

MARKET ABUSE – whether Applicants engaged in market abuse – yes - whether behaviour based on relevant information not generally available - yes - Financial Services and Markets Act 2000 ss 118 and 123; FSA Handbook : The Code of Market Conduct MAR 1

THE FINANCIAL SERVICES AND MARKETS TRIBUNAL

ROBIN CHHABRA

First Applicant

-and-

THE FINANCIAL SERVICES AUTHORITY

Respondent

SAMEER PATEL

Second Applicant

-and-

THE FINANCIAL SERVICES AUTHORITY

Respondent

**Tribunal: DR A N BRICE (CHAIRMAN)
MR C BURBIDGE
MR N DOUCH**

Sitting in London on 26, 27, 28, 29 and 30 October 2009

Jason Mansell Counsel, instructed by Messrs Kingsley Napley Solicitors, for the First Applicant

Robin Barclay Counsel for the Second Applicant

Guy Philipps QC, instructed by the Financial Services Authority, for the Authority

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DECISION

The references

1. Mr Robin Chhabra (Mr Chhabra) and Mr Sameer Patel (Mr Patel) referred to the Tribunal a Decision Notice made by the Financial Services Authority (the Authority) on 21

November 2008. The Decision Notice stated that the Authority had decided to take the following action:

- (1) to impose a penalty on Mr Chhabra for market abuse and to prohibit him from performing any function in relation to any regulated activity carried on by any authorised person on the ground that he was not a fit and proper person; and
- (2) to impose a penalty on Mr Patel for market abuse and to prohibit him from performing any function in relation to any regulated activity carried on by any authorised person on the ground that he was not a fit and proper person.

2. At a directions hearing on 25 June 2009 the Tribunal directed that the references of Mr Chhabra and Mr Patel should be heard at the same time.

The legislation

3 The relevant parts of Section 118 of the Financial Services and Markets Act 2000 (the 2000 Act) provide:

“118 – Market abuse

- (1) **For the purposes of this Act, market abuse is behaviour (whether by one person alone or by two or more persons jointly or in concert) –**
 - (a) **which occurs in relation to qualifying investments traded on a market to which this section applies;**
 - (b) **which satisfies any one or more of the conditions set out in subsection (2); and**
 - (c) **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 a person or persons concerned to observe that standard of behaviour reasonably expected of a person in his or their position in relation to the market.**
- (2) **The conditions are that –**
 - (a) **the behaviour is based on information which is not generally available to those using the market but which, if available to the 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;**
 - (b) **the behaviour is likely to give a regular user of the market a false or misleading impression as to the supply of, or demand for, or as to the price or value of, investments of the kind in question;**
 - (c) **a regular user of the market would, or would be likely to, regard the behaviour as behaviour which would, or would be likely to, distort the market in investments of the kind in question.**
- (10) **In this section- ...**
“regular user”, in relation to a particular market, means a reasonable person who regularly deals on that market in investments of the kind in question.”

4. Section 119 of the 2000 Act provides that the Authority should produce a code giving guidance on what does or does not amount to market abuse. Under the provisions of section 119 the Authority has produced the Code of Market Conduct which is published in the Authority’s Handbook as MAR 1. We set out the relevant extracts later in this Decision.

5. The relevant parts of section 123 of the 2000 Act provide:

“123 Power to impose penalties in cases of market abuse

(1) If the Authority is satisfied that a person (A) –

(a) is or has engaged in market abuse, or

(b) by taking or refraining from taking any action has required or encouraged another person or persons to engage in behaviour which, if engaged in by A, would amount to market abuse,

it may impose on him a penalty of such amount as it considers appropriate.”

6. Section 56 of the 2000 Act provides that the Authority may make a prohibition order prohibiting an individual from performing specified functions, or any function, if it is satisfied that the individual is not a fit and proper person.

The issue

7. At the directions hearing on 25 June 2009 the Tribunal directed that the issue of liability in both references be heard first as a separate issue and that any issues as to penalty be heard at a later date. This Decision therefore deals only with the issue of liability (namely, whether Mr Chhabra and Mr Patel engaged in market abuse) and not with the other issues arising under section 123 (the penalties) or section 56 (the prohibition orders).

8. On three occasions between May and July 2004 Mr Patel placed a series of spread bets on listed companies. In respect of each occasion the Authority argued that Mr Patel placed his bets in reliance on relevant information not generally available which had been disclosed to him by Mr Chhabra from which it followed that Mr Chhabra and Mr Patel had engaged in market abuse as defined in section 118(2)(a). Alternatively the Authority argued that Mr Patel had engaged in market abuse and that Mr Chhabra had taken action which encouraged Mr Patel to engage in market abuse within the meaning of section 123(1)(b).

9. Both Mr Chhabra and Mr Patel denied that they had engaged in market abuse. Mr Patel denied that he had placed his bets in reliance in relevant information disclosed to him by Mr Chhabra and Mr Chhabra argued that, on the occasions of the three bets, he had not been in possession of relevant information not generally available and that he had not disclosed such information to Mr Patel.

10. Thus the issue for determination by the Tribunal is whether the Applicants engaged in market abuse and, in particular, whether Mr Patel placed his bets in reliance on relevant information not generally available which had been disclosed to him by Mr Chhabra.

The evidence

11. Eight bundles of documents were produced. Bundles A1 and A2 contained transcripts of interviews; B1 and B2 contained trading records; C contained telephone records; D1 and D2 contained miscellaneous correspondence and documents; and E contained pleadings, witness statements and exhibits. At the hearing frequent reference was made to bundles D1, D2 and E; some reference was made to bundles A1, A2 and C; but no reference was made to bundles B1 and B2.

12. Each Applicant gave oral evidence on his own behalf. Witness statements signed by Mr David Prais, the Managing Partner of Pembridge Partners LLP, a consultancy to small businesses; by Mr Andrew Yeo, the Head of Equity Capital Markets at McCall Aitken McKenzie & Co, a broking firm; and by Mr Norman Crowley, the Executive Chairman of

Internal Efficiency, an energy services company; containing evidence on behalf of Mr Chhabra, were not objected to by the Authority and were read at the hearing. A witness statement signed by Ms Susan Flynn, the Chief Executive of Hermes Private Equity, containing evidence on behalf of Mr Patel, was not objected to by the Authority and was read at the hearing.

The facts

13. From the evidence before us we find the following facts.

Mr Chhabra and Mr Patel

14. Both Mr Chhabra and Mr Patel are now 38 years of age. Both graduated from the London School of Economics and both trained with Price Waterhouse (as it then was) and qualified as Chartered Accountants. Thereafter Mr Patel studied for an MBA at the London Business School and, between 2003 and 2007 he passed all three stages of the Chartered Financial Analyst (CFA) programme.

15. Mr Chhabra and Mr Patel first met in 1989 when they began their studies at the London School of Economics. They became good friends and have remained so ever since. Mr Patel was the best man at Mr Chhabra's wedding in 2003 and later the godfather to his son and Mr Chhabra was the best man at Mr Patel's wedding in 2007. During 2004 both Mr Chhabra and Mr Patel lived in West Hampstead and were in regular contact at social events and by means of telephone calls and emails.

Evolution

16. In 2001 Mr Chhabra started working for Evolution Beeson Gregory (Evolution), a firm of stockbrokers. He was employed as an analyst primarily covering the leisure sector. He was an approved person (CF21 Investment Adviser) from 2002 until he left Evolution in 2006. Evolution had a number of departments of which we heard about three, namely, analysts, corporate finance and sales. Evolution had both corporate clients (which were listed companies) and institutional clients such as fund managers and may also have had private investment clients.

17. At Evolution Mr Chhabra was allocated approximately 20 companies to research and his role involved the monitoring of the stocks of these companies, their competitors and the leisure sector generally. He did this on a daily basis taking account of publicly available information and he was aware of the days when those companies planned to make scheduled announcements. As part of his role he met regularly with the management of the companies he covered. He communicated his views on his stocks to current and potential investors who were clients of Evolution both formally through research notes and presentations and informally through telephone conversations and meetings.

18. Evolution was the corporate broker to about six of the stocks covered by Mr Chhabra. These included Ebookers plc (Ebookers), an online travel company, and Eidos plc (Eidos), a video and computer games company. In cases where Evolution was the corporate broker to a company then from time to time Mr Chhabra would be provided with relevant information not generally available for a short period before the information was made public so that he could analyse the information and be ready to comment on it when it was released. The provision of such information within Evolution was referred to at the hearing as being "made inside".

19. When a person was “made inside” at Evolution his name, with the time and date, was entered on an Insider Register. It was the responsibility of the person who was making another inside to make the appropriate entries in the Register. Individuals were not made inside before it was necessary and usually analysts were made inside at the latest possible time. Also, a person was not made inside if he was out of the office. As most employees worked in an open plan office the procedure was that the person who wished to disclose relevant information would personally approach the person to whom it was to be disclosed and invite him to a meeting room in which the information would be communicated. However, on at least one occasion inside information was communicated by email.

20. In June 2004 the compliance office at Evolution advised Mr Chhabra that being on the Insider Register in relation to a company allowed him to write notes and speak to other institutions about the company but he would have to be very careful about what he said so as not to share the inside information. Mr Chhabra said that he knew the limits of what he could and could not say and was aware of the boundaries.

Mr Patel's employment and betting

21. In 2001 Mr Patel joined General Motors Asset Management (GMAM). GMAM is an asset management organisation based in the United States of America and, at the relevant time, was wholly owned by General Motors Inc. At that time the role of the organisation was to manage assets for the General Motors United States defined benefit pension plan. From 2002 until 2005 Mr Patel was an approved person (CF27 Investment Manager). Originally Mr Patel was based in Luton but he moved to the City of London in 2004. Mr Patel's role at GMAM was to monitor and conduct due diligence on European private equity funds. He had access to many sources of publicly available information and broker research reports but would not gain access to price sensitive information in quoted stocks through his role as investment manager.

22. Mr Patel began investing in shares personally in 1989 and described himself as “quite an enthusiastic investor”. He then turned to spread betting as a hobby because of the increased leverage it provided and the advantageous tax treatment if profits were made. Also as a spread better he could bet on the movements in share prices and other financial instruments such as share price indices. Mr Patel opened an execution only account with IG Index in January 2003. The account had limits beyond which Mr Patel could not open new positions without more funding. He referred to his spread betting transactions as trading. He primarily traded online but sometimes on the telephone. Between 2003 and 2004 he made in excess of 350 bets most of which were on the movement in market indices. However, about 100 trading positions related to 34 individual stocks and about half of these related to companies which were corporate clients of Evolution. Some of the latter were companies which had been allocated to Mr Chhabra for monitoring including Ebookers and Eidos. Mr Patel started trading in the shares of Ebookers in March 2003 and again traded in these shares in October 2003, January 2004 and March 2004. Three of these four trades were ahead of quarterly results. Less than half of the positions taken out by Mr Patel in stocks covered by Mr Chhabra were profitable and the success rate (in the number of positions terms) was 47%. Overall that was the broad picture of his trading generally.

23. When trading Mr Patel used a variety of sources of information including: news publications; broker research reports; internet websites; insights gained through his own due diligence on particular sectors (including the airline travel industry and the video games industry); and conversations with friends, including Mr Chhabra. He also relied on “having a

hunch” and said that his investment approach constituted a combination of gut instinct, speculation and intellectual argument. When spread betting he liked stocks with a high historical volatility in their share price. He frequently traded in advance of the scheduled announcements made by companies, taking a view as to how the announcements were likely to affect the share price. When trading Mr Patel was accustomed to establishing a position in stages and to making a series of bets rather than one single bet; this enabled him to watch the progress of his position before making a further trade or trades. However, these stages generally took no more than a few hours to complete.

24. Mr Patel’s appetite for risk grew over time. We saw a schedule of his top 20 positions (by size of exposure) between January 2003 and December 2004. Only three of the 20 were dated in 2003, the rest being in 2004. 6 of the 20 related to Ebookers and 2 to Eidos and the largest profits were made in respect of bets on Ebookers and Eidos.

Mr Chhabra and Mr Patel – pattern of contacts

25. As good friends Mr Chhabra and Mr Patel were in frequent contact. For example, there were 165 telephone contacts between them between 20 April 2004 and 3 August 2004. They discussed a variety of interests including investments. Mr Chhabra knew that Mr Patel was a frequent spread better and followed the progress of the bets he had made. Mr Patel knew that Mr Chhabra was a readily accessible source of publicly available information on the stocks that he covered but did not always share the same views as Mr Chhabra on the same stocks. On a number of occasions Mr Patel placed bets shortly after speaking to Mr Chhabra on the telephone. On at least four occasions Mr Patel spoke to Mr Chhabra before placing a bet where there was no allegation that Mr Chhabra had any inside information. There were also a number of instances where Mr Chhabra was entered in Evolution’s Insider Register as having relevant information not generally available and where Mr Patel did not place any bets. It is also relevant that, as an analyst, Mr Chhabra was interested in the long term performance of stocks (as well as the short term performance) whereas, as a spread better, Mr Patel was much more concerned with short term fluctuations.

26. We now turn to find the facts relating to the three occasions on which the Authority claimed that Mr Patel placed bets in reliance on relevant information not generally available disclosed to him by Mr Chhabra.

The first bet – 7 May 2004 – Ebookers 1

27. The background to the first bet was that on 22 March 2004 Ebookers published its results for the calendar year 2003 which recorded that there had been a good finish to a tough year; that the company had recorded its first annual adjusted pre-tax profit; and that there had been a strong beginning to the first quarter of 2004. However, on the same day Mr Chhabra published a research note about Ebookers reducing a previous recommendation from BUY to ADD. He lowered his profits-before-tax forecast for 2004 from £16.5 million to £10 million and forecast profits-before-tax for the first quarter of 2004 of £1 million. After the announcement the price of shares in Ebookers fell.

28. In April 2004 Mr Patel made a series of trades betting on movements in the share price of Eidos. On 21 April 2004 a research paper was published by Dresdner Kleinwort Wasserstein expressing the view that the shares in Eidos were overvalued and recommending SELL. On 26 April Mr Patel took out a long position in Eidos at various prices between 173.7 and 175.4 so that he would gain £570 for every penny that the price went up. On 27 April the price went up to 177 but thereafter started to fall. On 30 April 2004 the Investors Chronicle

stated that Eidos was in better shape than it had been for years but, in spite of the positives, it was time to sell. However, on 6 May a financial publication reported rumours of stake-building in Eidos by an entrepreneur and on 7 May another publication reported that Eidos had announced that it had secured a co-publishing deal for a music video game.

29. Ebookers was scheduled to announce its results for the first quarter of 2004 on 10 May 2004. In the days prior to the announcement two research papers were published recommending neutral and hold respectively.

30. The sequence of events in relation to the first bet was:

Thursday 6 May 2004

Some time on 6 May 2004 Mr Chhabra returned from a visit to Costa Rica where he had been since 2 May. He visited the office of Evolution for about three hours. Mr Chhabra knew that he was going away on Friday 7 May to Ireland but on his return wanted to spend Sunday 9 May working on the comments he would make on Ebookers' forthcoming announcement.

14.34 - Mr Chhabra answered an email accepting an invitation from Ebookers to a presentation of the scheduled announcement at 07.00 on 10 May.

14.43 - Mr Chhabra telephoned Mr Oliver Strong, the head of investor relations at Ebookers, the call lasted for only two seconds.

14.43 - Mr Chhabra telephoned Mr Addison Smith of Ebookers. The call lasted for only two seconds.

14.45 Mr Chhabra again telephoned Mr Addison Smith of Ebookers. This call lasted fifty seconds.

15.12 – Mr Strong sent an email to Mr Chhabra with draft 5 of a press release to be issued on 10 May 2004 with Ebookers' results for the first quarter of 2004 and a copy of the draft accounts. This email was not copied to any other person at Evolution. The email was headed "ebookers private and confidential" but there was no message. The draft press release attached was headed "ebookers delivers continued growth and profitability, and announces £2.5m cost efficiencies due to increased automation". There followed a number of highlights including increases in gross sales, turnover and adjusted pre-tax profits and a statement that the margin achieved was at the best ever level of 13.2%. Looking forward to the second quarter the statement said that trading was in line with expectations and would continue to deliver significant organic growth. Draft 5 of the press release contained a number of blanks and, in particular, a number of comparator numbers had not been included.

22.09 – Ebookers sent to Mr Mike Brennan, of the corporate finance department of Evolution, and also to a number of others at Evolution, an email headed "Q1 draft press release". Draft 6 of the press release was sent as an attachment. Draft 6 contained some but not all of the numbers missing from draft 5.

Friday 7 May 2004

08.11 – Mr Brennan forwarded draft 6 of the Ebookers’ press release to Mr Chhabra by email. It was clear on the face of the email that it had originated from Ebookers; that it had been sent to a number of people at Evolution; and that it concerned the results for the first quarter of 2004. The covering message from Mr Brennan read: “Can you put yourself in the book.” (This was a reference to the Insider Register but no entry in the Register was in fact made). As well as attaching draft 6 of the press release, the email also attached Ebookers’ detailed accounts for the first quarter.

08.35 – Mr Chhabra was recorded as having read Mr Brennan’s email of 08.11.

11.45 – Mr Chhabra made a telephone call from his mobile telephone to Mr Patel’s mobile telephone and the call lasted 7 minutes and 8 seconds.

11.54 to 11.57 – Less than two minutes after completing the call from Mr Chhabra Mr Patel closed out about half of the long spread bet position that he held in Eidos at the price of 168.1 thus making a loss.

11.58 to 12.12 – Immediately after closing his bets in Eidos, Mr Patel made seven separate “buy” bets in Ebookers and accumulated a long position in Ebookers of £350 per point at a starting price of between 276.7 and 282.7 (which meant that he stood to gain £350 for every penny that the share price increased). That was the second largest position in relation to an individual company that Mr Patel had ever established.

Some time during the day Mr Chhabra, together with Mr Brennan and some other colleagues, left the offices of Evolution to catch a 15.30 flight from Biggin Hill to Ireland for the week-end. Mr Chhabra intended to return on the evening of Saturday 8 May and to spend Sunday 9 May as a working day before flying to Los Angeles on Monday 10 May.

During the day there was significant trading in the shares in Ebookers which closed the day (7 May 2004) at 285 pence per share.

Sunday 9 May 2004

Mr Chhabra had returned from Ireland and attended Evolution’s office to work on his research note containing comments on Ebookers’ forthcoming announcement.

Monday 10 May 2004

07.00 - Ebookers gave a presentation of its scheduled announcement.

07.14 - Ebookers released its first quarter’s results. The published announcement was headed: “Ebookers delivers profitability, continued growth and announces £2.5m cost efficiencies in 2004 due to successful internet conversion strategy.”

09.43 – Evolution published an announcement in relation to the Ebookers results which stated “Good news at last”.

09.49 – Mr Chhabra released his research note commenting on the results. The note was headed “Solid improvement across all key metrics”. He upgraded his March recommendation from ADD to BUY and increased his profits-before-tax forecast for

the 2004 year end by 25% (from £10 million to £12.5 million). Notwithstanding Mr Chhabra's recommendation the price of the shares in Ebookers fell.

13.33 and 13.37 - Mr Patel closed out the rest of his long position in Eidos at a price of 160.6. Thus he made a loss of £3,862 in respect of the positions in Eidos which were closed on 7 and 10 May.

The shares in Ebookers closed the day (10 May 2004) at 277 pence per share.

20 May 2004

Mr Patel closed his position in Ebookers incurring a loss of £4,775.00.

The second bet – 20 and 21 May 2004 – Eidos

31. Whereas the first bet was made before an expected scheduled announcement, the second bet was made before an unexpected and unscheduled announcement.

32. It will be recalled that in April 2004 Mr Patel made a series of trades betting on movements in the share price of Eidos. On 21 April 2004 a research paper was published by Dresdner Kleinwort Wasserstein expressing the view that the shares in Eidos were overvalued and recommending SELL. On 26 April Mr Patel took out a long position in Eidos at various prices between 173.7 and 175.4 so that he would gain £570 for every penny that the price went up. On 27 April the price went up to 177 but thereafter started to fall. On 30 April 2004 the Investors Chronicle stated that Eidos was in better shape than it had been for years but, in spite of the positives, it was time to sell. On 6 May a financial publication reported rumours of stake-building in Eidos by an entrepreneur and on 7 May another publication reported that Eidos had announced that it had secured a co-publishing deal for a music video game. On 7 and 10 May Mr Patel closed his long position in Eidos at prices between 168.1 (7 May) and 160.6 (10 May) thus crystallising a loss.

33. However, on 11 May Mr Patel started to bet again that the price of the shares in Eidos would rise. On 11 May 2004 the price was 177.4 and Mr Patel placed a buy bet in relation to Eidos of £100 per point. On 14 May 2004 the price was 181.4 and Mr Patel made four further buy bets resulting in a total long position of £195 per point. Thus Mr Patel was betting that the price of the shares in Eidos would go up so that he would gain £195 for every penny that the price went up. Mr Chhabra was aware of this.

34. In the week beginning 10 May Mr Chhabra was at a conference in Los Angeles and he returned to London on Friday 14 May. Mr Patel telephoned him on 15 and 16 May. They met on 17 or 18 May and Mr Chhabra gave Mr Patel an email which he had received from the analyst at Dresdner Kleinwort Wasserstein expressing pessimistic views about the shares in Eidos. Mr Chhabra was aware of Mr Patel's open long position in Eidos; they discussed the stock. Between 11 May 2004 and 18 May 2004 the price of a share in Eidos rose from 177.4 to 182.5 pence which was higher than it had been for a year.

35. The sequence of events in relation to the second bet was:

19 May 2004

Mr Chhabra published a research note about Eidos. On 14 May he had returned from the conference. There had been a rise in the share price since February and rumours of a takeover bid. The research note pointed out that the acquisition by Eidos of IO, the

owner of the intellectual property in the game of Hitman, would provide it with more bargaining power in negotiation. Mr Chhabra gave a target price of 183/200 and recommended Eidos as a BUY (unchanged).

12.48 – Mr Patel telephoned Mr Chhabra.

At the close of business the price of a share in Eidos had fallen to 176.25.

20 May 2004

9.04 – Mr Chhabra telephoned Mr Patel’s mobile telephone; the call lasted for about five seconds.

9.32 - Mr Michael Arnaouti, the company secretary of Eidos who was in the United States, telephoned Mr Jeremy Ellis of Evolution’s corporate finance department, and told Mr Ellis that Eidos was going to release an unscheduled negative announcement later that day. The call lasted 15 minutes and 42 seconds. The call was a courtesy call as Mr Arnaouti was not seeking advice from Evolution but merely giving information; (UBS was the principal corporate finance adviser and broker to Eidos and Evolution was a joint broker.)

9.54 – Mr Ellis telephoned Mr Chhabra’s mobile telephone and left a voicemail message. We express our views about the contents of the voicemail message below. At the time of this call Mr Chhabra was at a conference in another building which conference related to a company called Luminar.

10.24 – From the conference Mr Chhabra used his mobile telephone to call Mr Patel on his office landline; the call lasted for eleven seconds.

10.25 – Mr Chhabra checked his voicemail messages. The call lasted one minute and forty-eight seconds.

10.28 – Mr Chhabra telephoned Evolution and was put through to the extension of Mr Assad Malic, who was a member of the Evolution sales team responsible for a number of companies including Eidos. Mr Malic did not answer. The call to Evolution was then put through to Mr Ellis’s extension and the call lasted 12 seconds.

10.30 – Mr Chhabra telephoned the mobile telephone of Mr Julian Morse, a member of Evolution’s sales team responsible for Eidos and other companies. This call lasted 59 seconds.

10.32 – Mr Chhabra called Mr Patel’s mobile telephone. This call lasted one minute and 3 seconds. Mr Patel thought that it was probable that the shares in Eidos were discussed during this or the next call.

10.36 – Mr Chhabra called Mr Patel’s mobile telephone. This call lasted 12 seconds. Mr Patel thought that it was probable that the shares in Eidos were discussed during this or the previous call.

10.36 to 10.40 – The price of a share in Eidos dropped to 171.8. Mr Patel made seven sell bets in Eidos totalling £395 per point. This resulted in a loss for his long trades of

£1,382 and converted his previous long position of £185 per point into a short position of £200 per point. Thus Mr Patel was then betting that the price of the shares in Eidos would go down and if he was right he would gain £200 for every penny that the price did go down.

11.29 - Mr Chhabra called Mr Patel's mobile telephone and the call lasted for 16 seconds.

11.30 to 11.32 – Mr Patel made two further sell bets in Eidos totalling £120 per point. This resulted in his short position reaching £320 per point. Thus Mr Patel stood to gain £320 for every penny that the share price fell.

11.50 - Mr Chhabra telephoned Mr Patel's mobile telephone and the call lasted 1 minute and 50 seconds.

11.53 to 11.58 – Mr Patel closed a number of bets relating to Ebookers.

11.58 – 12.00 - Mr Patel further increased his sell bets in Eidos from £320 per point to £570 per point. Thus Mr Patel stood to gain £570 for every penny that the share price fell. This was then the third largest position Mr Patel had ever established (the other two being the Eidos and Ebookers trades on 7 May 2004).

12.30 – Mr Chhabra, having returned to the office, attended a meeting with Mr Ellis, Mr Julian Morse of the sales department, and Mr Malic, at which Mr Ellis told those present that Eidos was about to publish a negative announcement which would mention Hitman. Mr Morse circulated a draft of the announcement.

12.30 - The Evolution Insider Register recorded Mr Chhabra and others as having been made inside in connection with the Eidos information to be released at 13.00 that day.

13.21 - Eidos published the unscheduled announcement in the form of a trading update which stated that the sales of Hitman had been negatively affected by conditions in the game market and that this would have an adverse impact upon the financial performance of Eidos for the full year.

Mr Arnaouti then became aware that there had been some significant dealings in the shares of Eidos before the announcement was published and asked Mr Ellis to confirm his audit trail.

14.11 - Mr Ellis sent an email to Mr Arnaouti about Evolution's lines of communication and stated that he had briefed the director in corporate finance, Mr Chris Calloway, at 11.30 and had made Mr Chhabra inside at 12.30.

14.14 - Mr Ellis sent copies of his email of 14.11 to Mr Calloway, Mr Chhabra and others.

The shares in Eidos finished the day at 120.5 pence per share, a fall of 31% from the closing price of 177 pence the previous day,

21 May 2004

In a series of bets on 21 May 2004 Mr Patel closed out his position in Eidos and made a profit of £24,359. Also, having reversed his previous long position he avoided a loss of £10,003. Thus he gained an overall benefit of £34,362 from the series of bets in Eidos on 20 and 21 May 2004. That was by a factor of two his largest win so far.

The third bet – 28 July 2004 – EBookers 2

36. Like the second bet, the third bet also related to an unexpected and unscheduled announcement. The background was that on 25 May 2004 there was a change in the chief financial officer of the company. In his research note published on 10 May 2004 about EBookers Mr Chhabra had forecast profits of £12.5 million. On 8 June the price was 282 but on 1 July it was 275. From 1 July 2004 to 20 July 2004 the price of the shares in EBookers fell from about 275 to 223. On 20 July Mr Rhandawa, Mr Chhabra's assistant, posted a research note that EBookers' shares were drifting because of weak trading in the travel industry and the uncertainty caused by the new finance director (Mr Healy). On 20 July the price dropped to 220 on intra-day trading but there was then a small rise. However, by 27 July the price had fallen back to 220.

37. Between Monday 19 July 2004 and Wednesday 28 July 2004 the corporate finance department at Evolution was engaged with EBookers in reviewing and drafting a revised profit forecast of £2 million with a view to making an unscheduled negative announcement.

38. The sequence of events in relation to the third bet was:

28 July 2004

10.28 – Latasha Malik, the assistant of Mr Oliver Strong who was head of investor relations at EBookers, sent an email to Mr Michael Brennan, a member of Evolution's corporate finance department. The email was entitled: "Confidential ... Trading Statement". The message to Mr Brennan was: "We are going to need to discuss this with you". Attached to the email was a draft of an announcement which EBookers intended to make later that day. The draft announcement was headed "eBookers trading update" and stated that the company expected that its adjusted profit for the year would be "significantly below recent published analyst expectations". The draft announcement concluded by giving Mr Strong's name, email address and telephone numbers if further information were required.

At 11.23, 11.25 and 11.27 Mr Chhabra was at his desk sending emails on other matters.

11.31 – Mr Chhabra made a call from his mobile telephone to Mr Patel's mobile telephone which lasted 52 seconds.

During the morning Mr Brennan showed the draft announcement to Mr Chhabra. He did this in a private meeting room at Evolution. (The Authority argued that this was between 11.27 and 11.30 but Mr Chhabra argued that it was at 12.00. We deal with this dispute below.) When Mr Brennan had shown the draft announcement to Mr Chhabra, Mr Chhabra was unable to understand why EBookers was reducing its profit forecast and he wanted to speak to Mr Healy of EBookers. Mr Brennan therefore made a call to arrange a meeting with Mr Healy.

11.37 - The only substantive call made from Evolution to Ebookers that morning was made at 11.37 from a meeting room. It was made to Mr Oliver Strong at Ebookers and the call lasted for just under eighteen minutes that is until 11.55. Very shortly after that time Mr Brennan and Mr Chhabra left for a meeting at the offices of Ebookers which was a few minutes away from the offices of Evolution.

11.45 – Mr Patel began to close out a total of seven sell bets in a company called Photo Me and by 11.53 he had closed out this position. In evidence he told us that he had to close out these positions so that he had the capacity to trade in Ebookers.

11.49 - Mr Patel commenced betting on the share price of Ebookers and placed seven sell bets between 11.49 and 12.00 noon at prices between 217.5 and 213.5. He thus established a short position of £465 per point that is he would gain £465 for each penny that the share price fell. He added funds to his account at IG Index after these trades.

12.00 noon to about 13.40 - Mr Chhabra and Mr Brennan attended a meeting with Mr Healy the finance director of Ebookers at the office of Ebookers to discuss the pending announcement

13.44 - Mr Chhabra returned to his office and worked on his commentary on the announcement.

13.44 - Mr Chhabra called Ebookers and spoke to Mr Healy.

14.00 – Mr Chhabra telephoned Mr Patel from his mobile telephone and the call lasted for 36 seconds.

14.01 - Mr Patel closed out a position in the stock of a company called Regal Petroleum.

14.03 and 14.07 – Mr Patel made four more sell bets on Ebookers at prices from 213.7 to 212.5 bringing his total short position to £695 per point. This was the largest position that Mr Patel had ever taken in an individual company. For the second time in a day he added funds to his account at IG Index after these trades.

14.51 Mr Chhabra called Ebookers and spoke to Mr Strong.

15.26 – Ebookers released an unscheduled trading update stating that its full year forecast profits had been reduced from £12.5 million to £2.1 million which was “significantly below the low end of recent published analyst expectations”.

Mr Chhabra spent some time talking to institutions.

The price of Ebookers’ shares fell by 36% from 220 pence to 140 pence.

Mr Chhabra and Mr Patel met that evening and talked extensively about the events of the day. Mr Chhabra advised Mr Patel to close out his position in Ebookers.

29 July 2004

Am – Mr Patel closed out his positions in Ebookers and made a profit from his trading of £51,179. That was by far the largest profit that he had ever made by spread betting.

39. No entry was made on 28 July 2004 in Evolution's Insider Register of the fact that Mr Chhabra had been made inside in respect of the negative announcement to be made by Ebookers. Later, IG Index notified the Authority of unusual transactions in the shares of Ebookers immediately prior to the release of the unscheduled trading update.

40. On 8 September 2004 the Authority wrote to the head of compliance at Evolution asking for a timetable of the events that had led up to the announcement made by Ebookers on 28 July 2004. On 10 September 2004 an entry was made in Evolution's Insider Register of the fact that Mr Chhabra had been made inside at 12.00 on 28 July 2004 in respect of the negative announcement to be made by Ebookers.

41. On 18 January 2005 Mr Patel wrote to the Authority explaining the rationale of his bet on 28 July. One reason for his trade was that the stock had moved down to 220. The letter mentioned that Mr Patel knew Mr Chhabra but that Mr Patel had no inkling of the profits warning on 28 July.

42. In a letter dated 24 January 2005 the head of compliance at Evolution informed the Authority that Mr Chhabra had been made inside approximately three hours prior to the announcement being published; that on the date of the announcement on 28 July Mr Patel had telephoned Mr Chhabra and said that he was going to deal in Ebookers and that as Mr Chhabra was then in possession of inside information he did not comment on the stock in question. The manuscript note on which the letter was based did not state who had made the call and also clarified the fact that the call referred to was made after 12.00 noon.

The arguments

43. For the Authority Mr Philipps argued that, on the occasions of each of the three bets, Mr Chhabra was in possession of relevant information not generally available; Mr Chhabra made a telephone call to Mr Patel; very soon after the call Mr Patel began to bet on the shares of the company; and the direction of the bet was consistent with the information in the possession of Mr Chhabra. He relied upon the similarities in the sequences of events leading to each of the three bets, and especially the similarities between the second and third bets, and argued that it was not possible to interpret the facts as having an innocent explanation. An unscheduled intra-day profits warning was rare and the probability that, on two occasions in nine weeks, Mr Chhabra knew about such warnings and Mr Patel placed successful sell bets on the same day without knowing about such warnings, was infinitesimal. Accordingly, the inference should be drawn that Mr Chhabra had disclosed the relevant information to Mr Patel who had placed his bets in reliance on it. It followed that Mr Chhabra and Mr Patel had engaged in market abuse as defined in section 118(2)(a). Alternatively, Mr Philipps argued that Mr Patel had engaged in market abuse and that Mr Chhabra had taken action which encouraged Mr Patel to engage in market abuse.

44. For Mr Chhabra Mr Mansell argued that the Authority's case was entirely circumstantial and depended upon inferences being made. It did not satisfy the burden and standard of proof appropriate to market abuse. He cited *Teper v The Queen* [1952] AC 480 at 489 for the principle that, in making an inference, a court should be sure that there were no co-existing circumstances that would weaken or destroy the inference. He cited *Regina v Fryer, Sparkes and Walker* [2004] EWCA Crim 1163 at [22] to [24] for the principle that one

should not “pick out the plums and leave the duff behind” but should assess the evidence as a whole. He went on to argue that each of the three series of bets had to be considered separately and, in respect of each, it was necessary to ask if Mr Chhabra was in possession of relevant information and whether he had made a recommendation based on that information to Mr Patel. It was relevant that Mr Chhabra and Mr Patel were accustomed to telephoning each other on a regular basis to discuss stocks and that was permitted by MAR 1.4.6. Also, the Authority had shown no motive on the part of Mr Chhabra for disclosing relevant information. This was not a case about coincidence; Mr Chhabra’s case was a mixture of recollection and reconstruction but it was not speculation.

45. For Mr Patel Mr Barclay adopted the arguments of Mr Mansell for Mr Chhabra. He cited *Jugnauth v Ringadoo* [2008] UKPC at [17] - [19] for the principle that cogent evidence was required to satisfy a civil tribunal that a person has been fraudulent or behaved in a reprehensible manner and he argued that there was no cogent evidence that Mr Patel had behaved in a reprehensible manner. It was inherently improbable that he would choose to do so and his good character and his career prospects rendered it utterly unlikely. Mr Barclay also argued that Mr Patel had not placed his bets in reliance upon relevant information not generally available but had based them on the product of his own independent thoughts. The Authority’s case was based on circumstantial evidence and coincidence and ignored the context which was that it was normal for Mr Chhabra and Mr Patel to speak to each other on the telephone and it was normal for Mr Patel to place bets after these calls. It followed that the mere proximity of the calls to the bets did not prove that there had been market abuse. Also, it was normal for Mr Patel to trade in advance of scheduled announcements.

Reasons for decision

46. What we have to determine is whether, on three occasions, Mr Patel placed his bets in reliance on relevant information not generally available which had been disclosed to him by Mr Chhabra.

47. In approaching our decision we first refer to the statutory provisions. We then consider the burden and standard of proof and identify the principles established by the authorities cited to us. Before turning to consider the issue for determination we deal separately with a number of specific questions relating to each individual bet and form provisional views about these questions. We then stand back and consider all the facts and circumstances as a whole before deciding whether Mr Patel placed his bets in reliance on relevant information not generally available which had been disclosed to him by Mr Chhabra. We then consider three arguments put to us by Mr Barclay about the application of the provisions of MAR 1 to the behaviour of Mr Patel before finally deciding whether the Applicants had engaged in market abuse.

The statutory provisions

48 Beginning, therefore, with the statutory provisions we first refer to section 2 of the 2000 Act. Section 2 provides that, in discharging its general functions, the Authority should act in a way which is compatible with the regulatory objectives, one of which is market confidence. We also must act in accordance with those objectives and we have kept the requirement for market confidence very much in mind.

49. Section 118(1)(a) of the 2000 Act defines market abuse and provides that market abuse is behaviour which occurs in relation to qualifying investments; which satisfies one of the conditions in section 118(2); and which is likely to be regarded by a regular user of the

market as a failure to observe the standard of behaviour reasonably expected of a person in his position. In this reference it was not disputed that the shares in Ebookers and Eidos were qualifying investments.

50. The condition in section 118(2) which is relevant in this reference is in section 118(2)(a) which provides that the behaviour is based on information which is not generally available to the regular user of the market but which, if so available, would be likely to be regarded as relevant when deciding the terms of which transactions in investments of the kind in question should be effected.

51. The third element mentioned in section 118(1) is that the behaviour is likely to be regarded by a regular user of the market as a failure to observe reasonable standards of behaviour. It was not disputed that, if Mr Chhabra had disclosed relevant information not generally available to Mr Patel, and if Mr Patel had placed his bets in reliance on information that he knew was relevant information not generally available, that would be regarded by a regular user of the market as a failure to observe the required standard of behaviour.

52. Section 123 of the 2000 Act is also relevant because the Authority argued either that both Mr Patel and Mr Chhabra had engaged in market abuse within the meaning of section 123(1)(a) or that Mr Patel had engaged in market abuse and Mr Chhabra had encouraged Mr Patel to engage in market abuse within the meaning of section 123(1)(b).

53. Finally we refer to MAR 1.4.6 which was relied upon by Mr Mansell. It provides:

“1.4.6 People are free to use information that they have obtained through research, analysis or other legitimate means. Legitimate means include the observation of a public event. Observation of a public event includes any information which is discussed in a public area or can be observed by the public without infringing rights of privacy, property or confidentiality. Such information will be considered generally available. The fact that in practice other users of the market cannot obtain the information because of limitations in their resources, experience or competence does not mean that the information cannot legitimately be obtained.”

The burden and standard of proof

54. There was no dispute about the burden and standard of proof. The Authority accepted that the burden of proof was on them and that the standard of proof was the balance of probabilities. In *Jugnauth v Ringadoo* (2008) the Privy Council emphasised that, in applying the civil standard of proof, there is no question of applying anything other than the standard of proof on the balance of probabilities. However, some things are inherently more likely than others and cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in a reprehensible manner. Generally speaking, people tend not to commit serious offences – not least because of the consequences likely to follow if they do – and someone with a good character is less likely to behave badly than someone with a bad character. Someone who values their reputation will be less likely to imperil it than someone known to be disreputable. The more inherently unlikely it is that something has happened the more persuasive the tribunal will need to find the evidence pointing that way before concluding it to be more likely than not.

55. We have these principles very much in mind and record that we regard allegations of market abuse as serious allegations.

56. Mr Mansell relied upon *Teper* at 489 for the principle that, in making an inference, a court should be sure that there were no co-existing circumstances that would weaken or destroy the inference. We have approached this authority with caution because it concerned the admissibility of hearsay evidence in criminal proceedings whereas these are civil proceedings and hearsay evidence is admissible. However, at 489 Lord Normand said:

“It is also necessary before drawing the inference of an accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

57. We have applied this principle, especially when considering the separate questions relating to each bet. If, for example, we were to form the view that it was impossible for Mr Chhabra to have been aware of relevant information then that could destroy the inference that he disclosed it to Mr Patel. We have also applied the principle in *Fryer, Sparkes and Walker*, that it is necessary to assess the evidence as a whole. For this reason we express only provisional views about the specific questions arising out of each bet and then stand back and consider the evidence as a whole before deciding the issue for determination.

58. Finally, we comment on the oral evidence. Mr Chhabra frankly admitted that much of his evidence was based on the reconstruction of events from documents rather than from direct recollection. We appreciate that it is not always possible to recall events with accuracy five years after they occur and have borne this in mind when deciding what weight to give to Mr Chhabra’s evidence. Much of Mr Patel’s evidence was directed to his motives for placing his spread bets. While we accept his evidence about his general approach we were less convinced by the evidence which related to his motives for placing the three bets at issue in this reference.

59. We now turn to consider a number of questions specific to each of the individual bets.

Specific questions about the first bet

60. Arising out of the arguments of the parties there were the following specific questions relating to the first bet:

- (1) Did draft 6 of the Ebooker’s press release, sent by Mr Brennan to Mr Chhabra on 7 May 2002, contain relevant information not generally available?
- (2) Was Mr Chhabra in possession of relevant information when he made the telephone call to Mr Patel at 11.45 on 7 May 2004?
- (3) Did Mr Patel close out his positions in Eidos at 11.54 on 7 May to free up capacity for a bet on Ebookers on the same date?
- (4) What caused Mr Patel to place the first bet?

61. Beginning with the first question, Mr Mansell argued that the information in draft 6 of the Ebookers’ press release, which was sent by Mr Brennan to Mr Chhabra at 8.11 on 7 May 2004, was not relevant information because it was not material within the meaning of MAR 1.4.9(2); the information was merely a scheduled trading announcement which stated that results were in line with expectations.

62. The context of this argument lies in section 118(2)(a) of the 2000 Act which provides that market abuse is behaviour based on information which is not generally available to those using the market but which, if available to the 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. Regular user is defined in section 118(10) as a reasonable person who regularly deals on that market in investments of the kind in question.

63. MAR 1.4.9 provides guidance as to the meaning of “relevant information” and provides:

“Whether, in a particular case, a particular piece of information would, or would be likely to, be regarded as relevant information by the regular user will depend on the circumstances of the case. In making such a determination, the regular user is likely to consider the extent to which:

- (1) the information is specific and precise;
- (2) the information is material;
- (3) the information is current;
- (4) the information is reliable, including how near the person providing the information is, or appears to be, to the original source of that information and the reliability of that source;
- (5) there is other material information which is already generally available to inform users of the market; and
- (6) the information differs from information which is generally available and can therefore be said to be new or fresh information.

64. Draft 6 of the press release contained a scheduled announcement and so we have to ask whether the regular user of the market would be likely to regard that scheduled announcement as relevant information when deciding on the terms of a transaction relating to the shares of the company. We are of the view that he would. Mr Brennan of Evolution clearly thought that draft 6 of the press release contained relevant information as, when he sent it to Mr Chhabra on 7 May, he asked Mr Chhabra to put himself in the Insider Register. Also, on the day of the release of the same announcement on 10 May, Mr Chhabra released a research note upgrading his previous recommendation from ADD to BUY and increasing his profit forecast. From this we conclude that the information in the announcement would be relevant when deciding on the terms of a transaction relating to shares in Ebookers.

65. We note that the introduction to MAR 1.4.9 provides that a decision as to whether a particular piece of information would be regarded as relevant information by the regular user will depend on the circumstances of the case. Six examples are given of likely factors, one of which is whether the information is material. However, these are examples only and none is determinative of whether the information was relevant information. Although we are of the view that the information in the press release was material, even if we were not of that view, we still consider that it was relevant information having regard to all the circumstances of this case. In our view the fact that the share price fell after the press release was published did not affect the materiality or relevance of the information.

66. We therefore conclude that draft 6 of the Ebookers’ press release did contain relevant information. We are also of the view that the same applies to draft 5 which was sent to Mr Chhabra on 6 May.

67. The second specific question arising out of the first bet is whether Mr Chhabra was in possession of relevant information when he made the telephone call to Mr Patel at 11.45 on 7 May 2004. The Authority argued that he was. Mr Chhabra admitted that he had read the email of 7 May at 8.35 but denied that he had opened the attachment which was draft 6 of the press release.

68. In evidence Mr Chhabra said that he thought that he did not open the attachment to Mr Strong's email of 6 May. (The attachment was draft 5 of the press release.) He agreed that he had been emailing and telephoning Ebookers on 6 May because he wanted to work on the results for the first quarter of 2004 on Sunday 9 May but his evidence was that he was too busy to open the attachment because he was only in the office for a limited period on 6 May. Mr Chhabra also did not believe that he opened the attachment to Mr Brennan's email of Friday 7 May which was draft 6 of the press release. One reason was that he knew that it contained a scheduled announcement and, as he had a number of things to do before leaving for Biggin Hill, the announcement was not urgent. Also he did not want to be made inside before it was necessary as that would make it difficult for him to speak to investors. Also he thought that if he had read the attachment he would have put himself in the Insider Register and no entry was made in the Register. He thought he opened the attachments to the emails on Sunday 9 May for the first time because he was working that day on his comments on the announcement.

69. In considering whether Mr Chhabra opened draft 5 of the press release on 6 May we regard it as relevant that, after accepting the invitation from Ebookers to the presentation of the announcement, he telephoned Ebookers three times on 6 May after which draft 5 was sent to him without a message. We are of the view that the most likely reason for that was because Mr Chhabra had asked for it to be sent to him and Ebookers knew that he was expecting it. Turning to draft 6, we regard it as relevant that it was clear on the face of the email that it had originated from Ebookers; that it had been sent to a number of people at Evolution; and that it concerned the results for the first quarter of 2004. The covering message from Mr Brennan read: "Can you put yourself in the book." That indicated that the information attached to the email was inside information. Ebookers was one of the six stocks that Mr Chhabra was responsible for monitoring and for which Evolution was the corporate broker. Also, Mr Chhabra had expressed views about the company on 22 March 2004 and must have wished to know how the company was progressing. Further, Mr Chhabra received the emails on 6 May and 7 May and the announcement was due on Monday 10 May by which time Mr Chhabra would be required to have analysed the results and to comment on them.

70. Mr Mansell argued that, if Mr Chhabra had been in possession of relevant information at 11.45 when he telephoned Mr Patel then he must have obtained it at 8.35 when he read the email from Mr Brennan. If he had wished to disclose such information then there was no reason why he should wait more than three hours until 11.45 to do so. However, this is only speculation and there could be any number of reasons why Mr Chhabra did not speak to Mr Patel until 11.45. Also it is equally possible that Mr Chhabra read either draft 5, or draft 6, or both, at some time after they were received but before 11.45 on 7 May.

71. After considering all the evidence and arguments we conclude that it is probable that Mr Chhabra opened and read either the attachment to Mr Strong's email, or the attachment to Mr Brennan's email, or both, at some time before 11.45 so that he was in possession of relevant information not generally available when he made the telephone call to Mr Patel at 11.45 on 7 May 2004.

72. The third question relating to the first bet is whether Mr Patel closed out his positions in Eidos at 11.54 on 7 May to free up capacity for a bet on Ebookers on the same date,

73. For Mr Patel Mr Barclay argued that it was unlikely that Mr Chhabra had disclosed relevant information relating to Ebookers to Mr Patel at 11.45 on 7 May because after that call Mr Patel immediately traded in the shares of Eidos. The Authority argued that Mr Patel closed out his positions in Eidos on 7 May in order to free up capacity for a bet on Ebookers on the same date; the bets on Eidos had been placed on 26 April 2004 and were that the price of the shares would rise; the price did rise on 27 April but no profit was then taken; the price of the shares then fell but on 6 and 7 May some positive comments were made in research reports; when Mr Patel closed his positions on 7 May it was at a loss and just as the price was about to improve; these actions could only be explained by a desire to free up capacity.

74. Mr Patel's evidence was that he took out his original position in Eidos on 26 April on the basis of the news flow in the financial press. He did not take a profit when the shares rose on 27 April as he thought that the rise would continue. However the price dropped and when it continued to drop he became nervous and so he closed out his positions on 7 and 10 May. The price of the shares in Eidos then rose and so he "jumped back in".

75. In considering this question we first recall the timing of the relevant events on 7 May. These were that Mr Chhabra telephoned Mr Patel at 11.45 and the call lasted 7 minutes and 8 seconds. Less than two minutes after completing the call Mr Patel started to close out his long positions in Eidos and immediately after doing that he made several buy bets in Ebookers and that was the second largest position that he had ever established.

76. We think it probable that during the long telephone call on 7 May Mr Chhabra and Mr Patel discussed both Eidos and Ebookers. However, bearing in mind the issue in this reference we do not have to decide whether Mr Patel closed out his positions in Eidos at 11.54 on 7 May in order to free up capacity for a bet on Ebookers at 11.58. The timings are so close as to be almost simultaneous. What we have to decide is whether he placed the bet on Ebookers in reliance on information disclosed to him by Mr Chhabra. That does not depend upon whether he had to close out his positions in Eidos first. Conversely, the fact that Mr Patel, immediately after speaking to Mr Chhabra, did trade in the shares of Eidos does not prove that during the telephone call Mr Chhabra did not disclose relevant information about Ebookers.

77. The final question arising out of the first bet is what caused Mr Patel to place it. The Authority argued that there was no objective reason for Mr Patel to think that market expectations were likely to be exceeded. Ebookers' results for the calendar year 2003 were confident for the year ahead but Mr Chhabra's published note of March 2004 had taken a somewhat less favourable view. By the beginning of May those views were known to the market. Also, the two research papers published immediately prior to 7 May had been neutral. The only explanation for Mr Patel being sufficiently optimistic as to place buy bets on Ebookers on 7 May (thereby establishing his second largest position ever in relation to an individual company) was that he had been told that the results were likely to be better than forecast. Mr Chhabra's note of 10 May showed that Mr Chhabra shared that view and regarded the actual results as "worth a buy" although, as events transpired, the market did not agree as the price of the shares fell after the announcement was published.

78. For Mr Chhabra Mr Mansell argued that the information in the draft press release did not explain the very large size of the positions that Mr Patel took on 7 May. For Mr Patel Mr Barclay argued that, when he made the bet on 7 May, Mr Patel had a positive view of Ebookers and the bet was in line with his normal strategy under which it was not unusual for him to bet in advance of scheduled announcements. The evidence of Mr Patel was that he had a positive view of the shares because of his knowledge of the long haul airline industry and he was more optimistic than the market generally; he also thought that the shares were undervalued. For that reason he had thought that the results for the first quarter would prove to be better than expected.

79. We regard it as relevant that the bet made by Mr Patel on 7 May was not in line with Mr Chhabra's note of 22 March 2004 nor with the two research notes published in the days prior to the announcement. It was, however, in line with Mr Chhabra's thinking on 7 May as evidenced by his note published on 10 May. We also regard it as relevant that this was the second largest bet ever placed by Mr Patel at that time.

80. At this stage we do not have to decide what caused Mr Patel to place the first bet. However, we do record that the direction of the first bet was consistent with the conclusion that it was placed in reliance on relevant information not generally available (namely the unpublished scheduled announcement and Mr Chhabra's positive views) and the timing is consistent with the conclusion that the bet was placed after the conversation with Mr Chhabra.

Specific questions relating to the second bet

81. The arguments of the parties raised the following specific questions relating to the second bet:

- (1) What information was left in the voicemail by Mr Ellis for Mr Chhabra at 9.54 on 20 May 2004?
- (2) Was the information received by Mr Chhabra relevant information?
- (3) Was Mr Chhabra in possession of relevant information not generally available when he made the telephone calls to Mr Patel at 10.32, 10.36, 11.29 and 11.50 on 20 May?
- (4) What caused Mr Patel to place the second bet?

82. Beginning with the first question the Authority argued that, after Mr Chhabra had checked his voicemail messages at 10.25 on 20 May 2004, he knew that Eidos was about to put out an unscheduled announcement and that he realised (although not specifically told) that it would be a negative announcement.

83. We have already found as a fact that at 9.54 on 20 May 2004 Mr Ellis telephoned Mr Chhabra's mobile telephone and left a voicemail message. In deciding what was in the voicemail message we review the evidence of Mr Ellis and Mr Chhabra.

84. In an interview with the Authority on 15 June 2006 Mr Ellis said that he believed that he would have said in his voicemail that an announcement was likely to go out in relation to Eidos that day and that he needed to speak to Mr Chhabra and to make him an insider at the

earliest opportunity; Mr Ellis thought it unlikely that he would have said that the announcement would be negative. Later Mr Ellis said that if he spoke to somebody on the telephone he would say that he needed to make them an insider about an announcement relating to Eidos but if he left a message on a voicemail he would ask them to contact him as soon as possible as he needed to communicate something to them. In a second interview on 19 January 2007 Mr Ellis repeated his view that he would have said in the voicemail that there was an announcement which was likely to go out and he suspected that Mr Chhabra would have concluded that the announcement would be negative and might have guessed that it related to Hitman; he would probably have mentioned the company name but he emphasised that he would never leave a sufficiently detailed message that it would have made someone an insider.

85. The evidence of Mr Chhabra was that, although he had no recollection of the contents of the voicemail message, he agreed that Mr Ellis mentioned that there was something urgent and Mr Chhabra knew that it was about Eidos as he was not working with Mr Ellis in connection with any other company. However, he did not think that the voicemail contained “bombshell news” because if it had done so he would have called Mr Ellis immediately and not called Mr Malik and Mr Morse first. Also if he had thought that an announcement was coming out he would have dropped everything to deal with it as he was the person who would have to comment on it. Further, he would have got in touch with Eidos which he did after 12.30. Finally there were a number of reasons why Mr Ellis might want to speak to him urgently about Eidos because Eidos was an important client and demanded high standards of service. Even if Mr Ellis had mentioned an announcement Mr Chhabra might have assumed it was about a takeover bid.

86. In the light of this evidence we find it probable that, in the voicemail message which Mr Ellis left for Mr Chhabra at 9.54 on 20 May 2004, Mr Ellis said that he needed to speak to Mr Chhabra urgently and that Mr Chhabra knew that it was about Eidos. We also find that it is also probable that Mr Ellis mentioned that there was to be an announcement. However, we find that he did not mention that the announcement was negative.

87. Accordingly, after listening to his voicemail at 10.25, Mr Chhabra knew that Mr Ellis needed to speak to him urgently about Eidos. The fact that something urgent had happened in relation to a company could in itself be information not generally available and could be regarded by a regular user of the market as relevant. Also, in our view it is probable that Mr Chhabra was told that there was to be an announcement and concluded, without being told directly, that it was likely to be negative. That information also would be relevant information not generally available. .

88. The second question arising out of the second bet is whether the information received by Mr Chhabra was relevant information. Mr Mansell argued that it was not possible for Mr Chhabra to engage in market abuse in circumstances where he did not receive any information that was specific and precise within the meaning of MAR 1.4.9(1). The Authority argued that the person who committed market abuse was Mr Patel and it had to be shown that he was in possession of relevant information not generally available; he got that information from Mr Chhabra who thus encouraged Mr Patel to engage in market abuse within the meaning of section 123(1)(b).

89. The condition in section 118(2)(a) is that the behaviour is based on information which is not generally available to those using the market but which, if available to the general 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. MAR 1.4.9 (which is set out in paragraph 63 of this Decision) provides that whether, in a particular case, information would be likely to be regarded as relevant depends upon all the circumstances one of which is whether the information is specific and precise and another is whether the information is new or fresh information. We are of the view that the information that an unexpected announcement was imminent was new and fresh information and would be likely to be regarded by a regular user as relevant when deciding on the terms of a transaction.

90 We therefore conclude that the information received by Mr Chhabra was relevant information.

91. The third question relating to the second bet is whether Mr Chhabra was in possession of relevant information not generally available when he made the telephone calls to Mr Patel at 10.32, 10.36, 11.29 and 11.50 on 20 May. The Authority argued that he was but Mr Mansell argued that Mr Chhabra only became in possession of relevant information at 12.30 relying upon the Insider Register and the emails of Mr Morse at 14.11 and 14.14 on 20 May 2004.

92. We have already concluded that, when Mr Chhabra checked his voicemail messages at 10.25, he knew that something urgent had happened in relation to Eidos; and that it was probable that he knew there was to be an announcement and had concluded that it was likely to be negative. That information was, in our view, relevant information not generally available and was in the possession of Mr Chhabra when he made the telephone calls to Mr Patel at 10.32, 10.36, 11.29 and 11.50 on 20 May. We accept that it was not until the meeting at 12.30 that day that Mr Ellis told Mr Chhabra specifically that the forthcoming announcement about Eidos was negative (and showed him a draft of the announcement) but in our view Mr Chhabra had realised that at 10.25 when he picked up his voicemail messages. We do not regard the Insider Register as conclusive because Mr Ellis would have completed it on the basis that he made Mr Chhabra inside at 12.30 because that was the time that he showed Mr Chhabra the draft announcement. That was also the context of the email sent to Mr Arnaouti at 14.11 on 20 May 2004.

93. The final question arising from the second bet is what caused Mr Patel to place the second bet. The Authority argued that the only reason why Mr Patel switched his bet on Eidos from long to short at 10.36 on 20 May was because he had received information from Mr Chhabra. Mr Patel could have closed his long position in Eidos shares on 18 or 19 May and made a profit, especially as his evidence was that he had already come to the view that the stock was overvalued. Also Mr Patel increased his sell bets twice more each time after a call from Mr Chhabra. Mr Barclay argued that the second bet on Eidos was in line with general movements in the share price and the comments of analysts and the financial press. It was just as likely that the call at 11.50 related to Ebookers because it was immediately followed by Mr Patel closing his buy bets in Ebookers.

94. Mr Patel's evidence was that he accepted that he may have discussed the Eidos share price with Mr Chhabra on 20 May but the share price continued to fall further on 20 May and that influenced his decision to go short. He was also influenced by the views of the Investors Chronicle and the analyst from Dresdner Kleinwort Wasserstein. If he had known in advance

about the profits warning he would not have bet in stages but he was waiting to see what happened to the share price.

95. We find this evidence unconvincing because the pessimistic views of Dresdner Kleinwort Wasserstein were known from 21 April, the pessimistic views of the Investors Chronicle were known from 30 April, and the views of the individual analyst from Dresdner Kleinwort Wasserstein were known from 17 or 18 May whereas until 20 May Mr Patel was betting that the price of a share in Eidos would rise. If he had been influenced by those views he would have started to sell before 20 May. The price of the shares continued to rise until 18 May when they were at their highest for a year. On 19 May Mr Chhabra published a research note recommending a buy strategy but the price of the shares fell that day. Mr Patel did not begin to sell until 10.26 on 20 May.

96. At this stage we do not have to decide what caused Mr Patel to place the second bet. However, we do record that the direction of the second bet was consistent with the conclusion that it was placed in reliance on relevant information not generally available (namely the unscheduled announcement) and the timing is consistent with the conclusion that the bet was placed after the conversations with Mr Chhabra.

The specific question relating to the third bet

97. The arguments of the parties raised the following specific questions relating to the third bet:

- (1) Did Mr Chhabra telephone Mr Patel at 11.31 on 28 July 2004 or was that call made at 11.28?
- (2) At what time on 28 July 2004 was Mr Chhabra aware of the unscheduled announcement to be made by Ebookers?
- (3) Was Mr Chhabra in possession of relevant information not generally available when he telephoned Mr Patel at 11.31? (It was not disputed that Mr Chhabra was in possession of such information when he called Mr Patel at 14.00.)
- (4) What caused Mr Patel to place the third bet?

98. Beginning with the first question Mr Chhabra argued that, because of a timing difference, the call to Mr Patel at 11.31 in fact took place at 11.28. On the penultimate day of the hearing he gave oral evidence that there was a timing discrepancy between his mobile telephone records and the Evolution landline telephone records so that on 28 July 2004 the difference was three minutes.

99. The timing argument was based on a somewhat convoluted comparison of calls to and from Cyprus and ran as follows. Mr Chhabra said that the arrangement was that a call put through to his extension at Evolution would be automatically re-routed to his mobile telephone. He was in Cyprus on 16 July 2004 when two calls for him had been received at Evolution at 14.41 and 15.15. These two calls had been forwarded to his mobile telephone in Cyprus and recorded at 16.44 and 17.18. Cyprus time was two hours ahead of United Kingdom time and so the records proved that the Evolution telephone time was three minutes behind his mobile telephone time.

100. The Evolution telephone records showed both incoming and outgoing calls. On 16 July they showed that an external call was received at 14.41 and that an outgoing call was sent at 14.41 to the telephone number of Mr Chhabra's mobile telephone. They also showed that another external call was received at 15.15 and that an outgoing call was sent at 15.15 to the telephone number of Mr Chhabra's mobile telephone. The records that we saw for Mr Chhabra's mobile telephone stated that they recorded numbers called. However, they did record that at 16.44 and 17.18 there were calls to that number followed at the same time by calls to the same United Kingdom number.

101. We received no other evidence about the timing difference and, in particular, were not told whether it was claimed that Evolution telephone time or the mobile telephone time (or neither) was correct. On this evidence before us, therefore, we cannot conclude that the call to Mr Patel made by Mr Chhabra on his mobile telephone, and timed at 11.31, was made at any other time. All we can conclude is that, if a differential in the timing of a call made on an Evolution landline and a call made on Mr Chhabra's mobile telephone were crucial to our decision, we would take the differential into account. However, such a differential is not crucial.

102. All the documents prepared by both parties prior to the hearing, and all the oral evidence at the hearing (other than the evidence mentioned above) was based on the times we have given in our findings of fact. The timing difference was only the subject of argument in relation to the third bet and we are not satisfied on the evidence before us that there was a relevant timing difference.

103. The second question arising out of the third bet is at what time on 28 July 2004 was Mr Chhabra made aware of the unscheduled announcement to be made by Ebookers. The Authority argued that Mr Chhabra had been informed of the forthcoming announcement by Mr Brennan in a meeting room at Evolution at 11.27; that he then left the meeting room, either to invite his assistant Mr Tejinder Rhandawa to join Mr Brennan and himself or for some other reason; that he made the call to Mr Patel at 11.31 and then returned to the meeting room to join Mr Brennan; and that meant that sometime between 11.27 and 11.30 on 28 July 2004 Mr Chhabra knew that Ebookers was about to put out an unscheduled negative announcement and that was relevant information not generally available. Mr Chhabra denied that he was in possession of such information at 11.31 and claimed that he only became aware of it at 12.00 noon.

104. In considering this question we have reviewed all the evidence before us. We do this in chronological order because the statements made closer to the events of 28 July 2004 are likely to be based on a stronger recollection than those made at a later date.

105. At an interview with the Authority on 2 June 2005 Mr Chhabra said that, as far as he could recall, he first became aware of the intention to release the announcement at about 12 noon on 28 July because that time was in the Insider Register. He said that he was asked by Mr Brennan to go into a meeting room and was then given a draft of the announcement. He wanted an explanation of the figures and so wanted to speak to Mr Healy of Ebookers. Mr Brennan had telephoned Mr Healy and arranged a meeting. He and Mr Brennan got in a taxi and went to the office of Ebookers and, after half an hour, or maybe forty-five minutes, there was a meeting with Mr Healy at Ebookers. At this interview Mr Chhabra also recalled that he had telephoned Mr Patel at a time when he was in possession of inside information although he had not disclosed it to Mr Patel.

106. In an interview with the Authority on 12 September 2005 Mr Rhandawa made a statement that he had been informed of the forthcoming announcement at 12 noon because that was the time in the Insider Register.

107. In an interview with the Authority on 7 October 2005 Mr Brennan stated that he first made Mr Chhabra an insider and that Mr Chhabra went to tell his assistant, Mr Tejinder Rhandawa. Mr Chhabra could not understand where the numbers were coming from and asked him to speak to Ebookers. He had made Mr Chhabra and Mr Rhandawa insiders about five or ten minutes before telephoning Mr Healy. He confirmed this at an interview on 18 December 2006 but was unable to give an estimate of the length of the call to Mr Healy and he also said that it was possible that Mr Healy had been called from a mobile telephone.

108. In an interview with the Authority on 6 June 2006 Mr Strong did not recall receiving a telephone call from Evolution on 28 July 2004 but he thought that there would have been conversations with Mr Brennan on the basis of the text of the announcement.

109. Mr Chhabra attended for a second interview with the Authority on 14 March 2007 when he provided the Authority with an oral statement. Part of the statement was that his best recollection was that on 28 July 2004 Mr Brennan informed him of the forthcoming announcement while they were both in a meeting room at the offices of Evolution. Whilst he could not be sure, this was possibly the same room from which the call at 11.37 was made and it was possible that Mr Brennan told him of the announcement and showed him a draft during the call itself. The call lasted 17 minutes and 56 seconds. In oral evidence Mr Chhabra informed us that he had not then seen the transcripts of Mr Brennan's or Mr Rhandawa's interviews and if he had done so he would not have made his statement in the way he had.

110. In a letter to the Authority on 11 January 2008 Mr Chhabra's solicitors wrote that Mr Chhabra's recollection was that Mr Brennan had informed him of the forthcoming announcement while they were together in a meeting room at the offices of Evolution which may have been the same room from which the conference call at 11.37 was made and that Mr Chhabra's best guess was that he was made an insider during the course of the meeting with Mr Brennan and this may have occurred during the telephone call at 11.37 which finished at 11.55. The letter concluded that the most likely time that he was made an insider was during the 11.37 call which finished at 11.55

111. Mr Chhabra's evidence at the hearing was that that the call at 11.37 was not the call that was made to Mr Healy to fix the meeting at Ebookers. The call at 11.37 was made to the extension of Mr Oliver Strong and the person most likely to speak to Mr Strong was not himself but another employee of Evolution. Although Mr Strong was in charge of investor relations at Ebookers he would not be able to deal with numbers and Mr Chhabra wanted to discuss the numbers. He recalled Mr Brennan making a call but he did not recall it lasting 18 minutes. The call to Mr Healy was short and took place at around noon almost immediately after he had been told about the announcement by Mr Brennan. It could have been made on a mobile telephone and so not recorded on the landline telephone records of Evolution.

112. We approach this question by starting from the facts that we have found. At about 12.00 noon on 28 July 2004 Mr Chhabra and Mr Brennan left the offices of Evolution to attend a meeting at the offices of Ebookers, which were a few minutes away from the offices of Evolution. That meeting had been arranged on the telephone. The only record of a call

from Evolution to Ebookers was made from a landline in a meeting room and the call was made at 11.37 to the line of Mr Oliver Strong of Ebookers and lasted until 11.55. During that time Mr Chhabra and Mr Brennan were in a meeting room at the offices of Evolution. The meeting at Ebookers was needed because Mr Chhabra had reviewed the text of the forthcoming announcement and was unable to understand why Ebookers was reducing its profits forecast and needed to have discussions with Mr Healy of Ebookers.

113. We first have to decide whether the call made at 11.37 was the call during which Mr Brennan fixed the meeting with Mr Healy. That call was made to the number given in the draft announcement and was Mr Strong's telephone number. As Mr Brennan and Mr Chhabra were both in a meeting room, and as Mr Brennan had the draft announcement with him, that number would have been the easiest to find as it was printed on the announcement. There was no record of any other call from Evolution to Ebookers that morning and so, on the evidence before us, we conclude that that was most probably the call at which the meeting with Mr Healy was arranged.

114. We also conclude that Mr Chhabra knew what was in the draft of the unscheduled announcement before the telephone call began at 11.37 because before the call he had reviewed the text of the announcement and did not understand the numbers. Bearing in mind the practice at Evolution of imparting inside information it is likely that Mr Chhabra was given that information by Mr Brennan in the same meeting room some minutes before the call began at 11.37. Mr Brennan had said that he told Mr Chhabra of the forthcoming announcement in a meeting room "about five or ten minutes" before the call was made to Mr Healy of Ebookers which would put the time that Mr Chhabra knew about the forthcoming announcement at about 11.27. We have found as a fact that he made a call from his mobile telephone to Mr Patel at 11.31 and this would have been possible if he left the meeting room to find Mr Rhandawa as described by Mr Brennan.

115. Mr Chhabra relied upon the entry in the Insider Register to support his view that he only became aware of the contents of the unscheduled announcement at 12 noon. However, the time of 12 noon as entered in the Insider Register was the time that Mr Brennan and Mr Chhabra left for the meeting with Ebookers and no doubt the entry was made because the time of 12 noon was later identified as the time that M Chhabra was made inside. In our view the evidence of the Insider Register was unreliable because the relevant entry was made on 10 September 2004 which was six weeks after the event.

116. On the evidence before us we conclude that sometime between 11.27 and 11.30 on 28 July 2004 Mr Chhabra knew that Ebookers was about to put out an unscheduled negative announcement and that information was relevant information not generally available.

117. The third question arising out of the third bet was whether Mr Chhabra was in possession of relevant information not generally available when he telephoned Mr Patel at 11.31. (It was not disputed that Mr Chhabra was in possession of such information when he called Mr Patel at 1400.)

118 It follows from what we have said in relation to the second question that Mr Chhabra was in possession of relevant information not generally available when he called Mr Patel at 11.31. However, if we are wrong about that then there was no dispute that by 12.00 Mr Chhabra was in possession of relevant information not generally available, that he telephoned Mr Patel at 14.00 and that at 14.03 and 14.07 Mr Patel placed large bets on Ebookers. Mr

Patel had placed similar bets earlier in the day at £465 per point but in the afternoon he increased his position to £695 per point.

119 The final question arising out of the third bet was what caused Mr Patel to place the third bet. The Authority argued that Mr Patel had previously said that one reason for his trade in Ebookers that day was because the price fell to 220 but the price had fallen to 220 on 20 July and there had been no trades on that date; all the negative factors about the stock had been present for some time; also, there was no event on 28 July to trigger the later trades because there had been no additional downward movement between the trades at 12.00 and those at 14.00 yet further bets were placed. Mr Barclay argued that by the time of the call at 14.00 Mr Patel had established his strategy of selling the shares of Ebookers and the call at 14.00 did not alter that strategy.

120. We agree that the shares in Ebookers fell from 8 June 2004 from a high of 282 on that date to a low of 220 on 27 July. However, Mr Patel had not then bet on the shares. During the course of 28 July the price of the shares fell by 36% to 140 pence but after the publication of the announcement.

121. At this stage we do not have to decide what caused Mr Patel to place the third bet. However, we do record that the direction of the third bet was consistent with the conclusion that it was placed in reliance on relevant information not generally available (namely the unscheduled announcement) and the timing is consistent with the conclusion that the bet was placed after the conversations with Mr Chhabra.

The main issue

122. Having expressed some provisional views about the specific questions which relate to each of the three bets we now stand back and consider the evidence as a whole in order to decide the main issue which whether Mr Patel placed his bets in reliance on restricted information not generally available which had been disclosed to him by Mr Chhabra.

123. The Authority relied upon the similarities in the sequences of events leading to each of the three bets and argued that it was not possible to interpret the facts as having an innocent explanation from which it followed that the inference must be drawn that Mr Chhabra had disclosed the relevant information to Mr Patel who had placed his bets in reliance on it. A very short summary of the relevant parts of the sequences of events relating to the three bets is:

7 May 2004	08.35	Mr Chhabra in possession of information which looks positive
	11.45	Mr Chhabra telephones Mr Patel
	11.58	Mr Patel starts to bet that the share price will go up The price of the shares goes down and Mr Patel makes a loss.
20 May 2004	10.25	Mr Chhabra in possession of information which looks negative
	10.32	Mr Chhabra telephones Mr Patel
	10.36	Mr Chhabra telephones Mr Patel
	10.36	Mr Patel starts to bet that the share price will go down
	11.29	Mr Chhabra telephones Mr Patel
	11.30	Mr Patel makes further bets that the share price will go down
	11.50	Mr Chhabra telephones Mr Patel
	11.53	Mr Patel closes a number of bets relating to another company
	11.58	Mr Patel makes further bets that the share price will go down

The price of the shares goes down and Mr Patel makes a large profit.

28 July 2004	11.27	Mr Chhabra in possession of information which looks negative
	11.31	Mr Chhabra telephones Mr Patel
	11.45	Mr Patel closes a number of bets relating to another company
	11.49	Mr Patel starts to bet that the share price will go down
	14.00	Mr Chhabra telephones Mr Patel
	14.03	Mr Patel bets again that the share price will go down
		The price of the shares goes down and Mr Patel makes a large profit.

124. These sequences are compelling but we must consider the evidence as a whole. The context is that Mr Chhabra and Mr Patel are close friends and telephoned each other frequently not only to discuss shares but also social arrangements and other matters. They were both of good character, they both had professional qualifications, and, at the relevant time, they were both approved persons. They must both have been aware of the consequences likely to follow if they did engage in market abuse and they both valued their reputations. With their good characters, they were less likely to behave badly. There was no evidence before us of any financial motive for Mr Chhabra to disclose inside information or for Mr Patel to place bets in reliance on it. All these are relevant factors in deciding whether they engaged in market abuse.

125. It is also relevant that Mr Patel was a prolific spread bettor and about half of the companies whose shares he bet against were clients of Evolution. His largest profits were made in respect of his bets on Ebookers and Eidos. Mr Patel frequently traded in advance of scheduled announcements and his appetite for risk grew over time. These factors illustrate the fact that some of Mr Patel's behaviour during the sequences of bets was not unprecedented.

126. Mr Chhabra admitted to us that, with hindsight, it could appear suspicious to communicate with a third party while in possession of inside information but that was not proof of wrong-doing. We agree but we also note that on 20 May and 28 July, at the times of his calls to Mr Patel, Mr Chhabra was having to deal with unscheduled announcements which were contrary to his previously published forecasts. We found it surprising that he found the time to telephone Mr Patel at such times (although we appreciate that it was Mr Chhabra's case that he did not know about the terms of the Eidos announcement until 12.30 on 20 May).

127. Having stood back and considered the evidence as a whole, and all the relevant circumstances, we find that the similarities in the sequences of events leading to each of the three bets, together with the fact that the largest profits made by Mr Patel were made in respect of the second and third bets, lead us to conclude that Mr Patel did place his bets in reliance on restricted information not generally available which had been disclosed to him by Mr Chhabra.

Did the Applicants engage in market abuse?

128. Before reaching a final decision about whether Mr Chhabra and Mr Patel engaged in market abuse we have considered three arguments put forward by Mr Barclay. These arguments were: that the safe harbour provisions applied because Mr Patel had taken a firm decision to enter into his transactions and that did not alter after the receipt of the information; that the standards of behaviour to be expected of Mr Patel were not the same as the standards to be expected of a person who was used to handling inside information; and that Mr Patel did not know that the information he received from Mr Chhabra was inside information.

129. Mr Barclay's first argument was that the safe harbour in MAR 1.4.21 and MAR 1.4.22 applied to each of Mr Patel's bets. At the relevant time MAR 1.4.19 provided that MAR 1.4.21 set out descriptions of behaviour that did not amount to market abuse in that the behaviour did not constitute a misuse of information. MAR 1.4.21C and MAR 1.4.22E provided:

"1.4.21C Dealing or arranging deals will not amount to a misuse of information if the person's possession of relevant information that is not generally available did not influence the decision to engage in the dealing or arranging in question.

1.4.22E It will be presumed for the purposes of MAR 1.4.21C that the person's possession of the information in question did not influence his decision to deal or arrange deals if:

- (1) the person had taken a firm decision to deal or arrange deals before the relevant information was in the person's possession; and
- (2) the terms on which the person had proposed to enter into the transaction(s) did not alter after the receipt of the information."

130. On the evidence before us we are unable to find that Mr Patel had taken a firm decision to arrange any of the three bets before the relevant information was in his possession.

131 Mr Barclay's second argument was that the standards of behaviour to be expected of Mr Patel were not the same as the standards to be expected of a person who was used to handling inside information. This argument arose out of section 118(10) of the 2000 Act and MAR 1.2 which, at the relevant time, concerned the regular user test. The relevant parts of MAR 1.2 provided:

"1.2.1 A regular user is defined in section 118(10) of the Act as 'in relation to a particular market, a reasonable person who regularly deals on that market in investments of the kind in question.' Behaviour will amount to market abuse only where it would be likely to be regarded by a regular user as a failure on the part of the person or persons concerned to observe the standard of behaviour reasonably expected of a person in his or their position in relation to the market.

1.2.2 In determining whether behaviour amounts to market abuse, it is necessary to consider objectively whether a hypothetical reasonable person, familiar with the market in question, would regard the behaviour as acceptable in the light of all the relevant circumstances.

1.2.3 In determining whether behaviour falls below the standard expected, the regular user is likely to consider all the circumstances of the behaviour, including: ...

- (4) the position of the person in question and the standards reasonably to be expected of that person at the time of the behaviour in the light of that person's experience, level of skill and standard of knowledge. For example, the standards which it would be reasonable to expect of a retail investor are likely to differ from those to be expected of an industry professional; and

(5) the need for market users to conduct their affairs in a manner that does not compromise the fair and efficient operation of the market as a whole or unfairly damage the interests of investors.

1.2.6 A mistake is unlikely to fall below the objective standards expected where the person in question has taken reasonable care to prevent and detect the occurrence of such mistakes.”

132. Mr Barclay relied upon MAR 1.2.3(4) and argued that, although Mr Patel was an industry professional, he was not “market facing” and could not be expected to behave in the same way as a person who was used to handling inside information.

133. In our view Mr Patel’s position as a market professional, as an approved person, and as a qualified chartered accountant indicates that the highest standards were to be expected of him.

134. Mr Barclay’s third argument was that Mr Patel did not know that the information he received from Mr Chhabra was inside information. Mr Barclay relied upon MAR 1.2.6 and argued that even if Mr Chhabra had conveyed inside information to Mr Patel who accepted it, and placed reliance on it, Mr Patel did not know that it was inside information. Mr Patel’s evidence was that he was not aware until 2005 that Mr Chhabra could be taken inside on the stocks that Mr Chhabra covered and that he, Mr Patel, was never knowingly in receipt of relevant information not generally available; if he had suspected that he was, he would not have traded on it. Mr Barclay argued that if Mr Patel had inadvertently engaged in market abuse then that would not be a failure to observe reasonable standards of behaviour as a regular user of the market would regard it as a mistake within the meaning of MAR 1.2.6.

135. We agree that if Mr Patel had received relevant information from Mr Chhabra but did not know that it was inside information then the placing of bets in reliance on such information would not be market abuse on the part of Mr Patel so long as he had taken reasonable care to ensure that such information was not inside information. However, on the evidence before us we are of the view that Mr Patel was aware that the information was relevant information not generally available.

Determination

136 We therefore determine this issue in the reference as that Mr Patel did place his bets in reliance on restricted information not generally available which had been disclosed to him by Mr Chhabra and that both Mr Chhabra and Mr Patel did engage in market abuse.

Direction

137. Section 133(4) of the 2000 Act provides that, on a reference, the Tribunal must determine what, if any, is the appropriate action for the Authority to take in relation to the matter referred to it. Section 133(5) provides that, on determining a reference, the Tribunal must remit the matter to the Authority with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination.

138 At this Decision deals only with the issue of liability (namely, whether Mr Chhabra and Mr Patel engaged in market abuse) and not with the other issues in the reference, namely the penalties and the prohibition orders, we cannot at this stage determine the reference or remit the matter to the Authority.

139. **WE THEREFORE DIRECT** that any party has liberty to apply to the Tribunal, within three months from the date of the release of this Decision, for directions leading to a hearing of any issues relating to the penalties and the prohibition orders. If no such application is made the reference may then be determined and the matter remitted to the Authority.

140. This is a unanimous decision.

DR A N BRICE

CHAIRMAN

RELEASE DATE: 29 December 2009

**[This Decision was released to the parties on 17 December 2009.
This version corrects clerical mistakes under Rule 28(3).]**

Chhabra and Patel
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