[2011] UKUT 49 (TCC)

Upper Tribunal reference FIN/2009/0024

MARKET ABUSE - Conditions in FSMA s118(2) –Whether applicant an insider within s118B(e) – Yes - Whether information not generally available – Yes – Whether information of a precise nature within meaning of s118C(2) – Yes – Whether information likely to have a significant effect on price within meaning of s118C(6) – Yes – Defence under s123(2)(a) of belief on reasonable grounds that not market abuse – Defence not made out - Penalty to be imposed – Whether applicant fit and proper – No - Prohibition

IN THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER) FINANCIAL SERVICES

BETWEEN

DAVID MASSEY

Applicant

-and-

THE FINANCIAL SERVICES AUTHORITY

Respondent

Tribunal: **Andrew Bartlett QC**

Keith Palmer

Colin Senior

Sitting in public in London on 6-9 December 2010

Date of written decision: 2 February 2011

For the Applicant: **Alexander Cranbrook**

For the Respondent: **Sarah Clarke**

DECISION

INTRODUCTION

1. This reference concerns an allegation by the Financial Services Authority that the applicant, Mr David Massey, engaged in market abuse on 1 November 2007. In its Decision Notice dated 4 December 2009 the Authority decided that he had engaged in market abuse, imposed a penalty of £281,474, and made a prohibition order preventing him from performing any function in relation to regulated activities.

2. The transaction complained of comprised Mr Massey's short sale of 2.5 million shares in a company called Eicom plc at the price of 8p per share (ie, for £200,000), which was followed almost immediately afterwards by his purchase of 2.6 million new shares from Eicom at the discounted price of 3.5p per share (ie, for a consideration of £91,000), which he used to fulfil the short sale. It is not in dispute that Mr Massey conducted these transactions and thereby made a net profit of a little more than £100,000. The essence of the case against Mr Massey is that he sold short on the basis of inside information concerning the availability of discounted shares.

3. Mr Massey disputes the allegation of market abuse and has referred to the matter to the Tribunal. By the Financial Services and Markets Act ("FSMA") s133 the Tribunal's function, having heard the evidence, is to determine what, if any, is the appropriate action for the Authority to take in relation to the matter referred.

4. The principal issues are-

    a. Whether Mr Massey's short sale amounted to market abuse within the relevant definition in FSMA s118.

    b. If it did, whether pursuant to FSMA s123(2)(a) he has a statutory defence against the imposition of any penalty on the basis that he believed, on reasonable grounds, that his behaviour did not fall within the statutory definition.

    c. If not, the appropriate level of financial penalty, and

    d. whether a prohibition order should be made and if so in what terms.

5. There is no material dispute as regards the facts of the allegedly abusive transaction itself. There are areas of factual dispute concerning the market context within which Mr Massey acted, including the knowledge available to the market, and what he said to others after the event. The Authority contends that Mr Massey was evasive and misleading when speaking to others after the transaction, and that this tends to support the Authority's case that he was aware that the transaction was not legitimate. We begin

with the facts that were either not in dispute or, in the light of the evidence, not capable of being disputed.

THE UNDISPUTED OR INDISPUTABLE FACTS

6. Eicom was a company of modest size, listed on AIM, which is the London Stock Exchange's international market for smaller companies seeking access to growth capital. AIM has a more flexible regulatory system than the main market. Eicom's shares were traded through three market makers, who held modest quantities of stock, Shore Capital, Winterflood Securities, and Evolution Securities. Eicom was a relatively illiquid share; transactions through the market makers were relatively few and far between, and the quantities of Eicom shares so traded were generally small.

7. Mr Massey had a law degree and was an experienced market professional. He had considerable knowledge and experience of the AIM market and AIM listed companies. At the time of the transactions Mr Massey was employed by Zimmerman Adams International ("ZAI"), a corporate finance advisory company. He was entitled to deal on a personal basis provided his dealing was afterwards reported to his employer. Before the transaction of which complaint is made, from about 2004, Mr Massey had worked as a consultant for Eicom on his own account on an ad hoc basis; this included introducing Eicom to potential fundraisers, handling financial public relations and drafting announcements.

8. On 3 November 2006 Eicom issued a regulatory news service (RNS) announcement, which included the news that Eicom had made an arrangement with Pacific Continental Securities, known as PCS, for subscriptions for new shares to a maximum value of £2.7 million to be raised in five tranches at a 45% discount to average bid price. The take up of the first and second tranches were announced on 23 March 2007, the third on 9 May 2007, and part exercise of the fourth on 2 July 2007. Apart from a small drop on 9 May 2007, none of these four announcements caused any change in the share price.

9. PCS went into administration shortly before the announcement of the fourth tranche, with the result that the efforts to raise funds through PCS came to an end, leaving a shortfall of approximately £800,000 in the funds that Eicom had announced its intention to raise by issuing large numbers of shares at a discount. The collapse of PCS was a newsworthy event which was widely known in the market. Following PCS's default, Eicom approached about 20 companies in an attempt to replace the funding it had been expecting to receive for the purpose of working capital. In order to raise funds Eicom was willing to increase the level of discount beyond the 45% agreed with PCS.

10. In and after June 2007 Eicom was in discussion with Mr Massey about its need for further funds for a possible acquisition; this was additional to the existing need for working

capital. Mr Massey was active in seeking to find investors who would take substantial issues of new shares. The information about the possible acquisition was highly confidential. As part of the steps toward the acquisition Mr Massey provided to Eicom a letter from ZAI dated 5 September 2007 in which ZAI undertook to use its best endeavours to place at least £200,000 of Eicom shares over three months at a discount of 50%. This did not come into effect because for various reasons the process of ZAI accepting Eicom formally as a client never took place. Eicom announced its interim results on 28 September 2007; while the announcement made a general reference to growth by acquisition, it made no mention of ongoing funding needs. Eicom's proposed acquisition fell through in early October 2007.

11. Unknown to Mr Massey, a company called October Investments agreed with Eicom on 18 October 2007 to take just over 1.6 million newly issued Eicom shares at a heavily discounted price of 3.2593p per share. The shares were issued on 24 October, but payment was not received until 29 October.

12. In late October 2007 Mr Massey was in touch with Allianz as a potential buyer of Eicom shares, and with Eicom in relation to a possible issue of discounted shares. By a series of emails between Eicom and Mr Massey commencing on 25 October 2007 Eicom offered to Mr Massey to issue 3 million shares at 3.5p, and this offer was extended to 5pm on 2 November. Mr Massey's email of 30 October was from his personal email address and referred to "my option to subscribe". On 31 October Mr Massey spoke to Mr Taylor of Shore Capital in relation to the possible purchase of 2.5 million Eicom shares, the intended purchaser being Allianz. While Shore Capital was one of Eicom's market makers, Mr Taylor was a sales trader in a different department. Later that day Allianz told one of Mr Taylor's colleagues that it would purchase on the following day.

13. Accordingly, on the morning of 1 November Mr Taylor and Mr Massey spoke on the telephone, and the sale of 2.5 million shares at 8p was agreed. Because of uncertainty over the accuracy of the clock at Shore Capital, the exact time is in doubt, but it was between 8:53 and 9:05am. Probably the latter is correct. This was the short sale by Mr Massey.

14. After the short sale, at 9:05am Mr Massey emailed Eicom from his email address at ZAI as follows:

> "Further to our emails I confirm that on behalf of our client we wish to take up our option to subscribe for 2,600,000 shares in Eicom PLC at 3.5 pence per share for a total consideration of 91,000 stg. Please issue the shares directly into the account of … Zimmerman Adams International …."

At 9:12am Eicom replied: "Thank you. Issuing shares now."

15. Mr Massey was at risk in the short interval between his naked short sale to Allianz and his subsequent receipt of confirmation from Eicom that it would issue 2.6 million discounted shares. Mr Massey had not received an offer relating specifically to 2.5 or 2.6 million shares but only to 3 million, and he had earlier agreed with Eicom that their offer could be withdrawn at any time. However, it was not in dispute that the risk was a small one from Mr Massey's point of view, because of the previous emails offering him 3 million discounted shares and because of Eicom's continuing need for funds.

16. On the afternoon of the same day Mr Massey informed his colleague, Mr Wates, of the sale to Shore Capital and inquired about how the trade should be booked.

17. The following morning (2 November) at 10:02 Mr Massey asked Mr Wates to "dribble out some [Eicom] into the market and sell up to 100,000 at 8p on my account. I suspect that you will only be able to get around 10,000 away but no problem." Mr Wates was unhappy with the situation because the market maker at Shore Capital had known nothing about the previous day's trade, and Mr Wates made his views clear to Mr Massey. Mr Massey attempted to book the sale of the 2.5 million shares to the account of a Mr Lubin, who was an associate of his, to whom Mr Massey was indebted; this was unsuccessful because Mr Lubin did not have an account with ZAI. The trade was therefore booked to Mr Massey's own ZAI account.

18. Eicom, after consultations with its nomad (nominated adviser) issued two announcements on that day (2 November), at 15:02 and 15:07. The first concerned the resignation of a non-executive director. The second concerned the issue of discounted shares, combining the issues to October Investments and to Mr Massey into one:

> "Eicom plc … announces that it has undertaken a placing of new Ordinary Shares and has issued 4,283,730 Ordinary Shares of 0.5p each at an average price of 3.4p per share to raise £145,878."

19. The new shares represented about 13% of the company's share capital. The average discount was nearly 60%. After seeing the announcements Winterflood dropped its bid/offer spread from 6-9p to 4-7p. Shore Capital, on seeing the change in Winterflood's pricing, moved its prices down also. Evolution's spread was already at 4-9p and did not alter. Later that afternoon a transaction took place at 5p. On the next day's trading the price recovered to a midprice of 6.25p.

20. When Mr Massey's trading came to light he provided various accounts of it, the accuracy of which was a matter of dispute between the parties.

INGREDIENTS OF MARKET ABUSE

21. Market abuse may be committed in a number of ways. The Authority's case against Mr Massey was based on FSMA s118(2). Under that subsection market abuse is behaviour where an "insider" deals in a qualifying investment on the basis of "inside information" relating to the investment in question. It was not in dispute that Mr Massey dealt with a qualifying investment when he sold short. The issues were whether he was an "insider" and dealt on the basis of "inside information".

22. By FSMA s118B, an insider is "any person who has inside information- … (c) as a result of having access to the information through the exercise of his employment, profession or duties, … or (e) which he has obtained by other means and which he knows, or could reasonably be expected to know, is inside information." By the end of the hearing, the Authority was relying only on (e), as the evidence did not clearly establish that the relevant information was obtained by Mr Massey through his employment.

23. "Inside information" is defined in s118C. By s118C(2), it is "information of a precise nature which- (a) is not generally available, (b) relates … to the qualifying investments, and (c) would, if generally available, be likely to have a significant effect on the price of the qualifying investments …" The three parts of the definition of inside information which we have underlined are further defined:

    a. By s118C(5) information is precise if it- "(a) indicates circumstances that exist or may reasonably be expected to come into existence or an event that has occurred or may reasonably be expected to occur, and (b) is specific enough to enable a conclusion to be drawn as to the possible effect of those circumstances or that event on the price of qualifying investments …".

    b. By s118C(8) "information which can be obtained by research or analysis conducted by, or on behalf of, users of a market is to be regarded … as being generally available to them".

    c. By s118C(6) information would be likely to have a significant effect on price "if and only if it is information of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions".

24. Various exceptions and safe harbours are provided by the effect of s118A(5) and s122(1). None of these was relied on by Mr Massey. His defence was that the information upon which he acted was not precise, or was generally available, or was unlikely to have a significant effect on price.

25. No penalty may be imposed where the statutory defence in s123(2)(a) applies. In essence this is where the person who engaged in market abuse believed on reasonable

grounds that his behaviour did not fall within the definition of market abuse. Mr Massey relied on this provision if the Tribunal found that he had engaged in market abuse.

THE WITNESS EVIDENCE

26. The Authority called a number of witnesses, who were cross-examined:

    a. Mr Fowler was the finance director of Eicom. He gave evidence on Eicom's financial position, its many attempts to raise funds by offering discounted shares, and his dealings with Mr Massey. We found him straightforward. Unsurprisingly there were some points of detail that he could not recall. He admitted he did not think carefully about whether, when placing the 2.6m shares at a discount, he was dealing with Zimmerman Adams or with Mr Massey personally; he was willing to raise money by selling to any legitimate purchaser. He agreed in cross-examination that at the end of October 2007 a considerable number of brokers in the City would have known that Eicom was willing to sell discounted shares, both because Eicom had made various approaches and because an intelligent broker would be able to work out from the demise of PCS that Eicom needed money.

    b. Mr Wilkinson was the market maker at Winterfloods. It was he who marked down the price of Eicom after seeing the 2 November 2007 announcements. He said in his written statement that he did not specifically recall the events of that day, as Eicom was one of over 200 stocks for which he was responsible at the time. His evidence therefore necessarily consisted of reconstruction and speculation, and we found it generally of little assistance. It was clear to us that he did not deal in Eicom shares frequently, and did not follow Eicom's fortunes sufficiently closely to have in mind that it had been seeking additional capital and had been frustrated by the demise of PCS, though he agreed with hindsight that someone could have inferred from public information that Eicom was still seeking capital after PCS went down. We concluded that his marking down of the stock on 2 November 2007 was an instinctive reaction, not dependent upon any particular knowledge or analysis of Eicom's position.

    c. Mr Zimmerman was a director and the chief executive officer of ZAI. After Mr Massey's transactions were drawn to his attention he had discussions about them with Mr Massey and with Rosemary Bhattacharjee of Bovills, ZAI's financial services regulatory consultant, and concluded that there was no need to report to the FSA or take further action regarding the transactions, but that Mr Massey's future trading should be watched. We found him a straightforward witness.

    d. Ms Bhattacharjee was also called. We found her to be an honest and careful witness, to the extent that she was able to recall the events. She made no

attempt to conceal that there was a lack of rigour in the way she dealt with the inquiries she received from Mr Zimmerman and Mr Massey. We generally accept her evidence. However, contrary to some of what she said in her statement and orally, we consider that she advised Mr Massey on 6 November 2007 that her initial view was that on the face of it he had not engaged in market abuse; we consider this is clear from Mr Massey's email of 6 November at 17:16, her own note dated 3 March 2008, and Mr Massey's undated note made on or after 6 November 2007, and it is further corroborated by Mr Zimmerman's note made on or about 7 November 2007.

27. We also received witness statements, the factual accuracy of which was not challenged, from the purchaser at Allianz, Mr Burge, the sales trader at Shore Capital, Mr Taylor, the other two market makers, Mr Conyerd (Shore Capital) and Mr Deadman (Evolution Securities), and Mr Wates of ZAI.

28. Mr Massey gave evidence on his own behalf. His explanation of his approach to the relevant events was, in summary-

    a. Once the proposed acquisition by Eicom had fallen through, Mr Massey no longer considered himself to be an insider, and he believed he was free to deal in Eicom shares.

    b. That Eicom needed further cash, because the PCS funding line had faltered, was generally available information. The market was therefore on notice that more discounted shares might be issued.

    c. The Eicom announcements concerning the PCS funding line had not moved the price by a significant amount.

    d. There was accordingly an opportunity for him to make a turn if he could find a buyer for Eicom shares and if Eicom was prepared to issue to him at a discount, since he considered that the issue of further discounted shares, within the number originally expected, would not be price sensitive.

    e. Mr Burge of Allianz was a market professional and it was up to him to review publicly available information when deciding to purchase Eicom shares for his fund. Mr Massey did not consider that there was any undue inequality of information: any well informed market participant would be aware that Eicom wished to issue a large number of shares at a discount, so this was presumably already factored into the share price.

    f. Once Mr Massey had the emails from Eicom, offering to issue 3 million shares, it was very unlikely that Eicom would not issue the shares Mr Massey wanted, even

though it had been agreed that Eicom could withdraw at any time. The lack of a binding offer from Eicom was a risk Mr Massey was prepared to take when he sold short to Allianz, because he had a reasonable expectation that Eicom would issue the necessary shares.

g. He did not owe a duty either to Allianz or to Eicom, since neither was his client in the transactions. He was exploiting the difference between buying and selling price in a way analogous to what market makers did every minute of every day. He did not believe that an announcement of the placing to him would adversely affect the share price.

h. The purchase was made on his own account; his attempt to book it to Mr Lubin was with a view to repayment of a debt that he owed to Mr Lubin.

i. While he was told by Eicom in late October (incorrectly) that it had recently issued shares at 3.5p, he did not know any of the actual details of the transaction with October Investments. The terms of the announcement on 2 November 2007 were therefore a surprise to him.

29. There were features of Mr Massey's account of events which we found unsatisfactory and gave us cause for concern. These did not bear directly on the nine points which we have listed in the previous paragraph. We therefore deal with them below in the context of the statutory defence under FSMA s123(2)(a).

30. Before leaving our discussion of the witness evidence we need to make findings relevant to the issue of price sensitivity. Mr Zimmerman's view was that sometimes there is a drop in price after an announcement, sometimes not; it was very hard to predict. Mr Wilkinson, Mr Conyerd and Mr Deadman expressed various views on the relation between the content of the announcements made on 2 November 2007 and the subsequent fall in the share price of Eicom. We have already stated our finding that Mr Wilkinson's marking down of the stock on 2 November 2007 was an instinctive reaction. We conclude from Mr Conyerd's statement that he was not aware prior to 2 November 2007 of the situation regarding Eicom's funding through PCS, nor did he have any recollection of seeing the announcements made on 2 November 2007, and that he marked Eicom down on that day simply as a reaction to the reduction made by Winterflood. It was not clear from Mr Deadman's statement when he first became aware of the various announcements. We do not consider that we are bound by their opinions, despite the absence of any cross-examination of Messrs Conyerd and Deadman. We are also cautious about drawing conclusions, about the price sensitivity of the information known to Mr Massey, from what actually occurred after the two announcements made on 2 November 2007, both because of the possible impact of the director resignation and because of the combination of the

issue to Mr Massey with the issue to October Investments, to which Mr Massey was not privy.

31. The extent to which Eicom's approaches to various companies to raise funds may have been known by brokers or others active in the market cannot be precisely determined. On the evidence, at least some of the approaches were clearly kept confidential, as would be expected, and the likelihood is that all were so treated. We conclude therefore on the balance of probabilities that information about those approaches, while known to those approached, and possibly to some brokers and others active in the market, was not generally available.

32. In our judgment the issue of 2.5 or 3 million discounted shares in Eicom at 3.5p was potentially price sensitive information. While the market ought to have known or was able to discover that Eicom still required funds for additional working capital, and might issue discounted shares for that purpose, this issue arranged with Mr Massey was not part of the PCS funding line. It was not part of a pre-announced programme and was not specifically expected. The number of shares was a significant proportion of the total shares issued, yet the discount was greater than that in the PCS arrangement, and the money raised by the issue was a modest amount, which could raise concerns about Eicom's financial position. For these reasons, while the share price might remain unaltered, as had occurred on some but not all of the previous occasions, there was a substantial risk that it would fall when the discounted issue became known.[1] We are not deflected from this conclusion by Mr Massey's evidence that he believed, in the light of the share price history, that the price of the shares would be unaffected by the issue of discounted shares to him. We think it is probably true that Mr Massey so persuaded himself and so believed, but objectively the risk remained of a possible fall in the price.

WAS THERE MARKET ABUSE?

33. Subject to our finding on price sensitivity, we will consider the question of market abuse on the basis of taking at face value Mr Massey's evidence on the matters set out in paragraph 28 above.

34. It is necessary to identify the inside information, if any, that was known to Mr Massey at the time when he effected the short sale. The Authority identified it in several ways. In the Decision Notice and in the Statement of Case it was stated that Eicom was conducting a secondary placing of at least 2.6 million newly issued shares (equivalent to more than 9% of the existing issued share capital) at a discount of 59% to the market price. In her oral opening Ms Clarke for the Authority said the information was to the effect that "Eicom was

[1] Mr Massey himself conceded in his oral evidence that it was possible that the deeper discount could have an effect on the share price.

prepared to conduct a secondary placing of at least 2.6 million shares at a discount of 59 per cent to the market price".[2]

35. Neither of these formulations quite corresponds with the evidence. At the time of the short sale Mr Massey was in possession of emails from Eicom expressing their willingness, short of a legally binding commitment, to issue 3 million shares at 3.5p. He knew it was very likely that they would proceed with the issue of that number of shares, or a lesser but still very substantial number, at that price, if he requested them to do so.

36. This information about Eicom's willingness to issue discounted shares was in line with, but was not the same as, the information that was generally available concerning the likelihood that Eicom was still in need of working capital and would be willing to issue discounted shares in order to obtain it. The information known to Mr Massey was more specific, and the proposed discount was deeper than the discount which had been available through PCS. The information known to him therefore satisfied the requirement that it be not generally available.

37. To satisfy the statutory definition of being "precise", the information must (a) indicate circumstances that exist or may reasonably be expected to come into existence or an event that has occurred or may reasonably be expected to occur, and (b) be specific enough to enable a conclusion to be drawn as to the possible effect of those circumstances or that event on the price of the shares. Regarding element (a), at the moment when he sold to Allianz, the information known to Mr Massey indicated to him an event, namely the issue of at least 2.5 million discounted shares at 3.5p, which he reasonably expected to occur. Without that expectation, he would not have committed himself to the sale to Allianz. In accordance with his plan of action, his commitment to Allianz also committed him to taking up Eicom's offer of discounted shares.

38. Element (b) is less straightforward. We have not found the statutory wording easy to understand. The phrase "specific enough to enable a conclusion to be drawn" seems to introduce a strong note of definiteness, which is then effectively removed, or at least diluted, by the phrase "as to the possible effect … on the price". We note that there is no requirement for a conclusion as to the actual or probable effect on the price, but only as to the possible effect. We also note that the statutory words contain no explicit guidance on how precise the conclusion needs to be. Is it enough that there be a conclusion merely that the event, when it becomes known, may alter the price? A risk of alteration is a "possible effect", even if it is not known whether the occurrence of an alteration is more probable than not, or whether, if it occurs, it is more likely to be an increase or a decrease.

[2] Two other, slightly different, formulations had been put forward in the representations to the Regulatory Decisions Committee and in the Warning Notice.

39. We have some doubts over whether it can be right to read element (b) so literally, as to do so would arguably render the phrase “specific enough to enable a conclusion to be drawn” almost empty of effect. We therefore assume in Mr Massey’s favour, without deciding the point, that the conclusion as to a possible effect on price must relate to an effect in a particular direction. In our judgment, on the evidence in the present case, it was uncertain whether the issue of at least 2.5 million discounted shares at 3.5p, when announced, would have an effect on the price; but such an effect was possible and, if there were such an effect, it would be to reduce the price. No one would reasonably have thought in the circumstances of the present case that a possible effect would be an increase.

40. We have therefore reached the conclusion that the relevant information known to Mr Massey was precise, within the meaning of the statutory definition.

41. We consider next whether the information was likely to have a significant effect on the price of the shares. Mr Massey’s case is that it was not likely to have such an effect. We would have considerable sympathy with his view if the phrase “likely to have a significant effect on the price” had been used in the Act in its ordinary sense. But we have to apply the specially extended meaning assigned to this expression by s118C(6). Whether or not the information was (in the ordinary sense) likely to have a significant effect on the price, we consider it is clear that it was information “of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions”. If a hypothetical reasonable investor in Mr Burge’s position had known of Eicom’s willingness and offer to issue 3 million shares at 3.5p, he would have been likely to use that information as part of the basis of his decisions about purchasing Eicom shares.

42. For the above reasons we conclude that Mr Massey dealt with Allianz on the basis of “inside information” as defined in s118C.

43. By FSMA s118B(e), Mr Massey was an insider if he knew or could reasonably be expected to know that the relevant information was inside information. While we accept that Mr Massey thought the price of the shares would probably be unaffected by the issue of discounted shares to him, in our view he ought to have known that there was the possibility of an adverse effect on the price, and he ought to have known that information about Eicom’s willingness and offer to issue 3 million shares at 3.5p was information of a kind which was not generally available and which a reasonable investor would be likely to use as part of the basis of his investment decisions. Accordingly, Mr Massey ought to have known that the information he had, at the time he dealt with Allianz, was inside information.

44. We adjudge, therefore, that he was an insider, and engaged in market abuse.

THE STATUTORY DEFENCE

45. To avoid a penalty by relying on the terms of FSMA s123(2)(a), Mr Massey needs to demonstrate that he believed on reasonable grounds that his behaviour did not fall within the definition of market abuse. This raises issues about his state of mind at the time when he effected the short sale. Some light is cast on this by what he said and did after the event.

46. On 5 November 2007 Mr Wates raised with Mr Zimmerman his concerns about Mr Massey's sale to Allianz. As a result, Mr Massey was asked to speak to Ms Bhattacharjee to get advice. They spoke on the telephone on 5 or 6 November. We were shown the note from Ms Bhattacharjee's handwritten notebook. We treat the note with due caution because it did not clearly distinguish between what was said by Mr Massey and Ms Bhattacharjee's own thoughts, but we accept her evidence that the note was made at the time of the conversation and shortly after. It is clear from this note, taken together with the other approximately contemporaneous evidence, that the reason why Ms Bhattacharjee gave initial advice that there was no market abuse was that Mr Massey gave her the impression that the issue of shares to him was part of a series of placings which were in the public domain before they occurred. This was over-simplified and misleading, the actual facts being as we have stated above.

47. A further discussion took place with Mr Zimmerman on or about 7 November 2007. Part of his note reads:

> "Having discussed Ed's [Mr Wates'] concerns with both Ed and David, Ed thinks it looks "dodgy" that David bought shares in Eicom plc 1 day before there was an RNS announcement about a placing and a Director resigning. David is adamant that he
>
> didn't know any insider information – barely knows the company! ∴ [therefore]
>
> couldn't have traded on II [inside information] b/c [because] didn't have any."

48. In cross-examination Mr Massey denied he had said that he barely knew the company. Given the contents of the contemporaneous note (on which Mr Zimmerman was not challenged when he gave his evidence) we are unable to credit Mr Massey's denial. The impression which Mr Massey gave, that he barely knew the company, was substantially false, given that he had worked as a consultant for Eicom on his own account on an ad hoc basis, including introducing Eicom to potential fundraisers, handling financial public relations and drafting announcements.

49. These two misleading statements made after the event have a similarity: they were exaggerations or distortions of a genuine point that was in Mr Massey's favour, so as to strengthen it. He was guilty of a similar kind of distortion during his oral evidence. There was a similarity between the three incidents of distortion which gave us an insight into Mr Massey's conduct. (1) It was true that there had been pre-announced placings through PCS, which had not been completed; this was distorted by Mr Massey so as to give the impression to Ms Bhattacharjee that the issue of shares to him was part of the same series. (2) It was true that Mr Massey's confidential involvement with the proposed acquisition by Eicom had come to an end; this was distorted by him so as to convey to Mr Zimmerman that he was saying he knew almost nothing of Eicom. (3) Mr Wilkinson said in his oral evidence to us that, although he had looked at the Eicom announcements made prior to 2 November 2007, it was not necessarily apparent to him that Eicom might still be looking for funds after PCS went down.[3] This was distorted by Mr Massey, who claimed in his own oral evidence that Mr Wilkinson had said he (Wilkinson) had never read any of the prior announcements.[4]

50. These were not premeditated attempts to deceive. (1) The lack of direct relation between the issue of shares to him and the previous announcements was a matter of public record. (2) He had previously talked to Mr Zimmerman about Eicom, so it made little sense for him to say he barely knew the company. (3) The evidence given by Mr Wilkinson was heard by the Tribunal, recorded, and transcribed, so there was no possibility of his persuading the Tribunal that Mr Wilkinson had really said something different from what the record showed. Our conclusion from these three examples is that Mr Massey is liable to persuade himself of a distorted version of the facts when he feels that his interests are at stake.

51. We accept, therefore, that Mr Massey genuinely believed the matters set out in paragraph 28 above, in the sense that he persuaded himself that the circumstances were such that he was entitled to trade as he did. But wishful thinking is not the same as having a belief on reasonable grounds that his behaviour did not fall within the definition of market abuse.

52. In our judgment he did not have reasonable grounds. At the time he sold the shares to Allianz he knew that he possessed detailed information about Eicom's willingness to offer heavily discounted shares, which Mr Burge obviously did not have and which was not generally available, being information which a reasonable investor would be likely to use as part of the basis of his investment decisions. A reasonable market professional, even without having in mind the precise wording of the statutory test for market abuse, would have appreciated that the transaction at least risked constituting such abuse, and would

[3] Transcript Day 2 pages 30-32.
[4] Transcript Day 3 pages 65-67.

therefore have either drawn back from implementing it or sought appropriate advice to confirm that it was legitimate before proceeding. If Mr Massey had considered the matter dispassionately and objectively, he should have appreciated the existence of each of the elements of market abuse which we have analysed above. If he had had reasonable grounds for his belief that he was entitled to trade in the way that he did, there would have been no need for the distortions in what he said to Ms Bhattacharjee and to Mr Zimmerman. His statutory defence therefore fails.

THE APPROPRIATE LEVEL OF FINANCIAL PENALTY

53. At the hearing before us the only criticism made of the level of financial penalty levied by the Authority was that it was in excess of Mr Massey's ability to pay. Mr Massey was remarkably uncooperative in supplying verifiable financial information to the Authority. We see no sufficient reason to take a different view of the proper amount of penalty on the basis of Mr Massey's ability to pay.

54. However, having heard the witnesses, including Mr Massey, at some length, our view of the facts is not entirely the same as the Authority's. The Authority's view was that Mr Massey deliberately traded knowing full well that he was committing market abuse, and that he was afterwards deliberately deceitful about the circumstances of the transactions. We are not of that view. In our judgment he was (rightly) concerned about whether he was entitled to do what he did, but by a process of wishful thinking persuaded himself on inadequate grounds that he was so entitled, and in what he said to others after the event he distorted the facts in the way that we have described above, rather than through deliberate or premeditated deceit.

55. If we had taken the same view of the facts as the Authority did, we would have upheld the amount of penalty imposed by the Authority. But in the circumstances we consider that the appropriate penalty should be in the region of the amount of profit made, plus 50%, and accordingly we set it at £150,000.

PROHIBITION

56. By engaging in market abuse, and persuading himself on inadequate grounds that he was entitled to act as he did, Mr Massey contravened the standards of the regulatory system. By misleading Ms Bhattacharjee and Mr Zimmerman concerning the true facts, he failed to act to an appropriate standard of honesty and integrity. His distortions of the truth give strong cause for concern. On the evidence of this case he is in our view not a fit and proper person, and a prohibition order is justified.

57. We emphasize, however, that our view of the case is less serious than the view taken by the FSA in the Decision Notice. The prohibition order should not be regarded as a lifetime

ban if Mr Massey is able in the future to rehabilitate himself and to provide evidence that he is a fit and proper person to perform regulated activities.

58. At the oral hearing the parties did not address us on the precise terms of the prohibition order. We were conscious of the potential distinction between total prohibition and lesser forms of restriction (of which an example can be found in the Tribunal's decision in Allen v Financial Services Authority FIN/2008/0010). We noted that while the Decision Notice prohibited Mr Massey from performing any function in relation to any regulated activity carried on by any authorised or exempt person or exempt professional firm and the same wording was used in paragraph 80 of the Authority's statement of case, the Authority's statement of case at paragraph 2(2) and the Authority's skeleton at paragraph 2b both described the order made by the Authority as an order prohibiting the applicant from performing any controlled functions in relation to regulated activity. Lest this had given rise to any confusion, after the hearing we gave Mr Massey an opportunity to make written submissions, if he so wished, in support of a contention that in the light of our findings a more limited form of prohibition would be appropriate. He did not do so. We confirm the total prohibition in the form stated in the Decision Notice.

CONCLUSIONS

59. Mr Massey engaged in market abuse. His statutory defence fails. The financial penalty should be set at £150,000. The Authority was right to make a prohibition order in the form stated in its Decision Notice. Our decision is unanimous.

Andrew Bartlett QC

Judge of the Upper Tribunal

Signed on original 2 February 2011

Release Date: 03 February 2011