such an order may relate to a specified regulated activity, any regulated activity falling within a specified description or all regulated activities.
4. Pursuant to section 63 of the Act, the FSA 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 function to which the approval relates.

### The Fit and Proper Test for Approved Persons

5. The part of the FSA Handbook entitled the Fit and Proper Test for Approved Persons (“FIT”) sets out guidance on how the FSA will assess the fitness and propriety of a person to perform a particular controlled function.
6. The purpose of FIT is to outline the main criteria for assessing the fitness and propriety of a candidate for a controlled function. FIT is also relevant in assessing the continuing fitness and propriety of an approved person.

7. FIT 1.3.1G states that the FSA will have regard to a number of factors when assessing the fitness and propriety of a person and that the most important considerations will be the person's honesty, integrity and reputation, competence and capability and financial soundness.
8. FIT 2.1.1G provides that, in determining a person's honesty, integrity and reputation, the FSA will have regards to factors including, but not limited to, those set out in FIT 2.1.3G. FIT 2.1.3.G sets out the following factors, amongst others which are relevant to this matter:
  - i) whether the person has contravened any of the requirements and standards of the regulatory system (FIT 2.1.3(5) G); and
  - ii) 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 systems and with other legal, regulatory and professional requirements and standards (FIT 2.1.3(13)G).

The FSA's policy in relation to prohibition orders and withdrawal of approval

9. The FSA's policy in relation to prohibition orders and withdrawal of approval is set out in Chapter 9 of the Enforcement Guide ("EG").
10. EG 9.4 summarises the FSA's policy on making prohibition orders and the circumstances under which Enforcement will consider recommending such action. In particular:

*"The FSA has the power to make a range of prohibition orders depending on the circumstances of each case and the range of regulated activities to which the individual's lack of fitness and propriety is relevant. Depending on the circumstances of each case, the FSA may seek to prohibit individuals from performing any class of function in relation to any class of regulated activity, or it may limit the prohibition order to specific functions in relation to specific regulated activities. The FSA may also make an order prohibiting an individual from being employed by a particular firm, type of firm or any firm."*
11. EG 9.5 continues as follows:

*"The scope of a prohibition order will depend on the range of functions which the individual concerned performs in relation to regulated activities, the reasons why he is not fit and proper and the severity of the risk which he poses to consumers of the market generally."*
12. EG 9.8 provides:

*"When the FSA has concerns about the fitness and propriety of an approved person, it may consider whether it should prohibit that person from performing functions in relation to regulated activities, withdraw its approval, or both. In deciding whether to withdraw its approval and/or make a prohibition order, the FSA will consider in each whether its regulatory objectives can be achieved adequately by imposing*

*disciplinary sanctions, for example public censures or financial penalties, or by issuing a private warning.”*

13. EG 9.9 states that, when it decides to exercise its power to make a prohibition order against an approved person and/or withdraw its approval, the FSA will consider all the relevant circumstances of the case. These may include, but are not limited to, the following factors:
  - i) whether the individual is fit and proper to perform functions in relation to regulated activities. The criteria for assessing the fitness and propriety of approved persons are set out in FIT 2. One criterion is the honesty, integrity and reputation of the individual (FIT 2.1);
  - ii) whether and to what extent the approved person has failed to comply with the Statements of Principle issued by the FSA with respect to the conduct of approved persons;
  - iii) whether the approved person has engaged in market abuse;
  - iv) the relevance and materiality of any matters indicating unfitness;
  - v) the particular controlled function the approved person is (or was) performing, the nature and activities of the firm concerned and the markets in which he operates; and
  - vi) the severity of the risk which the individual poses to consumers and to confidence in the financial system.
  
14. EG 9.11 provides that due to the diverse nature of the activities and functions which the FSA regulates, it is not possible to produce a definitive list of matters which the FSA might take into account when considering whether an individual is not a fit and proper person to perform a particular, or any, function in relation to a particular, or any firm. However, EG 9.12 gives examples of types of behaviour which have previously resulted in the FSA deciding to issue a prohibition order or to withdraw the approval of an approved person. These examples include:
  - i) severe acts of dishonesty e.g. which may have resulted in financial crime; and
  - ii) serious breaches of the Statements of Principles for approved persons.
  
15. EG 9.23 provides that in appropriate cases, the FSA may take other action against an individual in addition to making a prohibition order and/or withdrawing approval, including the use of its powers to impose a financial penalty.