Reference numbers: FS/2011/0001
FS/2011/0002
FS/2011/0005

MARKET ABUSE — share price manipulation — admitted in December 2007 but in part denied in January 2008 — whether established — yes — whether prohibition necessary — yes — measure of monetary penalty

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

STEFAN CHALIGNE
PATRICK SEJEAN
CHEICKH TIDIANE DIALLO **Applicants**

- and –

THE FINANCIAL SERVICES AUTHORITY **The Authority**

Tribunal: Judge Colin Bishopp
Miss Sandi O'Neill
Mr Christopher Chapman

Sitting in public in London on 16 to 20, 23 and 25 April 2012

Mr Jonathan Barnard, counsel, instructed by Kingsley Napley, for the first Applicant

The second and third Applicants appeared in person

Mr Andrew Mitchell QC appeared for the Authority.

DECISION

Introduction

1. On 22 December 2010 the Regulatory Decisions Committee ("RDC") of the Financial Services Authority ("the Authority") issued decision notices addressed to each of the applicants, Stefan Chaligné, Patrick Sejean and Tidiane Diallo. The notices conveyed the RDC's conclusion that each of the applicants had committed market abuse in breach of s 118 of the Financial Services and Markets Act 2000 "FSMA"). That section, so far as relevant to these references, reads

> "(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 [type of behaviour] 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 …."

2. The decision notices stated that the conduct of each of the applicants had breached s 118(5), in the case of Mr Chaligné on 31 December 2007 and 31 January 2008, and in the case of Mr Sejean and Mr Diallo on 31 December 2007 only. The essence of the complaint was that they had deliberately increased the closing prices of various quoted stocks by artificial, manipulative trading. The decision notices went on to impose various sanctions:

- all of the applicants were made subject to a prohibition order in accordance with s 56 of FSMA, which is set out at para 93 below;
- Mr Sejean and Mr Diallo had their approved person status withdrawn in accordance with s 63 of FSMA, the relevant parts of which are reproduced at para 95 below (Mr Chaligné was not an approved person);
- Mr Chaligné was made subject to a financial penalty, imposed in accordance with s 123 of FSMA, set out at para 106 below, of £900,000 plus the disgorgement of the personal benefit he had obtained, amounting to £266,924; and
- Mr Sejean was subjected to a penalty of £550,000.

3. The decision notice addressed to Mr Diallo stated that the RDC would have subjected him to a financial penalty of £100,000, but for its conclusion that its doing so would inflict serious financial hardship upon him. It decided instead not to impose any monetary penalty, but to direct the Authority to publish a statement to the effect that he had committed market abuse.

4. All of the decision notices were referred to the tribunal in January 2011, and the references were later directed to be heard together as they arise from the same facts.

5. Before us, Mr Chaligné was represented by Mr Jonathan Barnard, counsel, while Mr Sejean and Mr Diallo represented themselves. They had previously been represented by solicitors but, we were told, were no longer in a position to pay their fees. The Authority was represented by Mr Andrew Mitchell QC. All of the applicants put in witness statements and gave oral evidence supplementing them; we also had the evidence of Mr David Hacon, who was in charge of the Authority's investigation, and of Mr Patrick Spens, who is employed by the Authority but who was called as an expert witness on the subject of market practice. He was the founder and manager of a hedge fund, and a former managing director of Citigroup, with responsibility for 100 traders and proprietary capital of $1.5 billion. We accept him as an expert, and are satisfied that his employment by the Authority does not compromise his ability to give dispassionate evidence.

The tribunal's jurisdiction

6. Before coming to the substance of the allegations we need to deal with the scope of our jurisdiction in respect of one aspect of Mr Sejean's reference; it is not a matter we need to address in respect of Mr Chaligné or Mr Diallo.

7. Although the Authority contended before the RDC that Mr Sejean was guilty of market abuse in January 2008, the RDC did not find the allegation made out, and Mr Sejean's conduct on that day (to the detail of which we come later) was not referred to in the decision notice. The Authority argues that the RDC's conclusion was wrong and that we should instead find that Mr Sejean was indeed culpable in both December 2007 and January 2008: its case, as it was put in the statement of case and before us, is that the January conduct was essentially a repeat of what Mr Sejean had done a month earlier. In addition, it says, if we find that market abuse by Mr Sejean in January 2008 is established we should increase the penalty (disregarding any reduction on grounds of financial hardship which we might allow) to £600,000, to reflect the repetition.

8. In both his reference notice and his reply, Mr Sejean accepted the finding of deliberate market abuse on 31 December 2007, as well as all the findings of fact, as they were made by the RDC, relating to his own conduct in respect of the dealings on that day. He also accepted the RDC's decision to withdraw his approval and make a prohibition order, as the inevitable consequences of his committing that abuse. In his reference notice, he accepted too that a penalty of £550,000 for the December 2007 conduct would have been appropriate in principle, but for his alleged financial hardship, though he modified that position in his reply, arguing that a starting point of £550,000 was too high, without

making it entirely clear whether he was attacking the principle, or only the amount in his own particular circumstances. At the hearing he continued to accept the inevitability of prohibition (while emphasising its effect on his earning capacity) and focussed, in respect of the penalty, only on his own circumstances. For reasons with which we shall deal more fully later, we do not address the amount of the penalty actually to be imposed on Mr Sejean in this decision, though we do address the "headline" figure.

9. Mr Sejean's reference notice said nothing about the January 2008 conduct, no doubt because it did not feature in the decision notice. After reciting the fact that the decision notice related only to December 2007, the Authority's statement of case went on to deal with its contention that Mr Sejean's conduct in both December 2007 and in January 2008 amounted to market abuse. Nothing was said about the tribunal's jurisdiction, if any, to deal with the January 2008 conduct, nor indeed did the Authority draw attention to the fact that it was seeking to re-open the RDC's conclusions in relation to it. In his reply (served when he was represented by solicitors) Mr Sejean contended that it was not open to the Authority now to "resurrect" (as it put it) its arguments before the RDC in connection with the January 2008 trading, a contention he repeated before us. The essence of the reasoning is that it is the decision notice which has been referred, thus only the facts and matters dealt with in that notice are before the tribunal and, accordingly, we have no power to consider other matters. The reply added that Mr Sejean denied market abuse in January 2008 as a matter of fact, for reasons we shall develop below.

10. The statutory provision which governs the tribunal's jurisdiction in a reference of this kind is s 133 of FSMA which, as substituted with effect from 6 April 2010 and so far as relevant to this point, is as follows:

> "(1) This section applies in the case of a reference or appeal to the Tribunal (whether made under this or any other Act) in respect of—
>
> (a) a decision of the [Financial Services] Authority;
>
> (b) …
>
> (c) …
>
> (2) In this section—
>
> 'relevant decision' means a decision mentioned in subsection (1)(a), (b) or (c); and
>
> 'the decision-maker', in relation to a relevant decision, means the person who made the relevant decision.
>
> (3) …
>
> (4) The Tribunal may consider any evidence relating to the subject-matter of the reference or appeal, whether or not it was available to the decision-maker at the material time.
>
> (5) The Tribunal must determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter referred or appealed to it.

> (6) On determining the reference or appeal, the Tribunal must remit the matter to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination."

11. Mr Mitchell submitted that Mr Sejean's argument ignored the decision of this tribunal's predecessor, the Financial Services and Markets Tribunal, in *Philippe Jabre v the Authority* (2006, Decision 35). The issue in that case was whether the tribunal had the power to direct the Authority to take action—the withdrawal of Mr Jabre's permissions and the imposition of a prohibition—when the RDC had not done so, but had imposed only a penalty and, moreover, prohibition had not been adverted to in the warning notice. Section 133, as it was in force at that time, was in different terms, although its effect was essentially the same.

12. At para 23 the tribunal said

> "The Tribunal is not an appeal tribunal. It neither hears appeals from decisions of the statutory authority nor does it sit in an appellate role to hear appeals against decisions of tribunals of first instance. Instead it has been created to function as part of the regulatory process. It is there to consider the relevant evidence and to determine what is the appropriate action for the Authority to take in relation to the matter referred."

13. It went on to summarise Mr Jabre's argument that as there was no finding in the decision notice in respect of his fitness and propriety (an adverse finding being a necessary pre-condition of prohibition or withdrawal of permission: see FSMA ss 56 and 63), his fitness and propriety were not in issue before the tribunal. The matter he had referred was the financial penalty imposed on him, and it was that alone which the tribunal could consider. The tribunal then explored the scope of its function, in the light of the observation it had made at para 23:

> "28. The meaning of the expressions 'the matter referred', or 'the subject-matter of the reference' in section 133 has to be derived from their context. The first point relevant to this is the Tribunal's function. It provides a stage in the regulatory process to determine what is the appropriate action for the Authority to take having considered any evidence relating to the subject-matter of the reference. As the Tribunal's role is not to adjudicate on the rightness or otherwise of the decision as expressed in the decision notice, the decision itself is not strictly a relevant consideration for the Tribunal to take into account. Instead it is the allegations made in the decision notice and the circumstances on which these are based that fall to be considered and evaluated. They comprise the matter referred. It is in relation to those circumstances and any further relevant evidence that was not available to the Regulatory Decisions Committee that the Tribunal's function is to determine the appropriate action for the Authority to take. The indications, so far, are that the circumstances, the evidence and the allegations before the Regulatory Decisions Committee, and not the decision, are the subject-matter of the reference.
>
> 29. The second point is that in the present case the facts and circumstances on which the Authority relies in its statement of case were before the Regulatory Decisions Committee. They are either set out within the decision notice or are recorded in the decision notice as matters on which the Regulatory Decisions Committee did not reach a concluded factual

> finding. In this respect it can be said that the facts and matters before the Regulatory Decisions Committee are the facts and matters relied upon by the Authority for the purposes of the present reference. This is not a case such as that considered in *Parker v FSA* (an unreported decision on a preliminary issue) where a new allegation unconnected with the factual context that gave rise to the original decision was sought to be raised. Nor is the present situation comparable to that found in *Ryder (No 2)* (2006), a Pensions Regulator Tribunal reference. There the matter that Mr Ryder had sought to raise related to factual issues that had not been in front of the Determinations Panel of the Pensions Regulator and therefore formed no part of the body of facts to which the determination notice related."

14. There is a difference between that case and this in that, there, the decision notice did refer to the matters on which the Authority sought to rely before the tribunal whereas, here, the decision notice is silent about them. However, we do not think that difference affects the principles set out by the tribunal in *Jabre*, with which we respectfully agree. If one starts from the proposition that the tribunal is itself part of the regulatory framework, charged with determining what is the appropriate action for the Authority to take, it must follow that it is not merely able but required to take account of all relevant material, and is not restricted by the RDC's view of it. The contrary proposition on which Mr Sejean's argument depends is inconsistent with what is now s 133(4): if the tribunal is able to enquire into material which was not before the RDC, and reach its own conclusion, it necessarily follows that it must be able to direct the Authority to take action which the RDC, for reasons of lack of evidence or otherwise, did not consider appropriate, or perhaps did not consider at all. The safeguard for an applicant lies in the difference between this case and *Jabre*, on the one hand, and *Parker* and *Ryder (No 2)*, on the other: while it is open to the Authority in a reference to this tribunal to rely on allegations which were put before the RDC and on further evidence supporting them which has since become available, it is not open to it, in the context of a reference about one matter, to raise another unconnected matter. It must instead issue a fresh warning notice, as the starting point of further proceedings.

15. Naturally the tribunal must take care to ensure that it limits its enquiry to facts and events connected with the subject-matter of a referred decision notice. However here, as will become apparent from what follows, we are satisfied that there is a clear connection between the events in December 2007 and those in January 2008 and, as we shall explain, we agree with the Authority that they all form part of the same course of conduct, namely an attempt to raise the closing prices of various stocks; it would be quite artificial to regard the December and January trading as discrete episodes. We accordingly conclude that it is open to us to consider whether Mr Sejean committed market abuse in January 2008.

16. In similar vein, the Authority argued that the penalty (exclusive of disgorgement) of £900,000 imposed on Mr Chaligné was too low, and that we should instead direct that it be increased to the sum of £1,250,000 which had been proposed to the RDC. Though Mr Chaligné resists any increase, he does so by reference to the merits of his case and it was not disputed that we may increase the penalty if we think it appropriate.

17. We were not invited by the Authority to revisit the RDC's conclusions in respect of Mr Diallo. For the reasons we give later, we agree that there should be no financial penalty in his case.

The facts

The background

18. Much of the factual background to the references was agreed, or at least undisputed, and in what follows we do not record the source of the various facts unless there was a disagreement about them, or there is some other reason for doing so.

19. All three of the applicants now accept that what they did (or some of it) amounted to market abuse within the meaning of s 118. The dispute between the parties focuses, rather, on the interpretation to be placed on the facts. In particular, we need to determine Mr Chaligné's motives or purpose and whether or not he was dishonest; whether the amount of the penalty imposed on him should be adjusted; the extent of Mr Sejean's culpability, and the magnitude of the penalty to be imposed on him; the extent of Mr Diallo's culpability; and whether, in the light of the findings we make in respect of those matters, prohibition is an appropriate sanction in respect of each of the applicants. We are not immediately able to deal with Mr Sejean's penalty since he had not produced, by the time of the main hearing, all of the documents and other material on which he wished to rely in support of his contention that a much smaller penalty should be imposed on him by reason of his financial circumstances, and we decided that another hearing should be convened for the purpose of considering the size of the penalty in his case. Thus we deal below only with the "headline" figure, that is the amount which, absent financial hardship, we would consider it appropriate to direct the Authority to impose.

20. Mr Chaligné is a French national, but his home and office are situated near Geneva, Switzerland. Although he was not a person approved by the Authority in accordance with s 61 of FSMA he was a long-standing market participant. He had been a partner in a US stock broking firm and a person registered by the Securities and Futures Authority between 1989 and 1999, while he was working in London, and it is undisputed that he is a sophisticated and experienced investor in market securities.

21. He is the founder, director and largest shareholder of the Iviron Fund ("the Fund"), an open-ended investment company incorporated in the Cayman Islands. At 31 December 2007, the Fund had net assets of approximately €95 million, and Mr Chaligné was the direct and indirect beneficiary of about 24% of the Fund; members of his close family had holdings of a similar aggregate size, and the remainder was held by what he described as close friends. At all material times the Fund was closed to new investors. Mr Chaligné is also the founder, director and beneficial owner of all the shares of Cambos Investment Limited ("Cambos"), a British Virgin Islands company which is the investment manager for the Fund. Cambos was entitled to a management fee equal to 1.5% per annum (but payable by monthly instalments) of the net asset value ("NAV") of the Fund. The management fee was based on the NAV at month-end. In addition, Cambos was

entitled to a performance fee equivalent to 20% of the appreciation of the NAV of the Fund above the highest NAV achieved as at 31 December of any previous year: in other words, if Cambos was to be entitled to a performance fee the Fund's value at 31 December in the year must exceed the highest previous year end NAV, and not merely that at the preceding year end.

22. The purpose of the abusive trading, the Authority says, was to increase the Fund's NAV and with it Cambos' performance and management fees, and it is no coincidence that it occurred on days by reference to which the fees were fixed. Mr Chaligné denies that this was his motivation, and offers an alternative explanation with which we shall deal later.

23. The principal evidential difference between the Authority and Mr Chaligné on this issue is that while the Authority asserts that he instructed Mr Sejean to make the prices of the Fund's stocks move as high as possible, and that the messages from Mr Sejean to the traders accurately reflected that instruction, Mr Chaligné's case is that Mr Sejean simply misunderstood him, and instructed the traders to buy (and, in January 2008, himself bought) stocks more aggressively than was intended. His evidence was that he hoped merely to counterbalance an anticipated drop in value, and had no desire to push up the prices of the stocks. Mr Barnard emphasised in Mr Chaligné's support that at no time is he shown by the telephone transcripts or the Bloomberg messages to have used the phrase "as high as possible" or an equivalent (though such expressions were used by Mr Sejean and the traders, and Mr Chaligné came close to such expressions: see para 43 below) and that he did not sell the stocks once the prices had increased, but retained them within the Fund. These are important features of the evidence, with which we shall deal in some detail later.

24. Mr Sejean, also a French national, was a salesman on the French sales desk at the London office of Cantor Fitzgerald Europe ("CFE"), the global financial services company which provides (among other things) execution-only brokerage services; these were the services CFE supplied to Mr Chaligné (or, perhaps more accurately, to Cambos, though we shall refer in this decision to Mr Chaligné rather than to Cambos, since it is Mr Chaligné's actions which are in issue). At the relevant time, Mr Sejean was approved by the Authority to perform the customer controlled function (CF30). Mr Chaligné had known Mr Sejean for four or five years, and had placed execution-only orders with him, at CFE, since 2004. By 31 December 2007 Mr Sejean was Mr Chaligné's primary contact at CFE; he was responsible for the relationship between Mr Chaligné and CFE, and Mr Chaligné was one of Mr Sejean's most significant clients. In essence Mr Sejean's role was to maintain the relationship between CFE and those of its clients, including Mr Chaligné, for whom he was responsible. He had formerly been a trader, and on occasion did still execute trades himself, but that was no longer his primary task.

25. Mr Diallo, too, is a French national. At the material time he was an analyst and trader at CFE, in the latter capacity working on the French desk in London. It is common ground that he was a relatively inexperienced trader. He was approved by the Authority to perform the customer controlled function (CF30). It is undisputed that on Mr Sejean's instructions he executed Mr Chaligné's orders in certain European stocks on 31 December 2007. He played no part in the trading in January 2008.

The events on which the Authority relies

26. The relevant events began with a telephone call from Mr Chaligné to CFE on Friday 28 December 2007. His intention was to give instructions to execute certain trades, to which we shall come, on the following Monday, 31 December, a date which coincided with the Fund's year end. Telephone conversations between CFE staff and clients were routinely recorded and, with an exception with which we deal next, we had available to us the recordings made of all Mr Chaligné's conversations with Mr Sejean and Mr Diallo (and a few other members of CFE's staff), as well as transcripts. The conversations were almost all in French, as were the transcripts, but we were provided also with English translations which, with limited exceptions, were agreed to be accurate. We had in addition copies of Bloomberg messages (again, mostly in French but English translations were provided) passing between the three applicants and, in some cases, other CFE staff.

27. Mr Chaligné was not able to speak to Mr Sejean, who was on holiday in Barcelona. It appears that Mr Chaligné may already have been aware of that fact, and that he telephoned CFE primarily in order to discover which of its staff would be working on Monday 31 December, and who therefore would place the various trades he wished to execute; he also wished to find out what were the closing times of the markets on which he wished to trade. He spoke to a Mr Bellaiche, also a trader working on the French desk, but was not satisfied with the limited information Mr Bellaiche was able to give him and decided to call Mr Sejean on his mobile telephone in Barcelona. During the course of that day he made four calls to Mr Sejean, lasting in all for over 17 minutes. CFE's rule was that its staff should not speak to clients by using their own mobile telephones, since the calls could not be recorded (even though the phone was provided to Mr Sejean by CFE, from whose records the fact and duration of the calls but not their content could be derived) and Mr Sejean admits that he breached the rule. We do not, therefore, have transcripts of these calls.

28. It is, however, accepted by both Mr Chaligné and Mr Sejean that instructions were given and accepted to undertake the various trades effected on 31 December 2007 which are the subject of these references, and that Mr Sejean passed on the instructions to Mr Diallo and other CFE staff during the day by telephone and by Bloomberg message; he also made further calls and sent messages on 31 December to both Mr Chaligné and to CFE staff, particularly Mr Diallo. Mr Sejean concedes that he realised, as the instructions were given, that their execution would amount to market abuse but that he did not resist or seek to modify Mr Chaligné's instructions, warn him that he was about to commit market abuse, or take any other action which might have deflected him. Instead he passed the instructions on to Mr Diallo and others, with additional advice of his own on the manner in which they might be executed. He also did not warn any of the traders that what he was asking them to do amounted to market abuse.

29. It is apparent from his conversations with CFE staff and the Bloomberg messages he sent to them during the day that Mr Sejean believed, from his conversations with Mr Chaligné, that the underlying purpose of the trades was to effect a material increase in the price of the stocks, indeed to increase their closing prices on 31 December as much as possible, and much of the advice he offered

was designed to guide the inexperienced Mr Diallo in achieving that result. He made it equally clear in his telephone calls and Bloomberg messages to Mr Diallo and the other traders who were involved that this was the objective, and neither Mr Sejean nor Mr Diallo denies that he knew (or believed, if Mr Chaligné is right in his claim that he was misunderstood) that the aim was to maximise the price increase.

30. At the end of 2007 the Fund had positions in what can be regarded for present purposes as two sets of stocks, some traded on European Union exchanges, all agreed to be "prescribed markets" within the scope of s 118, and others traded on Swiss or North American markets. For the reasons we explain in the next paragraph, the Swiss and North American stocks were not within the scope of s 118; the Authority's reliance on evidence relating to those stocks is intended to support its assertion that the trading amounted to an attempt by Mr Chaligné to increase the prices of several of the stocks of which the Fund already had substantial holdings, and which represented 53% of its aggregate holdings at the time. The European Union stocks were in OL Groupe (the standard code for which, used in the Bloomberg messages from which extracts appear below, is "OLG"), Laurus NV ("LAU"), Michael Page International plc ("MPI"), Meetic ("MEET") and GMA Resources plc ("GMA"). The only Swiss stock traded was in Mobilezone Holding AG ("MOB"). The North American stocks were in Calvalley Petroleums Inc ("CVI"), Telemig Celular Participacoes SA ("TMB") and Tim Participacoes SA ("TSU"). The holdings in TMB and TSU were in the form of American Depositary Receipts ("ADRs"). Most, though not all, of them are, or were, comparatively illiquid stocks, in companies with modest capitalisation. For those reasons, and as a consequence of the wide price spreads typical of illiquid stocks, even small trades may have a significant impact on the price of the stock.

31. Mr Diallo dealt with the December 2007 orders which were to be placed on European markets. Mr Sejean placed the January 2008 orders himself; only two stocks, OLG and MOB, were traded on this occasion. Neither Mr Diallo nor Mr Sejean handled transactions on North American markets and other CFE traders were involved instead in the December 2007 trades, though Mr Sejean was the intermediary between Mr Chaligné and those traders. As the Swiss and North American stocks were not traded on a "prescribed market" (which means, in short, a regulated market within the European Union: see the Financial Services and Markets Act 2000 (Prescribed Markets and Qualifying Investments) Order 2001) dealings in them cannot amount to market abuse within the meaning of s 118.

32. The essence of the Authority's case is that Mr Chaligné, assisted by Mr Sejean and, on 31 December 2007, by Mr Diallo in respect of the European and Swiss stocks, and by the other CFE traders dealing in the North American stocks, manipulated the market by placing orders in relation to the stocks which were not *bona fide* purchase orders (even if the stocks acquired as a result of them were retained) but were designed to effect an artificial increase in the price of the stocks at the close of trading. As the affected stocks represented, collectively, more than half of the Fund's entire holdings, any increase in price would (and the Authority say was intended to) affect its NAV significantly. Although, as we shall later explain, Mr Chaligné denies that his purpose was to increase the NAV, both Mr

Sejean and Mr Diallo acknowledge that Mr Chaligné's instructions, as they understood them, would have that effect, and that 31 December 2007 and 31 January 2008, being respectively the year end and a month end, were important days for the Fund since its performance and its manager's fees were determined by reference to the NAV at year- and month-end.

33. A further part of the Authority's case is that the applicants attempted to increase the prices of the European stocks by exploiting the mechanism by which their closing prices are determined (which in the majority of cases was via an "auction" or "closing auction"). The mechanism varies in its detail according to the rules of different exchanges, and we do not think it necessary for present purposes to provide a detailed explanation. It is sufficient to say that in a short period (typically five minutes) at the end of the main trading session firms which are members of the relevant exchange place, delete or amend orders; those instructions are recorded by the exchange but do not result in a trade. The exchange then freezes the order book and its computer system runs an algorithm that determines the price at which the greatest volume of each individual stock can be traded. It then matches and executes the orders accordingly, and notifies the member firms whose orders have been executed. The whole process is entirely electronic. One of its functions is to determine the closing price of each stock, a price which is reflected in the NAV of each fund which holds that stock.

34. We should add, in case there should be any doubt, that the Authority does not suggest that CFE was aware, at the time, that Mr Sejean and Mr Diallo were manipulating the market on Mr Chaligné's instructions. An internal review and disciplinary enquiry later led to Mr Sejean's and Mr Diallo's dismissal. We heard some evidence about the dismissal process, in which (the Authority say) Mr Sejean and Mr Diallo were not as candid about their conduct as they should have been. We have decided, however, that we should leave this evidence, and the conclusions the Authority ask us to draw from it, out of account, on the ground that to do otherwise might be unfair. Disciplinary proceedings in the context of an employment contract raise rather different considerations from those before us; and Mr Diallo, in particular, was unable to develop fully arguments he raised, but which we do not need to ventilate, about the process. We also bear in mind that we have heard nothing from CFE.

35. We should add that our leaving this evidence to one side does not reflect in any way on CFE which has, we understand, assisted the Authority in its own enquiry, for example by providing the recordings and transcripts of the various telephone conversations and copies of the Bloomberg messages.

The relevant transactions

36. At 4.38 pm on 28 December 2007, after having spoken to Mr Chaligné several times during the day, Mr Sejean sent a Bloomberg message to Mr Diallo, by which he passed on what he understood to be Mr Chaligné's instructions. The translation of the message reads:

> "Orders for Monday.
>
> To buy, to work in the last half hour of trading including the fixing
>
> 30000 olg fp

> 40000 mob sw
> 120000 lau na
> 400000 mpi ln
> 40000 meet fp
> 300000 gma ln.
>
> If you can't do all the size, it's not serious. The goal is to make the stocks as high as possible on closure."

37. The codes in the message represent the stocks, as we have previously identified them, and the exchanges on which they were traded. (As it happens, the Swiss exchange, identified as "sw", was closed on 31 December and MOB could not be traded on that day.) The important parts of the message are the instruction to Mr Diallo to trade in the last half hour of the day, and to make the closing price as high as possible. Mr Diallo immediately acknowledged the message, which Mr Sejean followed up by a telephone call a few minutes later. The unchallenged transcripts show that he again said that the aim was to secure a very high closing price—as high as possible compared to the last trade. Mr Diallo confirmed that he understood. Mr Sejean warned Mr Diallo that he should take care not to breach the suspension thresholds, that is he should not increase the price of any share to a level which would prompt the relevant exchange to suspend trading in that share. Mr Sejean later confirmed, during an interview with the Authority, that he believed that if any of the stocks was suspended trading might not restart and there would not be a closing price.

38. During the evening of 28 December Mr Sejean sent a Bloomberg message (in English) to another CFE employee who traded on North American markets. It was in similar vein:

> "Hi … I have some orders from stefan [*ie* Mr Chaligné] for monday. Please buy in the last hour of trading next monday 300000 cvi.a 30000 tmb 40000 tsu. The goal is to put each stock price as high as possible at the close, so if you want you can buy most of the volume at the close. I will call u monday before the close. Thanks".

39. We interpose that the Authority places considerable reliance on these messages as evidence, even if indirect, of Mr Chaligné's true intentions. They were sent very soon after the telephone conversations between Mr Chaligné and Mr Sejean, and when, says the Authority, the nature of Mr Chaligné's instructions must have been fresh in Mr Sejean's mind. They are, it argues, clear evidence of an agreement to increase the prices as much as possible, and to do so not by placing the orders during the course of the day, still less over several days, a tactic which would be expected to minimise price movements, but by placing them all shortly before the close of the markets, in order to have the greatest possible impact on the prices and to reduce the chance that they would fall again before the close.

40. The Authority relies also on the sizes of the orders which were placed. The orders in respect of all but two of the stocks represented more than half of the average daily volume ("ADV") over the preceding three months of shares traded in those stocks and, it says, the only reason that was not the case in respect of the other two was that their ADV was so great that the Fund did not have the resources to place such large bids. Even so, the orders were of a high value. With

a single exception, the orders had no price limit: placing such orders at levels higher than the prevailing price executes existing orders placed by other participants and is consistent with an intention that the price should rise as much as possible. The transcript of a telephone conversation between Mr Chaligné and Mr Sejean on 31 January 2008 showed that the reason for the placing a price limit on the one exception was, in Mr Chaligné's words, "so that things look a little more normal". We will deal with Mr Chaligné's answer to these contentions later.

41. The orders, and how they compared to the Fund's existing holdings, are illustrated in the following table. We should perhaps add for completeness that its holdings in MPI and GMA were in the form of contracts for differences, rather than in shares.

Stock	**Number ordered**	**Order as % of ADV**	**Approx value (£)**	**Fund's position**	**Approx value of position (£)**
OLG	30,000	181	453,817	349,321	5,304,934
LAU	120,000	62	295,632	802,904	1,985,772
MPI	400,000	8	1,121,000	3,026,731	8,482,414
MEET	40,000	103	755,994	245,885	4,665,371
GMA	300,000	56	31,500	8,900,000	934,500
CVI	300,000	173	838,595	1,832,400	5,148,350
TMB	30,000	84	851,869	295,300	8,342,729
TSU	40,000	6	706,108	137,400	2,413,187
Totals			5,054,513		37,277,257

42. There were extensive communications between Mr Chaligné, Mr Sejean and Mr Diallo on 31 December 2007, beginning soon after the European markets opened. As there was little dispute about what was said and what was done in relation to the trades on that day, and each of the applicants admits that his conduct amounted to market abuse, there is little to be gained by our setting out the events of the day at length. A fairly short, summary narrative will give a sufficient impression of the morning's trade; as this was the last day of the year most of the markets closed early.

43. At the beginning of the day Mr Diallo took the precaution of ascertaining the relevant suspension thresholds. At 9.30 am there was a telephone conversation between him and Mr Chaligné in which Mr Chaligné asked him to "make it blow up for me"; later in the same conversation he said

> "what I want is that you push it to the maximum … you are the one to see the best timing. I leave it to you … If you want to do it in the last half hour, you do it in the last half hour. If you want to do it in the last 10 minutes, you do it in the last minute."

44. At 11.42, Mr Diallo spoke to Mr Sejean and told him that he had started trading, by placing small bids in order to test the reaction of the market. In fact, he said, the prices had begun to rise. Mr Sejean pointed out that Mr Chaligné's total orders were large by comparison with the ADV of shares traded, and that it would not matter if Mr Diallo could not buy all the shares Mr Chaligné wanted: the most important thing, he said, was to raise the price as high as possible. Mr Diallo asked whether, if a suspension occurred, he should "attack again". Mr Sejean replied that he should, once permission to trade in the stock had been restored.

45. A few minutes later, Mr Diallo called Mr Sejean again, seeking advice about how he could increase the price of GMA, which was traded not by way of an exchange, but with a market maker. The telephone transcript shows that Mr Sejean said, "each time he [the market maker] proposes something, bam you lift and lift and lift".

46. The meaning of this conversation was a matter of some dispute. The Authority's position is that while "lift" (in French "lever"), without more, can be an instruction to take up an offer to sell that might be in the market, the purpose of making such purchases repeatedly (which the instruction to "lift and lift and lift" was encouraging Mr Diallo to do) is to make the price rise, and that was the intended effect. Mr Chaligné and Mr Sejean, however, maintain that "lift" meant no more than "buy", and that all Mr Diallo was being asked to do was to buy as many of the stock as he could. Although we recognise the ambiguity of the term, we have concluded, after listening to the conversation itself, that Mr Chaligné's and Mr Sejean's explanation is to be preferred. We do not, therefore, treat this conversation as support for the Authority's case.

47. At 12.32 pm, Mr Diallo rang Mr Sejean; this conversation took place during the closing auction, and after Mr Diallo had bought 136,534 MPI shares in two transactions, at 12.17 and 12.24, in each case at a premium to the last traded price of 283p. Mr Diallo told Mr Sejean that there were now sellers of MPI at a price of 288p, and suggested buying the balance of Mr Chaligné's order (264,000 shares) at up to 10% more, a level which matched the suspension threshold. Mr Sejean told him to buy the shares in the auction, but without going over the threshold. Within a few minutes Mr Diallo bought the shares, and again spoke to Mr Sejean to inform him of the purchase and that the price of MPI shares had gone up by 2.77% over the closing price on 28 December, which Mr Sejean described as "very good". Part of that rise had occurred before Mr Diallo began to trade, however, and accordingly not all of it is attributable to his dealings.

48. In the same conversation Mr Diallo said that he had managed to place less than 9% of Mr Chaligné's order for LAU (120,000 shares, or 62% of the ADV), and was annoyed to find that the shares were "blocked" at a price of €3.41. He said that he would wait four or five minutes and then "accelerate". Very shortly after the telephone conversation he bought 20,021 shares, and in the last 15 minutes of trading another 16,807, at €3.41: the price at which his earlier trades had executed was €3.39. He then tried to raise the LAU price further by a bid for 72,627 shares placed in the last moments of the auction, but the intended trade did not execute. The successful bids represented only 39% of Mr Chaligné's order, but 55% of the volume traded in LAU during the period while Mr Diallo was trading (though only 26% of all the shares traded on that day).

49. Similarly, the purchase order for 30,000 OLG shares placed by Mr Chaligné represented as much as 181% of the stock's ADV. Mr Diallo bought 13,712 of the shares in several separate transactions during the morning, and purchased a further 11,858 in the closing auction. He acquired a total of 25,570 during the day, amounting to 85% of Mr Chaligné's order. The trades accounted for 93% of the volume of OLG shares traded that day, and for 100% of those traded in the auction phase. The market opened at €20.50 but the price had already risen to

€20.69 when Mr Diallo began to trade. The average price at which he bought was €22.02, and the closing price was €22.55.

50. The purchase order for MEET, as the table above shows, represented 103% of the ADV. Mr Diallo started buying at 11.40 am, when the price was at €26.43, and bought 10,276 shares in separate transactions, at increasing prices, before the auction and a further 15,724 in the auction. He was the only purchaser in the auction, and overall his trades accounted for 80% of that day's volume (and 97% of the volume in the period in which he was trading). The average price at which he bought was €28.86, and the closing price was €29.73, an increase of 14.2% over the opening price of 26.03. Indeed, the price increased so much that trading in the shares was suspended for a few minutes shortly before the auction.

51. Mr Diallo was able to buy only 175,000 of the 300,000 GMA shares which Mr Chaligné had ordered, 75,000 from one market maker and 100,000 from another, in each case at 11p. The second purchase was not reported until after the close and had no effect on the closing price. The Authority's case, which the applicants do not dispute, is that the price increase during the day was from 10.5p to 10.75p, and that the increase was attributable to Mr Diallo's trading.

52. Shortly after the European markets closed, Mr Diallo called Mr Sejean to report to him on the morning's trade. The Authority points out that he did so by giving the percentage by which the price of the stock had risen as a result of his trading activity. Mr Sejean indicated then, and in a number of subsequent conversations and Bloomberg messages, that he was pleased with what had been achieved. A few minutes later, Mr Chaligné telephoned Mr Diallo for an update. The Authority relies upon Mr Diallo's explanation in this conversation of his inability to raise the price of LAU any higher: "… I put a lot on. But I could not understand why that, that did not go higher". Mr Chaligné's reaction to the news was one of approval, to the extent that he used the French word "impeccable", meaning "perfect". However, although it is true (as the Authority points out) that Mr Chaligné made a number of comments expressing approval of the price increases which had occurred, and no concern, still less dissatisfaction, it is apparent if one listens to the recordings of this and, indeed, most other, of his conversations with Mr Sejean and Mr Diallo that his tone of voice is very matter-of-fact; there is no hint of the elation which one might expect if the Authority's arguments about his motives were entirely correct.

53. The shares in LAU which had been acquired were allocated to the Fund. The shares in OLG, MPI, GMA and MEET were not allocated to the Fund, but were instead allocated to a separate investment account used by Mr Chaligné for, it seems, long-term holdings for himself and his family. (We interpose that there were differences between the Authority and Mr Chaligné about the source of the money used for the purposes of this account, and indeed about the reasons why Mr Chaligné used a separate account, but the differences are not relevant to our conclusions and we shall not deal further with them.) Thus while the Fund's year-end NAV rose by reason of the price increases, the Fund did not itself meet the costs of the majority of the trading.

54. We can deal with the North American trading on 31 December 2007 very briefly. There are no closing auctions on the relevant exchanges (NASDAQ, the

New York Stock Exchange and the Toronto Stock Exchange) but instead the closing price is determined by the last trade. Again, Mr Sejean instructed the traders who were dealing in the stocks to place the bulk of the orders as near to the close of the market as possible, and to drive up the prices of the relevant stocks by placing bids at a premium to the prevailing price. As in the case of the European stocks, the tactic succeeded (as the applicants accept) in increasing the prices of the North American stocks (or, in the cases of TSU and TMB, limiting a fall in price which could otherwise have been expected). Mr Chaligné expressed satisfaction in later telephone conversations, though again in a low-key manner. The ADRs in TSU were allocated to the Fund and the others to Mr Chaligné's separate account but, as in the case of the European stocks, the overall effect was to increase the Fund's NAV.

55. As we have said, only Mr Chaligné and Mr Sejean were involved in the 31 January 2008 trading. We need to deal with the day's events in a little more detail in view of Mr Sejean's argument that what he did was not abusive. The trades which took place are, as one might expect, properly documented and there is no issue about them; what is in issue is their purpose. That is most clearly evidenced by the transcripts of telephone conversations between the two applicants which, again, were not disputed in any material way.

56. As before, there were several such conversations during the course of the day, in which Mr Chaligné placed orders to buy significant quantities of OLG and MOB. It seems that no other of the Fund's stocks were traded on that day. At that time the NAV of the Fund was approximately €87 million, or £65 million at the prevailing exchange rate. Its holdings of OLG and MOB together represented about 14% of that value and significant changes in their prices were likely to have a correspondingly material effect on the NAV. The available evidence did not establish clearly the size of the orders placed by Mr Chaligné with Mr Sejean, but the executions which resulted represented 66% of the ADV in MOB and 75% of the ADV in OLG; the Authority argues that trading of such volumes can normally be expected to have a material impact on the price of the stocks, and that was Mr Chaligné's intention.

57. On 30 January, Mr Sejean had purchased 7,210 MOB for Mr Chaligné. The following morning he telephoned in order to report on the dealing; in the course of the conversation Mr Chaligné commented that MOB was "falling down", and instructed Mr Sejean to purchase a further 5,500 shares, an order which Mr Sejean executed immediately. In the same conversation they discussed "lifting" not only MOB but also CVI, OLG and MEETIC.

58. At 2.36 pm, Mr Chaligné telephoned Mr Sejean. It was in the course of this, fairly lengthy, conversation that he said "so that things look a little more normal on OLG … buy them up to 19.50"; the best offer in the market at the time was €19.29. Mr Sejean made an immediate purchase of 612 shares, while they were still talking. There were then exchanges about further possible trades before Mr Chaligné asked Mr Sejean to buy "30 or 40,000" shares in MOB. When Mr Sejean expressed concern that he would not be able to execute an order of that size, Mr Chaligné responded that executing the entire order was "not the goal". Mr Sejean said that he understood and assured Mr Chaligné that "I'm not going to

do that to you. We're going to see what I can do to make it go up, hoping there aren't any big sellers hiding in the wings."

59. Mr Sejean made two small purchases of OLG shortly before the auction. Then, in the auction, which lasted for the relevant exchange's usual five minute period, Mr Sejean placed three orders for shares in OLG, resulting ultimately in the purchase of a further 5,600. The first was a market order (that is, an order without a price limit which is given priority in the subsequent uncrossing and price determination phase of the auction) to buy 2,000 shares. This had the effect of pushing the theoretical (as it remained until the uncrossing) price to €20.40. However, 30 seconds before the close he cancelled this order and replaced it with a larger market order for 3,000 shares. This had the effect of further increasing the theoretical price to €21. A seller entered the market at that point, offering 2,000 shares at €20.60. That offer had the effect of reducing the theoretical price to €20.60. Then, three seconds before the end of the auction, Mr Sejean cancelled the order for 3,000 shares and replaced it with another, larger still, market order for 5,600 shares. The timing of this order, as is conceded, gave other market participants little or no time to react, and had the effect of returning the theoretical price to €21. The order was executed in full, and the shares bought represented all the OLG shares traded in the auction on that day. The theoretical price of €21 became the closing price; it was the highest price of the day, and represented a 7.69% increase on the previous day's closing price. That price had fallen slightly before Mr Sejean began trading, and if the Authority's analysis is right (and neither Mr Chaligné nor Mr Sejean challenged it) the price increased by 8.8% as a result of Mr Sejean's orders. An examination undertaken by Mr Hacon of the available records showed that the last of the orders was the largest market order in respect of OLG to be entered in the closing auction in the entire month of January and that it was entered much later than the time at which market orders are typically entered.

60. The evidence relating to trades in MOB is similar. During the course of a telephone conversation at 9:37 am, Mr Chaligné instructed Mr Sejean to buy 5,500 MOB shares, which he did immediately. He made four more purchases during the afternoon, bringing the total number of shares purchased during the day, but before the closing auction, to 13,494. He then placed further orders during the auction: first a market order to buy 10,000, amended five seconds before the end of the initial phase of the auction to 26,506 shares. This order was executed in full, and represented almost all of the shares traded in the auction—the only other order to be executed was for 45 shares. The Authority's case is that this pattern of trading, particularly the placing of a very large market order very late in the auction period, is most unusual. The order to buy 26,506 MOB is, moreover, conceded to have been the largest such order to be entered in the closing auction in the entire month of January, and was nearly twice the size of the next largest order.

61. Following the close of trading, Mr Sejean sent Bloomberg messages to Mr Chaligné reporting on the closing prices of OLG and MOB. He told him that the price of OLG had increased by 7.69% and that the price of MOB had increased by 5.09% .

62. Shortly afterwards, Mr Sejean telephoned Mr Chaligné . He said, in respect of OLG, that "if at any time someone started to press, [he] upped the volume". Mr Sejean said that, in the end, he did not have to go too high, as the seller pulled out and "left us quoted 21". During the call, Mr Chaligné referred to the fact that bids from various TV stations for television rights in relation to matches in the French Football League were being made and he commented: "so I was right to buy. At 21 I was right to buy".

63. The Authority accepts that Mr Chaligné had a legitimate long-term interest in OLG, which is the holding company for a prominent French football club in Lyon, and that the price of the stock may well have been influenced by the TV rights bidding process. But, it says, that interest does not explain the extraordinarily short term nature of the trading on 31 January 2008, at a time when no imminent announcement of the outcome of the bidding was expected.

The result of the trades

64. The Authority says that the 31 December 2007 trades had the desired effect: the closing prices of OLG, MPI, GMA and MEET were all at the highest level achieved during the sessions. Mr Diallo also made the highest-priced purchase of the day in LAU, although the price had fallen away by the close. A comparison of the closing prices on 28 December 2007, the last preceding trading day, with those on 31 December 2007 shows that the price increases in OLG and MEET represented the largest daily movements for either stock in the entire period from their admission to trading on the relevant market, Euronext Paris, until the end of December 2009. Mr Diallo was not able to execute Mr Chaligné's orders in full. Had he done so, the Authority says, the impact on the closing prices would have been greater still. The trades on 31 January 2008 likewise led to large price increases.

65. It is not disputed that the increase in the value of the Fund attributable to the price movements in the European stocks resulting from what the Authority says were abusive trades amounted, on 31 December 2007, to €1,799,510 (equivalent, using the exchange rate adopted by the Authority, to £1,323,364) and on 31 January 2008 to €639,257 (£477,307), a total of €2,438,767 (£1,800,671). A further increase was, the Authority says, attributable to the movements in the prices of MOB and the North American stocks, which do not fall within s 118. These increases are together equivalent to estimated uplifts in the Fund's NAV of 2.88% and 1.13% respectively.

66. The Authority relies, for its argument that Mr Chaligné was attempting to make the Fund's performance appear better than it truly was, and thereby benefit from higher management fees, on a comparison with the Dow Jones Stoxx 600, the benchmark index for the Fund. Over the whole of 2007, the Fund's NAV appreciated by 4.56%, while the Stoxx 600 fell by 0.87%. This equates to an outperformance by the Fund of 5.43% during the course of 2007. However, the outperformance was entirely attributable to the earlier months of the year, since the Fund's NAV fell by 6.39% in November 2007, while the Stoxx 600 fell by 4.65% (an underperformance by the Fund of 1.74%) and in December it fell by a further 2.12%, against a fall in the Stoxx 600 of 1.64% (an underperformance by the Fund of 0.48%). In January 2008 the Fund's comparative performance

improved, in as much as its NAV declined by 8.8% while the Stoxx 600 fell by 11.6%. This represented an outperformance by the Fund of 2.8%.

67. Without the trading on 31 December 2007 and 31 January 2008, the Authority says, the performance of the Fund, as compared with the Stoxx 600, would have been an underperformance of 3.36% in December 2007, an outperformance of 2.55% during the whole of 2007 and an outperformance of 1.67% in January 2008. These figures were not disputed by Mr Chaligné. The result of the trading on 31 December 2007 and 31 January 2008 was, therefore, exactly as Mr Chaligné intended: to improve the comparative performance of the Fund. It also reduced its apparent volatility, assessed by reference to its monthly performance, by reducing the falls in the NAV between 30 November 2007 and 31 December 2007 and between 31 December 2007 and 31 January 2008.

68. Although he does not accept the Authority's case about his motives, Mr Chaligné does not dispute its analysis of the result of the trading.

Mr Chaligné's conduct

69. We have set out the substance of the Authority's case above and need not repeat it now. The essential question, as we have explained, is whether Mr Chaligné was dishonest and, if so, in what respects.

70. As we have said, Mr Chaligné now acknowledges that what he did amounts to market abuse within the meaning of s 118. However, he made that acknowledgment only reluctantly, and he continues to maintain that, abusive or not, his conduct was consistent with a legitimate long-term investment strategy of combating downward pressure in a difficult and volatile bear market, that he was trying to support the prices, not to increase them to their maximum possible level, that he was not dishonest, in particular that he was not attempting to increase the level of the fees payable to Cambos, that the stocks acquired were retained and not re-sold immediately for short-term profit, and that he should be treated as misguided rather than anything worse. An unrealistically low share price, he said, put a company at risk because it made it more difficult to obtain finance, whether by way of capital subscription or by way of borrowing. The Fund had a legitimate interest in ensuring that companies in which it had invested prospered and it was for that reason that he had attempted to support the prices. This was, in fact, the thrust of his evidence, both before the RDC and before us.

71. He strongly denied in his evidence before us that he had realised at the time that he was acting improperly, although he did concede, again reluctantly, that a man of his market experience should have recognised, without training or instruction, that price manipulation, even if undertaken for the best of motives, was unacceptable.

Mr Chaligné's submissions

72. Mr Chaligné emphasised the investment objective of the Fund, which he described as one of seeking consistent absolute returns with limited risk. He described himself as a "stock picker", or "fundamental player", investing primarily in long positions on listed equities and equity-linked instruments, with little or no leverage and limited hedging. His strategy, he told us, is simple but

labour intensive: he conducts extensive and rigorous research to establish his target company's true worth, accumulates stock until its price nears or reaches that fair value, and then sells it. By the end of December 2007, he said, the Fund's position was longer than ever before. The Fund had always had a small, stable number of investors, all either members of his family or close friends, had never been marketed and had been closed to new investors since 2004. It became apparent to us from his evidence that Mr Chaligné does indeed spend a good deal of his time managing the Fund, and that he does so professionally and in accordance with the objectives and strategy he described.

73. Mr Barnard particularly drew our attention to a telephone conversation between Mr Chaligné and Mr Diallo on 31 January 2008. The conversation was, he said, important for three reasons. First, Mr Diallo gave a contemporaneous account of the market's volatility as he perceived it. Second, it showed that Mr Diallo shared the pessimism evident within articles published in the financial press at the time: that the market would be gripped by very considerable selling pressure. Third, Mr Diallo also expressed the "doomsday" view current at the time, in which accelerating selling in an increasingly panicked market would wipe the value from what were in truth perfectly good shares. There was, Mr Barnard said, evidence that the market might no longer operate efficiently in determining the fair values of stocks. Mr Chaligné's conduct, he said, was a rational reaction to those fears.

74. Mr Barnard argued that the shoring up of the share prices involved no obvious deception, as in the case of well-known devices such as "wash trades" or "painting the tape": on the contrary, Mr Chaligné paid real money to buy stocks for the Fund or for his other investment account, and the Fund and that account (in both of which he had a large personal stake) assumed a real investment risk. Thus, said Mr Barnard, while his actions may have forced up the prices, the Fund's exposure and risk were to be measured by reference to those increased prices. Though he may have achieved higher prices by what he now recognises to be improper means, he nevertheless had a genuine interest in the stocks and in consequence a legitimate interest in their price levels. In fact, we should point out, the evidence showed that the greater part of the risk was assumed by the other account, and that the Fund benefited from the rise in its NAV at little cost.

75. It was worth asking whether Mr Chaligné's shoring up strategy made coherent sense. The Authority's position was that the fair and appropriate price of a stock is determined by the proper interplay of supply and demand, a view to which Mr Chaligné has subscribed for almost all of his trading life. His evidence, however, was that the turmoil in the markets which began in 2007 and continued unabated at the relevant time introduced quite different considerations. There was considerable press comment at the time about the unpredictable and volatile nature of the markets (several examples were included in the bundles of evidence before us) and that volatility was clearly of great concern to Mr Chaligné, as his telephone conversation with Mr Diallo with which we dealt at para 73 above showed.

76. Against that background, Mr Chaligné's fear that his stocks would come under attack must be regarded as rational. It was quite reasonable for him to fear that the interplay of supply and demand was resulting in unfair and inappropriate

prices for the stocks he held, or at least threatening to do so, and his reaction to that fear was itself reasonable.

77. Mr Chaligné is not an authorised person, and was not authorised at the relevant time. It was not in dispute that he last took a regulatory examination in 1984, in the USA. That was nearly a quarter of a century before the relevant events, and two years before the Financial Services Act 1986 (FSMA's predecessor) came into force. He had not been trained in the workings of the FSA's Code of Market Conduct, and had not read it, and there was no reason why he should have done so. He ceased to be a registered person in 1999, before FSMA was enacted. He undertook no compliance training thereafter (and was under no obligation to do so).

78. There was no evidence that anyone warned Mr Chaligné that his actions were, or even might be, improper. He gave instructions for the trades while he was working, alone, in his office in Geneva. He had no compliance officer to warn him that he might be embarking on prohibited conduct. The Authority does not contend that Mr Sejean or Mr Diallo, or anyone else at CFE, ever suggested to Mr Chaligné that what he was doing was wrong, and neither Mr Sejean nor Mr Diallo had said that he did. Although CFE was an execution-only broker, a client such as Mr Chaligné should be able to rely on its refusing to accept improper instructions.

79. Mr Barnard referred us to the observation of Lord Hoffman in *Twinsectra Ltd v Yardley and others* [2002] 2 AC 164 at [20] that, when deciding whether a finding of dishonesty is appropriate,

> "I consider that [the established] principles require more than knowledge of the facts which make the conduct wrongful. They require a dishonest state of mind, that is to say, consciousness that one is transgressing ordinary standards of honest behaviour."

80. We need at this point to deal with Mr Spens' evidence. It was that a fund manager with a long term investment strategy such as that claimed by Mr Chaligné would act very differently. Ordinarily, he said, such an investor would seek to buy his favoured stock in a way which was not disruptive to the price, and at an optimal (that is, the lowest possible) level. Typically he would purchase such stock at various times throughout a period when he perceived that the stock was good value, and would limit the volume purchased, and the upper price level, in a manner designed to minimise potential price movement. By this means, favoured stock can be acquired at lower prices, resulting in capital appreciation over the long term. By contrast, Mr Chaligné's orders were designed to coincide with the Fund's valuation dates; were time specific (being executed over a short period in the latter stages of trading on those dates); were large in relation to the ADV of the stocks; and with only one exception were market orders. The trades were, in his view, inconsistent with a long term investment strategy.

81. Even if, he said, Mr Chaligné genuinely thought the prices of the stocks needed to be "shored up", his claimed strategy for doing so (whether or not it amounted to market abuse) made little sense. A long term investment manager who believed that shares in which he was interested were under-valued, for example as a result of perceived increased selling pressure or short selling, could

take advantage of the low price by buying, in order to benefit from a later increase in price. An investment manager adopting a defensive trading strategy—which is what, in effect, Mr Chaligné claimed to be doing—would reduce his bid price in response to any significant selling pressure, and place a series of orders at specific, reducing, price levels. Mr Chaligné did not do that; he placed large market orders which can usually be expected to execute immediately at the best available price. Such orders are likely to raise prices. But an investment manager faced with selling pressure would not place such orders because they typically result in him paying more than necessary for the shares; he would be supporting the prices but at an unnecessary excess cost to his fund.

Conclusions on Mr Chaligné's conduct

82. We are satisfied that Mr Chaligné's purpose was not to increase the fees payable to Cambos; in short, we accept his evidence that cheating his family and friends (which would be the effect of such conduct) was not in his contemplation. We prefer the view that he intended to support, and if possible improve, the NAV of the Fund, for one of two other reasons. The first, as Mr Mitchell suggested, was to dissuade investors from withdrawing their funds. There was some evidence available to us about withdrawals which occurred in 2007 and 2008, but none from which we could properly draw conclusions about the risk of further withdrawals, still less the extent to which investors may have been dissuaded from withdrawing as a result of Mr Chaligné's conduct. The second reason, which we find more probable, is that Mr Chaligné acted as he did for reasons of pride: we have formed the view that he wished to be seen as a competent fund manager in a difficult market. We had no evidence to suggest that at other times Mr Chaligné had been anything other than a prudent and experienced fund manager. Nevertheless, though it may not have been venal, his conduct on 31 December 2007 and 31 January 2008 was in our judgment dishonest in the broader sense identified by Lord Hoffman in the extract from *Twinsectra v Yardley* set out above.

83. We do not accept Mr Chaligné's claim that he did not ask Mr Sejean and Mr Diallo to increase the prices of the stocks as much as possible, and that they misunderstood him. It is true, as Mr Barnard pointed out, that he did not give such an instruction in unequivocal terms, although in the telephone conversation with Mr Diallo on the morning of 31 December 2007, to which we referred at para 43 above, he did say "make it blow up for me" and "push it to the maximum", both phrases at the least consistent with the view that his intention was to achieve the greatest possible increase. Much was made by Mr Barnard of the possibility that the quality of reception when Mr Chaligné and Mr Sejean spoke by mobile phone on 28 December was poor, and that this may have contributed to misunderstanding between them. Had the evidence rested there, we might well have been willing to resolve this point in Mr Chaligné's favour.

84. Mr Sejean, however, has consistently said that the instruction given to him in those telephone conversations was accurately reflected in the Bloomberg messages he sent, namely that the aim was to raise the prices as high as possible at the close. Examination of the transcripts of later telephone conversations, not tainted by possible poor reception (indeed, we have listened to some of them

ourselves) shows that at no point did Mr Chaligné express any misgivings about the strategy which was being adopted, of placing orders at increasingly higher prices and of doing so near to the close of the markets. We also consider it of great significance that the conduct occurred at year-end and month-end; there was no evidence that Mr Chaligné traded in a manner designed to support the prices of the Fund's stocks, as he claimed was his purpose, at other times. If that was his true purpose he would not achieve it by only intermittent support.

85. We also do not accept Mr Chaligné's claim that he did not know, or at least realise, at the time that his conduct was improper. It is true that none of the CFE staff to whom he spoke warned him but, as we explain later, we do not think the absence of a warning assists him on this point. In our view he could have failed to recognise the impropriety of his intended course of action only if he deliberately closed his eyes to the obvious. But all of the transcripts show that he knew that the prices were being pushed up, not in the ordinary course of share dealing, but by deliberately placing large orders at chosen times when a resultant price movement could be confidently expected. We think it significant too that Mr Chaligné made the comment about the need for appearances to be "more normal" (see para 40 above); that is, in our view, a clear indication that Mr Chaligné knew that the bids which were being placed would draw attention to themselves precisely because they were out of the ordinary. He did not have any real answer to this point. In short, we agree with Mr Spens that his conduct was not that of a prudent fund manager respecting market rules.

86. Mr Barnard emphasised the absence (as we have accepted) of an intention by Mr Chaligné to increase Cambos' fees, even if that was the effect of his conduct, and his evidence that he was attempting to support the companies in which the Fund had invested, rather than to make short-term gains—in particular, the stocks acquired had been retained and not immediately re-sold at a profit. We are not, however, persuaded that these points help Mr Chaligné much. Even if we accept that his underlying objective was to support those companies, the fact remains that he was an experienced market user. If he knew his actions were improper his underlying motive does not, and cannot, excuse his conduct. If he did not, he is not fit and proper to be a market participant. His failure to recognise, until a relatively late stage, that what he did was abusive is in itself a matter of serious concern.

Mr Sejean's conduct

87. Mr Sejean, to his credit, has accepted that he realised, even without being expressly told, that the year end was likely to have significance for the Fund and that, whatever Mr Chaligné's underlying purpose, the price manipulation in which Mr Sejean engaged amounted, even if only in December 2007, to market abuse and was prohibited. Despite his reservation about the January trading, he has not concealed what was done. He accepts too that he did not warn Mr Chaligné, and did not attempt to deflect him in any other way, that he executed the instructions he was given fully and without making any attempt to avoid committing market abuse, and that he instructed subordinates, particularly Mr Diallo, to execute the trades on 31 December. He acknowledges that he was motivated in part by his desire to retain what he considered to be a good client, and in part by his desire to

increase his commission at a time when, because of market conditions, the commission he was earning was less than had been the case in earlier months.

88. Mr Sejean disagreed in several respects with Mr Spens' analysis of the trading. We do not mean any disrespect to either of them when we say that we did not find the analysis, or the criticisms of it, of great help. The essence of Mr Sejean's case in relation to January 2008 is that he believed Mr Chaligné was pursuing a legitimate trading strategy and had no reason to think otherwise. He emphasised that he traded on the Fund's account throughout the day, and not merely at or near the close, thus differentiating what happened then from what had been done in December. He also emphasised the fact that there was considerable speculation at the time about the bidding for the French television rights for first division football, and that the Fund had a legitimate interest in maintaining and extending its holding in OLG, which could expect to benefit significantly once the result of the bidding was announced.

89. We reject those arguments. We detect no material difference between what was done then and what was done in December, nor do we detect any reason why Mr Sejean should have thought, then or since, that there was any such difference. Mr Chaligné's instructions were of a similar character, and there is nothing in the telephone or Bloomberg exchanges between them to suggest the objective and the tactics to be adopted to achieve that objective had changed. Mr Chaligné himself accepts that if the December 2007 conduct was contrary to s 118(5), so too was what was done in January 2008. We are satisfied, in short, that Mr Sejean simply did what was asked of him, without reflecting on whether it was lawful or not and, as the Authority correctly contends, it was merely more of the same.

90. It does not, of course, excuse his conduct that Mr Sejean was acting on a client's instructions, nor that the additional commission he expected to earn was modest. We shall deal with what we consider to be the appropriate consequences for him of his conduct shortly; for the present we record that this is in our view as serious a case of market abuse of its kind as one might conceive. It was repeated, it was knowing, it was venal, it was committed by an approved person and it included, in December 2007 and in relation to the conduct within s 118, the enlistment of an inexperienced subordinate. We detected little if any remorse. The only mitigation we perceive is that, as we have said, after some initial dissembling Mr Sejean has not attempted to conceal the facts of his wrongdoing, even if he continued to assert that the January 2008 conduct was not abusive.

Mr Diallo's conduct

91. Mr Diallo also accepted that he realised that the year end was likely to have significance for the Fund, that he knew that what he was being asked to do amounted to market abuse, and that he did not protest. As we have already observed, he told us that he did not do so because he had no-one else to whom he could turn, save for Mr Sejean, because very few CFE staff were working at the time, and that he was fearful for what he believed was already a precarious job. He recognises now that he should have refused to do as Mr Sejean asked, and have accepted whatever were the consequences for his continuing employment. We are satisfied that he is genuinely remorseful, and not merely because of the

consequences for him and his family of his conduct. We accept that those factors do amount to some mitigation.

92. On the other hand, we cannot disregard the facts that Mr Diallo is an intelligent and well-educated man and that he was an approved person. While, as we accept, his subordinate position makes him less culpable than Mr Sejean, he was in our view nevertheless guilty of serious market abuse. He attempted to distort the prices of several stocks, engaged, even if in the course of a single day, in repetitive conduct, and knew that what he was doing was wrong. Even if we accept that there was no-one else available to whom he could turn—and since the Authority did not contend that there was, we are content to do so—the absence of any protest, even in mild terms, to Mr Sejean, about what he had been asked to do must count against Mr Diallo.

Prohibition and cancellation of approval

93. The power to make a prohibition order appears in s 56 of FSMA which, so far as material to these references, provides that:

> "(1) Subsection (2) applies if it appears to the Authority that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person.
>
> (2) The Authority may make an order ('a prohibition order') prohibiting the individual from performing a specified function, any function falling within a specified description or any function.
>
> (3) A prohibition order may relate to—
>
> (a) a specified regulated activity, any regulated activity falling within a specified description or all regulated activities …
>
> (7) The Authority may, on the application of the individual named in a prohibition order, vary or revoke it …."

94. Although a prohibition order relates to the carrying on of regulated activities, it is not a pre-condition that a person against whom such an order is made is an approved person. Thus Mr Chaligné may properly be the subject of an order.

95. The withdrawal of approval is dealt with by s 63. Only sub-s (1) is of any relevance here:

> "The Authority may withdraw an approval given under section 59 if it considers that the person in respect of whom it was given is not a fit and proper person to perform the function to which the approval relates."

96. Thus the test for the exercise of the two powers is the same: whether or not the person concerned is "fit and proper" in the eyes of the Authority or, on a reference, of the tribunal. The Authority's views are set out in Chapter 9 of its Enforcement Guide, as the "Fit and Proper Test for Approved Persons", otherwise known as FIT. Those views do not bind the tribunal, but in the interests of consistency they are generally respected, and they are in any event largely uncontroversial. The factors which are likely to lead to a conclusion that a person is not fit and proper include, among others, whether he has been guilty of market manipulation (whether or not it amounts to market abuse within s 118). In our

view anything but a wholly inadvertent, technical breach of s 118, promptly remedied, will almost always lead to prohibition. The conduct in this case is, self-evidently, not of such a character.

97. Mr Chaligné did not, ultimately, contest the making of a prohibition order against him, and Mr Sejean did not argue that the withdrawal of his approval as well as his prohibition were anything other than the inevitable consequence of his actions, though he made some observations about their impact on the scale of the penalty, to which we come in the next section of this decision. It will be apparent from what we have just said that if they had not accepted it, we would have been compelled to dismiss Mr Chaligné's and Mr Sejean's references in respect of their respective prohibition. Theirs was calculated, repeated conduct by persons who knew, or should have known, that what they were doing was wrong. It is a matter for some concern that, even now, Mr Chaligné does not seem to understand fully why what he did was abusive and, as we have said, Mr Sejean exhibits little remorse or, we think, recognition of the reasons why his conduct was unacceptable.

98. Mr Diallo, however, did argue that prohibition is excessively severe in his case, even though he accepted that the withdrawal of his approval was inescapable. He told us (and it was undisputed) that he had been working for CFE since June 2006, apparently soon after graduating. He began as an analyst but the banking sector crisis during 2007 led to redundancies. In order to protect his position he began working additionally as a trader which, he said, pleased his managers because he was doing two jobs for only one salary. His trading activities started in February 2007. We interpose that the banking crisis had not then begun, and Mr Diallo's explanation does not entirely ring true. Nevertheless, we accept that at the relevant time he was a relatively inexperienced trader.

99. He did not dispute that he placed the orders Mr Sejean passed on to him on 28 and 31 December 2007 and he did not disagree with any of the detail of the transactions as we have described them above. He also did not contend that he was unaware at the time of the underlying purpose of making the prices rise. We interpose that it would have been unrealistic for him to do otherwise; the transcripts of his telephone conversations with Mr Chaligné and Mr Sejean and the Bloomberg messages show that although he needed some guidance on the manner in which the trades should be executed, he fully understood what Mr Chaligné was attempting to achieve. He evidently felt strongly that Mr Sejean had taken advantage of his inexperience and fear of losing his job, and of Mr Diallo's inferior status within CFE.

100. Mr Diallo recognised that his conduct could not go unpunished—hence his acceptance of the loss of his approval—but, he said, prohibition, which he described as "a life sentence", was too severe. He emphasised not only his lack of experience, and the fact, as we have already mentioned, that he was reliant at the relevant time on Mr Sejean for guidance in the absence of any other senior person to whom he could turn for advice, but also the fact that he had been induced to execute the trades by Mr Sejean, who, he said, had taken advantage of his inexperience and his fear of losing his job. He had made an error of judgment but had not stood to make any gain from it, beyond the preservation of his job, but in fact he had lost his job, and was, now, for all practical purposes unemployable in

the only industry he knew. He emphasised that he had cooperated with the Authority's investigation, including attendance at a long interview when he had answered the questions put to him, and that he had not denied what he had done. He was not the instigator of the trades, and had done no more than he had been instructed to do. The fact of prohibition, coupled with the loss of his job, had caused severe hardship to him and his family and it was unfair and unreasonable that he should remain subject to prohibition indefinitely.

101. We accept that there is some merit in many of these points, although, as we shall explain, for the most part they are relevant only to the scale of the penalty. It will be clear from what has gone before that we are satisfied there is substance to Mr Diallo's claim that he was induced to act as he did by Mr Sejean. We accept, for the reasons we have given, that he had no other person in authority to whom he could turn, that he believed his security of employment to be precarious, and that this combination of factors led him to act as he did. Nevertheless, we consider it a point of some significance, which counts against him, that there is nothing in the transcripts of Mr Diallo's telephone conversations with Mr Sejean and Mr Chaligné, or in the Bloomberg messages, to suggest that he queried the instructions he was given or made even a mild protest about what he was being asked to do.

102. Mr Mitchell argued that a prohibition order was not merely appropriate but inevitable, and that Mr Diallo was fortunate not to have been made subject to a penalty as well. Participants in any market are entitled to assume that it is being operated, by others engaged in it, in an honest manner, and in accordance with the rules of that market. Abuse is serious not only because it undermines the honest and efficient operation of the market affected by it, but also because the difficulty of detection itself undermines confidence. As a matter of principle both severe punishment and removal from the market must be expected by those who are caught.

103. We agree. Prohibition undoubtedly has a punitive effect, one which cannot be ignored, and which may be a relevant factor when the scale of a monetary penalty is determined, but its plain primary purpose is to protect market users (or, depending on the case, consumers) from those who have abused the trust reposed in them to act in accordance with the law and the applicable rules when (in the context of this case) trading on a relevant market. There may, as we have indicated, be some minor cases in which a breach of s 118 does not lead to prohibition; but this is not one of them. In the absence of wholly exceptional circumstances, deliberate conduct amounting to abuse, even if not undertaken for dishonest reasons, and even when the person concerned stands to make no immediate personal gain, must result in prohibition if market confidence is to be maintained.

104. Mr Diallo's actions, even though not undertaken with a view to personal profit (we look upon a desire to preserve his employment in a different light), were not due to momentary lapse or innocent mistake. By his own admission, he knew that what he was asked to do was wrong and, whether or not influenced by a superior, he did it. He has accepted that he should have refused. But he did not, and that is not the behaviour of a person who is fit and proper, by which we mean a person who can be trusted, whatever the pressures on him, to respect the law and

the rules of the market. Mr Diallo's conduct cannot properly be marked by anything less than prohibition, not as a form of punishment, but for the protection of other market users and (which is equally important) as a clear indication that conduct of this kind, even by a person in a junior position, is unacceptable.

105. Mr Diallo's main concern, as he put it to us, was what he perceived as the "life sentence" which prohibition represents. The extract from s 56 which we have set out above includes sub-s (7), which allows for a prohibition to be lifted in a suitable case. It is not appropriate for us, in the context of this reference, to say whether, still less when, the Authority might take the view that revocation of the prohibition should be considered favourably. We merely say that we formed the opinion, despite the tenor of the observations we have made above, that Mr Diallo was foolish and misguided rather than anything worse and that, in time, and after some appropriate training, experience and greater maturity, revocation may be a suitable course in his case. We regret we cannot say the same about Mr Chaligné or Mr Sejean.

Penalties

106. The penalties were imposed on the applicants in accordance with s 123 of FSMA:

> "(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.
>
> (3) If the Authority is entitled to impose a penalty on a person under this section it may, instead of imposing a penalty on him, publish a statement to the effect that he has engaged in market abuse."

107. None of the applicants has argued, nor realistically could they do so in view of our findings, that they are entitled to the protection of sub-s (2). Mr Diallo was dealt with by way of a statement published in accordance with sub-s (3), and he did not challenge that course of action; thus we do not need, nor do we think it appropriate, to say any more about his position, beyond remarking that we agree that the consequences for him of what he did have been catastrophic and that the additional imposition of a penalty would serve little useful purpose. Mr Chaligné accepted that some penalty was inevitable, but disputed the amount (and, as we have said, the Authority invited us to direct an increase of the penalty imposed by

the RDC); he did not argue that the penalty on which we determined should be adjusted on grounds of financial hardship. Mr Sejean challenged both the scale of the "headline" penalty, with which we deal below, and the extent to which it should be adjusted by reason of his personal circumstances, and as we have mentioned the latter issue will be determined separately.

108. There is relatively little precedent in respect of penalties for market abuse, and such precedent as there is covers several different types of conduct. It offers some guidance, but we shall ultimately have to reach a conclusion of our own. Precedents to which we were referred include (among others) *Jabre*, mentioned above (insider dealing, and therefore conduct of a very different character); *Atlantic Law LLP and Greystoke* ("boiler room" selling, and again rather different conduct); *Visser and Fagbulu* (price manipulation) and *Eagle* (share ramping). The latter two are helpful, although the conduct in each case was conspicuously worse than that here.

109. Mr Visser instigated price manipulation on several occasions, with Mr Fagbulu's assistance. The aim was to improve the apparent NAV of a hedge fund, which ultimately collapsed causing the loss of all the investors' money. Mr Visser's conduct was cynical, calculated and repeated, and he appears—though it is not certain—to have profited personally from it. Mr Fagbulu was in a similar position to Mr Diallo, that is a subordinate of limited experience enlisted to help, rather than the instigator, and he made nothing from the abuse. The tribunal upheld a penalty of £2 million imposed on Mr Visser, and a "headline" figure in Mr Fagbulu's case of £350,000, while indicating that £500,000 could be justified, but that the penalty would not be increased for fear of deflecting meritorious references. Mr Eagle suffered a penalty of £2.8 million, of which £1.3 million represented disgorgement, for conduct intended to yield significant profit for himself, and which succeeded in that purpose. He bullied a subordinate into helping him.

110. We start, in what follows, from the position that any form of market manipulation is a serious matter. As we have already pointed out, users of markets are entitled to assume that other participants are operating within the rules of the market, that prices (whether of stocks, commodities or derivatives, for example) reflect supply and demand faithfully, and that bids or offers are not being placed in such a manner as to confuse or mislead not only human traders, but also the computers which are increasingly commonly utilised, not least in the uncrossing stage of the auction we have described.

Mr Chaligné

111. We should first make it clear, by way of summary and in case there should be any residual doubt despite his ultimate acceptance of this aspect of the Authority's case, that we are satisfied that Mr Chaligné should have known that what he instructed Mr Sejean and Mr Diallo (as well as the other CFE traders) to do amounted to market abuse. He was a man of mature years, and an experienced market participant both as an investor and, in earlier years, as an analyst and trader. Anyone in his position should have realised, unaided, that tactics designed to effect an increase in the price of stocks at the close by eliminating the possibility of a natural correction, as these were, were likely if not certain to be

contrary to the rules of the relevant market. In those circumstances we do not consider that the absence of any warning to him by Mr Sejean or Mr Diallo about the nature of the instructions, or their willingness to execute his instructions, can be regarded as any form of mitigation, still less a defence. Ultimately, Mr Chaligné, or Mr Barnard on his behalf, accepted all these points.

112. We have recorded already that we are satisfied from his evidence and from his demeanour that Mr Chaligné was not driven by a desire to increase the fees payable to Cambos by the Fund; the increase was, we have concluded, a consequence of his actions but not their purpose. To that extent we differ from the Authority, and do not find this part of its case made out. However, although Mr Chaligné's motive may not have been to profit, he has done so and the disgorgement element of the penalty was properly imposed in principle. In the course of the hearing we expressed one misgiving to the Authority. If one starts from the principle that that element of a penalty is intended to recover the illicit gain, but no more, it seems to us that where (as here) much of the illicit gain was earned in euros (only MPI and GMA were traded on UK exchanges), and there has been significant movement, adverse to Mr Chaligné, in the sterling to euro exchange rate in the intervening period, so much of the disgorgement as reflects a euro gain should be measured in euros. The parties have since agreed, in the light of that observation, that the disgorgement element of the penalty should be €362,950.

113. There is no need to deal with the remainder of the penalty in euros, and we shall confine ourselves to sterling.

114. Although the Authority asked us to increase the penalty (excluding disgorgement) from the £900,000 imposed by the RDC to the £1.25 million proposed by the Authority to the RDC or, alternatively, to £1 million, and Mr Chaligné asked us to reduce it, it is ultimately for us to decide the appropriate amount. Part of the Authority's case is that some of Mr Chaligné's conduct before and following the RDC's determination was itself dishonest, in that he failed to recognise and accept the impropriety of his conduct and make a "clean breast" of his wrongdoing. We are not persuaded to that view. As we have said, there was only late, and somewhat reluctant, acceptance on Mr Chaligné's part of wrongdoing; and even now we are not convinced that he fully understands why what he did was wrong, or why it is important that those who engage in conduct of that kind must suffer condign punishment, not least as a deterrent to others. But we prefer the view that this failure is attributable, not to dishonesty, but to a lack of understanding. That is not to say that Mr Chaligné's behaviour, once his conduct was discovered, is irrelevant, nor that lack of understanding amounts to any form of excuse.

115. Although, as we have indicated, we take the view that the conduct in *Visser* and in *Eagle* was worse, we have nevertheless reached the conclusion that Mr Chaligné's was deliberate manipulative conduct, which was repeated, and that there is little to be said by way of mitigation save that the motivation was not venal dishonesty. If £500,000 is appropriate for conduct of the kind in which Mr Fagbulu engaged, it is insufficient for Mr Chaligné, who was not an employee subject to pressure imposed on him by a superior, but an experienced and mature market user to whom it should have been obvious that price manipulation was

unacceptable, yet who engaged others to embark on such conduct on his behalf. His inability or reluctance to understand why what he did was wrong is a matter of some concern, since it is important that market users recognise that s 118, and many other provisions of FSMA, apply to them as much as to approved persons, and there is an obligation on them to inform themselves of the rules which govern a proposed course of conduct before embarking on it. In other words, market users cannot shelter behind ignorance or misunderstanding, nor can they rely entirely on their brokers to guide them.

116. On the other hand, we do not think that an increase to the amount the Authority is seeking—less than the penalty imposed on Mr Eagle but nevertheless a very large sum—can be justified. The conduct there was pursued for immediate personal gain, was cynical, and had no redeeming features of any kind. The gravity of Mr Chaligné's conduct falls between that of Mr Fagbulu and Mr Eagle and the conclusion we have reached is that the appropriate penalty (exclusive of disgorgement) in Mr Chaligné's case is the £900,000 at which the RDC arrived.

Mr Sejean

117. It can be said in Mr Sejean's favour that he did not instigate the abusive conduct, in either December 2007 or in January 2008, but that, in our view, is all that can be said in mitigation. He knew that what he was doing was wrong, but did not seek to deflect Mr Chaligné, and he enlisted the help of junior traders, including Mr Diallo. Although the immediate financial gain to him was relatively modest, it nevertheless represented part of his motivation; and the long-term retention of Mr Chaligné as a client would have benefited Mr Sejean financially. Although, after some initial dissembling, he has not sought to conceal what he did, he showed little, if any, remorse or contrition and we are, even now, unconvinced that Mr Sejean, too, understands fully why his conduct was wrong.

118. It will be apparent from what has gone before, and will become even more so from what follows, that a reduction in the "headline" penalty to be imposed on Mr Sejean is out of the question; we must instead consider whether it should be adjusted upwards. We recognise the danger of increasing penalties in a way which might operate as a disincentive to those with meritorious references, unless there is compelling reason. Here, we think there is. First, it was in contemplation from the outset that our accepting that Mr Sejean's conduct in January 2008 amounted to market abuse might lead to an increase in the penalty on that account, rather than because of our view of the gravity of the conduct, and we see no good reason not to direct such an increase to reflect the January trades. Second, we think it necessary to take into account Mr Sejean's position in this case. He could have deflected Mr Chaligné, by warning him that his proposed course was unlawful, and by refusing his instructions. He did not even attempt to do the former, but accepted the instructions and executed them, or procured others to execute them, with enthusiasm. By his own admission he knew perfectly well what the aim was, and that the means to be adopted in order to achieve it were unlawful. He did not instigate the trades, but he induced others to execute some of them. In our view there is little to choose in the gravity of their conduct between him and Mr Chaligné: they effectively acted in concert, and in principle they should suffer the same penalty. It is important, too, that brokers should recognise that they cannot

simply accept clients' instructions without question; they have a duty to other market users to act honestly, and they will be subject to severe penalties if they do not.

119. We take into account the fact that the effect of prohibition on Mr Sejean is to restrict his earning capacity significantly, and that he has lost well-paid employment. Those factors do enable us to impose on him a lower monetary penalty than on Mr Chaligné. However, this is nevertheless one of the (rare) cases in which we consider the RDC was too lenient to the extent that it is appropriate for us to direct an increase in the penalty. Mr Sejean was an established market participant, earning at the relevant time about £375,000 a year. It should not be thought that earnings of that magnitude can be achieved by disregard of the law, market rules or ordinary standards of honest behaviour. The conclusion we have reached is that the "headline" figure in his case, to include his conduct in December 2007 and in January 2008, should be £650,000.

Conclusions

120. Each of the prohibitions is upheld. The Authority was correct to withdraw Mr Sejean's and Mr Diallo's approvals. The penalty to be imposed on Mr Chaligné is to consist of a disgorgement element of €362,950, plus £900,000. The penalty to be imposed on Mr Sejean is to be £650,000, subject to adjustment for his personal circumstances in such manner as we shall determine at a later hearing. Mr Diallo is to be subject to no monetary penalty. We so direct the Authority. Our decision is unanimous.

Colin Bishopp
Upper Tribunal Judge

Release date: