MARKET ABUSE - Conditions - Information not generally available to the market - Transactions in 2003 - Whether Applicants traded in shares in reliance on inside information, being information not generally available to market - No - Condition (a) of s.118(2) of FS&MA 2000 not satisfied - No penalty to be imposed

PROCEDURE - Submission of no case to answer - Tribunal's discretion in dealing with submission

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 19, 20, 21 December 2005
Date of written decision: 24 January 2006

For the Applicants Jason Mansell

For the Respondent Ian Stern

DECISION

INTRODUCTION

1. The allegation in this case is that the first applicant, Timothy Baldwin, through his investment vehicle WRT Investments Limited ("WRT"), the second applicant, engaged in market abuse as defined by s 118 of the Financial Services and Markets Act 2000 ("the Act" or FSMA"). For this the Financial Services Authority ("the Authority" or "the FSA") imposed a penalty of £25,000 on Mr Baldwin and £24,000 on WRT.

2. The FSA alleged that on 28 or 29 July 2003 Mr Michael Nolan, the Chief Executive Officer of Minmet PLC (an Irish registered and incorporated company specialising in mineral exploration and mining activities) received a telephone call from Mr Baldwin, who worked for Canaccord Capital (Europe) Limited ("Canaccord") as an equity salesman selling securities in smaller companies to the UK institutional market. Mr Baldwin had an association with Minmet going back several years as a result of his previous employment. It was said that during the alleged conversation Mr Nolan gave Mr Baldwin information about the positive July performance of Minmet's principal asset, a gold mine in Sweden. This was relevant information that was not generally available to the market. WRT purchased shares in reliance on this information. The positive information was notified to the market in an announcement on 6 August 2003. This announcement caused Minmet's share price to increase by more than one hundred per cent. Not long after, WRT sold the shares and reaped a profit.

3. Mr Baldwin and WRT contested this allegation on various grounds. The principal ground was that no such telephone conversation took place.

4. After a brief adjournment at the end of the three day hearing we announced that our decision was in the applicants' favour, and that our written reasons would follow.

MARKET ABUSE

5. Section 118 of the Act defines market abuse as behaviour which occurs in relation to qualifying investments traded on a market to which the section applies, which satisfies at least one of the conditions set out in s 118(2), and which is likely to be regarded by a regular user of that market who is aware of the behaviour as a failure on the part of the person concerned to observe the standard of behaviour reasonably expected of a person in his position in relation to the market.

6. The parties were in agreement that the shares with which the present case is concerned were traded on a market to which s 118 applies, namely, the London Stock Exchange.

7. Of the three available conditions referred to in section 118(2) the one that is relevant to the facts and circumstances of this case is that set out in subsection (2)(a) which reads as follows:

> "*the behaviour is based on information which is not generally available to those using the market but which, if available to a regular user of the market, would or would be likely to be regarded by him as relevant when deciding the terms on which transactions in investments of the kind in question should be effected.*"

8. By s 119 of the Act, the FSA is under a statutory duty to issue a code giving guidance to those determining whether or not behaviour amounts to market abuse. Under s 122(2), the code applicable at the time the behaviour occurred "*may be relied on so far as it indicates whether or not that behaviour should be taken to amount to market abuse*". The most relevant parts of the Code of Market Conduct (MAR 1) to this case are: MAR 1.2 (the regular user test), MAR 1.4.4 (behaviour which amounts to market abuse); MAR 1.4.5 (circumstances in which information is to be regarded as generally available to those using the market), and MAR 1.4.9 (relevant information). In the event, because of our view on the facts, it is not necessary for us to make further reference to these provisions.

AGREED FACTS

9. The parties agreed many of the relevant facts. As agreed they were as follows:

10. Mr Baldwin is an experienced investor and equity salesman, having been involved in the market for about 18 years. At the time of the relevant trades he was 39 years old. His employment history is:

- January 1988 to April 2000 at Greig Middleton;
- July to October 2000 at Tiger as a non-executive director;
- September 2000 to September 2002 at Investec;
- 14th October 2002 to June 2004 at Canaccord.

11. Mr Baldwin was an approved person and had been since the scheme's inception in December 2001. He held controlled functions as an 'investment adviser' (CF21) and as a 'customer trader' (CF26). Although an equity salesman, in the twelve months or so before this incident he had spent about seventy per cent of his time doing "primary issue work which is the…placement of new shares in companies to finance whatever". This would involve "organising meetings for institutional clients, usually as an insider" and taking them through the structure of the deal and "receiving their orders as part of a book-building exercise for the placing" (Baldwin interview 26.5.04 Tape 2 p.3/99-4/110).

12. Mr Baldwin held a number of accounts through which he traded for his personal requirements. One of those accounts, WRT Investments, is the vehicle through which Mr Baldwin undertook the trades with which the Tribunal is directly concerned. WRT was incorporated in 1998 and is a private investment company controlled by Mr Baldwin. It is run as his "own personal portfolio" of which he owns "the majority of the controlling equity" and the rest is "largely family…and some friends" (Baldwin interview 26.5.04 Tape 3 p.7). In an account opening form with Brewin Dolphin Securities Ltd dating from March 2003 Mr Baldwin stated that he

held investments of £1 million. In the year December 2002 to December 2003 WRT carried out over 100 trades.

13. Minmet is an Irish PLC which specialises in the mining sector. The company is listed in Dublin but it is also quoted for trading on the London Stock Exchange's SEAQ system. Virtually all of the trading in Minmet shares takes place in London. At the relevant time Minmet had a number of exploration projects worldwide but the Bjorkdal mine was its only production asset.

14. In June 2002 Minmet shares were trading at around 11 pence. In July 2002 the Portuguese Supreme Court reversed an earlier favourable decision leading to the share price falling to 7 pence. In August 2002 Minmet announced that it was closing its trial mining operation in Brazil at a cost of around $19 million, causing its share price to drop to 2 pence. In October 2002 Minmet received a telephone call from a Swedish gold producing company that owned the Bjorkdal gold mine with a view to possible mutual assistance. The gold mine was attractive to Minmet and Minmet was attractive to the Swedish company as Minmet had both cash and good management, unlike International Gold Exploration ("IGE") who were the company managing the mine at the time.

15. There followed many meetings and discussions and on 27 January 2003 Minmet issued an announcement that they were "in advanced negotiations and are finalising due diligence in relation to the proposed purchase by Minmet of a 100% interest in the Bjorkdal gold mine…"

16. On 26 March 2003 Minmet issued an announcement stating that they had completed the acquisition of a 50% interest in Bjorkdalsgruvan, the company that owned the mine. On 27 March 2003 Minmet issued an announcement stating that IGE had unanimously approved an option agreement which gave Minmet the right to acquire the remaining 50% of Bjorkdalsgruvan. Between 1 January and 30 July 2003 the Minmet share price had gone no higher than 2.13 pence. On 29 July 2003 the closing share price was 1.65 pence and on 30 July it was 1.79 pence.

17. In the last two weeks of July there was cause for optimism within Minmet in relation to the production of gold from the Bjorkdal mine. On Tuesday 15 July 2003 the general manager of the mine informed the management that the grade of ore being mined was higher than expected. On Wednesday 16 July they were informed that the mine had produced 25 kilograms of gold in one day, whereas it had been producing between 75 to 90 kilograms per month. On Wednesday 23 July the management discussed the need to make an announcement updating the market. It was decided that an announcement was likely to be necessary but that, bearing in mind the fluctuating daily performance, the entire month's performance should be reviewed before making a final decision.

18. On Monday 28 July Mr Nolan started to draft an announcement. On Tuesday 29 July at 13.51 he e-mailed the draft to Rolf Nordstrom (Chairman of Minmet), David Hall (Director), Michael Johnson (non-executive director) and Alan Mooney (Company Secretary). On Friday 1 August the formal wording of the announcement was agreed at a Minmet Board meeting. The next day (2nd) a revised draft was circulated to the management. On Monday 4 August (which was a Bank holiday in Ireland) the announcement was embargoed until 7 a.m. on Wednesday 6 August 2003 to give IGE time to prepare their announcement to the Oslo Stock Exchange. At 7 a.m. on 6 August 2003 the announcement was released. Minmet's share price went from 2.23 pence (5 August) to 3.9 pence (6 August) and then to 5.38 pence on 7 August (an increase of more than 140 per cent over the closing price the day before the announcement).

19. Tiger is a UK company whose shares are traded on the London Stock Exchange. It was created by Minmet in 1996 and at that time was called Crediton Minerals PLC. Mr Baldwin was an integral part of its relaunch in October 2000 as Tiger – including the raising of about £3.6 million. On 16 January 2002 Minmet announced that it was to sell its entire shareholding in Tiger. Mr Nolan remains a non-executive director of the company. Financial statements show that in February 2003 Minmet accounted for about 35% of Tiger's investment portfolio. In January 2003 Tiger

purchased nearly 18 million Minmet shares nearly tripling their investment in that company. At 11.09 a.m. on 7 August 2003 Tiger made an announcement that the movement in its own share price was "due to the movement in the share price of Minmet PLC".

20. Minmet had used the services of Davy Stockbrokers in Dublin since 1988 but the company felt that it was necessary to acquire a London corporate broker in order to market and develop the company to institutional investors. They made presentations to various institutions and were successful in obtaining limited financial backing. In about 1997 Minmet met Mr Baldwin when he was working for Greig Middleton and they developed an informal broking relationship. The company managed to raise about £1 million which was, at that time, the most it had managed to raise. Greig Middleton was not formally appointed as Minmet's corporate broker until July 1999. That formalisation took place in advance of a major fundraising whereby Greig Middleton raised about £11.55 million for Minmet. Mr Baldwin was instrumental in raising that finance. In October 2000, by when Mr Baldwin had moved to Investec, he arranged a meeting between Minmet and Investec who then became their corporate brokers in February 2001. However, the collapse of the share price in August 2002 meant that Minmet were left with no corporate broking support (that is, in London).

21. Since the share price collapse in August 2002, Minmet had tried very hard to rekindle a London broker association in order to help re-establish their credibility in the market place. They had a first meeting with Canaccord at the end of October 2002 and a further meeting in November 2002 – on both occasions Mr Baldwin was present. The latter meeting was prompted by the opportunity to acquire the Bjorkdal gold mine. (Canaccord is renowned as a broking house specialising in the mining sector.) Moreover, Minmet had this very strong relationship with Mr Baldwin since 1997. Thereafter, Mr Nolan had no contact with Mr Baldwin from May 2003 up to the time of the alleged call of 28 or 29 July 2003.

22. As mentioned, shares were purchased on behalf of WRT, a company in which Mr Baldwin is one of three Directors, essentially an 'investment club' for various friends and family members in which Mr Baldwin makes all investment decisions:

- 30th July 2003 (16.33 p.m.) – purchase of 300,000 Minmet shares at 1.8 pence per share

- 31st July 2003 (9.35 a.m.) – purchase of 300,000 Minmet shares at 1.85 pence per share

- 4th August 2003 (10.13 a.m.) – purchase of 500,000 Tiger shares at 1.2 pence per share. Tiger Resource Finance PLC ("Tiger") was created by Minmet in 1996. At the relevant time, a shareholding in Minmet accounted for about 34% of Tiger's investment portfolio. Mr Baldwin had been a non-executive director of Tiger for several months in the summer of 2000 when he was between jobs.

23. All 600,000 Minmet shares were sold by the 1st October 2003 (400,000 of them within a few days of the announcement):

- 7th August 2003 (8.57 a.m.) – sale of 200,000 Minmet shares at 5 pence per share.

- 7th August 2003 (9.46 a.m.) – sale of 100,000 Minmet shares at 6.25 pence per share.

- 11th August 2003 (8.06 a.m.) – sale of 100,000 Minmet shares at 6.1 pence per share.

- 1st October 2003 (14.03 p.m.) – sale of 200,000 Minmet shares at 4.7 pence per share.

24. The total profit made by WRT from the Minmet trades amounts to £20,540.50.

25. Mr Baldwin is an experienced and professional investor who was well aware of the rules at the relevant time. He had been involved with Minmet

in a professional capacity for a number of years and was an approved person at the relevant time. It was also common ground that Mr Baldwin had an unblemished record as an institutional broker. There was undisputed evidence from Mr Metcalfe, former chairman of Minmet, that he held both Mr Baldwin and Mr Nolan in the highest regard and believed that they each maintained high standards of integrity in their profession.

SUBMISSION OF NO CASE TO ANSWER

26. Mr Mansell indicated that he wished to make a submission of no case to answer at the conclusion of the Authority's evidence. We record here our approach to this, in case it is of any assistance in other cases.

27. Rule 19 of the Financial Services and Markets Tribunal Rules 2001 directs the Tribunal to conduct all hearings in such manner as it considers most suitable to the clarification of the issues before it and generally to the just, expeditious and economical determination of the proceedings. This gives the Tribunal a discretion to entertain a submission of no case if the Tribunal considers it appropriate to do so. That discretion has to be exercised judicially, in the light of the statutory framework under which the Tribunal operates. Where a matter is referred to the Tribunal, the Tribunal's task is to hear it afresh and decide what action, if any, the FSA ought to take in fulfilment of the statutory objectives, which include maintaining market confidence and the protection of consumers. This is a public purpose, not merely the concern of the parties to the reference.

28. It did not appear to us that there was a clear-cut defect in the Authority's case. The issues depended on findings of fact. While it was for the applicants to decide what evidence they wished to call, our view was that we would be materially assisted, in reaching our decision on what action the Authority ought to take in fulfilment of the statutory objectives, by hearing Mr Baldwin's evidence. We were therefore not minded to entertain a submission of no case to answer. Mr Mansell accepted this and did not seek to press his submission.

29. In the event, Mr Baldwin's evidence has been pivotal to our decision.

THE WITNESS EVIDENCE

30. The Authority called as witnesses Mr Nolan of Minmet, Charles Olver of the FSA (who was tendered for cross-examination at the applicants' request), and the two experts, Keith Martin and Euan Worthington. We received written statements from Cassandra Fuller and Julia Neal of the FSA. On the applicants' side, in addition to Mr Baldwin's oral evidence, we received written statements from William Parsey and Jeremy Metcalfe.

31. We found no reason to doubt the good faith of any of the witnesses, who we considered were all doing their best to assist us. Mr Nolan and Mr Baldwin were each cross-examined at some length, which gave us a good opportunity to assess their evidence. We give below our reasons for preferring the evidence of Mr Baldwin to that of Mr Nolan on the vital issue of the telephone call. The two experts were well qualified to give opinions on the matters covered in their reports.

32. We also record that we have been greatly assisted by the FSA's very clear organisation of the hearing bundles and by the provision of a daily verbatim transcript of the hearing.

THE NATURE OF THE FSA'S CASE CONCERNING THE TELEPHONE CALL

33. The Authority's case was based on:

(1) Mr Nolan's recollection of a telephone conversation with Mr Baldwin,

(2) the timing of the three purchases of shares shortly before the announcement of 6 August 2003, together with the sales of Minmet shares shortly afterwards and the fact that a profit was made,

(3) expert evidence, which was relied on to show that Mr Baldwin's own explanations of the investment strategy and timing of the transactions were illogical and hence not credible.

34. The contest was on points (1) and (3). Mr Baldwin denied the occurrence of the alleged telephone conversation prior to the 6 August 2003 announcement, and explained the purchases and sales as part of his investment strategy at the time.

35. Owing to a combination of circumstances which were not ultimately in issue, the only possible date for the telephone conversation to have taken place was 29 July 2003. On the previous day Mr Baldwin was still on holiday in Italy. On the following day Mr Nolan flew to Sweden.

36. The telephone call was said to have started as a routine call by Mr Baldwin, by way of keeping in touch with Mr Nolan.

37. The Authority investigated the telephone records of Minmet, of Cannacord, and of Mr Baldwin personally. There were records of a variety of telephone conversations of Mr Nolan and of Mr Baldwin on 29 July 2003, but there was no record of any telephone conversation which could have been the alleged conversation between Mr Nolan and Mr Baldwin. In addition there was no contemporaneous or near contemporaneous written record of any kind to show that the conversation took place. Two particular features of the case follow from this absence of corroborative evidence:

38. First, the Authority's case involves that, by a remarkable and perhaps improbable coincidence

    (a) Mr Baldwin happened to make a routine call to Mr Nolan not from telephones from which he made other calls on that day (ie, his office telephone or his mobile), but from some untraceable telephone (whether a payphone or an unknown person's mobile), and

    (b) Mr Baldwin's use of an untraceable telephone happened to catch Mr Nolan at a time when Mr Nolan had important and sensitive information which he incautiously revealed.

39. The second particular feature is that the Authority's case depends upon satisfying us that Mr Nolan's recollection (with possible aid from the expert evidence but unaided by any contemporary record) ought to be preferred to the evidence given by Mr Baldwin.

WAS THERE A TELEPHONE CONVERSATION BETWEEN MR NOLAN AND MR BALDWIN ON 29 JULY 2003?

40. We start by acknowledging the difficulty which both Mr Nolan and Mr Baldwin faced, in being asked for precise recall of the timing and content of conversations or thought processes which took place more than two years ago, and which neither of them was first asked to recall until some while after the time in question.

Evidence concerning the alleged telephone call

41. Mr Nolan's first account of the relevant events over the material period was given in the detailed five page enclosure to his letter to the Authority dated 30 September 2003. The Authority had sought details of the events surrounding the August announcement and of all contacts with WRT and others. Mr Nolan's response described a telephone conversation with a Mr Wilson on 29 July 2003 but did not say that there had been any telephone conversation on that date (or any other date) with Mr Baldwin. A vague comment was made that "*any information disclosed by MinMet to Mr Baldwin was in the context of that* [the hoped for] *professional relationship and on a strictly confidential basis*".

42. We regard it as significant that in this first account, which was a detailed and apparently very careful written account, there was no mention of any telephone conversation with Mr Baldwin at the material time. The contrast with what Mr Nolan wrote about the conversation with Mr Wilson is striking. According to his letter Mr Nolan sought to assure Mr Wilson "*that the lack of news flow from MinMet should not be viewed negatively and it was the Company's intention to update the market on the Company's activities in the near future*". This implied that Mr Wilson should expect a positive announcement. It would have been

understandable if Mr Nolan had been unforthcoming about his conversations, for fear of being criticised over his lack of caution in disclosing price sensitive information. It is to his credit that he was candid with the regulator on this topic. His frankness about his conversation with Mr Wilson (who also dealt in Minmet shares at the material time, following the conversation with Mr Nolan) indicates to us that Mr Nolan was not deliberately holding back material information for the purpose of protecting his own interests. Either he did not recall any relevant telephone conversation with Mr Baldwin (and made a cautionary remark in case there had been one) or he was trying to protect Mr Baldwin. The latter possibility was not raised with him when he gave evidence.

43. The first time that Mr Nolan said that there had been a specific conversation with Mr Baldwin was in his letter of 24 October 2003, responding to the FSA's letter of 9 October 2003. His response put the call in the period 21-29 July 2003. The FSA's letter had included a request that he "*specify the content of the information provided*". The sum total of Mr Nolan's answer to this very specific question was that he provided "*certain details on the promising July 2003 production figures at Bjorkdal to that date and other on-going developments within the Company*." Thus Mr Nolan's first indication of a material conversation with Mr Baldwin came nearly 3 months after the material events. This indication was uncertain as to date and meagre as to content, and sits uneasily with the absence of any such allegation in Mr Nolan's first account of events.

44. Mr Baldwin was first asked about the alleged conversation in interview under caution on 26 May 2004, ten months after the events. The information sent to Mr Baldwin prior to the interview had contained a list of WRT's trades in Minmet shares for the whole of 2003, there being twelve such trades in that period. It was some hours into the interview before the first question about the alleged telephone call was put to him. He was told that the FSA's information was that he had called Mr Nolan on 29 July 2003, and that Mr Nolan had given him information about the production figures. His first response was that he did not recall the

conversation. He asked if it had been taped, and was told that it had not. Mr Olver said he thought the reason was that it had been made on his mobile. This gave the false impression that there was some record showing that the call was made on his mobile. This was a slip by Mr Olver.

45. The interview transcript shows Mr Baldwin's reaction of surprise to this (mis)information:

> *BALDWIN: (**Long pause**) Well (**pause**) I do not recall that, I have to say, I really don't recall it. Um, I think it's very unusual because (pause) why would he make me an insider about a week before the figures? I think – I find it unusual erm.*
>
> *… …*
>
> *I honestly don't recall any announcement, sorry any …*
>
> *… …*
>
> *Telephone conversation at that time, all I can remember, as I said, all I can remember is the fact that – all I've tried to rack my brains about you know looking back at the transaction, why did I do it and all the rest of it. …*

46. Mr Baldwin maintained a consistent absence of any admission that such a call took place at the material time before the share purchases.

47. When Mr Nolan and Mr Baldwin gave their evidence to the Tribunal, it seemed to us that they both understood the distinction between (a) actual recollection and (b) reconstruction from other known facts, but they differed in their adherence to the distinction.

48. We were impressed by Mr Baldwin's frankness when he said that he could not actually remember and was reconstructing. This was particularly apparent when he was asked about why he had made the decisions to purchase Minmet and Tiger shares. The temptation must have been very strong for him to work out a logical justification of the share purchases and

by a process of wishful thinking present it as actual recollection in order to bolster his case. He resisted this temptation. He was able to explain to us his general investment strategy, and the trends which he regarded as relevant at the time, but made clear that (as was to be expected) he did not have actual recall of the thought processes which led to the particular investment decisions and was only able to reconstruct them from knowledge of how he usually made such decisions.

49. In contrast, Mr Nolan varied in the clarity with which he adhered to the distinction between recollection and reconstruction. Because of the importance of the factual dispute over the telephone conversation we directed that he should give the material part of his evidence in chief orally, rather than merely confirming his witness statement. We found this helpful. In addition, he spoke of the conversation in cross-examination. It became clear to us that, while he had an actual recollection in his mind of having had a conversation with Mr Baldwin, he had no actual recollection of the content of the conversation. In his evidence about it he frequently used the expression "*would have*". The content was reconstructed from the other circumstances pertaining on 29 July 2003, in particular his preparation of the draft announcement, as being what he "*would have*" said. We consider that the same process of reconstruction accounts for what Mr Nolan wrote on 24 October 2003 concerning the contents of the conversation.

50. After that date Mr Nolan gave a number of further accounts in interview or in writing. The successive accounts evince a process of increasing detail and reducing uncertainty. In interview on 26 February 2004 Mr Nolan narrowed down the date for the call to 28 or 29 July, with a preference for the latter. As to content, he said: "*I would've given an update in accordance with what was happening*". By 17 February 2005 Mr Nolan was 80/90% certain that the call took place on 29 July. (In this context even 20% uncertainty is important to consider, bearing in mind Mr Baldwin's case.) The culmination was the positive description of the content of the conversation given in his witness statement for the Tribunal.

To put it shortly, "*I would have*" evolved into "*I did*". Whilst it is possible for close review of events to revive genuine lost recollections, this process of evolution by its very nature warns us to be cautious about accepting all Mr Nolan's evidence about the telephone conversation at face value.

51. There were other difficulties in Mr Nolan's account. Mr Mansell pointed out that Mr Nolan had no reason to disclose price sensitive confidential information to Mr Baldwin at a time when there was not even a broking relationship in place between Minmet and Canaccord. Indeed, to give him such information would put him 'offside' and prevent him doing his job in conducting any transactions in Minmet shares. When these matters were put to Mr Nolan in cross-examination, it seemed to us that Mr Nolan had no satisfactory explanation.

52. Mr Nolan stated that his confidence over the date of the conversation, having ruled out dates when the circumstances were such that it could not have taken place, was due to his associating it in his mind with other events, such as his calls to Mr Wilson and Mr Metcalfe, his drafting of the announcement, and his departure for Sweden. He said 29 July 2003 was an unusual day. While this is a reasonable point to make, it does not resolve the question whether the association with the other events and with 29 July 2003 is truly correct or is based on faulty recollection. If the association is correct, it is strange that it did not exist in Mr Nolan's mind when he wrote his first account on 30 September 2003.

53. From the nature of the case, it was very improbable that Mr Baldwin had acted on insider information and yet was genuinely unable to remember having done so or was mistaken about it. Realistically, as Mr Stern for the FSA accepted, Mr Baldwin was either innocent of the matter alleged or deliberately lying. In addition to being realistic about his ability to recollect, and alert to the distinction between recollection and reconstruction, we found Mr Baldwin to be straightforward, careful and candid in the way he gave his evidence, and neither evasive nor argumentative. During closing submissions we asked Mr Stern to indicate what features of Mr Baldwin's evidence should assist us in concluding that

it was dishonest and that he should be disbelieved. Mr Stern was not able to point to anything which demonstrated that Mr Baldwin was not telling the truth.

54. In support of a preference for Mr Nolan's account Mr Stern pointed to the interesting feature that Mr Nolan recalled Mr Baldwin saying something to the effect that "we" or "I" had dealt Minmet recently. It was submitted that Mr Nolan took this to be a reference to Canaccord's dealings and not Mr Baldwin personally, and that this was consistent with the fact that Mr Baldwin, in his capacity as a broker for Canaccord had dealt Minmet shares in mid-June 2003. Mr Stern commented, if the telephone call did not take place this was "a lucky guess" by Mr. Nolan.

55. Mr Stern also drew attention to Mr Baldwin's evidence that he believed that he had spoken to Mr Nolan on the telephone in September 2003. He submitted that we should disbelieve this evidence because it was not contained in Mr Baldwin's interview answers or in his written witness statement, and because Mr Nolan's evidence was that he had not taken or returned the call which Mr Baldwin made to him in September 2003. The latter was supported by Mr Nolan's letter of 24 October 2003 which stated:

> "*Michael Nolan has also received three telephone calls from Tim Baldwin, one in September 2003, one on 9 October 2003 and a third on 23 October 2003, none of which were returned …*"

56. We have considered these points. We find it unsurprising that the September call was not mentioned in Mr Baldwin's interview answers. The specific telephone call allegation was sprung on him without prior warning in the course of his very long first interview. He was not asked about the September call. At the time of the second interview he had had the opportunity of consulting his telephone records, and raised as a speculation the possibility that the call remembered by Mr Nolan may have been one that took place on 31 July 2003, after the two Minmet share purchases, notwithstanding that Mr Baldwin himself had no recollection of it. In fact this particular call could not have been taken by Mr Nolan

personally, since he was in Sweden at the time, but it was not suggested to us that Mr Baldwin knew this at the time of preparing for the second interview. If the 31 July call appeared a possibility worth exploring, it is understandable that Mr Baldwin did not focus at that time on the September call.

57. We were told by Mr Mansell, and Mr Stern accepted, that the September call was mentioned in Mr Baldwin's representations to the RDC in 2004, and therefore long before his witness statement of 26 October 2005. The absence of the September call from the witness statement was in our view a slip of no significance.

58. When Mr Baldwin gave his evidence to us about the September 2003 call, he did so with moderation. He said he recollected that the call had been made and told us why he thought it was made and what it would have covered, but candidly explained that he had no actual recollection of the conversation.

59. We draw attention to the fact that Mr Nolan's letter of 24 October 2003, while it gave dates for the two other calls, did not give a date for the September call. This suggests to us that in regard to the September call Mr Nolan was relying on memory rather than any written record. If this call took place in early September, that was before Mr Nolan was warned not to speak to Mr Baldwin, and he would have had no reason not to take or return the call.

60. In addition, if Mr Baldwin spoke to Mr Nolan in early September, that would explain Mr Nolan's recollection that Mr Baldwin had said something to the effect that "we" or "I" had dealt Minmet recently, since WRT had made three sales of Minmet shares in August. This is consistent with what Mr Nolan actually said in interview on 26 February 2004, which was that he took Mr Baldwin's remark "*to mean that Canaccord or he had dealt in Minmet shares in the recent, recent past*".

61. It seems to us to be possible, and indeed likely, that Mr Baldwin did speak to Mr Nolan in early September, and that there has been a confusion in Mr

Nolan's mind over the timing of this conversation. This is consistent with the evidence of Mr Metcalfe on a point which Mr Nolan did not recall. Mr Metcalfe recalled Mr Nolan having indicated to him at some stage that he had understood the telephone conversation with Mr Metcalfe, which Mr Nolan associated with the day of the call from Mr Baldwin, to have been when Mr Metcalfe was in France. It was not in dispute that Mr Metcalfe was in France in September and not in July.

Explanations for the trades

62. The issue over the accuracy of Mr Nolan's recollections cannot be separated from the issue whether there is an innocent explanation for the timing of the purchases and sales of shares. If the timing cannot be explained in the absence of inside information, that would corroborate Mr Nolan's recollections.

63. Mr Stern submitted that, in the light of the expert evidence, we should find that no expert investor would have acted in the way that Mr Baldwin did, if looking at the matter rationally.

64. The applicants' reply to the Authority's statement of case set out at paragraph 48 in six sub-paragraphs the considerations that were said to be relevant to Mr Baldwin's investment decision to purchase the Minmet shares.

65. Mr Keith Martin's remit was to give his opinion in relation to one only of those considerations, namely, the increase in volume of Minmet shares being traded daily in the two weeks or so prior to the purchase.

66. It seemed to us that Mr Martin was inappropriately constrained by his remit. To consider the increase in volume in isolation from the other five ingredients was an artificial exercise. Unsurprisingly, Mr Martin's conclusion was that an experienced investor would not use a short period of increased volume as the sole factor in making an investment decision. This was not disputed by Mr Baldwin.

67. Mr Euan Worthington's remit was, first, to give his opinion on whether the information said to have been passed to Mr Baldwin was relevant and not generally available (which we need not consider further) and secondly, on two of the six ingredients of Mr Baldwin's investment decision that were identified in paragraph 48 of the applicants' reply.

68. The first ingredient that Mr Worthington addressed was the movements in and prospects for the price of gold as seen at late July 2003. Mr Baldwin's view was that the market trend of gold was upwards at the material time. Mr Worthington's opinion was that a technical buy signal was not given until 20 August 2003. By this he meant that, until that date, the gold price had not broken out of a rising wedge chart pattern created from the February peak to the April low and subsequent oscillations.

69. In cross-examination he explained that there are many different methods used to identify technical buy signals and it would be possible to get ten different opinions. We note that the price of gold was rising nearly every day from 15 July to 28 July and that it was a matter of judgment whether the fall over the four days following 28 July was a temporary reverse or the commencement of a more settled trend. In our view Mr Baldwin was not irrational in interpreting the trends, without the benefit of hindsight, in a different way from Mr Worthington.

70. The second ingredient addressed by Mr Worthington was Mr Baldwin's view that Minmet appeared undervalued when compared with the rest of the sector and offered good value to an investor who took a positive view on the direction of the gold price. On this, the gist of Mr Worthington's view was that, if Mr Baldwin was truly bullish on the gold price, there were a number of more recognised investments available which would have offered better leverage. He also considered that WRT's portfolio was not consistent with that of someone who was bullish on gold in July 2003, since the gold mining equity holdings comprised only 5.8% of the value of the portfolio at that time. He thought a bullish investor would have put 30% into the gold mining sector.

71. In cross-examination questions on the valuation of the company, Mr Mansell sought to include in the valuation some $20M of historical revenue, which Mr Worthington forcefully pointed out was incorrect. Nevertheless, he agreed that 2.3p per share was a realistic figure for the price of Minmet shares as at May 2003, and that after May 2003 the price of gold went up. It followed that a speculative investor could have regarded Minmet as undervalued in July 2003.

72. Mr Worthington also explained that the possibilities for alternative investments cited in his report were merely examples; all he was saying was that, out of hundreds of possibilities, Minmet was not the most likely gold share to invest in at the time. He acknowledged the individual nature of investment decisions.

73. We reject the FSA's submission as to the effect of the expert evidence. It did not establish that no expert investor would have acted in the way that Mr Baldwin did in the absence of inside information. Accordingly the expert evidence did not corroborate the alleged telephone call.

74. Mr Baldwin in his evidence gave us a detailed account of his investment strategy and of the trends which he was aware of at the time. It is not necessary for us to set out the details. He regarded Minmet as undervalued in July 2003. His reconstruction of his thinking at the time when he made the purchases seemed to us to make good sense, and cross-examination did not reveal any serious deficiencies in it. The contents of and balance in the portfolio reflected his mandate from those for whom he was investing, which was "*to put in a well-spread bunch of speculative shares*".

75. His explanation for the timing of the sale of the Minmet shares was that he could not see any justification for Minmet being at a price as high as 6p per share. That price was in his view not justified by the announcement that was made on 6 August 2003 concerning production figures. He therefore took profits. The Tiger shares were retained.

Conclusion

76. Our conclusion is that the purchases were not made because Mr Baldwin received inside information from Mr Nolan: in our judgment Mr Nolan is mistaken about the telephone call and Mr Baldwin's denial of it is correct. The market's revaluation of Minmet after the announcement gave Mr Baldwin the opportunity of profit, which he took.

Receipt of price sensitive information

77. There is a point of general relevance to which we should draw attention, although it does not affect our decision. Mr Baldwin at one point in his evidence stated that as an equity salesman it was his practice, unless expressly made an insider, to assume that information given to him was in the public domain and was information that he could use. In our view such a practice is too broad. There may be circumstances where an equity salesman should realise, from the nature of information given and the circumstances in which it is imparted to him, that it is confidential price sensitive information which he is not free to use or disseminate.

DECISION

78. We have kept in mind that the burden of proof lies on the Authority, and the standard of proof (the balance of probability) must take into account the gravity of the allegation made. But our decision in the applicants' favour does not depend on the burden of proof. On consideration of the whole of the evidence we are satisfied that there was not a telephone conversation between Mr Nolan and Mr Baldwin on 29 July 2003, and are satisfied that WRT's trading in Minmet and Tiger shares was innocently conducted.

79. It follows that no finding should be made against the applicants and no penalty imposed.

80. As requested, we reserve any possible arguments on costs for later consideration.

81. Our decision is unanimous.

Andrew Bartlett QC

Chairman