Appeal number FS/2012/0013

Market abuse – Whether two emails contained Inside information – Yes – Whether emails sent in proper course of exercise of employment – No – Whether defence under section 123 FSMA available – No – Issue of penalty adjourned

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
Financial Services

IAN CHARLES HANNAM

The Applicant

- and –

THE FINANCIAL CONDUCT AUTHORITY

The Authority

Tribunal: Mr Justice Warren, Chamber President
Judge Bishopp
Mr Nicholas Douch

Sitting in public in London on 2, 3, 4 and 5 July 2013 and 3 October 2013

Laurence Rabinowitz QC and Emma Jones for the Applicant

Richard Boulton QC and Benjamin Strong for the Respondents

DECISION

Mr Hannam's actions in sending both the September email and the October email (as defined in our Reasons below) constituted behaviour falling within section 118(3) of the Financial Services and Markets Act 2000 ("**FSMA**"). He was thereby engaged in market abuse. His actions were not in the proper course of the exercise of his employment. He is not able to take advantage of the defence provided in section 123 FSMA. The issue of the appropriate penalty to impose is to be dealt with on a later occasion.

REASONS

Introduction

1. In this reference the Applicant, Mr Ian Hannam ("**Mr Hannam**") challenges a decision made by the Financial Services Authority, whose relevant powers and duties have since devolved to the respondent, the Financial Conduct Authority. We shall refer to them both as "**the Authority**". The decision was to the effect that Mr Hannam had committed market abuse. He is said to have improperly disclosed inside information in two emails that were sent by him or on his behalf on 9 September 2008 ("**the September email**") and 8 October 2008 ("**the October email**"). The information in the September email concerned a potential third party bid for Mr Hannam's client, Heritage Oil plc ("**Heritage**"). The information in the October email concerned positive developments in Heritage's oil exploration operations. Both emails were sent to Dr Ashti Hawrami, the Minister for Oil in the Kurdish Regional Government ("**Dr Hawrami**" and "**the KRG**"), and the second was blind copied to a Mr David Ishag, an adviser to a potential investor in companies with interests in Kurdistan.

2. We deal with the facts in more detail at a later stage but for ease of understanding we mention now that Mr Hannam was, at the time, the Chairman of Capital Markets at J P Morgan, and Global Co-Head of UK Capital Markets at J P Morgan Cazenove ("**JPMC**"), of which he was one of the three executive directors. Heritage, a company quoted on the London Stock Exchange, was a client of JPMC, and Mr Hannam was (and is) a close friend of Heritage's Chief Executive Officer, Mr Anthony Buckingham ("**Mr Buckingham**"). At the material time Heritage was engaged in (among other things) exploratory drilling in Uganda.

3. Mr Hannam denies that the two emails contained inside information. If he is wrong on that, he says that the information was disclosed in the proper course of the exercise of his employment so that the disclosure cannot amount to market abuse.

4. The Authority's decision was made under section 123 FSMA which allows it to "impose… a penalty of such amount as it considers appropriate" where it "is satisfied" that a person has engaged in market abuse. The definition of "market abuse" is found in section 118 (about which we say more later): it includes, under section 118(3), the disclosure by an insider of inside information otherwise than in

the proper course of the exercise of his employment, profession or duties. The Authority was satisfied that Mr Hannam was engaged in market abuse as a result of disclosure of inside information and imposed a penalty of £450,000 on him. The questions for us are whether market abuse is established and, if so, the appropriate penalty to impose.

The Tribunal's role

5. Our functions on the current reference derive from section 127(4) FSMA: where the Authority has decided to take action against a person in relation to market abuse within section 123 FSMA, that person may refer the matter to the Tribunal. On such a reference, section 133(5) FSMA provides that the Tribunal:

> "(a) must determine what (if any) is the appropriate action for the [Authority] to take in relation to the [subject] matter [of the reference]; and
>
> (b) on determining the reference, must remit the matter to the [Authority] with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination."

6. Under section 133(4) FSMA, the Tribunal may consider any evidence relating to the subject matter of the reference, whether or not it was available to the Authority when it made its decision. The role of the Tribunal is not to act as an appeal tribunal; it carries out a *de novo* review of the facts and matters which led to the reference: it considers the matter "completely afresh" as it was put by Moore-Bick LJ at [37] of his judgment in *R (Willford) v FSA* [2013] EWCA Civ 677. This is the exercise we have carried out in the present reference.

7. We have been presented with a mass of material including over 400 pages of written closing submissions. We have thought it appropriate to deal with the law and the facts at some length and to deal with the parties' submissions in great detail (although we do not deal with each and every point). This has resulted in a long Decision and considerable delay in its production. A shorter Decision would not have done justice to the full, thorough and well presented cases; nor, we think, would it have left the parties with a proper understanding of why we have reached the conclusions which we have.

The September and October emails

8. It is convenient at this point to set out the relevant parts of the text of the September and October emails since it is helpful to consider the issues of interpretation of the legislation which have arisen in the context of those emails rather than in the abstract.

9. The September email reads as follows:

> "Dear Ashti [Dr Hawrami],
>
> Following our drink last week and our telephone conversation yesterday, I look forward to seeing you next week.
>
> I thought I would update you on discussions that have been going on with a potential acquirer of Tony Buckingham's business. Tony, advised by myself, has deferred engaging with the client until Thursday of next week although we know they are very excited about the recent drilling results of Heritage

> Oil and today's announcement by Tullow. I believe that the offer will come in in the current difficult market conditions at £3.50 - £4.00 per share.
>
> I am not trying to force your hand, just wanted to make you aware of what is happening.
>
> Very best regards
>
> Ian [Mr Hannam]"

10. Tullow is a reference to Tullow Oil plc, another oil exploration company engaged in exploratory drilling at sites in Uganda close to those at which Heritage was working.

11. We will come, in due course, to what the Authority considers the inside information disclosed by the September email to be and how its view has changed over the passage of time since the Investigation Report of 8 July 2011.

12. So far as concerns the October email, we refer at the moment only to the postscript which reads as follows:

> "PS – Tony [Buckingham] has just found oil and it is looking good."

13. Mr Hannam's position is that Heritage had not found "oil" as that word would have been understood by either Dr Hawrami or by an objective investor or oil industry expert, all of whom would take a reference to "oil" as meaning black oil. At most, it had found the presence of liquid hydrocarbons during the course of drilling. The Authority accepts that black oil had not been found. Its position is that the words of the post-script taken in their entirety amounted to inside information as defined in the legislation.

Burden and standard of proof

14. The Authority accepts that the burden is on it to establish that Mr Hannam is guilty of market abuse on the evidence before the Tribunal. But an issue has arisen about the standard of proof which the Authority has to satisfy. The Authority says that it is the ordinary civil standard of proof on the balance of probabilities. Mr Hannam says it is the criminal standard of proof beyond reasonable doubt. The Authority suggests that it is an academic issue since there are no, or almost no, disputed facts, the real issues being the consequences of the facts. We propose, nonetheless, to deal with the point since it is of importance and it is appropriate to use this opportunity to give some guidance to the Authority and practitioners. We deal with it in a later section of this decision. We nonetheless state our conclusion at this point. It is that the appropriate standard to apply in a market abuse case is the civil standard.

The statutory framework and the Authority's handbook

15. Part VIII of FSMA is headed "Penalties for Market Abuse". Part VIII was amended in 2005 to transpose into domestic law two EU Directives namely **the Market Abuse Directive** (Directive 2003/6/EC) and **the Implementing Directive** (Directive 2003/124/EC).

16. As appears from recital (4) of the Market Abuse Directive, the Council, in 2000, had set up a Committee of Wise Men which later proposed the introduction of

> "new legislative techniques based on a four-level approach, namely framework principles, implementing measures, cooperation and enforcement. Level 1, the Directive, should confine itself to broad general 'framework' principles while Level 2 should contain technical implementing measures to be adopted by the Commission with the assistance of a committee."

[Levels 3 and 4 comprise cooperation and enforcement.]

The Market Abuse Directive

17. The Level 1 framework principles are found in the Market Abuse Directive. Recitals (12), (15) and (16) are relevant in identifying the purpose of the Directive and the meaning of inside information:

a. Recital (12):

> "Market abuse consists of insider dealing and market manipulation. The objective of legislation against insider dealing is the same as that of legislation against market manipulation: to ensure the integrity of Community financial markets and to enhance investor confidence in those markets……"

b. Recital (15):

> "Insider dealing and market manipulation prevent full and proper market transparency, which is a prerequisite for trading for all economic actors in integrated financial markets."

c. Recital (16): this describes what is inside information. Its wording is closely reflected in Article 1(1):

> "Inside information is any information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments. Information which could have a significant effect on the evolution and forming of the prices of a regulated market as such could be considered as information which indirectly relates to one or more issuers of financial instruments…"

18. Recital (29) explains that

> "Having access to inside information relating to another company and using it in the context of a public take-over bid for the purpose of gaining control of that company or proposing a merger with that company should not in itself be deemed to constitute insider dealing."

19. For the purposes of the present reference, we need refer only to Articles 1(1), 2 and 3. Article 1(1) defines 'inside information'. The first paragraph of the Article is relevant and provides as follows:

> "Inside information shall mean information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or one or more financial instruments and which, if it were made public would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments."

Article 1 directs the Commission to adopt implementing measures concerning this definition among other matters.

20. Article 2 provides for Member States to prohibit certain persons in possession of inside information from

> "using that information by acquiring or disposing of….. for his own account or for the account of a third party, either directly or indirectly, financial instruments to which that information relates."

The persons falling within the prohibition are identified in the second paragraph of Article 2 and include a person having access to the information through the exercise of his employment, profession or duties.

21. Article 3 provides for Member States to prohibit a person falling within the Article 2 prohibition from disclosing inside information to any other person

> "unless such disclosure is made in the normal course of the exercise of his employment, profession or duties…."

22. Another purpose of the Directive, which appears from recital (24), is to ensure prompt and fair disclosure of information to the public to enhance market integrity. The recital notes that selective disclosure can lead to loss of investor confidence in the integrity of financial markets. The recital gives examples of how market professionals can contribute to market integrity, including the application of internal codes of conduct and the establishment of "Chinese walls". The recital states in its last two sentences as follows:

> "Such preventive measures may contribute to combating market abuse only if they are enforced with determination and are dutifully controlled. Adequate enforcement control would imply for instance the designation of compliance officers within the bodies concerned and periodic checks conducted by independent auditors."

23. Reflecting that recital, Article 6 requires Member States to ensure that issuers of financial instruments inform the public as soon as possible of inside information which directly concerns those issuers. Issuers are, however, allowed to delay public disclosure in limited circumstances which we consider in more detail below.

24. Finally in relation to the Market Abuse Directive, we refer to Article 17(2) which in effect provides that the Implementing Directive is not to "modify the essential provisions of" the Market Abuse Directive itself.

The Implementing Directive

25. The Level 2 implementing measures are found in the Implementing Directive. The recitals explain the need for guidance and implementing measures in relation to the provisions of the Market Abuse Directive. Of relevance to the present reference are recitals (1), (3) and (5).

a. Recital (1):

> "Reasonable investors base their investment decisions on information already available to them, that is to say, on *ex ante* available information. Therefore, the question whether, in making an investment decision, a reasonable investor would be likely to take into

account a particular piece of information should be appraised on the basis of the *ex ante* available information. Such an assessment has to take into consideration the anticipated impact of the information in the light of the totality of the related issuer's activity, the reliability of the source of information and any other market variables likely to affect the related financial instrument or derivative financial instrument related thereto in the given circumstances."

b. Recital (3):

"Legal certainty for market participants should be enhanced through a closer definition of two of the elements essential to the definition of inside information, namely the precise nature of that information and the significance of its potential effect on the prices of financial instruments…"

c. Recital (5):

"In order to protect the legitimate interests of issuers, it should be permissible, in closely defined specific circumstances, to delay public disclosure of inside information. However, the protection of investors requires that in such cases the information be kept confidential in order to prevent insider dealing."

26. Article 1 makes further provision about the meaning of inside information. Under Article 1(1), information is deemed to be of a precise nature if, among other things, it is in relation to a set of circumstances or an event

"specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments…"

27. Article 1(2) explains that, for the purposes of applying Article 1(1) of the Market Abuse Directive, "information which, if it were made public would be likely to have a significant effect on the prices of financial instruments or related derivative financial instruments" shall mean

"information a reasonable investor would be likely to use as part of the basis of his investment decisions".

28. Article 3 of the Implementing Directive is concerned with identifying the circumstances in which there are legitimate interests for delaying public disclosure. Certain non-exhaustive circumstances are given where such a legitimate interest can exist.

CESR Guidance

29. In July 2007, the Committee of European Securities Regulators ("**CESR**") issued guidance and information on the common operation of the Market Abuse Directive. The guidance does not constitute EU legislation. However, it forms level 3 of the four level approach. The guidance plays, we consider, an important role in the exercise of interpreting the Market Abuse Directive and the Implementing Directive. As paragraph 1.3 of the Introduction states, the criteria of information of a precise nature and significant price effect are linked so that it is important not to consider each criterion in isolation. Nonetheless, CESR considered it possible to identify separately the factors which should be taken into

account in respect of each criterion. We shall have more to say on the CESR guidance later in our decision.

Part VIII of FSMA

30. Following the coming into force of the two Directives, HM Treasury and the Authority issued a consultation paper summarising the provisions of the Directives and the UK Government's proposals to transpose them into domestic law. Mr Laurence Rabinowitz QC, appearing before us, with Ms Emma Jones, for Mr Hannam, has referred us to paragraph 2.2 of the consultation paper describing the scope of market abuse. We agree with him in thinking that the broad description given is to be borne in mind in evaluating the facts of the present case and whether they give rise to market abuse. The paragraph is in the following terms:

> "2.2 Market abuse, which consists of insider dealing and market manipulation, arises in circumstances where investors have been unreasonably disadvantaged by others. It prevents full and proper market transparency and undermines market integrity and investor confidence. Articles 1-5 of the directive prohibit two broad descriptions of behaviour that might bring about these circumstances:
>
> - Where insiders use or seek to use certain information which is not publicly available (inside information), to their own advantage or the advantage of others ('insider dealing');
>
> - Where someone seeks to distort the price of financial instruments, or effect transactions or orders to trade or disseminates information in a manner which gives or is likely to give false or misleading signals about financial instruments ('market manipulation')."

31. The Directives were implemented by the making of amendments to Part VIII of FSMA. There remain, however, some traces of the pre-existing legislation so that, to some extent, domestic law is broader than the Directives.

32. Section 118(3) FSMA is an important provision in the present reference. It describes the behaviour which constitutes market abuse. The relevant behaviour must occur in relation to certain sorts of investment and fall within one of the seven types of behaviour listed in section 118(2) to (8). We do not need to dwell on the sorts of investment falling within the section since it is clear, and is common ground, that shares in Heritage do so fall. Further, it is only behaviour of the sort described in section 118(3) which is relevant in the present case. That is behaviour of the second type namely:

> "…where an insider discloses inside information to another person otherwise than in the proper course of the exercise of his employment, profession or duties."

33. The definition of an "insider" is found in section 118B FSMA. It is common ground that, assuming that he had any inside information, Mr Hannam was an insider in relation to Heritage since he had access to that information, as section 118B(c) puts it, "as a result of having access to it through the exercise of his employment, profession or duties".

34. The definition of 'inside information' is found in section 118C. In relation to the investments relevant in the present case, namely shares in Heritage, section 118C(2) provides relevantly that

> "inside information is information of a precise nature which –
>
> (a) is not generally available,
>
> (b) relates, directly or indirectly, to one or more issuers of the qualifying investments or to one or more of the qualifying investments, and
>
> (c) would, if generally available, be likely to have a significant effect on the price of the qualifying investments or on the price of related instruments."

35. It can be seen, therefore, that there has to be "information" which is "of a precise nature" and which, if generally available "would be likely to have a significant effect" on price.

36. As to what is precise, section 118C(5) provides:

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

37. Section 118C(6) is of some importance and its interpretation is an area of dispute between the parties. It provides as follows:

> "Information would be likely to have a significant effect on price if and only if it is information of a kind which a reasonable investor would be likely to use as the basis of his investment decisions."

38. This reflects Article 1(2) of the Implementing Directive with the addition of the words "if and only if" and the omission of "part of" before "the basis".

39. Under section 119 FSMA, the Authority is required to issue a code designed to "give appropriate guidance to those determining whether or not behaviour amounts to market abuse". The Authority complied with its obligations by issuing the Code of Market Conduct which was at the material time found in section 1 of the Market Conduct section of the Authority's handbook ("**MAR 1**"). The code sets out, among other things, descriptions of behaviour that, in the opinion of the Authority, amount or do not amount to market abuse and factors that, in the opinion of the Authority, are to be taken into account in determining whether or not behaviour amounts to market abuse.

40. The Authority also made disclosure rules under FSMA sections 73A and 96A regarding the information which issuers of listed securities must announce publicly. These rules were at the material time to be found in section 2 of the Disclosure and Transparency Rules section of the FSA Handbook ("**DTR 2**").

41. As Mr Rabinowitz correctly explains, depending on the status attributed to the particular provision, the code may provide conclusive evidence that the

behaviour in question does not amount to market abuse for the purposes of FSMA. Provisions with this effect are known as "safe harbours", and are designated in MAR 1 with the letter "C". Other provisions of MAR 1 create rebuttable presumptions of compliance with or contravention of the rules to which they refer (designated with "E"), whilst others provide non-binding guidance of no evidential effect (designated with "G"). Category G provisions can be relied on insofar as they indicate whether or not behaviour should be taken to amount to market abuse: see section 122(2) which provides, so far as concerns this category, that

> "the code in force ... at the time when particular behaviour occurs may be relied on so far as it indicates whether or not that behaviour should be taken to amount to market abuse."

42. If the Authority is "satisfied" that a person is or has engaged in market abuse, section 123(1) FSMA provides that it "may impose on him a penalty of such amount as it considers appropriate". There is, however, a defence available under section 123(2): the Authority may not impose a penalty if "there are reasonable grounds for it to be satisfied that" the person concerned "believed, on reasonable grounds, that his behaviour did not", so far as relevant to the present reference, "amount to his engaging in market abuse". In cases where the Authority is entitled to impose a penalty, it may instead of doing so publish a statement to the effect that the person has engaged in market abuse.

43. It is clear that, under the provision on which the Authority relies in its charges against Mr Hannam, the only sanctions available to it are the imposition of a financial penalty or the publishing of a statement. There is no power under the provisions relied on to withdraw or suspend the authorisation in relation to the provision of financial services which he in fact held. In a different case, the conduct of an individual may be such that the Authority could rely both on the market abuse provisions which we have just identified and on other provisions under which the wider sanctions could be invoked; but that is not so in the present reference where there is no suggestion that Mr Hannam is not a fit and proper person.

Issue of construction

44. A number of questions have arisen about the true construction of Part VIII of FSMA which we turn to next. It is to be remembered that the provisions, which were introduced in order to implement the Market Abuse Directive and the Implementation Directive, fall to be construed, so far as possible, in the light of the wording and purpose of those Directives. This is the principle of conforming interpretation discussed in *R (on the application of IDT Card Services Ireland Ltd) v Customs and Excise Commissioners* [2006] STC 1252, at [73]-[85] of the judgment of Arden LJ (with whom Latham and Pill LJJ agreed).

45. As we have seen, the definition of inside information requires that there be something which can be categorised as information in the first place ("inside information is … information which …."). But information is only inside information if it is "of a precise nature". As to when information is "precise", section 118C(5) contains two limbs in paragraphs (a) and (b) set out at paragraph 36 above. Although, logically, the question whether there is "information" is prior

to and separate from the question of whether information is "precise", the two questions are very closely related and the answers to the two questions are only relevant because they feed into the real issue which is whether there is something which is "inside information".

46. The issues of construction break down into the following issues:

a. The first relates to the extent to which accuracy (meaning correctness and completeness) is a necessary characteristic of inside information; that is to say, whether inaccurate information may nevertheless be sufficiently precise as to amount to inside information.

b. The second relates to the requirements for information to be specific enough to enable a conclusion to be drawn as to possible effect on price, and in particular what the word "possible" means.

c. The third relates to the interaction between section 118C(2)(c) and section 118(6). That gives rise to a sub-issue which is the meaning of "likely" in section 118(2)(c).

47. All these issues are inter-related to some extent. Although Mr Richard Boulton QC (appearing before us, with Mr Benjamin Strong, for the Authority) and Mr Rabinowitz have addressed discrete arguments to each issue of construction, those arguments have to be addressed reading all of the parts of section 118C together. We should say that we have found it very difficult to arrive at an interpretation of section 118C which gives a wholly satisfactory answer to what is and what is not "inside information" applicable in the wide variety of factual situations which might arise. We hope, however, that the approach which we favour will provide a sensible answer in the vast majority of situations which may in practice be encountered.

Precise – indicates circumstances which exist *etc*

48. The first issue of construction relates to the accuracy of information which is said to be inside information. Lengthy submissions were addressed to us on this aspect of the case. We deal with those submissions at this stage of our decision but we must observe that nowhere do sections 118 or 118C FSMA use the word "accurate" or any similar word. The question for us is how an inaccuracy in a statement affects the extent to which the statement is, or includes, information which is inside information.

49. As with almost any word, the word "information" takes its meaning from the context in which it is used. Information can, in some circumstances, include information which is inaccurate or even wholly wrong. Suppose Mr A is told a fact by Mr B and repeats that fact to his friend Mr C. When the supposed fact turns out to be inaccurate or wholly wrong, it would be a perfectly ordinary use of language for Mr A to correct himself by saying to Mr C: "My information from Mr B was such and such; but he was wrong". Indeed, section 118(7) FSMA itself uses the word "information" in one place where its meaning clearly includes information which is false (and, *a fortiori*, where it is merely inaccurate).

50. That subsection describes the sixth type of behaviour constituting market abuse: it consists of dissemination of **information** which gives, or is likely to give, a false or misleading impression by a person who knew or could reasonably

be expected to have known that the **information** was **false** or misleading. Clearly, the subsection is not concerned simply with information which, whilst accurate, is nonetheless misleading, for instance because other material information is omitted.

51. It does not follow from that, however, that **inside** information can include wholly false or even merely inaccurate information. The purpose of categorising certain information as inside information (a theme we will develop later) is to prevent a person making use of it in a way which falls within the first or second types of behaviour set out in sections 118(2) and (3) FSMA so as to obtain an advantage (for himself or for another person to whom he divulges inside information) over other persons when making his investment decisions. Whilst wholly inaccurate information with no grain of truth in it might be said to be incapable of providing any such advantage, the same is not true of inaccurate information. A statement made by an insider to a third party which is not wholly accurate may, nonetheless, convey a message to the recipient of the statement which does give the recipient an advantage over other market participants; if that is the case, the statement ought, in principle, to be capable of amounting to inside information notwithstanding its inaccuracy. It is therefore right, in our view, to approach the definition of inside information bearing in mind the purpose of the definition, that is to say to identify the sort of information the disclosure of which would provide this sort of advantage to a recipient. It would be entirely wrong, unless the language of the definition admits no other meaning, to interpret inside information as including only information which is wholly accurate.

52. The important parts of the definition in the context of a suggested need for accuracy are found in sections 118C(2) and (5). Section 118C(2) defines inside information as "information of a precise nature". The meaning of precise is found in section 118C(5) which commences with the words "Information is precise". The two subsections must be read together to identify what information is inside information.

53. The focus of the provisions is clearly on information which is accurate. In relation to the past, the information must indicate circumstances that exist or an event that has occurred; in relation to the future, where nothing can perhaps be said with absolute certainty, it is enough that the information indicates circumstances or an event which may reasonably be expected to come into existence or occur.

54. It is not, however, an express requirement that the information must be wholly accurate before it can qualify as inside information. We have already mentioned the opening words of section 118C(2) referring to inside information as "**information** [our emphasis] of a precise nature". Thus "inside information" is a sub-category of "information": we see no reason to restrict the meaning of "information" in section 118C(2) to wholly accurate information. Similarly, in identifying the meaning of "precise", section 118C(5) commences with the words "Information is precise" where, again, we do not perceive a requirement that information has to be wholly accurate before it can be precise.

55. This is a convenient stage at which to consider the requirement under section 118C(5)(a) that, for information to be "precise", it must give a relevant indication within that provision (*ie* that circumstances exist or may reasonably be

expected to come into existence, or that an event has occurred or may reasonably be expected to occur). In a case where the relevant information is wholly accurate, it will often be clear what circumstances or event that information indicates. If a true statement is made by an insider that company A is about to make a bid for company B at a price of £5 per share (being £1 above the quoted share price), then the statement contains information to that effect and it indicates circumstances which either actually exist (*ie* that there is a current intention to make a bid) or which may reasonably be expected to come into existence (*ie* that a bid will be made).

56. Where the relevant information is not wholly accurate, the position is not so clear. Suppose that a bid is about to be made, but at a price of £4.50 per share rather than £5 and that an insider (who has misunderstood what he has overheard) tells his friend that a bid is about to be made at £5. Assuming that the "information" includes the inaccurate information about the figure of £5, what circumstances does that information "indicate" for the purposes of section 118C(5)(a)? There are two possibilities:

a. First, the correct approach is to read section 118C(5)(a) as referring to circumstances which the information describes even if in fact they do not exist and cannot reasonably be expected to come into existence. In the example, these would be that there is an intention to make a bid at £5 or that it is reasonably to be expected that a bid will be made at £5.

b. Secondly, the correct approach is to read section 118C(5)(a) as referring to the circumstances which in fact exist or which may reasonably be expected to come into existence to the extent that the information can be taken as implicit in the information given. In the example, these would be that there is an intention to make a bid or that it may reasonably be expected that a bid will be made. It is necessarily implicit in the information that the bid will be made at £5 that it will be made at £4.50 at least so that, in context, the information indicates the actual circumstances of an intended bid at £4.50. The related question under section 118C(5)(b) is then what, if any, effect those circumstances would have on the share price.

57. The issues of (i) the impact of inaccuracy in the assessment of whether information is inside information and (ii) the correct approach to the identification of the circumstances indicated by such information are closely interlinked. They are both relevant to the identification of what information, using that word in its wider sense, is inside information and we deal with them together as part of that identification exercise.

58. The Authority acknowledges, without conceding, that it may well be that something which is wholly made up, a fiction, and has no connection with the truth cannot be inside information.

59. However, the Authority contends that information does not need to be entirely accurate before it can be "inside information". It submits that information which is grounded in fact and reflects underlying circumstances is nonetheless information and is capable of being "precise" even if it is only partially correct or is an embellishment of the facts. Such information can, the Authority says,

"indicate" circumstances or an event for the purposes of section 118C (5)(a); and provided it is specific enough to allow a conclusion to be drawn as to the possible effect on price of those circumstances or that event, it will satisfy the statutory definition of "precise". It is important to bear in mind that it is the effect, if any, on price of the circumstances or the event which is relevant; it is not the effect of the information as such. Thus, if the information is partially inaccurate, it is not right to consider the effect on price which that information would have if it were correct; rather, the right approach is to ascertain what circumstances or events are indicated by that information (or, if it is correct to construe section 118C as requiring that inside information must itself be accurate, such part of the information as is accurate) and then to ask what the possible effect on price of those circumstances and events would be.

60. In testing whether information is inside information or not, the Authority relies on the purpose of the Market Abuse Directive which it identifies by reference to the recitals which we have already set out. It makes reference to *Spector Photo Group NV v Commissie voor het Bank* (Case C-45/08) [2009] ECR I-12073 [2001] BCC 827 ("*Spector Photo*") in which the CJEU noted as follows:

> "Owing to its non-public and precise nature and its ability to influence the prices of financial instruments significantly, inside information grants the insider in possession of such information an advantage in relation to the other actors on the market who are unaware of it. It enables that insider, when he acts in accordance with that information in entering into a transaction on the market, to expect to derive an economic advantage from it without exposing himself to the same risks as the other investors on the market."

61. The purpose, on the Authority's case, is to preserve the integrity of the markets and in particular to prevent the use of information to provide an advantage to an insider and, we would add, to prevent an insider providing information to a third party whether or not that third party in fact makes use of the information. There is a risk, the Authority submits, of that purpose being thwarted even where the information is not wholly accurate; an approach that insists that inside information must be complete and wholly accurate would undermine that purpose.

62. Mr Boulton gave this example:

> "[A]ssume a director of Company X, Mr A, tells his friend that an offer for Company X will be announced the following Wednesday at a price of £2 per share, 100% above the prevailing share price. If this disclosure had no substance to it – there was in fact no imminent takeover – then it might be that there would be no breach of section 118(3) (although there might still be market abuse). But if the takeover was in fact due to be announced on the Tuesday, or was in fact announced on the Thursday, or the price turned out to be £1.50 rather than £2 per share, such inaccuracy should not mean that the disclosure is not inside information. Mr A's friend can still '*derive an economic advantage from it without exposing himself to the same risks as the other investors on the market*'. The damage to the integrity of the markets if such information is disclosed or acted on is the same as it would be if wholly true information was given."

63. It is, of course, possible to give many other examples which demonstrate that partially incorrect information can nonetheless be such that its disclosure would damage the integrity of the markets but we see no need to do so.

64. Mr Rabinowitz does not suggest that a statement can only constitute inside information if it is wholly accurate. As he puts it, if a statement is plainly irrelevant to the substance of what is being conveyed, that cannot affect its quality as inside information. This is because the fundamental character of inside information identified by the CJEU in *Spector Photo* is that it grants the insider in possession of it an unfair advantage over other market participants who are unaware of it. Information that has no factual basis, in that it indicates that an event has occurred when it has not, or that a circumstance exists when it does not, does no such thing, and does not, therefore, fall within the market abuse regime in section 118 FSMA insofar as it concerns inside information. That is plainly correct where the inaccurate part of the statement has nothing to do with the issuer; but it is far from obvious that it is true where the inaccuracy is directly related to the issuer or its activities.

65. As to the example given by Mr Boulton which we have set out above (and the same goes for other examples given by the Authority), Mr Rabinowitz says that it is an extreme and obvious example which does not assist the Authority. We agree that it is of limited value in the present case except to this extent. What it does is to demonstrate the principle that a statement which contains a material inaccuracy even in relation to the issuer and matters going to its share price can, nonetheless, contain information which is inside information. Whether in any particular case there is inside information is heavily fact dependent. It may, on the facts of the example, be essential, before being able to say whether information is "precise", to know whether the takeover was due to be announced on Tuesday or to know whether the price was £2 rather than £1.50. If it is right to move away from the proposition that accuracy and completeness are essential characteristics of precise information, a close examination of what the inside information is said to be and the context in which it is disclosed is necessary before it is possible properly to categorise it as "inside" or not: it is critical to determine what message the particular statement, said to constitute inside information, conveys.

66. It is in that context that we need to draw attention to the obvious distinction, lest there be confusion, between a statement or other communication on the one hand and information on the other hand. A communication may contain statements of existing fact or statements about the future. The statements of existing fact may be entirely accurate, entirely inaccurate or a mixture of both; and similarly, statements as to the future may relate to circumstances or events which may be reasonably expected to come about or to circumstances or events which cannot be reasonably expected to come about or a mixture of both. Insofar as the communication in question is accurate as to the past or a reasonable prediction as to the future, it clearly contains "information": it will be necessary to examine the entire statement critically to see precisely what message it does convey. But even a statement which is inaccurate may, in its context, indicate circumstances or events within section 118C(5)(a).

67. Mr Boulton's example illustrates the point in a situation where it is possible to break the statement down into constituent parts and then to "blue pencil," as it

were, the inaccurate parts. The inaccurate parts can be ignored with the accurate parts being left to indicate circumstances within section 118C(5)(a). The same principle applies, however, where it is not possible to excise the inaccurate parts in that way. We give an example. Suppose that the market knows that oil has been discovered in a particular field but does not know the likely extent of the reserves. It knows that reserves of at least X million barrels are required in order to make the field commercially viable. It is known within the company that the reserves are at least 2X million barrels and it is preparing a market announcement to that effect on the correct basis that this is inside information. An insider, misunderstanding what he has heard his colleague say in a phone call, tells his friend that the reserves are at least 3X million barrels. The statement by the insider to his friend is inaccurate; but it conveys an accurate message to a person aware of the critical need for reserves of X million barrels if the field is to be commercially viable. In our view, therefore, the statement by the insider discloses inside information. This is because the inaccurate information nonetheless indicates circumstances within section 118C(5)(a) (*ie* that the reserves have been found which exceed 2X million barrels which circumstance enable a conclusion to be drawn about the share price).

68. We consider that our approach is one which recognises that the concept of inside information is relevant not only to market abuse as a result of disclosure but also to the obligation of an issuer to inform the general public of inside information as soon as reasonably possible under Article 6(1) of the Market Abuse Directive and section 96A FSMA. The focus of that obligation is on the provision of information which is accurate and, clearly, an issuer should not provide information which it knows to be inaccurate. Nonetheless, an issuer may, it seems to us, be under an obligation to inform the public of something which it genuinely and reasonably believes to be true which subsequently turns out to be false, although the extent of the obligation needs to be clearly identified.

69. Let us illustrate this by reference to another example based on oil discovery. Suppose the drilling company discovers oil and that its technical people assess the reserves at X million barrels where X is sufficiently large to justify commercial exploitation; suppose that there is no reason to doubt the accuracy of the assessment and everyone involved genuinely and reasonably believes it to be accurate. It seems to us that the assessment and the company's belief in it are facts; and they are facts which, in principle, could affect the market price of shares in the company. If the market would in fact be moved if it knew of the discovery and the assessment, then those facts are inside information and the general public must be informed of them. And this is so even if, 6 months later, the assessment turns out to be mistaken and the actual reserves are found to be insufficient to justify commercial exploitation so that, had this been known from the start, the announcement would have been very different. The inside information is not, however, the (inaccurate) fact of reserves of X million barrels: rather, it is the (accurate) fact of an assessment genuinely and reasonably believed to be true.

70. Continuing with the example, suppose that the company announces the discovery and the assessment as it ought to do with the result that there is a significant rise in the price of the shares. Now suppose that an insider tells his friend, prior to the announcement, that oil has been discovered and that the reserves exceed X million barrels. It is clear to us that the insider has disclosed

inside information and this is so even though he has presented the reserves as a fact rather than as an assessment made by the company's technical staff. Although what he has disclosed is inaccurate – because the reserves are in fact less as is discovered 6 months later – his statement indicates two relevant circumstances which are specific and correct. The first is that oil has been discovered, which is clearly inside information if it also falls within section 118C(5)(b). The second is that there are genuine and reasonable grounds for saying that the reserves exceed X million barrels. This turns out, in the event, to be wrong but the original message was correct since that message only went to the genuine assessment of the reserves. In contrast, if the insider had made the statement which he did when oil had not in fact been discovered, his statement would not indicate any circumstance in fact which is accurate.

71. Our view is that inaccurate information in a statement or communication is properly to be described as information. Whether it is "precise" and thus capable of being "inside information" is to be assessed by reference to the requirements of sections 118C(5)(a) and (b). As to section 118C(5)(a), the information (albeit not wholly accurate) must indicate circumstances or events which actually exist or have occurred or which may reasonably be expected (objectively) to come about or to occur.

72. If we are wrong in our approach to the accuracy of the "information", then we would nonetheless reject an approach which requires all the information contained in a communication to be wholly accurate even in relation to matters which might have an impact on the share price. Instead, we consider that it would be correct to examine the communication critically and to extract from it the information which it imparts to the extent that it is accurate. That may be a simple task where it is possible to "blue pencil" the accurate from the inaccurate; it may be more difficult, but in principle possible, where a single sentence or paragraph contains a mixed message. This will be a heavily fact dependent exercise. To put this another way, there are degrees of inaccuracy and each case must be judged against the facts. If the inaccuracies do not detract in any significant way from the genuine facts then the information must be inside information. If the correct facts are still recognisable despite the inaccuracies, then in our view, the information would still be inside information.

73. In that context, we note Mr Rabinowitz's reference to the CESR guidance in relation to the requirement that information be of a precise nature, where it provides that:

> "… in determining whether a set of circumstances exists or an event has occurred, a key issue is whether there is firm and objective evidence for this as opposed to rumours or speculation i.e. if it can be proved to have happened or to exist."

74. That guidance demonstrates that CESR at least considered that the relevant existing circumstances or past events must be proved as matters of fact when considering whether information is precise. But here the circumstances or facts being referred to are those which the inside information indicates and not the inside information itself, although in many cases they will be the same thing. In the example we have given, it would have to be proved that oil had in fact been discovered and that there had been an assessment that reserves of X million

barrels existed; but it would not need to be proved, and indeed could not be proved, that reserves of that quantity in fact existed.

75. The CESR guidance which we have quoted is concerned with existing circumstances or events which have already occurred. As to future circumstances or events, the meaning of "may reasonably be expected to come into existence" and "may reasonably be expected to occur", Mr Boulton has referred us to the decision of the CJEU in *Geltl v Daimler* Case C-19/11 [2012] 3 CMLR 762 ("*Geltl*"), at [48]-[49], where the Court said this:

> "… in order to ensure legal certainty for market participants, including issuers, as referred to in recital 3 in the preamble to Directive 2003/124, precise information is not to be considered as including information concerning circumstances and events the occurrence of which is implausible …
>
> It follows that, in using the terms "may reasonably be expected", Article 1(1) of Directive 2003/124 refers to future circumstances or events from which it appears, on the basis of an overall assessment of the factors existing at the relevant time, that there is a realistic prospect that they will come into existence or occur."

76. We take the "realistic prospect" test as the law which we should apply. This does not mean that there must be a more than even chance of the circumstances coming into existence or the event occurring. It certainly means that the prospect must not be fanciful. But as we see it there can be a realistic prospect of circumstances coming into existence or of an event occurring without it being more likely than not that they will do so. We do not, in any case, find it of help to attempt to approach the question on the basis of assessing percentage chances.

77. In summary, our view is that the correct approach to statements or communications which are said to contain or amount to inside information is to ascertain what circumstances or events within section 118C(5)(a) are indicated. Where the statement or communication is wholly accurate, no difficulty should be encountered. Where the communication or statement contains a mix of accurate and inaccurate information (we say nothing here about the position if it is simply a work of fiction as we have described it), the correct approach does not differ; the exercise will be to establish what actual or reasonably expected circumstances and events are indicated by the information taken as a whole.

78. So far as existing circumstances or past events are concerned, the Authority is to identify such circumstances and events as it seeks to rely on and which it can prove to exist or have taken place; and so far as future circumstances or events are concerned, it is to identify such circumstances and events as it seeks to rely on and in relation to which it can demonstrate that there is a realistic prospect (in accordance with the test in *Geltl*) that they will come into existence or occur. The information contained in the statement or communication thus identified is then capable of constituting inside information if it indicates the relevant circumstances or fact(s).

79. If that approach is wrong, then it is necessary to consider the ways in which the statement is accurate and inaccurate. To the extent that it is accurate, the issue is then whether the accurate information indicates circumstances or events within section 118C(5)(a).

80. The result of these two approaches is, we think, not likely to differ in most cases.

81. We only add, before turning to the next heading, that our approach does not leave open an opportunity which has been suggested for circumventing the market abuse regime which may exist on Mr Hannam's approach. The suggestion is that by including inaccuracies in information disclosed to another person, a person would be able to ensure that the information would not qualify as inside information. On our approach, however, the information disclosed (presumably gauged by the insider so as to give a real indication to the recipient of how he should use it *eg* to buy or sell the shares in question) would almost certainly be such as to indicate the actual circumstances disclosure of which would have an effect on price.

Precise – specific enough *etc*

82. One question which arises under section 118C(5)(b) is whether the possible effect is as to a movement in price in a particular direction (*ie* upwards or downwards), or a mere movement. This was considered, but not decided, by the tribunal in *Massey v FSA* [2011] UKUT 49 (TCC) ("*Massey*"). In *Massey*, an issue arose about whether Mr Massey had dealt in shares in a company on the basis of inside information. In relation to the proposition that a possible movement in price in either direction fell within 118C(5), the tribunal considered that

> "The phrase 'specific enough to enable a conclusion to be drawn' seems to introduce a strong note of definiteness, which is then effectively removed, or at least diluted, by the phrase 'as to the possible effect … on the price'."

83. Then, after noting that there is no need for a conclusion as to the actual or probable effect on price, but only as to the possible effect, it went on to say (at [39]):

> "We have some doubts over whether it can be right to read element (b) so literally, as to do so would arguably render the phrase 'specific enough to enable a conclusion to be drawn' almost empty of effect. We therefore assume in Mr Massey's favour, without deciding the point, that the conclusion as to a possible effect on price must relate to an effect in a particular direction …"

84. Mr Hannam unsurprisingly agrees with the conclusion arrived at by the tribunal in *Massey* that, in order to come within section 118C(5), it is at least necessary to be able to say that the information must be such as would enable one to reach a conclusion as to its possible effect on price in a particular direction although he gets there by a slightly different route as we explain in a moment.

85. Relying again on the purpose of the Directives and FSMA and the passage from *Spector Photo* which we have already quoted, Mr Rabinowitz submits that information falls within section 118C(5)(b) only if it enables a reasonable investor to assess with confidence whether the effect on price will be positive or negative.

86. And so he submits that if, despite being in possession of the information in question, the reasonable investor would not be able to assess with confidence how (as opposed to merely whether) the price of the relevant instrument would be

affected were the information to be generally available (*ie* would the price go up or down), then it would follow that the investor would not be any better placed than other market participants to take investment decisions in relation to the relevant instrument. If the investor is not any better placed than other market participants, then his submission is that the Market Abuse Directive does not apply to the information; to fall within the Directive, the information would need to enable the reasonable investor with access to it to make investment decisions at a low financial risk *vis-à-vis* other market participants who were unaware of it. This would necessarily involve the investor being able to gauge whether the information in question would have a positive or a negative effect on the price of the relevant financial instrument.

87. This interpretation is, he submits, supported by the CESR guidance. He has referred us to a number of paragraphs of that:

a. Paragraph 1.3, which notes that the criteria of information of a precise nature and significant price effect are very much linked to each other and that it is important not to consider each in isolation. Nonetheless, CESR considered it possible to identify separately the factors which should be taken into account in relation to each criterion.

b. Paragraph 1.8, which suggests that information will be specific enough to allow a conclusion to be drawn about its impact on price where it is such as to "allow the reasonable investor to take an investment decision without, or at very low, financial risk i.e. the investor would be able to assess with confidence how the information, once publicly known, would affect the price of the relevant financial instrument".

88. It is from the second of those paragraphs, and the reference to "assess with confidence" that Mr Rabinowitz has extracted the test which he says is the correct test. However, it is to be noted that those words were used in the context of an example, introduced by the words "… CESR consider this would occur **for example** in two circumstances" [our emphasis]. Moreover the second example was where a piece of information was such that it would be likely to be exploited immediately on the market; that is to say that, as soon as the information became known, market participants would trade on the basis of it. Whilst we would not dispute the common ground that information must be such as would enable one to reach a conclusion as to its possible effect on price in a particular direction, we do not see the second example as requiring the information to be such that an investor would be able to assess **with confidence** how the information would affect the price.

89. The reference to drawing a conclusion as to the "possible effect" on price does nothing, on Mr Hannam's case, to alter the foregoing conclusion or to dilute (the word used by the tribunal in *Massey*) what would otherwise be the clear requirements of the Implementing Directive and section 118C(5)(b). Rather, what the reference to "possible effect" does is no more than to reflect the fact that any conclusion as to the effect of the information on the price is invariably potential (as opposed to actual) given that the information is, by definition, not generally available (and may never become so) and that, in the intervening period prior to

the information becoming public, other events might occur which could counteract the anticipated movement in price.

90. Accordingly, Mr Rabinowitz concurs with the conclusion of the tribunal in *Massey* for slightly different reasons based on the purposes of the legislation; and he introduces the requirement that the investor must be able to assess with confidence the direction of movement of the price.

91. The Authority agrees that it must be possible to say in which direction the information would move the price of the shares. But it says that it is not necessary to be certain whether there will in fact be a movement or how far the price may move. Further, the Authority says that it is enough that the information might, but not necessarily would, move the price of the shares. It disagrees with Mr Hannam's contention that the investor must be able to assess **with confidence** that the effect on price **will** be positive or negative, rejecting Mr Rabinowitz's explanation of the word "possible" in Article 1(1) of the Implementing Directive and in section 118C(5)(b). Instead, "possible" should be given its ordinary meaning as contrasting with probable or certain.

92. It is also said that Mr Rabinowitz's explanation ignores the fact that the focus of the definition of "precise" is on the specificity of the information not its effect on price: section 118C(5) is concerned with the meaning of "precise" whereas the effect on price is dealt with in a different part of the definition of inside information namely sections 118C(2) and 118C(6).

Significant effect on price

93. These rival submissions can only be properly addressed in the light of a further difference of approach to the interaction between section 118C(2)(c) and section 118C(6) and to the requirement that inside information "would, if generally available, be likely to have a significant effect on the price of the qualifying investments". There are two issues which we need to address. They can be stated separately but, once again, they are not entirely independent of each other. We will consider them sequentially. The issues are these:

a. The first is the extent, if any, to which section 118C(2)(c) continues to have a life of its own independently from section 118C(6).

b. The second is the level of probability which is introduced by the use of the word "likely".

94. In construing those two provisions, it must be remembered that the first reflects Article 1(1) of the Market Abuse Directive and the second reflects Article 1(2) of the Implementing Directive and they are to be construed accordingly. It also needs to be remembered that Article 17(2) of the Market Abuse Directive precludes an implementing measure which modifies its essential provisions. The CESR guidance on the meaning of inside information reflects that in providing as follows:

> "The 'reasonable investor test' … assists in determining the type of information to be taken into account for the purposes of the 'significant price effect' criterion. In this context it should be noted Article 17.2 of MAD makes clear that implementing measures do not modify the essential provisions of the Level 1 Directive."

95. We must, therefore, so far as possible interpret Article 1(2) of the Implementing Directive and section 118C(6) FSMA in such a way that the essential provisions of Article 1(1) of the Market Abuse Directive are not modified.

96. In relation to the first issue, there is some common ground. Although section 118C(6) appears, on a literal reading, to lay down a necessary and sufficient condition for there to be a significant effect on price, the Authority does not suggest that the "reasonable investor" test in section 118C(6) altogether supplants the test found in section 118C(2)(c). It stands by the way it was put in its skeleton argument: that is to say that the words "likely to have a significant effect on price" should be borne in mind in applying the reasonable investor test thus reflecting the constraint found in Article 17(2) of the Market Abuse Directive. This does not, it is said, detract from the fact that it is only the reasonable investor test which is to be applied.

97. The way that a significant effect on price is taken into account is, on the Authority's approach, through the attributes of the reasonable investor and what he would be likely to take into account. A reasonable investor would have no reason to use as part of the basis of his investment decisions information which would have no prospect of significantly affecting the price of the investment. There is therefore no need to make such information public and no regulatory reason to prevent selective disclosure. Conversely, the purpose of the Directives and of FSMA requires that information which is capable of affecting the price of the investment must be announced, and that there be a prohibition on selective disclosure of such information.

98. The common ground is that Mr Rabinowitz agrees that section 118C(2)(c) informs the way in which section 118C(6) is to be read. He considers that this approach gets him to the place where he wants to be because one must always have in mind that one is seeking to identify information which is likely to have a significant effect on price; and this will colour what is to be treated as information which the reasonable investor would use in making his investment decisions. Information not likely to have a significant effect on price would not be information which a reasonable investor would be likely to use. He does not, however, go all the way with Mr Boulton when Mr Boulton says that information which is merely capable of affecting the price of the investments rather than likely to do so is inside information.

99. Before we address that further, we mention, if only to reject, another approach which Mr Rabinowitz has suggested (indeed, it was his primary approach) to the effect that section 118C(6) adds a further requirement to section 118C(2)(c). We consider it to be a strained and artificial construction to read the provisions together in that way, especially given the use of the words "if and only if". In effect, it is to read section 118C(6) as if the words "if and" were omitted. The same point arises, if less starkly, in relation to Article 1(1) of the Implementing Directive which uses the words "shall mean", words which, using language in an ordinary sense, would provide an exhaustive definition. His argument in relation to that approach also draws a distinction, which we perceive again as strained and artificial, between the kind or type of information, with which it is said section 118C(6) is concerned, and the effect of information, with

which it is said section 118C(2)(c) is concerned. In any case, we agree with Mr Boulton when he says that there is no class of information (at least which either he or we have been able to think of) which would meet the first test ("likely to have a significant effect on price") but would not meet the second test ("information of a kind which a reasonable investor would be likely to use"): if information is likely to have a significant effect on price then of course a reasonable investor will use it.

100. We agree that the correct approach on this issue of interpretation is to see the "reasonable investor" test as providing a definition of what would be "likely to have a significant effect on price".

The reasonable investor

101. We need to pursue further the common ground by considering the attributes of the reasonable investor and what information he would be likely to use. There is no definition of the reasonable investor in either EU or domestic legislation. The Authority suggests that its Handbook, in providing guidance, is of assistance; it is pointed out that (even) Mr Tolkien (one of the expert witnesses providing evidence for Mr Hannam) based his approach to the meaning of reasonable investor on that guidance. The Authority suggests that for present purposes, a reasonable investor can be taken to be a rational and economically motivated investor with some experience of investing in listed shares, but not an investment professional. A reasonable investor is a hypothetical investor and is necessarily assumed to have access to all generally available information and, we would add, to take account of it where relevant. Mr Hannam has put forward a more detailed definition. Subject to two points, there is nothing inconsistent with the Authority's definition and we do not consider that the detail has any relevance to the matter which we have to decide. The two points are these:

a. It is said that the reasonable investor represents the type of investor typically found in the market so that, for instance, if that investor, on the evidence, was particularly risk-averse, that would be likely to be a relevant factor. Quite apart from the fact, specific to the present case, that we have no evidence about what the attitude of a typical investor in the shares of a petroleum exploration company was in September/October 2008, we do not agree with the proposition. We do not understand what is meant by a "typical" investor save that, circularly, he may be a reasonable investor. Further, even if the market is volatile and/or the investor is risk-averse, that does not mean that information which would boost the share price or cause it to fall would be ignored.

b. It is submitted that the reasonable investor, although not necessarily a professional investor, has relevant knowledge and experience in the market in which he is operating and of the instrument in which he is dealing. We do not accept that. He is, as the Authority's own description of the reasonable investor shows, a person who is to be treated as knowing all relevant publicly available information. But he may have no experience in the particular market at all: it cannot be said, we think, that a person cannot be a reasonable investor simply

because he has no experience in the particular market concerned; nor is it right to insist that he has the knowledge of an experienced (albeit non-professional) participant in that market.

102. As just noted, the reasonable investor is an investor who would take into account information which would be likely to have a significant effect on price. Conversely, he is an investor who would not take into account information which would have no effect on price at all or, as the Authority itself submits, information which would have no prospect of significantly affecting the price of the investment. Neither the Authority nor Mr Hannam has explained their understanding of what a significant effect on price might be. Our view is that a "significant" effect is one which is to be contrasted with an insignificant, in the sense of trivial, effect. What is, or is not, trivial will depend on the particular circumstances of the case: for instance, a 1p rise in a share worth £10 may be regarded as trivial but a 1p rise in a share worth 2p would not. There is, we accept, a certain inherent uncertainty in this approach but it provides a sensible way of reaching the essence of what is significant. The reasonable investor will surely take account of information which may have a non-trivial effect on price: such information may have an effect on price which is significant to the reasonable investor. Our approach, is, we consider, the way in which it is appropriate to deal with the tension between section 118C(2)(c) and section 118C(6). We do not think it would be helpful to try and postulate any quantitative approach to determining what constitutes a "significant" effect.

103. The tribunal in *Massey* addressed the question of what was meant by "likely to have a significant effect on price". It appears to have adopted a rather different approach to the impact of section 118C(6) from that of the Authority. *Massey* concerned the advantage taken by Mr Massey, a market professional, of his knowledge that there was an impending discounted issue on AIM of shares in the relevant company. The Authority contended that what Mr Massey knew was inside information. He contended that it was not, on the basis that it was generally known that the company needed to raise capital and that, on the basis of previous placings, it could not be said that there would be a significant effect on price had the information about the intended placing been generally known. At [41] of the decision, the tribunal said this:

> "…We would have considerable sympathy with his [Mr Massey's] view if the phrase 'likely to have a significant effect on the price' had been used in the Act in its ordinary sense. But we have to apply the specially extended meaning assigned to this expression by s 118C(6). Whether or not the information was (in the ordinary sense) likely to have a significant effect on the price, we consider it is clear that it was information 'of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions'. If a hypothetical reasonable investor in Mr Burge's position had known of Eicom's willingness and offer to issue 3 million shares at 3.5p, he would have been likely to use that information as part of the basis of his decisions about purchasing Eicom shares."

104. It appears, therefore, that the tribunal was saying that, so long as the information was "of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions", it was irrelevant whether that information was "likely to have a significant effect on the price", despite the fact

that, in order to come within section 118C(2)(c), the Act appears to require that the information should be such that "if generally available, [it would] be likely to have a significant effect on the price".

105. The tribunal appears from that passage to have considered that it might be possible to find a situation where a reasonable investor would take into account, in making his investment decision, information which would not in fact have a significant effect on price; but, because of the extended definition in section 118C(6), that information would nonetheless be inside information. It is not at all clear to us why the tribunal put the matter the way it did in expressing sympathy with Mr Massey's view: earlier on in its decision it had concluded on the facts that the announcement of the placing would be likely to have a significant effect on the price, which would fall.

"likely"

106. We now turn to consider the meaning of the word "likely" in section 118C(2)(c) (which must be the same meaning as it has in Article 1(1) of the Market Abuse Directive). This is where the ground ceases to be common. There is no definition or explanation of what "likely" means either in the Directives or FSMA. The Authority's case is that "likely" indicates a low level of likelihood. Mr Hannam's case is that "likely" means "more likely than not". Mr Boulton suggested in his closing submissions that the meaning of "likely" may not matter if the Authority's approach to the "reasonable investor" test is adopted. We are not sympathetic to that submission. Even on the Authority's approach, section 118C(2)(c) must be borne in mind. We put it more strongly than that and consider that it is of importance in informing what information the reasonable investor would be likely to use. The meaning of "likely" is a relevant factor in understanding the relationship between the "reasonable investor" test and the words of that which it is defining.

107. Since section 118C(2)(c) reflects the provisions of Article 1(1) of the Market Abuse Directive, we should give the word "likely" the same meaning in that section as it has in that Article. English authorities showing the use of the word in different contexts are therefore of limited assistance in discovering the meaning properly to be attributed to it although the authorities do illustrate the truth of the familiar observation that a word can mean different things in different contexts.

108. Mr Rabinowitz suggests that more assistance can be found in the CESR guidance on this issue, which provides that:

> "The Directive test is 'likely' so on the one hand the mere possibility that a piece of information will have a significant price effect is not enough to trigger a disclosure requirement but, on the other hand, it is not necessary that there should be a degree of probability close to certainty."

109. The guidance thus suggests, he says, that "likely" means something more than a mere possibility (ie "may well"), but something less than near certainty (*ie* beyond reasonable doubt). This, in Mr Hannam's submission, is akin to saying that "likely" should be interpreted in the Directives, and hence in the Act, as meaning "more likely than not". We do not read "mere possibility", in the way that Mr Rabinowitz suggests, as "may well", words which convey to us something

considerably stronger than a mere possibility. A mere possibility (something weaker than a possibility *simpliciter*) is one which would provoke, if suggested as something which might happen, the reaction "well, it might happen; anything can happen; but this is highly unlikely". We agree with Mr Boulton when he says that this passage says no more than the unremarkable proposition that "likely" means something between 5% probable and 95% probable.

110. Both parties rely on the purpose of the legislation. Mr Hannam's position is that it is concerned with preventing behaviour that amounts to an abuse of the financial markets, and penalising that behaviour where it does occur. Inside information gives the insider in possession of it a material economic advantage over other market participants who are unaware of it. Where it cannot be said that the information in question is more likely than not to have a significant effect on price of the relevant financial instrument, Mr Rabinowitz submits that it is difficult to see why that information should be captured by a regime on market abuse, and why persons in possession of it should be regarded as having behaved abusively for dealing or not dealing with that information in a particular way and subject to potentially serious consequences as a result. The regime is unlikely to have been intended to apply to cases at the margins, where there is little more than a mere possibility that the information in question will have a significant effect on price.

111. The Authority acknowledges that purpose of the market abuse regime. Mr Boulton emphasises that the mischief at which the market abuse regime is aimed is improper disclosure of information and taking action on the basis of that information as the structure of the legislation shows. Information may, in some circumstances, be a pure statement of existing or reasonably anticipated fact or circumstances; but that will not always be so and may sometimes simply be an indicator of such facts or circumstances. The definition of what information is "precise" includes section 118C(5)(a): the information must indicate relevant facts or circumstances. The "reasonable investor" test (section 118C(6)), in contrast, is concerned directly not with the facts or circumstances but with the information.

112. He also reminds us that the concept of inside information does double duty. As we have already mentioned, Article 6 of the Market Abuse Directive makes it a requirement that issuers announce inside information publicly as soon as possible, a requirement reflected in the DTR Rule 2.2.1R. This is because, as recital (24) to the Market Abuse Directive shows, "prompt and fair disclosure of information to the public enhances market integrity, whereas selective disclosure by issuers can lead to a loss of investor confidence in the integrity of financial markets." We agree with Mr Boulton that it is in this context, as well as in the context of abuse by an insider, that the meaning of "likely" must be assessed.

113. The Authority's position is that it makes sense to require information to be announced if it is information that reasonable investors are likely to take into account. Reasonable investors are concerned about the return they will receive on their investments. Information which has no prospect of significantly affecting the price of the investment is not relevant to them, and there would in general be no reason to require a listed company to make it public. Reasonable investors will often take into account information which gives less than a 50% assurance about the future. It would be irrational to exclude such information when making

investment decisions. If such information is excluded from the definition of inside information, issuers will not be obliged to announce it publicly and insiders will be free to disclose it selectively to their favoured acquaintances. That is exactly the sort of behaviour that the Market Abuse Directive is intended to prevent because it undermines confidence in the markets. Investors need information which might, but also might not, have an effect on price in order to make their investment decisions on a properly informed basis.

114. The Authority also makes a practical point. It would be highly impractical if issuers had to decide whether information was more likely than not to affect prices significantly – one person might consider that a particular piece of information had a 40% chance of affecting prices, but another person might put the chance at 60%. Reasonable investors do not reject as irrelevant information which has a less than 50% chance of affecting prices significantly. The utility of the reasonable investor test is that it avoids any need for such fine (and irrelevant) distinctions.

115. As to that, Mr Rabinowitz does not understand why it would necessarily be easier for persons considering whether information was price-sensitive to apply a test of 'may well' rather than 'more likely than not'. A line must be drawn somewhere, and the reality is that, wherever it is drawn, there will always be some cases which cannot neatly be categorised as falling on one side of the line or the other. There is an element of truth in that. But some lines are easier to draw than others. The line which the Authority would seek to draw – not "may well" as Mr Rabinowitz might like but "more than a mere possibility" or "having a real prospect" as we would suggest – is one which makes categorisation easier than the one which he seeks to draw – "more likely than not".

116. On this approach to the meaning of "likely", there is no difficulty in reconciling the provisions of section 118C(2)(c) and section 118C(6). The reasonable investor will use all of the information which is "likely" to have a significant effect on price but will not take account of anything which is not "likely" to do so. As Mr Boulton puts it, the litmus test is whether a reasonable investor would be likely to take the information (we add: information which, of course, must be capable of having an effect on price) into account in deciding what to do. It is not enough for a reasonable investor simply to read the information and ignore it. The information has to be sufficiently material that it may have an effect on his decisions. That is the sort of information which must be made public in a transparent market and which must not be disclosed to a limited group of people without good reason. We agree.

117. We would add, on this topic, a reference to what Lord Nicholls said about the meaning of the word "likely" in *Re H* [1996] AC 563 at p 584G:

> "In everyday usage one meaning of the word likely, perhaps its primary meaning, is probable, in the sense of more likely than not. This is not its only meaning. If I go walking on Kinder Scout and ask whether it is likely to rain, I am using likely in a different sense. I am inquiring whether there is a real risk of rain, a risk that ought not to be ignored. In which sense is likely being used in this subsection?"

118. We ask ourselves the same question in relation to Article 1(1) of the Market Abuse Directive and section 118C(2)(c) FSMA. For the reasons given by the

Authority, we reject the "more probable than not" conclusion. Our conclusion is that the Authority's approach is correct and that the word "likely" in section 118C(2)(c) FSMA is properly to be construed as meaning that there is a real (in contrast with fanciful) prospect of that information having an effect on the price of qualifying instruments.

119. Viewed with the eyes of an English lawyer, the analysis of FSMA so far is at risk of becoming circular or empty. Thus:

a. One starts with section 118C(2)(c) which requires that the information would be likely to have a significant effect on price.

b. That in turn is defined, by the "reasonable investor" test in section 118C(6) as information which a reasonable investor would be likely to use.

c. The reasonable investor will use information which is likely to have a significant effect on price. Conversely, he will not use information which will have at most a *de minimis* effect on price.

d. So a reasonable investor is an investor who will use information in making his investment decisions if but only if it is likely to have a significant effect on price; and information is likely to have a significant effect on price if and only if an investor is likely to use it.

120. We do not consider that a charge of circularity would be justified. The wording of FSMA reflects the wording of the Directives. The Market Abuse Directive is drafted at a high level setting out framework principles. More detail is to be found in the implementing measures envisaged by the Directive. The Directive is not, and is not intended to provide, an exhaustive meaning to any particular concept such as "likely to have a significant effect on price". There is a range (perhaps a small range, but a range nonetheless) within which the implementing measure can itself define what is meant by that phrase without modifying its essential content and thus infringing Article 17(2). It is possible, we think, for an implementing measure, in conformity with Article 17(2), to expand or to constrain in each case within reasonable limits what might otherwise be seen as "likely to have a significant effect on" price. The approach to the "reasonable investor" test which we have discussed and consider to be correct does not modify any essential element of the Market Abuse Directive but it does provide a more focused and nuanced explanation of the concept in issue than the words of Article 1(1) itself. In particular, there may be cases where different minds might take different views on whether information is "likely to have a significant effect on" price. The "reasonable investor" test then provides a way of resolving such a difference. The test is an attempt to capture the essence of the concept.

Conclusion on section 118C

121. Our conclusions, in summary, in relation to the issues of construction identified at paragraph 46 above, are as follows:

a. As to the required level of accuracy of a statement or other communication for it to qualify as inside information: the existing circumstances or events in the past or the future indicated by the information contained in the statement or communication must be

proved (for the past) as existing or having occurred and (for the future) it must be demonstrated that there is a realistic prospect (in accordance with the test in *Geltl*) that they will come into existence or occur. To the extent that the statement or communication (whether or not wholly accurate) indicates that the relevant circumstances exist or will come into existence or that an event has occurred or may reasonably be expected to occur, the information which it contains is capable of constituting inside information notwithstanding the inaccuracy (if any). A statement by an insider which indicates a genuinely and reasonably held belief on the part of an issuer is capable of constituting inside information even if the belief subsequently turns out to be mistaken.

b. As to the requirements for information to be specific enough to enable a conclusion to be drawn as to possible effect on price, and in particular what the word "possible" means: the information must indicate the direction of movement in the price which would or might occur if the information were made public. The information does not need to indicate the extent to which the price would or might be affected. The information does not need to be such as to enable an investor to know with confidence that the price will move if the information were made public but only that it might move and, if it does, the movement will be in a known direction. In our view, if the disclosure of information on which an investor can safely act knowing that there is a real prospect of profit but no risk of loss is allowed, this has to be contrary to the same policy which prohibits disclosure where the recipient of the information could be confident that the market would move and in which direction it would move. We acknowledge that this casts a greater disclosure requirement on issuers than Mr Rabinowitz's approach; but we consider such a requirement to be consistent with the policy of the legislation.

c. As to the interaction between section 118C(2)(c) and section 118(6): the "reasonable investor" test in section 118C(6) requires, as is in any case common ground, the provisions of section 118C(2)(c) to be taken into account: The earlier subsection must be borne in mind in construing the later (Mr Boulton) or informs the meaning of the later (Mr Rabinowitz). The word "likely" is to be read as meaning that there is a "real prospect" of the information having a significant effect on price (which in turn means having a more than *de minimis* effect).

Proper course of employment

122. The behaviour on which the Authority relies in its case against Mr Hannam is the second type of behaviour described in section 118(3) FSMA. This applies where an insider discloses inside information "otherwise than in the proper course of the exercise of his employment, profession or duties". Mr Hannam's case is that even if, contrary to his submissions, he disclosed inside information to Dr Hawrami, he did so in the proper course of his employment, profession or duties. The burden of proof being on it, it is for the Authority to show that the disclosure was outside the course of Mr Hannam's employment, profession or duties.

123. The wording of section 118(3) reflects the wording of Article 1(1) of the Market Abuse Directive which precludes disclosure of inside information by a person unless it is made "in the normal course of the exercise of his employment, profession or duties". If it was not common ground at an earlier stage, by the end of the hearing it was common ground that the words "proper course" in section 118(3) were to be given the same meaning as "normal course" in Article 1(1). Unfortunately, the EU legislation does not provide any definition or guidance about the meaning of "normal".

124. Mr Rabinowitz identifies the principal prohibition, so far as inside information is concerned, as the prohibition on dealing ("acquiring or disposing … of financial instruments") found in Article 2 of the Market Abuse Directive. He describes the prohibition in Article 3(a) of the Market Abuse Directive, regarding the disclosure of inside information as "ancillary to and supportive of Article 2": he states, no doubt correctly, that its purpose in the context of the market abuse regime as a whole is to limit the number of persons capable of taking advantage of inside information, thereby minimising the risk of insider dealing. We do not, however, accept that the prohibition on disclosure in Article 3(a) is ancillary to Article 2; rather, it is a component of the regime designed to preserve market integrity and is not there simply to enable proper effect to be given to the prohibition on dealing by the insider. The exclusion from the prohibition of disclosure made in the normal course of the exercise of the insider's employment, profession or duties is not a derogation from the insider's obligations under Article 2 but is a recognition that it may be part and parcel of what the insider is employed to do, or what his duties require, that he disclose information to his client or, in some circumstances, to a third party.

125. Mr Rabinowitz contrasts the "normal course" of the exercise of an employment with the absence of some improper purpose and the absence of any purpose ancillary or unrelated to the exercise of the employment. It is no doubt correct that disclosure for an improper purpose or for a purpose which is not ancillary or related to the exercise of the employment cannot be in the normal course. But it does not follow, and we do not accept, that a disclosure which is in some way related to the exercise of the employment will, by virtue of that relationship, necessarily be in the normal course. Moreover, even if disclosure is justified, the normal course may require that restrictions are placed on the recipient of the information in the way in which he can use it.

126. Some assistance can be found in Article 6 of the Market Abuse Directive. We have already mentioned Article 6(1) (see paragraph 23 above) which requires issuers of financial instruments to inform the public as soon as possible of inside information. An issuer is permitted, by Article 6(2), to delay public disclosure "such as not to prejudice his legitimate interests" provided that such omission would not be likely to mislead the public and "provided that the issuer is able to ensure the confidentiality of that information". Further, Article 6(3) provides as follows:

> "Member States shall require that, whenever an issuer, or a person acting on his behalf or for his account, discloses any inside information to any third party in the normal exercise of his employment, profession or duties … he must make complete and effective public disclosure of that information…

> [We do not think that the phrase 'in the normal exercise' has a different meaning from 'in the normal course of the exercise'.]
>
> The provisions of the first subparagraph shall not apply if the person receiving the information owes a duty of confidentiality, regardless of whether such duty is based on a law, on regulation, on articles of association or on a contract."

127. Accordingly, the Market Abuse Directive requires Member States to ensure that, whenever a representative of an issuer discloses inside information relying on his ability to do so "in the proper [course of the] exercise of his employment, profession or duties", public disclosure must be made unless the recipient is subject to a duty of confidentiality.

128. The structure of Article 6 is thus as follows: the general rule is that an issuer must disclose inside information but may delay doing so in order not to prejudice his legitimate interests. It is envisaged that selective disclosure may nonetheless be made in some circumstances (*ie* "in the normal exercise of an employment, profession or duties") but if that is done, the recipient must be under a duty of confidentiality. It would be inconsistent with that for an insider who, perfectly properly, is in possession of inside information to disclose that information, in a case where he knows that public disclosure is not being made, unless he knows that the recipient will owe a duty of confidentiality.

129. It should be noted that the recital identifies the sources of the duty as law, regulation, articles of association or contract. Whether an implicit understanding is sufficient to give rise to a duty of confidentiality is a matter we need to address later.

130. We have already referred to DTR 2.2R which reflects Article 6(1) of the Market Abuse Directive. That is subject to the exception in DTR 2.5.1R (which reflects Article 6(2)):

> "An issuer may, under its own responsibility, delay the public disclosure of inside information, such as not to prejudice its legitimate interests provided that:
>
> (1) such omission would not be likely to mislead the public;
>
> (2) any person receiving the information owes the issuer a duty of confidentiality, regardless of whether such duty is based on law, regulations, articles of association or contract; and
>
> (3) the issuer is able to ensure the confidentiality of that information."

131. Domestic regulation, it can thus be seen, also expressly requires confidentiality where an issuer divulges inside information selectively while relying on its legitimate interests to justify the non-disclosure to the public of that information. In a case where an issuer is relying on this exception, we cannot conceive of a situation where an insider would be acting in the normal course of the exercise of his employment, profession or duties in disclosing inside information without at the same time ensuring that that the recipient is subject to a duty of confidentiality. If the insider did not ensure this, then paragraph (2) of DTR 2.5.1R would not be satisfied, and the issuer itself would not fall within paragraph (3). It would have to disclose to the public the very information which it was seeking to withhold.

132. If the issuer itself is under an obligation to disclose the relevant inside information to the public because to delay the provision of such information would not prejudice the legitimate interests of the issuer or because delay would be likely to mislead the public, the analysis is slightly different. In such a case, the issuer's obligation is to disclose the inside information as soon as possible (see DTR 2.2.1). Clearly, the issuer could not itself disclose inside information to a third party prior to the public announcement unless the recipient were prevented from making use of the information. In particular, the recipient should be prevented from passing the information on to someone else who might make use of it: he must be made subject to a duty of confidentiality pending the public announcement. An insider cannot do what the issuer itself could not do: he cannot, in our view, validly claim to be able to disclose inside information without a duty of confidentiality being imposed on the recipient. Again, the insider cannot claim to be acting in the normal course of the exercise of his employment, profession or duties when he does something which the issuer itself could not do.

133. In any case, the duty of confidentiality is not an end of the matter: the imposition of such a duty does not, of itself, mean that the disclosure is in the normal course of the exercise of the employment, profession or duties of the insider. DTR 2.5.7G contains guidance as to the conditions under which inside information may be selectively disclosed. As it makes clear

> "… selective disclosure cannot be made to any person simply because they owe the issuer a duty of confidentiality. For example, an issuer contemplating a major transaction which requires shareholder support or which could significantly impact its lending arrangements or credit-rating may selectively disclose details of the proposed transaction to major shareholders, its lenders and/or credit-rating agency as long as the recipients are bound by a duty of confidentiality. An issuer may, depending on the circumstances, be justified in disclosing inside information to certain categories of recipient in addition to those employees of the issuer who require the information to perform their functions."

134. The Authority submits that, since the possibility of selective disclosure of inside information in the proper course of employment is an exception to the general rule (*ie* that inside information, if not announced, must not be disclosed) it should be narrowly construed. That approach was applied by the ECJ in the specific context of the predecessor Directive, which contained materially identical wording, in *Grøngaard and Bang* (Case C-384/02) [2005] ECR I-9939:

> "26. Under Article 3(a) of Directive 89/592, the prohibition of disclosing inside information does not apply to its disclosure by a person in the normal course of the exercise of his employment, profession or duties.
>
> 27. Even if that rule, having regard to the terms used, is capable of covering very different situations, it must, as an exception to a general prohibition and in the light of the objective pursued by Directive 89/592, be interpreted strictly.
>
> …
>
> 34. In the light of those objectives, and having regard to the fact that Article 3(a) of Directive 89/592 is an exception which must be interpreted strictly, the disclosure of such information is justified only if it is

strictly necessary for the exercise of an employment, profession or duties and complies with the principle of proportionality."

135. The important point being made here was that the exception must be interpreted "strictly" and that disclosure could be justified only if "strictly necessary", a formulation found in other contexts of EU law.

136. That, however, is not the language used in the Authority's own guidance. That guidance is found in MAR 1.4.5 which is denoted E. This means that it has evidential status so that, pursuant to section 122(2) FSMA, it may be relied on to indicate whether or not particular behaviour should be taken to amount to market abuse.

137. The guidance in force at the time of the September and October emails provided as follows:

> "In the opinion of the FSA, the following factors are to be taken into account in determining whether or not the disclosure was made by a *person* in the proper course of the exercise of his employment, profession or duties, and are indications that it was:
>
> (1) whether the disclosure is permitted by the rules of a *prescribed market*, a *prescribed auction platform*, of the *FCA* or the *Takeover Code*; or
>
> (2) whether the disclosure is accompanied by the imposition of confidentiality requirements upon the *person* to whom the disclosure is made and is:
>
> (a) reasonable and is to enable a *person* to perform the proper functions of his employment, profession or duties; or
>
> (b) reasonable and is (for example, to a professional adviser) for the purposes of facilitating or seeking or giving advice about a transaction or *takeover bid*; or
>
> (c) reasonable and is for the purpose of facilitating any commercial, financial or *investment* transaction (including prospective underwriters or placees of *securities*); or
>
> (d) reasonable and is for the purpose of obtaining a commitment or expression of support in relation to an *offer* which is subject to the *Takeover Code*; or
>
> (e) in fulfilment of a legal obligation, including to *employee* representatives or trade unions acting on their behalf; or
>
> (3) …"

138. Mr Hannam relies particularly on paragraph (2)(c). Mr Rabinowitz suggests that, according to the Authority's own guidance, where a professional adviser makes a disclosure of inside information for the purpose of facilitating a commercial transaction, then, provided the disclosure was reasonable and it was made in circumstances in which it was understood that the recipient was required to keep the disclosure confidential, this would indicate that the disclosure did not involve any market abuse.

139. In our view, that is to put an unjustified gloss on the wording of the guidance which refers to the imposition of confidentiality requirements: that is not

the same as an understanding by the recipient (of which it may be inherently difficult for the Authority to prove the absence) that he was required to keep matters confidential. This difficulty is particularly acute in the present case where the recipient, Dr Hawrami, has not given evidence.

140. But if we take his point as referring to circumstances in which the recipient is already clearly under a duty of confidentiality, it has some force. Further, if necessity, strict or otherwise, is the test, it is surprising that the guidance is worded as it is. Mr Rabinowitz notes that the language of "necessity" was used in a draft of the guidance that was circulated in June 2004, prior to the transposition of the Market Abuse Directive into national law. By the time the guidance was published, this had been abandoned in favour of the language of reasonableness. However, it is not suggested by the Authority that "reasonable" as used in the guidance means "necessary". The observation seems to us to add nothing to the debate.

141. Mr Rabinowitz submits that the guidance is what governs and that *Grøngaard and Bang* does not assist in determining the scope of the words used in FSMA. We do not think that the case can be side-lined in this way. The wording of the provision under consideration in that case was virtually identical to that of Article 3(a) of the Market Abuse Directive and the reasoning of the Court appears to us to be applicable to Article 3(a). We consider that, applying a conforming interpretation, we should give, so far as appropriate, the exception in section 118(3) the same meaning as the exception in Article 3(a): we do not agree that the case does not assist in determining the scope of the words used in FSMA.

142. We should note one other passage from the judgment of the Court at [39] and [40]:

> "39. It is also appropriate to point out that the exception under Article 3(a) of Directive 89/592 must be appraised taking into account the particular features of the applicable national law.
>
> 40. What is to be regarded as coming within the normal ambit of the exercise of an employment, profession or duties depends to a large extent, in the absence of harmonisation in that respect, on the rules governing those questions in the various national legal systems."

143. Since national rules might take a very wide approach to what activity falls within any particular employment, a strict approach to the exception needed to be taken by the Court otherwise the policy of the Directives could be undermined. In a Member State where the activities seen as falling within an employment are wide, the test of strict necessity in relation to the exception serves to limit the situations in which the exception might apply when, in principle, it should not. In contrast, in a Member State where the activities seen as falling within an employment are narrow, there is already inherent a degree, at least, of the strict necessity which the Court required: in other words, because the scope of the activities is narrow, the situations in which the exception can apply are narrow so that it is more likely that, where disclosure can be made at all in the course of the employment, it will be necessarily made.

144. There is, however, clearly a tension between the Authority's submission based on *Grøngaard and Bang* that disclosure can be made only where it is

strictly necessary and its own guidance which allows for the possibility, at least, of disclosure being made where it is reasonable. It is not clear to us how that tension can be resolved and, if it cannot be, whether the submission or the guidance is to govern the position in this jurisdiction. For reasons which will become apparent, we do not need to provide an answer to those difficulties.

145. Since the September email concerned a possible bid for Heritage, we should also mention the Takeover Code. This prohibits disclosure in relation to a take-over offer or contemplated offer except where necessary and in circumstances of strict confidence:

> "2.1 The vital importance of absolute secrecy before an announcement must be emphasised. All persons privy to confidential information, and particularly price-sensitive information, concerning an offer or contemplated offer must treat that information as secret and may only pass it to another person if it is necessary to do so and if that person is made aware of the need for secrecy. All such persons must conduct themselves so as to minimise the chances of an accidental leak of information."

146. Although the Takeover Code is not incorporated into the market abuse regime under FSMA, it is referred to in MAR 1.4.5E as we have seen (see paragraph 137 above): if disclosure was permitted by the Takeover Code, that is a factor to be taken into account, and is an indication that it was made in the proper course of the exercise of the employment, profession or duties. Equally, if the disclosure was prohibited by the Takeover Code, that is, in our view, clearly relevant to whether the disclosure was in the proper course of the exercise of employment. The Authority submits that it could only be in the most unusual circumstances for that to be so where a corporate finance adviser, in the M & A department of an institution such as JPMC, acts in breach of that rule. The rule requires that, even with a firm advising on a potential transaction, the number of individuals who are made aware of the approach be kept to a minimum. Disclosure to persons who are not involved in the transaction must therefore be very strictly controlled. We agree with those submissions. We would go further and say that persons not involved in the transaction should not be given access to inside information if at all possible.

Standard of proof

147. We return to the question of the standard of proof. We should say at the outset that the cases have been, and our discussion is, directed at the standard of proof of disputed facts and not at the evaluation of those facts, as found in accordance with the application of the appropriate standard of proof, in the context of the issues to which the facts give rise.

148. Although we had written submissions from both sides on the question of standard of proof, time did not permit us to hear oral submissions from Mr Strong in reply on behalf of the Authority. In the course of preparing this decision, we considered that we would be assisted by further submissions and requested Mr Strong to provide us with written submissions. He complied with that request. Mr Rabinowitz complains mildly that the reply submissions raise new points which should have been raised earlier in the Authority's detailed written submissions. He does not suggest that we should decline to consider the arguments raised but has

himself addressed a written response; it is entirely appropriate for him to have done so and we take account of his further submissions.

149. It is common ground that, in domestic law, market abuse as such does not give rise to a criminal offence, although in a particular case, the facts which give rise to market abuse may also give rise to an offence. Whether proceedings in relation to market abuse are criminal proceedings for the purposes of Article 6 ECHR does not arise for consideration in the context of the standard of proof since Article 6 does not mandate any particular standard.

150. Nonetheless, Mr Rabinowitz suggested in his opening submissions that the Authority's allegations in the present case are "tantamount to allegations which constitute criminal offences", referring to section 52 Criminal Justice Act 1993 which provides for the offence of insider dealing. Of relevance here is section 52(2) which provides:

> "An individual who has information as an insider is also guilty of insider dealing if—
>
> …
>
> (b) he discloses the information, otherwise than in the proper performance of the functions of his employment, office or profession, to another person."

151. To fall within that section, an individual must, it can be seen, have "information as an insider". Mr Strong takes issue with Mr Rabinowitz's categorisation. He points out that, under section 57, a person has information as an insider only if "he knows that" the information is inside information. Proof of the criminal offence therefore has a mental element which is wholly absent from the market abuse provisions with which we are concerned. He also points out that, under section 53(3), a person is not guilty of an offence under section 52(2)(b) if he did not expect any person to deal because of the disclosure.

152. We agree with Mr Strong that the conduct alleged against Mr Hannam is not tantamount to criminal conduct: the Authority does not allege that the necessary mental element on the part of Mr Hannam existed, nor does it allege that Mr Hannam expected Dr Hawrami to deal in Heritage securities on the basis of the September email or the October email. But that is not to say that a finding of market abuse might not have very serious consequences for the individual concerned. Indeed, the penalty of £450,000 imposed on Mr Hannam is an example of a serious consequence.

153. It is also common ground, in the light of the decisions of the House of Lords in *Re H* [1996] AC 563 and *Re B* [2009] 1 AC11 that in civil cases, the normal standard by which disputed issues of fact are to be decided is the balance of probabilities. The approach which allowed for a "sliding scale" in the civil standard, by which it varied according to the seriousness of what has to be proved, has been exposed as a heresy.

154. However, although the normal standard is as just stated, there are some civil proceedings in which the criminal standard is applied. These are cases in the first category which Lord Hoffmann identified in his speech in *Re B* at [5] where the

courts have thought that the criminal standard, or something like it, should be applied because of "the serious consequences of the proceedings".

155. Lord Hoffmann also clarified the relevance of inherent probabilities in relation to the standard of proof. This is reflected in his second category where it has been observed that when some event is inherently improbable, strong evidence may be needed to persuade a tribunal that it more probably happened than not. He dealt with this at [14] and [15] of his speech citing from Lord Nicholls in *Re H* at p 586 and summarising the position in this way:

> "There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities … It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred. In many cases, the other evidence will show that it was all too likely."

156. On behalf of the Authority it is submitted that the fact that serious allegations are made does not require an application of the criminal standard. Indeed, it is said that that the mere fact that an allegation in civil proceedings is of behaviour so serious that it amounts to criminal conduct does not alter the standard to which the allegation must be proved in the civil proceedings: the seriousness of the conduct alleged and the consequences for a person's reputation do not affect the standard of proof. That submission is correct to this extent: it is not necessarily the case that, where a serious allegation is made (or we would add that a serious consequence follows if the allegation is proved), the criminal standard must be adopted. *Re H* and *Re B* are examples which demonstrate that. But that does not assist in determining in which cases the general rule should be displaced.

157. In their written submissions, Mr Boulton and Mr Strong consider the cases referred to by Lord Hoffmann falling in his first category. They submit that all of the cases involve a deprivation of fundamental liberties. It is in that sense that the proceedings have "serious consequences" and require adoption of the criminal standard of proof. We here mention the cases:

a. *R v Secretary of State for the Home Department, ex p Khawaja* [1984] AC 74. This was a case involving the detention and removal from the country of an immigrant on the ground that he had obtained leave to enter by fraud or deception. The higher standard of proof was appropriate because the decision involved issues of personal liberty: see in particular Lord Fraser of Tullybelton at 97G, Lord Wilberforce at 105E, Lord Scarman at 113G-H and Lord Templeman at 127H-128D.

b. *B v Chief Constable of Avon and Somerset* [2001] 1 WLR 340. This case concerned a sex offender order made against B which significantly restricted B's liberty. The order contained prohibitions on communications with children, entering a dwelling where a child was present, undertaking any activity likely to bring B into contact with a child and not loitering near a bus stop except for the purpose of travel (see page 342E-F). The order could only be made if B "had

acted … in such a way as to give reasonable cause to believe that an order … is necessary to protect the public from serious harm from him". In explaining why the Magistrates should apply a standard of proof "which will for all practical purposes be indistinguishable from the criminal standard" Lord Bingham referred at [30] to "the seriousness of what has to be proved and the implications of proving it". The implications were the restrictions on B's movements and freedom of association imposed by the order.

c. *R (McCann) v Crown Court at Manchester* [2002] UKHL 39 [2003] 1 AC 787. This case concerned anti-social behaviour orders which, among other matters, prohibited the defendants from entering a particular area of the city in which they lived. The order thus restricted freedom of movement.

158. In *Re B* Lord Hoffmann said (at [13]) that he did not intend to disapprove any of the cases in his first category but he agreed with Lord Steyn's observation in *McCann* that clarity would be enhanced if the courts said simply that, although the proceedings were civil, the nature of the particular issue made it appropriate to apply the criminal standard. Accordingly, the question in market abuse cases is whether the standard of proof is the ordinary civil standard, the balance of probabilities but taking into account inherent probabilities in the way Lord Hoffmann has explained, or the criminal standard, beyond reasonable doubt.

159. Lord Hoffmann did not mention another case, *Gough v Chief Constable of Derbyshire* [2002] EWCA Civ 351 [2002] QB 1213. The Authority draws attention to it. It accepts, indeed it avers, that this case falls into Lord Hoffmann's first category: it does so because this case, too, involved a deprivation of fundamental liberties in that the order restricted the respondents' freedom of movement by prohibiting them from attending certain football matches or coming within a specified area of the ground and by requiring them to surrender their passports to prevent them from travelling to matches abroad.

160. The Authority also refers to a number of cases where the normal civil standard applies. These are cases involving serious allegations but where strong evidence is required in the light of the inherent improbability of an event as explained by Lord Hoffmann.

161. The first case is *Hornal v Neuberger Products Limited* [1957] 1 QB 247 which Lord Hoffmann referred to as the leading case (until *Re H*) in his second category. This case involved an allegation of fraud. The gravity of the allegation (which was of criminal conduct) did not affect the standard of proof, but it was appropriate to take into account in weighing the evidence according to that standard the improbability of the person having committed fraud.

162. *Re H* itself is also relied on by the Authority as another example of the civil standard being applied in relation to allegations of the utmost gravity, sexual abuse within a family. Lord Nicholls could see no reason for departing from the normal civil standard in family cases noting (see p 586 D) that although family proceedings often raise serious issues, so too do other forms of civil proceeding. After the passage cited by Lord Hoffmann at [11] of his speech in *Re B*, the passage in which Lord Nicholls explains the relevance and importance of inherent

probabilities, Lord Nicholls notes that his approach substantially accords with the approach in the authorities including *Hornal*. He adds that this approach "also provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters." Then, at p587B-C, Lord Nicholls considers the possibility of a third standard somewhere between the balance of probability and the criminal standard. The only alternative which suggested itself to him was that the standard should be commensurate with the gravity of the allegation and the seriousness of the consequences, concluding:

> "A formula to this effect has its attraction. But I doubt whether in practice it would add much to the present test in civil cases, and it would risk causing confusion and uncertainty."

163. The next case is *Lek v Mathews* (1927) 29 Ll L Rep 141. In that case, Mr Lek claimed on an insurance policy in respect of the theft of a stamp collection. The insurance company alleged that he had lied about what stamps were in the collection, an allegation of fraud and perjury. Lord Sumner said (at 164):

> "…on a civil issue I do not think more is required than a correct appreciation of the incidence and the shifting of the onus of proof and a reasonable estimate of the weight pro and con of the various parts of the evidence. Mr Lek's wealth and reputation are material only as ground for considering the probability of such misconduct. The consequences of a verdict against him are quite immaterial."

164. The same approach appears in *Re D* [2008] UKHL 33 [2008] 1 WLR 1499. The decision in this case was handed down on the same day as *Re B*. Lord Carswell (with whom the other members of the panel agreed) stated at [28] that the standard of proof is "finite and unvarying" going on to identify situations which might make a heightened examination (not a heightened standard) necessary. These situations included the inherent unlikelihood of the occurrence taking place, the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact. But as he put it:

> "….a possible source of confusion is the failure to bear in mind with sufficient clarity the fact that in some contexts a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard. The standard itself is, however, finite and unvarying. Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place (Lord Hoffmann's example of the animal seen in Regent's Park), the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact … These are all matters of ordinary experience, requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or a specially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established."

165. Lord Brown of Eaton-under-Heywood (see at [47]) also had something to say about the seriousness of the consequences of an allegation being proved:

> "If the evidence satisfies a tribunal charged with deciding questions on the balance of probabilities that an allegation made against A is more likely than not to be true—notwithstanding whatever unlikelihood there may be in A having acted as alleged given the serious adverse consequences to him likely to result from so acting—then in my judgment it would be quite wrong for that tribunal to decide the question in A's favour merely to save him from the serious consequences of a finding against him—for example, to save a bank manager from a finding of dishonesty."

166. Lord Brown speaks in that passage of a tribunal which applies the standard of balance of probabilities. He did not see an allegation of serious mis-conduct – he gave the example of a bank manager's dishonesty – as requiring the criminal standard to be applied to the civil action; in other words, an allegation of dishonesty was not seen by him as requiring an exception to bring the case within Lord Hoffmann's first category.

167. The Authority then submits that the examples which Lord Hoffmann gives of cases within his first category are different in type from cases of market abuse. Arrest and deportation of illegal immigrants, sex offender orders restricting what the offender may do in the ordinary course of his life and antisocial behaviour orders restricting the movements of the subject of the order have little, if anything, in common with the penalties which may be imposed for market abuse. That submission is correct, but the fact that Lord Hoffmann only identified cases of this sort which fell within his first category does not mean that there cannot be other exceptional types of case which should also fall in that first category. The question is whether market abuse is such an exception.

168. The appropriate standard of proof has been addressed in a number of tribunal cases (both in the Upper Tribunal and in the Financial Services and Markets Tribunal) both before and after *Re B*. It is correct to say that the tribunals have consistently applied a civil standard; but it is important to note that in the cases before *Re B* the now-rejected "sliding scale" was adopted which resulted in a heightened standard close to the criminal standard. Mr Rabinowitz submits, hardly surprisingly, that the tribunals which held that a heightened civil standard was appropriate because of the seriousness of the case for the individual concerned would surely have adopted the criminal standard if they had known what the correct approach actually was. We mention four of these cases.

169. The first is *Davidson and Tatham v The Financial Services Authority* [2006] UKFSM 031. The Authority argued that the ordinary civil standard applied. Mr Davidson and Mr Tatham argued that the difference between the criminal and civil standards did not matter because allegations of market abuse were very serious indeed and the penalties imposed were high; the heightened civil standard was to be applied, a standard virtually indistinguishable from the criminal standard. The tribunal did not take the easy way out by saying that it did not need to decide which standard applied because they were indistinguishable. Instead it addressed two questions: first, was the appropriate standard the criminal standard (beyond all reasonable doubt) or the civil standard (the balance of probabilities. Secondly, if the correct standard was the civil standard, how was the tribunal to apply it? The tribunal considered the cases including: *Hornal*, *Re H*, *B v Chief Constable of Avon and Somerset* and *McCann*.

170. The tribunal also considered two other cases, *Campbell v Hamlet* (April 2005) and *R v Mental Health Review Tribunal* (December 2005). We do not think that we need to say anything about those save to note two matters referred to by Richards LJ in the second of those. First, he referred to three situations where the criminal standard was applied namely contempt of court, anti-social behaviour orders and certain disciplinary contexts, emphasising that these were exceptions to the general rule. Secondly, he referred to the flexible application of the civil standard – the "sliding scale" which we have referred to.

171. The tribunal concluded on the first question in this way:

> " We are of the view that the civil standard of proof is sufficiently strong to establish what has to be established in these references. Although in *McCann* the criminal standard was said to apply to civil proceedings relating to anti-social behaviour orders, and in *Campbell* it was said to apply to disciplinary proceedings against lawyers, nevertheless in *Mental Health Review Tribunal* these were regarded as exceptions to the general rule. Without authority to guide us we are reluctant to extend what the Court of Appeal regarded as exceptions. We therefore conclude that the appropriate standard of proof is the civil standard."

172. The tribunal then went on to answer the second question:

> "… In the light of all the authorities we conclude that there is a single civil standard of proof on the balance of probabilities but that it is flexible in its application. The more serious the allegation, or the more serious the consequences if the allegation is proved, the stronger must be the evidence before we should find the allegation proved on the balance of probabilities."

173. In applying the flexible approach, the tribunal regarded "the allegations of market abuse, the subject of these references, as very serious allegations indeed. We also note that if the allegations are proved, the consequences will be very serious also" and they later stated "We must apply the standard of proof with the strictness appropriate to the seriousness of the matters to be proved and the implication of proving them. They are very serious allegations which will require cogent evidence to establish".

174. There can be no doubt, we think, that the tribunal was applying the now-discredited "sliding-scale" approach and was not simply taking account of the inherent probabilities in the way which Lord Nicholls explained in *Re H* and which Lord Hoffmann clarified in *Re B*.

175. Whether the tribunal would have answered the first question which it asked itself differently if it had appreciated that the flexible approach was not available to it, we can only speculate. It might have adopted the criminal standard, or it might have formed the view that, taking account of inherent probabilities in the way in which Lord Hoffmann has described, its concerns about the seriousness of the allegations and the consequences if proved, it should apply the civil standard.

176. The second decision is *Parker v The Financial Services Authority* [2006] UKFSM 031. This was a decision of a three-person panel including two of us, Judge Bishopp and Mr Douch. The tribunal followed *Davidson and Tatham* on the question of standard of proof, again adopting the flexible approach. The charges were grave and the penalty imposed by the Authority was large. The slide was therefore held to come to rest very near the top of the scale, making it

difficult to draw a distinction between the standard which the tribunal should apply and the criminal standard. It is not appropriate to discuss what the tribunal would have done had it known that the flexible approach was not open to it.

177. The third case is *7722656 Canada Inc and Beck v The Financial Services Authority* [2011] UKUT 17 (TCC). As appears from [47], there was very little debate about the standard of proof because counsel for the applicants accepted that the civil standard should apply (and, of course, by this time, the law had been explained in *Re B*). Although the tribunal cited the first part of [13] of Lord Hoffmann's speech in *Re B*, it did not address whether the case before it was one of those exceptional cases where the criminal standard should apply notwithstanding the civil nature of the case.

178. The fourth case is *Mark Anthony Financial Management and Ainley v The Financial Services Authority* [2012] UKUT B17 (TCC) (in which case Mr Douch was a member of the panel). In this case, too, counsel for Mr Ainley accepted that the civil standard applied. The tribunal nonetheless expressed the view that the case was not one of the exceptional cases where the criminal standard should apply, but it must be appreciated that it did not appear to have received full argument on the point. It expressed that view in this way at [21]:

> "… This case does not fall into that category of cases, such as sex offender orders and anti-social behaviour orders which the law classifies as civil but which are "quasi-criminal" in nature and in relation to which the courts have held that the criminal standard of proof is appropriate."

179. Mr Rabinowitz submits that Lord Hoffmann, in *Re B*, did not, and was not purporting to, lay down an exhaustive categorisation of the types of case where it would be appropriate to apply the criminal standard of proof. A case does not have to be of a "quasi-criminal" nature (whatever that may mean) before it can be an exception to the general rule. Nor, he says, does a case need to be one that concerns fundamental liberties before the criminal standard is to be applied. He submits allegations of market abuse are, in their very nature, serious and that where the consequences are also serious – a penalty of £450,000 in the present case – the essential character of the case takes it into the exceptional category.

180. We agree that the cases which Lord Hoffmann used to illustrate the exceptional nature of the case required before the criminal standard is adopted are not exhaustive of the type of case which is covered. We also agree that deprivation of fundamental liberties is not a necessary ingredient. This is demonstrated by reference to in *Re a Solicitor* [1993] QB 69 where the criminal standard was applied to solicitors' disciplinary proceedings. Although the remarks of Lord Lane CJ in that case were addressed to a case which he described as "tantamount to a criminal offence", the case can be taken as authority for the proposition that the criminal standard is applicable in all disciplinary proceedings against lawyers: see the Privy Council case of *Campbell v Hamlet* [2005] UKPC 19, [2005] 3 All ER 1116, at [16] *per* Lord Brown of Eaton-under-Heywood. We would add that he interpreted *Re a Solicitor* as warranting the Law Society Disciplinary Committee applying the criminal standard in all cases and not only in those where what is alleged is tantamount to a criminal offence. Whether *Campbell v Hamlet* remains the law in relation to solicitors is doubtful: the current

Disciplinary Procedure Rules (see Rule 7.7) of the Solicitors Regulation Authority state that the "standard of proof shall be the civil standard".

181. It does not, however, follow that in all cases where an allegation is serious and has serious consequences for an individual that the allegation must be proved on the criminal standard. In some cases it will, in others it will not. On one side of the line, where the criminal standard is appropriate, are disciplinary proceedings relating to lawyers as we see from *Re a Solicitor* and *Campbell v Hamlet.* Cases the other side of the line where the ordinary civil standard has been applied include these:

a. *R v Provincial Court of the Church in Wales, ex p Williams,* 23 October 1998. Latham J applied the civil standard in a case which concerned the stripping of a priest of Holy Orders. The Judge explained *Re a Solicitor* as turning on the fact that the allegation against the solicitor amounted to a criminal charge. The standard of proof was "that described by Lord Nicholls in *Re H.*" We do not think that Latham J, in saying that, can be taken as adopting the incorrect understanding of Lord Nicholls' description of the standard (that is to say the "sliding scale") rather than the correct understanding of that description as explained by Lord Hoffmann.

b. In *Greaves v Newham LB*, 16 May 1983, Browne-Wilkinson J (sitting in the Employment Appeals Tribunal) applied the civil standard in relation to findings made against the applicant notwithstanding that her livelihood was at stake.

182. In disciplinary cases relating to professionals other than lawyers, the ordinary civil standard is nearly always applied. In many cases, the rules of the relevant procedures expressly provide for a civil standard and, accordingly, decisions in those circumstances do not demonstrate what the answer should be in the absence of express provision. But the fact that disciplinary rules do provide, in many cases, for the civil standard does suggest to us that considerable caution must be exercised in relation to the submission made on behalf of Mr Hannam that cases of market abuse fall into Lord Hoffmann's category of exceptional cases because they are serious and carry serious penalties: the same is true in the field of discipline under professional rules of conduct. The Authority draws attention to the following:

a. Doctors and other health care professionals: under section 60A of the Health Act 1999, the disciplinary panels of the General Medical Council, the General Dental Council, the Nursing and Midwifery Council and the General Optical Council are required to apply the standard of proof which is "*that applicable in civil proceedings*" where a person's fitness to practise is in issue.

b. The accountancy professional bodies uniformly apply the civil standard of proof in disciplinary proceedings, whether or not those proceedings could result in the exclusion of a member from the relevant body.

i The FRC Accountancy Scheme is an independent disciplinary scheme operated by the Financial Reporting Council. The

standard of proof applied is the civil standard (Rule 10 of the Scheme).

ii The Institute of Chartered Accountants in England and Wales applies the civil standard of proof. There is no express reference to that standard in the ICAEW's disciplinary rules, but there are decisions of the Disciplinary Tribunal where this standard has been applied. We are not aware of any cases involving members of the ICAEW where the criminal standard has been applied.

iii The Association of Chartered Certified Accountants also applies the civil standard under The Chartered Certified Accountants' Appeal Regulations 2006, Rule 10(2). The same goes for the Chartered Institute of Management Accountants under its Disciplinary Committee Rules 2011.

c. The civil standard of proof applies in disciplinary proceedings against architects. Under section 20 of the Architects Act 1997, the title 'architect' is protected and can only be used by someone registered with the Architects Registration Board. The Professional Conduct Committee of that Board has the power to erase an architect's name from the register. It applies the civil standard of proof (rule 12(e) to the rules made by the Architects Registration Board pursuant to section 14(6) of the Architects Act 1997).

183. The case before us is not, of course, one of disciplinary proceedings. We do not refer to the standard of proof in such proceedings as providing an answer to the standard of proof which is to be applied in cases of market abuse. Rather, we refer to them to show that there are many situations where the civil standard applies notwithstanding the possibility of serious consequences, including loss of livelihood, for the individual concerned. We do not agree with any suggestion that the seriousness of the consequences leads, almost inevitably, to the application of the criminal standard of proof.

184. There is, of course, a strong public interest in deterring market abuse because that sort of behaviour undermines the integrity of financial markets and thereby harms the public. In that respect there is a parallel to be drawn with disciplinary proceedings, at least so far as concerns authorised persons and the Authority's functions as the authorising body. Just as the professional bodies can impose financial penalties on their members where they misbehave, so too the Authority is able to impose financial penalties on approved persons where they misbehave (by engaging in market abuse). In each case, it is appropriate, it can be said, to apply the civil standard. We should not be deterred from reaching that conclusion by the fact that the market abuse regime also applies to persons who are not market professionals and approved by the Authority.

185. Returning to the decisions in *Davidson and Tatham* and *Parker*, we do not consider that they lend support to the view that the criminal standard should be applied in cases of market abuse. As we have already observed, it is a matter of speculation what the tribunal in *Davidson and Tatham* would have decided if it had appreciated that the flexible approach to the civil standard was not available, particularly given the explanation given by Lord Hoffmann of how inherent

probabilities remain to be taken into account. The tribunal would also have had to take into account the fact that market abuse may take different forms, ranging from the serious and consequential serious penalties such as a very large financial penalty, to the much less serious, where the consequence may be comparatively modest, such as a small financial penalty or publishing a statement that the individual concerned has engaged in market abuse. Under the flexible approach, the tribunal was able to take account of these differences when deciding what the civil standard required. But once it is acknowledged, as it must be, that there is now a choice between the criminal standard and the single civil standard (taking account of inherent probabilities), there is no room for a difference of approach between the serious and not-so-serious cases since, in our view, a single standard must apply to all cases of market abuse. The adoption of a universal criminal standard would make it harder for the Authority successfully to control less serious types of market abuse. This consideration would no doubt have influenced the tribunal in *Davidson and Tatham* had it recognised that the choice between the criminal and civil standards had to be made.

186. Mr Strong submits that the legislative purpose of FSMA Part VIII (which includes section 123) suggests that the requirement for the Authority to be "satisfied" means satisfied on the balance of probabilities. He submits that Part VIII was intended to fill a perceived gap between the criminal offences of insider dealing and misleading statements and practices and the regulatory rules applicable to authorised persons. Obtaining criminal convictions was perceived as too difficult to be an effective deterrent, and disciplinary action could only be brought against authorised persons. Parliament therefore introduced a non-criminal market abuse regime, applicable to everyone. Requiring proof beyond reasonable doubt would undermine the objective of the legislation.

187. He has referred to two text-books in support of that last proposition. They are Blair, Walker and Purves (eds), *Financial Services Law* 2nd ed. (2009), 8-02 and Hudson, *The Law and Regulation of Finance* 2nd ed. (2013), 12-09. The first of those references quotes from the First Report (29 April 1999) of the House of Lords and House of Commons Joint Committee on Financial Services and Markets:

> "The market abuse regime is intended to supplement, but not replace, the existing criminal sanctions for insider dealing, misleading the market and market manipulation. It is designed to allow the FSA to deal with any conduct that is damaging to the markets and in particular it is intended to enable the FSA to deal with market-abusive behaviour by non-authorised persons which is not caught by the existing criminal offences."

188. Mr Rabinowitz submits that it is perhaps obvious that the stated purpose of empowering the Authority to penalise non-authorised persons for market-abusive behaviour not caught by existing criminal offences would not in any way be undermined by requiring proof of such behaviour beyond reasonable doubt. Accordingly, he submits that this text does not assist the Authority.

189. The second of those references, Hudson, states that the aim of the market abuse regime is to expand the powers of the Authority to deal with those market participants who act inappropriately. Hudson goes on to suggest that the purpose of the legislation was to make successful prosecutions for market abuse easier to

obtain than had been the case under the pre-existing criminal law. The use of the word "prosecution" and the reference to the pre-existing criminal law is reflected in a further passage where it is suggested that "*giving a public body like the FCA the power to impose penalties does seem to create a quasi-criminal jurisdiction for that public body*". If that is right, then there is considerable force in Mr Rabinowitz's submission that requiring proof beyond reasonable doubt would not be at odds with either of the purported legislative objectives identified in Hudson. Again, he submits that the text does not assist the Authority.

190. Ultimately, however, we do not find these texts, in contrast with the Joint Committee report, of assistance. Current textbooks are not, of course, authorities and are no more than the views, supported by such arguments as are presented in the text, of the living authors. The passages referred to from the two texts are in any case, thin on argument.

191. Drawing all of this together, we do not consider that market abuse falls within Lord Hoffmann's first category. We have already explained that we do not perceive allegations of market abuse as tantamount to allegations which constitute criminal offences. Although the consequence in the case of serious market abuse may be a large financial penalty, there is no other sanction (apart from censure) which the Authority can impose under the market abuse regime (in contrast with the sanctions it can impose on an approved person whom it considers is not "fit and proper": see sections 63 and 66 FSMA). In the light of that, a person against whom allegations of market abuse are raised is not, it seems to us, entitled to the same sort of protection as a person whose fundamental liberties are at risk, any more than a person whose livelihood is at risk is entitled to such protection (as to which see *R v Provincial Court of the Church in Wales, ex p Williams* and *Greaves v Newham LB* referred to above). Further, it seems to us that if an analogy with another area is to be found, the closest analogy is a case of civil fraud falling in Lord Hoffmann's second category, such as *Hornal v Neuberger Products Ltd*, where the ordinary civil standard applies but where the inherent probability of the relevant event (*eg* the activities amounting to market abuse) may lead to the need for strong evidence to persuade the tribunal that the event occurred.

192. Our conclusion therefore is that the standard of proof applicable in market abuse cases is the civil standard. We would only add that this conclusion appears to be more consonant with the Market Abuse Directive than a conclusion that the appropriate standard of proof is the criminal standard. Recital (24) (see paragraph 22 above) envisages strict enforcement of the disclosure requirement which would most effectively be achieved if the hurdles placed in front of the regulatory authorities are not set too high.

The Witnesses

193. The witnesses of fact called on behalf of Mr Hannam were Mr Hannam himself, Mr Anthony Buckingham, the Chief Executive Officer of Heritage and Mr Paul Atherton, the Chief Financial Officer of Heritage. The witnesses of fact called on behalf of the Authority were Mr James Arculus of Deutsche Bank's UK Mergers and Acquisitions ("M & A") department (whose client, Perenco SA ("**Perenco**"), was a potential acquirer of, or of a stake in, Heritage at the relevant

time) and Mr Alastair Stuart, the Chief Petroleum Engineer of Heritage at the relevant time.

194. Each party called one expert in each of two disciplines. As oil experts, Mr Hannam called Mr Andrew Crouch and the Authority called Mr William Prast. As corporate advice experts, Mr Hannam called Mr Richard Tolkien and the Authority called Mr Christopher Airey.

195. We say something about each of these witnesses starting with the witnesses of fact.

196. **Mr Hannam** projected an engaging, yet forceful, personality; as Mr Boulton accurately describes him, he is a man with considerable personal charisma. We formed the impression of him as a man much more interested in and comfortable with the large picture than with the detail. This is reflected both in the unfocused nature of much of his evidence and in the attention which he gave to proper process in the course of his dealings with Dr Hawrami. His answers were very discursive and his thread on occasions not easy to follow. He occasionally diverted the question by becoming argumentative with Mr Boulton. This resulted sometimes in his not answering questions put and the need for Mr Boulton to repeat them. Examples identified by the Authority in relation to some key areas include these:

a. whether he believed that the September email was true when he wrote it;
b. whether Mr Buckingham kept him updated on discussions with Perenco;
c. whether he believed Perenco would make an offer for Heritage;
d. whether there is any evidence that Dr Hawrami was treated as an insider by JPMC; and
e. when Mr Boulton asked him whether disclosing inside information risks people trading on the basis of it, Mr Hannam deflected the question by suggesting that Mr Boulton was making an accusation against Dr Hawrami when he was not.

197. We note that considerable emphasis has been placed by Mr Hannam on the fact that the Authority did not challenge his honesty and integrity. As a man of honesty and integrity, it was therefore surprising to hear certain aspects of his evidence about the contents of the September email. We will come to that in more detail later but for the moment we note that, by the time of the hearing, his case before us was that the September email was factually incorrect in that, as of its date, there were no ongoing discussions between Heritage and Perenco; significantly, however, he said that it would have been acceptable behaviour to invent things in the context in which the September email was sent and that it would not be abnormal behaviour to invent something like that in order to encourage someone to enter into a deal.

198. We found **Mr Buckingham** to be a straightforward witness who was doing his best to assist us. He projected a strong personality. He gave his evidence clearly and, in the main part, convincingly. He answered the questions put to him directly; his evidence, in contrast with that of Mr Hannam, was focused. Although not giving evidence as an expert, he was, through his senior position and his

experience in the oil business, better able to assess the commercial relevance of the results of oil exploration (in particular drilling) than any other witness. We accept nearly all of his evidence. One area which causes us difficulty, however, is his reaction to the September email, where statements which he has made on different occasions – including in his witness statement and oral testimony – are hard to reconcile. We will need to look in more detail later at the different things which he has said.

199. We note here that, as we have said, Mr Buckingham and Mr Hannam are close friends: and, as Mr Buckingham acknowledged, that was why he was giving evidence. He was, however, adamant that he was not in any way tailoring his evidence to help his friend. He said that he did not "soften" his evidence because Mr Hannam is a friend; he would absolutely not manipulate the evidence in Mr Hannam's favour. Whether his evidence, consciously or unconsciously, was in reality affected by the friendship, we will need to assess. We must approach with some caution those parts of his evidence which concern Mr Hannam's own conduct.

200. **Mr Atherton** struck us as a somewhat partisan witness. We agree with Mr Boulton's assessment of him as a very defensive witness, reluctant to make concessions. We treat his evidence with a fair degree of caution although his evidence is, as it happens, fairly peripheral to the issues which we need to decide.

201. **Mr Arculus** and **Mr Stuart** were both disinterested witnesses who gave their evidence carefully and, in our assessment, accurately. They were clearly doing their best to assist us. We accept their evidence.

202. Turning now to the **oil experts**, Mr Crouch and Mr Prast were helpful witnesses, both experienced in their field. We do not accept any suggestion that Mr Prast was in some way too close to the Authority and that his evidence should not therefore be relied on. The suggestion arises as a result of his carrying out "competent person" reports on companies applying for listing. We do not consider that this compromises in any way the independence of his evidence for the purposes of this hearing. We make one observation about Mr Crouch's evidence namely that, as he acknowledged in cross-examination, the way in which investors used information about Heritage in their investment decisions was outside his expertise. We do not take what he said about that into account.

203. As to the **corporate advice experts** Mr Tolkien was not a persuasive witness and we find his evidence to be of little assistance. Although his written report read well, he was not always able to support the position which he had taken in it, and which he was continuing to take in his oral evidence; and he was unwilling to concede points even when it was obvious that his position could not be supported. His report supported Mr Hannam on all issues, including some which were later abandoned. There was no evidential basis for some of the matters of fact which he relied on.

204. In contrast, we found **Mr Airey** to be a helpful and measured witness. He was clearly experienced in the proper handling of inside information; we reject the suggestion, not pursued by Mr Rabinowitz in his closing submissions, that his expertise lay in the wrong field, since he was a corporate broker rather than a corporate adviser.

The facts

205. There is very little dispute on the primary facts (in contrast with the conclusions to be drawn from them). Save where otherwise appears, the facts recited in the following narrative down to paragraph 313 below form part of our findings of fact.

206. Mr Buckingham formed Heritage as an oil and gas exploration company in 1992. It listed on the Toronto stock exchange in 1999, where it retains a listing.

207. During the period under consideration, as we have already noted, Mr Hannam was Chairman of Capital Markets at JP Morgan, a position he had held since 2000, and Co-Head of UK Capital Markets and one of the three executive directors at JPMC. Previously, Mr Hannam had worked at Robert Fleming & Co. ("**Flemings**"), which was acquired by JP Morgan Chase in 2000.

208. Whilst working at Flemings, Mr Hannam came across Mr Buckingham, although they had no further contact with each other until, in 2006, they were re-introduced by David Weill of Chiliogan Partners. The purpose of the meeting arranged by Mr Weill between Mr Buckingham and Mr Hannam was to discuss the possibility of moving Heritage's primary listing from Toronto to London in order to raise the profile of the company and to allow it access to greater funds. The business relationship between Mr Hannam and Mr Buckingham (and Heritage and JPMC) developed from there.

209. On 16 May 2007, Heritage and JPMC entered into a Strategic Advisory Mandate which confirmed the basis on which JPMC was to act as financial adviser and broker for Heritage in connection with "a possible Transaction (as defined below) [*eg* a merger, consolidation or joint venture] with any other person". Pursuant to this mandate, JPMC introduced Heritage to a number of international oil companies. Despite the attempts made, the process did not at that stage result in any concluded transaction. During the course of 2007 and the first quarter of 2008, Heritage nonetheless continued to work closely with Mr Hannam and his team at JPMC in preparation for Heritage's listing on the London Stock Exchange, which took place at the end of March 2008.

210. After this listing, Mr Buckingham started looking, with Mr Hannam, at a number of strategic opportunities for Heritage. At this time, Heritage already had interests in Uganda, Russia and the Middle East, but wanted to concentrate in the last of those regions in particular on Kurdistan. As Mr Buckingham explained (and we accept), Heritage saw Kurdistan as having highly attractive overall geology, and it had aspirations to become a very serious player in the region.

211. Heritage was one of the first companies to pursue opportunities in Kurdistan, and, the previous year, had entered into a Production Sharing Contract and a Refinery Joint Development Agreement with the KRG in relation to the Miran Block. These arrangements gave Heritage prospecting rights in the Miran Block in return for an undertaking by Heritage to build a refinery. The process of securing an interest in the Miran Block involved the KRG undertaking background checks and due diligence on Heritage to make sure that the company had the financial and technical wherewithal to be awarded the contract and to operate within Kurdistan. Mr Hannam was not involved in these discussions, which took place between Heritage and, on behalf of the KRG, Dr Hawrami.

212. Dr Hawrami knew Mr Buckingham well, not only from his involvement in the negotiations with Heritage over the award of the Miran Block licence. They had been introduced in about 2005 by the then CEO of Heritage, Mr Gulbenkian and, by 2008, Mr Buckingham and Dr Hawrami were in regular communication, and they generally met whenever the latter was in London.

213. Notwithstanding the interest in Kurdistan, Heritage's most important assets at this time were, however, its exploration rights in Uganda. In his oral evidence, Mr Hannam said that Heritage was worth around £1.5 billion, of which the Ugandan interests alone were worth around £1.4 billion. In a research note dated 22 September 2008, Goldman Sachs estimated the value of the company at a similar amount. In Uganda, Heritage had exploration rights in the Lake Albert Basin known as Block 1 and Block 3A. Block 1 was to the North of Block 3A, with Block 2 between them. Heritage had a 50% interest in each of Blocks 1 and 3A, with the other 50% being held by another oil company, Tullow, which also had rights to Block 2.

214. There was no infra-structure to transport the oil away from the Lake Albert Basin and little domestic demand. Although other possibilities were considered, the favoured option in 2008 for exploiting oil found in the region was to build a pipeline to Mombasa, approximately 1,250km away. We have been shown one analysis (a KSF research note dated 8 September 2008 which we see no reason to doubt) stating that the expected cost was up to $2 billion. Accordingly, it would most likely be possible to exploit oil finds commercially only if oil was present in sufficient quantities to justify the cost of constructing the pipeline. We have also been shown an analysis (Newcrest research note dated 15 May 2008 which, again, we see no reason to doubt) concluding that the threshold of commerciality was around 350-400 million barrels of oil.

215. Heritage explored Block 3A first, and in 2007 announced the results of drilling at the Kingfisher-1 well, where good quality oil was found at four intervals. Independent consultants, RPS Energy, certified the most likely gross volume of oil at these intervals at Kingfisher-1 to be 118 million barrels. On 29 April 2008, Heritage announced that Kingfisher-2, 1 km away, had "spudded", that is to say that drilling had commenced. The purpose of that well was to appraise the contingent resources in the reservoir discovered by the Kingfisher-1 well.

Approach by Perenco

216. In late May 2008, Deutsche Bank approached Heritage on behalf of its client Perenco expressing an interest in purchasing Heritage's Ugandan assets. Unsolicited approaches to Heritage are, apparently, quite common with potential acquirers being, as Mr Buckingham described them, "*pure tyre kickers who are just testing the water to see whether or not you would be interested in selling*". According to Mr Atherton's evidence, which we accept, Heritage took a number of steps to satisfy itself about the genuineness of Perenco's interest:

a. Mr Atherton and Mr Buckingham told Deutsche Bank that Heritage would be interested in an offer between £4.50 and £5, indicating that they were not interested in low-ball offers.

b. Heritage satisfied itself that Perenco had the necessary resources to finance an offer at a suitable level.

c. Heritage required Perenco to enter into a Non-Disclosure Agreement.

d. Heritage asked Perenco to confirm its interest in writing, which it did by a letter dated 18 June 2008. The letter acknowledged that Perenco was "*very sensitive to the need to maintain complete confidentiality regarding this letter and information made available to us during due diligence*".

217. Heritage also explained to Perenco that, for fiscal reasons, consideration would need to be given to Perenco buying the whole company and then disposing of any assets in which it was not interested, as Mr Atherton explained in his witness statement.

218. Heritage involved JPMC's M & A department at a very early stage, the first reference in a JPMC document to the approach being in an internal email dated 4 June 2008 from a Mr Riddell to Neil Haycock. By 5 June 2008, JPMC had prepared a draft leak announcement; and on 9 June 2008 an insider list was set up.

219. We agree with Mr Boulton when he submits that it is clear that Heritage envisaged that Perenco would come into possession of inside information. And so the Non-Disclosure Agreement contained express provisions intended to safeguard the secrecy of inside information and to impress upon Perenco the consequences of receiving inside information. Thus:

a. Perenco agreed to keep "*secret*" both the information that Heritage provided to it including "*the fact that [Heritage] is considering selling the Business and the existence and contents of this Agreement*" (see the definition of Confidential Information in Clause 2.2).

b. By clause 9.4, Perenco consented to being made an insider within the meaning of the Criminal Justice Act 1993 and agreed to bring to the attention of its representatives who received information as insiders the prohibitions on insider dealing and market abuse contained in the Criminal Justice Act 1993 and FSMA.

c. By clause 9.5, Perenco confirmed that it was "*aware of its obligations under all applicable law and regulations relating to unpublished, price-sensitive information*".

d. Clause 2.7 required Perenco to provide Heritage, on request, with a list of all persons to whom confidential information had been provided. We note that this clause satisfied the guidance in DTR 2.8.8G in respect of Heritage's obligation to maintain an insider list.

220. There were two all-parties meetings, one towards the end of June and a technical meeting at the beginning of July, during or shortly after which Perenco was provided with financial and technical data on Heritage's assets. It is clear that a great deal of data was provided on a hard drive. At the meeting on 2 July 2008, Mr Atherton gave a presentation. According to a Deutsche Bank internal email, Perenco was very pleased.

221. On 4 July 2008, the Panel on Takeover and Mergers ("**the Panel**") was notified of the approach. The Panel noted that JPMC had informed it of Perenco's approach, that Perenco was beginning due diligence, that the base price of Heritage was 318.75p and that Heritage was being added to the "watch list".

222. Towards the end of July 2008, there was a lull in activity: there were no ongoing discussions and the Panel was told by Mr Arculus that Deutsche Bank had "downed tools". This is explained (as appears from an email sent on 25 July 2008 by Mr Arculus to Mr Weir) by Perenco wanting to wait for the drilling results from Kingfisher-2 which Perenco required in order to decide whether it was worth engaging seriously any further.

223. The Panel was informed, on 5 August 2008, that discussions had terminated. The Panel noted that Deutsche Bank had confirmed that Heritage should come off the watch list. That said, Mr Atherton's evidence, which we accept, was that things had not ground to a complete halt: even after 6 August 2008, he, or more probably Heritage's technicians, were dealing with the ongoing data room exercise to provide Perenco with information. This is consistent with an email dated 1 August 2008 from Mr Spink of Perenco to Mr Low of Deutsche Bank saying that he would "*keep the team working*".

224. It is fair to say that Mr Buckingham was cynical about the approach from Perenco, and saw it as a potential fishing expedition. That was the impression Mr Buckingham gave to Mr Hannam, and the view he held at the end of the process. Despite the interest from Perenco, there had been no principal-to-principal meeting. The focus of the energies of Heritage and Mr Buckingham remained on promoting a deal between Heritage and the KRG.

Contacts between Mr Hannam and Dr Hawrami

Kurdistan - June 2008

225. It is clear that Mr Buckingham was keen to expand Heritage's interests in the Miran Block. As we have noted, Heritage already had a licence to explore. But it also had an obligation in the licence to construct a refinery: Mr Buckingham wanted to find a means by which Heritage could escape from this obligation since he considered it to be onerous. The obligation was shared by Genel Energy Plc ("**Genel**"), an existing client of JP Morgan which was considering listing in London or Toronto. Genel's interest in Kurdistan was similar to that of Heritage: it held the Taq Taq concession adjacent to the Miran Block, as well as sharing the obligation to build the refinery with Heritage. The individual at JP Morgan responsible for the relationship with Genel was Mr Megalli. Unlike Heritage, Genel saw the refinery as a profit opportunity according to Mr Hannam: we see no reason to disagree with that.

226. Mr Hannam's witness statement explains that, because of the differing views of Heritage and Genel regarding the refinery, "*it seemed sensible to visit Kurdistan to carry out an evaluation and find out more about the area and I therefore agreed with Murad Megalli to go on a fact finding trip*". Mr Buckingham encouraged Mr Hannam to go on this visit, and wanted him to "*evaluate the area for further business possibilities for Heritage*". In his oral testimony, Mr Hannam explained that the refinery issue was the catalyst for the

visit but not the primary reason for going. On any view, the trip was a fact-finding mission concerning oil exploration and development generally in the region. This difference in emphasis does not matter much. What is of more relevance is what was considered within JP Morgan and/or JPMC about this trip in relation to Dr Hawrami and whether he was classified as an insider within JP Morgan and JPMC and, if he was, whether he was informed of that. We will return to that question, and the whole issue of confidentiality, later in this decision when we have examined what happened in the period ending in October 2008 when JPMC went through the "on-boarding" process to make the KRG a client so that the KRG could trade through JPMC.

227. The trip to Kurdistan took place between 22 and 24 June 2008. The party included Mr Hannam, Mr Megalli and a number of individuals from Genel. It was taken with the utmost seriousness by all concerned in the light of the then security situation in Iraq. JPMC must have considered the trip as having the highest importance, sending two of its senior employees on a fact finding trip accompanied by 16 bodyguards and 4 armoured Toyota Landcruisers. Not only did the trip require considerable organisation and approval from the highest level, but JP Morgan also had to understand how it was going to ensure that its pre-existing relationship with Iraq was not prejudiced by the establishment of any relationship with Kurdistan and the KRG.

228. While in Kurdistan, Mr Hannam and Mr Megalli did, of course, meet Dr Hawrami. As Mr Hannam says:

> "He was the first point of contact for any business concerning oil in the region … it was absolutely necessary for us to meet him if we were going to do any business for either Heritage or Genel in Kurdistan. The Minister was aware of everything that went on in the oil industry in Kurdistan and any major transaction required his involvement and consent."

229. At their meeting, Dr Hawrami informed Mr Hannam and Mr Megalli that he was speaking at a conference in Madrid the following week. Dr Hawrami suggested that discussion could continue in Madrid at the conference. This suggestion was confirmed subsequently in phone calls with Mr Megalli who, together with Mr Hannam, travelled to Madrid to meet Dr Hawrami again.

Madrid Petroleum Conference – 30 June 2008

230. Mr Hannam and Mr Megalli met Dr Hawrami again at the Madrid Petroleum Conference on 30 June 2008 when Mehmet Sepil, the CEO of Genel, was present. This meeting is significant because it is the only meeting with Dr Hawrami at which Mr Hannam (or anyone else) says confidentiality was discussed.

231. The discussions initially focused on the oil refinery situation and the potential for a refinery tolling model, which had the objective of simultaneously relieving Heritage of its obligation in relation to the construction of a refinery and of providing Genel with a profit making opportunity; it had the additional attraction of helping to bring an end to the need for subsidised imports into the region.

232. Mr Hannam's case is that he and Mr Megalli also discussed with Dr Hawrami his vision for the future of the Kurdistan oil industry, and what JP Morgan could do for the KRG. He maintains that, in the context of these discussions the topic of confidentiality arose, and that Mr Megalli and Dr Hawrami "*discussed at length [Dr Hawrami's] understanding of confidentiality.*" Mr Hannam's evidence is that Dr Hawrami said that "*confidentiality was in his blood*" at this meeting. According to Mr Hannam, the context was Dr Hawrami's explanation that, in his role as Kurdish Minister for Natural Resources, he was not going to grant exploration licences to local businessmen for fear of allegations of corruption, but that locals could become involved in other activities such as the proposed refinery.

233. The Authority's position is that it is most unlikely that there was a discussion of confidentiality at this meeting, particularly with Dr Hawrami using the memorable phrase "*in my blood*". When explaining his position to the Authority's Regulatory Decisions Committee ("RDC"), Mr Hannam did not suggest that Dr Hawrami had used that phrase at the meeting. Mr Hannam did attribute the phrase to Dr Hawrami, but this was in a rather different context: "*We believed the Minister would keep the talks with Heritage confidential and he has confirmed in his interview with the FSA that confidentiality is in his blood.*"

234. Dr Hawrami was not called as a witness in the present case nor has he provided any sort of statement. He was asked in his interview by the Authority this question: "*Did you ever have any discussions with Ian Hannam or any other members of JPMC concerning confidentiality?*"; his full answer was this:

> "No, we didn't alight on that point. As I say, we were preparing some general discussions. We [the KRG] were not offering them any confidential information of substance."

235. That answer might be taken as showing a restricted understanding of the question, namely was there any discussion about confidentiality of the KRG's information. The question was, however, entirely open; and in the exchanges immediately following, Dr Hawrami explained that he fully understood the obligation to keep inside information confidential adding:

> "Even if I don't have a confidentiality agreement, confidential information is in my blood. I don't share it. I don't pass information around … It's part of my education. I worked as a consultant for ten years. That was a trust we had with our clients."

236. In the context of the entire exchange, we think it highly unlikely that Dr Hawrami would not have mentioned any discussion with JPMC concerning the confidentiality of the information which he had obtained from JPMC/Heritage if such a discussion had taken place. We agree with the Authority's submission that, if JPMC had been concerned to ensure that Dr Hawrami understood the confidentiality of information provided to him, he would have recalled that concern.

237. Our conclusion is that Mr Hannam's evidence concerning discussions in Madrid about confidentiality is unreliable. As with his evidence in relation to classifying Dr Hawrami as an insider, we consider that he is muddled and that he

has persuaded himself that the comment about confidentiality being in Dr Hawrami's blood was made in Madrid when it was not.

From Madrid to Lunch at Harry's Bar – 6 August 2008

238. Mr Hannam met Mr Buckingham on 16 July 2008. He cannot recall the purpose of the meeting but said in his witness statement that, by this stage, Mr Buckingham "*wanted to do something bigger in Kurdistan*". This appears to have been some sort of deal with the KRG. It is said on his behalf that this was clearly very much on the agenda as can been seen from a letter dated 29 July 2008 from Mr Buckingham to Dr Hawrami. The letter not only suggested a meeting to discuss assignment of the Miran licence and the development of a refinery, but also referred to the "*possibility of a corporate transaction between our parties in accordance with your recent discussions with me and Ian Hannam of JPMorgan Cazenove*".

239. On 21 July 2008, Heritage and JPMC entered into a Corporate Broking Agreement. The agreement was a formal reflection of the work that had been carried out since Heritage's listing in March 2008, and was ongoing.

240. Dr Hawrami was in London in early August 2008, and Mr Hannam met him twice on 5 August (once with Mr Sepil). The following day, 6 August 2008, Mr Buckingham, Mr Atherton, Dr Hawrami and Mr Hannam had lunch at Harry's Bar.

241. Amongst other things, they discussed the possibility of the KRG "vending in" assets to Heritage in return for shares. Mr Hannam says that, going into the meeting, a 10% share was in contemplation but that over the course of the lunch discussions progressed to a 25% deal. Mr Atherton said that there were three possibilities: a small transaction for less than 10% of Heritage's share capital; a series of such transactions; and a single larger transaction involving Heritage issuing around 90 million shares. There is no doubt that Heritage was looking for a larger transaction than 10%: as Mr Atherton put it "*We effectively want to part privatise the Kurdistan oil industry*". This preference for the single larger transaction is reflected in an email sent the following day, 7 August, by Mr Buckingham to Mr Hannam encouraging Mr Hannam to pursue this possibility with Dr Hawrami. Mr Hannam says, and we accept this, that he regarded the email as a clear instruction to him, as Heritage's corporate finance adviser, to engage with Dr Hawrami to try to facilitate the larger transaction with the KRG. As it happens, Mr Hannam met with Dr Hawrami during the morning of 7 August. It is not clear when he saw the email, which was timed 11:10, although nothing turns on that.

242. At this stage, however, the parties had not begun to identify what assets the KRG might transfer to Heritage, or what their value might be, as was clear from Mr Atherton's cross-examination. In his email, Mr Buckingham impressed upon Mr Hannam that he was not to allow Dr Hawrami to demand "*ridiculous valuations*", but that was a discussion for the future. Mr Buckingham says in his witness statement that over the lunch at Harry's Bar he "*mentioned that Heritage had received approaches from interested third parties*". He said this in the context of seeking to interest Dr Hawrami in the sort of deal they were contemplating. But it is also clear that Mr Buckingham's comments were very general: he did not tell

Dr Hawrami the identity of the third party [Perenco], but (as he said in his witness statement) "*I wanted him to know that he was not the only party interested in us and to make him understand that he needed to make his mind up relatively quickly as to whether he was seriously interested in doing a deal with us*" and (as he said in cross-examination) "*it certainly was to say to [Dr Hawrami] you know if you want to do something potentially get a hurry up*".

Results of Kasamene-1

243. Also on 6 August 2008, Tullow announced the results of its Kasamene-1 exploration well in Block 2. Although Heritage had no interest in Block 2, this was significant for it too because Kasamene-1 was only 2.5km from Block 1. Heritage made its own announcement on 6 August 2008 explaining the significance of the Kasamene-1 results. Under the heading "Highlights" it was stated that "*Excellent results from Tullow Oil's Kasamene-1 well in Block 2, substantially lowers the exploration risks in Heritage's Block 1*" and in the section addressing upcoming drilling activity it was reported that:

> "Heritage is planning an active drilling campaign in Block 1 that is expected to commence next month on the Buffalo, Giraffe and Warthog prospects. The excellent drilling results from the Kasamene-1 well … significantly lowers the exploration risk of these and other prospects in Block 1."

244. Mr Buckingham was reported as commenting:

> "The Kingfisher-2 and Kasamene-1 wells continue the very successful drilling programmes in the Albert Basin. We believe that these successes coupled with the near-term drilling programmes will prove up sufficient reserves for commercial development. The remainder of the year will be a very exciting time for Heritage as we look forward to commencing drilling in Block 1 and continued drilling in Block 3A."

245. Tullow's own announcement was equally upbeat but we do not think that we need to refer to it in any detail.

Renewed discussions with Perenco

246. During the afternoon of 1 September 2008, Mr Weir phoned the Panel and spoke to Mr Geoff Iles. Mr Iles' note of the conversation records the following:

> "[Mr Weir] said that he wanted to let me know that the company released its results last week as did Tullow (with whom Heritage share an oil field in Uganda).
>
> Weir said that Heritage was planning to release the results of pressure testing at the Ugandan oil well later this week and the results are likely to be positive. He said that could cause volatility in the share price. I said we had Heritage off our watchlist and he confirmed that was right and there were no discussions ongoing about a potential offer for the company. He said that the previous bidder (Perenco I believe) may show renewed interest when the results are announced."

247. On 3 September 2008, Heritage issued a press release announcing record test results for the Kingfisher-2 well. It was stated that "*Exploration risks in Block 1 have been significantly reduced due to the recent drilling success in Block 2, very close to the Block 1 border*". Mr Buckingham, commented:

> "The cumulative flow rate of 14,364 bopd from the Kingfisher-2 well has surpassed our expectations, indicating the outstanding potential of the Kingfisher discovery…. This is an exciting time for Heritage, as we approach the commercial threshold for the development of our reserves in Uganda which will transform the Company."

248. It appears from an email to Mr Low (of Deutsche Bank) from Mr Arculus that he had spoken with Mr Atherton on 4 September 2008 in order for Mr Atherton "*to update us on the information flow*". Mr Atherton said he would "*revert on [Mr Low's] bond CoC question tomorrow*".

249. On 5 September 2008, Mr Spink of Perenco informed Deutsche Bank by email that they had decided "*in principle, to proceed with this deal*". Mr Atherton continued to send information on Uganda at least until 6 September 2008, and sent further information on other interests on 8 September 2008. As Mr Atherton described it in cross-examination, it was "*the technical back up to the test results which are set out in this press release, there is nothing else. There is no further information to be sent.*"

250. At some time on 8 or 9 September 2008, Mr Arculus had a phone call with Mr Weir. From a note in his day book, Mr Arculus was able to time this call between the end of an internal weekly M & A meeting starting at 9.30 am on 8 September (the end time is not known) and the start of a phone call at 1.00 pm on 9 September. The note reads:

> "T4 – Barry Weir
>
> 1. Approach to the Panel – had told them pens up. > he will call Panel.
> 2. Timing & Next Steps
>
> > he wants to manage client
>
> > Said meeting on value mid this week, client engaged and much more in execution mode
>
> > Said would revert to him later in week with a clearer perspective on timeline & next steps > he will manage client's expect's
>
> > likewise on structuring > agreed to speak + poss get together in advance of proposal to compare notes on structuring."

251. Mr Weir did call the Panel, as a result of which the Panel put Heritage back on the watch list. That, it can be seen, was on 8 September: Mr Weir also emailed Mr Arculus at 2.51pm on 8 September 2008 to confirm that he had done this and to raise the question of timing:

> "I have spoken with Geoff Iles and said that we have re-engaged and provided you with MNPI [material non-public information]. He has put HOIL on the watch list and I have said we would monitor accordingly.
>
> Separately, I have spoken to Paul A[therton] about timing. He understands the need for your client to work through the data etc but said that given Jeremy's [Low] guidance etc they have a strong preference for seeing something sooner rather than later. I have steered him away from the end of this week but it is something you should have in the back of your mind when

you talk to your client later this week. I have told Paul that we'll hear back from you after that and he is fine (for now…)."

252. It seems to us more likely than not that the phone call between Mr Weir and Mr Arculus took place in the morning or early afternoon of 8 September 2008. In that phone call, Mr Weir told Mr Arculus that he had phoned to say that he would call the Panel and to ask about timing because he wanted to manage Heritage's expectations: see Mr Arculus' note of the phone call. Mr Arculus explained that the Perenco side was to have a meeting later in the week and that his client, Perenco, was "*engaged and much more in execution mode*" (consistent with Mr Spink's email of 5 September 2008). Mr Arculus told Mr Weir that he would revert with "*a clearer perspective on timeline*" and asked Mr Weir to manage Heritage's expectations. Mr Weir's email at 2.51 pm on 8 September then informed Mr Arculus that he had spoken to the Panel and had spoken to Mr Atherton to manage his expectations in relation to timing. It is not easy to see how the email could have preceded the phone call: neither would then make very good sense.

253. There was clearly some contact between Mr Buckingham and Deutsche Bank at around this time. At 6.27 pm on 9 September 2008 (after the September email had been sent), Mr Arculus sent an internal email to Mr Low stating that "*Ben [Morgan of Deutsche] has spoken to Tony B*". It is not clear whether the phone call took place before or after the September email had been sent. Mr Rabinowitz submits, further, that there is no evidence about what was discussed during the conversation. However, it is unrealistic to think that the conversation was not about the transaction (or something very similar) between Perenco and Heritage which had previously been under discussion before Deutsche Bank downed tools.

254. Mr Arculus' notebook contains a note made between the afternoon of 9 September and the afternoon of 10 September where it is recorded:

"T. Buck [Mr Buckingham]

Insto's [institutions] and mgmnt [management] don't want to sell below £3.50

- wants to know timetable + when get there

- thinks we BS'ing [bull-shitting], wants principal to principal".

255. It is not clear what this note refers to; but it demonstrates that Mr Buckingham had spoken to someone at Deutsche Bank about the matters recorded in the note, that is to say, clearly, a proposed sale of shares in Heritage. It is possible that the conversation recorded in this note took place before the September email was sent at 4.01 pm on 9 September but we are quite unable on any rational basis to determine whether or not that is so.

256. There was also a phone call between Mr Low and Mr Atherton. This is referred to by Mr Morgan (of Deutsche Bank) in an internal email on 10 September at 10.21 am to Mr Low and Mr Arculus where he states that Mr Buckingham was aware that Mr Low had spoken to Mr Atherton. But no light is shed in the email on when that conversion took place. However, Mr Weir's email (see paragraph 251 above) indicates, we think, that Mr Atherton had spoken to Mr

Low ("… *given Jeremy's guidance*") and we conclude that this was the conversation referred to in Mr Morgan's email.

257. Mr Buckingham's wish for a principal to principal discussion was met. By the afternoon of 10 September 2008, he had arranged a meeting with Francois Perrodo, the Chairman of Perenco. This appears from an email dated 10 September 2008 from Mr Spink to Mr Low, Mr Morgan and Mr Arculus reporting that Mr Perrodo had already spoken briefly with Mr Buckingham and that a meeting had been arranged for the following Wednesday, 17 September 2008. The email records that Mr Buckingham gave the impression of not wanting to sell but that he did mention, twice, a price of £3.50 per share.

Contact with Dr Hawrami and the September email

258. As well as the communications between Heritage (through Mr Buckingham and Mr Atherton) and JPMC (through Mr Weir) on the one hand and Perenco (through Mr Spink and Mr Perrodo) and Deutsche Bank (through Mr Low, Mr Morgan and Mr Arculus) on the other hand, there were further communications with Dr Hawrami.

259. On 3 September 2008, the same day as the announcement of the Kingfisher-2 results, Mr Buckingham, Mr Hannam and Dr Hawrami met for lunch, and later drinks in the Cigar Bar at the Lanesborough Hotel. There is very little evidence about the main topic of conversation. However we accept Mr Hannam's evidence that the conversation involved "*the possibility of a larger corporate transaction*" and that Mr Buckingham "*was very motivated by the prospect of doing a deal with the KRG and I was at the forefront of his team, working with him to make this happen*". In the course of these discussions, Mr Buckingham again mentioned that there was third party interest in Heritage. His evidence was that he could not conceive of it not being mentioned at the evening meeting that the third party "*had been excited by the 3 September announcement*". Asked in cross-examination whether he would have kept the discussions "*highly generalised*" he responded "*I certainly would, yeah, I would certainly not go into specifics because there is, at that point in time there was nothing really to say*". Mr Hannam agreed that there was nothing really to say. We are satisfied that in these discussions no third party was identified and that neither Mr Buckingham nor Mr Hannam went into any detail. Whether this was because there was "*nothing really to say*" we do not decide: whether or not there was anything to say, we conclude that nothing was in fact said.

260. The next contact between Mr Hannam and Dr Hawrami was in a phone call on 8 September 2008. Mr Hannam cannot recall what was said, but it seems likely that they agreed to meet the following week. Mr Hannam followed this up with the September email, on 9 September 2008, to which he received no substantive response. On the same day, Tullow announced that it had discovered oil at its Kigogole-1 well in Block 2. This well was shallower, at 616 metres, than the planned target depth of Warthog-1, at 953 metres.

261. We will have more to say about the September email later. But we note here Mr Hannam's submission that his purpose in mentioning the third party interest was the same as Mr Buckingham's, namely to try and get Dr Hawrami to focus on the deal that had earlier been discussed between the KRG and Heritage, and to

seek to prevent the possible deal from drifting. As Mr Buckingham said "*we wanted to get some definitive guidance on whether or not he wished to proceed with the transaction"*.

262. After the September email, Mr Hannam fixed a meeting with Dr Hawrami which they had agreed to have. It took place on 17 September 2008 over drinks in the basement bar at the George Club and was attended by Mr Buckingham, Mr Atherton, Mr Hannam and Dr Hawrami. Mr Buckingham explained that he would be very interested in doing a deal with Dr Hawrami, stressing the need for speed because of the third party interest. Dr Hawrami was enthusiastic in his response but noted that there were impediments, including his accountability to the Kurdish Prime Minister and the need for the approval of his Committee. There is no suggestion that there was any detailed discussion of exactly what any deal would comprise. There were various discussions concerning the oil business in Kurdistan which we do not need to look at.

263. The upshot of the meeting was that it was agreed that Mr Hannam would be invited to Kurdistan to discuss the options with the Prime Minster and the Committee.

The state of discussions with Perenco

264. Returning to the state of discussions between Heritage and Perenco in the period leading up to 9 September 2008, Mr Hannam's case is that there were no ongoing discussions being carried on when the September email was sent on 9 September. The Authority submits that that is contradicted by Mr Buckingham's evidence and that, in the light of its submissions reflected in our discussion at paragraphs 216*ff* above, it is overwhelmingly likely that Mr Buckingham's evidence is correct. As to that evidence, Mr Buckingham says in his witness statement that Perenco was

> "encouraged by [the Kingfisher-2] result and we were hoping for a sensible offer to come through. They were taking their time in the data-room and in discussions with their advisers."

265. He can only have been able to say that if there was communication between the two companies and/or their respective advisers. This is confirmed by what he said in cross-examination about Perenco's positive interest:

> "Q. So to know that they were encouraged by this result you or your advisers were having some kind of communications with Perenco. You have something that gives you the basis for that statement.
>
> A. Yeah I think, I mean clearly they liked Uganda enormously. It was our number one asset. They had done a lot of technical work on Uganda. They saw the overall prospectivity of the country and these results just underlined the potential of the structure."

266. In their meeting on 3 September 2008, Mr Buckingham told Dr Hawrami that the third party was excited about the announcement made by Heritage on that day. It is not easy to see how he would have been able to impart this information if Heritage (or its advisers) had not been in contact with Perenco (or its advisers) although we note that he was unable, in cross-examination, to explain the basis for saying what he did. This meeting, it is to be noted, was before Mr Atherton had

telephoned Deutsche Bank the next day, 4 September, "*to update [them] on the information flow*". It was put to Mr Buckingham in cross-examination that there had been direct contact with Perenco or its advisers on that very day. Mr Buckingham's response was this:

> "With the technical team. The technical, more than likely would have been speaking to Perenco's technical team as well, yeah. I certainly cannot recall speaking to them on that day."

267. In the September email, Mr Hannam said:

> "I thought I would update you on discussions that have been going on with a potential acquirer of Tony Buckingham's business. Tony, advised by myself, has deferred engaging with the client until Thursday of next week although we know they are very excited about the recent drilling results of Heritage Oil and today's announcement by Tullow. I believe that the offer will come in in the current difficult market conditions at £3.50 - £4.00 per share."

268. Mr Rabinowitz submits that evidence about whether there were in fact discussions ongoing at the time of the September email presents a rather confused picture, with different people involved having different views depending on what is meant by discussions. The picture he presents is this:

a. Looking at the substance of what appears to have transpired, by the time of the September email, it seems that there had been some contact between Heritage and Deutsche Bank, and between JPMC and Deutsche Bank, during which there had been talk of timetabling and some technical information had been provided.

b. However, as at 9 September 2008, it would not have been accurate to say that there were any discussions ongoing regarding a potential deal between the parties, still less any discussions of substance: in this regard 'discussions' in the context of a potential acquisition connotes something more than just the provision of data and conversations about logistics, which is all that was going on as at 9 September 2008. Even by 18 September 2008, the day after the only principal-to-principal meeting, the most that could accurately be said by Heritage was that it was in "*highly preliminary discussions with a third party*" as it was put in the announcement of that date to which we will come. The situation was, he submits, considerably less advanced 9 days earlier.

269. We do not consider that it is correct to describe the communications as simply some contact with talk of timetabling and some technical information. It is to be remembered that the context in which these communications took place was the commencement of re-engagement of the parties in a process that had been put on hold whilst the results of drilling from the Kingfisher-2 well were awaited: these communications were not simply the first exchange of information between parties who had not previously considered a transaction. In that context, Mr Hannam was, we consider, correct to describe the third party (known to him to be Perenco) as a potential acquirer.

270. Even if the communications were as limited as Mr Rabinowitz would have it, we would incline to the view that it would be a perfectly proper use of language to describe them as "discussions". But they are not so limited. Mr Hannam's email describes the third party as "*very excited*". This (omitting the word "*very*") is consistent with Mr Buckingham's evidence about the meeting on 3 September 2008 at the Lanesborough Hotel (see paragraph 259 above) to the effect that he could not conceive of it not being mentioned at the evening meeting that the third party "*had been excited by the 3 September announcement*". He could not have given that evidence unless there had been discussions between Heritage and Perenco (or their respective advisers) about the results of drilling at the Kingfisher-2 well; and Perenco could only have been excited if it had thought that the prospect of some deal with Heritage was a possibility.

271. We add that, unless what Mr Hannam wrote was largely a work of fiction, the September email itself provides evidence that there were discussions going beyond mere provision of information. That is not simply because the email expressly states that discussions had been taking place (and does so in a way which give no hint that they might have come to an end) but is also because the maker of the statement, Mr Hannam, was in a position to know what discussions were going on. He was, on his own evidence, in regular contact with Mr Buckingham and with Mr Weir (leading JPMC's M & A team) both of whom would have known what discussions were taking place and would have been very likely to have kept Mr Hannam in the loop. As Mr Hannam acknowledged in cross-examination, there was no reason why he would not know what was happening between Heritage and Perenco.

272. We note that the joint note prepared by Mr Airey and Mr Tolkien, by contrast, uses the word "discussions" in a rather specialised sense. In cross-examination, Mr Tolkien admitted that the word "*can be used more generally or more specifically*". The note was prepared before the experts knew that Heritage had gone back on the Panel's watch list, which they regarded as "*relevant and of significance. This is because an adviser will have explained and the Panel will have agreed that there is something … relevant going on.*" The issue whether there were discussions or not is, in any case, a matter for us and not for expert evidence.

273. It is hard to resist the conclusion (indeed, we reach the conclusion) that the whole of the main paragraph of the September email was based on conversations (there were at least 3 phone calls between them on 8 September) which Mr Hannam had had with Mr Buckingham about the progress of discussions with Perenco. Mr Buckingham said that he would not have asked Mr Hannam's advice about whether to suggest a price of £3.50 per share to Perenco, but that they would have talked about setting up a meeting with Mr Perrodo and that Mr Buckingham would have referred to the price he had mentioned:

> "A. I think we were always strategising and talking about opportunities and clearly Ian was fully mandated to work on our behalf and get the best possible deal he could and that was obviously with KRG and also as our advisers, bankers, certainly whilst talking to Perenco.

> Starting Q. If you call Perenco or you call Deutsche Bank and on each call you mention £3.50, is that the sort of thing that you would have strategised to talk to Mr Hannam about before you had made the call?
>
> A. I, no. No. I would not have, I would not have spoken to him specifically and said, do you think I ought to say £3.50? That would not have been a question. I more likely would have spoken to him and said, listen I have got a meeting planned with Francois next Wednesday, I would have certainly have brought the subject up to him without any question.…
>
> Q. I am not suggesting in anyway, Mr Buckingham, that you [are] not an experienced enough businessman to come up with your own view as to the price of the shares. We know you have a very significant interest. It would be quite important to pitch what you were asking for at the right level, would it not? You cannot say you would not have talked to Mr Hannam about that kind of issue?
>
> A. Oh no, no, absolutely I would speak to him about it. Obviously, yeah. As our banker and our adviser he would be front and centre of whatever we were going to put forward. So clearly I would speak to him and seek his advice and guidance without any question."

274. In the light of that evidence, and of the submissions reflected in our discussion at paragraph 240 above, we conclude that there were ongoing discussions with a potential acquirer of Mr Buckingham's business as Mr Hannam stated in the September email. Further, however preliminary these communications were, they are properly to be seen as discussions with a view to a transaction.

Announcement on 18 September 2008

275. In the early afternoon of 18 September 2008, the Panel required Heritage to make an announcement in relation to its discussions with Perenco. This was because the price of Heritage shares had risen by 18% since 12.30 pm. The announcement did not identify Perenco; it simply confirmed that Heritage was in discussions with a third party:

> "[Heritage] notes the recent movement in the Company's share price. The Company confirms that it is in highly preliminary discussions with a third party regarding a potential disposal of certain of its assets. These discussions may or may not ultimately lead to an offer for the Company."

276. The reason for this rise in the share price is not known. Mr Airey said the price increase was consistent with the discussions with Perenco having been leaked, a proposition to which we will return. There is no evidence of how the share price moved later in the day, save that it closed at 240p, which was about the level when the Panel had required the announcement to be made; it closed the following day up a further 11p.

277. On 23 September 2008, Heritage received an oral offer of US$400m from Perenco for its Ugandan assets, an offer which Mr Buckingham regarded variously as "*just a futile waste of time and effort*", "*blatantly ridiculous*" and a "*waste of everybody's time*". Following this, on 30 September 2008, Heritage announced that it had terminated all discussions with the third party and its advisers.

Heritage's drilling in Uganda

278. On the same day, 30 September 2008, Heritage announced the start of drilling at Warthog-1 exploration well in Block 1, which it expected to take less than a month to complete, and at the deeper Kingfisher-3 appraisal well in Block 3A, which was likely to take four to five months to complete. The Kingfisher wells in Block 3A had been the wells where Heritage had first made discoveries in Uganda, with a discovery at Kingfisher-1 in 2006/2007, and a further discovery at Kingfisher-2 in September 2008. We have already referred to the need for sufficient reserves of oil to be found in the whole area to justify the cost of construction of a pipeline to the coast at a cost of up to $2b. This, it is plain, was information in the public domain.

279. Block 1 also contained the Buffalo and Giraffe prospects, which had been assessed independently to have gross un-risked prospective resources of 420 and 89 millions of barrels of oil respectively. Heritage's management considered that the Warthog prospect could be similar in size to the Giraffe prospect.

280. The Warthog-1 prospect was the first well to be drilled in Block 1, which lies 100km north of the Kingfisher (Block 3A) sites. As Mr Stuart, the Chief Petroleum Officer at Heritage explained in his evidence (which we accept), there were two reasons for drilling the Warthog-1 well at the start of the programme in Block 1: first, because it was easier to obtain the relevant environmental permissions and to construct the well-site; and secondly, because Tullow, Heritage's partner in the region, had made recent discoveries in Block 2 which were in close proximity to Warthog-1, and which substantially lowered the risk on the prospect as the announcement mentioned

> "… The discovery in the Kasamene-1 well in Block 2, which encountered a reported net oil column of 31 metres in a gross interval of 75 metres, has significantly lowered the exploration risk of Warthog and other prospects in Block 1. Kasamene-1, located approximately … 5 kilometres southwest of the Warthog-1 well, appears to have been drilled on the same structural trend as Warthog ...."

281. On the day of these two announcements (the termination of the third party discussions and the news of the drilling), Heritage's price initially fell by 14%, which Bloomberg attributed to the ending of the talks with Perenco. However, the price recovered during the day and closed slightly up on the previous day's close. In cross-examination, Mr Buckingham accepted that it was helpful to Heritage to be able to put out these two announcements in tandem, with the good news of the spudding of Warthog-1 off-setting the bad news of the ending of talks. The Authority submits that this necessarily involves accepting (a) that announcing the termination of even "*highly preliminary discussions*" was likely to cause the share price to fall; and (b) that announcing no more than the commencement of drilling at Warthog-1 could be expected to move the share price in the opposite direction. Mr Buckingham appeared to accept that in cross-examination: the market buys on speculation and sells on fact, as he put it. We agree with the thrust of the Authority's submission on this point.

KRG's interest in investing in oil companies

282. At about the same time Mr Hannam was making preparations for a further trip to Kurdistan. He was to go with his JP Morgan colleague Mr Megalli, and there were to be other interested businessmen at some of the meetings, including an investor called Mr Darko Horvat and his adviser Mr David Ishag. We mention the further trip now to put what follows in context; we will return to the trip itself later.

283. Dr Hawrami met Mr Hannam in London on 1 and 3 October to discuss the possibility of the KRG becoming a client and opening a brokerage and share dealing account with JPMC. Mr Hannam was keen to promote this for the benefit of JP Morgan. This can be seen from an internal email of 6 October 2008 to Mike Reynolds (compliance officer at JP Morgan) and copied to various others including Mr Megalli:

> "The aim is to purchase shares in several listed companies with oil interests in and around Kurdistan and, in due course, a KRG Government holding vehicle may be created….
>
> ….
>
> The real prize here is an up to $1bn account which will be set up with JPMorgan."

284. Mr Neil Passmore was in charge of opening the account for the KRG with JPMC, and Mr Hannam reported on 6 October 2008 to Dr Hawrami that Mr Passmore was "*working as fast as possible with our Head of Compliance*" on this. Mr Passmore and Mr Riddell, as part of the "on-boarding" process, prepared papers for the JP Morgan Reputational Risk Committee and the JPMC Commitments Committee, as well as gathering the conflicts clearance papers and documents to satisfy anti-money laundering regulations.

285. Both of those committees met on 8 October 2008 and approved taking on the KRG as a client to enable it to purchase shares in companies with interests in Kurdistan. However, the Reputational Risk Committee was only prepared to approve specifically the particular transaction then under discussion. In the event, the KRG did not in fact become a client of JPMC and no trades were carried out on its behalf.

The October email

286. Once drilling at the Warthog-1 well had commenced, Heritage received daily drilling reports from the well-site geologist. These reports were circulated internally by James Binnie, the operations geologist based in London, who had a morning call each day with the team on-site in Uganda. Reports were not sent to JPMC. These reports came in two parts. The first part was an email summary of the day's drilling composed by the senior operations geologist. The second part was an attachment to the email and contained a full geological and drilling report for the day.

287. On 5 October 2008, Mr Atherton imposed a prohibition, often referred to as a "blackout", on Heritage employees dealing in the company's shares because the drilling at Warthog-1 was approaching the potential reservoir zone.

288. The reports for drilling on 6 and 7 October 2008 showed in essence as follows:

a. On 6 October 2008, the well reached 621m. The well proposal anticipated that the top of any hydrocarbon reservoir would be at 622m. At 8.34am on 7 October 2008, Mr Binnie circulated the daily geological report for the previous day's drilling (*ie* 6 October 2008) to individuals at Heritage and Tullow. The daily geological report recorded oil shows and fluorescence at 620 to 621 metres. The chart forming part of the daily results had the symbol for "*Good Oil Show*": there was a liquid component although no black oil. Mr Buckingham says that from the email he received (which is what he looked at, rather than the geological report) "*it looked as though we had found evidence of oil*".

b. On 7 October 2008 the drill went down to 627m. At 6.54am on 8 October 2008, Mr Binnie circulated the daily geological report for the previous day's drilling (*ie* 7 October 2008). Again, this report recorded oil shows between 621 and 625 metres, and again there was fluorescence. The daily results had the same symbol for "*Good Oil Show*" as the previous day. In his witness statement, Mr Stuart summarises the data in the reports as "*a positive indication of oil*". Mr Buckingham says that, to him, the email he received "*would say that we had found oil indicators*".

289. There is no dispute about these reports. Indeed, it is common ground, and Mr Crouch accepted, that liquid hydrocarbons had been found by this stage, although not black oil. As Mr Crouch acknowledged:

> "Q. … As I understand it, you agree that the report sent from the well head Warthog-1 of the drilling on 7 October, showed that liquid hydrocarbons had been found?
>
> A. That's correct."

290. It appears that Mr Hannam had two phone conversations with Mr Buckingham during the afternoon of 7 October 2008. The Authority's schedule of calls which it prepared when investigating Mr Hannam's conduct shows that these calls lasted about 4 minutes and 6 minutes. Mr Hannam also had two phone conversations with Mr Buckingham during the morning of 8 October 2008, at 8.35 am and 10.07 am: these were short calls of 17 seconds and 1 minute respectively. They took place before the October email was sent, at 11.11 am.

291. In relation to the two calls on 8 October Mr Hannam says this in his witness statement:

> "The 'PS' to the October email was a piece of information that I would almost certainly have picked up from Tony on one of our calls on that day."

He then goes on to say, in relation to the two calls on 7 October,

> "It is quite possible that [Mr Buckingham] would have said to me on one of those calls that they had just found oil – meaning that evidence of oil had been found at Heritage's Warthog well in Uganda. In fact, I now understand from the documents disclosed by the FSA in this action, that, as at 8

October, Heritage had not, in fact, discovered oil, but were still drilling through the gas leg. Traces of hydrocarbons indicating that oil might be present had been found, but there had been no oil find as such."

292. In using the word "oil" in that passage, Mr Hannam is clearly referring to black oil.

293. In his witness statement, Mr Hannam gives a reconstruction – he has no actual recollection – of how the October email came to be drafted. His evidence is this:

a. He started drafting this email on 7 October 2008, most probably continuing into the early hours of the morning of 8 October 2008. He had a number of meetings later, starting at 7.30 am. This was a very busy time for Mr Hannam coming so soon after the failure of Lehman Brothers and problems at a number of other very substantial financial organisations.

b. Following the later of the two phone calls which we have just mentioned, he believes that he telephoned his secretary, Mary Callan, and asked her to access his email account and amend the draft email with him giving her the changes over the phone. He thinks that it is more likely than not that Jamie Riddell, a member of his team at JPMC, was also on the call. He does not recall whether the postscript was part of the draft already, or whether it was added during his conversation with Ms Callan following his calls with Mr Buckingham earlier that day (although we note that in his response to the Authority's Warning Notice, he said that it was "more likely" that the postscript was added when he was speaking to Ms Callan than that he had included it himself when drafting it the previous evening).

c. So far as concerns the process whereby this email was finalised and sent:

i On Mr Hannam's instruction, Ms Callan forwarded the draft email to Mr Riddell at 10:35am to check it. Beneath the postscript were several notes, including *"BCC DI; mm"*. This was an instruction to blind copy the email to Mr Ishag, who was arriving in Kurdistan the day after Mr Hannam, and Mr Megalli. Mr Hannam is clear in his own mind that the postscript was sent to Mr Ishag in error. Perhaps this error arose, we speculate, because the body of the email concerning arrangements for the trip to Kurdistan was relevant to Mr Ishag who was to travel with Mr Hannam and it was simply overlooked that the postscript should not have been included in an email to him.

ii Mr Riddell sent the draft email back to Ms Callan at 11.07am. The subject line said *"Spot on – couple of minor typo corrections"*. Ms Callan removed the notes beneath the postscript, but not the postscript itself, and sent the email to Dr Hawrami.

iii At 11.13am, Ms Callan forwarded the email to other members of Mr Hannam's team.

d. He says that he cannot recall whether the postscript was intended for his team at JPMC and was sent to Dr Hawrami in error, or whether it was intended for Dr Hawrami in order to try to facilitate the possible deal between the KRG and his client. It seems to us more likely than not that it was meant for Dr Hawrami. It would be odd to draft a message to the team as a postscript; this is particularly so given that the draft of the email contains notes after the postscript so that a message to the team might more naturally have appeared as part of the notes.

294. This reconstruction on the part of Mr Hannam is the only explanation of how the email came to be written. We proceed on the basis that the speculation is materially accurate.

Events thereafter

295. The following week, Mr Hannam travelled to Kurdistan, as planned. Prior to leaving, he discussed the proposed trip with Mr Jakob Stott, a senior JPMC officer, to ensure that it would not compromise JP Morgan's existing interests in Iraq. Mr Stott arranged for Mr Hannam to meet Mr Hussein al Uzri, who briefed Mr Hannam and Mr Stott on Kurdistan. Mr Hannam's evidence, which we accept, is that Mr Al-Uzri, the CEO of the Trade Bank of Iraq, was positive, and offered to travel from Baghdad to attend the forthcoming meetings with the KRG in Kurdistan.

296. Mr Hannam used the trip to Kurdistan to continue to pursue his mandate of facilitating a corporate transaction between Heritage and the KRG. Whilst in Kurdistan, he was able to progress this to another level when he was granted a dinner meeting with the Prime Minister of Kurdistan, during which he talked about the merits of having a London listed company (that is to say, Heritage) with major assets in Kurdistan. On his return, the discussions around a corporate transaction between Heritage and the KRG continued.

297. On 21 October 2008, Heritage announced the results of the drilling at Warthog-1 which were described as "*a significant new discovery with Warthog-1*". The announcement stated that this success reduced "*significantly the exploration risk of the next two exploration wells in Block 1*" and quoted Mr Buckingham as saying:

> "This discovery highlights the potential in Block 1 as we continue our high impact multi-well exploration programme. The programme in Block 1 together with the Kingfisher-3/3A appraisal wells in Block 3A, have the potential to transform the Company, by achieving the commerciality threshold and allowing us to proceed with the early development of the Albert Basin."

298. One analyst commented:

> "Although the data from Warthog still needs to be processed, it is likely that Warthog contains c. 75-90 mboe [million barrels of oil equivalent] recoverable reserves.
>
> On this basis, we estimate that Warthog could be worth c.37-45pps (21-26% of share price) on an unrisked basis to Heritage and c.13-16pps to Tullow (3% of share price).

….

Given c.250 mbo thought to have been discovered to date in the basin, Warthog alone may have proved up enough reserves for export commerciality in Uganda (c350-450 mbo)."

Events leading up to the Authority taking action against Mr Hannam

299. In the following paragraphs, we deal very briefly with the events which led to the Authority taking action against Mr Hannam. It would be of no relevance to the matters which we need to decide were it not for Mr Hannam's reliance on what he asserts was an acquittal by JPMC, in the course of disciplinary proceedings against him, of any market abuse. The point having been raised, we should say something about it.

300. On 9 June 2009, Heritage announced that it had entered into a memorandum of understanding in relation to a proposed merger with Genel. Shortly after the deal was announced, it emerged that individuals within Genel had recently traded in Heritage shares. On the advice of JP Morgan's legal advisers, Mr Hannam gave instructions that a report should be made to the Serious Organised Crime Agency under the whistle-blowing rules. It redounds to his credit that he had no hesitation in so doing, even though this would lead to the deal collapsing, as it inevitably did.

301. As a result of the investigation which followed, the Authority obtained Mr Hannam's emails. This caused the Authority to commence an investigation into whether Mr Hannam was guilty of an offence under section 52 of the Criminal Justice Act 1993. JP Morgan was made aware of this because it had to hand over the emails, but Mr Hannam was told not to give any details of the investigation to JP Morgan.

302. It was in this context that, in December 2009, JPMC conducted a disciplinary investigation into Mr Hannam in relation to a number of emails, including the September and October emails. On 18 December 2009, JPMC gave Mr Hannam a final written warning because it concluded that he had "*conducted business communications with third parties in a manner falling below the standard expected of you.*"

303. Mr Hannam said in cross-examination that JP Morgan "*satisfied themselves that I had not done market abuse*". The Authority submits, and we agree, that that is not what the documents say. Rather, we conclude that JP Morgan and JPMC did not reach any determination on the topic. The letter inviting Mr Hannam to a disciplinary hearing said "*This hearing forms part of the firm's disciplinary process and is separate from the FSA's investigation.*" According to the note of the disciplinary hearing, the chairman said: "*The firm will not duplicate the investigation into possible insider dealing offences as this was for the FSA."* It is apparent that the disciplinary hearing did not address any issue of whether Mr Hannam had committed a criminal offence or market abuse. JPMC focussed on whether he had complied with its internal procedures regarding client confidentiality. In relation to that, it concluded that his conduct had fallen "*below the standard expected of you and on at least one occasion it appears that you have imparted confidential information to a client, without being able to give a proper explanation for why this was appropriate."*

Was Dr Hawrami an insider?

304. It is of some importance to establish whether Dr Hawrami was ever classified within JP Morgan/JPMC as an insider and if so when; and whether, if he was so classified, he was ever told, or understood, that he was an insider and subject to the restrictions on making use of inside information which that classification entails. Mr Hannam said in cross-examination that JP Morgan (or perhaps JPMC) had discussions (in the context of the proposed June 2008 trip to Kurdistan) involving the Compliance Department, in the course of which it was decided that Dr Hawrami was to be treated as an insider. Had he been, and had he agreed, he would not have been able to deal in Heritage securities. The Authority's position, however, is that Mr Hannam was confusing discussions at this time with what happened later, in October 2008.

305. In October 2008, JPMC went through the "on-boarding" process which we have mentioned in order to make the KRG a client, with the purpose of enabling the KRG to trade through JPMC. The Authority submits that Mr Hannam's confusion over timing is clear. For instance, during the course of his cross-examination he referred, in the context of a question about his evidence that confidentiality was discussed on 30 June 2008, to "*paperwork*" involving JP Morgan and JPMC committees; but that occurred only in October 2008 and there is nothing to suggest that a paperwork exercise was carried out in June. In the same passage of his cross-examination, he referred to a meeting with the CEO of the Trade Bank of Iraq as having happened at about that time; but no such meeting was mentioned until October when, as the October email itself indicates, the meeting had occurred recently "*ahead of our reputational risk meeting*" (which was held on 8 October 2008).

306. When asked where the evidence was that JP Morgan or JPMC had already classified Dr Hawrami as an insider by September 2008, he said this:

> "I think, you know, I come back to the evidence that you have here but also my witness statement, which it goes right back the very second meeting where we were – not the first meeting, because then it was very big picture in Erbil -- but the second meeting over a six hour session and a dinner afterwards, that is when we mapped out and the Minister mapped out the basis of our relationship with the person who was responsible for him, which was Murad Megalli and subsequently, as we developed and made sure we were doing the same – as I said, I had meetings before I went with compliance, when I came back with the head of JP Morgan Cazenove, et cetera -- all I can say is it is a fact that we at JP Morgan have never felt the need on any of the following transactions, that transaction Heritage Genel or the following Golaris Genel or the (inaudible) ever feel obliged to put confidentiality in place with the Minister. Sorry for being –"

307. That, to put it charitably, does not appear to us to be a very strong basis on which to conclude that consideration had been given in June 2008 to classifying Dr Hawrami as an insider let alone that he was so classified. There is, unfortunately for Mr Hannam, no better evidence than that. There is no documentation at all suggesting that JP Morgan or JPMC classified Dr Hawrami as an insider for any purpose at that stage. By contrast, the process which was undertaken in October 2008 is well documented, with the JP Morgan Reputational

Risk Committee and the JPMC Commitments Committee approving taking on the KRG as a client.

308. It is, in any case, not easy to see why JPMC would have needed to consider whether Dr Hawrami should be classified as an insider in the context of a trip by Mr Hannam and Mr Megalli to Kurdistan in June 2008 on behalf of their clients Heritage and Genel. The discussions were to be about oil exploration, production and refining in Kurdistan. Those were matters on which Dr Hawrami obviously would have a great deal of information. There is no reason to think that JP Morgan or JPMC might need to supply him with inside information about either of their clients, Heritage and Genel.

309. There is no mention in Mr Hannam's witness statement of any discussion of treating Dr Hawrami as an insider in June 2008. This contrasts with the full explanation about the procedures adopted to "on-board" the KRG in October 2008. Further, if Dr Hawrami had previously been classified as an insider by JPMC or JP Morgan, we would have expected the explanation to include at least some mention of any previous classification of Dr Hawrami as an insider, but it does not. Moreover, it is surprising that there is no reference to this in the documents relating to the Reputational Risk Committee and/or the Commitments Committee.

310. Mr Hannam did not say anything about Dr Hawrami's having been classified as an insider in June 2008 in his interview with the Authority on 8 December 2009. He was specifically asked whether JPMC considered the implications of Dr Hawrami being privy to sensitive information by virtue of his position. His answers showed that it was not considered at that time. We would have expected Mr Hannam to mention that Mr Hawrami had been classified as an insider if that was the position: Mr Hannam was under caution because the Authority was investigating a possible criminal offence. Had Dr Hawrami been classified as an insider, Mr Hannam might have been able to avail himself of the statutory defence that he did not expect Dr Hawrami to deal in the relevant securities.

311. Finally, no mention was made by Mr Hannam in the course of his disciplinary proceedings about Dr Hawrami's now-alleged status as an insider from June 2008. We consider that it would inevitably have been raised if Mr Hannam had believed that Dr Hawrami had been classified as an insider before the times when the September email and the October email were sent.

312. We conclude, in accordance with the Authority's submissions, that Dr Hawrami was not classified as an insider in June 2008 or at any time before the September email and the October email were sent and that no consideration was given to such a classification prior to the "on-boarding" exercise in October 2008.

313. We should note, however, that there was a confidentiality clause in the production contract between Heritage and the KRG covering certain operations in Kurdistan. It did not relate to Uganda at all. We do not consider that this assists Mr Hannam's case.

Allegations of Market Abuse

314. Following our analysis of the law and our statement and findings of fact, we now turn to apply the law to the facts and to analyse the allegations of market abuse.

315. As a preliminary matter, Mr Rabinowitz criticises the way in which the Authority has changed its case in the course of the investigation into Mr Hannam's conduct. There have, he says, been numerous reformulations of the allegations of market abuse including a reformulation appearing for the first time in the Authority's skeleton argument for the hearing. He submits that the Authority should be restricted to its pleaded case whilst maintaining, in any event, that its case should fail however it is formulated.

316. The issues for us are as follows:

a. Did the September email and/or the October email disclose inside information to another person?

b. If they (or either of them) did so, can the Authority establish that the information was disclosed otherwise than in the proper course of the exercise of Mr Hannam's employment, profession or duties as financial and strategic adviser to Heritage, contrary to section 118(3) FSMA?

c. If the Authority establishes that Mr Hannam contravened section 118(3), does Mr Hannam in any event have a defence under section 123(2)?

d. If Mr Hannam does not have a relevant defence, is it appropriate to impose a penalty in the circumstances, and, if so, what should be the amount of any such penalty?

The September email

317. It is helpful to have the relevant text of the September email (set out in full at paragraph 9 above) to hand so we repeat it here:

> "I thought I would update you on discussions that have been going on with a potential acquirer of Tony Buckingham's business. Tony, advised by myself, has deferred engaging with the client until Thursday of next week although we know they are very excited about the recent drilling results of Heritage Oil and today's announcement by Tullow. I believe that the offer will come in in the current difficult market conditions at £3.50 - £4.00 per share.
>
> I am not trying to force your hand, just wanted to make you aware of what is happening."

318. The Authority's contention in the written closing submission on its behalf is that this email contains the following items of information:

a. that Heritage was engaged in discussions with a potential acquirer of the company ("*I thought I would update you on discussions that have been going on with a potential acquirer ...*");

b. that JPMC and Mr Hannam were advising Heritage in relation to those discussions *("Tony, advised by myself ...")*;

c. that Heritage's Chief Executive Officer was personally going to "*engage with*" the potential acquirer the following week ("*Tony ... has deferred engaging with the client until Thursday")*;

d. that the potential acquirer was "*very excited*" about recent drilling results ("*... we know that they are very excited about the recent drilling results*");

e. that there had been contact between representatives of the potential acquirer and Heritage that day ("*they are very excited about … today's announcement*");

f. that Mr Hannam believed that an offer would be made for Heritage ("*I believe that the offer will come in ...*"); and

g. that there were reasonable grounds for believing that an offer for Heritage would be made.

319. The Authority submits that these items of information, taken individually as well as collectively, were inside information.

The pleading point

320. Before going further we need to address Mr Rabinowitz's argument about the Authority's changing case. He complains that the way the case is put in Mr Boulton's skeleton argument is different from the way it was put in the Warning Notice issued on 23 September 2011, is significantly different from the way it was put in the Decision Notice of the Regulatory Decisions Committee dated 27 February 2012, and is also different from the case as it is put in the Authority's Statement of Case dated 24 April 2012.

321. In the Warning Notice, it was asserted the September email disclosed that (i) Heritage's corporate advisers (JP Morgan) were engaged in ongoing discussions with a potential acquirer of Heritage, (ii) the CEO of Heritage, on advice from Mr Hannam, had decided to engage in those discussions, but to delay doing so for 9 days, and (iii) Mr Hannam believed that the potential acquirer would make an offer of between £3.50 and £4.00 per Heritage share.

322. In the Decision Notice, it was alleged that the September email disclosed that (i) Heritage's corporate advisers (JP Morgan) were engaged in ongoing discussions with a potential acquirer of Heritage, and (ii) the CEO of Heritage, on advice from Mr Hannam, had decided to engage in those discussions. The third disclosure (Mr Hannam's belief) alleged in the Warning Notice was not mentioned and was not relied on.

323. The same formulation as in the Decision Notice is found at paragraph 25 of the Authority's Statement of Case. A slightly (but not materially) different wording is found in paragraph 51. That is where matters stood until a week before the hearing when the Authority served its skeleton argument putting forward a case based on items a. to f. set out at paragraph 318 above. It was only in the Authority's written closing submissions that item g. was added.

324. Mr Rabinowitz objected to the new case being relied on at such a late stage, some 15 months after the Statement of Case was served, especially as the Authority, in his submission, is seeking not only to revive a case based on matters

previously abandoned (Mr Hannam's belief) but also to rely on parts of the email which have never previously featured in the Authority's case.

325. The Authority's closing written submissions devoted a number of pages to meeting this pleading point. It maintains that the case is sufficiently pleaded for the purposes of tribunal proceedings where a laxer approach is, it is said, to be taken than in relation to the more formal position in court proceedings. During closing submissions, Mr Boulton was asked if he wished to amend the Statement of Case. He said that he did not wish to do so because the matter was adequately pleaded; but if the tribunal was against him on that, he would wish to seek to amend and produced an amended pleading for that purpose. The amended pleading is to the effect that the September email disclosed that:

a. Heritage, advised by its corporate advisers (JP Morgan), were engaged in ongoing discussions with a potential acquirer of Heritage;

b. The CEO of Heritage, on advice from [Mr Hannam] had decided to engage in those discussions in nine days' time;

c. The potential acquirer was "very excited" about recent drilling results;

d. There had been contact between representatives of the potential acquirer and Heritage on the day of the September email; and

e. Mr Hannam believed that an offer would be made for Heritage.

326. The changes from the original Statement of Case are the addition of c. to e., the reformulation of a. to make clear that it was Heritage which was in discussion and not simply its advisers and the addition in b. of a reference to nine days' time.

327. We do not propose to go into the arguments made by the Authority in response to the pleading point. They are twelve in number and all point to the conclusion that Mr Hannam will suffer no prejudice if the Authority is entitled to rely on all the information which it now asserts the September email disclosed. We do not need to go into the arguments because of the response given by Mr Rabinowitz during the course of the interchange between the tribunal and Mr Boulton. After Mr Boulton had indicated that he would want to amend if the tribunal considered that his pleading was not adequate, the transcript reveals the following:

> "MR JUSTICE WARREN: … we do not want to go away from here leaving things, leaving anything else to be re-argued. So at some stage I would wish to hear an application to amend on the footing that amendment is required because it will be, I imagine, opposed, is that right?
>
> MR RABINOWITZ: My Lord, sorry. Our position has always been it was not pleaded. I have to say my learned friend identifies a number of reasons as to why it probably does not matter. My reason for raising it earlier was really to say to him, look you are being put to an election. You can find all types of reasons why it does not matter but your pleading is inadequate. Are you going to amend or not? He has elected not to amend. The only basis upon which I could oppose it is that.
>
> MR JUSTICE WARREN: You have said and you have put it all in your closing.
>
> MR RABINOWITZ: We have.

> MR JUSTICE WARREN: There is enough. You think we have enough to resolve the issue.
>
> MR RABINOWITZ: I think you have enough to resolve the issue. My learned friend I say has made his election and that is it. I am not going to argue about what he says here."

328. What this comes to, as we understand Mr Rabinowitz's position, is that he takes the pleading point; but if an application to amend is made, he really has no sensible opposition to it other than the fact that the Authority has made an election not to amend and cannot then change its mind. The position, then, is that either the Authority is entitled to rely on all of the matters set out in its revised draft pleading and its closing written submissions without needing to amend the Statement of Case or it needs to amend in order to be able to do so. In the latter case, Mr Boulton would seek permission to amend and there would be no opposition other than one based on the election made not to amend. If amendment is required, we do not consider that the election argument should prevent us granting permission. Accordingly, whether or not it is strictly necessary, we consider that the appropriate course now is to allow the amendments to be made. This conclusion is consistent with our duty under s 133(5) FSMA, which is to direct the appropriate action; being hamstrung by pleading errors would obstruct us in that duty.

Section 118C(5)(a) FSMA: indicates circumstances

329. We return to the substance of the dispute about the September email and start with section 118C(5) FSMA, the requirement that information "*indicates circumstances that exist or may reasonably be expected to come into existence or an event has occurred or may reasonably be expected to occur*".

330. The Authority submits that the information contained in the September email satisfies that requirement because it indicated:

a. circumstances that existed: Heritage was in discussions with a potential acquirer and JPMC was advising Heritage in relation to the discussions;

b. an event that might reasonably be expected to occur: a discussion between Mr Buckingham and the potential acquirer;

c. circumstances that existed: the potential acquirer was very excited about drilling results;

d. an event that might reasonably be expected to occur: an offer for Heritage; and

e. circumstances that existed: Mr Buckingham and/or Mr Hannam believed that an offer would be made for Heritage.

331. We have already dealt at some length with the evidence about paragraph a., reaching the conclusion that there were communications between Heritage and/or its advisers with a potential acquirer, namely Perenco and/or its advisers and that those communications are properly to be categorised as discussions. It is clear that JPMC was advising Heritage in relation to those discussions. We are therefore satisfied that the circumstances specified in paragraph a. are established.

332. The September email clearly indicates that Mr Buckingham would be engaging with the client (ie the third party): the statement that engagement was being deferred is consistent only with a belief on Mr Hannam's part that a meeting would take place (as in fact it did). We consider that this was "an event which might reasonably be expected to occur". It is irrelevant whether the meeting was set up after the September email was actually sent. As noted above, Mr Buckingham had told Mr Hannam that he planned to meet Mr Perrodo and Mr Hannam would in any event have known from his "*strategising*" with Mr Buckingham that the latter was keen to obtain a bid from Perenco. We are therefore satisfied that the circumstances specified in paragraph b. are established.

333. We are satisfied on the evidence that Perenco was excited about the drilling results both in relation to the Kingfisher-2 well and also in relation to Tullow's Kigogole-1 well in respect of which the results were announced on the very same day as the email itself, 9 September 2008. Mr Buckingham's evidence about Heritage's announcement was clear and we have no reason to doubt it. Mr Hannam may have been putting matters too highly in saying that the third party was very excited. Whether the message received by Dr Hawrami (or by an objective reader of the September email) would have been any different if Mr Hannam had simply said "excited" rather than "very excited" we rather doubt. In any case, the statement that the third party was "very excited" necessarily entails that it was "excited" so that, in accordance with our analysis of the result of inaccuracy in information, the message that the third party was excited could, in theory, still amount to disclosure of inside information. We are therefore satisfied that the circumstances specified in paragraph c. are established.

334. The September email clearly conveyed the message that an offer for Heritage would be made. The issue is whether an offer could reasonably be expected to be made, applying the "reasonable prospect" test which we have derived from *Geltl*.

335. Mr Rabinowitz has placed considerable reliance on Mr Arculus' evidence that Perenco's interest in doing a deal was critically dependent on obtaining satisfactory drilling data. His evidence of the position on 4 September 2008 includes, for example this: "*We did not know whether there was a deal we wanted to do. What we did know is that if there was a chance of us looking at the deal we needed to see that data to come to a view*", and there are other answers to similar effect. The data to which Mr Arculus referred was provided by Mr Atherton over the period 4-8 September 2008. Mr Rabinowitz asserts (although we do not know the evidential basis for this) that it had not been evaluated by 9 September 2008. We would be surprised to find that there had been no evaluation of data which had been provided on, say, 4 and 5 September at all by that date.

336. We do not dissent from the proposition that this data was required by Perenco before it would do a deal. Clearly, how to pitch an offer will depend on the data and, of course, there is always the possibility that Perenco might view the data as unsatisfactory and say, as Mr Arculus agreed, "Forget it".

337. But that does not mean that, before the data was actually received, there was no reasonable prospect of a deal being done. Indeed, Perenco actually decided that it wished in principle to proceed with a deal before it had all of the data as can be seen from the email of 5 September 2008 (see paragraph 249 above) from Mr

Spink of Perenco to Perenco's own adviser, Deutsche Bank. Perenco clearly knew enough to be able to decide that in principle it wished to proceed. There must have been at least a reasonable prospect that the data would be satisfactory – if there was no prospect, the decision to proceed in principle could not sensibly have been taken. If there was such a prospect, then it seems to us that there was also a reasonable prospect of an offer being made. That conclusion is reinforced by the facts that Perenco was excited by the drilling results and that it had previously taken very seriously the prospect of a deal until tools were downed at the end of July 2008.

338. There are these other factors, going back to July, which support the view that there was a reasonable prospect of an offer being made: Perenco was not put off by the high initial indications of price which Heritage had given; Heritage had satisfied itself that Perenco had sufficient resources for a bid; Perenco had written formally to express interest; it had engaged Deutsche Bank and had been reviewing a large volume of data for some time; recent drilling results were positive; Mr Arculus of Deutsche Bank had informed Mr Weir of JPMC on 8 September 2008 that Perenco was "*engaged and much more in execution mode*"; and Mr Weir had emailed Mr Arculus to say that Heritage had "*a strong preference for seeing something sooner rather than later*". It appears that on 8 September 2008 Mr Arculus had told Mr Weir that they would come back with a "*proper timeline to when they'll get the proposal*". As Mr Atherton acknowledged (and we accept), Heritage would not have made the further information available to Perenco after 3 September 2008 if it had thought there was no possibility of negotiating an acceptable offer.

339. Mr Rabinowitz, in contrast, submits that at that stage (*ie* by 9 September), not only had Perenco not decided whether to proceed with any deal, it had not decided which asset definitively it was interested in, or what value to put on any such asset. Even Mr Arculus did not know whether his client would make a proposal at that point; he had simply been given the "green light" to do the work. If Perenco had not decided whether it was worth engaging seriously until it had carried out further work, objectively, there could, he says, be no reasonable expectation that an offer would be made for the purposes of section 118C(5)(a) of the Act. It seems to us rather to beg the question to suggest that Perenco had not decided whether it was worth engaging seriously. It engaged seriously enough to give Mr Arculus the "green light" just referred to.

340. Next Mr Rabinowitz refers to the position as at 18 September 2008 and to the press release issued at the request of the Panel stating that the discussions "*may or may not ultimately lead to an offer for the Company*". Over a week earlier, when the parties' advisers had only recently been in contact again after having downed tools for a considerable period of time, the prospects of an offer being made were, he suggests, even more remote. If that is right, and the correct test is whether it was more likely than not that an offer would be received, we would see some force in Mr Rabinowitz's submission. But that is not, in our view, the test as we have explained it; and we do not accept his submission that there was no realistic prospect of an offer being made.

341. In our view, the evidence shows that there was, as of the time of the sending of the September email, a reasonable prospect of an offer being made. The

reference to the figure of £3.50 to £4.00 per share does not detract from the message that some offer will be made. That message is itself potential disclosure of inside information. We are therefore satisfied that the circumstances specified in paragraph d. are established.

342. We do not believe that Mr Hannam was writing a work of fiction when he composed the September email. Perhaps the figure of £3.50 to £4.00 was "spin" but it would be more than "spin" for him to have said that he believed an offer would come in at that figure unless he believed that some offer would come in. We are of the view that he did believe that an offer would come in. Even if he did not, we do not consider that he can take advantage of what would be his own lie to say that he was not disclosing information (*ie* about his own state of mind) at all. We are therefore satisfied that the circumstances specified in paragraph e. are established.

Section 118C(5)(b) FSMA: specific

343. The Authority submits that in fact the information in the September email easily satisfies Mr Hannam's stricter test, namely if it enables a reasonable investor to assess with confidence whether the effect on price will be positive or negative. The Authority submits that a reasonable investor could assess with confidence that the effect on price of the information would be to increase the price of Heritage shares: information about takeover talks is the paradigm example of inside information. In this context, attention is drawn to two passages in the CESR Guidance:

a. "The fact that the proposed takeover might not in the end take place does not mean that the approach to the target company is not precise information in its own right." [para 1.6]

b. "In addition, it is not necessary for a piece of information to be comprehensive to be considered precise. For example, an approach to a target company about a takeover bid can be considered precise information even though the bidder has not yet decided the price." [para 1.7]

344. These passages support the view, which we consider to be correct, that the fact of the approach by Perenco is in itself specific information which enables a conclusion to be drawn about the possible effect on price. It is not necessary to be told that a bid will be made. We reached a similar conclusion in the discussion at paragraph 88 above.

345. In our view, the information contained in the September email falls within section 118C(5)(b) FSMA.

Section 118C(2)(c) and (6) FSMA: likely to have a significant effect on price and the reasonable investor test

346. We have discussed the meaning of section 118C(2)(c) and (6) and how they interact, in the section of this decision dealing with the law: see the passage beginning at paragraph 106 above. In summary (see paragraph 121c. above), to repeat: the "reasonable investor" test in section 118C(6) requires the provisions of section 118C(2)(c) to be taken into account: the earlier subsection must be borne in mind in construing the later or informs the meaning of the later. The word "likely" in section 118C(2)(c) is to be read as meaning that there is a "real

prospect" of the information having a significant effect on price (as to which see paragraph 102 above).

347. Applying that approach, the Authority submits that the September email easily meets the reasonable investor test whatever meaning it is appropriate to attach to "significant". Indeed, it submits that the email also meets the high test set by Mr Hannam in that it was more likely than not that the information the email contains would significantly affect the price of Heritage shares if made generally available.

Comparison of September email and 18 September announcement

348. In considering the Authority's submission, there is a discrete point which we would like to deal with. It is the distinction which Mr Tolkien sought to draw between the September email, which he said would not have formed part of a reasonable investor's investment decisions, and Heritage's 18 September 2008 announcement of discussions with an unnamed third party, which he accepted as being of interest to the reasonable investor. The 18 September 2008 announcement was required under rule 2.2(c) of the Takeover Code because of unexplained movements in Heritage's share price. It can then be argued that the 18 September 2008 announcement was necessary because by that time the state of the discussions between Perenco and Heritage put Heritage in possession of information which a reasonable investor would use in making his investment decisions. The distinction, if valid, is then important because, even if it is the case that the 18 September announcement disclosed what would otherwise have been price-sensitive information, it does not necessarily follow that the September email also did so.

349. The Authority submits that this supposed distinction is unrealistic and does not withstand scrutiny. Thus, it points to the material part of the 18 September 2008 announcement referring to "*highly preliminary discussions with a third party regarding a possible disposal of certain of its assets … The discussions may or may not ultimately lead to an offer for the Company*". It suggests the following contrasts with the September email:

a. the September email does not qualify the discussions as being "highly preliminary";

b. it refers to a "*potential acquirer*" rather than simply a "*third party*";

c. the September email indicates that it is likely, or at least that Heritage's adviser believes that it is likely, that an offer will be made ("*I believe that the offer will come in ...*"); and

d. the announcement's focus on "*a possible disposal of certain of its assets*" emphasises the uncertainty over whether there will be a takeover offer because it indicates that, even if a transaction is agreed, it will not necessarily result in a bid for the company's shares.

350. And so, according to the Authority, on any fair reading, the September email gives much *greater* grounds for believing that a takeover offer is likely than the 18 September 2008 announcement does. We need to examine that proposition. Taking the paragraphs in turn:

a. As to a., although the September email does not qualify the discussions as being highly preliminary, the fact is that they had not reached a stage near to the formulation of an actual offer, albeit that they were discussions nonetheless which might have led to an offer. If the September email is to be read as suggesting that the discussions had reached a more advanced stage, it would be factually inaccurate. In accordance with our approach to the operation of section 118C in relation to partially inaccurate information, the message which could properly be taken from the September email would not go beyond information that the possibility of an offer was under discussion but no terms had yet been proposed. We would add that it does not follow from the fact that the discussions were "highly preliminary" on 18 September that they were something less (and thus not discussions at all as Mr Rabinowitz would have it) on 9 September.

b. As to b., this is, we think a distinction without a difference. It is obvious, we would have thought, that the third party referred to in the announcement was a potential acquirer of something.

c. As to c., it is certainly the case that the email is stronger than the later announcement in indicating what might happen.

d. As to d., the email does, accurately in our view of the facts, purport to provide more certainty than the announcement

351. It is right that we should deal with some of Mr Tolkien's evidence on the comparative reactions of a reasonable investor to the email and the announcement. We take the following paragraphs virtually verbatim from the Authority's closing submissions:

a. In his report, Mr Tolkien said that a reasonable investor would give less weight to the email than to the announcement because the announcement stated that Heritage was actually in talks, which was "*far removed from the speculative thoughts of Mr Hannam set out in the September email, in relation to price*". The Authority points out that, of course, the September email also said that Heritage was in discussions and his statement about price forms no part of its case. It says that it is impossible to see why adding speculation about price which Mr Tolkien considered "*in any event consistent with what was anticipated in the market as being the value of the company as a whole*" made the email less definitive than the announcement. We agree.

b. In his report Mr Tolkien said "*I consider that **had** the 9 September 2008 email said clearly that there **will** be an offer and it **will** be in the range £3.50-£4.00 per share such a categorical statement would, against the background of the prevailing price of £2.04 at the close on 9 September 2008, be very likely to have a positive effect on Heritage's share price*" (emphasis in original). The Authority submits that there is no clear basis for Mr Tolkien to distinguish the wording of the September email ("*I believe that the offer **will** come in in the current difficult market conditions at £3.50 - £4.00 per share*"

(emphasis added) from the "categorical statement" set out above; given that a takeover bid had not yet been made, any statement as to a future event could only be an expression of belief. Mr Tolkien says that any offer would have been expected by a reasonable investor to be in this range, and so the inclusion of a price range cannot be the basis for Mr Tolkien's view that his hypothetical categorical statement "*would… be very likely to have a positive effect on Heritage's share price*".

352. There are two comments we make on the submissions in that last paragraph. The first is that we perceive a real difference between,

a. on the one hand, a statement that an offer will be made when the statement is made by an insider who can make it with a real degree of confidence approaching as near to certainty as one can get about a future event and

b. on the other hand, a statement by an insider that, on the basis of what he has heard, he thinks it is quite possible (perhaps he would even put a bet on it) that an offer will be made.

An investor is, we consider, bound to react differently in those two situations, even if the wording of the statement in each case is identical; his reaction will depend on the degree of confidence which he has about what an insider can (accurately) tell him.

353. That leads to the second comment which is that, if the statement is not wholly accurate, it is only to the extent that it indicates circumstances within section 118C(5) that it can disclose inside information (an aspect which we have examined in our consideration of the legal principles). Mr Tolkien's hypothetical example is given on the basis that the contents of the statement are accurate. But that is a counterfactual basis since Mr Hannam could not properly have asserted that an offer will be made, for he would then have been asserting a degree of confidence about a future event which he could not reasonably have held. In contrast, he could say that he believed that an offer would be made but, in saying that, he could not be taken as expressing any particular degree of confidence. Accordingly, we do not find Mr Tolkien's example or the Authority's response to it of material assistance.

354. We have no evidence about what discussion, if any, took place between Perenco and Heritage between 9 and 18 September. We are unable to conclude that Heritage was in any better a position on 18 September to say whether or not an offer would be made than it was on 9 September, let alone to assess at what level an offer would come in. Indeed, when it did come in, on 23 September, it was far lower than hoped for or expected and was regarded as derisory by Mr Buckingham: see paragraph 277 above. Our conclusion is that the information disclosed by the September email is almost certainly just as likely as, and probably more likely than, the 18 September announcement to have been used by a reasonable investor as part of the basis his investment decisions within the meaning of section 118C. We cannot say that the information contained in the September email to the extent that it was accurate was any less likely to be inside information than the information in the announcement.

Significant effect *continued*

355. With that point out of the way, we should say that we do not consider the 18 September announcement to be of assistance in deciding whether the information disclosed by the September email would be likely to have a significant effect on price. This is because (i) the announcement itself does not appear to have had a significant effect on the price of Heritage shares as we explain in the next paragraph; and (ii) the reason for the untoward movement before the announcement was made is not known. All that can be done is to speculate that the untoward movement was because of a leak, the explanation which Mr Airey thinks is most likely.

356. We have just said the announcement itself does not appear to have had any significant effect on price. As we have already noted, there is no evidence of how the share price moved later in the day after the announcement, save that it closed at 240p, which was about the level when the Panel had required the announcement to be made. It closed the following day up a further 11p but there is nothing to demonstrate that this rise was attributable to the announcement. The closing share price the next day was nowhere near the £3.50 to £4.00 figure referred to in the September email. It is not possible to take from the evidence a conclusion that the announcement affected the share price.

357. Leaks are not necessarily accurate and, like rumour and speculation, may turn out to be inaccurate. Even an inaccurate leak, like rumour or speculation, may affect markets; but an inaccurate leak may not indicate circumstances within section 118C(5) in which case it would not be a disclosure of inside information (this follows from our analysis of section 118C in relation to inaccurate statements). Even if one were to accept that Mr Airey's explanation is correct, it does not follow that the leak, or any rumour or speculation, was accurate; and so we cannot say that a rise in price which occurred on the back of that leak, rumour or speculation, was necessarily attributable to (accurate) inside information rather than (inaccurate) leaks, rumour or speculation. It is to be noted, however, that, the price did not fall back when the announcement was made; and so it can be said that whatever it was that had caused the price rise in the first place was not negated by the announcement. If Mr Airey's speculation that the cause was a leak is correct, then there would be some force in an argument that the announcement by itself would have been enough to cause the rise in price if there had not be an earlier untoward rise in price; and if that is so, the inside information contained in the September email would have been enough to cause a rise in price if it had been made publicly available. This somewhat tortuous analysis is not, we think a firm foundation for placing reliance on the announcement as demonstrating the significant price effect of the inside information contained in the September email.

358. Mr Tolkien accepted that a reasonable investor who knew nothing other than that an offer was going to be made for Heritage would consider that a bid in the range £3.50-£4 per share would be reasonable. Mr Buckingham said that this price range "*would probably have been the view of anyone else who had access to the publicly available information regarding Heritage and our share price*". Mr Airey and Mr Tolkien agreed that takeover offers are typically made at a substantial premium. Mr Airey's evidence was that a "*premium for control of 20-40% would not be unusual*". Mr Buckingham said "*clearly if one was going to sell*

the company you would look for 40% or 60% increase in the current share price". We accept that a significant premium would be usual. That evidence is not, however, enough for the Authority to succeed where, as was in fact the case, it was not known that an offer would be made. The evidence establishes only that there were discussions of a preliminary nature which Heritage reasonably expected would lead to an offer. So although an (accurate) statement that an offer was about to be made might be likely to have a significant effect on price for the purposes of section 118C, it does not necessarily follow that a statement to the effect that Heritage was in discussion with a potential acquirer and that there was a real prospect that an offer would in the course of time be made would also be likely to have a significant effect on price.

359. The Authority relies on Mr Airey's opinion that disclosure of the information contained in the September email would "*have had a significant positive effect on the Heritage share price if it had become generally known*". He expressed that view in a witness statement supplemental to his report. In his report, he had reached a similar conclusion adopting, on instructions, the Authority's then approach to the "reasonable investor" test, namely that section 118C(6) was an exclusive definition of what was meant by a significant effect on price. In his witness statement, he then approached the matter on the basis of Mr Hannam's primary approach namely that section 118C(2)(c) and (6) were cumulative. Adopting that approach, he noted that the September email disclosed (a) that Heritage and its advisers were in discussions with a potential acquirer (b) that the CEO of Heritage had decided to engage in those discussions in a matter of days and (c) that Mr Hannam expected an offer to be made for Heritage. Mr Airey did not rely on the proposition that an offer <u>would</u> be made, correctly assessing the position as one where Mr Hannam (and implicitly at least, Heritage/Mr Buckingham) expected an offer to be made; nor did he rely on what Mr Hannam said about price. After noting that takeovers were invariably at a premium to market price (see paragraph 358 above) – it is now common ground that that is typically, if not invariably, so – he reached the conclusion which we have just set out. His conclusion would, *a fortiori*, have been the same if he had adopted the nuanced approach which we have held to be correct: the words of section 118C(2)(c) must be borne in mind in construing section 118(6) or the earlier provision informs the meaning of the later but there need only be a real prospect of the information having a significant effect on price.

360. To reinforce his opinion – the proof of the pudding *etc* as he said – he referred to the fact that, after the announcement, the shares closed almost 20% up on their previous close. Given that the sharp rise in price preceded (and indeed triggered) the announcement, we do not think that the difference in closing prices reinforces Mr Airey's opinion. Our reasons for saying that are the same as the reasons we have already given (see paragraphs 355 and 356 above) for saying that we do not find the 18 September announcement to be of assistance to us. Mr Airey's opinion does, all the same, have some resonance with what one might intuitively consider the effect of a positive announcement to be.

361. The Authority also relies on the Takeover Code, saying that it is precisely because the fact of even preliminary discussions affects the price of listed companies' shares significantly that the Takeover Code emphasises "*the vital importance of absolute secrecy before an announcement*" and requires that an

announcement is made when, following an approach, a company "*is the subject of rumour and speculation or there is an untoward movement in its share price*". That observation is almost certainly true; but it does not mean that the existence of preliminary discussions in a particular case is necessarily price-sensitive information. That is a matter which must be judged on the facts of the particular case. We do not gain assistance from the Takeover Code on this aspect of the case save to confirm us in our approach of viewing with a great deal of circumspection the proposition that disclosure of information relating to a potential offer will **not** have a significant effect on price.

362. Mr Rabinowitz argues for radically different conclusions, for which he advances four principal reasons.

363. First, he submits that there is no evidence that information disclosing the existence of talks at the embryonic stage which he says they had reached would have been likely, if generally available, to have had a significant effect on the price of Heritage shares. The conclusion that there could be a significant effect is, he says, even harder to reach on an *ex-ante* basis given the inherent volatility in the share price, and the general instability in the markets at the time, both of which Mr Airey referred to in his evidence. We accept that volatility was a feature of Heritage's share price at the time; but it does not follow from that that a particular factor (*eg* an announcement that an offer within a particular range of price was expected in the very near future) could not have a significant effect on the price even if it is harder to detect in practice within a volatile market. Further, it is unrealistic, he says, to suggest that volatility would simply have been ignored by a reasonable investor when making his investment decisions, or that it is irrelevant as to whether the information in question was likely to have a significant effect on price. We do not disagree with that.

364. But equally, the three pieces of information which Mr Airey has identified as being disclosed by the September email (see paragraph 359 above) and on which he has based his opinion would not be ignored either. This is especially so in the light of our findings of fact which are not consistent with the discussions being as embryonic as Mr Rabinowitz would have it. And, in assessing whether there is likely to be a significant effect on price, we must apply the approach which we have identified in our discussion of the law: see our conclusion at paragraph 121 above. It will not, we suggest, be that difficult to say whether information is likely to have such an effect even in the context of a share whose price is experiencing some volatility. Even in a volatile market, an investor who has relevant information which other investors do not have will be at an advantage.

365. The degree of probability of an offer being made is, we acknowledge, a factor to be brought into account in assessing whether the information in question would be likely to have a significant effect on price: that proposition is established, we consider, by *Geltl* at [50] where the CJEU acknowledged that reasonable investors base their investment decisions on all *ex ante* available information. The degree of probability that an event will occur is something they will take into account but this goes "*to determining whether information is liable to have a significant effect on the prices of the issuer's financial instruments*". Mr

Rabinowitz submits that, at the time of the September email, the degree of probability that Perenco would make an offer was very low indeed.

366. We have already addressed this to some extent at paragraph 341 above. We concluded that there was a reasonable prospect of an offer being made; we therefore reject the submission that the probability of an offer was very low.

367. Mr Rabinowitz's second reason relates to Mr Airey's evidence. He says that Mr Airey appeared to accept that any reaction to the kind of information that could accurately have been announced as at 9 September 2008 would have been *"conjecture"*. It is worth setting out a passage from Mr Airey's cross-examination (which is set out in the written closing on behalf of Mr Hannam):

> "Q. If it is the case that an announcement of highly preliminary discussions, as we have seen, has no effect on the price, I take it that you would accept that an announcement that cannot even say that they had reached highly preliminary discussions stage would equally have no effect on price?
>
> A. No, I am sorry, I don't agree with that. The way the market behaves in circumstances where, by reason of rumour, leak if you prefer, press speculation, whatever it may be, to the idea that it now seems to think that there might be a takeover and it had not had that view, they invariably will mark shares up. The default assumption will be that the shares will rise on that. There are some circumstances in which they don't. It has been particularly prevalent, actually, in recent years. A number of retail companies were taken over but with little or no or even negative control premiums because they were bust; the equity could not get a premium.
>
> Q. And that is of course speculation, correct?
>
> A. Why, it is conjecture. It is nevertheless an observable price effect."

368. To digress for a moment, the premise of the question, we remark, seems to us to beg a quite important issue although to be fair to Mr Rabinowitz, his later questioning did cover the point which we are about to make which is this. It is true that the actual announcement was not followed by a significant immediate price rise (although the shares did close 11p up the next day) but it is equally true that during the early afternoon of 18 September 2008, there had been a significant and untoward price rise which was what led to the Panel requiring the announcement to be made in the first place: see the discussion at paragraphs 275 and 357 above. It is at least possible that that rise was attributable to information which had leaked. Although that is speculation (albeit that Mr Airey thought it was certainly a possible explanation and quite likely the actual explanation), it is equally speculation on the part of Mr Rabinowitz that the discussions between Heritage and Perenco, whatever stage they had reached, had no part to play in that price rise even though he has an alternative explanation (which was put to Mr Airey and which we come to when considering Mr Rabinowitz's third reason). We gain no assistance one way or the other from what happened to the actual price of the shares in the course of 17 and 18 September 2008.

369. Returning to Mr Airey's evidence, the questioning continued. When it was suggested that the price effect of a hypothetical public announcement on 9 September 2008 of something even more equivocal than the 18 September announcement would be even less significant than that actual announcement, the exchange proceeded:

> "A. … No, I don't agree with you about the price effect, I think it would still have an effect on price. I am still confident that that price effect would be positive because the overarching point here is that in a world where control premiums in takeovers are of the order of 20 to 40 per cent -- and they can be more and they most certainly can be less -- that is more important than the equivocation. Its new news there might be a takeover, however equivocal it is. Whether or not that effect will be more or less, we have already disagreed over whether it is an observable effect.
>
> Q. It would be true to say what you are describing is the consequence of speculation of whether there is a reasonable basis for thinking –
>
> A. Clearly. The market has almost no solid information to work on other than the fact that this equivocal announcement has been made. But the market is quite used to on a daily if not minute by minute basis generating price reactions out of almost nothing, or even less."

370. On the basis of that, it is said that if the market reaction to an announcement along the lines of the September email would have been a rise in the share price, that would be only because of speculation and conjecture; but a "reasonable investor" is not an investor who would be likely to make investment decisions on the basis of conjecture or speculation. Accordingly, the information contained in the September email was not inside information because a reasonable investor would not take account of it in making his investment decisions even if the market would take account of it as a matter of speculation or conjecture.

371. We do not agree with that argument. It may be that speculation and conjecture cannot form the basis of inside information (although a less judgmental term than "speculation and conjecture" would be "expectation" which reasonable investors use in their investment decisions all the time). But that is not the position in the present case. There is no speculation or conjecture in the three factors relied on by Mr Airey: (a) Heritage and its advisers were in discussions with a potential acquirer (on our findings of fact); (b) the CEO of Heritage had decided to engage in those discussions in a matter of days (and in fact did so); and (c) Mr Hannam expected an offer to be made for Heritage (we have already explained that Mr Hannam believed an offer would be made and had reasonable grounds for doing so). We consider that a reasonable investor would take account of those factors in making his investment decisions so that, in the language of section 118C(6), he would "be likely to use it" in making his decisions; and the market, whether on the basis of speculation and conjecture or not, would, according to Mr Airey's evidence, react in a way which produced a rise in price. The information is thus "inside information" since there would, in fact, be a significant effect on price and the information would be such that a reasonable investor would use it in making his investment decisions.

372. Mr Rabinowitz's third reason can be seen as a riposte to the conclusion which we have just expressed in relation to his second reason. It relates to the movement in the share price after the 18 September announcement. Mr Rabinowitz puts forward an alternative explanation to the leak hypothesis for the sharp rise in the share price on 18 September, before the announcement was made.

373. On the morning of 18 September, an announcement was made by Heritage of a presentation to analysts taking place later the same day. Mr Airey accepted that it was possible that news of the analysts' presentation, coupled with the volatility of the stock, could have produced the rise in the share price. And so it is submitted that, on any view there is no basis for attributing the movements in Heritage's share price on 18 September 2008 to speculation of a takeover bid, or news of Heritage being in highly preliminary discussions with a third party. Prior to the announcement, the increase was probably due to the news of the presentation. After the announcement, there does not appear to have been any movement at all.

374. We do not accept that submission either. Mr Airey accepted that Mr Rabinowitz's speculation and conjecture about the effect of the announcement of a presentation to analysts in a volatile market might have produced the price rise; but that was not the explanation which Mr Airey favoured. But even if that is the explanation, it says nothing about what would have happened to the price if the announcement of the presentation to analysts had not been made. And that is what is important for present purposes because we are concerned with how the market would have reacted if the information contained in the September email had been publicly disclosed on 9 September when there was no hint of a forthcoming presentation to analysts. Insofar as 18 September is relevant at all, what is relevant is what would have happened to the share price on the making of the 18 September announcement if nothing had been said about a presentation to analysts. As to that, the best evidence we have, subject to Mr Rabinowitz's fourth reason, is that of Mr Airey which we have already discussed. In any case, if the market rose on the basis of an announcement that a presentation to analysts was to be made, it is not easy to see why it would not have risen on the public disclosure of the positive information contained in the September email.

375. The fourth reason relates to the evidence of Mr Tolkien. Mr Tolkien recognised that the 18 September announcement was not very strong. But, in his view, it was clearer and more reliable than Mr Hannam's speculative thoughts in the September email. He also expressed the opinion that a reasonable investor would have recognised that the email contained the words of a salesman, and that Mr Hannam was trying to force Dr Hawrami's hand, and so would have put little weight on it. Mr Rabinowitz says that that evidence supports his case because information which a reasonable investor would have been sceptical about is not information which, if generally available, would have been likely to have had a significant effect on the price of Heritage's shares.

376. We do not accept that submission. We accept that Mr Hannam wrote what he did in the course of his attempts to persuade Dr Hawrami to move forward on a deal of some sort. But to the extent that the September email was accurate (a matter we have already discussed in detail), it disclosed information. The question is whether the reasonable investor would use that information in making his investment decisions. We are wholly unpersuaded that he would not do so even if the information were imparted to him by provision of a copy of the September email, although we do acknowledge that he might be less bullish than if there had been a public announcement to the same effect as the information contained in the September email. The reasonable investor, reading the email, would see its source; he would know that Mr Hannam was a very senior person in a reputable

investment bank; he would know of the reputational damage which would be caused if the information provided to Dr Hawrami was known to Mr Hannam to be materially inaccurate. We do not believe that the reasonable investor would be as sceptical as Mr Tolkien thinks he would be.

377. That is enough to deal with the fourth reason. But we add this. Even if the reasonable investor reading the September email would be highly sceptical, we doubt that it is correct to treat him as though he had read the email. Section 118C is concerned with information: an insider must not disclose information which has a significant price effect. The information in the September email was disclosed (at least to the extent that it was accurate) to Dr Hawrami and the scepticism with which it may or may not have been received by a reasonable investor does not detract from that. The question then, for the purposes of section 118C, is whether that information would be likely to have a significant effect on price. Even if the reasonable investor would have had a degree of scepticism had he read the September email, that is irrelevant: the question is whether the information contained in the September email (to the extent that it was accurate) was of a type which he would use in making his investment decisions on the basis that it was accurate.

378. Let us give an extreme example to illustrate the point:

> Mr T is a man well known in City circles. He is regarded as incompetent; nobody understands why he keeps his job as an analyst. One day, he sends his friend an email telling him that A Co is about to make a bid for B Co; he does not tell his friend how he knows this, but it is, in fact, because he has confidential information learned in the course of his employment. His friend makes a profitable trade on the basis of this information. Such is Mr T's reputation that, had the reasonable investor seen this email at the time, he would have entirely discounted the information contained in it, being able to place no reliance at all on anything coming from Mr T. We ask: Can Mr T successfully contend that he has not disclosed inside information because the information coming from him would have no significant effect on price because no-one (except a gullible friend) believes anything he says? Our answer is: Of course not. Mr T has disclosed accurate information; and that information is clearly information of a kind which a reasonable investor would be likely to use as the basis of his investment decisions. The fact that the market would not respond to the information because it came from Mr T does not mean that the information itself would not be likely to have a significant effect on price.

Conclusion on the September email

379. The September email disclosed the information identified in the proposed amended Statement of Case. That information was inside information.

Information already disclosed

380. Mr Hannam argues that, even if the September email did contain inside information, it did not disclose it to Dr Hawrami for the purposes of section

118(3) of FSMA because it had already been disclosed to him by Mr Buckingham: it is not possible, and is an abuse of language, to describe provision of information to a person who already knows it as disclosure. The occasions on which it is said that Mr Buckingham disclosed the information to Dr Hawrami were (i) at the lunch at Harry's Bar on 6 August 2008 (discussed at paragraph 240 above) and (ii) over drinks in the Cigar Bar at the Lanesborough Hotel on 3 September 2008 (discussed at paragraph 259 above).

381. The Authority has two responses to this. The first is that, whether or not it amounted to inside information, the information imparted by the September email went significantly further than Mr Buckingham had gone on either of those occasions and was of more value than what he had previously told Dr Hawrami: it referred to "*discussions… with a potential acquirer*" and to excitement about the recent drilling (*ie* the 3 September results from Kingfisher-2); it said that Mr Buckingham had "*deferred engaging*" until the following week, indicating that he was proposing to do so shortly; it referred to the third party's excitement about an announcement that very day (from Tullow); and it expressed Mr Hannam's belief that an offer was likely. We deal later with the argument that the wording of the September email was designed to get Dr Hawrami to "hurry up".

382. The second response is that Mr Hannam's argument proceeds from a false premise. The fact that inside information has already been imparted to a person does not mean that the same information cannot be disclosed again to him for the purposes of section 118C FSMA. A number of reasons are given for reaching this conclusion:

a. The prohibition on disclosing inside information in section 118(3) does not include any indication that the person disclosing the information must know or believe that the recipient does not have the information already. If disclosure to a person to whom that inside information had already been disclosed did not fall within subsection 118(3), a person could escape liability by the good fortune that someone else had tipped the recipient off already. That would not promote the integrity of markets.

b. Repetition of information may lend credence to it:

   i Disclosure by a more authoritative or reliable person may have an effect which prior disclosure by someone else did not have. But it is irrelevant for the purposes of construing subsection 118(3) whether Mr Hannam is more or less authoritative and reliable than Mr Buckingham.

   ii As Mr Hannam noted in cross-examination, repeating information may cause the hearer to pay more attention to it. When asked whether, in saying in the September email that he was updating Dr Hawrami, Mr Hannam was indicating that there had been a movement in the discussions since 3 September 2008, Mr Hannam replied:

   "Not necessarily. It might have been reinforcing the message. Using what information I had, Ashti sees many people. I am a great believer in tell them once, tell them a second time and if

> they don't get it tell them a third time. It often works quite well."

383. In our view, Mr Hannam did disclose to Dr Hawrami the relevant information in the September email. We agree with the Authority's first contention that the information went beyond that which Mr Buckingham had already conveyed and did so in a material way.

384. As to the Authority's second contention, we do not express a final view. One purpose of the legislation is clearly to prevent insiders from disclosing information; insiders are to be discouraged from behaviour which would disclose inside information. The focus is therefore on what the insider is doing, namely providing information to another person; it is not focused on the recipient and what he does or does not already know. It would be odd, to say the least, if a provider of information who had no reason to think that the recipient already knew the information could argue, when brought to task by the Authority, that he had not disclosed it. We incline to the view that an interpretation of the legislation which has that result should be rejected. However, the position may be different where the provider knows for certain that the recipient has the information and does not therefore believe that he is providing information at all, although even in this case there would have to be the caveat that if the new disclosure significantly reinforced the existing knowledge it might be construed as inside information. Moreover, it can be argued that, as a matter of policy, the Authority should not need to enquire into the state of mind of the recipient. We do not need to decide the extent to which communications containing information in these sorts of case amounts to disclosure.

The October email

385. We are concerned only with the postscript to the October email: "*Tony has just found oil and* it *is looking good"*. It is common ground that "Tony" is Mr Buckingham and that the postscript related to the Warthog-1 well. Mr Hannam submits that the postscript was materially inaccurate: oil had not been found so that the assertion that it is looking good, based on that inaccuracy, was also inaccurate. Since an incorrect statement cannot, on Mr Hannam's approach, disclose "information" it is necessarily the case that it cannot disclose inside information. In any case, it is said that the information disclosed by the postscript was not "precise" within the meaning of section 118C.

Precise

386. According to its terms (and ignoring for the moment its accuracy) we consider that the postscript communicated two messages:

a. oil had been found; and

b. Heritage and/or Mr Hannam thought that the find was good news – a positive assessment of the situation – for Heritage.

387. The Authority submits that a third message was communicated: this is put as a message that the oil find could reasonably be expected to turn out to be commercially significant. We will examine that proposition more closely in due course.

388. As a preliminary point, it is submitted on behalf of Mr Hannam that it is relevant to bear in mind how Dr Hawrami understood the postscript. We are not clear why that is said since there must be an objective assessment of what it is that the email disclosed. However, assuming that it is relevant, Mr Hannam relies on Dr Hawrami's interview by the Authority in November 2010 during the course of which this exchange took place:

> "Thorpe: Are you aware what oil find that relates to?
>
> Minister: Not really. I don't know from his back garden or from somewhere else. I don't know. But presumably somewhere he is operating.
>
> Thorpe: Was there anything that might have caused you to link it to his operations in Uganda?
>
> Minister: Not really. The reason for this, I mean, if you look at it – no, I didn't think about it.
>
> …
>
> Minister: Even now I don't understand it, by the way. As an oil man –
>
> Thorpe: Mmm-hmm.
>
> Minister: - this is only way of spudding the well and finding oil. I've never seen that in history. How do you find oil? Sorry."

389. And so it is said that to Dr Hawrami the postscript was meaningless. Accordingly, there is no reason for concluding that the reaction of a reasonable recipient would have been any different. This, in Mr Hannam's submission is the end of the matter since there is no risk of anyone trading on the basis of or passing on information which is meaningless.

390. We do not accept that reasoning. First of all, it must be remembered that we did not have the advantage of receiving evidence from Dr Hawrami. We find very surprising his answer that he did not know what oil find the postscript related to. Perhaps he had forgotten the September email. He was not pressed by Mr Thorpe on this at his interview. Had he been cross-examined by Mr Boulton, it is possible that Dr Hawrami's answers would have persuaded us that our surprise was misplaced. But there was no opportunity for such questioning. We would be reluctant to accept, on the basis of that interchange, that the reasonable recipient knowing the context in which the October email was written would have thought that it related to anything other than Heritage's current drilling programme in Uganda. In any case, the interview took place more than two years after the email was sent and, so it seems, Dr Hawrami was not provided with any of Heritage's contemporaneous announcements regarding its drilling activities. It is common ground, moreover, that the email in fact related to the Warthog-1 well. In all these circumstances, we do not accept that Dr Hawrami's answers recorded above provide us with any assistance, still less do they bring an end to the case against Mr Hannam based on the October email.

Section 118C(5)(a) – indicates circumstances

391. As to the first limb of section 11C(5), we have already said that the postscript indicated that (i) oil had been found and (ii) Heritage and/or Mr

Hannam thought that the find was good news – a positive assessment of the situation – for Heritage.

392. The Authority's case is that Mr Hannam was telling Dr Hawrami that it was Mr Buckingham's view that things were looking good. Mr Hannam was not an oil exploration expert but Mr Buckingham was; at least, he had far more knowledge than Mr Hannam or Dr Hawrami about the drilling at the Warthog-1 well. Dr Hawrami knew that Mr Hannam was Mr Buckingham's adviser. Our view is that the objective reader in the position of Dr Hawrami knowing that background would read the postscript as an expression of the view which had been communicated to Mr Hannam by Mr Buckingham or someone else at Heritage. Further, given the reference to "Tony" rather than Heritage having found oil, the objective reader, and certainly Dr Hawrami who knew the individuals concerned, would take the informant to be Mr Buckingham. We therefore agree with the Authority on this point.

393. As a matter of fact, we find that it was indeed Mr Buckingham's view that "things were looking good" and that he had communicated that view to Mr Hannam before the October email was sent. Thus, Mr Buckingham's evidence in his witness statement was that words such as "*things were looking good for us*" was "*the sort of thing I could have said to Ian, in the broadest possible sense, on the phone that day*"; and in his oral evidence he said "*It is looking good is certainly a statement I would use*". Further, in his interview by the Authority, he also described the drilling report which he received on 7 October 2008 as "*good news*".

394. The Authority also relies on what Mr Buckingham said in his interview by the Authority: "*I'd phone him up and I'd say listen Ian, fantastic news, we've, Warthog looks like it's come in, or words to that effect*" and "*I think I'd more likely say to him oh listen we've picked up some interesting gas shows or gas readings and it's looking good and if we recovered oil to surface I'd say to him we've got live oil to surface, words to that effect. I certainly would not go into the technicalities*". He could not remember specific calls: "*…. I can't remember if I phoned him up and said listen we've got a really good discovery in Warthog-1 or whatever, but with the relationship and the amount of times that we tend to speak to each other it would be almost inconceivable that I wouldn't mention something to him"*. These answers indicate that, whether it was gas or oil which had been found on 7 October, Mr Buckingham would have regarded it as good news and would have told Mr Hannam as much.

395. The answers in the interview must be treated with some caution, however. They do not show (i) that Mr Buckingham told Mr Hannam, before the October email was sent, that oil had been found or (ii) that oil had in fact been found. The questioning in this part of the interview was not focused on the drilling results on 6 and 7 October: it was far more general. The answers set out above came in the context of communications generally; the first and third answers could have related to conversations after 8 October, indeed after a time when black oil had been discovered. And the second answer, in its terms, makes clear that it is addressing different stages of gas shows or gas readings, and recovery of oil to surface. These answers, it seems to us, are not a reliable indicator that Mr

Buckingham said to Mr Hannam, before the October email, that things are looking good because he had just found oil.

396. In particular, the reference to fantastic news was in the context of the scenario where "Warthog looks like it's come in or words to that effect". No doubt a finding of black oil would have been described by Mr Buckingham in that way: and whilst he clearly saw the drilling results on 7 October as "good news", whether those results would have qualified as "fantastic" his answers in the interview do not tell us.

397. This takes the force out of the Authority's submission that Mr Buckingham's answers show that he clearly thought that the information was price-sensitive: it is hard to imagine how something can be "*fantastic news*" but not, at the same time, be likely to affect the share price of Heritage. However, we cannot proceed on the basis that he did regard the drilling results as "fantastic" news. Whether "good news" is price sensitive depends on the news and we gain little assistance from the epithet "good".

398. As we see it, therefore, the postscript accurately conveyed Mr Buckingham's view that things were looking good. And it accurately conveyed Mr Buckingham's view that this was so in the light of the drilling results on 7 October. Mr Buckingham's view that things were looking good was not based on a discovery of black oil (which he knew had not occurred): Mr Hannam was communicating Mr Buckingham's view of the actual results of the drilling. The fact that he, Mr Hannam, may have thought that black oil had been discovered and that that was why things were looking good does not detract from the accuracy of what he wrote.

399. Next, the Authority says that, even if the email is to be read as conveying Mr Hannam's view rather than Mr Buckingham's view, it expressed his true view. It is said that he accepts that he thought that what he said was true. We are not clear what relevance that is said to have if in fact the email was untrue. But that is beside the point because, as we take his cross-examination, Mr Hannam did not accept that the email was true in the sense that it was to be read as a reference to black oil. Asked whether he had any basis for saying what he did other than that the statement was thought by him to be true when he put it in the postscript, he gave a rather long answer explaining how the email came to be drafted and that, when speaking to his secretary on the phone "*Maybe I should have said on the phone said oil traces*". As far as he was concerned, he was just reporting something that he had obtained from Mr Buckingham: "*Yes, It may have been oil traces, I just don't know. You are looking at an email which I did the best to ensure was correctly done*".

400. Mr Hannam has submitted that an expression of view is not an event or circumstance. We do not accept that submission. Whether a person does or does not hold a particular belief is a matter of fact. If a particular person does hold a belief and has good reason for doing so, it may be that a share price would be affected if that belief were publicly known. We have given the example (see paragraph 69 above) of an assessment of oil reserves by technical experts which turns out to be incorrect. The assessment – the expression of opinion or belief on the part of the experts – is a fact albeit that the assessment turns out to be inaccurate. So, too, the beliefs of Mr Buckingham and Mr Hannam are facts in the

real world. In the example, the assessment of oil reserves falls within section 118C(5)(a) because it is information which indicates circumstances that exist, namely, a physical state of affairs such as to lead the experts to their conclusions; alternatively, it is information which indicates circumstances which may reasonably be expected to come into existence, namely the discovery of oil when further assessment of the reservoir is carried out. In the present case, Mr Buckingham's beliefs fall within that paragraph because they constitute information which indicates circumstances that exist, namely a physical state of affairs such as to lead Mr Buckingham to hold the view that "things are looking good"; alternatively, that information indicates circumstances which may reasonably be expected to come into existence, namely the belief that further drilling will confirm expectations. Whether the information in each case would affect the market is a different issue. The reasonable investor may pay a great deal of attention to the oil experts and he may pay considerable attention to Mr Buckingham's views. If it is Mr Hannam's views which are relevant, the reasonable investor may pay less attention to them save to the extent that he perceives them as a reflection of Mr Buckingham's views.

401. We now return to the third message which the Authority says was communicated: the oil find would turn out to be commercially significant. It is submitted that "*it is looking good*" must refer either to the Warthog-1 discovery itself (and thus, on the Authority's case, to the likelihood that there would be substantial recoverable reserves in Warthog-1) or to the broader implications of the Warthog-1 discovery for the chances of discovering oil in the additional wells to be drilled in Block 1 before the end of 2008 (Buffalo and Giraffe): on either basis, the October email contained information that the likelihood of discovering commercially exploitable oil in the Albert Basin of Uganda had increased.

402. There does not appear to be any dispute that a significant oil find could reasonably be expected. The Authority points out that Mr Crouch's report said that "*exploration success with the Warthog-1 well [was] highly expected*". He added that "*the exploration success….would not, by itself, necessarily change the value of Heritage because it was not expected to be big enough in combination, with the existing discoveries, to achieve the threshold volumes of oil need to justify the development"*. However, in cross-examination, he agreed (with Mr Buckingham) that success at Warthog-1 increased the likelihood of finding oil at Giraffe and Buffalo.

403. It is also appears from analysts' reports (*eg* a BMO Capital Markets Report dated 25 March 2008) that there was a reasonable expectation (although no certainty) that oil would be found in sufficient quantities in the Albert Basin to enable it to be commercially exploited.

404. We consider that the Authority's case in relation to this third message is to put the matter far too high when it is said that the oil find would turn out to be commercially significant. We do not consider that the postscript suggested that the oil find would, rather than could reasonably be expected to turn out to be commercially significant.

405. We do not even consider that the words "*it is looking good*" convey the message that the oil find could reasonably be expected to turn out to be commercially significant; or if it does, it is a trivial message adding nothing to the

disclosure that oil had been found. This is because the market would know, on the Authority's own case, a number of things: (i) that exploration success at Warthog-1 was expected; (ii) that there was a threshold for oil discoveries in the Albert Basin which had to be met before commercial exploitation became viable; (iii) that a discovery of oil would increase the prospect of success in Giraffe and Buffalo; and (iv) that analysts considered that sufficient quantities of oil would be found in the Albert Basin to justify commercial exploitation. Accordingly, disclosure that oil had been found in Warthog-1 would automatically carry with it the message that market expectations were being confirmed so that things were indeed "looking good". Without those four factors, the message conveyed by "*it is looking good*" has nothing to say about commercial viability. Clearly, no oil prospector goes drilling unless he hopes to find commercially significant reserves; and the bald statement that things are looking good in the context of an oil find – with no more said about, for instance, the anticipated extent of the reserves – says no more than that there is nothing to bring activities to an end.

406. We therefore agree with Mr Rabinowitz on this point when he says that nothing in the postscript could be read as indicating that any oil find would turn out to be commercially significant.

407. The Authority has submitted that the statement "*Tony has just found oil*" is accurate. It submits that what Heritage found at Warthog-1 on 7 October 2008 was indeed "oil" within the meaning of the postscript as properly understood. We will deal with its arguments in a moment. But before we do so, we should explain that we do not regard this as a critical issue. The reason for that flows from our analysis of how inaccurate information is to be treated for the purposes of section 118C. Whether it is correct to call what was discovered "oil" does not detract from the fact that something was discovered, as appears from the drilling report for 7 October. We will refer to the discovery as one of "LHs" for liquid hydrocarbons. We appreciate Mr Hannam's submission that matters were far less certain than an actual finding of LHs: rather, there were no more than indicators of the potential presence of LHs. We will come to that in a moment, but for the purpose of simplifying the argument, we will consider the position as if LHs had been found. The position then is as follows:

a. If it is correct to call LHs "oil" then the postscript was entirely accurate; but the reasonable investor and the market would understand that it was learning of a find not of black oil but only of LHs.

b. If it not correct to call LHs "oil" then the postscript is inaccurate. But in our view and in the light of our analysis of the treatment of inaccurate information, it can be taken as a disclosure of information to the extent that it is accurate. We gave an example (see paragraph 67 above) of an inaccurate disclosure of the level of reserves. We do not repeat it, but note that an inaccuracy as to quantum as in the example does not necessarily result in apparent information being non-information (if we may use that word). In our view, the same approach can apply where the inaccuracy is as to quality. Suppose, then, that a statement that "Tony has just found LHs" amounted to a disclosure of inside information. We would then consider that, in the context of the October email, the statement that "*Tony has just found oil* [*ie* in

context, black oil]" also provides inside information by indicating relevant circumstances or events, namely that a substance has been found which is a strong indicator, but not a guarantee, of a finding of black oil. This is particularly so if it is correct to say (as we think it is) that, quite apart from the finding or indications of LHs, the drilling result for 7 October 2008 as a whole provided strong indications that black oil was deeper in the well.

c. If Mr Hannam is right in saying that not even LHs had been found, but that there were only indicators of the potential presence of LHs, the inaccuracy of the postscript can, perhaps, be seen as even greater. But there is no difference in principle to the correct approach which is to ask whether the indicators of the potential presence of LHs can be treated as disclosed and, if so, whether those indicators would have amounted to price sensitive information if expressly and accurately disclosed.

d. The issue, as we see it, comes down to whether (i) the postscript can be read as disclosing what had actually been discovered and (ii) if so, whether that (accurate) statement would have been a disclosure of inside information. It does not matter what label (*eg* "oil") is used to describe what has been disclosed.

408. The next matter we need to consider is exactly what was and was not found on 6 and 7 October and reported in the drilling reports. It is clear that black oil was <u>not</u> found however strong the indicators may or may not have been. Nor can it be said that the indicators were so strong that it could be said that black oil was as good as found. Even Mr Prast at his most confident did not put matters that high. The results of drilling on 6 and 7 October were not inconsistent with an eventual outcome of finding no black oil below, however disappointing and contrary to expectations that might have been.

409. It is common ground that the daily drilling reports reported oil shows, even though by 8 October 2008 the drilling was still in the gas leg of the reservoir and had not reached the part which contained black oil. The basis on which the box referring to oil shows was ticked is not entirely clear but there are two possible reasons. The first relates to the presence of pentane. In the reservoir, pentane, at the temperature there, would have been in gaseous form. But at the surface, it condenses and is found in liquid form. In its liquid form, pentane is a liquid hydrocarbon. In the context of the box to be ticked by the geologists at the rig, this could, on one view, be seen as an "oil show" (not, of course, a showing of black oil). As Mr Prast put it in cross-examination: "*I would consider the pentane, for example, being indicative of oil below, and I think that's why perhaps the geologists at the rig ticked the 'oil shows' box. But it is not dry gas*". We are not convinced by that explanation and think it is just as likely (although this is perhaps speculation) that the "oil shows" box was ticked because there was actually liquid pentane at the surface and that was regarded as "oil". Indeed, one of the Authority's arguments is that pentane was in fact found at the surface in liquid form so that a liquid hydrocarbon had been found; a liquid hydrocarbon is, it is said properly described as "oil" so that the postscript was in fact accurate.

410. The second possible explanation is the presence of "minor traces of staining". Mr Stuart explained what minor traces of staining meant to him and what the reference to oil in the drilling reports was. He explained that "*when you say oil, that is your first indication that you have got a liquid component as opposed to just dry gas, but as I was suggesting it could be a volatile oil condensate that you're looking at. You don't know if you've got black oil, but you've got a liquid*". He said that to anyone reading the report, it would be an indicator of oil. And in relation to the report dated 6 October 2008 referring to "*bright yellow spotty 30% DF [direct fluorescence]*" he said "*what we see here is that we are getting liquids for the first time, hydrocarbon liquids.*"

411. In cross-examination, Mr Stuart nonetheless accepted that it would have been misleading and incorrect to say that oil had been found by 8 October 2008: "*To have suggested that we had found oil, yes, [all] we could have said at that point that we had discovered hydrocarbons"*. It is clear that Mr Stuart was there using the word "oil" to refer to black oil and was making the point that black oil had not been found. That reflects what he said in his interview with the Authority: *"it's nice that you're getting some C5s* [C5 means pentane], *as I said you're probably potentially heading towards having some liquid component but it's not a guarantee"*. Consistently, he accepted that, if an announcement had been made – it was not, he considered, necessary – then something along the lines put to him by Mr Rabinowitz would have been appropriate, namely: "*the most you could accurately have said was that drilling had encountered positive indicators of liquid hydrocarbons but it was not possible to tell whether this was black oil, volatile oil or condensate and that further drilling and testing would be required before any definitive comments in that regard could be made.*"

412. This uncertainty is identified by Mr Crouch, who said in his report that the presence of pentane at the surface "*indicated the potential presence of liquid hydrocarbons*". That, we accept, is entirely accurate in the sense that there is no guarantee of liquid hydrocarbons being found at the level of the drilling. But the confidence with which an expert would be able to assess that potential depends on a multiplicity of factors relevant to the Warthog-1 well itself and on the assessment of that expert of the importance or otherwise of other facts such as the geology of the region and the extent of other findings of oil already made in the Albert Basin.

413. Mr Prast was prepared to express a more optimistic view. He said that pentane shows are considered within the oil and gas industry to be a strong indicator that oil may lie below: "*It is not an absolute indicator, but it is close to being one*". The opinion stated in his report was that, on the basis of the drilling reports for 6 and 7 October 2008, and because successful exploration wells nearby had proved to be discoveries of crude oil, "*this would prompt an informed and experienced oil and gas professional to conclude that oil had been found*". This might seem a surprisingly confident assertion. He explained that this was because of the pentane shows he had referred to in his report. His final position in cross-examination was that it [the result of the 7 October drilling] "*would give me great confidence that oil would be found*" and

> "you must complete the drilling in order to find what you find … Clearly the drilling had not been finished, but the indications were very encouraging,

> and at that point, I would have expected an informed professional to be very encouraged about the results, because they were coming in as the oil plan had projected, and whilst drilling was not finished, it would provide great confidence, on the state of the knowledge that had been achieved as at that date."

414. That any conclusion to be drawn from the presence of pentane is provisional is confirmed by what Mr Stuart said in his interview with the Authority. He was taken to an email where Brian Smith, the Exploration Manager at Heritage, had noted the presence of C5 at lower depths in the drilling (c.773 metres) and said it was still likely to be oil. As it turned out, and as Mr Stuart observed, "*this section [was] dry*".

415. As to the meaning of the word "oil", the Authority contends that it is a generic term for any combination of hydrocarbons that can exist in a liquid state. As Mr Crouch accepted, when one sees a liquid hydrocarbon, one is seeing generic oil: "*… people can use that term.*"

416. It relies on what Mr Stuart said about the daily drilling reports for 6 and 7 October 2008: "*…as I observed in my interview with the FSA, for 90% of the people in the oil industry reading that, they will see oil. What we see here is that we are getting liquids for the first time, hydrocarbon liquids*". We do not read that answer as a statement to the effect that oil had been found: rather, 90% of people would "see oil" in the sense that the reports contained clear indications that oil would be found but without any guarantee that it would be, let alone that it had already been, found.

417. Mr Buckingham said that he would have looked at Mr Binnie's email dated 7 October 2008 containing the daily report on his BlackBerry and that "*from the email, I could see that it looked as though we had found evidence of oil*". We do not read that as saying that oil had been found. Rather it was a statement that what had been found was both consistent with oil being found and a positive indicator that it would be found.

418. In his interview with the Authority, Mr Buckingham was shown the October email and asked "*So I mean can we take it that you would understand from that that oil had been found?*". He replied "*Yes absolutely*". Clearly, he took the question as relating to black oil and answered it accordingly. The question related, it must be emphasised, to the October email. Mr Buckingham's answer was given to that question: he was not explaining what the drilling reports would have meant to him.

419. Mr Hannam submits that the phrase "*Tony has just found oil"* would be taken by any reasonable reader of the October email to mean that there had been an actual discovery of black oil, as opposed to any other form of liquid hydrocarbon. That, it is pointed out, is consistent with the terminology used by Heritage in its subsequent press releases where a clear distinction was drawn between oil, condensate and wet gas. And so, on any sensible view of the words "oil" and "found" in the October email, no oil had been found as at 8 October 2008.

420. Mr Hannam's case is that most of the witnesses who spoke to the daily geological reports of 6 and 7 October 2008 seemed to agree that it would not be

possible to reach any definitive conclusions on what had been "found" at the Warthog-1 well until the drilling had been completed and further tests had been undertaken. Until this point, the most that could be said was that there were "oil shows" or positive indicators of the potential presence of liquid hydrocarbons in the daily geological reports for drilling on 6 and 7 October 2008. In this context, Mr Stuart also referred in his evidence to the difficulty of issuing an announcement too early in relation to the Warthog-1 drilling, which included being *"guilty of saying there was oil where there was condensate"*. This reinforces the point made above that a meaningful distinction is drawn between the various mixed-phase/liquid hydrocarbons. That may be so. But it does not meet the point that an inaccurate (and possibly misleading) statement may nonetheless disclose inside information. Consider again the example in paragraph 69 above where the mis-statement of reserves might be materially misleading if made in a public announcement but would still be a disclosure of inside information when the statement is made privately by an insider to a friend.

421. Our conclusion in the light of all of the above factors and evidence is that it was materially inaccurate as a matter of fact to say that oil had been found. We agree with Mr Rabinowitz that the postscript is properly to be read as referring to black oil; and in saying that (black) oil had been found, the postscript was telling the reader not simply that there were strong indicators that there was oil to be found, it was saying that Heritage actually had found oil.

422. The postscript was thus wrong because black oil had not been found in that sense. All that had been found were indicators that black oil might be found. We do not accept Mr Rabinowitz's submission that the only indication was of the potential presence of liquid hydrocarbons. On the totality of the evidence, including in particular that of Mr Prast which we accept on this point, it was possible to assert with a real degree of confidence and not as a matter of speculation that black oil would be found, although of course that was not a certainty: it may have been that only condensate or volatile oil would be found, or perhaps nothing at all. It was possible to say with certainty only that pentane in liquid form had been found at the surface. If we are wrong in saying that the postscript refers only to black oil and that it refers to any liquid hydrocarbons, then we consider that it would be correct to say that oil had been found even though the liquid pentane was found only at the surface.

423. For the reasons given at paragraph 406 above, we do not consider that the words in the postscript, *"it is looking good"*, make any difference to what was disclosed by the statement that "*Tony has just found oil*": the words do not make any difference because the market would automatically take from the statement that oil had been found that "*it is looking good*". The message is simply confirmatory and contrasts with "*Tony has just found oil. But don't get excited. It looks as though we will, at best, find only a small quantity of crude oil and the commercial prospects are not good*".

424. Mr Hannam's case is that, even if the postscript said *"things are looking good"* or *"we have some good indicators"*, the Authority would have had no sustainable case that such broad statements could constitute inside information. If by that it is suggested that the condition of section 118C(5)(a) cannot be fulfilled, we would not agree. A statement that there are good indicators of the presence of

black oil discloses, in our view, information which falls within section 118C(5)(a); indeed, even a statement that there are good indicators of liquid hydrocarbons (rather than black oil) coupled with the revelation of the finding of pentane in liquid form on the surface discloses information within that subsection. Whether the information, in either case, is inside information is a different question the answer to which depends on whether the information would have a significant effect on price which we come to in a moment.

425. The question then for the purposes of section 118(5)(a) is what circumstances and facts were indicated by the postscript in spite of its inaccuracy: Did the postscript indicate what was actually found on 6 and 7 October (namely, strong indicators, but no guarantee, of the presence of black oil and the positive view of Mr Buckingham/Mr Hannam)? Or was the postscript so inaccurate as to be treated in the same way as a statement which is wholly untrue?

426. In our judgment, the postscript did disclose information falling within section 118C(5)(a). The postscript indicates circumstances, namely the presence of strong indicators of black oil; and it indicates the fact that Mr Buckingham and Mr Hannam (or perhaps Mr Hannam only) considered this to be positive news. We will refer to this information as "**the Relevant Information**". Returning to the example in paragraph 67 above, the incorrect statement that the reserves are 3X million barrels indicates something which is true and material to what the recipient of the message is interested in, namely that the reserves exceed the threshold for commercial exploitation. Similarly, on the facts of the present case, the incorrect statement that black oil has been found indicates something which is true namely that indicators of black oil have been found.

427. Suppose, in contrast, that in the example the actual reserves had been only X million barrels. The statement that the reserves are at least 3X million barrels would not then be materially correct in any way: reserves of 3X million barrels would mean that the find was commercially viable where reserves of only X million barrels would not be. The effect (if any) on the share price would, we surmise, be in different directions in each case. Similarly, in the present case, if in fact the drilling tests had revealed information which indicated that, although there might be a presence of black oil, that was considered very unlikely, the postscript would then be wholly inaccurate and could not be seen as providing any information at all falling within section 118C(5)(a).

428. There is one final matter which we should raise in relation to section 118C(5)(a). Mr Rabinowitz submits that, even if there were grounds for increased confidence that Warthog-1 would prove to be a successful discovery, and this was communicated unequivocally in the postscript, this would not assist the Authority in satisfying section 118C(5)(a). The relevant consideration for the purposes of that provision is whether the information in question indicates circumstances that may reasonably be expected to come into existence. No distinction is drawn in the Act between degrees of expectation. Accordingly, insofar as there is already a reasonable expectation that the relevant circumstances will come into existence on the basis of publicly available material, non-public information that makes this more likely will not fall within section 118C(5)(a) unless, perhaps, it can be said that this information gives rise to a different reasonable expectation. No other reasonable expectation has been suggested by the Authority.

429. We do not agree with that submission. First, information can fall within section 118C(5)(a) even if it is generally available. It is not, of course, inside information, but this is because it is excluded by section 118C(2)(a), not because it is not "information". Secondly, the fact that two pieces of information may lead to the same reasonable expectation does not mean that each is not information at least capable of amounting to inside information. Each piece of information may indicate circumstances which exist or may reasonably be expected to come into existence. A discovery which reinforces an existing indicator is nonetheless an indicator. That does not mean the information is inside information: that will depend, assuming it is not already generally available, on whether it is likely to have a significant effect on the price of the relevant shares for the purposes of section 118C(2)(c) read with section 118C(6).

Section 118C(5)(b): specific

430. The Authority submits that the postscript provides information which is specific. The postscript might have an effect on Heritage's share price if made public and, if it were to do so, the direction of movement could only be up. We agree, because an accurate announcement of the results of drilling on 6 and 7 October 2008 and of Mr Buckingham's assessment that things were looking good could not, in our judgement, be seen as capable of having a downward effect on Heritage's share price. The coupling of that view with the actual results indicates that the results are positive. We gain some comfort in reaching that view (although it is not a factor relied on in reaching the decision) that Mr Buckingham acknowledged that the announcement that Heritage had spudded two wells (i.e. commenced drilling, with no indication as to the results of drilling) would be expected to have a positive effect on the share price. Further, in the context of what would have been known to the reasonable investor about Heritage's exploration drilling activity at the time of the October email, any positive indication of drilling results from the Warthog-1 well would in fact have been likely to have had a positive effect on the price of Heritage's shares. We examine this aspect further in the context of sections 118C(2)(c) and 118C(6) of the Act below.

431. Mr Hannam has a number of reasons for saying that the postscript did not contain information which was "specific". Perhaps his most significant argument turns on Mr Crouch's evidence that <u>if</u> the kind of liquid hydrocarbon found at Warthog-1 was different from the other discoveries in the region, and was a condensate rather than a black oil, "*that might need different processing, might be a change of development plan was required*". As to that, Mr Prast and Mr Stuart both recognised that vast quantities of condensate would have to be discovered in order for it to be worth exploiting and thus to be of any value to Heritage. And so, Mr Rabinowitz argues, <u>if</u> only condensate had been found at Warthog-1, this would have been bad news, rather than good, especially if there was an existing reasonable expectation that (black) oil would be found. There was every possibility that this might have had a negative effect on the price of Heritage's shares.

432. That may all be correct. But the "ifs" which we have underlined are large. Indeed, so far as we are aware, there is nothing to suggest that the liquid hydrocarbons found at Warthog-1 were in fact different from the other discoveries

in the region. We do not consider that the possibility of the liquid hydrocarbons found being different or the possibility of only condensate being found (in other words, a subset of the situations in which no black oil would be found) can have an impact on the effect of the Relevant Information. In that context, we do attach significance to the words "it is looking good" since it reflects Mr Buckingham's assessment that matters were on course, if we can express it that way, or running according to expectations. There is certainly no reason to think that the information to which we have just referred would cause the market in Heritage shares to fall. As the Authority submits, the question is whether what was in the postscript was specific enough for a conclusion to be drawn as to the *possible* effect on the price of Heritage shares of the event or circumstances indicated. The answer to that question is straightforward: the event and circumstances indicated could only increase the price.

"likely"

433. Mr Hannam's case, unsurprisingly, is that even if the October email contained information of a precise nature, that information was not likely to have had a significant effect on the price of shares in Heritage. In making that submission, Mr Rabinowitz reminds us of the turmoil in the financial markets in the latter part of 2008. As Mr Airey himself explained, at the time of the October email markets were nervous and very risk averse. He regarded Heritage shares as a relatively volatile stock and thus exposed to the market nerves.

Mr Airey's evidence

434. Both parties have placed considerable reliance on different parts of the evidence which was given by Mr Airey. The Authority refers to his statement and to his second report which include, respectively, the following:

> "To any oil exploration company, news on the progress of an exploration well would be examined by any market user. It doesn't matter if the news merely confirmed the expectation in the market or if that news was not definitive or final… Oil exploration companies live and die by the results of their exploratory drilling and to suggest that a reasonable investor would not be likely to use information about Warthog-1, even when it was far from definitive, simply lacks any credibility."

> "The quoted phrase from the October email, in my opinion … (iii) is clearly capable of having a significant effect on the price of Heritage as news about Warthog-1 would have been used by a reasonable investor, in my opinion, as part of the basis of their investment decisions in Heritage."

435. These references are made to support the proposition that the information in the postscript was of a kind which the reasonable investor would be likely to use. It is important to note, however, that Mr Airey was, in those parts of his evidence, addressing information provided by the statement that "Tony has found oil". We see no reason, however, to think that what he said in the first passage quoted would have been any different if he had been addressing the actual results of the drilling reports. Those reports constituted just the sort of news to which he was referring.

436. The position in relation to the second passage quoted is more problematical. Mr Airey's focus in that passage was on the actual words of the postscript and his conclusion is that those words would have been taken account of by a reasonable investor: he does not say, but it is implicit, that he has in mind an investor who regards the postscript as accurate. However, Mr Airey's reasoning for his conclusion is that news about Warthog-1 would have been used by the reasonable investor. We can therefore properly take from his evidence that an accurate statement of what the drilling results had revealed, coupled with an assessment by Mr Buckingham that things were looking good, is something which a reasonable investor would have taken into account in the real world.

437. None of that, unfortunately, addresses the continuing effect of section 118C(2)(c) on the "reasonable investor" test in section 118C(6). Mr Airey dealt with that in his third witness statement when giving his opinion on "significant effect" on the assumption that the test adumbrated by Mr Hannam was correct, *ie* that the two subsections are cumulative (and, *a fortiori*, his opinion covers the approach which we have held to be correct, namely that section 118C(2)(c) must continue to be borne in mind, or informs, section 118C(6), with "significant" being contrasted with insignificant or trivial). His view was that the information contained in the October email acted as confirmation of the widely held expectation that Warthog-1 would be successful saying, in a passage relied on by Mr Hannam:

> "As such it could have had a significant effect on the share price of Heritage, but I cannot be sure that it would have had a significant effect, or how long any effect would have lasted."

438. What he does not say, because he was never asked, is whether an accurate statement of what the drilling results had revealed, coupled with an assessment by Mr Buckingham that it was were looking good, would also have acted as confirmation of the widely held expectation and, if so whether it could have had a significant effect on price. One thing which is clear is that an accurate statement would have provided weaker confirmation, if it provided any information at all, than the postscript assuming it had been accurate. At best from the Authority's perspective, therefore, Mr Airey's conclusion would have been even more strongly qualified than it was.

439. Mr Airey was taken back to this in cross-examination. We find this exchange:

> "Q. In other words you cannot say that the information in the October email was very likely or more likely than not to have had that effect, can you? That is what you are saying there?
>
> A. I was never asked to address the point in precisely those terms. This is/was a genuinely difficult one for me to judge, because I accept the point about the level of expectation and the element of confirmatory –
>
> Q. So you would accept it is not easy?
>
> A. Most certainly. On the balance of probability I could see someone marking a price up a few pence but you have to remember that in the context of the way that this share price is behaving at the time, that could just be noise. I think within a week either way of this point the shares are 30 or 40p higher and lower for reasons which you clearly cannot attribute to this. So

> the ordinary volatility of the shares is such that attributing with very high degrees or higher degrees of certainty what actually would have happened in response to this becomes very difficult. In fact for me impossible, to be candid."

440. Mr Airey was there being questioned assuming that the most which the October email could have said was that positive indicators of oil had been found at the Warthog-1 well. The questioning was also on the basis of Mr Hannam's approach to the meaning of "likely" namely that it means more likely than not and on the basis of the cumulative approach to sections 118C(2)(c) and (6). Mr Airey was not asked whether he considered that there was a real prospect of the information having an effect on price nor was he asked what he regarded as significant. He did accept, before the passage just quoted, that on the assumption just indicated, all the email could do was to confirm that there was a widely held expectation that oil would be or was very likely to be found. But we need to emphasise that he did not say anything at that point about whether such confirmation could have any effect on Heritage's share price: an expectation can be more or less firm, there can be different degrees of expectancy.

441. What we can take from Mr Airey's evidence is this:

a. He could not say that it was more likely than not that the information would have had a significant effect on the share price.

b. He could see on a balance of probability that someone might mark up the price by a few pence.

c. But if such a movement were actually seen, one would not know whether it was a reaction to the information or simply "noise" or the result of volatility.

442. None of that is very helpful evidence. As to a., the test is not whether the information is more likely than not to have a significant effect; it is whether there is a real prospect of its doing so. As to b., Mr Airey might have thought that there was a real possibility of a greater increase than a few pence. As to c., that increase might have been large enough so as not to be swamped by "noise".

443. Our conclusion is that we cannot be satisfied from Mr Airey's evidence that the information (within the meaning of section 118C) which was contained in the October email was likely to have a significant effect on price. We must therefore consider the other evidence on which the Authority relies.

Investor expectation

444. The Authority sets the scene by identifying what information the reasonable investor would have when he came to assess the Relevant Information. It relies on the following.

a. First, there were good reasons for Heritage to be confident that it would find oil when it drilled the Warthog-1 well:

i According to a Cazenove research note dated March 2008, the quality of the seismic 2D work across Block 1 was very good. It suggested that the Warthog, Buffalo and Giraffe prospects had similar seismic anomalies to and were on the same trend as

Tullow's discovery at Kasamene-1. This information was contained in a presentation to investors by Mr Atherton in early October 2008.

ii The press release issued by Heritage on 30 September 2008 advising that the Warthog-1 well had been spudded stated as follows:

> "The discovery in the Kasamene-1 well in Block 2, which encountered a reported net oil column of 31 metres in a gross interval of 75 metres, has significantly lowered the exploration risk of Warthog and other prospects in Block 1. Kasamene-1, located approximately 2.5 kilometres from the Block 1 border and approximately 5 kilometres southwest of the Warthog-1 well, appears to have been drilled on the same structural trend as Warthog. This trend also contains encouraging seismic amplitude anomalies at reservoir level and can be traced northeast from the Kasamene discovery through the Warthog, Giraffe and Buffalo prospects."

b. Secondly, whilst there were reasons to be optimistic, the discovery of oil was not something that could be taken for granted as Mr Buckingham himself recognised. He accepted that although the seismic data looked good, he could not be certain before drilling the well that there was oil in place; and he also accepted that the Warthog-1 well carried risk.

445. Despite Mr Buckingham's optimism, it is the Authority's position that investors were taking a much more cautious approach. There are contemporaneous research analyst reports setting medium term targets for the Heritage share price that were considerably above the current trading price, and which were explicitly based on the prospect of Heritage finding sufficient quantities of recoverable oil in Uganda to bring forward the date for commercial development:

a. Mr Atherton noted in a letter to the Authority dated 22 October 2010 that five of the seven brokers that covered Heritage had price targets in excess of £3.50 at the time. Mr Atherton provided this information in response to a question by the Authority whether there was anything to support the price of £3.50 to £4.00 mentioned in the September email.

b. BMO Capital Markets initiated coverage in March 2008 with a stock rating of "*Outperform (Speculative)*". BMO said that the basis of an investment in Heritage should be made exclusively on an investor's perception of Uganda and noted that "*It is prudent for investors to take a step-wise approach to an investment in Heritage as every well drilled is likely to have a material impact on the stock*".

c. Cazenove initiated coverage on 31 March 2008 with an "*OUTPERFORM*" recommendation and a fair value range of 330-350 pence. The key catalysts to attain Cazenove's fair value rating included "*exploration success from the high-impact drilling campaigns in 2008 in Uganda and Kurdistan*". Cazenove attributed

only a 20% chance of success to Heritage's exploration assets in Block 1.

d. Kaupthing Singer & Friedlander ("KSF") issued a report on 8 September 2008 with a target price of 300 pence (as against a price at that date of 214.5 pence). KSF noted that the shares were trading close to their net asset value of 179 pence "*which we believe is unjustified given the exciting exploration upside in the next six months*".

e. KSF noted that, to justify economic development, the players in the region needed to find recoverable reserves of 350 – 400 million barrels, a threshold figure that they believed could with some success be reached. KSF believed that discoveries in Blocks 2 and 3A in the Albert Basin "*have yielded potential recoverable reserves of approximately 300 mmbbl*" and "*We believe that the exploration drilling in Block 1 could provide a significant boost to reserves and a minimum of success could easily take the reserves of the region past the hurdle required*". In this context, they noted that the Warthog, Buffalo and Giraffe prospects "*have potential P50 gross unrisked resources of approximately 600 mmbbl*".

f. Goldman Sachs set a price target of 317p on 22 September 2008, noting that the company was highly geared to success in Uganda, which accounted for 92% of the value in the price target.

446. The Authority relies on the emphasis placed by the brokers covering Heritage stock on the potential impact of the imminent Block 1 drilling, assuming various levels of success, on the share price. And further reliance is placed on the announcement by Heritage itself on 6 August 2008 (as to which see paragraph 243 above).

447. The final report to which we refer is an email update from Cazenove issued on 30 September 2008 commenting on the announcements that Heritage had terminated discussions with a potential acquirer and that it had commenced drilling Warthog-1 and Kingfisher-3. The analyst cited Heritage's view that Warthog could be a similar size to Giraffe (89 mmbbl) and concluded: "*The Block 1 drilling campaign could prove up enough reserves for a commercial export solution in Uganda before year end. We therefore remain with our OUTPERFORM recommendation*".

448. According to the Authority, the only reasonable conclusion to draw from these reports is that the brokers covering Heritage anticipated that positive results from the Block 1 drilling could have a very significant impact on the share price; and therefore that the likelihood of successful drilling on Block 1 was not yet reflected in the share price. We agree with the premise that the brokers anticipated that positive results could have a very serious impact on the share price. In this context, however, the reports are clearly contemplating success in terms of discoveries of black oil in the quantities which, in the various reports, are thought (or hoped) to exist. The reports say nothing about the impact on the share price of preliminary drilling results which are simply consistent with the hoped-for outcome or which go no further than increase confidence that the hoped-for outcome will occur. Given the premise, explained in that way, we agree that the

conclusion follows. It does not follow, however, that the Relevant Information would have been regarded by the brokers in the same way as the positive results which they had in mind so as to have the potential for a significant impact on share price.

449. We accept, as the Authority suggests, that Warthog-1 was a significant exploration well: it was the first well to be drilled on Block 1; it was anticipated to be on the same structural trend as Kasamene-1 (in Block 2), which could then be traced through Warthog to the Giraffe and Buffalo prospects; a successful well would have positive implications for the prospects of finding recoverable reserves in Buffalo and Giraffe or, to use different language, it had the potential to de-risk Giraffe and Buffalo. But equally, a dry hole, or a failure to find an oil reservoir, would cast doubt upon the expectations for those prospects based on the seismic work performed.

450. The Authority appears to consider that the views of Mr Buckingham and others about, the announcement on 21 October 2008 and market reaction to it are of assistance. All reacted positively with Mr Buckingham regarding the results as significant. It suggests that it is relevant that the announcement caused the Cazenove research analyst to estimate that the Warthog discovery could be worth 37-45p per share and to note that it helped to de-risk the other prospects in Block 1. Cazenove's briefing considered that "*Warthog alone may have proved up enough reserves for export commerciality in Uganda …*". However, the Authority accepts, as it must, that the 21 October 2008 announcement included substantially more information than the postscript. We derive no assistance from consideration of the 21 October announcement and the reactions to it.

451. Again, it is not suggested that the postscript alone would allow a reasonable investor to conclude that the reserves in Uganda *would* then be developed. But the Authority submits that an informed investor would know that, if Warthog-1 was a successful well, that was a major step towards achieving the commercial threshold, based in part on Warthog's own recoverable reserves and in part on the reduction in the risk associated with the wells to be drilled at Buffalo and Giraffe before the end of the year. As Mr Stuart put it during cross-examination: "*… success on Warthog … did have and would have had a large impact on the risk associated with the finding of that 500 million barrels*" (referring to the prospects in Block 1). This point was also accepted by Mr Crouch in cross-examination.

452. Further reliance is placed on Mr Buckingham's acceptance in cross-examination that even the early indications from the Warthog-1 well represented significant steps along the path to commercial production:

a. penetrating the top reservoir seismic marker at the expected depth was itself good news;

b. finding signs of hydrocarbons, C1 to C5, was good news;

c. finding pentane is a very good indicator that you are going to find oil;

d. encountering oil shows that were consistent with what Tullow had encountered on Kasamene-1 was good news.

453. It is submitted that any indication of positive news from the Warthog-1 well, particularly if it appeared to come from a reliable source, would have been likely to have a significant effect on the price of Heritage's shares.

The views of the experts and Mr Buckingham on "likely to have a significant effect"

The experts

454. We have already dealt with Mr Airey's evidence. Mr Crouch was unable to give us any assistance since the relevant issues were outside his field of expertise.

455. We have also already stated our general conclusions about the reliance which we can place on Mr Tolkien's evidence. Here again, submissions have been made in relation to the effect of the 21 October announcement on the share price. We deal with it for completeness, although we do not consider that events nearly two weeks after the October email was sent are of assistance. Mr Tolkien noted that the Heritage share price rose on 21 October 2008, following the announcement about the success at Warthog-1. He suggested, based on his "*experience of markets*", that this increase may have had as much to do with a research note from a Cazenove analyst of the same date, which suggested that the Warthog-1 find would have substantial value for Heritage and its shareholders. This, it seems to us, as it seems to the Authority, shows some confusion. What we are interested in is how the announcement may have affected the share price. The Cazenove note shows how one analyst reacted to news of success at Warthog-1. It was the news that affected the analyst: to the extent that an investor would have reacted to the analysis, the ultimate cause of his reaction was the news, not the analysis. Moreover, the fact that an informed observer (the analyst) thought that this was positive for the Heritage share price in itself demonstrates that the information was likely to have a significant effect on price.

456. Of more importance is Mr Tolkien's evidence about whether the reasonable investor would take account of the postscript. In his report, he went as far as to say that anyone buying shares on the basis of the postscript would be acting rashly not rationally. In response to that, it is pointed out by the Authority that Mr Tolkien accepted in cross-examination that the sort of reasonable investors who might invest in Heritage are likely to be very interested in the outcome of exploration wells since Heritage is, after all, an exploration company; that Uganda was very important to Heritage; that the results of the first well to be drilled in Block 1 would be important; and that in principle the results could have a significant effect on the share price. It is true that he did accept these things; but it must be recognised that he gave these answers on the footing that the reasonable investor "*… had the results. Then we have to have a discussion about what the word "results" means*". Although Mr Tolkien must be taken as accepting that the final results would be of importance, in particular if black oil had been found in significant quantities, we do not think that his answers can be taken as an acceptance that there had been any results which would make him qualify what he had said in his report. That is not to say that we accept his evidence. As will be seen, we do not, in the end, agree with his conclusions.

Mr Buckingham's views

457. Finally on this aspect of the case, the Authority relies on further aspects of Mr Buckingham's evidence submitting that he readily accepted that information about progress of the Warthog-1 well would constitute inside information. Reliance is placed on his reaction to two emails from Mr Binnie dated 13 and 14 October 2008, which provided a summary of the Warthog-1 well so far. He accepted that he would not want that information to be circulated outside Heritage. When it was put to him that that would in part be because data of that specificity would be quite price sensitive, he replied "*You would be right in saying that*". But these emails gave far more information than the Relevant Information because by this time, drilling had yielded good oil shows. In the second email, Mr Binnie referred to the main reservoir section as "*looks very good, the best oil shows we have ever seen in Uganda*". We do not gain any assistance from this evidence.

458. More relevantly, Mr Buckingham was also clear that he would not have given Mark Denning of Capital, a large shareholder in Heritage, any information about the early results from the Warthog well when they had lunch on 8 October 2008:

> "Q. Can I clarify this is right, even though Mr Denning is a very important shareholder, you would not have been giving him information about finding oil shows for example.
>
> A. No.
>
> Q. The reason for that is?
>
> A. Because, one, if I was going to give him that information, I would be making him an insider and, clearly, I would say 'I am going to make you an insider. Do you want to become an insider, yes or no?' and I didn't want to put him in a position where he could not trade in Heritage stock. So I didn't want to give him any price sensitive information."

459. This evidence is consistent with Mr Buckingham's reaction when he was first shown the October email during an interview with the Authority. His reaction to the email on that occasion makes clear how seriously he saw the disclosure and that he was genuinely shocked that Mr Hannam had passed on this information which was, at the very least confidential, even if Mr Hannam is right in saying that it was not inside information:

> "FSA: … were you aware that he was passing that information to …?
>
> Buckingham: Absolutely not. 100% not.
>
> FSA: So you never authorised it to be passed on?
>
> Buckingham: I mean this is crucial information. I mean this is no. I mean absolutely not."

460. In his witness statement, Mr Buckingham described the postscript as simply part of the ongoing discussions with Dr Hawrami and characterised it as something that "*would not have meant much to Ashti or to anyone else at the time*". This evidence, as well as being at odds with what he said in his interview, is hard to reconcile with his response in cross-examination that he would not have

provided information about oil shows to Mr Denning without asking him if he was prepared to be made an insider.

461. Mr Buckingham denied that he had softened his evidence to assist his friend. But he also accepted that the observation in his witness statement that he "*would not have given [the September email] a second thought*" if he had seen it at the time "*was glib, there is no question*". We, however, treat his evidence about this aspect of the October email with a great deal of circumspection. We consider that his reaction in the interview more accurately reflects how he would have reacted in October 2008 if he had known that the October email had been sent.

462. The Authority's submission at the end of all this evidence is that there was a real prospect that the postscript would, if made generally available, have had a significant effect on the price of Heritage shares. Although it does not need to go this far, it submits that it would have been more likely than not to have a significant effect.

463. Subject to an argument based on an alleged inconsistency in the Authority's position (which we discuss under the next heading of this Decision), we agree with the Authority's submission and conclude that the October email contained inside information which was disclosed to Dr Hawrami.

Alleged inconsistency in the Authority's position

464. Mr Hannam's position is that his case that the October email did not disclose inside information is consistent with the Authority's stance in relation to Heritage itself; whereas the Authority's case that the October email did disclose inside information is inconsistent with that stance. To put the point another way, Mr Hannam says that the facts that Heritage did not make an announcement until 21 October 2008 and that the Authority does not suggest that Heritage was not acting properly, show that there was no inside information before that date.

465. Mr Hannam relies on the DTR, and in particular DTR 2.2.1R and 2.5.1R. As we have mentioned (see paragraph 112 above), the first of those rules requires an issuer to announce inside information publicly as soon as possible. That is subject to DTR 2.5.1R, the material parts of which we have set out at paragraph 130 above: it permits an issuer under its own responsibility to delay public announcement of inside information under certain conditions.

466. Mr Hannam's argument is this:

a. If the October email contained inside information, then Heritage itself must have been in possession of inside information since everything Mr Hannam could accurately disclose he learned from Mr Buckingham/Heritage.

b. Subject to DTR 2.5.1, Heritage was therefore under an obligation to announce this inside information.

c. Heritage did not make an announcement until 21 October 2008 and the Authority does not contend that it should have done so earlier.

d. Accordingly, the Authority's position that Heritage did not need to make an announcement on or before 8 October 2008 can only be reconciled with its position that Mr Hannam was in possession of

inside information on 8 October which he disclosed to Dr Hawrami if Heritage was able to delay an announcement "such as not to prejudice its legitimate interests".

e. Heritage had no such legitimate interest.

f. It therefore follows that, if what Mr Hannam disclosed was inside information, Heritage should have made an announcement.

g. Since the Authority accept that Heritage did not need to make an announcement before 21 October, it necessarily follows that Heritage did not have inside information on 8 October, so that what Mr Hannam revealed was not inside information.

467. The Authority's response is that Heritage clearly expected that it might have inside information well in advance of the announcement. It imposed a black-out on dissemination of information about the well prior to reaching the target horizons and a prohibition on dealing by staff on 5 October 2008 (thus, even before the results of the drilling on 6 and 7 October) because drilling was approaching the reservoir zone.

468. It also submits that Heritage was entitled to delay announcing the discovery of oil until it had completed drilling to the target depth; it is said that, for a shallow well like Warthog-1, this is standard practice in the industry. For that proposition reliance is placed on the evidence of Mr Prast. That, however, is not what Mr Prast said. What he did say was that it was industry standard to apply a black-out in this sort of case to ensure confidentiality.

469. Reliance is also placed on what Mr Stuart said in his interview by the Authority, which does lend support to the proposition. He said that an announcement can be made at any time, and normally as quickly as possible

> "I think industry practice is to try to get something out as quickly as possible and one would normally do that when one had done a preliminary analysis of the results. So quite often announcements are made before the T[otal] D[epth] of the well. And some times they can be made after the TD, yes…
>
> ….
>
> It [an announcement] would normally be related to the point at which you could make some definitive comments on the well result…. We knew pretty well what we were expecting to find and when we would make an announcement based on that section of the reservoir which you were interested in. I mean you can make any announcement on the fact that you drilled into basement I suppose is what I am saying."

470. More focused is what Mr Stuart said in cross-examination. Mr Rabinowitz suggested to him that there was no industry practice that announcements are made only once drilling has reached target depth. Mr Stuart responded in a way which did not directly answer the questions: "*It's a common practice to make an announcement when you feel you have the information to accurately and in a timely manner make an announcement*". The question was repeated and elicited the answer "*That's correct*". As to the actual timing of an announcement, when it was suggested to Mr Stuart that there was no hard and fast rule of practice about when to make an announcement, we find this interchange:

"A From a technical perspective, irrespective of where that target is, you want to ensure that you had the time before you make an announcement to assure yourself that what you're doing is right. And as we just discussed, if you make an announcement early on Warthog you might have been guilty of saying there was oil where there was condensate.

Q. Indeed.

A. And there is constant difficulty in making sure that you have made the announcement as early as you possibly can, but at the same time from a technical perspective the confidence that nothing's going to come out later on which means that the announcement was erroneous.

Q. Indeed. And so what I was going to suggest in addition to saying there was no industry practice, no hard and fast rule as to when to make an announcement, I think you appear to be saying, indeed what you told the interviewers, is that what happens is that an announcement is made when there is something of significance to report and it can be reported accurately.

A. Correct."

471. Consistently with that, Mr Buckingham said that before putting out an announcement, "*We want to be absolutely certain of what we see and what we say to the market does not mislead the market in any way whatsoever…*"

472. The Authority relies on Mr Airey's evidence that companies have to take significant care that they do not release information early which subsequently turns out to be misleading. He also drew an analogy with financial reporting:

"The phrase I just used was [custom and] practice. All companies can make announcements earlier than they do. Some of those announcements are, I would say, unequivocally capable of being inside information, or are inside information. The easy example being the usual bi-annual financial reports, the interim and final figures of the company. Any company could make those announcements a day or two days or a week earlier. The management might have really high quality figures 6 or 7 weeks before they are available, but they don't make those announcements at that point."

473. He gave that example by way of an illustration of why, in his view, Heritage did not need to make an announcement. He had previously accepted that in the absence of a legitimate interest, either Heritage should have disclosed the information, or the information was not inside information. Whether he accepted that there was in fact no legitimate interest which would have justified delay in disclosure we are not clear: the question was put on the basis that there was "no legitimate interest that either you or I can discern" but he was not invited to comment on that. Mr Rabinowitz then suggested that those were the only two possibilities to which he responded "*Or that there is a legitimate practice, at least, in the sense of custom and practice, by which companies delay some of these announcements in certain circumstances*".

474. We do not perceive any room for this third possibility. The DTR are clear that an announcement must be made of inside information subject only to the exception in DTR 2.5.1R although the requirement is only that this be done "as soon as possible" which imports some, albeit small, element of flexibility. We do not think that this third possibility is needed in order to cater for the sort of example which Mr Airey gave, quoted at paragraph 472 above. Any quoted

company, perhaps any company at all, has a legitimate interest in the orderly disclosure of its financial results in accordance with statutory and regulatory reporting requirements. It has a legitimate interest in running its administration and reporting in accordance with well-understood standards and requirements. Unless there is some exceptional event or fact which requires immediate disclosure, the company can reasonably rely on DTR 2.5.1R to justify delaying announcement of its financial results until the due reporting date even though it has all the relevant information to hand and even though its accounts may be all but complete in final draft form.

475. Mr Hannam's case is that Heritage had no legitimate interest in delaying announcement of the results of the drilling on 6 and 7 October if, contrary to his case, they constituted inside information. We consider that the only basis on which the Authority can attempt to assert that there was such a legitimate interest is that announcing the drilling results would have risked misleading the market: it is said that making an announcement which risks misleading the market prejudices an issuer's legitimate interests in the market being properly informed. We come to that in a moment. But before we do, we should say that it became apparent during the course of the hearing that the announcement of the results of drilling on 6 and 7 October would not have prejudiced Heritage's legitimate interests in any other way and we do not understand the Authority as now saying that they do. In particular, there is no suggestion that making an announcement would have had any effect on Heritage's ability to continue drilling or would in any other way (apart from misleading the market) operate to the detriment of Heritage or its shareholders.

476. We turn then to the issue of misleading the market. The Authority submits that, if potentially incomplete information had been announced, there would have been a significant risk of volatility in Heritage's share price because the market could be misled. It is said that no-one suggests that Heritage could practically have announced drilling results in a way which did not at least risk misleading the market. Heritage was justified in waiting to avoid misleading the market.

477. Mr Rabinowitz describes this as a non-point. This is because an announcement is only misleading if it is drafted in a misleading way: if an announcement is appropriately drafted, it can never be misleading. Further, concerns about misleading the market are not a basis for delaying an announcement under the DTR; this is not because there is no concern that the market should not be misled but rather it is a reflection of the fact that it is not necessary to find such a carve out because inside information cannot, by definition, be misleading. He does not accept that it would have been practically impossible to have announced the drilling results in a non-misleading way: as Mr Stuart said, it could have been announced that Heritage had encountered positive indicators of liquid hydrocarbons, but that the nature of such liquids was not known yet and would not be known until further drilling tests had been carried out, a statement which would not have been misleading.

478. In our view, Heritage was entitled to delay announcement of the drilling results. It is true that some announcement could have been made but it would not be easy to formulate an announcement that was pure fact and made no value judgment about the likelihood of eventual success. If an announcement were

required as a matter of the proper interpretation of the legislation and market guidance, a burden would be placed on Heritage to monitor on a daily basis whether the most recent drilling results would, if made publicly available, be likely to have a significant effect on Heritage's share price. This could produce real volatility as the results came in indicating swings in the prospects of finding oil. This in turn would create uncertainty in the market about Heritage's share price and could lead to a disorderly market in the shares. It would, we consider, certainly be reasonable for Heritage to take the view that an announcement should wait until completion of the drilling programme (or a phase of a more extended drilling programme) unless, perhaps, some really significant results were obtained – for instance the discovery of a large reserve at a higher level than had been expected. We do not, therefore, detect the inconsistency between the Authority's position in relation to the October email and its stance in relation to Heritage itself.

Conclusion on the October email.

479. The October email disclosed relevant information about the drilling results on 6 and 7 October and about Mr Hannam's (and implicitly Mr Buckingham's) beliefs that the results were positive. That information was inside information.

Proper course of exercise of employment

480. Assuming that the September and October emails did disclose inside information, the issue then is whether that disclosure was otherwise than in the proper course of Mr Hannam's employment. We have received submissions, large in number and great in length even by the standards of this decision, on this topic. We do not propose to deal with all of them since this aspect of the case can be dealt with on the basis of the most important of those submissions which relate to non-compliance with the Takeover Code (in the case of the September email) and to the appropriate conditions under which disclosure of inside information can be made, in particular conditions as to confidentiality.

481. As a preliminary, we note that it is part of the definition of the second type of behaviour as set out in section 118(2) FSMA that the disclosure is otherwise than in the proper course: section 118(2) does not define a type of behaviour simply by reference to disclosure and then provide a defence, as it were, to an allegation of market abuse based on disclosure. It is for the Authority to show that the disclosure was not in the proper course of Mr Hannam's employment. We bear that in mind in reaching our conclusions.

482. One thing seems to us to be clear, namely that in sending both the September and October emails, Mr Hannam was acting in the course of his employment because (i) JPMC was retained as Heritage's strategic and financial adviser and (ii) he was the individual responsible for providing the services which JPMC had contracted to provide.

483. It cannot, therefore, be said that Mr Hannam was out on a frolic of his own (to draw on the language of vicarious liability) when he wrote and sent the emails. But nor can it be said that, even if Mr Hannam saw the provision of the information in the September emails and the October emails as something which would assist in achieving a transaction for his client, that it was therefore

necessarily in the "proper" course of the exercise of his employment to disclose that information.

484. Mr Hannam was, we accept, mandated to work on behalf of Heritage to get the best possible deal he could for Heritage with the KRG; Dr Hawrami was the way to that deal. Mr Rabinowitz submits that there is nothing wrong in a corporate adviser seeking, as Mr Rabinowitz puts it, "*to galvanise the potential counterparty into action by passing on confidential information regarding his client, provided that this was done appropriately*". As a general proposition, that may ordinarily be true, although the advisor ought not to pass on any type of information confidential to his client without the consent, express or implied, of the client.

485. It is not necessarily true in relation to inside information. There are almost certainly circumstances where the disclosure of inside information simply could not be countenanced although it might then be said that the general proposition still held good because disclosure could not be done "*appropriately*". Whenever inside information is involved, the advisor will have to consider very carefully whether he should pass it on at all and, if he does pass it on, the conditions under which it is appropriate to do so. Moreover, if the inside information relates to an offer, the Takeover Code must also be borne in mind. In all cases, careful analysis of what is and what is not inside information is needed before information is transmitted; and that is as true in corporate finance work as it would be if one were talking directly to investors. And so too the decision whether or not to make a recipient of information an insider needs to be just as carefully thought through.

486. It may not always be easy to decide whether the information concerned is both confidential and inside information. But that is no reason for not applying a strict approach to the disclosure of inside information when deciding whether disclosure is in the proper course of the exercise of any employment. If an insider has any doubt, the counsel of caution is to treat the information as inside information. Otherwise, there may be disclosure of information which turns out to be inside information without the "appropriate" measures having been put in place, leaving the insider having to rely on a defence under section 123 FSMA.

487. The general proposition that it is appropriate to galvanise a counterparty is made more specific on the facts of the present case in this way: the September and October emails were, according to Mr Hannam, both legitimate attempts by him to facilitate a significant commercial transaction for his client. His own evidence was even more specific: he said that he sent the September email to ensure that a meeting was fixed with Dr Hawrami and to progress a concept (*ie* what in fact came to fruition 6 months later). We accept that that was the real purpose behind the September email.

488. In the context of that proposition, we should say something about the use of the word "legitimate". It has forensic attraction. However, we must not be distracted by that. If the word "legitimate" is used to distinguish that which is, from that which is not, in the proper course of the exercise of Mr Hannam's employment, it is of no assistance in resolving the issue. If it is used to distinguish that which is a legitimate attempt (*eg* powerful advocacy) from that which is not (*eg* blackmail), it becomes trivial: we need no persuasion that, were it not for the restrictions on the disclosure of inside information, it would have been perfectly

appropriate for Mr Hannam to make use of whatever information he had (subject to his client's permission to use confidential information). In relation to the September email, both Mr Airey and Mr Tolkien thought that to seek to persuade Dr Hawrami or to get him to "*hurry up*" as Mr Rabinowitz put it to Mr Airey, was the sort of thing Mr Hannam could be expected to do. But the questioning of Mr Airey which elicited his answer was careful to leave aside the issue whether the manner in which the information (in the context of the questioning, the need to hurry up) was communicated was proper; and Mr Tolkien's report cannot be taken, as we read it, as an affirmation of his view that it was proper to get Dr Hawrami to hurry up by disclosing inside information, which is, in any case, a matter for us not for expert evidence.

489. The position in relation to the postscript to the October email is less clear at least so far as Dr Hawrami is concerned. Mr Hannam was unable to recall whether he intended the postscript to go to him. If he did not intend to send it to Dr Hawrami, or if it was included carelessly, he cannot, in accidentally sending it, have had the motive of facilitating a transaction. This would present an obvious difficulty for Mr Hannam in contending that the provision of inside information to Dr Hawrami by the October email was in the proper course of the exercise of his, Mr Hannam's, employment.

490. If he did intend to send it, his evidence to us was that the aim of the postscript would have been to maintain Dr Hawrami's interest in a deal with Heritage and to keep Heritage in the forefront of his mind. The Authority does not agree with that suggestion and gives other explanations for the postscript:

a. It says that the October email cannot have been meant simply to hurry Dr Hawrami along: the talks with Perenco had come to an end and the visit by Mr Hannam and others to Kurdistan had been arranged. Dr Hawrami was clearly not going to do anything before that visit had taken place. That is probably true, but it is not Mr Hannam's case that the postscript was simply to hurry Dr Hawrami along.

b. The suggestion that the postscript was intended to maintain Dr Hawrami's interest in a deal is said not to reflect what he told the Authority in his interview: he said then that the postscript could have been a way of personalising the email, a personal touch. That, we consider, is not a fair interpretation of his answers. The "personal touch" was the adding of the information in a postscript rather than in the body of the email: the substance of Mr Hannam's answer is found in his observation that "*… .it wasn't done for any other reason, than any other essentially just talking to Ashti Hawrami about getting him more interests in Heritage Oil & Gas. That's all I can say*".

c. The purpose of the postscript was not simply to further Heritage's interests alone. It was in the interests of Genel as well as Heritage for JP Morgan to be close to Dr Hawrami. That may be true: but there was no conflict in that regard between Genel and Heritage. In any case, whether or not there was a conflict, it was in Heritage's interests to foster the contact and, clearly, Mr Hannam wrote the email in his capacity as adviser to Heritage, not Genel.

d. Mr Hannam hoped, at that time, to attract a mandate for JP Morgan/JPMC to manage the $1bn fund of the KRG, which he described as "*the real prize*" in his internal email dated 6 October 2008. We do not see how that assists the Authority. It is not easy to see how disclosure of information about Heritage would assist in winning the prize. It is true that the fostering of a close relationship might do so; but that close relationship was to be fostered by the proposed transaction with the KRG and it was to that transaction that the disclosure was relevant.

491. Although Mr Hannam's evidence can be seen as self-serving, it seems to us to be very likely that Mr Hannam's motive in sending the October email, if he sent it deliberately, was as he explained. Mr Airey and Mr Tolkien both agreed that the most obvious purpose of the postscript, if intended for Dr Hawrami, was to develop his interest in a deal with Heritage. Even if there were other advantages to JP Morgan/JPMC in making the disclosure, that does not detract from the advantage to Heritage. If the disclosure of the information would have been in the proper course of the exercise of Mr Hannam's employment in the absence of those other advantages, it does not cease to be so simply because there may be other motives.

492. We note here that Mr Hannam accepted, in the course of his response to the Authority's Preliminary Investigation Report, that "*it was an error to send the information in the postscript to Dr Hawrami*". It is not entirely clear whether he meant it was sent by mistake or that he meant it was a mistake (*ie* error of judgment) to have sent it. If it was an error of judgment, that is not the best starting point from which to argue that the disclosure was in the proper course of the exercise of Mr Hannam's employment.

493. Mr Rabinowitz's submissions depend critically on the justification for sending the two emails, namely that they were legitimate attempts by Mr Hannam to facilitate a significant commercial transaction for his client. That was something he was mandated to effect. Provided it was done appropriately, it was therefore within the proper course of the exercise of his employment.

494. That submission does not get off the ground in relation to Mr Ishag. So far as Mr Ishag is concerned, Mr Hannam did not intend the October email to go to him. Mr Hannam cannot, therefore, have intended to influence Mr Ishag in any way. The sending of the email to him cannot have been in furtherance of his efforts to obtain a commitment to some sort of deal with Dr Hawrami or the KRG or even Mr Horvat (whose adviser Mr Ishag was). We do not consider that the sending to him of the October email can be seen as an attempt by Mr Hannam to facilitate Heritage's interests in any way, let alone to facilitate some sort of transaction with any person. We conclude that the October email disclosed information to Mr Ishag otherwise than in the proper course of Mr Hannam's exercise of his employment.

495. So far as concerns Dr Hawrami, we conclude, on balance, that the postscript to the October email was deliberately included in the draft which Mr Hannam considered on the phone with his secretary, whether he wrote himself or whether it was added by her in the course of their conversation; it formed part of the draft email and was not simply part of the notes following the main body of the

message which he instructed to be deleted. It was, we consider, not included in the October email itself by mistake. In those circumstances, we conclude that the postscript was included to maintain and develop Dr Hawrami's interest. Similarly, we conclude that the September email was sent for the same, or a similar, purpose.

The September email and the Takeover Code

496. Mr Hannam does not argue that the disclosure in the September email was permitted by the Takeover Code (or indeed that the disclosure in the October email was so permitted by it, although it is perhaps obvious that it was not). Rule 2.1 (see paragraph 145 above) requires "*absolute secrecy*" and that information is passed only "*if it is necessary to do so*" and if the recipient "*is made aware of the need for secrecy*".

497. The September email did not comply with these requirements.

a. First, it purported to provide information about a contemplated offer in that it referred to ongoing discussions about a potential acquisition and that an offer was likely. The September email was accurate, on our view of the facts as we have explained, in saying that there were discussions about a potential acquisition; Mr Buckingham and Mr Hannam certainly hoped for and expected that some offer would be made (as indeed it was, although seen as derisory by Mr Buckingham).

b. Secondly, Mr Hannam did not make Dr Hawrami aware of the need for secrecy. It is no answer to that to say that Dr Hawrami was an experienced professional who did not need telling. It cannot be right that an enquiry has to be made into the state of understanding of a person who is given relevant information in order to decide whether there has been compliance with the Takeover Code. We do not wish to seem too rigid. If it were absolutely clear that that the recipient of inside information understood both (i) the restrictions on the use which he could make of it and (ii) his secrecy obligations and if it were also clear that the insider knew that the recipient knew of those obligations (for instance because they had dealt before and the requirements had been explained and discussed), then that might pass muster. But where, as in the present case, the evidence is vague and unsatisfactory, we do not consider that the conditions of the Takeover Code are satisfied. Our approach is consistent with Mr Airey's evidence (which we accept) that the norm is to be explicit when inside information is disclosed and to make a note of it afterwards: this is more than sensible, indeed it is what the normal course of the exercise of Mr Hannam's employment required, since, as Mr Boulton puts it, "*it focuses minds and minimises the risk of insider dealing*".

c. Thirdly, it was probably not necessary to tell Dr Hawrami about any offer in order to impress on him that the opportunity to do a deal might be lost, although it must be accepted that the message might not have been so strong without the information about an expected offer being provided.

498. In paragraph 146 above, we have expressed our agreement with the Authority's submissions that it could only be in the most unusual of circumstances for disclosure in breach of the Takeover Code to be in the proper course of business where a corporate finance adviser, in the M & A department of an institution such as JPMC, acts in breach of that rule; and that disclosure to persons who are not involved in the transaction is to be very strictly controlled. In our view, unusual circumstances of that sort are not to be found in the present case so as to justify the disclosure to Dr Hawrami of the information contained in the September email. For this reason alone, we do not consider that such inside information as was disclosed to Dr Hawrami in the September email was disclosed in the proper course of the exercise of Mr Hannam's employment.

The September and the October emails

499. Quite apart from that, the Authority contends that the inside information contained in the September email and in the October email should not have been disclosed at all; alternatively, if it could properly be disclosed subject to appropriate conditions, no appropriate conditions were laid down.

The guidance in MAR 1

500. In that context, we need to say something about the Authority's own guidance found in MAR1, the relevant provision of which we have already referred to. We have also described the significance of the denoting letters E (evidential) and G (non-binding guidance): see paragraphs 41 and 136 above. The Authority's guidance carries considerable weight, far greater weight, in our view, than publications produced by commentators, however eminent.

501. As we have seen, MAR 1.4.5E identifies (non-exhaustively) factors which would indicate that a disclosure was within the proper course of employment. These include that the disclosure was (a) accompanied by the imposition of confidentiality requirements (b) reasonable and (c) for the purposes of facilitating a commercial transaction: see generally paragraphs 137 above and following, where we have also considered the tension between this rule and the CJEU decision in *Grøngaard and Bang*.

502. That rule is, of course, only indicative: it does not follow that where a case does not fall within it that the disclosure is not in the proper course of employment. The rule is, nonetheless, of some relevance: if it would have been easy for the insider to bring the case within the rule, the insider will need to explain why the easy course was not taken and why the disclosure, nonetheless, falls within the proper course of his employment.

503. The most important aspect of the rule relates to confidentiality. It is an aspect which has generated a great deal of dispute. The relevant reference in paragraph (2) of MAR 1.4.5E is to a disclosure "*accompanied by the imposition of confidentiality requirements*". It is not suggested by Mr Hannam that the disclosure in the two emails was accompanied by the express imposition of a confidentiality requirement in relation to the information disclosed let alone an agreement by Dr Hawrami that he was to become an insider (what has been referred to as "wall-crossing" although we think that has a rather different, and special meaning, referring to the crossing of Chinese walls **within** an

organisation, for example where an analyst has become involved in underwriting). Instead Mr Hannam relies on

a. An understanding said to have existed for a number of years on the part of Dr Hawrami who was well-versed in the need for confidentiality in matters of this sort.

b. The discussions during the Madrid meeting on 30 June 2008 between Mr Hannam, Dr Hawrami and representatives of Genel.

504. As to the general understanding, it may well be that Dr Hawrami had a general understanding of the need to keep confidential information precisely that, confidential. To repeat what he said in his interview with the Authority "*confidential information is in my blood. I don't share it. I don't pass information around*". However, the fact, if it be a fact, that Dr Hawrami was generally aware of the requirements of confidentiality does not, of itself, show that the imposition of a confidentiality requirement can safely be dispensed with. Nor is it necessarily the case that he appreciated that the information which he received was in fact confidential.

505. In the first place, it does not mean that Dr Hawrami understood the particular importance attached to the non-disclosure of inside information in the context of the EU and UK statutory requirements. In this context, it is not without significance that Dr Hawrami in fact instructed HSBC to purchase Heritage shares on behalf of the KRG on 16 October 2008. There is nothing to suggest that he had learned of any new information between 8 October and 16 October to trigger such an instruction; nor is there anything to suggest that the information in the October email had come into the public domain by then. Dr Hawrami would no doubt have said, had he given evidence, that he did not instruct HSBC on the back of that information. But that is not the point since, had he given an express confidentiality undertaking, his course of conduct might have been very different and, *a fortiori*, if he had given an undertaking not to make use of such information and *a fortissimo* if he had been made an insider.

506. In the second place, it does not demonstrate any sort of consensual relationship, an understanding, using that word in a different sense, between him and Mr Hannam that he knew of, and would be subject to, a confidentiality restriction on the use of any information which he might receive.

507. In the third place, it means that there is no record of what has been said. That is, we consider, undesirable: the Authority might give consideration to making mandatory the keeping of a record of when and how a person has been made subject to confidentiality obligations and of precisely what he has been told. This is particularly so in the case of inside information in the context of a potential bidder in a corporate transaction. With such a record, the task of investigating potential dealing based on inside information would be more straightforward than without one.

508. And in the fourth place, we are unimpressed by the submission that the fact that Dr Hawrami was a Minister of State is a factor to be taken into account. We know nothing of the culture of Iraqi or Kurdistani officials or ministers. We have no reason to think that Dr Hawrami was not a man of integrity, but we have no

reason to think that he was of any greater integrity than any other man of his background as a senior oil industry executive.

509. As to the Madrid meeting, we have expressed our views about this at paragraph 237 above. We concluded that Mr Hannam's evidence concerning discussions about confidentiality at that meeting is unreliable. We are satisfied that there was no discussion from which Dr Hawrami would have understood the need for confidentiality.

510. Indeed, there is nothing to suggest that Mr Hannam gave confidentiality a thought when sending either the September email or the October email. It is clear to us that he did not, in particular, form the view when sending the emails that he did not need to impose any conditions of confidentiality on Dr Hawrami because he, Dr Hawrami, was well aware of them.

511. That he did not give confidentiality any thought is not entirely surprising because there is nothing to suggest that he even gave any consideration to the question whether what he was telling Dr Hawrami amounted to inside information. If black oil had been discovered and been revealed by the drilling results for 6 and/or 7 October, the postscript to the October email would clearly have contained inside information. Mr Hannam sent the October email believing the postscript to be accurate and yet he does not appear to have given any consideration to whether he might be disclosing inside information and what, if any, steps he then needed to take to ensure that he did not commit market abuse.

512. We do not consider that it was reasonable that Mr Hannam did not ensure that a confidentiality requirement was imposed or, at the very least, expressly address and satisfy himself that Dr Hawrami would be subject to confidentiality obligations.

513. It is our view that MAR 1.4.5(2) was not satisfied in relation to either the September or October emails:

a. First, there was no imposition of any confidentiality requirement on Dr Hawrami. Nor, indeed, was there anything which could reasonably be taken as having the same or similar effect as the imposition of such a requirement whatever vague understandings Mr Hannam may have had about Dr Hawrami's appreciation of the need for confidentiality (and, in relation to the September email, the requirement for secrecy required by the Takeover Code even if, contrary to our view, Dr Hawrami could properly have been told about a contemplated offer at all).

b. Secondly, the disclosure was not only not necessary (thus not passing the test in *Grøngaard and Bang* that disclosure can be made only where it is strictly necessary) but it was not reasonable either (thus not passing the test in MAR 1.4.5(2)(c)). We say that it was not reasonable because (i) no confidentiality requirements were imposed which, in the present case, we consider should have been imposed; (ii) the particular disclosure in the case of each email was not a reasonable or proportionate way of achieving the objective of each email. In relation to the September email, that is very much an "on balance" conclusion because we accept that other ways of conveying the

message that Dr Hawrami needed to "*hurry up*" may not have had as much impact. But in relation to the October email, it does not seem to us that there was any real need to disclose anything to Dr Hawrami at that stage rather than to wait a week or two more when drilling would be expected to reach reservoir depth. It cannot be said, in our view, that it was reasonable to disclose this information in order to keep up Dr Hawrami's interest with a view to ensuring that a meeting took place: the meeting had already been fixed and, as we have said, Dr Hawrami and the KRG were unlikely to take any action until after it had taken place.

c. Thirdly, Mr Hannam gave no consideration to whether he could properly disclose the information which he did. We do not need to rely on that factor; we consider, however, that it is a relevant and admissible factor and would count against Mr Hannam.

514. The fact that the disclosure did not fall within MAR 1.4.5 does not, as we have acknowledged, necessarily mean that it was not made in the proper course of Mr Hannam's employment. But non-compliance, at least where compliance so far as confidentiality is concerned would have been easy, is a factor to be taken into account in assessing whether disclosure was in the proper course. As well as that factor, we have just explained why we consider that the disclosure was not reasonable. Although, logically, disclosure could be both unreasonable and yet still in the proper course of employment, we consider that the factors which have led us to the conclusion that disclosure was not reasonable also lead to the conclusion that the disclosure was not in the proper course of Mr Hannam's employment. Again, this is an "on balance" conclusion in relation to the September email, but a firm conclusion in relation to the October email.

515. Quite apart from this, the general rule, as we have explained in paragraph 128 above (and the paragraphs leading up to its conclusion) is that an issuer must disclose inside information but may delay doing so in order not to prejudice his legitimate interests. Where selective disclosure is made in the normal exercise of an employment, profession or duties, the recipient must be under a duty of confidentiality. As we said, it would then be inconsistent with that for an insider who, perfectly properly, is in possession of inside information to disclose that information, in a case where he knows that public disclosure is not being made, unless he knows that the recipient will owe a duty of confidentiality.

516. We go further than that. We consider that it could never be in the proper course of a person's employment for him to disclose inside information to a third party, where he knows that his employer and client would not consent to the public disclosure of that information, unless he knows that the recipient is under a duty of confidentiality and that he knows that the recipient understands that to be the case. In our view, that follows from the terms of Article 6 of the Market Abuse Directive. Under that Article, disclosure can be made in the normal exercise of an employment. However, the second paragraph of Article 6 does not apply if the recipient "owes a duty of confidentiality …". This is reflected in regulations 10(10) and (11) of the Market Abuse (Directive 2003/6/EC) Regulations 2005 (SI 2005/342 ("**the 2005 Regulations**").

517. Since this is an exception to a general rule, it is to be construed strictly: we follow the reasoning in *Grøngaard and Bang*. An issuer or person acting on his behalf cannot, in our view, rely on that exception unless the recipient is placed under an obligation of confidentiality or unless, perhaps, the recipient understands that he is under such a duty and the person providing the information knows for certain that the recipient understands that to be the case. If it were enough that the person receiving the information was, as a matter of law, under an obligation of confidentiality without (i) the recipient understanding that to be the case, and (ii) the person providing the information knowing that the recipient understood that to be the case, the fundamental purpose of the requirement to make public disclosure would be undermined. An insider who, objectively, ought to have ensured public disclosure because he was disclosing information to a person who he did not know was subject to an obligation of confidentiality would, when brought to task by the Authority, be able to shelter behind the happenstance that the recipient was in fact under such an obligation. To establish that obligation might, as in the present case, involve the assessment of a considerable amount of evidence. It cannot, in our view, have been envisaged by the draftsmen of the Market Abuse Directive or of the domestic regulations that such an enquiry would be necessary and we see no need to interpret the legislation at either the EU or domestic levels as requiring such an enquiry.

518. Whether that is right or wrong, it cannot, in our view, sensibly be argued that whenever there is a disclosure of inside information, and even if (which we do not decide) the recipient *ipso facto* owes a duty of confidentiality to the issuer and/or the provider of the information, the disclosure automatically falls within the exception on the basis that the recipient is subject to confidentiality obligations.

519. In the present case, we do not consider that Dr Hawrami was subject to an obligation of confidentiality within the meaning of Article 6(3) of the Market Abuse Directive or regulation 10(11) of the 2005 Regulations.

520. There remain to be considered some arguments made by Mr Rabinowitz with which we have not already expressly or implicitly dealt with.

521. One of the Authority's arguments is identified as being that Mr Hannam should have told Dr Hawrami that he was (potentially) about to receive inside information and that he could not trade on the basis of it. That argument, it is suggested, is premised on the information being inside information and on Mr Hannam knowing (or there being a reasonable basis for his considering) it to be so at the time. And it is asserted that "*Plainly, if this were not the case, the argument could not be made: it could not be inappropriate for someone to disclose information without making the recipient an insider in circumstances where it was reasonable to conclude that the information in question was not inside information*". We do not agree with that assertion. Whether or not information is or is not inside information is to be assessed objectively. The restriction is on the disclosure of inside information; information does not cease to be inside information simply because the insider does not consider, albeit reasonably but wrongly, that it is not inside information. In any case, it cannot be right that it is acceptable for Mr A to disclose information because he does not (incorrectly)

believe it to be inside information when it would be wrong for Mr B to disclose it because he does (correctly) believe it to be so.

522. It is suggested that it would be inconsistent with the Authority's own guidance in MAR 1.4.5 to conclude that that it can never be within the normal or proper course of a financial adviser's employment to disclose inside information unless the recipient is expressly forewarned that he is about to be made an insider. We do not propose to decide whether such a conclusion would be right or wrong. We have based our decision in relation to the September email and the October email on the need to ensure that a confidentiality obligation exists. We have expressed a separate decision in relation to the September email based on the Takeover Code. We would go so far as to say that it can never be in the proper course of the exercise of an employment to divulge an offer or contemplated offer to a third party without giving him a warning that he is about to be made an insider. We see nothing inconsistent between that conclusion and the guidance in MAR 1.4.5.

523. Nor do we see that what we have said is in any way inconsistent with Mr Airey's evidence.

524. Mr Rabinowitz has made lengthy submissions (we make no criticism of that) to the effect that it was appropriate for Mr Hannam to rely on an implicit understanding that Dr Hawrami would not abuse any inside information. The first problem with that submission, which we do not think Mr Rabinowitz has addressed, is that Mr Hannam did not rely on any such implicit assumption. As we have already explained, we think that the evidence shows that he did not give any thought when sending the September email and the October email about whether they contained inside information let alone whether Dr Hawrami was, implicitly, subject to confidentiality obligations which he, Dr Hawrami, understood. Further, if he had considered the issue of inside information, the only view consistent with the case made before us is that he would have concluded (wrongly in the light of our decision) that there was no inside information contained in the emails; again, he would not have relied on any implicit understanding.

525. Quite apart from that, we are not persuaded by his arguments that such understanding as Dr Hawrami did have, even assuming that it was known to Mr Hannam and relied on by him, was sufficient to bring the case within Article 6(3) of the Market Abuse Directive, regulation 10(11) of the 2005 Regulations or the opening words of MAR 1.4.5(2). It is suggested that Dr Hawrami was seen as an "insider" by Mr Hannam and JP Morgan, in the sense that he and the KRG were regarded as being on the corporate finance (*ie* private) side of the Chinese Wall, not on the institutional trading (*ie* public) side. Reliance is placed on Mr Hannam's evidence to the effect that the reality of the situation was that, given his pivotal role in relation to energy matters within Kurdistan, Dr Hawrami was potentially in receipt of inside information about companies with an interest in Kurdistan all the time, as well as any transactions involving the KRG, and he received that information as a matter of course. We do not accept that. One thing which is clear is that Dr Hawrami did not regard himself as an insider, or at least he did not act as if he so regarded himself in that he dealt in Heritage shares in October 2008; it is also difficult to accept that anyone in JP Morgan/JPMC

actually believed him to be an insider. We do not accept that even Mr Hannam thought this to be the case.

526. However, even if Mr Rabinowitz's submissions about the existence of an implicit understanding are right and even if we ignore the fact that Mr Hannam did not rely on such an understanding, it does not follow that Mr Hannam was acting in the proper course of his employment without taking more formal steps to ensure that the necessary obligations were in place. We consider that, save in exceptional circumstances, the recipient of inside information ought to be made an insider and this is so as much where the information is intended for a corporate transaction as for a securities transaction. Once confidential information has been passed on, control is lost over that information: the provider therefore needs to ensure that steps are taken with a view to preserving confidentiality. JPMC and Mr Hannam appear to have recognised the need to make Dr Hawrami an insider if he wanted to trade securities with JPMC. We do not think that it can make any difference to the need to make him an insider that he chose to trade elsewhere, as he in fact did with HSBC.

527. Further, there is the hint of a suggestion (a hint in that the suggestion is implicit rather than explicit) on behalf of Mr Hannam that one reason for not expressly imposing confidentiality obligations on Dr Hawrami and making him an insider was that he would be offended in the light of his standing as a Minister and his experience in the oil industry. That strikes us as a very feeble excuse for not doing what otherwise should have been done. Indeed, the very experience and knowledge on which Mr Hannam relies suggests to us that Dr Hawrami would have well understood the need for JP Morgan/JPMC to take precisely the actions which Mr Hannam suggests would have offended him: he could not reasonably have felt offended. Dr Hawrami might, of course, have wanted to be able to trade and would not have wanted to be made an insider: perhaps he would not have been offended at all, but would simply have declined to give the appropriate undertakings, in which case the inside information should not have been disclosed.

Conclusion on proper course of employment

528. In our judgment, the information contained in the September email and the October email, to the extent that it was inside information, was not disclosed by Mr Hannam in the proper course of the exercise of his employment. So far as concerns the September email, the disclosure was a breach of the Takeover Code: it was not within the proper scope of the exercise of Mr Hannam's employment for him to disclose information in breach of the Takeover Code.

529. Even if that is not so, the September email and the October email contained information which could be disclosed, in accordance with Article 6(3) of the Market Abuse Directive and regulation 10(11) of the 2005 Regulations, only if Dr Hawrami was under an obligation of confidentiality. In our view, the facts establish that he was not, for the purposes of those statutory provisions, under such an obligation.

530. Further, we do not consider that the disclosure was reasonable. Although that does not necessarily mean that it was not in the proper course of Mr Hannam's employment, it is a significant factor and, given our reasons for why

we think it is not reasonable, we reach the conclusion that it was not in the proper course of Mr Hannam's employment.

The section 123 defence

531. Mr Hannam relies on the statutory defence found in section 123(2)(a) FSMA. He has not continued with his reliance, which was part of his pleaded case, on section 123(2)(b). We are not clear if Mr Hannam relies on this defence in relation to the sending of the October email to Mr Ishag, but we will address that possibility in our discussion. Section 123(2) provides:

> "(2) But the FCA 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 [engaging in market abuse], or
>
> (b) he took all reasonable precautions and exercised all due diligence to avoid behaving in a way which fell within [engaging in market abuse]."

532. This defence requires Mr Hannam to establish:

a. that he believed on reasonable grounds that he was not engaging in market abuse; and

b. there are reasonable grounds for the Authority to be satisfied that he did so believe.

533. It is to be noted that Mr Hannam does not need to establish that the Authority actually is satisfied that Mr Hannam had reasonable grounds: the test is entirely objective. But he does have to show that he believed that he was not engaging in market abuse and that his belief was reasonable. In order to rely on this defence, we consider that Mr Hannam is to be supposed to have been aware of and understood what it meant to engage in market abuse. In particular, he must be taken to have been aware of the provisions of sections 118 and 118C FSMA and have held a reasonable view, although not necessarily a correct view, of what they meant when applied to the September email and the October email.

534. There are two bases on which Mr Hannam might argue that he believed that his behaviour did not amount to market abuse. The first is that he reasonably believed that neither the September email nor the October email contained inside information. The second is that he reasonably believed that the communication of that inside information to Dr Hawrami would not amount to the disclosure of inside information other than in the proper course of the exercise of his employment. The second basis could, in turn, be either because he reasonably believed there was no disclosure because Dr Hawrami already knew the relevant information or because he reasonably believed that what he was doing was in the proper course of his employment. We take the September email and the October email in turn.

The September email

535. As we have already noted, there is no evidence to suggest that Mr Hannam ever gave any thought to whether the September email contained inside

information. Mr Hannam's own evidence in his witness statement was to the effect that he believed "now", that is to say when making the statement, that neither the September email nor the October email contained inside information: but he does not say anywhere that that was his conscious belief at the time. The most that can be said in his favour is that he did not consciously consider that it was inappropriate to send the email to Dr Hawrami and it has not been contended by the Authority that he did, at the time, think it was inappropriate; indeed, the Authority does not impugn his honesty or integrity.

536. The very subject matter of the September email was such that any reasonable adviser in Mr Hannam's position would have thought about it. It is not enough for Mr Hannam to say that, had he thought about it, he would have concluded that the email did not contain inside information. Nor is it enough for him to say that, had he thought about it, it would have been reasonable to conclude that it did not contain inside information. Neither of those situations falls within the literal wording of paragraph (a) and such a generous interpretation would not reflect the policy behind the defence which surely applies only where the person concerned has acted reasonably overall.

537. Accordingly, on this narrow ground alone, we do not consider that Mr Hannam can rely on the defence provided by section 123(2)(a) in relation to the September email.

538. But that is not the only reason why Mr Hannam cannot rely on this defence. In deciding whether he believed that his behaviour did not constitute market abuse, it must be remembered that Mr Hannam believed that its contents were true. Not only did he believe that there were discussions in progress, but he believed that an offer would be made and that it would made in the region of £3.50 to £4.00 per share. It is not easy to see how it could be contended that the fact of an expected offer and the level of that offer could be other than inside information if accurate. Mr Hannam thought that what he was communicating in the September email was true: his "behaviour" for the purposes of section 123(2)(a) was the sending of the September email and thus the communication of information which he could not, reasonably, have thought was other than inside information. He could not, in our view, have reasonably formed the view, had he in fact thought about it, that what he was doing was other than communicate inside information. Whether he could reasonably have formed that view had he understood what, if any, inside information the September email contained is not the point: that is clearly not what he understood.

539. We have deliberately used the word communicate because Mr Hannam might say that, had he thought about it, he would have formed the view that the September email did not disclose any information because Dr Hawrami already knew it. That does not withstand examination on the facts. Clearly Dr Hawrami did not know of any contemplated offer by a third party let alone that it would come in at £3.50 to £4.00 per share. The September email, had it been fully accurate as Mr Hannam believed it was, would clearly have disclosed new information.

540. Mr Hannam might then say that, had he thought about it, he would have concluded that he could make the disclosure because to do so was in the proper course of his employment and that such a conclusion would have been reasonable.

We have already considered in some detail how the Takeover Code impacts on what can be in the proper course of employment. Had the September email been accurate (so that there was a contemplated offer which Mr Buckingham reasonably believed would come in at £3.50 to £4.00) it may well be that Mr Hannam should not have disclosed the information at all on the basis that it was not necessary (within the meaning of the Takeover Code) to do so.

541. But even if he could have disclosed the information, we are clear that Mr Hannam could not have disclosed the relevant information without ensuring at the very least that Dr Hawrami was subject to strict confidentiality (amounting to secrecy) obligations and that Dr Hawrami was aware of the restrictions on dealing to which he would be subject as the result of holding such sensitive commercial, price sensitive, information. Unless he had ensured that, the disclosure could not be in the proper course of Mr Hannam's employment.

542. Importantly, we do not consider that Mr Hannam could reasonably have believed that it would be proper for him to disclose the information without ensuring that that was so. Mr Hannam did not ensure that that was so by taking steps at the time of the September email to impose appropriate confidentiality obligations or to explain that Dr Hawrami must not deal in Heritage shares. The vague understandings which we have discussed are not, for the reasons given, enough to bring about compliance with the Takeover Code. In our judgment, Mr Hannam could not reasonably have thought that they were enough had he thought about it.

543. Our conclusion, therefore, is that the defence under section 123(2)(a) FSMA is not available to Mr Hannam in relation to the September email.

The October email

544. As with the September email, there is no evidence to indicate that Mr Hannam ever gave any thought to whether the October email contained inside information. The fact that he cannot remember whether he intended the postscript to the October email to be sent to Dr Hawrami strongly suggests that he did not. Again, it is not enough for Mr Hannam to say that, had he thought about it, he would have concluded that the email did not contain inside information. Nor is it enough for to him to say that, had he thought about it, it would have been reasonable to conclude that it did not contain inside information.

545. Accordingly, as with the September email, we do not consider that Mr Hannam can rely on the defence provided by section 123(2)(a).

546. But, again, that is not the only reason why Mr Hannam cannot rely on this defence in relation to the October email. In deciding whether Mr Hannam believed that his behaviour did not constitute market abuse, it must be remembered that Mr Hannam thought that he was telling Dr Hawrami that black oil had been found and that the find was sufficiently encouraging for things to be looking good. It is not easy to see how this could be other than inside information. We do not consider that Mr Hannam could reasonably have thought that it would not be inside information if accurate. He could not reasonably have considered that his behaviour was other than market abuse on the basis that what he was communicating was not inside information.

547. In contrast with the September email, there is no suggestion that Dr Hawrami already knew the information which the postscript purported to impart: indeed, on Mr Hannam's own case and as the facts demonstrate, black oil had not been found so Dr Hawrami could not have been in possession of that information already.

548. In relation to disclosure being in the proper course of the exercise of Mr Hannam's employment, the position is different from that in relation to the September email since the strictures of the Takeover Code do not come into play. We have concluded that what Mr Hannam in fact disclosed was inside information and that such disclosure was not in the proper course of his employment. The conclusion would have been that much stronger if the postscript had been accurate in communicating that black oil had been found.

549. Although the position is not as clear as in relation to the September email, we do not consider that it would have been reasonable for Mr Hannam to have believed that he could, in the proper course of the exercise of his employment, disclose a finding of black oil without ensuring that appropriate confidentiality obligations were in place (if indeed he could reasonably have believed that he could disclose such information to Dr Hawrami at all). He could not, in our judgment, have reasonably believed that the vague understandings on which he now relies (or rather the ones that may still be available following our rejection of his evidence about discussions at the Madrid meeting) were sufficient to ensure the confidentiality obligations which needed, on any view, to be in place.

550. There is one other aspect which Mr Hannam raises to indicate that the postscript was not inappropriate. He asked another member of his team to check the content of the email before it was sent. The individual was described by Mr Hannam as "*a 30-year old very qualified investment banker*". He did not ask this individual expressly to check the email for inside information; but part of the individual's role on a day-to-day basis was to talk to Heritage about its reporting obligations. He was, according to Mr Rabinowitz, therefore well-placed to form a view on whether or not the postscript contained inside information so that "*it was not necessary for Mr Hannam to have given … express instructions in this regard for Mr Hannam to have had reasonable grounds for believing that Mr Riddell would have raised any issues with him if he did not consider that the postscript was inappropriate*". We are, frankly, surprised that this line of argument has ever been raised. On the assumption that Mr Hannam was engaged in market abuse in the first place (if he was not, the whole issue of reasonable belief is irrelevant), we not only find it unattractive, but hold it to be wrong, that Mr Hannam should be able to shelter behind the fact that a junior member of his team did not spot, and report to him, a potential problem when he had not even been asked to vet the email for inside information.

551. Our conclusion, therefore, is that the defence under section 123(2)(a) FSMA is not available to Mr Hannam in relation to the October email.

552. So far as Mr Ishag is concerned, Mr Hannam agrees that it was a mistake to send the October email, or at least the postscript, to him. We accept that it was copied to him by mistake. However, the fact remains that it was sent to him on Mr Hannam's instructions, and there is no reason to think that Mr Ishag already knew about the information it contained. While it may have been an inadvertent error,

Mr Hannam nevertheless disclosed inside information to someone not entitled to receive it, and thus not in the normal and proper exercise of his employment duties, and without securing a confidentiality agreement. Inadvertence does not excuse such a disclosure.

Overall conclusion

553. Mr Hannam's actions in sending both the September email and the October email constituted behaviour falling within section 118(3) FSMA. He was thereby engaged in market abuse. His actions were not in the proper course of the exercise of his employment. He is not able to take advantage of the defence provided in by 123 FSMA.

Penalty

554. Although the parties' written submissions did say something about the appropriate penalty if Mr Hannam had been engaged in market abuse, we consider that we cannot properly deal with this aspect of the case without giving the parties the opportunity to make further submissions in the light of our findings on the substantive issues. The tribunal and the parties will need to consider the best way forward procedurally for dealing with the question of penalty.

Mr Justice Warren

Judge Bishopp

Released 27 May 2014