Reference numbers: FS/2010/0001
FS/2010/0006

MARKET ABUSE — collapse of hedge fund — whether applicants attempted to manipulate market, breached investment restrictions and misled investors — yes — whether approvals properly withdrawn — yes — whether prohibition appropriate — yes — level of financial penalties to be imposed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

MICHIEL VISSER
OLUWOLE MODUPE FAGBULU **Applicants**

- and –

THE FINANCIAL SERVICES AUTHORITY **The Authority**

Tribunal: Judge Colin Bishopp
Mr Keith Palmer
Mr Terence Carter

Sitting in public in London on 28 February, 2 to 4, 8 to 11 March 2011

The first Applicant did not appear and was not represented

Mr Mark Fenhalls, counsel, and Mr Robert Wong, solicitor, for the second Applicant

Mr Javan Herberg QC and Mr Simon Pritchard, counsel, for the Authority

DECISION

Introduction

1. This decision relates to references by Michiel Visser and Oluwule Fagbulu of, altogether, six decisions made by the Authority and set out in Decision Notices issued on 15 March 2010. They all arise from the conduct of the applicants in the running of Mercurius Capital Management Limited ("Mercurius"), a UK company authorised by the Authority which acted as investment manager for a Cayman Islands-based hedge fund called Mercurius International Fund Limited ("the Fund"). Mr Visser was the Chief Executive Officer and a director of Mercurius and Mr Fagbulu was employed as its Chief Finance Officer. He was not a director but was the senior person with compliance oversight responsibility in the firm. Both were approved persons. The Fund had approximately 20 investors, and had a variable amount under management—for most of the relevant time it was about €35 million. The Fund collapsed and was placed in voluntary liquidation on 11 January 2008. Investors have, so far, recovered nothing and we were told that it appears unlikely they ever will.

2. The essence of Authority's case is that the applicants committed market abuse; deliberately and repeatedly breached the investment restrictions placed on the Fund; undertook transactions designed to give a false impression of the value of the Fund's assets; and concealed important information—the true nature of the Fund's investments, the resignation of its prime brokers and the consequential loss of margin, and its increasingly precarious financial position—from investors, who might otherwise have been able to withdraw their investments in time, and from new investors who put money into the Fund when, had they been told the true position, they would be unlikely to have done so.

3. The decisions relating to Mr Visser were, first, to impose on him a penalty of £2 million for breach of Principle 1 of the Authority's Statements of Principle for Approved Persons ("APER") and for engaging in market abuse; second, to withdraw his approval so as to prevent him from continuing to perform the functions to which his approval related; and, third, to prohibit him from performing any regulated activity. The decisions relating to Mr Fagbulu were identical, save that the financial penalty imposed was £500,000. The facts are common to the two references, and it was directed that they proceed and be heard together.

4. Mr Visser did not appear at the hearing, and was not represented. His former solicitors had ceased to act for him about a week earlier. We do not know the reasons for certain, but comments made by Mr Visser indicate that he was no longer able to afford their fees. Mr Visser communicated with the tribunal shortly before the hearing was due to begin, asking for a postponement because, he said, he was ill. When we sat on the first scheduled day, 28 February 2011, we decided that he should be given the opportunity of producing some evidence, in the shape of a doctor's note, to support his claim, and we adjourned in order to allow him to do so. He produced some very limited evidence, a letter from his general practitioner stating no more than that he was under medical care. Mr Visser

claimed that he could do no better because of confidentiality laws in the Netherlands, where he lives—we understand he is a Dutch national. We resumed the hearing on 2 March, when he was again not present or represented.

5. For the Authority, Mr Javan Herberg QC, leading Mr Simon Pritchard, asked us to hear both references despite Mr Visser's absence. He had requested an oral hearing before the Regulatory Decisions Committee ("RDC"), then sought a postponement of that hearing, which was refused, and he failed to attend the hearing. There was, as Mr Herberg demonstrated to our satisfaction, a history of Mr Visser's having failed to do what was required of him in the prosecution of his reference, either on time or at all. The medical evidence produced now was insufficient since it not only did not describe the condition from which Mr Visser was suffering, but said nothing about his ability to travel or attend a tribunal hearing. Mr Robert Wong, the solicitor representing Mr Fagbulu (he was also represented by Mr Mark Fenhalls of counsel, who was able to attend only part of the hearing) supported the request that the hearing should proceed, pointing out that Mr Fagbulu had an interest in having the matter concluded without delay.

6. We were conscious that the penalty imposed in this case is of an extremely large sum, and that the other decisions made in respect of Mr Visser have very serious consequences for him. We recognise too the difficulty he faces in pursuing a reference without legal representation. We could not, however, ignore the history of the matter, and Mr Visser's failure, even when represented, to deal with his reference in a diligent manner: on that point we agree with Mr Herberg. The medical evidence produced was of no real value, and again we agree with Mr Herberg that the claim that Dutch law prevents the disclosure of medical information for confidentiality reasons makes little sense when it is the patient himself who is seeking the information which he requires for onward transmission to the tribunal. We take into account, too, the interests of Mr Fagbulu, who is entitled to have his reference dealt with promptly. Hearing his reference separately did not seem to us to be a practical proposition, as the facts of the two references are closely entwined. We came to the conclusion that we should proceed, whether or not Mr Visser was present, but again adjourned until the following day, to give him a last chance of attending—our decision to adopt this course was immediately communicated to him. However, when we resumed on 3 March, he was still not present.

7. As we have proceeded in his absence, Mr Visser will have the right to apply to have our decision set aside, if he is dissatisfied with it, in accordance with r 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008. He will need to satisfy the judge who deals with his application that it is in the interests of justice for it to be set aside, and in order to do so he will have to produce (in addition to any other relevant material on which he wishes to rely) evidence, almost certainly from a registered medical practitioner, that he was unfit for medical reasons to attend the hearing. Though we obviously cannot tie the hands of the judge who deals with any such application, we should point out for Mr Visser's benefit that unsubstantiated claims of an unspecified illness with no comment by the medical practitioner of its effects, which is all we had, are unlikely to be enough.

The facts

8. We preface this section of the decision with the observation that, while Mr Fagbulu accepts most of the Authority's factual case, with reservations about his own role and his knowledge and understanding of several of the events we shall describe, it is unclear whether, and to what extent, Mr Visser does so. Such limited material as he has produced to the Authority and to the tribunal during the course of the reference—a statement of case (in effect a reply) and a witness statement, each running to only four pages, and containing much shared material—suggests that his principal challenge is to the severity of the penalty and the seriousness for him of the other measures on which the Authority decided. However, as we shall later explain, he did offer some criticism of parts of the Authority's case and, as he was not present during the hearing, it is appropriate that we set out the facts as we find them in some detail. We shall do so by setting out the Authority's case on each of several issues, followed by the applicants' responses.

9. We heard the oral evidence of Jonathan Baker, an Advanced Associate in the Authority's Enforcement and Financial Crime Division, and of Mr Fagbulu. We had statements from Patrick Spens, the Head of the Authority's Market Monitoring Division, and Alex Allen and Jeremy Charlesworth, both chief investment officers of institutions which invested in the Fund. Mr Fagbulu did not challenge anything in those statements, which we have read and have taken into account. We have borne in mind that Mr Visser has not had the opportunity of cross-examining the witnesses, or of challenging Mr Fagbulu's case that he bears the primary responsibility for events, Mr Fagbulu largely doing little more than follow instructions.

The Fund and its management

10. The Authority's case in respect of the structure and management of the Fund, with which we deal in this section, was not disputed by Mr Fagbulu and appears to be undisputed by Mr Visser.

11. Mr Visser was at all material times the Chief Executive Officer and sole director of Mercurius. He was approved by the Authority to perform a number of controlled functions, most importantly for present purposes Director (CF1), Chief Executive (CF3), and Investment Management (CF27) (there were some changes over time in the detail of his approvals, but they are not relevant to this decision). Mr Fagbulu was employed by Mercurius from April 2003, becoming its Chief Finance Officer in August 2003, and he reported directly to Mr Visser. He was approved by the Authority to perform a number of controlled functions, of which those important for present purposes were Compliance Oversight (CF10) and Finance (CF13). Mr Fagbulu was therefore responsible for overseeing Mercurius' compliance with the rules as they are set out in particular sections of the Authority's Handbook. He was in charge of Mercurius' "back office" functions; we accept his evidence that he rarely undertook any dealing and, on a day-to-day basis, had no responsibility for, or involvement in, investment decisions. He did, however, have the responsibility for the preparation of much of the written material, particularly about the Fund's performance and holdings, which was provided for current and prospective investors. Some of that material was

provided by other Mercurius employees, but Mr Fagbulu, as he accepted, was responsible for checking its accuracy before it was published.

12. The structure of the Fund and those appointed to service it requires some explanation. By a Management Agreement of 20 December 2002, a date close to its own creation, the Fund appointed a company incorporated in the Cayman Islands called Mercurius Capital Management (Cayman) Limited ("MCM Cayman") to manage its activities. By an Investment Management Agreement of the same date MCM Cayman in turn appointed Mercurius to manage the Fund's portfolio "on a discretionary basis in accordance with the investment objective and approach and subject to the investment restrictions set out in the Prospectus or as otherwise stipulated by the [Fund's] Directors from time to time". Mr Visser was one of the Fund's directors, but Mr Fagbulu was not: he had not joined Mercurius at this time, and even after he did he join he was not appointed a director. The Prospectus, as its name suggests, was a formal document which was shown to actual and prospective investors, and which set out the Fund's intended investment strategy. The Prospectus was, it seems, amended from time to time; the version relevant in these references was published on 23 March 2006.

13. Further materials sent to investors and prospective investors stated that the Fund targeted annual returns greater than 25%, and that Mercurius' investment strategy comprised three components: the Fundamental Stock Pricing Strategy, which selected stocks that were underperforming in the market; the Directional (or Momentum) Strategy, which utilised short-term, high-volume trading to take advantage of short-term trends; and the Event Driven Strategy, which took positions in order to profit from corporate events such as mergers, acquisitions and initial public offerings ("IPOs"). The Event Driven Strategy, in particular, was managed by Mr Visser. We should perhaps add that there can in our view be no real doubt that prospective investors reading the Prospectus and the other materials would be well aware that the Fund represented a high-risk investment, with the prospect of large gains but also the possibility of substantial losses. The Prospectus did, however, offer some safeguards, to which we shall come shortly.

14. At the beginning of 2006, the Fund appointed an administrator, Fortis Prime Fund Solutions Administration Services ("Fortis") which was responsible for, among other things, the calculation of the Fund's Net Asset Value ("NAV"), which the Prospectus defined as being "equal to the value of its total assets less its total liabilities". It did not become clear to us whether Fortis replaced an earlier administrator, or there had been some other arrangement before 2006, but it does not seem to be of any importance for present purposes.

15. Even though the Investment Management Agreement did not expressly impose these duties on Mercurius, in practice Mercurius provided to Fortis the portfolio data and information required for calculation of the Fund's NAV in line with the principles to be followed in valuing the Fund that were set out in the Prospectus. In addition, it communicated with investors, especially in the provision of regular performance information, and marketed the Fund both by encouraging existing investors to retain, or increase, their investments, and by seeking to attract additional investors. Mercurius' activities were undertaken in the United Kingdom and it was accordingly required to comply with the

provisions of the Financial Services and Markets Act 2000 ("FSMA") and the Authority's rules made in accordance with FSMA.

16. Mr Visser acted as Mercurius' investment manager, and undertook some dealing himself; Mercurius also employed other dealers, who ran their own portfolios within the Fund under Mr Visser's overall supervision. Mr Visser evidently spent a good deal of his time speaking to existing and prospective investors. Mr Fagbulu was responsible for maintaining Mercurius' financial records. His tasks included recording transactions, providing information to Fortis about the Fund's portfolio, liaising with Fortis to enable it to calculate the Fund's NAV, liaising with the Fund's prime broker and counterparties as to particular transactions, and creating (and approving as compliant with the Authority's rules) written communications with the Fund's investors and potential investors. In addition, Mr Fagbulu drafted and signed various contractual documents on behalf of the Fund and arranged some, though we accept not many, deals in investments for the Fund. It is not, we understand, disputed that all of these tasks were undertaken by Mr Visser and Mr Fagbulu in the course of exercising their respective controlled functions.

17. Mercurius managed the Fund throughout its existence, from early 2003, when the Fund commenced operations, until January 2008, when it was placed into liquidation. We have very little information about the management and performance of the Fund before 2006, and it is sufficient to record that the Authority makes no criticism in these references of the applicants' conduct before 2006. Its focus is on the period between July 2006 and the liquidation in January 2008. We need, however, to mention that in March 2006 the Fund made its first investment in NT Energy, an unlisted company which had been established in order to acquire and develop oil leases in Texas. The Fund bought 1.5 million shares at a cost of £3 million. There was no evidence available to us about the rationale for this purchase, which the Authority does not criticise, in itself, but it became clear to us as the evidence was given that the investment was in fact unwise and that it set the scene for the eventual collapse of the Fund.

18. During the period with which we are concerned, the Fund had approximately 20 investors, who collectively invested approximately €35 million. The investors were all or almost all very sophisticated, including "Fund of Hedge Fund" institutions. The background to what follows is the rapid deterioration in the Fund's performance during that period. The Authority's case is not that the applicants made poor investment decisions (though it must follow from what happened that Mr Visser at least did so) but that they deliberately concealed the deterioration in the Fund's performance from the investors, so that existing investors did not withdraw their investments, and new investors put in money. Between late September 2007 and the Fund's collapse Mercurius succeeded in attracting as much as €8 million in new investment. The applicants' case is that they were doing their best to keep the Fund afloat, so that investors would be able to recover at least some of their investments, and that they acted with the best of intentions. In that they were unsuccessful. Mr Fagbulu now recognises that much of what he did was, at best, misguided. In an extract from his statement which we set out below, Mr Visser concedes that he mismanaged the Fund, expresses regret and says he has already apologised to the investors.

The elements of the factual dispute

19. The Authority's case against the applicants has four elements. The first, in summary, is that during the relevant period Mr Visser and Mr Fagbulu repeatedly disregarded investment restrictions laid down in the Prospectus and also the limits, agreed with one of the investors, as to the levels of particular securities which the Fund was permitted to hold. The second element is that Mr Visser and Mr Fagbulu both engaged in deliberate market manipulation. Third, the Authority contends that the applicants falsely enhanced the Fund's apparent NAV by entering into fictitious transactions, intending that assets supposedly acquired by that means would be used by Fortis in its computation of the Fund's Net Asset Value at the month end, with the objective of making the Fund's performance appear better than it actually was. Last, the Authority says that the applicants repeatedly issued misleading investor communications, and deliberately failed to inform investors of important developments, also with the intention of misleading them into believing that the Fund was performing well when, in fact, it was in serious difficulty.

20. In view of his absence from the hearing, we are compelled to take Mr Visser's challenge to the Authority's case against him only from his reference notice, the statement of case he served in September 2010, and the witness statement he served in December 2010. We have borne in mind that Mr Visser has had limited representation by English lawyers, that English is not his first language and that he was not present at the hearing, and have accordingly taken care to resolve any ambiguity in what he has submitted in his favour.

21. The grounds of challenge set out in his reference notice can be summarised as follows: the Authority took little or no notice of the arguments he advanced; his inability to obtain legal assistance has deprived him of a fair chance to defend the Authority's accusations; he has been victimised and the Authority has made an example of him because of a change in the regulatory climate in the UK; and he has faced difficulties generating an income for himself and his family since the closure of Mercurius—and prohibition and the publicity attached to the decisions will make it more difficult for him to generate an income in the future. We should perhaps observe for his benefit that the hearing before us is not for the purpose of reviewing the Authority's decision, or more accurately the decision taken on its behalf by the Regulatory Decisions Committee, but is a complete rehearing, at the end of which we are not required to decide whether the Authority's decision was or was not reasonable, but to form our own view of the action the Authority should take, and to direct it to do so. To take one of his complaints: that the Authority has chosen to make an example of him (if true) is of no continuing significance, since we are required to consider the matter afresh. We have, therefore, examined the material put forward by Mr Visser, limited though it is, in order to determine for ourselves whether it answers, wholly or partly, the allegations made against him. We have, naturally, taken the same approach in relation to Mr Fagbulu, though with the added advantage of hearing his oral evidence and of his being legally represented.

22. In Mr Visser's statement of case appear the following three paragraphs:

> "I do not wish to dispute the facts cited by the FSA in support of many of the allegations against me. Where I made mistakes in my capacity as CEO of

Mercurius, these are deeply regretted and I have apologised to (and where possible reimbursed) the many investors who have lost large sums of money as a result of the mismanagement of the fund. I sincerely hope all investors will ultimately be reimbursed once the fund recovers.

> "However, some of the FSA's allegations are incorrect, and I believe that this should influence the size of the fine that should be imposed upon me. I would also like to dispute the basis upon which the fine of £2 million has been calculated. Finally, in considering the extent of my culpability and the level of the fine, I would like to explain the business rationale behind what 1 was trying to achieve with the fund immediately before its collapse.

> "My three principal disputes with the FSA's statement of case relate to (a) the alleged breach of investment restrictions, (b) financial transactions that were allegedly detrimental to the fund, and (c) the alleged NAV manipulation through mismarking and fictitious transactions."

23. Mr Visser's statement of case then expands, though by no means extensively, on those three points. We shall set out what he and Mr Fagbulu say as we deal with each element of the Authority's case.

Breach of investment restrictions

24. The Prospectus was, as one would expect, a document of some importance; it was the Fund's principal means of attracting investment, and it set out the terms on which investments were accepted and could be withdrawn. It included this paragraph:

> "The investment objective of the Fund is to provide investors with consistent absolute returns primarily through investing and trading in equities of companies incorporated and whose principal operations are in Europe and the United States and related instruments."

It went on to indicate, and in our view very clearly, that the Fund offered an aggressive investment strategy, which involved a high level of risk.

25. The Prospectus contained five investment restrictions, of which only the first, known as "Investment Restriction A", is important for present purposes. It was that the Fund will not

> "invest more than 30 per cent of its gross assets in the securities of any one issuer. This restriction will not apply in relation to investment in securities issued by a government, government agency or instrumentality of a European Union or OECD Member State or by any supranational authority of which one or more European Union or OECD Member States are members".

26. The Authority accepts that there is a lack of clarity in the meaning of the phrase "gross assets" as it is used in that restriction. Mr Baker's evidence, which initially Mr Fagbulu disputed on this point, was that in computing the gross assets, liabilities such as short positions were not to be netted off. Although the moment at which a breach might occur and the degree to which the restriction was breached would differ, depending on whether or not Mr Baker is right, the breaches which the Authority has established, as we shall relate, were such that timing and magnitude make little real difference to the outcome of this reference.

Mr Fagbulu tacitly accepted that this was the case. As far as we can tell Mr Visser does not take any issue with Mr Baker's view of the meaning of the phrase.

27. Investment Restriction A was qualified by the following paragraph, which also appeared in the Prospectus:

> "Save where specified to the contrary, the above restrictions apply as at the date of the relevant transaction or commitment to invest. Changes in the investment portfolio of the Fund will not have to be effected merely because any of the limits contained in such restrictions would be breached as a result of any appreciation or depreciation in value, or by reason of the receipt of any right, bonus or benefit in the nature of capital or of any scheme or arrangement for amalgamation, reconstruction or exchange or by reason of any other action affecting every holder of the relevant investment. However, no further relevant securities will be acquired until the limits are again complied with. In the event that any of the investment restrictions are inadvertently breached, the Investment Manager will take reasonable steps to rectify the breach."

28. In other words, a breach of the 30% limit did not offend the restriction and require Mercurius to take immediate remedial action if it occurred for what might conveniently be considered external reasons, but any other breach had to be rectified. Thus Investment Restriction A would be breached not only if Mercurius acquired shares in the "offending" security (either by buying in the market or by taking up a right or entitlement not available to all holders of the stock) which brought its holding to a value exceeding 30% of the gross assets of the Fund, but equally if other securities were sold off from the portfolio, with the result that the value of the "offending" security then represented more than 30% of the remaining gross assets.

29. On 19 September 2006 the Fund acquired a further 2.5 million shares in NT Energy. The acquisition brought the Fund's investment in NT Energy above 30% of its gross assets and put it in breach of Investment Restriction A. Although further trades had the effect of correcting the breach, a reduction in the value of the remainder of the Fund's portfolio between December 2006 and February 2007 had the consequence that the value of the NT Energy holding again exceeded the 30% investment limit. As Mr Baker's evidence showed, the breach was not attributable to a decline in value of the portfolio, but to the Fund's having sold assets. By 28 February 2007, NT Energy shares represented as much as 43.8% of the assets. On 26 March 2007 part of the Fund's holding in NT Energy was exchanged for shares in Sandhaven Resources plc ("Sandhaven"), a company which was admitted to trade on the PLUS market (though not until May 2007), and whose primary assets were shares in NT Energy. This exchange eliminated one breach—the surfeit of NT Energy shares—only to replace it by another, since it led to 36% of the Fund's assets consisting of Sandhaven shares.

30. Although corrective action was taken, and for a time there was no breach of Investment Restriction A, a further breach occurred on 26 September 2007 when the Fund acquired an additional 6 million Sandhaven shares, as before by way of an off-market exchange for NT Energy shares. As Mr Baker's unchallenged evidence again showed, this was not a transaction effected pursuant to a right "affecting all holders" so as to come within the qualification to Investment

Restriction A. Far from taking steps to rectify the breach, Mercurius caused the Fund to purchase a further 55,000 Sandhaven shares on 28 September 2007. This breach had not been remedied before the voluntary liquidation of the Fund in January 2008.

31. The Authority relies also on a further investment restriction which was imposed by a "side letter" between Mercurius and an investor in the Fund, Sal Oppenheim ("Oppenheim"), a German bank. The side letter was attached to an e-mail sent to Mr Visser on 18 August 2006 by Attica Capital ("Attica") which was managing two funds for Oppenheim, and was to be signed and returned by Mercurius. The e-mail explained that Attica wanted the side letter in order to satisfy German compliance requirements. The restriction imposed by the side letter was that " … the fund will only invest up to 30% of the value of the fund in equity investments in companies, which have not been admitted to a stock exchange or are not included in an organised market". The letter also stipulated that "If the fund intends to invest in assets, which are not listed above or which are explicitly excluded, we [*ie* Mercurius] will inform you in sufficient time to give you the chance to return the units of the fund in time."

32. Mr Visser forwarded the e-mail attaching the side letter to Mr Fagbulu, who completed it, reprinted it on Mercurius headed paper, signed it and returned it to Attica on 7 September, sending a copy of it, as signed, to Mr Visser. On the strength of the side letter (one must assume, though there were no doubt other considerations), Oppenheim invested €800,000 in the Fund on 1 November 2006, and a further €24,193 on 30 December 2006.

33. The Authority maintains that the Fund was in breach of the Restriction imposed by the side letter from 30 September 2006 (as a result of the Fund's purchase of its NT Energy holding on 19 September) until 30 April 2007 and that at no time did Mercurius inform Oppenheim that the restriction had been breached. Accordingly, the Authority says that the applicants misled Oppenheim about their true intentions, in order to secure its investment, and then deliberately and knowingly failed to notify Oppenheim of the breach.

34. The core of the Authority's case on this issue is that none of these breaches was technical or insignificant, that they were all deliberate and that no steps were taken, as the Prospectus explicitly, and the side letter implicitly, required, to rectify them, even though the fact that Investment Restriction A and the restriction imposed by the side letter had been breached should have been obvious to both of the applicants. The proximity in time between the signature of the side letter and the breach of the restriction is such as to suggest that the applicants never intended to observe it. The breaches were all the more prejudicial to investors since (as is common ground) shares in NT Energy and Sandhaven were illiquid, and the amount held was substantial in relation not only to the Fund's assets, but also in relation to the size of the companies. NT Energy was unlisted, and although Sandhaven was listed on the PLUS market from May 2007 until July 2008, its illiquidity is clear from the difficulties which the Fund had (and we were told still has) in seeking to dispose of the holding.

35. Mr Visser does not appear, in principle, to dispute that the various breaches of Investment Restriction A which the Authority has identified occurred; but he

says in his statement of case that the breaches are of no real significance “because the percentage holding could have varied from 25% to 35% in any one day”, and he adds that investors were well aware that this might happen. He relies, it seems, on volatility in the share prices leading to inadvertent breaches, but it is in our view an inescapable conclusion from the evidence that this was not the true cause, albeit price volatility might have had some aggravating effect. The inference to be drawn from the events as they emerged, we think, is that Mr Visser thought that a large investment in NT Energy, and then Sandhaven, would be very profitable and for that reason he took the risk of breaching the investment restrictions and committed the Fund to that large investment. Whether or not Mr Visser was justified in thinking that NT Energy and Sandhaven were worthwhile investments is, however, beside the point: investment restrictions such as those set out in the Prospectus are designed to prevent the very thing that happened, namely over-reliance on one investment which—whatever may have been thought at the outset—turns out to have been unwise, and which leads to eventual collapse of the whole Fund.

36. In addition, Mr Visser’s claim that investors were aware of the possibility is not borne out by the evidence of Mr Allen and Mr Charlesworth, both of whom said that they expected Mercurius to comply with Investment Restriction A. For the reasons we have just given we prefer their evidence. The restriction is in clear terms and in our view investors were entitled to rely on its observance. Investors may have accepted a high risk; they could not reasonably be thought to have accepted what was effectively the unlimited risk which disregard of the restrictions brought with it.

37. Mr Visser also argues that “when the fund purchased its position in NT Energy—and the side letter was agreed with the investor—it was anticipated that the company would be floated very soon and before the investor invested in the fund”. The further difficulty with Mr Visser’s position is that the fact that the Fund was exposed, and that the supposed justification for the investment was no longer valid, should have become very clear to him when, in November 2006, a letter sent out by NT Energy stated that the IPO, which Mr Visser (and others) had been expecting in September, had been delayed and that NT Energy was raising money by other means, albeit with the continuing hope of an IPO in early 2007. Far from attempting to rectify the breach, he made it worse by increasing the Fund’s investment in NT Energy and then Sandhaven.

38. Mr Fagbulu accepts that he was responsible for monitoring the Fund’s portfolio and its compliance with Investment Restriction A on a monthly basis. An e-mail from Mr Fagbulu to the Authority dated 14 November 2007 attaches a spreadsheet showing the Fund’s portfolio at each month end between 31 January 2007 and 31 July 2007. In his interview during the course of the Authority’s investigation, he explained that the spreadsheet was the one he used to monitor compliance with the restrictions and that it includes a reference to the percentage of gross assets represented by each security. On 30 September 2007 Mr Fagbulu signed a form entitled “Monthly Investment Guidelines and Restrictions Monitoring”, a document which he accepted was intended to be signed by him each month as part of the monitoring process, although he conceded that in practice he did not always sign it. Its purpose was to confirm that there were no

contraventions of the Fund's investment restrictions (including Investment Restriction A). He signed it on this occasion despite the fact that (as he conceded he knew) the Fund's acquisition of Sandhaven shares during the month had put the Fund substantially in breach of the restriction.

39. As we have said, Mr Fagbulu initially disagreed with the Authority's interpretation of the phrase "gross assets", though he later accepted (or Mr Fenhalls accepted on his behalf) that there was no real merit in the point. In fact, even if Mr Fagbulu's preferred interpretation is correct, it was plain from the evidence that the Fund was still in breach of Investment Restriction A at the times identified above, although the extent of the breach may have been different; and Mr Fagbulu himself concedes that there was a breach of the side letter restriction between December 2006 and February 2007. In fact the breaches of this restriction, too, were rather more prolonged but there is nothing to be gained by a detailed analysis of the magnitude and length of the breaches; it is enough that there were breaches and, as we find, they were knowing and deliberate, and not inadvertent, and for the most part nothing was done to correct them. Investment decisions were Mr Visser's province and he must bear that part of the responsibility, but it was no less Mr Fagbulu's duty to identify breaches when they occurred and to ensure that they were properly reported to the investors, a duty which, as we shall later relate, he repeatedly failed to perform.

Market abuse

40. The Authority's case is that both of the applicants engaged in deliberate market abuse, in the form of manipulation, in May and June 2007, and that Mr Visser committed a further act of manipulation in September 2007. The purpose of the manipulation, it says, was to bolster the Fund's NAV, by increasing the market price of Sandhaven shares and, on the last occasion, by attempting to increase the market price of shares in Private Trading Systems plc ("PTSP"), another company quoted on the PLUS market.

41. Market abuse may amount to a criminal offence, although it is often countered, as here, by the imposition of a civil penalty. FSMA contains some provisions which deal with particular types of abuse, but the generic provision, on which the Authority relies in this case, is found in s 118 of FSMA. The parts of that section relevant to these references read as follows:

> "(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) which—
>
> (a) occurs in relation to—
>
> (i) qualifying investments admitted to trading on a prescribed market …
>
> and
>
> (b) falls within any one or more of the types of behaviour set out in subsections (2) to (8).…
>
> (5) The fourth is where the behaviour consists of effecting transactions or orders to trade (otherwise than for legitimate reasons and in conformity with accepted market practices on the relevant market) which—

(a) give, or are likely to give, a false or misleading impression as to the supply of, or demand for, or as to the price of, one or more qualifying investments, or

b) secure the price of one or more such investments at an abnormal or artificial level."

42. The Authority relies on an explanatory expansion of those provisions which appears in the Code of Market Conduct at MAR 1.6. Mr Herberg referred us to several passages in the Code, but we think it is necessary to mention only two. At MAR 1.6.2E the Code says:

> "The following behaviours are, in the opinion of the FSA, market abuse (manipulating transactions) of a type involving false or misleading impressions: (1) buying or selling qualifying investments at the close of the market with the effect of misleading investors who act on the basis of closing prices, other than for legitimate reasons…"

43. At MAR 1.6.5E it adds:

> "In the opinion of the FSA the following factors are to be taken into account when considering whether behaviour is for 'legitimate reasons', and are indications that it is not: (1) if the person has an actuating purpose behind the transaction to induce others to trade in, or to position or move the price of, a qualifying investment; (2) if the person has another, illegitimate, reason behind the transactions or order to trade; (3) if the transaction was executed in a particular way with the purpose of creating a false or misleading impression."

44. We agree that those passages fairly reflect the underlying purpose of s 118. Mr Fenhalls did not suggest otherwise.

45. "On market" trades on PLUS (which is, and at the material time was, a "prescribed market" within the meaning of sub-s (1)(a)(i)) are placed through registered market makers; a market maker for both Sandhaven and PTSP shares was Winterflood Securities Limited ("Winterflood"). Mr Spens' evidence (which was unchallenged by Mr Fagbulu and appears to be unchallenged by Mr Visser—indeed, he does not appear to challenge any aspect of this part of the Authority's case) was that under PLUS rules, a security's closing price is set at the mid-point between the lowest offer and highest bid quoted by the registered market makers at the close of the market (4.30 pm). Shares may also be purchased "off market" through private transactions.

46. The manipulation in May and June 2007 which the Authority alleges consisted of causing the Fund to make a series of fairly small bids for Sandhaven shares, most leading to purchases, on the day of the Fund's month-end valuation. By this time, as we have related, the Fund had a large holding of those shares. The bids were deliberately pitched well above the market price, with the aim of forcing it up in order to inflate the Fund's NAV. The evidence shows that the tactics were successful in that the price of Sandhaven shares rose significantly during each of those two days. The Authority puts its case on the footing that Mr Visser inspired and directed the transactions, but on the first two occasions, Mr Fagbulu was knowingly involved. Although he did not normally deal, he made some of the relevant bids, and, the Authority says, the messages he sent to Winterflood using the Bloomberg system (copies of which were provided to us)

show that he understood what he was doing, and what its likely effect would be. While Mr Fagbulu was dealing through Winterflood, Mr Visser was bidding for the same shares through a Dutch broker, Amstel Securities NV ("Amstel"). The reason for his doing so, the Authority says, was to give the impression that there were two competing bidders and a genuine demand for Sandhaven shares, in order to drive the price up further and more rapidly.

47. The first of the trades on which the Authority relies took place on 31 May 2007. The documentary evidence shows that at 10:28 am Mr Fagbulu purchased 12,500 Sandhaven shares at 142p per share. Then, at 2:14 pm, he wrote the following message to Mr Benjamin Jowett of Winterflood: "hi can you get me 5000 more, I don't mind the price ok my limit is 190". A further purchase was made at 2:20 pm at a price of 155p. At 2:42 pm, Mr Fagbulu sent another message saying that he wanted to buy an additional 5,000 shares at 165p; the trade was executed at that price at 3:04 pm. Twelve minutes later Mr Fagbulu asked to buy 1,000 more shares, offering 170p; this purchase took place at 3:41 pm, at 165p. Last, at 3:53 pm Mr Fagbulu sent a further message to Mr Jowett: "hi Ben I will like to buy 8,000 SRPP PZ [the market code for Sandhaven shares] between now and the close with a 200 top. Can you call me 15 mins before the close thanks."

48. The last of those messages shows, the Authority contends, that Mr Fagbulu was prepared to pay up to 200p per share—a premium of 70p, or 54%, over the opening price, and 35p, or 21%, more than the price he had achieved only 12 minutes earlier. There is no evidence that Mr Jowett told Mr Fagbulu that Winterflood might find it difficult to obtain more Sandhaven shares, or that Mr Fagbulu would need to bid a higher price to acquire more: on the contrary, Mr Fagbulu was offering substantially more than he needed to, and in fact did, pay for the shares. The telephone call Mr Fagbulu requested in the last of those messages was duly made; the transcript shows that Mr Fagbulu was concerned to know the closing price of Sandhaven shares. The call was interrupted by another call from Mr Visser, who was put through to Mr Jowett.

49. The transcript of that call shows that Mr Visser was very anxious to demonstrate that he wanted as many Sandhaven shares as possible, and was willing to pay 195p (the last of Mr Fagbulu's purchases had been at 165p). Mr Jowett is recorded to have told Mr Visser that a seller was offering shares "off market" at only 155p. That seems to have made Mr Visser realise that the market had closed, whereupon he ended the call. He showed no apparent interest in acquiring shares "off market" (and the Fund did not buy any by that means on 31 May 2007), a fact which, the Authority says, shows that he was not interested in buying shares for their own sake, but merely as a means of improving the Fund's apparent NAV.

50. While Mr Fagbulu was in direct communication with Winterflood, Mr Visser instructed Amstel to purchase shares from Winterflood in Amstel's own name, and then to transfer the shares to the Fund. Amstel purchased 40,000 shares at an average price of 158.75p from Winterflood and immediately sold them to Mercurius at 160p per share.

51. Mr Fagbulu's transactions with Winterflood led to the purchase by the Fund of a total of 23,500 Sandhaven shares, and the placing of an order for a further

8,000 (the last of the intended purchases was, it seems, not immediately executed). In fact, the Fund purchased a total of 45,000 Sandhaven shares directly from Winterflood on that day, but the available evidence does not show whether Mr Visser or Mr Fagbulu (or perhaps another of Mercurius' dealers) placed the remaining orders.

52. The closing price of Sandhaven shares was 155p on 31 May 2007, an increase of 25p over the opening price of 130p. This movement was reflected in an increase of £1.125 million in the Fund's NAV, and the Fund was able to report a gross performance of +5.2% for May 2007. If there had been no increase in the price of Sandhaven shares, the Fund's performance would have been approximately -0.3% for the month.

53. On 28 June 2007, shortly before the NAV for that month was to be determined, Mr Fagbulu e-mailed a spreadsheet to himself; it did not become clear to us why he e-mailed it to himself but he accepts that he prepared it. The spreadsheet appears to show the Fund's performance for June 2007 on three different assumptions. The first was based on pricing the Fund's portfolio at the closing market price on that day (in particular Sandhaven shares were priced at 142p per share); the spreadsheet shows that, on this assumption, the Fund had lost approximately €10 million during the month. The second assumption was the same except that some of the illiquid stocks held by the Fund were given higher values: for this calculation Sandhaven shares were priced at 160p per share. The third assumption was that the Fund's illiquid stocks had an even greater value and, in particular, Sandhaven shares were priced at 180p per share; this assumption, if it were true, would lead to the Fund's making a gain of €103,000.

54. On 29 June (the last working day of the month), Mr Fagbulu again purchased Sandhaven shares directly from Winterflood, while Mr Visser purchased shares indirectly for the Fund through Amstel. Although there are differences of detail, the pattern of dealing was much the same as it had been on 31 May, of several relatively small purchases, and the result was, as before, a significant increase in the price of Sandhaven shares and, in consequence, of the Fund's NAV.

55. The Authority argues that Mr Fagbulu's spreadsheet is evidence of a pre-arranged strategy of concealing the losses suffered by the Fund by further market manipulation, designed to increase the Fund's apparent NAV, and that the trading by Mr Fagbulu and Mr Visser was the execution of that strategy. It enabled the Fund to report a gross performance for the month of +3.4%; had the market price of Sandhaven not been manipulated, the Fund's performance in June 2007 would have been approximately -3.7%.

56. Mr Visser also sought, but failed, to increase the price of Sandhaven shares by the same means on 28 September 2007. On 27 September, in anticipation of the month end the next day, Mr Fagbulu prepared another spreadsheet which revealed that the Fund had made a loss of €6.5 million during the month, primarily due to the reduced value of its investment in PTSP. On 28 September, the opening market price of Sandhaven shares was 141.5p. During the day, Mr Visser purchased 55,000 shares, this time directly from Winterflood, at an average price of 148.64p per share. Again, we had transcripts of Mr Visser's discussions

with Mr Jowett, which show clearly that Mr Visser's primary concern was the closing price. His final purchase of the day was of 20,000 shares at 155p. The closing price was 151.5p per share, an increase during the day of 10p. The effect on the Fund's NAV was an increase of £875,000. The Fund's performance for the month was reported at +2.3%; had the price of Sandhaven shares not risen it would have been approximately -1.5%.

57. The Authority also says that there was no economic purpose for the purchase of 55,000 Sandhaven shares by the Fund on that day. It had breached Investment Restriction A only three days before, when its NT Energy shares were swapped for Sandhaven shares (at an assumed Sandhaven price of 67p per share). In addition, between 12 and 27 September, the Fund sold a total of 1.225 million Sandhaven shares at between 130p and 135p per share, and on 28 September, the very day on which Mr Visser was buying shares for around 150p, it sold 750,000 shares at a price of 84p per share.

58. On the same day, the Authority contends, Mr Visser also attempted, though unsuccessfully, to increase the price of PTSP shares. He purchased 1 million PTSP shares from the market maker at a price of 12.8p per share, and attempted to buy another million. The transcripts of his conversations with the market maker show that, as in his conversations with Winterflood, he was keen to know what effect his trades would have on the market price. However, Mr Visser failed in what the Authority says was his purpose because, during the day, the price of PTSP shares fell from 13p to 12.25p. The Fund's acquisition of PTSP shares, too, it says, made no economic sense as it already had a holding of approximately 62 million PTSP shares (representing about 14% of PTSP's share capital), whose price had increased from 4.25p to 19.75p between June and August, an increase which (according to Mr Fagbulu) had led the Fund to attempt to sell PTSP shares aggressively during that period at prices above its stop loss position of 15p; unfortunately it had been unable to find any buyers.

59. Neither Mr Visser's witness statement nor his statement of case addresses the Authority's market abuse allegations, even obliquely, and we correspondingly have no explanation from him of the purpose behind what he did. We must accordingly assume that he accepts what is said against him, in particular that his dealings were undertaken as a means of artificially improving the Fund's month-end NAV and of deceiving investors.

60. The Authority accepts (as do we) that Mr Fagbulu bought Sandhaven shares from Winterflood on Mr Visser's instructions, but it does not accept his claim that he was not fully aware of what he was doing (and that it was capable of being market abuse) and of its likely consequences. We have already mentioned what he is recorded to have said to Mr Jowett. The Authority also places reliance on what he said in the interviews he attended during the course of the investigation. He denied manipulating the market, although he accepted that Mercurius' trading had had an effect on the price which he had been pleased to see as it increased the Fund's NAV; but, he said, others were also trading in the shares (though he denied knowing that Mr Visser was buying through Amstel). He also said that it was necessary to offer increasing prices in order to motivate Winterflood to locate stock which the Fund could then buy.

61. Both at interview and in his evidence Mr Fagbulu made the point that he is not a trader, and has no trading licence, so was allowed only to execute trades, which he did rarely and at Mr Visser's direction. While it accepts the underlying basis of that assertion, the Authority maintains that Mr Fagbulu was more closely involved in the transactions than he would have been if he were simply executing instructions from Mr Visser. This, it says, is shown by his preparation of the spreadsheets which show the effect of the manipulation which in fact happened.

62. In our view it is not a sufficient answer for Mr Fagbulu to argue that he dealt on Mr Visser's instructions. As we have said, we do not doubt that Mr Visser instigated the trades—he does not deny it—but we have equally no doubt that Mr Fagbulu understood perfectly what the purpose of the trades was, and that the result, if the exercise was successful, would be to inflate the NAV artificially. Mr Fagbulu is an obviously intelligent man who cannot possibly have thought, despite his lack of dealing experience, that the best way for a purchaser to make a bargain is to offer more than the seller is willing to accept. It is perfectly clear from his exchanges with Mr Jowett that he had no interest at all in buying at the best available price. There is also no evidence that he protested, or reported to the other directors of the Fund or to Fortis, that the NAV had been increased by this means. The only conclusion to be drawn is that he willingly participated in market manipulation.

63. Mr Fenhalls suggested that we might find that Mr Fagbulu was protected by the defence set out in s 123(2) of FSMA, which we need to set out with sub-s (1):

> "(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.
>
> (2) But the Authority may not impose a penalty on a person if, having considered any representations made to it in response to a warning notice, there are reasonable grounds for it to be satisfied that—
>
> (a) he believed, on reasonable grounds, that his behaviour did not fall within paragraph (a) or (b) of subsection (1), or
>
> (b) he took all reasonable precautions and exercised all due diligence to avoid behaving in a way which fell within paragraph (a) or (b) of that subsection."

64. It will be readily apparent from what has gone before that we are quite satisfied that Mr Fagbulu is unable to take advantage of that defence.

Detrimental and fictitious transactions

65. The third element of the Authority's case is that, it says, the applicants twice borrowed money at exorbitant rates of interest, and arranged and executed two sets of transactions that were fictitious in that they were no more than a pretence, undertaken like the market manipulation for the purpose of inflating the Fund's apparent month-end NAV.

66. The two borrowings took the form of share sale and buy-back transactions, in February and March 2007. The Authority placed great emphasis on the burdensome nature of the transactions, which were, it says, in reality emergency borrowings, designed to tide the Fund over, and conceal the fact of, its acute shortage of cash.

67. On 24 January 2007 the Fund's prime broker, at that time BNP Paribas, terminated its agreement with Mercurius with effect from 7 February 2007 (giving the minimum 14 days' notice). A replacement prime broker was not readily available, and it took Mercurius until 30 March 2007 to find one: Citigroup Global Markets ("Citi"). In the meantime, the Fund was left without finance to fund its trading. As Mr Spens' unchallenged evidence explained, a prime broker takes custody of a hedge fund's portfolio of assets and provides financing—essentially access to a borrowing facility known as "margin"—and settlement services when the hedge fund trades. A prime broker is, in practical terms, essential to any hedge fund's investment manager since, without one, the fund is able to purchase shares using only the cash immediately available to it. It is unable to trade on margin, or to use the proceeds of unsettled trades to enter into new trades. This limitation was particularly significant for the Fund because (as the Prospectus stated) such trades were a key component of its strategy and, before financial difficulties began to afflict it, it had routinely traded in that way. By early 2007, however, the Fund had limited cash resources, and Mercurius was finding it increasingly difficult to fund purchases outright, with the consequence that it was heavily dependent on its margin.

68. BNP Paribas' resignation and the Fund's loss of its margin made the position much worse and it became necessary to address the Fund's cash position while Mercurius secured a new prime broker. Mercurius entered into two transactions in order to do so. In early February 2007 it agreed that the Fund would sell 1.3 million shares in Private Trading Systems Inc ("PTSI") to a counter-party for $1.2 million, and buy the same shares back three weeks later for $1.3 million. The relevant agreement was signed by Mr Fagbulu. By an exchange of e-mails on 13 March 2007, an exchange which was copied to Mr Visser, Mr Fagbulu agreed to sell a further 2,475,000 of the Fund's PTSI shares to a different counter-party for $1,980,000, and gave the counter-party a put option to sell the shares back to the Fund six weeks later for $2,227,500.

69. The Authority maintains that these transactions were not true sales and purchases, but effectively short-term secured loans, the first of $1.2 million at an interest rate equivalent to 144% per annum, and the second of $1.98 million at an effective rate of 108% per annum. These rates, it says, were exorbitant. It points out by way of comparison that while BNP Paribas was its prime broker, the Fund had been able to borrow at a rate of 1 week LIBOR + 60 basis points. In February and March 2007, 1 week LIBOR peaked at 5.38%, and the Fund would therefore have been able to borrow at approximately 6% per annum.

70. In his witness statement Mr Visser referred to these transactions as "emergency bridging loans", which he explained as necessary to address the liquidity crisis which, absent the loans, would have led to the loss of all the investors' funds; he did not directly address the complaint about the magnitude of the interest rate, but contended that the Fund was not in breach of its borrowing

powers and he denied that the transactions were detrimental to its interests. Mr Fagbulu initially denied that the transactions were borrowings at all, arguing that the agreement by the Fund to buy back the shares was an incentive (though it was not clear, and he was unable to explain, for what it was an incentive). Later, he accepted that the transactions could be viewed as loans. Again, he said that he was merely doing what Mr Visser instructed him to do.

71. The Authority sought to counter Mr Fagbulu's case by arguing that it was known, or at the least ought to have been obvious, to Mr Fagbulu at the time he entered into them that the arrangements were not genuine trading transactions but, in reality, loans designed to facilitate trading in the absence of a prime broker. It disputed Mr Visser's claim that the loans were for the investors' benefit, pointing out that they have in fact lost the entirety of their funds, but more particularly it relied on the fact that the applicants refrained from informing the investors that the loans had been taken, information which would have revealed the parlous financial position of the Fund.

72. We will come to that last contention in the next section of this decision. There can in our view be no doubt that these transactions were designed to secure short-term funds at a time when there was no other source of cash. We are willing to accept that Mr Visser decided to enter into them out of a sense of desperation, though his doing so does not make his decision prudent; rather, it calls into question the quality of his management of the Fund at that time, the very fact which had led to the resignation of BNP Paribas. We are unable to accept that Mr Fagbulu really believed that these were anything other than artificial transactions (there is no suggestion they were fictitious), or that he was under any illusion that, whether one describes them as disguised borrowings or otherwise, they were in reality a means of raising short-term and expensive funds.

73. Citi also resigned as the Fund's prime broker in September 2007, less than six months after it had been appointed. Such evidence as was available (in the form of e-mails from Citi to Mr Fagbulu in September and October 2007) indicated that it too had serious concerns about the nature of the Fund's portfolio and its financing. It originally gave the Fund as little as three days' notice of termination of the account, and at the same time raised its margin rates to 100% (that is, it eliminated altogether any further use of margin), made a substantial margin call (that is, it required the Fund to repay a large part of its existing borrowing) and told Mercurius that it would clear and settle only those trades which were risk-reducing and had been approved in advance. Although Mercurius managed to persuade Citi to relax its requirements to some extent, the effect on the Fund was, again, immediate and its ability to trade seriously impaired.

74. On 25 October 2007 the Fund entered into an agreement (or purported agreement), signed on its behalf by Mr Fagbulu, to acquire 7.9 million Sandhaven shares at 35p per share from Calisto Investments Limited, on 14 November 2007, in an off-market transaction. If it could be taken at face value, this was a very advantageous transaction for the Fund, since Sandhaven shares were then trading at 131.5p per share. Although the transfer had not yet taken place, and according to the agreement itself was not to take place until 14 days into the future, the 7.9 million Sandhaven shares were included in the Fund's portfolio listing and NAV calculation at the October month-end by Fortis which, as before, was dependent

on Mercurius for the information from which its calculations were made. This was, incidentally, the last NAV calculated by Fortis; it was not prepared to sign off any later statements. Since the shares were included in the NAV at the market price rather than the off-market purchase price, the acquisition improved the NAV by almost £1 for each share.

75. On 12 December 2007 the Fund agreed (or purportedly agreed) to sell back to Calisto 2.9 million of the 7.9 million Sandhaven shares, at the much higher price (higher, that is, than the supposed purchase price) of 90p per share. The money difference between the two trades (7.9 million at 35p less 2.9 million at 90p) amounted to £155,000, which Mr Fagbulu said, in an e-mail to Fortis, he had sent to Calisto. Attached to the same e-mail was a photocopy of what appeared to be a Sandhaven share certificate, for the five million shares which remained (assuming the transactions were genuine) in the Fund's ownership. The copy was indistinct, but appeared to show the holder of the shares not as the Fund, or Calisto, but as Copark Properties Limited, a company which enquiry revealed was listed in Sandhaven's shareholders' register as the holder of 5 million shares. No evidence could be found that the Fund ever became the registered holder of the shares supposedly bought.

76. On 17 December, Mr Visser sent an e-mail to Fortis, stating that the Fund had agreed to buy the same 2.9 million Sandhaven shares from Calisto, again, on 24 December, at a price of 95p per share. No record of any such agreement has been produced. But on 8 January 2008, Calisto wrote to Mr Visser agreeing to take £155,000 in "full and final settlement" for the termination of the share purchase agreements, a termination which released Calisto from its obligation to deliver any shares. The Authority's case is that the net result of these transactions was that Calisto received £155,000 from the Fund and the Fund received nothing in return.

77. The second set of transactions began, if they began at all, on 29 October 2007 when the Fund agreed, or purportedly agreed, to buy 120 million PTSP shares at €0.0185 per share (a total cost of €2.22 million) from Tendall FZ ("Tendall"), a Dubai-based property development company. This contract was, or appears to have been, an "off-market" purchase, although there was a reference in the documentation to the Frankfurt Stock Exchange. It too was to be completed on 14 November.

78. These shares were also included in the Fund's October 2007 month-end portfolio and valued by using the price on the Frankfurt exchange of €0.055 (rather than the PLUS price of 2.75p or €0.0395), at €6.6 million, or three times the purchase price. This valuation was adopted even though the Prospectus provided that shares should be valued by reference to the price on the main market for that share. The Authority's case, which neither Mr Visser nor Mr Fagbulu challenges, is that the Frankfurt exchange was not the main market for PTSP shares, since by 31 October 2007 only 7,000 PTSP shares had ever been traded on that exchange, while nearly 4.5 million had been traded on PLUS during October 2007 alone.

79. On 3 December 2007, Mr Fagbulu e-mailed Tendall, saying that: "I need to reverse the trade I did with you last month. I have made a contract to close it out

as usual no movements required.” He attached to the e-mail an agreement dated 20 November, to sell the 120 million shares back to Tendall, this time at €0.020 per share, a total therefore of €2.4 million. Although the contract appears to effect a sale of the security back to Tendall, the comment “no movements required” indicates, the Authority says, that it was not necessary to transfer the shares or pay the money referred to in the agreement, because, despite the fact that the original agreement purporting to evidence Mercurius’ purchase of the shares on behalf of the Fund was dated 29 October (so as to make it possible to include the shares in the month-end NAV), the trade had still not been settled by 3 December.

80. An examination of PTSP’s share register reveals (as neither applicant disputed) that no shareholder then held as many as 120 million PTSP shares, a holding which would have represented more than a quarter of the company’s total issued capital of 462 million shares, and that there were no movements of 120 million shares in October 2007—the largest trade was of about 12 million shares. The Authority said that this transaction too was a sham, designed to show, falsely, that the Fund made a profit of €108,000, even though there is no evidence that any money was in fact paid to it by Tendall.

81. It argued that none of these transactions had any commercial purpose, that there was no plausible explanation for the undervalued sale by Calisto or the increase in the price agreed by the applicants on behalf of the Fund when selling the 2.9 million shares back to Calisto, and that the inference to be drawn is that the supposed sale of the shares was a sham, carried out in order to manufacture an apparent, but not real, improvement in the Fund’s NAV at the October month end, when it was in real difficulty. Similarly, the supposed purchase of PTSP shares was no more than a pretence, with the same purpose. The reality, the Authority said, is that neither transaction ever took place, or had any prospect of doing so, and they were subsequently cancelled or simply not completed.

82. Neither Mr Visser nor Mr Fagbulu has offered any real, let alone plausible, explanation of these transactions. Mr Visser argued, in his witness statement and in his statement of case, that the NAV was Fortis’s responsibility, and that the transactions could not have affected the NAV in any event as they were simply “booked and then reversed out”. He did not, however, address the point that the Sandhaven shares supposedly bought at 35p were included in the October 2007 NAV at their much higher market value, nor did he address the Authority’s case that the Fund paid £155,000 to Calisto and received nothing in return, save for the opportunity to inflate its NAV at a time when it was in serious financial difficulty. Similarly, he said nothing about the inclusion of the PTSP shares in the October 2007 NAV, or the use of the Frankfurt exchange price.

83. Mr Fagbulu told us that he spoke to Mr Visser about these transactions because there was insufficient money in the accounts to pay for the purchases, but he was assured that they were “back to back transactions” and that an immediate profit would be made. We do not accept that explanation. We are willing to accept that the transactions were instigated by Mr Visser, but it is clear from the available documents that Mr Fagbulu was actively involved in them, and that he must have known that, even if he believed a profit would be made, it would not be immediate. His claim that Mr Visser’s explanation satisfied him makes no sense: if the purchases were real, money (which on his own evidence the Fund did not

have) would be needed for the settlement. The only possible inference we can draw is that he knew the transactions were artificial, if not completely fictitious, yet he cooperated with Mr Visser in the pretence.

Failure to inform the investors

84. The fourth element, and a recurrent theme, of the Authority's case is that the applicants systematically misled investors and the directors of the Fund (apart from Mr Visser himself), not only by twice concealing the fact that the Fund's prime brokers had resigned, but also about the true financial position of the Fund and the nature of its assets, consisting as they did of an excess of illiquid securities, as well as the fact that the investment restrictions had been repeatedly breached. Their deception was successful, as the evidence of Mr Charlesworth and Mr Allen showed: they are experienced fund managers, yet neither had any inkling that BNP Paribas and later Citi had resigned. On both occasions the applicants presented the change of prime broker as Mercurius' choice, and hid the fact that the Fund had been without a broker for substantial periods, instead giving the impression that there had been no interlude when the Fund had no prime broker. Mr Charlesworth and Mr Allen were also unaware of the serious financial difficulties affecting the Fund or of the acute imbalance in its holdings, and both were taken wholly by surprise when it collapsed and went into liquidation.

85. Mercurius employed two principal means of communicating with the Fund's investors. The first was individual contact, undertaken (it seems exclusively) by Mr Visser, who telephoned or wrote letters to investors on an *ad hoc* basis in order to update them on the Fund's performance and investment strategy. The second was the "Flash Reports", which were customarily e-mailed to investors approximately one week after the Fund's month end NAV had been determined. The Flash Reports provided information about the Fund's performance, its positions and its exposure to sectors, geographical locations and market capitalisation categories. The Flash Reports also included core information such as the identity of the Fund's prime broker and auditor, and the address of the investment manager. They were accompanied by a "monthly performance commentary" which described the Fund's performance during the month, and gave details of the Fund's trading in named securities. Occasionally Mercurius gave presentations to prospective and existing investors. The Authority contends that the applicants deliberately misled investors by all three of these means. We had a good deal of evidence on this topic, but in the absence of a challenge to the Authority's case we think a few examples will suffice.

86. Mr Allen's evidence included a reference to a telephone call from Mr Visser in September 2006, in which Mr Visser told him that an IPO of NT Energy was imminent, and that it represented a good opportunity for the Fund with little or no risk. In fact, the Fund was by then already very substantially exposed to NT Energy, having acquired a holding which represented 33% of its gross assets, in breach of Investment Restriction A. His words suggested that there was no real downside exposure. There was a similar conversation with Mr Charlesworth at about the same time.

87. In February 2007, Mr Visser wrote a circular letter to investors. It included this passage:

> "We view the performance of the Fund for 2006 [the reported outturn was growth of 16%] as disappointing as we have emphasised that our annual target is 25%. We would like to stress that this performance was not due to changes in risk appetite or strategy but as a result of unforeseen delays in our Event-Driven strategy. As an example we spent much time and resources on the IPO of NT Energy, a Texas based oil and gas driller. Against all expectations the IPO was postponed due to a correction in the oil price."

88. The letter was, the Authority says, misleading in three respects, two of omission and one of deliberate misstatement. It failed to mention both that the Fund's prime broker, BNP Paribas, had resigned, and that the Fund's investment in NT Energy was in breach of Investment Restriction A. The postponement of NT Energy's IPO had nothing to do with a correction in the oil price but, as NT Energy had itself told its shareholders by a letter of 2 November 2006, "the AIM market is currently experiencing significant turmoil making it difficult to accomplish IPOs at the current time"; as a result the company intended instead to make a private securities offering.

89. In fact, the Authority argues, the loss of the Fund's prime broker was an event of such a serious nature that it should have been communicated without delay, and irrespective of any routine circular, to the Fund's investors. Mr Allen and Mr Charlesworth both said they would expect to be informed promptly of such a development, which they regarded as a matter of great significance. The evidence clearly shows, however, that the applicants omitted to mention the resignation of BNP Paribas in any of the communications which they had with investors and others in the period when the Fund had no prime broker; and when Citi had been appointed, they presented the change as if it had been Mercurius which instigated it.

90. In August 2007 Mr Visser wrote another circular letter to investors. He drew attention to what he described as the Fund's positive performance in volatile financial markets, at the same time reducing its "event-driven positions" (which included NT Energy, Sandhaven and PTSP), when in fact its holdings in those three shares together represented over 70% of its gross assets.

91. Mr Fagbulu was responsible (as he accepts) for preparing the financial information contained in the Flash Reports, while the Fund's portfolio managers, who included Mr Visser, prepared the commentary which Mr Fagbulu added before he despatched the reports. Between July 2006 and January 2008, Mercurius sent out 16 Flash Reports. The Authority contends that every one of them was misleading in one way or another. All but two of the reports included sections which listed the Fund's "top long" and "top short" positions. As the applicants both knew, in each of those 16 months the Fund's top long position was one of four securities: NT Energy, Sandhaven, PTSP or PTSI. In fact, not one of the reports referred to any of those securities. The Flash Reports also failed to mention breaches of the investment restrictions and the resignations of the Fund's prime brokers.

92. Some additional criticisms of detail are made. The June 2007 report omitted to mention that the Fund had received a dividend of 64 million PTSP shares at no cost but with a market value of €4 million, a windfall which flattered the NAV considerably, and falsely suggested that the Fund still held shares in a company

called Transics although it had disposed of the holding during the month. The next report failed to disclose that the Fund had made an apparent gain of €12 million (35% of its value) on its position in PTSP, whilst simultaneously losing over 30% of the value of its portfolio elsewhere, with the consequence that it was becoming increasingly over-weighted with illiquid securities. By September 2007 the Fund was in a perilous financial position. Its portfolio had become increasingly concentrated in Sandhaven and PTSP, two illiquid positions which together formed as much as 64% of the Fund's gross assets, a fact which was not disclosed in the Flash Reports or by other means. In addition, as we have mentioned, Citi had given notice of resignation as the Fund's prime broker, had eliminated its margin facility and had restricted its ability to trade so that it could only reduce existing positions. None of those developments featured in the report which, instead, gave a positive account of the Fund's performance, even to the extent of claiming a successful trade in ABN AMRO shares when in fact the Fund had made a loss from trading in that security.

93. In October 2007 Mercurius gave a presentation ("the Presentation"), as a marketing tool designed to attract further investors to the Fund. It included several purported trading examples to demonstrate the Fund's trading strategy but, the Authority says, it included two untruthful statements, namely that the Fund had traded in a stock in which it had not, in fact, traded at all; and that it had traded profitably in another stock in which it had in reality made a loss of €250,000. The trading examples were prepared by Mr Visser, while Mr Fagbulu was responsible for reviewing the presentation before it was sent to investors. The Authority says they both knew at this time that the Fund's situation was critical: it was about to lose (if it had not already lost) its prime broker, for the second time in less than a year, and it had sold liquid stocks in order to meet the margin calls Citi had made, with the consequence that the imbalance in the Fund's assets, that is the preponderance of illiquid stock, was increasing. Despite all these problems Mercurius continued to seek new investments, and as we have already mentioned was quite successful in doing so.

94. Mr Visser said nothing in his statement or submission about the Authority's case that he was responsible for making misleading, if not deliberately untruthful, statements to investors and others and, again, we must assume that he does not challenge it.

95. Mr Fagbulu, however, denied that he deliberately provided false information to investors, with whom he never had any direct contact. He agreed that he was responsible, in part, for the Flash Reports and the Presentation, but his responsibility extended only to the quality of his own contribution, and to checking the accuracy of the information provided to him by others for inclusion in them, and it was not always possible for him to be certain that the information was correct. He also maintained that the Flash Reports were not intended to provide detailed information or analysis to the investors, and that they did not pay much attention to them when making their own investment decisions. That assertion is somewhat undermined by the evidence of Mr Allen and Mr Charlesworth (which Mr Fagbulu did not challenge), who both complained that they were seriously misled by the statements in and omissions from the Flash Reports, and in our view it is impossible to accept. Moreover, it is apparent from

examination of the Flash Reports that some effort was put into their production. It is difficult to understand why that effort was expended if the results were thought to be of little value.

96. It is also difficult to understand why, if the reports were produced at all, they contained what, as Mr Fagbulu rather reluctantly acknowledged when he gave his evidence, was in fact incorrect and misleading material, when the inclusion of accurate material would have required no greater effort. It is true, as Mr Fagbulu said, that the Prospectus did not impose any obligation on Mercurius to produce regular reports to investors, and we are willing to accept that there was some information relevant to the Fund's performance and available to Mercurius which it would have been unwise to make public; but we agree with the Authority that, if the reports were provided at all, there was a duty on Mercurius to ensure that they were fair, accurate, and did not omit, without compelling reason, any relevant information which investors would have expected to see. The impression we formed as Mr Fagbulu gave his evidence was not that information was withheld because it was too sensitive, but that a positive decision was taken, to which Mr Fagbulu was a party, that the Flash Reports and the Presentation would paint a favourable picture of the Fund's performance, and that the truthfulness and completeness of what was said was very much a secondary consideration. It became abundantly clear to us as we heard the evidence that much of what was in the Flash Reports was not merely inaccurate, but could be attributable only to a deliberate attempt to deceive. We do not accept that Mr Fagbulu did not know the information was untrue; we are, on the contrary, satisfied he did, even if he did not know what the truth was.

The Mercurius notice

97. On 15 March 2010 the Authority issued a Decision Notice directed to Mercurius. The notice recorded the Authority's conclusion that Mercurius had demonstrated a wholesale failure to conduct its business with integrity, in breach of Principle 1 of the Principles of Business. In particular, the notice stated, Mercurius, through the actions of Mr Visser and Mr Fagbulu, had pursued a sustained and deliberate course of conduct over a period of 16 months in order to misstate the true position and value of the Fund; the conduct continued and became more serious as the Fund's financial position worsened; and the purpose of the conduct was to mislead investors in order to obtain and retain investment in the Fund. The Authority decided that the misconduct led ultimately to the demise and liquidation of the Fund and the loss of the investors' money.

98. Mercurius has not referred the notice to the tribunal, but in view of its own demise we do not consider its failure to do so is a matter of relevance to these references. We do not take the absence of any challenge by Mercurius to the Authority's conclusions to amount to evidence against Mr Visser and Mr Fagbulu nor, we should add, did the Authority ask us to do so.

Summary of conclusions of fact

99. It is in our view an inescapable conclusion that the breaches of the two investment restrictions were neither technical nor insignificant, but deliberate, persistent and foolhardy; in reality, as we have concluded, they contributed in

large measure to the collapse of the Fund. We reject Mr Visser's claim that the breaches were attributable to price volatility. The evidence showed that the unlisted stocks on which the Fund became increasingly dependent had little volatility precisely because they were unlisted. It seems to us that even if (which we doubt) the strategy of investing heavily in NT Energy and Sandhaven, in particular, might initially have been regarded as a sensible course, it did not excuse the repeated and wholesale disregard of the restrictions. There was ample evidence, too, that Mercurius (at Mr Visser's direction) not only failed to take action to correct breaches when they occurred, but that it aggravated them by investing even more into the relevant stock. The restrictions were designed to prevent precisely that which happened, namely the over-reliance on a very small number of stocks with consequent imbalance in the portfolio and the risk, as happened, of uncontrollable losses. The folly of what Mr Visser, in particular, did became all too clear when Citi resigned and made margin calls, forcing the sale of liquid stock and precipitating the collapse of the Fund.

100. We have, in addition, no doubt that both Mr Visser and Mr Fagbulu knew very well that the restrictions had been breached. One or even two breaches might be regarded as inadvertent, but the number and frequency of the breaches in this case, and the length of time for which they endured, are quite inconsistent with inadvertence. Though we are willing to accept in his favour that Mr Fagbulu did not cause the breaches, by making investment decisions, he did nothing to correct them, or ensure they were corrected, once he became aware of them, and he was quite clearly a willing and active participant, with Mr Visser, in what we can describe only as a systematic concealment of the Fund's true position over a period of many months.

101. Mr Visser does not deny that he committed market manipulation, and the evidence that he did is in any event overwhelming. We are willing to accept that Mr Fagbulu did not know that Mr Visser was simultaneously dealing through Amstel as he was buying shares from Winterflood, but we do not believe he was ignorant of the purpose of his own purchases. We are, indeed, satisfied he knew the purpose was to drive up the price of the shares and the Fund's NAV although it is true that his conversations with Mr Jowett of Winterflood reveal him to have been rather naïve. Similarly, while we accept that Mr Visser was the driving force behind the emergency borrowings in early 2007, and the fictitious or sham transactions in late 2007, we are satisfied that Mr Fagbulu knew their purpose and knew that the later transactions were not what they purported to be, even if he may not have been aware of all of the detail.

102. It will also be apparent from what has gone before that we are satisfied that both Mr Visser and Mr Fagbulu embarked on a deliberate and calculated course of concealing facts from investors and of misleading them. As we have said, Mr Visser has not disputed the Authority's case in that respect. We do not accept Mr Fagbulu's claim that the investors were not in fact deceived or misled; the evidence of Mr Allen and Mr Charlesworth, which he did not challenge, is quite to the contrary.

Withdrawal of approval, prohibition and penalty

103. The disciplinary powers which the Authority may exercise in a case of this kind are set out in s 66 of FSMA which, so far as material, provides that:

> "(1) The Authority may take action against a person under this section if—
>
> (a) it appears to the Authority that he is guilty of misconduct; and
>
> (b) the Authority is satisfied that it is appropriate in all the circumstances to take action against him.
>
> (2) A person is guilty of misconduct if, while an approved person—
>
> (a) he has failed to comply with a statement of principle issued under section 64; or
>
> (b) he has been knowingly concerned in a contravention by the relevant authorised person of a requirement imposed on that authorised person by or under this Act or by any directly applicable Community regulation made under the markets in financial instruments directive.
>
> (3) If the Authority is entitled to take action under this section against a person, it may do one or more of the following -
>
> (a) impose a penalty on him of such amount as it considers appropriate ... or
>
> (b) publish a statement of his misconduct."

104. Section 64, as sub-s (2)(a) indicates, permits the Authority to make statements of principle. That relied on here is APER Statement of Principle 1 which requires an approved person to act with integrity. It can scarcely be controversial that any approved person should do so. There is some tribunal authority about the meaning of "integrity", but it does not seem to us, with respect, to add much to the easily understood ordinary English meaning of the word.

105. We take into account, again, the fact that Mr Visser was not present at the hearing. However, the evidence that he deliberately undertook transactions designed to inflate the apparent (but not true) value of the Fund's NAV is overwhelming, and in his written submissions he made little effort to challenge that evidence, or the conclusions drawn from it by the RDC. His attempt to transfer the blame to the administrator, Fortis, is without any merit since, as the evidence made quite clear, the aim was to deceive Fortis in order that it would issue inflated NAV statements. Equally without merit are his claims that nothing he did had any real effect on the NAV. We are left in no doubt that Mr Visser, once he realised that the Fund was in difficulty, deliberately and knowingly embarked on a course of conduct designed to conceal that difficulty from existing and prospective investors, and that he knew that what he was doing was wrong. At first sight it might count in his favour (if we accepted it, which we do not) that he did it in the hope of salvaging the Fund, but there were not two or three relatively minor transgressions; there was a prolonged course of conduct, much of it of an extremely serious nature, including a sustained deceit of the investors.

106. Mr Fagbulu is in a somewhat different position. He told us and, although we have not seen Mr Visser for ourselves it rings true, that Mr Visser is a forceful personality whose demands were difficult to resist. There can, however, be no doubt—and in the end he did not really deny it—that Mr Fagbulu prepared and disseminated misleading information. It may be that he did so very much at Mr Visser's direction and that he did not wholly understand the importance of some of that information. We have accepted already that he dealt in Sandhaven shares at Mr Visser's direction, and that he may not have fully understood what he was doing, even if he knew, as he must have done, that it was designed to deceive and was wrong. But lack of understanding does not afford him a defence, or even an excuse. Mr Fagbulu was an approved person, responsible for Mercurius' compliance oversight. It was correspondingly his duty to ensure that Mercurius complied with the regulatory requirements which applied to it, a duty he signally failed to perform. The impression we formed was that Mr Fagbulu was, in truth, out of his depth, having taken on duties for which he had little or no training and of which he had little experience, and for which he was ill-equipped. We recognise, too, that Mr Visser appears to have concealed some of what he was doing from Mr Fagbulu.

107. There is a considerable public interest in its being clearly and widely understood that those who apply for approval to carry on controlled activities take on a serious responsibility, and cannot shelter behind claims of ignorance or inexperience when they fail to meet the obligations and standards which approval carries with it. There can be no possible room for doubt that the two applicants have not acted with an appropriate degree of integrity and have not met the requirements of APER Statement of Principle 1. We agree with the Authority that those who fail, as in this case persistently and in several different ways, to comply with the obligations they have voluntarily assumed as approved persons, who engage in market manipulation, who breach the trust reposed in them by investors, and who systematically deceive those same investors, deserve to forfeit their right to carry on controlled activities and to suffer severe punishment. Those are not, and are not intended to be, alternatives; the first is designed to protect the public, the second to mark disapproval of the person's conduct and to deter others from similar actions.

Approvals and prohibition

108. It follows from the conclusions we have reached about their conduct that the applicants have both failed, persistently and repeatedly, to respect not only the requirements of the Prospectus, but also the requirements of the Authority's Handbook. Neither of the applicants identified anything within the Handbook, a carefully compiled and respected guide to good practice, which was inappropriate in his case. Mr Fenhalls argued that Mr Fagbulu's conduct was inadequate rather than anything worse, that the responsibility for the collapse of the Fund lay with Mr Visser, and that prohibition was disproportionate. Mr Visser said nothing at all about either withdrawal of his permissions or prohibition.

109. In our view the only possible conclusion is that neither of the applicants is fit to work in any capacity within the financial services industry. They have, albeit with differing degrees of culpability, engaged in a prolonged deceit of the Fund's

investors. The withdrawal of their approval and their prohibition was not merely appropriate but inevitable. The references, so far as they relate to those matters, must be dismissed.

Financial penalties

110. We make the observation, at the beginning of this section of our decision, that the penalties which we are required to consider were imposed in accordance with s 66(3)(a) of FSMA, in respect of the applicants' conduct as a whole, and additionally in accordance with s 123(1), which is directed specifically at market abuse. The Decision Notices did not discriminate between the two provisions, or apportion the penalties between them. However, as each of the two sections states that the penalty may be of an unlimited amount, we agree with the Authority's implicit conclusion that there is no requirement that discrete penalties be imposed. The point might be of some importance had we found that some but not all of the conduct complained of was established, but that is not this case.

111. FSMA does not contain any criteria governing the imposition of a penalty, nor the amount of any penalty decided upon. It requires no more than that the Authority is satisfied that it is appropriate to impose a penalty, the amount of which is left to its discretion, subject only to reference to this tribunal. The Authority has, however, published some guidance about its policy, as it is required to do by ss 69 and 124 of FSMA. The guidance is to be found in Chapter 6 of the Decision Procedure and Penalties manual ("DEPP").We are not bound by the policy or the guidance, but they are a convenient and useful starting point.

112. DEPP 6.1.2G states that the principal purpose of imposing a financial penalty is to promote high standards of conduct by deterring those who have committed breaches from re-offending, and by deterring others from committing breaches. DEPP 6.3 relates specifically to penalties for market abuse. It provides that the factors that the Authority may take into account when deciding whether to impose a penalty include, among other things, the level of knowledge, skill and experience to be expected of the person concerned. DEPP 6.5 describes the factors the Authority will consider when determining the appropriate level of financial penalty. The non-exhaustive list includes the nature, seriousness and impact of the breach in question; the extent to which it was deliberate or reckless; whether the person on whom the penalty is to be imposed is an individual; the financial resources and other circumstances of the person on whom the penalty is to be imposed; the amount of benefit gained or loss avoided; the difficulty of detecting the breach; the person's conduct following the breach; and his or her disciplinary record and compliance history. In our view those are all pertinent considerations. We would add to them repetition, persistence, concealment and whether or not the person concerned has attempted to make amends.

113. There are some specific comments about the amount of a penalty, relevant to these references, at DEPP 6.5.2G:

> "The following factors may be relevant to determining the appropriate level of financial penalty to be imposed on a person under the Act: …
>
> (5) The size, financial resources and other circumstances of the person on whom the penalty is to be imposed

(a) The FSA may take into account whether there is verifiable evidence of serious financial hardship or financial difficulties if the person were to pay the level of penalty appropriate for the particular breach. The FSA regards these factors as matters to be taken into account in determining the level of a penalty, but not to the extent that there is a direct correlation between those factors and the level of penalty.

(b) The purpose of a penalty is not to render a person insolvent or to threaten the person's solvency. Where this would be a material consideration, the FSA will consider, having regard to all other factors, whether a lower penalty would be appropriate. This is most likely to be relevant to a person with lower financial resources; but if a person reduces its solvency with the purpose of reducing its ability to pay a financial penalty, for example by transferring assets to third parties, the FSA will take account of those assets when determining the amount of a penalty…."

114. Mr Fenhalls did not suggest that those observations were in any way inappropriate, and as far as we are able to tell Mr Visser too does not attack the stated policy, but only its application to him. In our view they constitute proper guidance to the determination of the level of a penalty, in conjunction with a close consideration of an individual applicant's own circumstances. We add, in order to record it as a further consideration, Mr Herberg's reminder to us of the comment of the tribunal in *Atlantic Law LLP v FSA* [2010] UKUT B7 (FS) that

> "The fact that the purpose of imposing a financial penalty is not to bring about insolvency does not mean that the Tribunal cannot and should not fix a penalty which may have that unfortunate result. Victims of boiler room schemes [the conduct found to have been perpetrated in that case] have to take the financial consequences of the losses perpetrated upon them. Those who help cause those losses do not deserve special protection."

115. The essential features of the Authority's case, in respect of each applicant, is that his failings were numerous, repeated and sustained; that neither paid any regard to the terms upon which Mercurius was required to manage the Fund; that each engaged in market abuse, in Mr Visser's case on three occasions and in Mr Fagbulu's case on two, in a way that caused significant increases in the price of illiquid securities; that each systematically and repeatedly deceived the Fund's investors; and that their respective acts and omissions contributed to the liquidation of the Fund and, as we were told is likely, the loss of approximately €35 million in investors' funds.

116. It adds, in relation to Mr Visser, that he actively sought and obtained substantial investment in the period from September 2007 even though he was aware that the Fund was in a perilous position, that he was in a position of significant influence at Mercurius and was able to abuse this position of control without question or challenge, and that it was he who embarked on, and procured Mr Fagbulu's cooperation in, the campaign of concealment which was, by design, difficult to detect. He attended a voluntary interview with the FSA's enquiry team, but made no comment in response to all of the questions that were put to him. It points out that Mr Visser withdrew his own investment in the Fund, amounting to

€1,909,789, in two tranches on 1 November 2006 (the day on which Oppenheim invested in the Fund) and on 1 March 2007.

117. Though it accepts that he was the less culpable of the two, the Authority nevertheless argues that Mr Fagbulu's actions should be regarded as particularly egregious because he was responsible for compliance oversight, and therefore for ensuring that Mercurius complied with the Authority's rules. His misconduct escalated as time passed and he made no attempt to draw any of the material matters affecting the Fund to the attention of its directors, its administrator or the Authority.

118. It will be apparent from what has gone before that we accept all of those essentials of the Authority's case, in respect of each applicant. Moreover, we consider that the repeated breaches, the length of the time over which they occurred and the prolonged and calculated concealment of the Fund's precarious position—indeed, its active misrepresentation—put this case at the most serious end of the scale. The only mitigating factor we detect is that each applicant has accepted some of the blame, although neither has been willing to recognise the full extent of his culpability. Though he acknowledged his shortcomings as an approved person, Mr Fagbulu attempted, even at the hearing, to persuade us, contrary to overwhelming evidence, that he did not know that the market in Sandhaven and PTSP shares was being manipulated. We accept, on the other hand, that Mr Fagbulu also attended interviews and, unlike Mr Visser, was cooperative. Mr Visser claims to have reimbursed some of the investors, though he has produced no evidence to support his claim. Neither of the applicants has a history of compliance failings.

119. There is comparatively little precedent about the starting point (that is, before adjustment for mitigation and personal circumstances) for determining the proper scale of the penalty to be imposed in the most serious of cases. Moreover, while concealment of the offence itself is commonplace in market abuse cases, few are accompanied by a prolonged course of deception and the wholesale disregard of investment restrictions as we have found here. Although it is not argued that the market manipulation and concealment of themselves led to the collapse of the Fund, the disregard of the investment restrictions, as we have already indicated, may have contributed to it and the concealment of the Fund's precarious position deprived investors of the opportunity of withdrawing their investments before it was too late. Mr Visser, rather than Mr Fagbulu, was responsible for investment decisions and we agree with the Authority that a further aggravating factor in his case is that he actively sought further investment in late 2007 when it must have been obvious to him that no-one knowing the full facts would have considered an investment in the Fund. Mr Fagbulu assisted him in that aim (in particular by his participation in the Presentation, and by his preparation of the Flash Reports) but we accept that he played, in this context, a relatively minor role.

120. Mr Visser argues in his submission that the penalty imposed on him, of £2 million, is greater than any other penalty imposed on an individual (which, if one disregards elements of a penalty attributable to disgorgement, it is), but in our view that is a matter for no great surprise: his conduct is worse than any other seen by this tribunal. We were made aware that the Authority's enforcement staff

recommended a penalty of £1.7 million, and it was the RDC which decided upon £2 million. It is not apparent to us why it decided on that amount since it did not give reasons (and Mr Herberg supplied none). Were we coming to the matter entirely afresh, we would probably have concluded that Mr Visser's conduct, particularly because of its systematic, repeated and prolonged character, was so bad that even £2 million is too little. It cannot be irrelevant that other investors lost €35 million, in part because they were deliberately misled, while Mr Visser salvaged his own investment before it was too late, even though the penalty is intended to punish rather than to be used as a substitute for restitution. On the other hand, we are mindful that it is undesirable that those who have meritorious cases should be put off making references by the risk that the tribunal will increase the penalty. It follows, in our view, that the tribunal should increase a penalty imposed by the RDC only in the clearest of cases, where it is plain the RDC has misdirected itself. This is not such a case. We do not, however, think that the additional factor to which we shall come when we deal with Mr Fagbulu can help Mr Visser. We have, accordingly, come to the conclusion that the starting point in Mr Visser's case must be the £2 million on which the RDC decided.

121. Mr Visser maintains that he did not intend to profit from what he did and has himself suffered considerably from the collapse of the Fund, and that insufficient consideration has been given to his current financial resources. The difficulty we have in dealing with those arguments is that Mr Visser has produced no evidence whatever to support them. We do not know the basis of his remuneration by Mercurius or the Fund and whether, by prolonging the Fund's life as he did, Mr Visser continued to receive remuneration which would otherwise have ceased. Save that the liquidation of the Fund inevitably meant that he ceased to be remunerated for running it, we have no evidence that Mr Visser suffered any capital loss when the Fund collapsed—as we have indicated, the evidence was that he withdrew his own investment several months before the collapse. We have no evidence about his means as they now are, although there was some material before us indicating that, in the recent past, Mr Visser had ample resources, and that he continues to live well even though, he claims, he cannot afford legal representation. We discount his claim that the Fund may yet recover some of the investors' money as speculative (and it is now more than three years since its liquidation began) and, even if correct, is of limited weight in considering the extent to which the penalty imposed on him should be reduced.

122. Faced with so little evidence, and nothing of substance in mitigation beyond the limited acceptance of his culpability (a factor taken into account when the penalty was first determined) we are not persuaded that the starting point we have determined of £2 million should be adjusted.

123. Mr Fagbulu has sought to put much of the responsibility on Mr Visser's shoulders, claiming, in particular, that it was the latter's duty to keep investors informed, and that he traded at Mr Visser's direction and without fully understanding what he was doing. He asserts that he believed at the time that some of the information was accurate which he now accepts was wrong, and he points to the fact that he has cooperated with the Authority in interview, and has fully participated in this reference. We accept, as we have already said, that Mr

Visser was dominant, that he directed Mr Fagbulu in much of what he did and that Mr Fagbulu was out of his depth. We also have no reason to think Mr Fagbulu would have embarked on conduct of this kind had Mr Visser not induced him to do so. But as we have indicated, we do not accept that he believed the information he produced was accurate—we are satisfied he knew perfectly well not only that it was inaccurate, but that it had been produced for the purpose of deceit—and that he knew, even if Mr Visser instigated it, that his trading was intended to increase the price of the shares.

124. The enforcement team recommended a penalty of £350,000 which the RDC increased to £500,000. In our view the higher sum, as a starting point, was entirely appropriate, if not lenient, but we are reluctant to endorse an increase, and the placing of a person in increased jeopardy, in the absence of a clearly articulated reason for doing so. In reaching that conclusion we have taken into account that Mr Fagbulu (in contrast to Mr Visser) cooperated with the investigation and with the RDC, and the undesirability of discouraging such cooperation by subjecting those concerned to the risk of an increased penalty. We therefore determine that the correct starting point in this case is £350,000, while adding that we have so determined on the peculiar facts of this case; that figure should not be taken as a precedent for other similar cases.

125. Mr Fagbulu did produce some evidence to support his claim that the penalty should be adjusted on account of his personal circumstances. He told us that Mr Visser had promised him remuneration, in the shape of increased salary and bonuses, which had not materialised, and we had evidence that the salary he did draw was not generous by the standards of the industry. We are conscious that he is a relatively young man with a wife and dependent children. We recognise that Mr Fagbulu will never again work in the financial services industry, and that such work as he does obtain is likely to be modestly rewarded. There was some evidence available to us of financial hardship, though it was also apparent that Mr Fagbulu is able to depend on his extended family for some support. This is not a case in which we think the penalty should be fixed without regard to the bankruptcy it might cause, yet it is one in which even a reduced penalty must be large enough to make it clear that conduct of the kind in which Mr Fagbulu engaged will be severely punished. We have decided that the penalty in Mr Fagbulu's case should be £100,000.

126. Save that the penalty imposed on Mr Fagbulu is to be reduced as we have indicated, the references are dismissed. Our decision is unanimous.

Colin Bishopp
Tribunal Judge

Release date: 09 August 2011