Neutral Citation Number: [2015] EWHC 2401 (Ch)

Case No: HC11C02409

**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 12 August 2015

**Before** :

**THE HON. MR. JUSTICE SNOWDEN**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

**THE FINANCIAL CONDUCT AUTHORITY** **Claimant**

**- and –**

**(1) DA VINCI INVEST LIMITED**
**(2) DA VINCI INVEST PTE LIMITED**
**(3) MINEWORLD LIMITED**
**(4) SZABOLCS BANYA**
**(5) GYORGY SZABOLCS BRAD**
**(6) TAMAS PORNYE** **Defendants**

- - - - - - - - - - - - - - - - - - - - -

**Mr. Javan Herberg QC and Mr. Simon Pritchard** for the Claimant
**Dr. Michael von Pommern-Peglow** for the First Defendant
The Second to Sixth Defendants did not appear and were not represented

Hearing dates: 6-8, 11-14, 19-20 May 2015

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**MR JUSTICE SNOWDEN :**

## Introduction

1. This is the trial of a claim commenced by the Financial Services Authority ("the FSA"), now the Financial Conduct Authority ("the FCA"), for a final injunction and a financial penalty against the Defendants for market abuse. The market manipulation in question is alleged to have taken place in 2010 and 2011 in the course of high volume trading in contracts for differences ("CFDs") in relation to shares traded on the London Stock Exchange ("the LSE").

2. The FCA's claim is brought pursuant to sections 381 and 129 of the Financial Services and Markets Act 2000 ("FSMA") on the basis that the defendants are alleged to have engaged in market manipulation of a type commonly known as 'layering' or 'spoofing'. This is alleged to have constituted the effecting of transactions or orders to trade which gave, or were likely to give, a false or misleading impression as to the supply of, or demand for, or as to the price of, shares listed on the LSE, contrary to section 118(5) of FSMA. This is the first

case in which, in addition to seeking an injunction under section 381, the FCA has invited the court to impose a penalty for market abuse under section 129: such penalties are more usually imposed by the FCA itself, subject to review by the Upper Tribunal (Tax and Chancery Chamber).

3. In very brief summary, the issues that arise for decision are (a) whether, and if so, on what basis, the FCA is entitled to invoke the jurisdiction of this court under sections 381 and 129 FSMA; (b) whether the activities of the Fourth to Sixth Defendants can be attributed to the First and Third Defendants; (c) whether market abuse in fact occurred; and (d) if so, whether it is appropriate for final injunctions to be granted and/or financial penalties to be imposed.

The Parties

4. The First and Second Defendants were at the relevant time companies in the same group headed by Da Vinci Invest AG. The First Defendant ("DVI") is an English company that operated from a branch office in Switzerland. It carried on business as an investment and fund manager and was regulated by VQF, a self-regulating body that was overseen by the Swiss Federal Regulator (FINMA). DVI appeared by counsel to defend the case against it: it called two witnesses of fact but did not adduce any expert evidence.

5. The Second Defendant ("DVPte") was a Singaporean company. I was told that since the events complained of, it has been dissolved in Singapore and that it has no assets. As a consequence, DVPte did not appear at the hearing and the FCA did not proceed with the case against it.

6. The Fourth to Sixth Defendants ("Messrs Banya, Brad and Pornye" - together "the Traders") are three individuals who were at the relevant time resident in Hungary. The Third Defendant ("Mineworld") is a Seychelles company that was owned and controlled by the Traders and used as the vehicle for derivatives trading on their own account and for the sharing of profits between them. I was told that about £460,000 in accounts in the name of Mineworld remains of the original amount frozen in this jurisdiction as a result of an interim injunction granted against it in these proceedings. Mineworld and the Traders filed defences, witness statements and instructed experts who participated in the pre-trial process. However, Mineworld has now been struck off the register in the Seychelles for non-payment of fees, and shortly before the start of the trial the solicitors for Mineworld and the Traders informed the FCA that they did not intend to attend the trial. As a result, I acceded to an application at the start of the trial by the FCA pursuant to CPR 39.3 that their defences be struck out. The FCA continued, however, to press the case against these Defendants in their absence. The consequence was that I did not hear any evidence from the Traders or their appointed expert witnesses.

7. Before turning to the facts, I should give a brief summary of the trading mechanisms and the derivatives that feature in this case, together with a general description of the type of market abuse that is said to have occurred.

Electronic Trading and Direct Market Access

8. Until 2007, the LSE operated the main electronic trading platform in the UK for the buying and selling of shares of companies listed on its main market. The introduction of the Markets in Financial Instruments Directive ("MiFID") in November 2007 opened up competition in this area and a number of other entities set up their own electronic trading platforms in competition to the LSE. These trading platforms are generally known as Multilateral Trading Facilities ("MTFs").

9. Since MiFID was introduced, the majority of trading in most companies listed in the UK still takes place on the LSE, although a significant proportion of trading is conducted on MTFs run by other operators. At the time of the events in issue in this case, these included BATS, Chi-X and Turquoise (BATS Chi-X became a single entity and a recognised investment exchange in 2013). The existence of such MTFs in addition to the LSE has led to a fragmented market, where investors can potentially trade on a number of different and competing platforms. Prices quoted on different platforms for the same shares tend to be closely linked, with the market price generally being established by the platform with the greatest liquidity or volume of business (the 'price formation' or 'primary' venue). The other MTFs and market participants will typically use the price available on the price formation venue as a reference for their own prices.

10. Shares are bought and sold on the LSE and other MTFs via what is known as an 'order book'. An order book essentially provides an electronic trading platform to match buyers and sellers in the shares of a particular company traded on those venues. Each of the LSE and the other MTFs operate their own order books. An order book displays the prices at which market participants are offering to buy and sell shares at any particular time. Importantly for the purposes of the type of market abuse alleged in this case, it should be noted that the order book is anonymous, in the sense that the name of the market participant placing an order is not shown to the market. This information is, however, available to the operator of the order book, e.g. the LSE.

11. Normally, trading on the order book is restricted to broker-dealers and market-making firms that are members of the exchange or MTF. Investors who wish to trade on the exchange or MTF can either place orders with their broker's own in-house traders for execution, or can sign up to use Direct Market Access ("DMA") services provided by some brokers. As their name suggests, these DMA services are trading facilities that connect the investors directly with the broker's systems via electronic means. The DMA provider makes a trading screen available to its investor client, and the client is able to place orders onto the DMA system directly by keyboard or button entry. These instructions are then processed automatically, subject to pre-set trading and risk limits and other controls, and result in an order being placed onto the order book by the member of the exchange. In many cases, the DMA system will include a 'smart order routing' capability which will direct the order to the exchange or MTF on which the best volume and/or price is displayed. Alternatively, the investor can request that this capability is turned off so that it can control which trading platform the order is placed on.

12. The 'best bid' on the order book (i.e. an order to buy) is the current highest price at which a market participant is prepared to buy shares (i.e. it represents the best price at which other participants can sell shares immediately). The 'best offer'

(i.e. an order to sell) is the current lowest price at which a participant is willing to sell shares (i.e. it represents the best price at which other participants can buy shares immediately). The volume of shares available at any particular bid or offer price does not influence which order appears as the best bid or offer.

13. The difference between the best bid price and best offer price is called the 'spread'. A quote of the best bid price and the best offer price is called 'the touch price' or just 'the touch'. The next best bids and offers are also listed on the order book in price order underneath the best bid and offer. The price and the volume of shares available at that price are shown in respect of all bids and offers on the order book.

14. When an order is entered onto an order book it represents an offer to buy or sell the specified number of shares at the price given. The order is revocable and may be withdrawn at any time up until the time where it is matched by another participant. Once the trade is matched, it is executed and the order cannot be withdrawn. That trade will then typically be settled through the London Clearing House or an alternative clearing system so that the shares are registered in the name of the buyer or his agent and any money due is paid to the seller's account.

15. Market participants are able to place orders on to an order book to buy and sell shares at a price that will trade immediately against other orders on the order book (i.e. 'lift' or buy an offer of shares or 'hit' or sell to a bid for shares). Orders to trade that will trade immediately are called 'aggressive' orders because they are priced at a level that ensures they will immediately execute against one or more orders displayed on the order book. Orders for the same price are listed on the order book in the sequence in which they are received, and execution of trades takes place against orders in the same sequence irrespective of the size of the order. Following execution against the best bid or best offer in the order book, and assuming the execution was for the full quantity available at that price, the next best priced bid or offer on the order book will become the best bid or offer and the spread will adjust accordingly.

16. It is also possible for an order to be placed that will not trade immediately (because a sell order is priced higher than the best bid, or a buy order is priced lower than the best offer); such orders are known as 'passive' orders and will continue to be displayed on the order book until they are traded against or cancelled. If a bid is entered into the order book at a higher price than the current best bid but does not immediately execute, that new bid will become the current best bid and, assuming the best offer remains the same, the spread will tighten (i.e. the difference between the price of the best bid and the best offer will reduce).

Contracts for Differences

17. A CFD is a type of derivative investment. A derivative is a contract which gives rise to rights and obligations whose characteristics and value depend upon the characteristics and value of an underlying asset or other factor, such as a share, a bond or a commodity. The right of a party under a derivative contract might be the right to buy or sell a specified quantity of the underlying asset, or, as in this case, the right to receive, or the obligation to pay, a sum of money calculated by

reference to the movement in price of the underlying asset. This case concerns CFDs which were priced by reference to shares traded on the LSE.

18. A CFD which references shares is an agreement whereby the parties agree to pay or receive the difference in value of a particular share between the time and date when the contract is opened (entered into) and the time and date when the contract is closed (terminated). Investors who enter into CFDs with a broker will 'buy' a CFD and thereby take what is referred to as a 'long' position if they expect the price of the underlying share to rise. Conversely, if the investor expects the price of the underlying share to fall, the investor will 'sell' a CFD and thereby take a 'short' position. The CFD will remain open until either the investor chooses to close it by giving notice, or a pre-agreed 'stop-loss' limit is reached. The closure of the CFD will give rise to an obligation on one party to pay the difference in value between the opening and closing price of the underlying asset.

19. Through CFDs, investors can speculate on both positive and negative share price movements without owning any underlying shares. This is a key financial advantage for high volume trading, in that investors can speculate on price movements in shares without having to invest the same amount of capital that would be required to buy and sell the underlying shares themselves. CFDs are also attractive to investors, as unlike transactions in shares, they do not attract stamp duty.

20. Brokers or market-makers who are prepared to offer to enter into CFDs with investors will invariably require their clients to provide a deposit in the form of cash or eligible financial instruments by way of security for their trading obligations. This is generally known as providing 'collateral', and this type of trading is commonly known as trading on 'margin'. Investors may be required to provide additional margin if the price of the underlying shares moves against the position (e.g. the share price falls when the investor has a long position) or in times of heightened volatility in share prices.

21. Investors who wish to use DMA trading, but who want to trade in CFDs rather than shares will submit requests for CFDs through the DMA provider's electronic trading systems. This is in effect a request for the firm to enter into a CFD with the investor upon the terms specified. Although the firm has, in theory, a discretion whether to protect itself against the risk that it would take by entering into the CFD with its client, in practice it will invariably do so automatically by placing an equivalent buy or sell order in its own name in respect of actual shares on an exchange or MTF. As and when that share order is accepted and executed, the CFD will in turn be accepted to the same extent. Accordingly, the effect of an investor placing a CFD order through a DMA provider is that an identical share order is immediately placed on the order book by the DMA provider. Any shares bought as a result of these equivalent orders will be retained by the CFD provider as a hedge against its potential liability under the CFD in the event of a rise in the price of the underlying shares.

'Layering' or 'spoofing'

22. The following general description of 'layering' or 'spoofing' offered by the FCA was accepted by the Upper Tribunal in 7722656 Canada Inc (t/a Swift Trade) v

FSA [2013] Lloyd's LR (FC) 381 at paragraph 6 and was not challenged before me:

> "'layering' consists of the practice of entering relatively large orders on one side of an exchange's … electronic order book … without a genuine intention that the orders will be executed: the orders are placed at prices which are (so the person placing them believes) unlikely to attract counterparties, while they nevertheless achieve his objective of moving the price of the relevant share as the market adjusts to the fact that there has been an apparent shift in the balance of supply and demand. The movement is then followed by the execution of a trade on the opposite side of the order book which takes advantage of, and profits from, that movement. This trade is in turn followed by a rapid deletion of the large orders which had been entered for the purpose of causing the movement in price, and by repetition of the behaviour in reverse on the other side of the order book. In other words, a person engaged in layering attempts to move the price up in order to benefit from a sale at a high price, then attempts to move it down in order to buy again, but at a lower price, and typically repeats the process several times."

From that description it will be apparent that the term 'layering' refers to the placing of multiple orders that are designed not to trade on one side of the order book, and the term 'spoofing' refers to the fact that the placing of such orders creates a false impression as to the person's true trading intentions.

The Factual Background

23. I now turn to the essential factual background to the trading that occurred during 2010 and 2011.

24. I heard evidence on behalf of the FCA from representatives of the two firms that provided DMA facilities to DVI and DVPte, namely Mr. Robert Crane who at the relevant time was co-head of Goldman Sachs Electronic Trading and Mr. Leslie Brady, who at the relevant time was the Chief Executive Officer of SunGard Global Execution Services Limited ("SunGard"). Both Mr. Crane and Mr. Brady were truthful and careful witnesses. The majority of their evidence related to the provision of the DMA trading facilities that were used by the Defendants from the perspective of the DMA service providers. That evidence was not really controversial or disputed by DVI, and I accept it.

25. I also heard evidence covering the background to the trading on behalf of DVI from Mr. Hendrick Klein ("Mr. Klein") and Mr. Silvio Dietz ("Mr. Dietz") who were directors of DVI. The evidence of Mr. Klein and Mr. Dietz primarily went to the arrangements between the Defendants. I shall return to that evidence in greater detail later, but for present purposes I find the following facts to be established.

*DVI and the Traders agree a joint venture*

26. DVI was incorporated in England in 2004 and began to trade as an independent asset manager managing investment funds in about 2006. Its directors were Mr. Klein and Mr. Dietz. Mr. Klein and Mr. Dietz had founded DVI with a third shareholder, Mr. Florian Albrecht ("Mr. Albrecht"), who was not a director, but took an active interest in the affairs of the company.

27. At all relevant times, Mr. Klein was DVI's Managing Director. He had considerable experience as a derivatives trader for a number of institutions in Germany, commencing in 1996. From 2000 until joining DVI in 2004 Mr. Klein had specialised in derivatives trading on EUREX and XETRA. He described himself as an expert in electronic trading.

28. Mr. Dietz was in charge of DVI's administration and risk management. Like Mr. Klein, Mr. Dietz had experience as a derivatives trader on EUREX and XETRA before joining DVI in 2004. Mr. Dietz resigned as a director of DVI in about August 2010 due to ill-health, but remained as an employee of the company and continued to perform risk management functions throughout the relevant period into 2011.

29. Prior to its involvement with the Traders, DVI had a significant asset management business. I was not given precise figures, but Mr. Klein told me that by mid-2010 DVI had about €370 million under management, including at least one substantial open-ended investment fund in Singapore that used an investment strategy based on volatility arbitrage. From November 2008 DVI also had an established relationship with Goldman Sachs International as the provider of brokerage services (for convenience I shall refer to all companies in the Goldman Sachs group as "Goldman Sachs").

30. The Traders are three Hungarian nationals resident in Budapest. They met in about 2005-2006 whilst engaged in DMA trading from Budapest on behalf of a Canadian company called 7722656 Canada Inc, which operated under the name of "Swift Trade Inc" ("Swift Trade"). Mr. Brad and Mr. Pornye engaged in day-trading in CFDs on behalf of Swift Trade, primarily in relation to securities listed on the main North American markets of the NYSE and NASDAQ, and (according to information provided by Swift Trade to the FSA) subsequently in relation to securities listed on the LSE. Mr. Banya traded in CFDs in relation to securities listed on the LSE.

31. In July 2007 the accounts of each of the Traders were suspended by Swift Trade following complaints from the LSE and Swift Trade's brokers, Merrill Lynch, about suspected manipulative trading involving layering. On 6 May 2011 the FSA imposed a penalty of £8 million upon Swift Trade for market abuse committed between 1 January 2007 and 4 January 2008 contrary to section 118(5) FSMA. That decision was upheld by the Upper Tribunal in a decision to which I have already referred above [2013] Lloyd's LR (FC) 381, and an appeal on points of law was dismissed by the Court of Appeal [2013] EWCA Civ 1662 ("Swift Trade").

32. Although they had been suspended from trading, none of the Traders were defendants to the FSA's proceedings in relation to market abuse at Swift Trade. I infer, however, that they must at very least have been aware in general terms of the concerns raised and the reasons why they had been suspended. Moreover, the activities of Swift Trade led a heightened market awareness of layering and spoofing, and to a number of notices being issued by the LSE to its members and by the FSA more widely concerning market manipulation. One of these was the FSA's Market Watch newsletter of August 2009, the introduction to which stated as follows:

> "Manipulation of the order book – 'layering or spoofing'
>
> We would like to highlight to firms who offer their clients direct market access (DMA) our concerns about order book conduct and the intentional pattern of behaviour call layering or spoofing. We have seen this most frequently when clients:
>
> - layer the order book, in which multiple orders are submitted at different prices on one side of the order book slightly away from the touch;
>
> - submitted an order to the other side of the order book (which reflected the client's true intention to trade); and
>
> - following the execution of the latter order, rapidly removing the multiple initial orders from the book.
>
> This behaviour may give a false or misleading impression about the supply and demand for securities."

33. After their involvement with Swift Trade had ceased, the Traders continued to operate from Hungary, trading with a number of other companies, until they joined forces in early 2010 and approached SunGard with a view to setting up DMA facilities. SunGard had been recently established as an English subsidiary by a US corporation with a view to providing network systems for wealth management clients to buy and sell equity investments. SunGard was planning to offer a DMA facility and the Traders indicated that they were interested in using that trading facility.

34. In about May 2010, in circumstances that are wholly unclear, the Traders approached Mr. Albrecht, who also had a home in Hungary. They indicated that they were looking for a provider of capital with which to trade. Mr. Albrecht then introduced the Traders to Mr. Klein and DVI as a potential source of trading capital, and the Traders reported to SunGard the possibility that DVI would become their 'new partner'.

35. On 3 June 2010 the Traders provided Mr. Klein and Mr. Albrecht at DVI with a short business plan which indicated their desire to trade using DVI's financial resources on the basis of some form of profit share. The business plan stated that the Traders initially intended to conduct day-trading in stocks listed on the LSE

using CFDs. They pointed out that this would mean that they could reduce the risk of holding overnight positions in securities and would also mean that they could avoid paying stamp duty. The business plan indicated that in the initial stages, the Traders would pursue 'capital intensive' trading strategies, such as participating in the opening and closing auction and 'scalping' which they described as,

> "…entering positions to make benefit from institutional activity. Making benefit [from] short term market turbulences, making advantage from huge buys/sells, holding orders under and above the actual market price."

36. In cross-examination, Mr. Klein said that he thought that in practice it was impossible to detect big buy or sell orders in the market, but that he had been prepared to give the Traders a small amount of capital and low risk limits for a short period as a test to see if they were good traders. Mr. Albrecht communicated this to the Traders, and it was further agreed that if the trading continued with larger amounts of DVI's capital, DVI and the Traders would split the net profits 50/50.

37. Although DVPte then executed an agreement with SunGard for DMA services, DVI decided that Goldman Sachs should also be involved as custodian. Discussions then continued for several months as to how both SunGard and Goldman Sachs could together provide the necessary facilities for the Traders to engage in CFD trading. In late July 2010, frustrated by the lack of progress, the Traders approached Goldman Sachs to provide all of the necessary DMA services for their 'Da Vinci work'. They also contacted a company called Townsend Analytics Limited that traded under the name of 'RealTick' to provide the front-end software to connect to the Goldman Sachs DMA system.

38. Goldman Sachs and RealTick agreed to provide the necessary services to DVI, and three sub-accounts in the name of DVI were established – one for each of the Traders. As part of the process of setting up the DMA access, Mr. Klein notified Goldman Sachs that "In terms of trading I am your main point of contact" but that "When it comes to risk management, Silvio Dietz is responsible". To that latter end, Goldman Sachs provided an additional 'view only' account for the use of Mr. Dietz, and Mr. Dietz was told how he could view and download various reports of the activity on each of the three sub-accounts used by the Traders.

39. Also in the course of setting up the trading system, the Traders indicated to Goldman Sachs (copied to DVI) that their strategies required them "to be able to use the MTFs and the primary separately" and that this meant that they could not use Goldman Sachs' smart order routing. Goldman Sachs' response (copied to DVI) stated that they understood this to be an indication by the Traders that their strategy would be to trade on the different venues separately, and that this facility could be provided.

*Trading in 2010*

40. The Traders commenced placing orders for CFDs on behalf of DVI on 19 August 2010. Initially, the amounts involved were modest. However, on 2 September

2010 (but dated "as of" 19 August 2010) Mr. Klein executed the necessary documentation on behalf of DVI with Goldman Sachs to permit more extensive CFD trading. Those documents included an Execution and Clearing Agreement, a Master Netting and Credit Support Agreement, and an ISDA Master Agreement, Schedule and Credit Support Annex. The broad effect of these agreements was that DVI undertook financial responsibility to Goldman Sachs for the CFD trading and agreed to provide the necessary finance and collateral to cover any losses. In particular, DVI provided collateral as margin cover for the Traders' trading. The amount of capital committed was £300,000, and Goldman Sachs permitted this to be 'leveraged' ten times to provide the Traders with a daily trading limit of £3 million (£1 million each).

41. After trading had commenced, Mr. Klein and Mr. Dietz both received reports as to the performance of the Traders. It was Mr. Dietz's task to monitor DVI's risk exposure and to keep an eye on the size of the positions taken by the Traders and the performance of the trading. Mr. Dietz monitored compliance with the trading limits and reported the daily profit and loss made by the Traders to Mr. Klein.

42. The trading proved profitable on most days, and the volume of trades placed by the Traders increased significantly during October and November 2010. In November 2010 the Traders traded in excess of US$700 million, and this led to both Mr. Klein and Mr. Dietz becoming involved in a successful effort, prompted by the Traders, to persuade Goldman Sachs to reduce the rates of commission that it charged.

43. The monthly gross profits from the Traders' trading reached £262,540 in November and £196,165.53 in December 2010, and amounted in total to £672,906.72 for the period until 23 December 2010. On Mr. Klein's figures, when the commissions charged by Goldman Sachs are taken into account, the total net trading profits during the four months from 19 August to 23 December 2010 amounted to £523,158.97.

44. On 15 December 2010, BATS made a confidential referral to the FSA indicating that on a number of dates between 2 and 13 December, its automated surveillance systems had highlighted an unusual pattern of behaviour by the same market participant. BATS reported that the participant had bought a particular security at the bottom of a periodic price variation and had sold at the top of the periodic price variation on multiple occasions without entering other orders or executing trades during the intervening period. BATS reported its suspicions that there was a risk that the prices of the relevant securities had been manipulated on the LSE between the trades on BATS. One of the instances reported related to trading in the shares of Aquarius Platinum Limited on 6 December 2010. On 21 December 2010, BATS provided further information to the FSA in relation to more trading by the same market participant that exhibited the same characteristics between 14 and 20 December 2010.

45. The market participant identified to the FSA by BATS was Goldman Sachs. On 21 December 2010, Goldman Sachs itself made a Suspicious Transaction Report to the FSA's market abuse team. That report identified DVI as responsible for potential market abuse, and referred specifically to the FSA's Market Watch bulletin from August 2009 (above) regarding layering. Goldman Sachs indicated

that its in-house surveillance had identified 12 occasions between mid-September and early December 2010 on which DVI had engaged in that type of behaviour. Later that same day, Goldman Sachs supplemented its report with details of further activity by DVI on 19 August 2010 and 20 December 2010. The supplemental report concluded that Goldman Sachs anticipated closing its relationship with DVI in due course.

46. In fact, Goldman Sachs moved immediately to stop any further trading by terminating DVI's DMA access on 22 December 2010. The termination was initially notified to the Traders in a telephone call by Mr. Crane. This prompted Mr. Klein to speak to another managing director at Goldman Sachs (Mr. Wim den Hartog) who told Mr. Klein that they had been told to stop the trading immediately by Goldman Sachs' compliance department. Mr. Klein protested to Goldman Sachs, but to no avail. The next day, 23 December 2010, formal written notice was served by Goldman Sachs terminating its entire business relationship with DVI.

*Trading in 2011*

47. The termination of the entire relationship between DVI and Goldman Sachs presented an obvious problem for DVI. It moved quickly to establish DMA trading and other facilities with an alternative supplier. Acting on Mr. Klein's instructions, on 27 December 2010 Mr. Dietz sought to pick up negotiations with SunGard where they had been left in July. After some negotiations and a meeting between Mr Klein and SunGard, on 16 January 2011 Mr. Klein signed an amendment to the earlier agreement between SunGard and DVPte to permit DMA trading to commence on SunGard's system using the RealTick front-end. DVPte ordered two active trading accounts, one for each of Mr. Banya and Mr. Pornye, and one view-only account for Mr. Dietz to monitor the trading. It is not clear what (if any) role Mr. Brad continued to play in trading. Setting up and testing the trading accounts and the link between the RealTick front-end and the SunGard system took some time.

48. At the same time, but unknown to Mr. Klein, SunGard asked the Traders whether they also wished Mineworld to have a trading account with SunGard. Mr. Banya indicated that Mineworld did wish to have a trading account with SunGard but stressed to SunGard that it should handle the DVPte and Mineworld accounts "totally separately" and that SunGard should "be advised not to mention Mineworld ever to Davinci". Notwithstanding that warning, a few days later and shortly before trading started on 15 February 2011, SunGard accidentally copied Mr. Klein into a string of emails about the additional trading account and facilities for Mineworld. Mr. Klein misunderstood a comment made by Mr. Banya in one of those emails to be a criticism of him, and he responded angrily, referring back to the events that had led Goldman Sachs to terminate its relationship with DVI and drawing attention to what he saw as a potential conflict of interest if the Traders were trading for both Mineworld and DVPte – "you could book good trades in Mineworld and bad trades in [DVPte]…How do we make sure that this is not happening?" Mr. Banya replied, seeking to assuage Mr. Klein's concerns by referring to the "very good profits" the Traders had already made for DVI and asking for more collateral to pursue his trading strategy. This response seems to have mollified Mr. Klein and trading by Mr. Banya and Mr. Pornye on behalf of

DVPte commenced on 15 February 2011. At the same time, collateral was lodged on behalf of Mineworld and trading commenced on its behalf.

49. As had been the case when the trading was conducted through Goldman Sachs, the trading on behalf of DVPte was monitored by Mr. Dietz who received daily reports from SunGard. Mr. Banya also requested copies of the reports together with copies of the Mineworld trading reports. Mr. Banya took care, however, to instruct SunGard, "Please do not send the Mineworld daily report to Davinci, ever."

50. The renewed trading by the Traders triggered further alerts at BATS. BATS made a series of referrals to the FSA in March and April 2011 referring to potential market abuse. This led to the FSA formally commencing an investigation on 26 May 2011.

51. On 13 June 2011 SunGard notified Mr. Klein that it would be stopping its execution business on 29 July 2011 for business reasons entirely unconnected with the activities of the Traders. SunGard offered to introduce DVPte to another broker, and Mr. Klein responded to indicate that DVPte would be moving its business to MF Global. In the event, however, the FSA intervened by issuing proceedings in mid-July and seeking interim injunctions before that could occur.

52. As before, the trading by the Traders during 2011 was very profitable. By the time trading ceased as a consequence of grant of the injunctions, Mr. Banya and Mr. Pornye had made gross profits for DVPte of £239,770, and gross profits for Mineworld of £971,625. When this subsequently became apparent to Mr. Klein, he formed the clear view (that he repeated in cross-examination) that in spite of the assurances that they had given, the Traders had nonetheless proceeded to prefer their own interests and those of Mineworld over the interests of DVPte and had cherry-picked for Mineworld the most favourable trades, or at any rate had devoted the majority of their efforts to trading on behalf of Mineworld rather than DVPte.

The Legal and Regulatory Regime

53. Dr. Peglow, who appeared for DVI, raised a considerable number of objections to the form of these proceedings, as well as several substantive points as to the tests which the FCA has to satisfy under FSMA before an injunction can be granted or a penalty imposed. I must therefore set out in some detail the legal and regulatory components of the market abuse regime.

54. The market abuse regime to be found in FSMA is designed to give effect to the United Kingdom's obligations under European Community law. At the time of the events in this case, as now, the relevant European law is Directive 2003/6/EC of the European Parliament and of the Council on insider dealing and market manipulation ("the Market Abuse Directive") and its implementing directives. For completeness I should, however, note that the existing regime will be repealed and replaced with effect from 3 July 2016 by a new EU Regulation (596/2014) on Market Abuse.

55. Article 5 of the Market Abuse Directive contains the basic requirement that Member States shall prohibit any person from engaging in market manipulation. 'Market Manipulation' is defined by Article 1(2)(a) to mean (in material part),

> "transactions or orders to trade:
>
> - which give, or are likely to give, false or misleading signals as to the supply of, demand for or price of financial instruments, or
>
> - which secure, by a person, or persons acting in collaboration, the price of one or several financial instruments at an abnormal or artificial level,
>
> unless the person who entered into the transactions or issued the orders to trade establishes that his reasons for so doing are legitimate and that these transactions or orders to trade conform to accepted market practices on the regulated market concerned;"

56. Article 1(2) then goes on to give a number of instances of market manipulation derived from the core definition, and further provides that,

> "The definitions of market manipulation shall be adapted so as to ensure that new patterns of activity that in practice constitute market manipulation can be included."

57. Article 1(5) also defines "accepted market practices" to mean,

> "Practices that are reasonably expected in one or more financial markets and are accepted by the competent authority in accordance with the guidelines adopted by the Commission in accordance with the procedure laid down in Article 17(2)."

58. The required regime to implement the market abuse regime is then set out in Articles 11 and 14:

> "11. Without prejudice to the competences of the judicial authorities, each Member State shall designate a single administrative authority competent to ensure that the provisions adopted pursuant to this Directive are applied.
>
> …
>
> 14. Without prejudice to the right of Member States to impose criminal sanctions, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible where the provisions adopted in the implementation of this Directive have not been complied with. Member States shall ensure that these measures are effective, proportionate and dissuasive."

59. The provisions of the Market Abuse Directive are also the subject of two implementing directives. The first is Commission Directive 2003/124/EC ("the 2003 Implementing Directive"). That contains, in Article 4, a requirement upon Member States to ensure that certain 'non-exhaustive signals' are taken into account when transactions or orders to trade are examined by market participants and competent authorities. I shall return to consider those 'non-exhaustive signals' later in this judgment.

60. The second implementing directive is Commission Directive 2004/72/EC ("the 2004 Implementing Directive"). For present purposes I need only refer to Recital (4) and Article 3 that provide as follows:

> "Recital (4)
>
> Competent authorities, while considering the acceptance of a particular market practice, should consult other competent authorities, particularly for cases where there exist comparable markets to the one under scrutiny. However, there might be circumstances in which a market practice can be deemed to be acceptable on one particular market and unacceptable on another comparable market within the Community. In case of discrepancies between market practices which are accepted in one Member State and not in another one, discussion could take place in the Committee of European Securities Regulators in order to find a solution. With regard to their decisions about such acceptance, competent authorities should ensure a high degree of consultation and transparency vis-à-vis market participants and end-users.
>
> ….."

> Article 3
>
> 1. For the purposes of applying paragraph 2 of point 1 and point 2(a) of Article 1 of Directive 2003/6/EC, Member States shall ensure that the procedures set out in paragraphs 2 and 3 of this Article are observed by competent authorities when considering whether to accept or continue to accept a particular market practice.
>
> 2. Without prejudice to Article 11(2) of Directive 2003/6/EC, Member States shall ensure that competent authorities, before accepting or not the market practice concerned, consult as appropriate relevant bodies such as representatives of issuers, financial services providers, consumers, other authorities and market operators.
>
> The consultation procedure shall include consultation of other competent authorities, in particular where there exist comparable markets, i.e. in structures, volume, type of transactions.
>
> 3. Member States shall ensure that competent authorities publicly disclose their decisions regarding the acceptability of the market practice concerned, including appropriate descriptions of such practices. Member States shall further ensure that competent authorities transmit their decisions as soon as possible to the Committee of European Securities Regulators which shall make them immediately available on its website.
>
> The disclosure shall include a description of the factors taken into account in determining whether the relevant practice is regarded as acceptable, in particular where different conclusions have been reached regarding the acceptability of the same practice on different Member States markets."

61. The central provision of FSMA is section 118, which contains the definition of market abuse. That provides, in relevant part,

> "(1) For the purposes of this Act, market abuse is behaviour (whether by one person alone or by two or more persons jointly or in concert) which —
>
> (a) occurs in relation to—
>
> (i) qualifying investments admitted to trading on a prescribed market,

(ii) qualifying investments in respect of which a request for admission to trading on such a market has been made, or

(iii) in the case of subsection (2) or (3) behaviour, investments which are related investments in relation to such qualifying investments, and

(b) falls within any one or more of the types of behaviour set out in subsections (2) to (8)."

62. Section 118 then specifies a number of types of behaviour, the relevant one of which is in section 118(5), namely,

> "(5) …where the behaviour consists of effecting transactions or orders to trade (otherwise than for legitimate reasons and in conformity with accepted market practices on the relevant market) which —
>
> (a) give, or are likely to give, a false or misleading impression as to the supply of, or demand for, or as to the price of, one or more qualifying investments, or
>
> (b) secure the price of one or more such investments at an abnormal or artificial level."

63. Section 118A supplements section 118 and provides,

> "(1) Behaviour is to be taken into account for the purposes of this Part only if it occurs —
>
> (a) in the United Kingdom, or
>
> (b) in relation to —
>
> (i) qualifying investments which are admitted to trading on a prescribed market situated in, or operating in, the United Kingdom,
>
> (ii) qualifying investments for which a request for admission to trading on such a prescribed market has been made, or
>
> (iii) in the case of section 118(2) and (3), investments which are related investments in relation to such qualifying investments."

"Behaviour" is defined by section 130A(3) FSMA to include action or inaction.

64. In this case, there is no dispute that the LSE is a prescribed market and shares listed on it are qualifying investments. Moreover, since the decision of the Court

of Appeal in Swift Trade (see in particular [2013] EWCA Civ 1662 at paragraphs 29-34), it is clear that offering to enter into CFDs with the provider of DMA services which will automatically seek to hedge those CFDs by placing orders on the exchange in the manner that I have described in paragraph 21 above, constitutes "effecting transactions or orders to trade" "in relation to qualifying investments" for the purposes of section 118.

65. Dr. Peglow did not seek to distinguish the basic mechanics of the DMA trading through Goldman Sachs from that in Swift Trade. In particular, he accepted that it made no difference that some of the orders were directed to be placed on MTFs rather than on the primary exchange, because all such orders related to shares that were admitted to trading on the LSE.

66. The trading that occurred on behalf of DVPte and Mineworld through SunGard had one point of difference from that conducted on behalf of DVI through Goldman Sachs. Instead of orders being placed on the exchange or MTF by Goldman Sachs' systems as a consequence of the orders received from the Traders, SunGard's systems permitted the Traders to place their orders directly onto the order book of the exchange or MTF as agent for SunGard. Moreover, when that order was executed, it would be adopted by KAS Bank NV with which SunGard had a clearing and settlement arrangement. KAS Bank would accumulate such trades intra-day and then enter into a "net" CFD with SunGard at the end of the day representing the outcome of all of SunGard's clients' trading. SunGard would then enter into equivalent CFDs with each of its clients, including DVPte or Mineworld.

67. In my judgment Dr. Peglow was plainly right to accept that the behaviour of the Traders on behalf of DVI potentially engaged section 118 and I think that the same conclusion must follow in relation to the trading on behalf of DVPte and Mineworld. In particular, I do not think that the different mechanism by which orders ended up being placed upon the exchange or MTF on behalf of SunGard in any way alters the fact that the Traders were "effecting transactions or orders to trade" "in relation to qualifying investments" for the purposes of sections 118: if anything the connection between the activities of the Traders and the transactions or orders placed on the markets was more direct. Nor can the different mechanism for clearing of those transactions and the execution of net CFDs at the end of the day make any difference to the application of section 118. Accordingly, I conclude that all the DMA trading in this case falls within the potential ambit of section 118(1)(a)(i). That said, the parties of course remained at odds as to whether the trading actually amounted to market abuse within the meaning of section 118(5).

68. Dr. Peglow also accepted that in order to constitute an "accepted market practice" for the purposes of the exception in section 118(5) FSMA, a market practice must be "accepted by the FCA": see section 130A(3) FSMA. For the FCA, Mr. Herberg QC contended, and Dr. Peglow did not dispute, that this means that the FCA must have gone through a formal acceptance procedure as envisaged by Article 1.5 of the Market Abuse Directive and Article 3 of the 2004 Implementing Directive (see above). Again, I agree, and to the extent that the Upper Tribunal in Hobbs v FSA (22 November 2012) appears to have concluded, apparently without the benefit of full argument, that it was open to it to decide on the facts and in the

absence of any formal acceptance of the same by the FSA that particular behaviour was in conformity with accepted market practices on the coffee futures market, I respectfully decline to follow that approach.

69. As envisaged by Article 14 of the Market Abuse Directive, FSMA contains provisions for the imposition, by a regulatory process, of sanctions upon those who engage in market abuse. Broadly, section 123(1) empowers the FCA to impose a penalty "in such amount as it considers appropriate" upon a person whom it is satisfied has engaged in market abuse. That power can only be exercised under section 123 after the FCA has given a warning notice to the person concerned under section 126. Moreover, section 123(2) contains a restriction that the FCA may not impose a penalty if, having considered any representations made to it in response to the warning notice, there are reasonable grounds for it to be satisfied that the person in question believed on reasonable grounds that his behaviour did not amount to market abuse or had taken all reasonable precautions and exercised all due diligence to avoid behaving in such a way.

70. A decision of the FCA to impose a penalty must be communicated to the person concerned by a notice served under section 127 FSMA, and a person served with a decision notice has the right to refer the matter to the Upper Tribunal. Such a reference is a disciplinary reference, and under section 133 FSMA the Upper Tribunal is empowered to determine what (if any) is the appropriate action for the FCA to take in relation to the matter and to remit the matter to the FCA with such directions (if any) as the Upper Tribunal considers appropriate for giving effect to its determination.

71. That regulatory process is, as I said at the start of this judgment, the process that has been followed by the FSA and FCA in the vast majority of cases. But the powers of the FCA and the Upper Tribunal are limited. Specifically, neither the FCA nor the Upper Tribunal can grant an injunction to prevent market abuse. That power is conferred on this court by section 381 FSMA that provides in material part as follows:

> "381. Injunctions in cases of market abuse.
>
> (1) If, on the application of the Authority, the court is satisfied —
>
> (a) that there is a reasonable likelihood that any person will engage in market abuse, or
>
> (b) that any person is or has engaged in market abuse and that there is a reasonable likelihood that the market abuse will continue or be repeated,
>
> the court may make an order restraining (or in Scotland an interdict prohibiting) the market abuse.
>
> …

> (3) Subsection (4) applies if, on the application of the Authority, the court is satisfied that any person —
>
> (a) may be engaged in market abuse; or
>
> (b) may have been engaged in market abuse.
>
> (4) The court make an order restraining (or in Scotland an interdict prohibiting) the person concerned from disposing of, or otherwise dealing with, any assets of his which it is satisfied that he is reasonably likely to dispose of, or otherwise deal with.
>
> (5) The jurisdiction conferred by this section is exercisable by the High Court and the Court of Session.
>
> …..

72. The final section of FSMA to which I shall refer is section 129, which is of central importance in this case. That section provides as follows:

> "129. Power of court to impose penalty in cases of market abuse
>
> (1) The Authority may on an application to the court under section 381 or 383 request the court to consider whether the circumstances are such that a penalty should be imposed on the person to whom the application relates.
>
> (2) The court may, if it considers it appropriate, make an order requiring the person concerned to pay to the Authority a penalty of such amount as it considers appropriate."

I should add that the reference to section 383 FSMA is to a provision enabling the FCA to apply to the court for a restitution order in a case of market abuse. If satisfied that the defendant has engaged in market abuse, subject to a defence in similar terms to section 123(2) FSMA, the court is empowered to order the defendant to make a payment of "such sum as appears to the court to be just" having regard to the amount of any profits made or losses caused to other persons as a result of the market abuse.

The Proceedings

73. On 12 July 2011, the FSA applied to Mr. Justice Briggs without notice and obtained a freezing injunction against the Defendants. Mr. Justice Briggs declined, however, to grant injunctions relating to trading on a without notice basis. A claim form was duly issued the next day, 13 July 2011, asking the court to grant an injunction prohibiting the Defendants from engaging in market abuse pursuant to section 381 FSMA and to impose financial penalties upon the Defendants pursuant to section 129 FSMA. The freezing injunction and the proceedings were served on the Defendants on 14 July 2011.

74. On the return date for the injunction application, 20 July 2011, the freezing injunction was continued by consent and undertakings not to engage in certain trading behaviour were given by the Defendants until after the *inter partes* hearing of the FSA's application.

75. Particulars of Claim were served on 24 August 2011. On 31 August 2011, a hearing took place before Mr. Justice Newey which was attended by counsel for the FSA and by Mr. Klein for DVI and DVPte. Mineworld and the Traders did not appear and were not represented. After hearing argument, Mr. Justice Newey ordered the continuation of the freezing injunction and granted injunctions restraining the Defendants from engaging in certain types of trading behaviour until trial: see [2011] EWHC 2674 (Ch). Those orders were modified by consent by Mr. Justice Roth on 14 May 2012.

76. DVI and DVPte served a joint defence, as did Mineworld and the Traders. One common feature of the Defences was the assertion that the Traders had used a computer algorithm in their trading activity. The Traders described this algorithm as generating an "entry signal" or "trading signal" that resulted in orders being entered into the DMA system. Various Requests for Further Information and Notices to Admit Facts were also served and answered.

77. Disclosure took place in 2012, and in late December 2012 the FSA applied for, and obtained, an order requiring the Traders to provide the FSA with a copy of the computer algorithm to which they had referred in their pleadings. That resulted in a disclosure statement from Mr. Banya to the effect that the algorithm in question, which his later witness statement indicated had been downloaded from the internet by Mr. Pornye, had been deleted in July 2011. Mr. Pornye's later witness statement confirmed the origin of the algorithm and claimed that it had been deleted as "a frightened reaction to the intervention of the FSA".

78. Witness statements were exchanged in early 2013, but in May 2013 the parties agreed to a stay of the proceedings to await the outcome of an appeal to the Court of Appeal in the Swift Trade case which, among other things raised questions as to whether DMA trading in CFDs fell within section 118(5) FSMA at all. Having regard to their interest in this case, DVI and DVPte appeared at the hearing of the appeal in Swift Trade as intervenors. Judgment was handed down by the Court of Appeal on 19 December 2013. Thereafter, in 2014 the instant proceedings recommenced, further witness statements were filed, and expert reports were produced by two experts instructed on behalf of the FCA, and two experts instructed on behalf of Mineworld and the Traders. The respective pairs of experts subsequently met in December 2014 and January 2015 and signed joint statements indicating the matters upon which they were agreed and not agreed.

## Jurisdictional and Procedural Objections

79. I now turn to consider the various jurisdictional and procedural objections to these proceedings that were made by Dr. Peglow on behalf of DVI.

80. As a preliminary observation, I note that section 129(1) FSMA does not, in terms, indicate what "circumstances" must be shown to exist in order to make it appropriate for a penalty to be imposed. The section does, however, cross-refer to

an application being made under section 381 or section 383. The common feature of those sections is that they confer a power upon the court to grant relief if the court is satisfied that the person concerned has engaged in market abuse. It therefore seems to me obvious that the intention is that the court's jurisdiction to impose a penalty under section 129 FSMA is not engaged at all unless the court is satisfied that the person concerned has engaged in market abuse.

*Court proceedings as opposed to regulatory proceedings*

81. The first point taken by Dr. Peglow was that it was "ultra vires and an abuse of process" for the FCA to seek to pursue its application to the court for financial penalties to be imposed under section 129, either at all, or in any event without having given a warning notice and decision notice as it would have been required to do had it been pursuing the regulatory route under section 123 et seq. FSMA.

82. I reject that argument. Section 129 FSMA both confers the power upon the court to impose a penalty for market abuse and enables the FCA to request its exercise. On the plain wording of the statute, that power and the decision of the FCA to ask the court to exercise it, are constrained only by the terms of section 129 itself and are in no way subject to the entirely separate requirements for the exercise by the FCA of its own power to impose penalties for market abuse under section 123. Specifically, the requirements under section 126 for a warning notice to be given and under section 127 for a decision notice to be given are, in terms, referable only to section 123, and not to any application made to the court under section 129.

83. Dr. Peglow also submitted that this interpretation of FSMA would be inconsistent with the Market Abuse Directive. He contended that the provisions of Articles 11 and 14 of the Directive meant that there had to be only one body authorised to impose penalties for market abuse in a member state. I disagree. The Market Abuse Directive is a minimum harmonisation directive and there is nothing in Article 11 or 14 that prevents the UK from empowering the court to impose penalties for market abuse in addition to the FCA. Quite the reverse: Article 11 requires there to be a single administrative authority in each member state to ensure that the provisions of the Directive are complied with, but that is expressly said to be "Without prejudice to the competences of the judicial authorities…".

84. Dr. Peglow further submitted that it would be inconsistent with the Defendants' rights under Articles 6 (Right to a fair trial) and 7 (No punishment without law) of the European Convention on Human Rights (ECHR) for there to be two possible routes under FSMA by which the FCA might seek to impose or request the imposition of a financial penalty. He said that this breached the principle of 'certainty'. He also submitted – at least in opening - that by applying to the court under section 129, the FCA had deprived the Defendants of various benefits that would have been available to them had there been a determination by the FCA under section 123, subject to review by the Upper Tribunal under section 127; and that in any event the court was an inappropriate forum in which to determine whether particular behaviour amounted to market abuse in comparison to the Upper Tribunal which was (so he submitted), "a specialist tribunal with market professionals as lay judges".

85. Again, I do not agree. Whilst it has been said that legal certainty is a function of the rule of law that Article 6 ECHR embodies (see e.g. per Laws LJ in International Transport Roth GmbH v Home Secretary [2003] QB 728 at paragraph 104), in this context the requirement for legal certainty must relate to the question whether, at the time of commission, it can be ascertained whether a particular act is, or is not, prohibited. But I cannot see that Article 6 can require that a person should know, prior to his commission of a prohibited act, which of two alternative procedures will be used to determine his resultant civil rights and obligations or any resultant criminal charge against him. As Mr. Herberg pointed out, for example, statute can provide that a particular criminal offence is triable before a magistrates court or in the Crown court.

86. I also do not accept that Article 6 is contravened by the procedure under section 129 in this case. So far as the deprivation of benefits is concerned, in his opening, Dr. Peglow drew attention to the fact that, as envisaged by sections 134-136 FSMA, the Lord Chancellor has made regulations establishing a legal assistance scheme in connection with proceedings before the Upper Tribunal (The Financial Services and Markets Tribunal (Legal Assistance) Regulations 2001 (SI 2001/3632)), but there is no such scheme providing assistance to parties faced with court proceedings under section 129. In the instant case, however, the point does not assist Dr. Peglow's client, because legal assistance under the tribunal scheme would not have been available to DVI (because it is only available to individuals, not companies (regulation 8), and because DVI could not pass the financial eligibility test (regulation 10)). Although the first of these points would not have debarred the Traders from applying for assistance, I note that they engaged solicitors and counsel, and instructed expert witnesses in relation to these court proceedings until shortly before trial. Moreover, in the communication which I received from their solicitors informing me that they did not wish to attend the trial, no mention was made of any difficulty in obtaining legal assistance. I therefore have no basis upon which to conclude that legal assistance is unavailable to the Traders, or that its cost had any bearing upon their decision not to attend this hearing to contest the case against them.

87. The only other suggested shortcomings of this court and its procedure that Dr. Peglow could identify were the absence of the warning notice process under which a party might make representations prior to a decision of the FCA; a suggestion that relevant documents might be more readily available in the regulatory proceedings; and the lack of specialist market knowledge in the court. But the Civil Procedure Rules which apply to these proceedings are designed to ensure that all relevant documents are disclosed between the parties and that each party has a proper opportunity to present its case to the court as the decision-maker; and the lack of specialist market knowledge in the judge is addressed, in this as in all other cases, by the well-established facility for receipt of expert evidence.

88. Of greater weight was a point raised by both counsel based upon a potential difference between the defences open to a defendant under section 123 as opposed to section 129. As indicated above, section 123(1) FSMA provides, so far as relevant, that the FCA may impose a penalty upon a person if it is satisfied that he has engaged in market abuse, but section 123(2) then goes on to provide:

> "(2) But the Authority may not impose a penalty on a person if, having considered any representations made to it in response to a warning notice, there are reasonable grounds for it to be satisfied that -
>
> (a) he believed, on reasonable grounds, that his behaviour did not [constitute engaging in market abuse], or
>
> (b) he took all reasonable precautions and exercised all due diligence to avoid behaving in a way which [constituted engaging in market abuse]."

The issue arises because section 129 contains no such express restriction on the power of the court to impose a penalty in a case of market abuse.

89. At first glance it is indeed odd that section 129 does not contain any express reference to a restriction such as contained within section 123(2). I cannot see any good reason why what amounts to a defence should be available to a person faced with the imposition of a penalty by the FCA under section 123, but would not be available to a person faced with an application to the court under section 129. Neither of the counsel appearing before me could suggest any such reason, and Mr. Herberg was quick to make it clear that the FCA accepted that in any deliberation whether to impose a penalty, I should consider the matter as if section 123(2) applied, *mutatis mutandis*. However, Mr. Herberg went on to submit, and I accept, that this result can be reached as a matter of interpretation of section 129 and not simply as a matter of concession by the FCA.

90. The court's power to act under section 129 is dependent first upon the existence of an application for an injunction under section 381 or for an order for restitution under section 383, and secondly upon a request being made of the court on that application by the FCA "to consider whether the circumstances are such that a penalty should be imposed". I have indicated in paragraph 80 above that I consider that it is implicit in section 129 that the court's jurisdiction to impose a penalty is only engaged if the court is satisfied that the person in question has engaged in market abuse, and section 129(2) then provides that, having been so satisfied, the court will only impose a penalty "if it considers it appropriate". It therefore appears that the basic elements of section 129 are similar to those in section 123(1). In my judgment it must also follow that the circumstances for the court to consider in deciding whether it is appropriate to impose a penalty must include the same considerations as would be relevant for the FCA under section 123(2) had the matter proceeded by the regulatory route.

91. I further note that if the court were considering an application under section 129 in conjunction with an application for a restitution order under section 383, the court would in any event be required to consider the same factors as appear in section 123(2) because they appear expressly in the same terms in section 383(3). It would therefore seem illogical for the court to be required to consider those factors as part of the application for a restitution order under section 383 but not in connection with the request for the imposition of a penalty under section 129.

92. Finally, it also seems to me that it might well be necessary for the purposes of section 3 of the Human Rights Act 1998 to read section 129 so as to avoid a situation in which the question of whether the same behaviour could result in a penalty would depend upon whether the FCA decided to proceed under section 123 or by application to the court under section 129. It might contravene Article 6 ECHR were it to be possible for the FCA to decide, after the relevant conduct had occurred, to deprive a defendant of the potential benefit of section 123(2) by applying to the court under section 129 rather than by proceeding under section 123.

93. Accordingly, in my judgment, section 129 FSMA should be read so that the court may not impose a penalty if the court is satisfied that the defendant believed, on reasonable grounds, that his behaviour did not constitute engaging in market abuse, or that he took all reasonable precautions and exercised all due diligence to avoid behaving in a way which constituted engaging in market abuse.

94. As to who bears the burden in this regard, it is clear, and was common ground between the FCA and DVI, that section 123(2) operates as a defence, and that the burden falls upon the person whose conduct is under consideration to satisfy the FCA of the requirements of section 123(2): see e.g. Swift Trade [2013] Lloyd's LR (FC) 381 at paragraph 45. The same must also be the case under section 383(3). That being so, I see no logical reason why the position should be any different under section 129. It is for the defendant to an application under section 129 to satisfy the court of the matters that I have set out in paragraph 93 above.

95. The final point raised in this context by Dr. Peglow was a concern that the amount of the penalty capable of being imposed by the court under section 129 is unlimited and seemingly at large, whereas the FSA had promulgated a detailed framework for determining regulatory penalties including the determination of penalties for market abuse. Again, I do not think that there is anything in this point. The statutory wording in both section 123 and 129 is identical, giving the court or the FCA power to impose a penalty "of such amount as it considers appropriate". Even in the case of regulatory proceedings commenced by a determination under section 123, the Upper Tribunal has indicated that it is not necessarily bound to apply the approach adopted by the FCA: see Tariq Carrimjee v FCA [2015] UKUT 0079 (TCC) at paragraph 15. However, whilst acknowledging that the court is not fettered in the exercise of its discretion by the FSA's penalty framework that was in existence at the time of the events in issue in this case, the FCA has nevertheless urged me to adopt an approach that is consistent with that framework and has expressly stated that it does not wish me to depart from it. It seems to me that these points must satisfy Dr. Peglow's concerns. I do not see that his client is in any different position before this court than it would have been before the Upper Tribunal as regards the determination of any penalty.

96. In conclusion on these points, I consider that there is no material difference and hence no unfairness to a defendant faced with an application to the court under section 129, rather than a decision by the FSA or FCA to impose a regulatory penalty under section 123.

*No penalty without an injunction?*

97. The next argument raised by Dr. Peglow was that the power of the court to impose a penalty under section 129 was only exercisable in a case where the court had actually granted an injunction under section 381 (or made a restitution order under section 383).

98. I reject that argument. On the plain wording of the section 129, the power of the court to impose a penalty arises simply where the FCA makes a request to that effect, "on an application to the court under section 381 or 383". Section 129 does not say, as it could so easily have done had that been the legislative intention, that the power to impose a penalty only arises, "if the court grants an injunction on an application under section 381, or makes a restitution order on an application under section 383".

99. I also consider that there are compelling practical reasons why legislature must have intended that the court's power to impose penalties should be exercisable in the same proceedings in which an injunction or restitution order is sought, irrespective of whether an injunction or restitution order is actually made in those proceedings. That interpretation of the statute has the obvious benefit of ensuring that the parties are only engaged in one set of proceedings in which all relevant factual and legal issues can be determined, in which the possible interplay between penalties, injunctions and restitution orders can be considered, and in which all relevant orders can be made.

100. The alternative interpretation would have the absurd result that in a case in which the court was entirely satisfied, having heard the evidence, that the defendant had engaged in market abuse, but decided that it was nevertheless not appropriate to grant a final injunction (for example because it was satisfied that there was no risk of repetition, or because the defendant was prepared to offer suitable undertakings to the court concerning its future behaviour), the court would be disabled from imposing a penalty in respect of the misconduct that it had found proved. Quite apart from the obviously perverse incentive that this would give to the court as regards the grant of an injunction and the disincentive to accept undertakings, this result would mean that the FCA would then have to go through a separate and duplicative regulatory process under section 123 et seq., with a possible review by the Upper Tribunal, at further expense and delay for the parties, before any penalty could be imposed. Alternatively, in order to avoid this possibility, in any case in which the FCA sought an injunction or a restitution order from the court, the FCA would be obliged to activate the regulatory penalty regime in parallel to the court proceedings. This would raise additional problems of attempting to co-ordinate judicial and regulatory proceedings over the same factual issues between the same parties at the same time.

101. Dr. Peglow also objected that if the section was construed so that a penalty could be imposed irrespective of whether an injunction was actually granted, the FCA would be able, if it wished, to make an application for an injunction as a matter of course or without any real basis for doing so, and then use that to ask the court to impose a penalty, thereby by-passing the regulatory route for the imposition of a penalty. Quite apart from the fact that I cannot see why the FCA might wish to use the court process in the way that Dr. Peglow postulated, if there was any

suggestion that the application for an injunction had been made as a device and was without foundation, the CPR contains ample powers for the court to strike it out or dispose of it summarily. If that occurred, the court would then be able to consider whether it had the jurisdiction to continue to entertain the application for a financial penalty, and whether it would in any event be appropriate for it to do so as a matter of case management rather than dismiss the proceedings altogether and require the FCA to commence the regulatory process for the imposition of a penalty.

102. I readily accept that there may be intermediate situations between the two extremes that I have identified (i.e. where the application for an injunction fails at trial on the one hand, and where it is struck out or dismissed summarily at the start of proceedings on the other). The parties might, for example, agree to undertakings being given, or the FCA might withdraw its claim for an injunction after disclosure and the exchange of witness statements. The court would then have to consider the precise meaning of the phrase "on an application" in section 129, and would doubtless wish to consider whether to proceed to trial in any event as a matter of case management. However, in my judgment that possibility does not negate the points that I have made above, and since such a situation does not arise in the instant case, I do not propose to express any concluded view upon it.

103. Dr. Peglow further submitted, in the alternative, that section 129 should be construed so that the court's power to impose a penalty would only arise in the event of breach of an injunction or restitution order that the court had granted under section 381 or 383. That is an even more extreme argument than the one that I have just rejected. There is no basis for it in the clear wording of section 129 which refers to the power of the court arising "on an application" under section 381 or section 383, not after it has been disposed of. Further, the plain intent of the statute is to enable the court to penalise market abuse itself, rather than just penalise a party for non-compliance with orders of the court made in respect of market abuse. The court already has a well-established range of powers by which to enforce its orders and if necessary to punish a breach of them as a contempt: it does not need an additional power to do so under FSMA.

The mental element and attribution in market abuse cases

104. There was a fundamental difference of view between the FCA and DVI as to the mental element necessary to establish that a person - and in particular a corporate person - had engaged in market abuse.

105. The FCA contended that whether or not market abuse had occurred was a purely objective question requiring no mental element, and that the question of whether the activities of the Traders in this case could be attributed to either of the corporate defendants was simply answered by reference to principles of agency. Mr. Herberg contended that the state of mind of a defendant would only be relevant to the application, by analogy under section 129, of the "reasonable belief" defence in section 123(2) FSMA, and in assessing the culpability of the defendant's conduct for the purposes of the imposition of an appropriate penalty.

106. In contrast, Dr. Peglow contended that it was inherent in the statutory reference to "behaviour" in the definition of market abuse that the court should be concerned

with the state of mind of the actor. He submitted that in the case of a corporate defendant, any relevant acts should not be attributed to the company unless they were the acts of the "directing mind and will" of the company, or were carried out at that individual's direction or with his specific knowledge or consent. He made a similar submission in relation to any relevant knowledge or state of mind.

107. The starting point of this analysis is the question of whether the definition of behaviour amounting to market abuse in sections 118(1) and (5) requires a mental element on the part of the person or persons alleged to have engaged in market abuse at all. In my judgment it does not. The word 'behaviour' does not, in my view, connote any requirement to investigate the state of mind of the person in question – a conclusion that is reinforced by the terms of section 130A(3) that simply provides that "behaviour" includes "any action or inaction". Moreover, section 118(5) refers only to the "effecting of transactions or orders to trade" which seems also to be referable only to objective conduct. Further, the reference in section 118(5) to behaviour that is "likely to give a false or misleading impression" focuses attention on the likely perception of other parties, not the state of mind of the person whose behaviour is under consideration.

108. This was, moreover, the conclusion reached by the Court of Appeal in relation to the meaning of a previous version of section 118 in relation to a share-ramping scheme in Winterflood Securities Limited v FSA [2010] EWCA Civ 423. At paragraph 25, Moore-Bick LJ said,

> "Section 118 defines market abuse in terms of behaviour which is either likely to have a certain effect (the creation of a false or misleading impression) or which would be regarded by a regular user as likely to have a certain effect (distortion of the market). As such the test is wholly objective; it does not require any particular state of mind on the part of the person whose behaviour is under consideration."

I see no basis upon which to differ from this approach on the current wording of section 118, and I am confirmed in that view by dicta to similar effect by the Upper Tribunal in Swift Trade [2013] Lloyd's LR (FC) 381 at paragraph 43.

109. The question of whether a corporate person has engaged in offending behaviour for the purposes of section 118 must be answered by a consideration of the law in relation to attribution and companies. The leading modern case in this field is the decision of the Privy Council in Meridian Global Funds Management v Securities Commission [1995] 2 AC 500, and the issue has received renewed attention very recently by the Supreme Court in Jetivia SA v Bilta Limited [2015] UKSC 23.

110. In Meridian at pages 506B-507F, Lord Hoffmann explained the need for rules of attribution when considering the potential liability of a company:

> " Any proposition about a company necessarily involves a reference to a set of rules. A company exists because there is a rule (usually in a statute) which says that a *persona ficta* shall be deemed to exist and to have certain of the

powers, rights and duties of a natural person. But there would be little sense in deeming such a *persona ficta* to exist unless there were also rules to tell one what acts were to count as acts of the company. It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called "the rules of attribution". ”

The company's primary rules of attribution will generally be found in its constitution, typically the articles of association, and will say things such as "for the purpose of appointing members of the board, a majority vote of the shareholders shall be a decision of the company" or "the decisions of the board in managing the company's business shall be the decisions of the company". There are also primary rules of attribution which are not expressly stated in the articles but implied by company law, such as "the unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company": see Multinational Gas and Petrochemical Co. v. Multinational Gas and Petrochemical Services Ltd. [1983] Ch. 258.

These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company. And having done so, it will also make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort.

….

The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer. This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability. For example, a rule may be stated in

> language primarily applicable to a natural person and require some act or state of mind on the part of that person "himself", as opposed to his servants or agents. This is generally true of rules of the criminal law, which ordinarily impose liability only for the *actus reus* and *mens rea* of the defendant himself. How is such a rule to be applied to a company?
>
> One possibility is that the court may come to the conclusion that the rule was not intended to apply to companies at all; for example, a law which created an offence for which the only penalty was community service. Another possibility is that the court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, i.e. if the act giving rise to liability was specifically authorised by a resolution of the board or a unanimous agreement of the shareholders. But there will be many cases in which neither of these solutions is satisfactory; in which the court considers that the law *was* intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was <u>for this purpose</u> intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy."

111. In <u>Jetivia</u>, Lords Hodge and Toulson (with whom Lords Neuberger, Clarke and Carnwath agreed) endorsed this approach, summarising it in this way at paragraphs 187-190:

> "187. A company can incur direct liability in at least three circumstances. First, the provisions of company legislation, a company's constitution … and the non-statutory rules of company law provide that certain acts of its board of directors are treated as the acts of the company….
>
> 188. Secondly, a company can also incur direct liability through the transactions of agents within the scope of their agency (actual or apparent). Thus, when an agent commits his or her company to a contract, the company incurs direct liabilities (and acquires rights) as a party to the contract under ordinary principles of the law of agency.

> 189. Thirdly, a statute or subordinate legislation or a regulatory body's code or rules of the common law or equity may impose liabilities or confer rights on a company….
>
> 190. In Meridian ... Lord Hoffmann … pointed out that it is a necessary part of corporate personality that there should be rules by which acts are attributed to the company. First, he identified the "primary rules of attribution" from company law, which is the first of the direct forms of liability which we describe above. He then referred to the general principles of agency and vicarious liability which in most circumstances determine a company's rights and obligations …. He recognised that there was a third category where, exceptionally, a rule of law expressly or impliedly excludes attribution on the basis of those general principles. For this third category, which is relevant to the third form of direct liability (above), he stated: "the court must fashion a special rule of attribution for the particular substantive rule".

112. Applying these principles to the instant case, and having regard to the fact that the question of whether a person has engaged in behaviour amounting to market abuse under section 118 FSMA is an objective test, it seems very clear that in the case of a company, this question can be answered simply by reference to the general rules of attribution which are derived from the law of agency. There is simply no need to anthropomorphise the corporate person by introducing concepts such as the "governing mind and will" of the company.

113. I would add that this conclusion makes sense in the context of the nature of modern trading on regulated markets. Frequently, trading is carried out at high volume and high speed by numerous employees of companies using complex computerised systems. It would be contrary to the policy of the market abuse regime under FSMA were the companies involved to be able to escape liability for the actions of their employees by contending that the senior directors or executives who might, for other purposes, be said to constitute their "governing mind and will" did not actually direct the trading in question and had no detailed knowledge of what was being done on the electronic trading platforms by those employees (or even by computer programs designed or operated by those employees). Quite apart from the obvious difficulties of proving such direction or knowledge, such an approach would put a premium on the management of a company paying as little attention as possible to what its traders or automated trading systems were doing.

114. Nor, I should add, does the policy of FSMA indicate that liability for market abuse should be capable of being avoided by the simple expedient of the company engaging traders to transact business on its behalf as independent contractors rather than as employees. The precise nature of the relationship between the company and the trader, whether it be as employee, independent contractor or joint venturer, should make no difference. What counts is the whether the behaviour in question occurs on behalf of the company.

115. Applying that conclusion to the facts of the instant case, the result is very clear. As indicated above, although the Traders were not employees of DVI or Mineworld, they were each authorised by those companies to place orders on their behalf through sub-accounts in the name of DVI or Mineworld established pursuant to contractual arrangements between those companies on the one hand and the DMA service provider on the other. When an order placed on the market was executed, the resultant CFD contract was between DVI or Mineworld on the one hand and the DMA service provider on the other. In every case it was DVI and Mineworld's credit with the DMA provider that was utilised, and it was DVI and Mineworld that, as against the DMA provider, were entitled to any profits generated and which were liable for any losses sustained by the trading. I can therefore see no escape from the conclusion that the behaviour of the Traders was, for the purpose of section 118, also the behaviour of DVI and Mineworld.

116. Having concluded that the question of whether a company has engaged in market abuse within the meaning of section 118 FSMA is an objective question to be answered by reference to the rules of agency, I nonetheless accept that a different approach could apply to other questions that might arise under the statutory scheme. Take, for example, the statutory defence to the imposition of a penalty under section 123(2) and its equivalent under section 129. In that context, the statute expressly requires a defendant's state of mind to be considered. It is therefore necessary to consider what rule of attribution is appropriate for that purpose in the case of a corporate defendant. In that regard, it would seem appropriate that the FCA or the court should first examine the belief and actions of the agent. If the agent whose actions resulted in the corporate principal being found to have engaged in market abuse had the necessary state of mind or had taken the appropriate steps to establish the defence under section 123(2), there would seem to be no good reason not to permit the company to rely upon that.

117. I can also see that the wording and policy of the statute may permit, for this purpose, the state of mind and actions of other natural persons to count as the state of mind and actions of the company. It may well be, for example, that a company could establish the defence under section 123(2) by showing that its directors or senior executives, who could be called its 'directing mind and will', believed on reasonable grounds that the behaviour of the agent in question was not unlawful, or that the company had, through other actors, taken all reasonable steps and exercised all due diligence to prevent the agents behaving in that way. Likewise, when considering the likelihood of repetition of the misconduct for the purposes of an application for an injunction, or the degree of culpability of a corporate defendant for the purposes of determining a suitable level of penalty, it may well be appropriate to have regard to the steps taken by the company through other means, and the state of mind of persons in senior management positions who were ultimately responsible for those activities within the company, rather than simply looking to the behaviour of the agent in question.

118. Whilst not conceding that the Traders had engaged in market abuse, Dr. Peglow naturally stressed this line of argument in seeking to distance DVI from their activities in any event. For his part, Mr. Herberg also appeared to accept that this was a line of argument open to DVI, and indeed he devoted some time and effort to seeking to establish that Mr. Klein and Mr. Dietz, as the senior management of

DVI, either turned a blind eye to what the Traders were doing or were reckless in the sense of being indifferent to the possibility that the Traders might have been engaging in market abuse. What Mr. Herberg stressed was that the defence under section 123(2) could not be made out by senior management simply asserting that they were unaware of the behaviour in question and had no reason to believe that it was taking place. He submitted that what must be established is a positive reasonable belief resulting from conscious consideration, or positive steps taken to prevent the behaviour in question. I shall consider that submission further below, but for present purposes I conclude that FSMA does permit a company faced with a claim that its agents have engaged in market abuse to seek to avoid or mitigate the consequences of that behaviour by adducing evidence of the belief of other natural persons and/or of relevant steps taken by other persons on behalf of the company.

The standard of proof

119. At the outset of the case, the parties were not in agreement as to the relevant standard of proof to be applied to the various factual issues arising in the case. Dr. Peglow contended that the relevant standard was the criminal standard – namely that I had to be satisfied that the facts had been proved beyond a reasonable doubt. For the FCA, Mr. Herberg contended that the relevant standard to be applied was the civil standard of proof on the balance of probabilities. He drew my attention to the well-known cases of Re H [1996] AC 563 and Re B [2009] 1 AC 11, and the detailed consideration of the standard of proof in the context of a market abuse case by the Upper Tribunal in Hannam v FCA [2014] UKUT 0233 (TCC) at paragraphs 147-192, which he urged me to follow.

120. In Re B, the House of Lords reaffirmed the earlier decision in Re H that in cases under the Children Act 1989 involving allegations of sexual abuse, the civil standard of proof applied. Lord Hoffmann considered the general approach to the question of the standard of proof in civil cases. He said,

> "2. If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened.
>
> ….
>
> 4. The question which appears to have given rise to some practical difficulty is the standard of proof in such cases, that is to say, the degree of persuasion which the tribunal must feel before it decides that the fact in issue did

> happen. In re H makes it clear that it must apply the ordinary civil standard of proof. It must be satisfied that the occurrence of the fact in question was more likely than not.
>
> 5. Some confusion has however been caused by dicta which suggest that the standard of proof may vary with the gravity of the misconduct alleged or even the seriousness of the consequences for the person concerned. The cases in which such statements have been made fall into three categories. First, there are cases in which the court has for one purpose classified the proceedings as civil (for example, for the purposes of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) but nevertheless thought that, because of the serious consequences of the proceedings, the criminal standard of proof or something like it should be applied. Secondly, there are cases in which 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. Thirdly, there are cases in which judges are simply confused about whether they are talking about the standard of proof or about the role of inherent probabilities in deciding whether the burden of proving a fact to a given standard has been discharged."

121. Lord Hoffmann then considered a number of cases in the various categories that he had identified, and continued,

> "13. My Lords… I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not. I do not intend to disapprove any of the cases in what I have called the first category, but I agree with the observation of Lord Steyn in [R (McCann) v Crown Court at Manchester [2003] 1 AC 787 at p 812], that clarity would be greatly enhanced if the courts said simply that although the proceedings were civil, the nature of the particular issue involved made it appropriate to apply the criminal standard.
>
> 14. Finally, I should say something about the notion of inherent probabilities. Lord Nicholls said, [in Re H [1996] AC 563 at 586], that -
>
>> "the court will have in mind as a factor, *to whatever extent is appropriate in the particular case* , that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."

> 15. I wish to lay some stress upon the words I have italicised. Lord Nicholls was not laying down any rule of law. 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. If a child alleges sexual abuse by a parent, it is common sense to start with the assumption that most parents do not abuse their children. But this assumption may be swiftly dispelled by other compelling evidence of the relationship between parent and child or parent and other children. 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. If, for example, it is clear that a child was assaulted by one or other of two people, it would make no sense to start one's reasoning by saying that assaulting children is a serious matter and therefore neither of them is likely to have done so. The fact is that one of them did and the question for the tribunal is simply whether it is more probable that one rather than the other was the perpetrator."

122. In Hannam the Upper Tribunal (chaired by Mr. Justice Warren) was faced with a market abuse case involving allegations of disclosure of inside information. It was submitted on behalf of Mr. Hannam that the conduct alleged against him was tantamount to criminal conduct, and the consequences (including the financial penalty sought) were so serious that the case fell within Lord Hoffmann's first exceptional category of civil cases in which the application of the criminal standard of proof was appropriate.

123. The Upper Tribunal rejected this submission after an extensive consideration of the relevant authorities. The Upper Tribunal noted, at paragraph 153, that the approach that allowed for a "sliding scale" in the civil standard of proof which varied according to the seriousness of what had to be proved had been exposed as a heresy in Re B; it considered a number of the civil cases in which, exceptionally, the court had been prepared to apply the criminal standard of proof; and it reviewed a number of earlier Tribunal decisions.

124. The Upper Tribunal concluded,

> "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 (*e.g.* 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) … 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."

125. I find this reasoning in Hannam compelling. All that I would add is that I think that the last sentence of paragraph 191 of the judgment ought to have referred to the "inherent improbability of the relevant event" rather than the "inherent probability". But the sense of the sentence is clear.

126. In argument, Dr. Peglow sought to distinguish Hannam on the basis that the FCA was not, in that case, making allegations of conduct that amounted to a criminal offence because it had not alleged that Mr. Hannam had knowledge that the information which he had disclosed was inside information, or that he expected the recipient of the information to deal on the basis of it: see paragraphs 151-152 of the judgment. That can be contrasted with the allegations of deliberate conduct made against the Traders and Mineworld in this case, and the allegation that DVI "turned a blind eye" or was reckless as to the activities of the Traders. But I do not think that this can be valid distinction. As the Upper Tribunal observed, at paragraph 185,

> "…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….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."

127. After some further argument and by the time the case came to be closed, Dr. Peglow and the FCA had reached a consensus that the civil standard was to be applied, but "taking into account inherent improbabilities". In essence, therefore, they ultimately agreed to adopt the position reached in Hannam. I concur, and shall therefore apply the civil standard of proof on the balance of probabilities, having regard, as appropriate, to the inherent improbabilities of what is alleged to have occurred.

Did the Defendants engage in market abuse?

128. I now turn to consider the central question in this case – namely whether the Defendants engaged in market abuse. Before analysing the evidence, I must first refer to the requirements of the 2003 Implementing Directive and its implementation in English law.

129. Article 4 of the 2003 Implementing Directive is entitled, "Manipulative behaviour related to false or misleading signals and to price securing" and requires mandatory guidance to be given to those considering whether market abuse has occurred in any particular case. Article 4 provides,

> "For the purposes of applying point 2(a) of Article 1 of Directive 2003/6/EC, and without prejudice to the examples set out in the second paragraph of point 2 thereof, Member States shall ensure that the following non-exhaustive signals, which should not necessarily be deemed in themselves to constitute market manipulation, are taken into account when transactions or orders to trade are examined by market participants and competent authorities:
>
> (a) the extent to which orders to trade given or transactions undertaken represent a significant proportion of the daily volume of transactions in the relevant financial instrument on the regulated market concerned, in particular when these activities lead to a significant change in the price of the financial instrument;
>
> (b) the extent to which orders to trade given or transactions undertaken by persons with a significant buying or selling position in a financial instrument lead to significant changes in the price of the financial instrument or related derivative or underlying asset admitted to trading on a regulated market;

> (c) whether transactions undertaken lead to no change in beneficial ownership of a financial instrument admitted to trading on a regulated market;
>
> (d) the extent to which orders to trade given or transactions undertaken include position reversals in a short period and represent a significant proportion of the daily volume of transactions in the relevant financial instrument on the regulated market concerned, and might be associated with significant changes in the price of a financial instrument admitted to trading on a regulated market;
>
> (e) the extent to which orders to trade given or transactions undertaken are concentrated within a short time span in the trading session and lead to a price change which is subsequently reversed;
>
> (f) the extent to which orders to trade given change the representation of the best bid or offer prices in a financial instrument admitted to trading on a regulated market, or more generally the representation of the order book available to market participants, and are removed before they are executed;
>
> (g) the extent to which orders to trade are given or transactions are undertaken at or around a specific time when reference prices, settlement prices and valuations are calculated and lead to price changes which have an effect on such prices and valuations."

130. It is plain that this court is neither the 'competent authority' referred to in Article 4 (since that is the FCA as the authority designated as such pursuant to Article 11 of the Market Abuse Directive) nor a market participant. That means that the UK is not required to ensure that this court takes into account the guidance in Article 4. However, Article 4 is implemented in the UK by section 119 FSMA which provides that,

> "(1) The Authority must prepare and issue a code containing such provisions as the Authority considers will give appropriate guidance to those determining whether or not behaviour amounts to market abuse."
>
> (2) The code may among other things specify—
>
> (a) descriptions of behaviour that, in the opinion of the Authority, amount to market abuse;
>
> (b) descriptions of behaviour that, in the opinion of the Authority, do not amount to market abuse;

> (c) factors that, in the opinion of the Authority, are to be taken into account in determining whether or not behaviour amounts to market abuse."

I see no reason to doubt that this court could fall within the wider and neutral description of "those determining whether or not behaviour amounts to market abuse" at whom the FCA's Code is aimed.

131. Moreover, the effect of the Code is described in section 122 FSMA:

> "(1) If a person behaves in a way which is described (in the code in force under section 119 at the time of the behaviour) as behaviour that, in the Authority's opinion, does not amount to market abuse that behaviour of his is to be taken, for the purposes of this Act, as not amounting to market abuse.
>
> (2) Otherwise, the code in force under section 119 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."

The court would plainly be required to have regard to the Code if it were contended by a defendant that his behaviour was of a type that the FCA had indicated in the Code did <u>not</u> amount to market abuse, and hence that he had a defence under section 122(1). In all other cases, section 122(2) appears to give "those determining whether behaviour amounts to market abuse" the ability, but not the obligation, to rely upon the Code.

132. For my part, I see no reason why this court should not, of its own motion, take into account the matters set out in Article 4 of the Market Abuse Directive and in the Code when determining whether behaviour constitutes market abuse. Indeed, it would be positively desirable to do so in order to ensure consistency between the FCA and the court in the application of the market abuse regime.

133. The Code promulgated by the FSA under section 119 FSMA is to be found in the Code of Market Conduct (MAR) section of the FSA Handbook. At the relevant time, the terms of Article 4 of the 2003 Implementing Directive were repeated in MAR 1.6.9, and the Code included the following additional provisions:

> "MAR1.2.3 Section 118(1)(a) of the Act does not require the person engaging in the behaviour in question to have intended to commit market abuse.
>
> MAR 1.2.4 Statements in this chapter to the effect that behaviour will amount to market abuse assume that the test in section 118(1)(a) of the Act has also been met.
>
> MAR 1.6.2 The following behaviours are, in the opinion of the FSA, market abuse (manipulating transactions) of a type involving false or misleading impressions:

(1) buying or selling qualifying investment at the close of the market with the effect of misleading investors who act on the basis of closing prices, other than for legitimate reasons;

(2) wash trades - that is, a sale or purchase of a qualifying investment where there is no change in beneficial interest or market risk, or where the transfer of beneficial interest or market risk is only between parties acting in concert or collusion, other than for legitimate reasons;

(3) painting the tape - that is, entering into a series of transactions that are shown on a public display for the purpose of giving the impression of activity or price movement in a qualifying investment; and

(4) entering orders into an electronic trading system, at prices which are higher than the previous bid or lower than the previous offer, and withdrawing them before they are executed, in order to give a misleading impression that there is demand for or supply of the qualifying investment at that price."

134. I have already outlined the background facts to the trading that took place by the Traders on behalf of DVI in 2010 and by Messrs. Banya and Pornye on behalf of DVPte and Mineworld in 2011. The detailed evidence as to that trading was provided by the evidence of Mr. John Norris ("Mr. Norris") who had experience in the financial services industry as a fund manager and proprietary trader before joining the FSA in 1999, where he joined the Markets Division in 2005 and was promoted to the role of Technical Specialist in the Market Monitoring Department in 2009. In that role he had conduct of the FSA's investigation into the trading of the defendants. Mr. Norris' evidence contained an account of the background and an extensive presentation and analysis of the data relating to the defendants' trading that had been collected by the FSA from the trading records of Goldman Sachs and SunGard. Further market data was also gathered from RealTick, the LSE and the MTFs upon which trading occurred. As might be expected, Mr. Norris gave his evidence in an accurate, neutral and considered manner. Whilst Dr. Peglow sought to challenge some of the inferences and conclusions that Mr. Norris drew from his analysis, the underlying raw data was not challenged and I accept its accuracy.

135. From the records of trading throughout the entire period, Mr. Norris applied a filter to select only those periods of trading that included the placing of 75 or more orders. That filter was adopted because the majority of trading involved episodes of 75 or more orders being placed, and most profits were generated during such periods of trading. Each of those periods was referred to as an "incident". The application of this filter left 766 incidents relating to trading on behalf of DVI in 2010, which amounted in total to 83.9% of the total orders placed and which accounted for 96.9% of the total gross profits generated during this period. So far as trading on behalf of Mineworld and DVPte in 2011 is concerned, the

application of this filter left 1,096 incidents representing 83.1% of the total orders placed and accounting for 97.3% of the gross profits generated.

136. Mr. Norris then performed a random sampling exercise to identify 25 of the incidents (10 for DVI and 15 for DVPte/Mineworld), to which two selected further incidents (one from December 2010 and one from March 2011) were added, giving a total of 27 incidents that were subjected to further analysis. The validity of the methodology used to select the 27 sample incidents was confirmed by the statistical experts instructed by the FCA (Professor Oliver Linton) and by Mineworld and the Traders (Dr. Nigel Young). They agreed in their joint report that the methodology was reasonable and that it would allow inferences to be drawn as to the characteristics of the trading that occurred over the wider population of incidents from which the sample had been drawn.

137. Professor Linton, who is a Professor of Political Economy and a Fellow of Trinity College, Cambridge (with a history of distinguished academic positions at the London School of Economics, Berkeley, Yale and Oxford before his current post) also gave evidence that as a matter of statistics, he could be 95% confident that more than 90% of the incidents of trading during 2010 and 2011 were of the same nature, and 75% confident that 95% of the incidents were of the same nature.

138. According to Mr. Norris, his analysis of the 27 sample incidents demonstrated a number of consistent features of the Traders' trading:

i) The trading took place in short periods (the longest being 38 minutes and the average being 12 minutes) concentrating on a particular stock.

ii) In each incident there was a "saw tooth" pattern caused by the successive creation of large cumulative net order positions on opposite sides of the order book (e.g. the creation of a large net buy order position followed by the creation of a large net sell order position). The number of reversals varied according to the length of the incident, so that there might only be one reversal in a period of 5-7 minutes of trading, but 11 reversals over a longer period of, for example, 22 or 23 minutes.

iii) The share price movement correlated with the saw-tooth pattern of order entry in almost every case.

iv) A very high percentage of orders (by reference to the number of shares traded) were executed on the opposite side to the cumulative net order position. The percentage ranged from 73% to 97%, but averaged about 88%.

v) The net share position tended to move in the opposite direction to the cumulative net order position (e.g. when the cumulative net order position was to sell, the net share position would be increased by the purchase of more shares).

vi) There was a much higher cancellation rate (calculated by number of shares) for large orders than for small orders. On average, the ratio of

large orders executed to those cancelled was about 1:8, whereas the ratio of small orders executed to those cancelled was about 3:1.

Mr. Norris produced a table setting out the detail of his analysis of the 27 sample incidents, and a number of graphs and charts illustrating the points made above. I attach the table that he produced as Annex 1 to this judgment.

139. In cross-examination of Mr. Norris, Dr. Peglow took minor points concerning some of the detail of Mr. Norris' analysis, but in my judgment he did not materially undermine it. Moreover, although Dr. Peglow sought to question in closing whether I could be satisfied that the 27 sample incidents were representative of the entirety of the Defendants' trading over the period or provided any support for Mr. Norris' analysis, for my part I accept the evidence of the statistical experts that it was. That conclusion is also supported by the results of further analysis by Mr. Norris of incidents with fewer than 75 orders. He concluded that these incidents showed less adherence to the characteristics of trading identified above, but that the pattern of trading remained largely consistent throughout.

140. I also note that since it had been the Traders' own pleaded case and evidence that they were using the same computer algorithm to generate trading signals throughout 2010 and 2011, one would naturally expect that the use of such an algorithm would produce consistent trading patterns. In my judgment it would be more surprising if the samples selected were not representative of the trading undertaken by the Traders over the relevant period.

141. Mr. Norris also analysed in greater detail four selected examples of trading of between 13 and 38 minutes' duration. Two of these were on behalf of DVI in December 2010 and two on behalf of DVPte and Mineworld in February and March 2011.

142. The first of these examples related to trading by Mr. Brad on behalf of DVI in the shares of Aquarius Platinum Limited ("AQP") between 11:04:17 a.m. and 11:42:52 a.m. on 6 December 2010. This was one of the periods of trading that had been referred to the FCA as a suspicious transaction by BATS later that month. A shorter period of that trading between 11:19:01 a.m. and 11:26:22 a.m. was also analysed step-by-step by Mr. Norris and demonstrated visually to me by the FCA's independent expert witness on trading and markets, Dr. Michael Aitken.

143. Dr. Aitken has a PhD in security market microstructure and holds the Chair of ICT Strategy at Macquarie University in Sydney. He has had a long-standing practical interest in, and a distinguished academic career focussing on, the operation of international securities markets (including DMA trading, the use of algorithmic trading techniques and CFDs) and the design of market surveillance systems. Dr. Aitken has been involved with the design of the 'SMARTS' market surveillance system that is now used by many exchanges, brokers and regulators across the world, and he used a module of that SMARTS system to demonstrate the trading in AQP shares on 6 December 2010 on a computer screen. Critically, the analysis offered to me was able to show something that would not have been apparent to a market participant at the time, namely the identity of the particular

market participant placing the various buy and sell orders. In particular, he was able to identify the orders placed by the Traders. Dr. Aitken was an impressive and authoritative expert and his evidence and demonstration using the SMARTS system was illuminating and clear.

144. This period of trading in AQP shares exhibited the following features:

i) There was a close correlation between DVI's cumulative net order position and the share price. Specifically, DVI first entered significant cumulative net buy orders until just before 11:06 a.m. and then rapidly reversed that position, entering significant cumulative sell orders until just after 11:09 a.m., when it reversed that position again and began to enter significant cumulative buy orders. It repeated that cycle six times over the 38 minutes of trading. The mid-market share price tracked that order activity, resulting in a clear "saw-tooth" pattern of price movement. I attach to this judgment a graph marked "Chart 2" produced by Mr. Norris that shows that correlation.

ii) DVI placed almost three-quarters (73.95%) of its passive orders on the same side of the order book as its cumulative net position, and entered all but one of its aggressive orders (amounting to 94.36% by volume of shares traded) on the opposite side of the order book to its cumulative net position. That is a remarkable disparity between the placing of orders indicating one intention and actual trading in the opposite direction.

iii) During its period of active trading, DVI entered many more orders (by share volume) at or close to (within 0.5%) of the touch price than other market participants. Whilst DVI was active, the level of order (by share volume) of orders placed close to the touch increased about four-fold, and DVI was responsible, on average, for about 84% of the increased volume.

iv) DVI entered into 18 'wash-trades' during this period. 'Wash-trades' are executed trades where the order placed executes against another order placed by the same trader. Moreover, DVI entered into a further 35 trades on MTFs that would have resulted in wash-trades if they had been entered on the LSE rather than the MTF.

145. So far as the comparison of the orders entered by the traders as a proportion of all orders at or close to the touch is concerned, I should record that for the purpose of comparing the activity of the Traders with other market participants, whereas Mr. Norris' analysis took account of all background trades, Dr. Aitken originally used market data provided to him by the FCA which only started approximately 30 minutes before the Traders began trading on each occasion. Dr. Aitken's conclusions as to the level of the Traders' orders as a proportion of all orders on the order book therefore excluded orders resting on the order book from before that time. When that point was drawn to his attention, Dr. Aitken took the trouble to reanalyse the numbers. He reconfirmed his conclusions that the Traders' orders represented a very high proportion of the total volume of orders, especially those close to the touch which would have the greatest impact upon price. I accept that evidence and I do not think that any of the points made by Dr. Peglow in response cast any doubt upon those conclusions.

146. I also note that the incidence of "wash-trades" was a matter of particular significance for Dr. Aitken. He referred to the number of wash-trades in the case of the AQP trading as "extraordinary over such a short period of time" and explained why they can be an important marker of market abuse:

> "In many markets wash trading is specifically prohibited and in the UK it is indicative of market abuse…Wash trading does not represent legitimate trading between two market participants and is not reflective of proper supply and demand in the security. Wash trading has no legitimate economic purpose as the same entity buys and sells shares at the same price thus incurring transaction costs while achieving no economic benefit. Other market participants will not know this, however, due to order book anonymity. They may therefore react to it by making trading decisions based upon the increased volumes traded in the security, which can [have an] impact on price."

147. A close examination of the trading in relation to AQP for a part of this time is revealing:

i) Commencing at 11:19:17 a.m., DVI entered four small (100 share) passive sell orders on the LSE at prices that successively reduced the best offer price, and four further larger passive orders (totalling in excess of 30,000 shares) to sell further away from the touch. None of those orders traded, and every one of them was subsequently cancelled.

ii) The AQP share price fell after those orders had been placed, and other market participants reduced their offer prices in line with the best offer price on the LSE.

iii) At 11:20:48, DVI entered two aggressive orders to buy a total of 2,767 shares on Chi-X at a price that was in excess of the price that DVI was offering to sell shares on the LSE.

iv) DVI then continued to place small sell orders for 100 shares close to the touch and larger sell orders further away from the touch on the LSE. The AQP share price fell, and at 11:21:40 DVI entered an aggressive buy order for 2,500 shares, this time on BATS, but again at a price higher than it was offering to sell on the LSE.

v) DVI continued to place small sell orders close to the touch in the LSE, together with larger sell orders further way from the touch. This pattern continued until 11:23:30 at which time DVI entered another large buy order for 6,300 shares, this time on the LSE. This buy order was again at a price above that at which DVI was offering to sell shares, and it therefore executed against three of the small 100 share orders that had been placed on the LSE by DVI itself, resulting in three wash-trades. The buy order did, however, also execute against three other much larger orders placed by other market participants, giving a total execution of 6,000 shares.

vi) Immediately after the execution of its buy order at 11:23:30, DVI reversed its pattern of entries. It began to increase its orders to buy shares and cancelled its sell orders. By 11:26:22 it had entered buy orders for 62,726 shares and had cancelled all its sell orders. The AQP share price had risen by this time, and DVI then sold a total of 12,812 shares, making a profit on the sale of the shares that it had bought a few minutes earlier.

148. I have also examined the other three examples of trading that were highlighted by Mr. Norris and considered in detail by Dr. Aitken, namely trading in United Utilities Group plc, Inmarsat plc and Admiral Group plc. Whilst there are of course differences between them, in Dr. Aitken's opinion and in my judgment they each exhibit the same essential features as the trading in AQP shares to which I have referred above.

149. In each case there was a distinct pattern that was repeated several times over the period of trading. Each cycle of trading commenced with a number of larger passive orders being entered on the same side of the LSE order book, priced just below the best bid price (in the case of buy orders) or just above the best offer price (in the case of sell orders) so as not to trade immediately. Small orders (typically around 100 shares) were then entered at prices that raised the best bid or lowered the best offer on the LSE by small increments. Sometimes the small orders would trade immediately and therefore not move the best bid or offer price up or down, but if that occurred, the orders would be repeated.

150. Once a raised best bid or lowered best offer had been achieved by the placing of these small passive orders, further large passive orders were then placed close to the improved best bid or offer. This resulted in a large cumulative net order position (in terms of share numbers) being created on one side of the order book. The movement in the share price would invariably closely reflect the Traders' order activity, such that if they built up a large cumulative net buy order position, the share price would rise; and when the position was reversed to create a large cumulative net sell order position, the share price would fall.

151. During and following the entry of these passive orders, other market participants would enter orders at or close to the new best bid or offer price. The Traders would then enter an aggressive order or orders on the other side of the order book from their net order position (e.g. if passive orders to buy shares had been entered and the best bid price raised, an order to sell shares would be entered). This order would be placed at a level which would ensure that it traded with large orders recently entered by market participants at prices at or close to the best bid or offer price.

152. Once such trades had executed, the Traders would reverse their position on the order book by cancelling their existing orders and repeating the steps above on the opposite side of the order book. This pattern of activity was then undertaken repeatedly. The result would be that the share price would exhibit a number of cycles of moving up and down in a "saw-tooth" pattern over a relatively short period of time in a manner consistent with the Traders' pattern of placing orders. The overall result was that the Traders were able to buy shares at lower prices when the market fell, and sell them at higher prices when the market rose. However, the repeated building of a net order position and then aggressive trading

across the order book in the other direction invariably also caused a number of wash-trades.

153. In my judgment, the analysis of the trading performed by Mr. Norris and Dr. Aitken provides the clearest possible evidence that the Traders were engaged in a joint enterprise to manipulate the market within section 118(5) FSMA during 2010, and that Mr. Banya and Mr. Pornye continued in the same vein in 2011.

154. The evidence and analysis produced by Mr. Norris show the same repeated patterns of trading that are too similar and too frequent to be the result of coincidence or some other innocent strategy. The expert evidence of Dr. Aitken also provided compelling reasons for concluding that the trading throughout this period was deliberate and manipulative. Dr Aitken put it quite plainly in cross-examination:

> "But there is a basic law of economics, right. Demand and supply says that basically if you…throw a lot of demand into the marketplace, you will push the price up…if you put a lot of supply into the marketplace, you will push the price down. There is no more basic theory than that. All of those so-called algorithms that you are talking about by these so-called finance people would have that as a fundamental assumption…
>
> I have tried to give [the Court] an indication of my view as to what the 100 share orders were trying to do. They were trying to suck people into the marketplace. They did a good job of doing that. They were basically on one side of the book, giving the impression that they were going to do one thing, and then did the other….
>
> Essentially you layer one side of the book…you are either heavily selling or heavily buying, and you don't transact any of those things, or very few of them. You put them in and then you just delete them. You also move from that side to the other side…in the process of doing so, you come across yourself through wash trades…
>
> I cannot know what the intention [of the Traders] is. All I can do is look at the compendium of information across the trading instances for each of the stocks. The more I see a consistent pattern, as I have seen here – I have actually never seen a pattern as consistent as this – the more I am convinced that this is manipulation."

155. Although Dr. Peglow sought to challenge Dr. Aitken's opinion on the basis that it was not supported by academic or scientific analysis, I reject that suggestion. The inferences that Dr. Aitken drew were, to my mind, compelling, and Dr. Peglow did not suggest any other likely explanation.

156. In response to this evidence and analysis, Dr. Peglow also submitted that I could not be satisfied that any false or misleading impression was either given, or was likely to have been given, for the purposes of section 118(5) FSMA unless I had evidence from actual market participants at the relevant time. In this respect he contrasted the position in the instant case with that in Swift Trade. I do not accept that submission. In my judgment section 118(5) FSMA plainly does not require actual evidence to be adduced from any market participant. The section is drafted in objective terms, and, particularly in the context of modern algorithmic and high speed trading, it would be wholly impracticable and would defeat the legislative purpose to require the FCA to have to find and adduce subjective evidence from individuals who were actually engaged in the relevant market and who responded to the offending behaviour at the time in question.

157. I also do not read the decision in Swift Trade as having in any way required such evidence. Dr. Peglow drew my attention to the evidence adduced in that case from a Mr. Shvorob, who was a market participant, but it is in fact clear that his evidence was not that he had personally been misled by the trading in question. He gave evidence as to whether what he had observed would have had an impact on other market participants by misleading them: see paragraphs 76-79 of the decision of the Upper Tribunal.

158. Dr. Peglow also sought to down-play the significance of the high number of wash-trades caused by the Traders. He submitted that these were not wash-trades as referred to in MAR 1.6.2(2), but wash-trades that had resulted "accidentally in a fast moving market" as a result of orders being placed on both sides of the order book, "which is what market-makers do all the time". I do not accept those submissions. The analogy with market-makers is false, and the incidence of wash-trades as a result of the Traders' activities was far too high and too frequent to be explicable as accidents in a fast-moving market. A detailed examination of some examples of the wash-trades by Dr. Aitken also demonstrated that they were most unlikely to have been accidental, but were explicable as the inevitable by-product of the Traders' deliberate layering of the book with small orders so as to induce other market participants to place larger orders against which they could then trade.

159. The argument that the Traders were simply making a market had initially been suggested by the Traders' expert, Professor Avgouleas, but in my judgment was rightly dismissed by Dr. Aitken in these terms in his supplementary report:

> "Market-making involves placing orders simultaneously on both sides of the marketplace. Indeed this notion is supported by [Professor] Avgouleas [who] notes "Market-makers simultaneously post limit orders on both sides of the electronic limit order book" (emphasis added). The function of a market-maker is to provide liquidity of the market by standing ready to fulfil both buy and sell orders and as such they must maintain continuous two-sided quotes. This was not the practice of the Defendants. They did not maintain continuous two-sided quotes and their practice was to place orders predominantly on one side of the book, moving orders from one side to the other in a

> "saw-tooth" pattern consistent with trading conduct intended to influence demand/supply and therefore price….That is not trading conduct which is consistent with market-making."

In the experts' joint report, Professor Avgouleas conceded that the Traders had not been trading as market-makers.

160. Dr. Aitken also examined closely a number of the wash-trades, including those that occurred in relation to the trading in AQP shares on 6 December 2010 to which I have referred above. Dr Aitken's commentary on the trading was as follows:

> "The market is 352.2 bid and 352.6 offer with DVI's 100 shares on the offer at 352.6 entered at 11:21:54.
>
> DVI also has 100 share offers at 352.7 (entered at 11.21.25) and 352.8 (entered at 11:21:13).
>
> In addition DVI has larger offers of 7,852 at 352.7 (entered at 11:22:33) and 7,741 at 352.8 (entered at 11:22:05).
>
> At this point there are a total of 2,578 shares offered by another market participant at 352.7 (entered at 11:22:05)
>
> At 11:23:15 DVI cancels the 7,852 offer at 352.7.
>
> At 11:23:23 DVI cancels the 7,741 offer at 352.8.
>
> Immediately after the second offer is deleted, and in the same second, the market offer of 2,578 shares at 352.7 is deleted and replaced by an offer in the same amount at 352.8.
>
> At 11:23:30 and with the market still 352.2 bid 352.6 offer, DVI enters a bid for 6,300 shares at 352.8…
>
> Once DVI had cancelled the 7,852 offer at 352.7 and the 7,741 offer at 352.8, the 6,300 bid at 352.8 was entered and traded against three of DVI's own offers at 352.6, 352.7 and 352.8, before trading against the 2,578 offer at 352.8. Had DVI not cancelled their own large offers, their 6,300 bid would have executed entirely against their own offers at 352.6 and 352.7. In my view it is highly unlikely that DVI could have cancelled the 7,852 offer at 352.7 and the 7,741 offer at 352.8 without being conscious of their smaller offers at 352.6, 352.7 and 352.8.
>
> It follows from this that, in my opinion, those latter offers were left on the order book deliberately when the others were cancelled, and therefore that DVI knew that their

> 6,300 bid would execute first against those offers giving rise to deliberate wash trades.
>
> That leaves the question of why DVI did not cancel the smaller offers. In my opinion they might have done so because by leaving the smaller offers on the book there was a reduced risk that the market offer for 2,578 shares at 352.8 would be cancelled. That risk would have increased if 352.8 had become the best offer price, which is what would have happened had DVI's own offers at 352.6, 352.7 and 352.8 been cancelled."

I consider that that analysis and the explanation given for it are convincing. No plausible alternative was suggested to Dr. Aitken in cross-examination, or by Dr. Peglow in his submissions.

161. The case that the behaviour of the Traders amounted to market manipulation is also supported by reference to the various indicia of manipulative trading contained in Article 4 of the 2003 Implementing Directive and MAR 1.6.9 (which re-enacts it) and MAR 1.6.2 of the Code. For example,

i) during the periods whilst the Traders were active, their orders represented a very high proportion of the orders placed in the market in relation to the shares in question: see paragraph 144(iii) above and Article 4(a) and (d);

ii) there was a very close correlation between the placing of the orders by the Traders and the price movement of the share in question: see paragraph 144(i) above and Article 4(b). Dr Aitken was clearly of the opinion that the Traders' trading caused the price movements from which DVI, DVPte and Mineworld made profits. Professor Avgouleas also accepted that "this may have been the case" and gave no identifiable reason why that would not, in fact, have been the case;

iii) there was a very high proportion of wash-trades by the Traders not involving any change in the beneficial ownership of the shares in question: see paragraph 144(iv) above, Article 4(c) and MAR 1.6.2(2);

iv) there was a significant number of orders concentrated within a short time span in the trading session which, for that period represented a significant proportion of the volume of transactions, and which led to a price change which was then reversed when the positions were reversed: see paragraphs 144(i)-(iii) above and Article 4(d) – (f); and

v) there were a large number of orders placed on one side of the order book, but which were then cancelled before they were executed: see e.g. paragraph 147(i) and (vi) above and MAR 1.6.2(3) and 1.6.2(4).

162. I also find it highly significant that there were repeated instances of the Traders entering orders to "buy high and sell low" – i.e. entering orders to buy shares on one exchange or MTF at a price higher than they were offering to sell the same security on another exchange or MTF (or entering orders to sell shares on one

exchange or MTF at a lower price than they were offering to buy the same security on another exchange or MTF): see e.g. the examples given at paragraphs 146(iii) – (v) above. That activity simply makes no legitimate economic sense.

163. In conclusion, put in terms of section 118(5) FSMA, I accept Mr. Norris' evidence and Dr. Aitken's opinion that the Traders' placing of numerous orders on one side of the order book gave, or was likely to have given, other market participants the impression of an increased supply or demand for the shares in question. I also infer from the level of passive and cancelled orders, the numbers of wash-trades and the examples of buying high and selling low, that this was a false or misleading impression. The purpose of the Traders was not in truth to sell or buy as indicated by the orders that they placed. Instead, the Traders intended to cause a movement in the market price of the share in question and to induce other market participants to place similar larger orders, with which the Traders could then trade aggressively in the opposite direction.

164. In short, I am entirely satisfied that the Traders jointly engaged in market manipulation within section 118(5) on behalf of DVI in 2010, and that Mr. Banya and Mr. Pornye jointly engaged in market manipulation within section 118(5) on behalf of DVPte and Mineworld in 2011.

Can any of the Defendants make out a defence to the imposition of a penalty?

165. Having concluded that the behaviour of the Traders amounted to market abuse, I now turn to consider whether any of the Defendants can establish a defence along the same lines as section 123(2) FSMA.

166. I can take the position of the Traders and Mineworld very shortly. I have formed the very clear view from the overwhelming evidence of the scale and nature of the market manipulation to which I have referred, that the Traders must have known full well what they were doing, and that they were well aware that what they were doing was wholly improper. They were experienced traders who must at very least have been aware from their association with Swift Trade that spoofing and layering was improper. I therefore cannot accept the lame explanations proffered in their pleadings and witness statements that they were unaware that what they were doing was in any way wrongful. At a very late stage the Traders chose not to attend the trial or give evidence on oath to explain their conduct and to submit themselves to cross-examination, and, as I have indicated, their response to the FSA's initial intervention in 2011 was to destroy the algorithm that they had used for their trading. Those simple facts speak volumes. Mineworld was the corporate vehicle that the Traders used for trading in 2011, and which they owned and controlled: it cannot stand in any better position than them.

167. The position is, however, different for DVI. The FCA did not contend that the senior management of DVI actually directed the market abuse by the Traders. The FCA's case was that DVI was simply driven by a desire for profits, and that it either suspected what the Traders were doing and consciously turned a blind eye, or was recklessly indifferent to what was going on.

168. Dr. Peglow denied that this was a fair representation of DVI's conduct. He submitted that once DVI had provided the Traders with the capital and

infrastructure for trading, it was not obliged to monitor how they behaved, and indeed he said that the Traders would have been unwilling to disclose their trading strategies to DVI. He likened DVI's relationship with the Traders to the relationship of an investor with an independent asset management firm and said that DVI, like an investor, was not obliged to monitor how an asset manager invested its funds. He further contended that it was entirely reasonable for DVI to rely upon the firms that had provided the DMA services (i.e. Goldman Sachs and SunGard) to have control systems in place to detect and prevent inappropriate behaviour on the part of those customers who were using the DMA services. Alternatively, he said that it was up to the exchanges or MTFs to monitor and control market abuse. So, said Dr. Peglow, DVI genuinely believed on reasonable grounds that the Traders were not engaged in market abuse and DVI had taken all reasonable precautions and exercised all due diligence to avoid any such behaviour by them.

169. As a preliminary point in this regard, it was common ground that when looking at the state of mind of DVI for the purposes of ascertaining, for example, whether DVI had a genuine belief that the behaviour of the Traders was not unlawful, or whether it consciously turned a blind eye to what it suspected that they were doing, the relevant person whose state of mind is to be attributed to DVI is that of Mr. Klein. He was undoubtedly the leading figure within the company at the relevant time, and it seems that he was the person to whom Mr. Dietz reported.

170. In this respect I should also record that Mr. Klein was plainly an intelligent and articulate witness who was in command of the facts and well aware of the implications of the case and the questions that were asked of him in cross-examination. In contrast, Mr. Dietz, who had stepped down from his position as a director of DVI due to ill-health in 2010, and who has clearly been seriously unwell in the intervening years, was an unimpressive witness who struggled with giving evidence in a foreign language and seemed to have little detailed recollection or involvement in the material events.

171. The factual analysis on this part of the case starts with the initial introduction of the Traders through Mr. Albrecht. Mr. Klein simply seems to have assumed that because they were introduced by Mr. Albrecht, the Traders could be trusted. He did not dispute that he made no inquiries into their background, apparently because (so he maintained in cross-examination) that would have "cost a lot of money". Mr. Klein also did not make any inquiries into what the Traders were proposing as part of their business plan, even though, as he admitted in cross-examination, he thought that most trading strategies were bluster ("there's a lot of bullshitting") and did not believe that anyone could reliably detect big buy and sell orders in the market, or benefit from short term market turbulence.

172. The very limited extent to which DVI was actually concerned to investigate the backgrounds of the Traders or to check what they were doing can be illustrated by two extracts from the cross-examination of Mr. Klein.

> "Q. You see, one might expect that Da Vinci would be exercising considerable caution before allowing three strangers to trade in your name with your money?

A. That's sounds strange but because it was recommended by a founder we didn't do a complete due diligence.

Q. Or really any due diligence?

A. We restricted them on risk limits so they couldn't do a big damage on our trading capital.

Q. So your real concern was that they didn't have enough scope to do you real financial damage by incurring losses?

A. Yes. We never thought about market manipulation or something like this."

And later,

"Q. If you had done some proper due diligence you might have uncovered more about these people's past that you would want to know; isn't that right?

A. I really don't know. Of course it's always good to know more about people and do proper background checks but --

Q. Especially when these people are going to be trading on your behalf on stock exchanges, or through CFDs on stock exchanges.

A. Stock Exchange is a regulated list of transparent market and the trading capital is in our name and our managing account so they can't go away with the money.

Q. You were also a regulated company in Germany. You understood compliance and regulatory responsibilities. You didn't do any due diligence and didn't record any. I suggest to you --

A. Every trader you test -- sometimes we test a trader only for one or two weeks to find out whether they are profitable or not. If you would have done a proper background check every [one] of these traders we would have lost a fortune. I mean you cannot always -- it cost -- you know probably as a lawyer how much it cost to cross-border check a person. This is in practice not possible if you're not a -- maybe Goldman Sachs have a compliance department of 200 people then that might be possible, but ...

Q. Would it be unfair to suggest that for you everything came down to money? How much money they could make you?

A. Yes.

> Q. How much money they might lose you?
>
> A. Yes.
>
> Q. And how much money it would cost to investigate them? [Probably] too much.
>
> A. We are a small company, we have limited resources and we cannot every person investigate, which I meet once or twice or I didn't even meet them."

173. I also do not accept Dr. Peglow's submission that Mr. Klein could not in any event have discovered more about how the Traders intended to trade if he had asked them. Whilst the business plan that the Traders provided to DVI on 3 June 2010 was admittedly short on specifics, it ended with an invitation to Mr. Klein in the following terms:

> "Hope you find this summary adequate. If you need any additional info let us know as we are willing to give any information you require."

174. Mr. Klein did not take up that offer in any way, and whilst I accept the point made by Dr. Peglow that traders are often unwilling to reveal their trading strategies to anyone who might turn out to be a competitor or who could use the information for private advantage, that was of course not the position as between the Traders and DVI. DVI was not a competitor of the Traders. As the letter recognised, DVI was providing the Traders with its capital to trade, and it was entitled to know what they planned to do with it.

175. I also reject the suggestion that DVI's relationship with the Traders was akin to an investor placing its money with a third party manager with the consequence that DVI was not obliged to have any regard to what the Traders were doing on its behalf. DVI was not investing in a financial product, or engaging the services of an independent regulated entity upon which it could rely to conduct transactions properly. DVI was giving three unknown individuals from a foreign country direct authority to commit it to market transactions in DVI's own name and using its own credit and its own funds. In my judgment DVI had the same responsibilities as regards supervision of the Traders as if it had employed them to trade on its behalf pursuant to a formal contract of employment. The fact that the relationship was on the basis of an informal profit-share rather than a formal contract of employment with a salary and bonus can make no difference.

176. I also reject the submission that DVI was entitled to rely upon the DMA providers to detect and prevent market abuse by their customers and did not need to concern itself with what the Traders were doing. It is certainly true that the DMA providers are required to have systems in place to detect market abuse. But it does not follow that their customers can absolve themselves of any responsibility in that regard. That position was made very clear in the Execution and Clearing Agreement entered into between Goldman Sachs and DVI in this case, which contained the following provisions (the reference to "Authorised Users" using

"Access Methods" being to the Traders and the RealTick front-end they were using to access Goldman Sachs' DMA systems):

> "16.5 You will be (a) solely responsible for all acts or omissions on any person using a [DMA] Service through your Access Methods; (b) bound by the terms of all Transactions executed, and notices or reports delivered through, a [DMA] Service using your Access Methods; and (c) solely responsible for monitoring in accordance with any of your internal policies and procedures the Authorised Users using the [DMA] Services to confirm trades executed by such Authorised Users. All transmissions generated by use of your Access Methods will be deemed to be authorised by you.
>
> …
>
> 18.3 Without limitation of the foregoing, you understand and acknowledge that many exchanges have rules which prohibit the execution of certain types of transactions using their trading facilities, such as wash trades and pre-arranged trades. In addition, virtually all exchanges (and/or applicable regulatory authorities) prohibit manipulation of their markets, as well as attempted manipulations, "squeezes" and "corners". In the event that you are not familiar with the laws, regulations or rules applicable to orders entered, or Transactions entered into, by you (including where relevant through the [DMA] Services you shall obtain copies thereof or shall request copies thereof from [Goldman Sachs].
>
> …
>
> Annex 1
>
> This Annex to the Schedule of [DMA] Services is designed to assist you by providing some examples of prohibited market practices together with some examples of the rules that you should be aware of in connection with your use of the [DMA] Services with particular focus on, but not limited to, trading at the close of the market. This Annex does not purport to be a comprehensive list of the applicable routes and [Goldman Sachs] is not undertaking to update its contents. You should therefore not rely solely on this document for the purpose of fulfilling your obligation to comply with such applicable laws, rules, regulations, policies and practices as detailed in the Terms."

177. Further, although the DMA systems provided by Goldman Sachs to DVI were designed to enable DVI to monitor the activities of the Traders if they had chosen to do so, Mr. Dietz and Mr. Klein chose only to concern themselves with monitoring the Traders' compliance with trading limits and to see if they were making money. That appeared clearly from the following parts of Mr. Dietz's evidence:

> "Q. Let me ask you about this monitoring account that Dr. Peglow was asking you about a few moments ago. What you were provided with, as I understand it, was a RealTick view only access and accounts statement, is that the way you put it, on a daily basis and you say in your witness statement that your main concern was profit and loss?
>
> A. Yes.
>
> Q. And also the size of stock positions held in the accounts. You say the size of the stock positions held was another of your concerns; yes?
>
> A. More…the actual real time profit and loss.
>
> Q. Yes.
>
> A. The traders had a limit, a monthly limit, and if they achieved at least minus 2 per cent than we reduce, they have only, they have only buy orders half, half position.
>
> Q. They also had daily limits, didn't they?
>
> A. Yes
>
> Q. The size of positions?
>
> A. Yes.
>
> Q. So the size of stock positions was also of relevance for you?
>
> A. Yes.
>
> Q. And I accept that those may have been your main interest in looking at RealTick but isn't it the case that your RealTick access just enabled you to see whatever the traders could see but didn't actually give you any power to input trade, it was view only access?
>
> A. It was only view only access and I was only looking at the daily, the actual real time profit and loss.
>
> Q. That may have been what you were looking at but am I right in thinking that you could see everything that the

> traders could see on their screens, you just couldn't do any inputting?
>
> A. I couldn't see the book what -- I only saw the profit and loss and take a look at it. I could never see the book, the bid and offer book."

178. Although Mr. Klein claimed in his evidence that DVI reasonably relied upon Goldman Sachs' monitoring and control systems, he never chose to inquire into or investigate what those systems were. Had he done so, he would have discovered that although they were undoubtedly sophisticated, they were (at the time) unable to detect suspicious trading patterns pre-trade and were confined to detection of suspicious activity after the event. That ought to have emphasised to Mr. Klein the importance of DVI doing its own checks and monitoring. Nor did Mr. Klein or Mr. Dietz take any advice (compliance or legal) to assure themselves that the strategies that the Traders intended to pursue were lawful.

179. In these circumstances I cannot accept the proposition that DVI did all that it reasonably could to prevent the Traders from engaging in market abuse. It has not made out a defence to an order under section 129 along the lines of section 123(2)(b) FSMA.

180. Nor do I accept that DVI can establish that it "believed, on reasonable grounds", that the Traders' behaviour did not constitute market abuse so as to make out a defence to an order under section 129 along the lines of section 123(2)(a) FSMA. Whatever might have been DVI's actual understanding or belief as to what the Traders were doing (which I shall consider below), I do not think that DVI could have formed any belief that the Traders were not engaging in market abuse "on reasonable grounds".

181. In this respect I accept the FCA's submission that the defence under section 123(2)(a) FSMA requires some positive knowledge and consideration by the party in question of whether the behaviour in issue was, or was not, market abuse. A party cannot take advantage of the defence if he is simply unaware of the relevant behaviour, or if he has made an unquestioning assumption that all is well in the absence of any indication to the contrary. Such an approach to the statute would be contrary to the policy of the Act, because it would encourage parties not to give any thought to the possibility of market abuse occurring, and (in the case of corporate bodies) for management to abstain from making any inquiries or even monitor what is going on within their organisation and in its name.

182. In that regard, and as indicated by the evidence to which I have referred in paragraphs 171-174 and 178 above, it is clear that (at best) Mr. Klein gave no thought to the issue of potential misconduct by the Traders at any time until after Goldman Sachs had summarily terminated the provision of DMA facilities to DVI on 22 December 2010, and then terminated their entire relationship a day later. Even then, as I shall indicate below, no-one at DVI carried out an investigation into the activities of the Traders with the vigour that might reasonably have been expected in response to such a dramatic turn of events. Instead the priority appears to have been to arrange for the Traders to have new facilities to continue trading on behalf of DVPte through SunGard in much the same way as before.

183. The FCA contended that far from having a genuine belief on reasonable grounds that the behaviour of the Traders did not amount to market abuse, DVI, in the form of Mr. Klein, in fact suspected all along that the Traders were manipulating the market illegitimately, and deliberately looked the other way in order that DVI could continue to enjoy the handsome profits that the Traders were generating it. Although unnecessary to dispose of any argument by DVI based upon section 123(2) FSMA, that contention is plainly relevant to the level of any penalty that might be imposed upon DVI, and hence I should deal with it.

184. In support of his contention that Mr Klein turned a blind eye to what he suspected that the Traders were doing, Mr. Herberg first set the scene by pointing to the lack of investigation carried out by DVI into the background of the Traders, and to the evidence to the effect that all that DVI was really concerned about was whether the Traders exceeded their limits and whether they made money. I have accepted that this does indeed appear to have been the driving force behind DVI's actions, but of itself it does not assist in answering the question of whether Mr. Klein's omission to inquire was deliberate.

185. Mr. Herberg then relied upon an email sent by Mr. Albrecht to the Traders, Mr. Klein and Mr. Dietz on 26 November 2010 concerning a proposal that the Traders might become involved in trading futures and responding to a request from Mr. Banya for increased trading limits permitting him to trade in orders of more than 10 futures contracts. Mr. Albrecht's email warned against the perils of trading on the futures markets and continued,

> "We can provide much bigger size, but it doesn't make sense for somebody who hasn't traded these futures before…you can manipulate the markets only with 2-5 million euro margin, but then you can lose 500k in a few seconds…so it doesn't make sense to take the risk at this stage."

186. Mr. Klein said that he thought that Mr. Albrecht had used the wrong word in the email and that he was not talking about "manipulating" the market in any improper sense, but in the context of having sufficient size to be able to have some impact upon the markets. Whilst I have some reservations about Mr. Klein's explanation, I do not think that this passing comment demonstrates that Mr. Albrecht was aware that the Traders were engaging in illegitimate market abuse as regards their trading in CFDs on the LSE, or that Mr. Klein should have deduced that from the email.

187. Mr. Herberg also put to Mr. Klein that he must have been suspicious that the Traders were performing far too well and making profits far too consistently for that to have been the result of legitimate trading. He pointed out that the Traders almost invariably turned a daily profit on trading and, over the four months from August to December 2010, made over £520,000 in net profits. Mr. Klein denied that these returns gave rise to any concerns. He said that DVI was pleased with them, but that they were not abnormal. In that respect Mr. Klein was supported by the evidence of Mr. Crane of Goldman Sachs, who said that the fact that the trading by the Traders made profits virtually every day would not have rung any alarm bells for him and would not have alerted him that there might be something

wrong. Again I cannot conclude from this that Mr. Klein either was or ought to have been suspicious as to what the Traders were doing.

188. Mr. Herberg also placed significant reliance upon Mr. Klein's reaction to the termination by Goldman Sachs of the DMA facilities on 22 December 2010, and the next day, 23 December 2010, of its entire relationship with DVI. He suggested that far from protesting loudly to Goldman Sachs at its sudden and dramatic decision, or seeking urgently to investigate the reasons for it with Goldman Sachs and the Traders (as might an innocent party), Mr. Klein and DVI in effect went quietly, and simply moved on to try to re-kindle an alternative relationship with SunGard. Mr. Herberg submitted that Mr. Klein's subdued reaction was consistent with someone who knew or strongly suspected that the Traders had been engaged in improper trading and who did not want to make a fuss.

189. In this respect, the chronology seems to be that after first receiving news of the trading stop on 22 December 2010, Mr. Klein had a conversation with Mr. Wim den Hartog who was the managing director of trading services at Goldman Sachs who was only prepared to reveal that it had been the compliance department of Goldman Sachs who had ordered the stop on trading. That seems to have prompted Mr. Klein to send an email to Mr. den Hartog in the following terms,

> "Wim,
>
> This behaviour of your compliance department is not acceptable. I need to be informed upfront, not my traders and we need to be able to transfer the account to another clearer. We are losing a minimum of 10k euro daily now!
>
> Who is the head of compliance making [these] decisions?"

190. Mr. Herberg closely questioned Mr. Klein as to why he was seemingly so willing to accept that DVI was going to have to transfer its account to another clearer rather than pursuing the matter further with Goldman Sachs. Mr. Herberg also pointed to the fact that when Mr. Klein subsequently had a conversation on Skype with the Traders, he told them that he was going to ask Goldman Sachs for more information, but (significantly, so Mr. Herberg submitted) he did not ask the Traders themselves to give an explanation of what was going on.

191. Mr. Klein's response was that since DVI was not a big account for Goldman Sachs, in reality he had to accept that the account would close and make urgent alternative arrangements. Mr. Klein also gave evidence that he had asked Mr. Albrecht to find out what had gone on with the Traders. That appears to be consistent with the fact that later in the evening of 22 December 2010 Mr. Klein received an email from Mr. Albrecht forwarding an email that Mr. Albrecht had received from Mr. Brad giving an explanation for the problems that had been encountered. Mr. Brad's email set out "The situation which may [have] caused this problem" and gave a lengthy account of his trading in an individual stock on the LSE. Mr. Brad concluded,

> "I had several buy and sell orders at a time but in my defence I wanted [to] have bigger positions than I got and the huge falling down in the stock price cannot be caused by my sell orders which were way out of the market, they even could not be seen in the order book depth"."

192. Mr. Klein's immediate reaction was to forward that email to Mr. den Hartog and Mr. Richard Pape at Goldman Sachs the next morning under cover of an email as follows,

> "Dear Wim and Richard
>
> We got more information from the trader who caused the issue (see below). Our 3 senior traders in Budapest did nothing wrong. He was the only one with strange order behaviour, but I am not sure, whether this is against the LSE rules, so no reason to terminate the whole company account! Should I send you the trade logs from RealTick as well?"

After Goldman Sachs gave formal notice to terminate the whole of its relationship with DVI, Mr. Klein seems to have given up trying to persuade them to keep the relationship on foot, and the focus of his efforts appears rapidly to have switched to trying to re-establish the relationship between DVI and SunGard.

193. Although I think that Mr. Herberg's points as regards the lack of reaction on the part of DVI and Mr. Klein to the termination of the relationship with Goldman Sachs had some force, I had the opportunity to observe Mr. Klein giving evidence. He was understandably embarrassed and defensive over the lack of attention that he and DVI had paid to the activities of the Traders. I also thought that his assertion at the start of his cross-examination that even now he believed that the FCA's analysis was wrong and that the Traders had been engaged in "some kind of market-making and…not layering and spoofing" was unrealistic, given the overwhelming evidence to the contrary. But nonetheless I thought that his answers as regards his state of mind at the time were given frankly and honestly.

194. I also place some weight upon the fact that Mr. Klein's reaction to receiving the email from Mr. Albrecht containing Mr. Brad's explanation was promptly to forward it to Goldman Sachs and to offer access to the RealTick trade logs. I accept that it is possible that Mr. Brad's email might have been cynically constructed to refer to an innocent piece of trading, but it does not have that appearance, and it contains some comments that might easily be taken to be a reference to layering. If Mr. Klein really had known or suspected that the Traders had been engaged in market abuse in this way, I doubt that he would have been willing to send the email to Goldman Sachs and to invite them to investigate further. Instead, I think that his actions in forwarding that email are consistent with an innocent (albeit unquestioning) state of mind.

195. Taking all of these points together, and bearing in mind the "inherent improbabilities", I am not satisfied to the requisite standard that Mr. Klein consciously turned a blind eye to the Traders' market abuse in 2010.

196. I have no doubt, however, that the FCA is right that DVI's overriding motivation throughout the period of trading in 2010 was profit, and that DVI was wholly indifferent to what the Traders were doing on its behalf provided that they stayed within their trading limits and continued to make regular profits. Mr. Klein had experience as a derivatives trader on EUREX and he professed expertise in electronic trading. He said he had passed exams which required him to show some knowledge of the rules regarding proper market conduct which covered rules against manipulating the market. He must have been well aware of the risks of market manipulation.

197. In these circumstances, it is most regrettable that DVI never made any proper attempt to check the background of the Traders or understand precisely what their trading strategy was; still less did DVI supervise what the Traders were actually doing. Although I have not found that Mr. Klein consciously turned a blind eye, in my judgment DVI's approach clearly went well beyond mere negligence. It was irresponsible and reckless.

198. Because the FCA is not pursuing DVPte, it is not necessary for me to decide whether Mr. Klein's state of knowledge of the activities of the Traders changed as a result of the events after trading through Goldman Sachs had stopped in December 2010. I therefore do not express any views upon that matter.

Financial Penalties in general

199. Under s.129, the Court can impose a penalty in respect of market abuse of *"such amount as it considers appropriate."* No further statutory guidance is given. At the time of commission of the market abuse in this case, the FSA had promulgated a detailed framework (DEPP) which included a statement of its policy for determining the amount of any penalty which it is able to impose under section 123. The current FCA DEPP framework is in very similar terms.

200. The Upper Tribunal has also indicated that whilst it is not bound by the FCA's framework, it will have regard to it when reviewing the decisions of the FCA: see Tariq Carrimjee v FCA ([2015] UKUT 0079 (TCC) and paragraph 95 above.

201. It was the FCA's submission, and I accept, that in determining any penalty under section 129, the starting point for the court should be to consider the relevant DEPP penalty framework that was in existence at the time of commission of the market abuse in question. To do otherwise would risk introducing an inequality of treatment of defendants depending upon whether the proceedings were taken against them under the regulatory route or the court route, and depending upon how long the proceedings had taken to come to a conclusion. By the same token, however, in common with the Upper Tribunal, the court is not bound by that framework, or by the FCA's view of how it should be applied. But if the court intends to depart from the framework in a particular case, it should explain why it considers it appropriate to do so. It occurred to me that in this regard there is some analogy with the approach of the criminal courts to the application of the sentencing guidelines produced by the Sentencing Council.

The relevant FSA penalty framework (DEPP)

202. At the time of commission of the market abuse in this case, the FSA's policies for determining the amount of penalties under section 123 were set out in DEPP 6.5. DEPP 6.5.2 provided:

> "The FSA's penalty setting regime is based on the following principles:
>
> (1) Disgorgement - a firm or individual should not benefit from any breach;
>
> (2) Discipline - a firm or individual should be penalised for wrongdoing; and
>
> (3) Deterrence - any penalty imposed should deter the firm or individual who committed the breach, and others, from committing further or similar breaches."

203. DEPP 6.5.3 provided that these elements were incorporated in a five-step framework summarised as follows:

> "Step 1: the removal of any financial benefit derived directly from the breach;
>
> Step 2: the determination of a figure which reflects the seriousness of the breach;
>
> Step 3: an adjustment made to the Step 2 figure to take account of any aggravating and mitigating circumstances;
>
> Step 4: an upwards adjustment made to the amount arrived at after Steps 2 and 3, where appropriate, to ensure that the penalty has an appropriate deterrent effect; and
>
> Step 5: if applicable, a settlement discount will be applied. This discount does not apply to disgorgement of any financial benefit derived directly from the breach."

204. There was a separate version of the five-step framework for each of (i) firms (DEPP 6.5A), (ii) individuals in non-market abuse cases (DEPP 6.5B) and (iii) individuals in market abuse cases (DEPP 6.5C). Plainly, (i) and (iii) are relevant here.

*DEPP 6.5A - Firms*

205. The five step penalty framework for firms was set out at DEPP 6.5A.

*Step 1 - Disgorgement*

206. DEPP 6.5A.1 provided:

> "The FSA will seek to deprive a firm of the financial benefit derived directly from the breach (which may include the profit made or loss avoided) where it is practicable to quantify this. The FSA will ordinarily also charge interest on the benefit."

*Step 2 - the seriousness of the breach*

207. DEPP 6.5A.2 provided,

> "The FSA will determine a figure that reflects the seriousness of the breach".

In broad terms this figure was to be determined as the product of a figure which represented the harm caused by the relevant misconduct and (depending on how the harm figure was calculated) either a percentage or multiple representing the seriousness of the relevant conduct.

208. DEPP 6.5A.2(1) provided that in many cases, the amount of revenue generated by a firm from a particular product line or business area would be indicative of the harm or potential harm that the relevant conduct may have caused. In such a case, DEPP 6.5A.2(3) indicated that the multiplier would be a percentage ranging from 0 to 20% of the revenue depending upon the seriousness of the misconduct, determined on a scale of 1-5, with 1 being the least serious and 5 being the most serious.

209. However, DEPP 6.5A.2(1) and 6.5A.2(13) also provided that in cases where revenue was not an appropriate indicator of the harm or potential harm caused by the firm's conduct, the FSA would use an alternative. In the instant case of high volume trading in CFDs, the FCA submitted that the appropriate measure would not be based upon revenue, but that it should be based upon profits made by the firm in question, which would reflect the loss and hence harm caused to market counterparties. In such a case, the DEPP framework did not spell out how the FSA would arrive at a suitable multiplier, but I had evidence from Mr. Robert Beauchamp, a lawyer within the Enforcement and Financial Crime Division of the FCA, who stated that the FSA would have applied a multiplier of between 0 and 4 depending upon the seriousness of the conduct, again determined on a scale of 1-5.

210. DEPP 6.5A.2 (11) provided that the following factors supported categorisation of the misconduct in question as level 4 or 5:

> "(a) the breach caused a significant loss or risk of loss to individual consumers, investors or other market users;
>
> (b) the breach revealed serious or systemic weaknesses in the firm's procedures or in the management systems or internal controls relating to all or part of the firm's business;

(c) financial crime was facilitated, occasioned or otherwise attributable to the breach;

(d) the breach created a significant risk that financial crime would be facilitated, occasioned or otherwise occur;

(e) the firm failed to conduct its business with integrity; and

(f) the breach was committed deliberately or recklessly."

211. DEPP 6.5A.2 (12) provided that the following factors supported categorisation of a case as level 1, 2 or 3:

"(a) little, or no, profits were made or losses avoided as a result of the breach, either directly or indirectly;

(b) there was no or little loss or risk of loss to consumers, investors or other market users individually and in general;

(c) there was no, or limited, actual or potential effect on the orderliness of, or confidence in, markets as a result of the breach;

(d) there is no evidence that the breach indicates a widespread problem or weakness at the firm; and

(e) the breach was committed negligently or inadvertently."

*Step 3 - mitigating and aggravating factors*

212. DEPP 6.5A.3 provided that the FSA might increase or decrease the amount of the financial penalty resulting from Step 2 to take into account factors which aggravate or mitigate the breach. Any such adjustment was to be made by way of a percentage adjustment to the figure determined at Step 2.

213. DEPP 6.5A.3(1) listed various factors which might be relevant in that regard. These included:

"(a) the conduct of the firm in bringing (or failing to bring) quickly, effectively and completely the breach to the FSA's attention (or the attention of other regulatory authorities, where relevant);

…

(c) where the firm's senior management were aware of the breach or of the potential for a breach, whether

they took any steps to stop the breach, and when these steps were taken;

…

(e) whether the firm had arranged its resources in such a way as to allow or avoid disgorgement and/or payment of a financial penalty;

…

(k) whether FSA guidance or other published materials had already raised relevant concerns, and the nature and accessibility of such materials…"

*Step 4 – adjustment for deterrence*

214. DEPP 6.5A.4 provided that the FSA might apply what was described as an "adjustment for deterrence". It was explained that this meant that if the FSA considered the figure arrived at after Step 3 was insufficient to deter the individual who committed the breach, or others, from committing further or similar breaches, then the FSA might increase the penalty. It listed relevant factors which included:

"(a) where the FSA considers the absolute value of the penalty too small in relation to the breach to meet its objective of credible deterrence;

….

(c) where the Authority considers it is likely that similar breaches will be committed by the firm or by other firms in the future in the absence of such an increase to the penalty;

(d) where the Authority considers that the likelihood of the detection of such a breach is low…"

*Step 5 - settlement discount*

215. This is not applicable in this case.

*DEPP 6.5C – Individuals*

216. DEPP 6.5C set out a separate five step penalty framework for individuals. The main difference between that framework and the framework for firms was at Step 2. In cases of market abuse committed by individuals, but where the market abuse was not referable to an individual's employment, DEPP 6.5C.2(3) provided that the relevant figure for the purpose of step 2 would be the greater of (a) a multiple of the profit made by the individual for his own benefit as a direct result of the market abuse, or (b) in cases in which the seriousness was assessed at level 4 or 5, £100,000.

217. DEPP 6.5C.2(3)(b) also stated that the FSA would usually expect market abuse committed deliberately to be assessed at seriousness level 4 or 5, and DEPP 6.5C.2(15) indicated that the following factors would support categorisation of a case as level 4 or 5:

> "(a) the level of benefit gained or loss avoided, or intended to be gained or avoided, directly by the individual from the market abuse was significant;
>
> …
>
> (c) the market abuse was committed on multiple occasions;
>
> (d) the individual breached a position of trust;
>
> …
>
> (f) the market abuse was committed deliberately or recklessly."

218. DEPP 6.5C.3 set out various mitigating and aggravating factors in relation to individuals. For present purposes, the only one that I need refer to is:

> "(h) whether the FSA guidance or other published materials had already raised relevant concerns, and the nature and accessibility of such materials."

Financial penalty upon DVI

219. Mr. Beauchamp's evidence was that at step 1 (disgorgement) when applying DEPP 6.5A.1 the FSA would have regarded it as inappropriate that those who have committed market abuse should be given any credit for any costs incurred in committing that market abuse. On that basis, Mr. Beauchamp gave evidence that the FSA would have considered it appropriate to require DVI to disgorge its gross profits from trading during 2010, which the FCA had calculated were £688,730.

220. I disagree with this approach – or at least I disagree with it as broadly as it was stated by Mr. Beauchamp. On the basis that step 1 – disgorgement – is designed to ensure "the removal of any financial benefit derived directly from the breach", I do not accept that a person who has engaged in market abuse should be required to disgorge benefits that they have not received. That would amount to a penalty, which is dealt with at steps 2-3.

221. The point can most readily be illustrated in relation to the dealing costs and commissions which were directly referable to the trading in question and which were payable by DVI to Goldman Sachs. As might be expected, those costs and commissions were simply deducted by Goldman Sachs from DVI's account, and DVI therefore never received or became entitled to them. I can see that there might be more merit in an argument that a defendant who has committed serious market abuse should not be able to claim credit for his general business

overheads, but that issue does not arise on the facts of this case, and so I express no view upon it.

222. The FCA had not prepared any analysis of profits on a net basis, and accordingly the only evidence that I had as to DVI's net profits came from Mr. Klein, who said that DVI received net profits in 2010 of £523,158.97. This figure took into account the fees and commissions deducted by Goldman Sachs but did not make any deduction for RealTick's costs which were paid by DVI AG. In the absence of any material challenge to that evidence from the FCA, I accept Mr. Klein's figures.

223. Mr. Beauchamp accepted that at step 1 account should be taken of profit-sharing arrangements between DVI and the Traders. DVI's disclosure revealed that although it had a 50/50 profit sharing arrangement with the Traders, in fact it had paid £200,000 to Mineworld in respect of the trading in 2010. Accordingly, I consider that DVI's disgorgement at step 1 should amount to (£523,158.97 - £200,000) = £323,158.97.

224. DEPP 6.5A.1 indicated that the FSA would ordinarily have charged interest upon any benefits payable at step 1. That would seem correct as a general proposition in order that a wrongdoer should be deprived of all benefits, including those derived from investment or use of money. I did not, however, receive any submissions as to an appropriate rate of interest that might be applied. Accordingly, and given that interest rates have generally been very low over the last few years, I do not propose to add any specific sum for interest. I shall, however, give some effect to this principle by rounding the final amount of the penalty to be imposed on DVI up rather than down.

225. At step 2 (seriousness) Mr. Beauchamp's evidence was that the FSA would not seek to determine a penalty figure on the basis of revenue but on the basis of gross profits, to which it would apply a multiple of 3 on the basis that this was a level 4 seriousness case. Mr. Herberg further submitted that I should apply this approach whether or not I accepted that DVI's conduct amounted to the deliberate turning of a blind eye to what the Traders had been doing, because recklessness would still be regarded as at least level 4 misconduct under DEPP 6.5A.2(11)(f).

226. I accept that at step 2 the gross profit made by DVI is an appropriate measure of the harm caused to other market participants who, by definition, must have suffered collective losses in an equivalent amount. On that basis the starting point for the amount of a penalty under step 2 in respect of DVI's trading during 2010 would be the sum of £688,730.

227. Mr. Beauchamp's evidence indicated, however, that the FSA would give credit for profit-sharing at this stage, so that he applied a multiple of 3 to his computation of DVI's retained share of gross profits. He calculated this as £427,012 on a pro rata basis given that DVI appears to have retained £323,158.97 of Mr. Klein's figure of £523,158.97 net profits. This resulted in Mr. Beauchamp suggesting a figure of £1,281,036 at step 2.

228. Logically, since this step is concerned with penalising misconduct by reference to the harm to the market and to a deterrent factor rather than disgorgement, I do not

see why any reduction in this amount should necessarily be made for the fact that DVI agreed to share its profits with the Traders. The harm caused by market abuse is the same however the person or persons who jointly engage in that behaviour decide to split the profits. I recognise, however, that applying this approach to a case where there was more than one wrongdoer acting together might result in the FCA recovering a combined sum many times greater than the harm caused to the market.

229. I also note that the multiple of 3 that Mr. Beauchamp indicated the FSA would have applied under this alternative method at step 2 is not based upon any particular published guidelines. This is in contrast to the published percentage of between 0 and 20% that would be applied to revenues. Mr. Beauchamp indicated, however, that in similar cases involving individuals who committed market abuse, the FSA would have applied a multiple of 3 to a case of level 4 seriousness under DEPP 6.5C.2(8), and would have applied that multiple to the profit made by the individual for his own benefit (see DEPP 6.5C.2(3) and (8)). DEPP 6.5C.2 did not explicitly indicate whether the profits would be taken as gross or net, but Mr. Beauchamp's evidence indicated that the FSA would have assumed these to be gross profits.

230. In order to be consistent with the approach to individuals, I am prepared to adopt Mr. Beauchamp's approach. Even though I have found that DVI's conduct did not amount to the deliberate turning of a blind eye to what the Traders were doing, nevertheless I entirely accept that DVI's conduct was still serious misconduct having a number of the features set out in DEPP 6.5A.2 (11) and thus should be treated as at level 4. I would therefore propose to apply a multiplier of 3 to DVI's share of the gross profits. However, rather than adopt Mr. Beauchamp's higher calculation in that regard, I would simply take DVI's share as being 50% of the gross profits of £688,730, namely £344,365, reflecting what was agreed between DVI and the Traders as to the division of the net profits. That is because I regard step 2 as designed to arrive at a measure of seriousness of the misconduct and responsibility for the harm caused to others, and I suspect that the payment of £200,000 was simply a payment on account of the division of profits. The application of a multiplier of 3 therefore results in a step 2 payment of £1,033,095.

231. Mr. Beauchamp also proposed adding a 10% uplift at step 3 in respect of DVI to reflect what he regarded as the aggravating factor that there had been published guidance from the LSE and FSA in relation to layering and spoofing following the Swift Trade case: see DEPP6.5A.3(2)(k). I agree that this was an aggravating factor in DVI's case, which, had it done what its contract with Goldman Sachs indicated, ought to have been aware of such guidance. I would also agree that it merits a 10% uplift at step 3, giving a total figure of £1,136,404.50.

232. In my view, the total payable by DVI as a result of steps 1-3 should therefore be £1,459,563.47.

233. Mr. Beauchamp's evidence was that if a penalty of £1,836,100 was imposed, the FSA would not have considered it necessary to make any upwards adjustment for deterrence at step 4. Mr. Herberg submitted, however, that if I was to arrive at a lesser number for a penalty in respect of DVI, I should consider an uplift for deterrence at step 4.

234. I have considered the matter as Mr. Herberg asked, but do not propose to apply any significant up-lift at step 4. The amount suggested by Mr. Beauchamp was on the basis of an overstatement of the benefits to be disgorged by DVI at step 1, together with an allegation that DVI knowingly turned a blind eye to the misconduct of the Traders. The former was inappropriate, and I have not found the latter proven. Whilst I accept that DVI's misconduct was indeed serious, it is, in my view, right that the end result should reflect the fact that I have not found it to have been deliberate.

235. Imposing a penalty of £1,459,563.47 would suggest some scientific precision in the process, and so it should be rounded off. As I have indicated, to take some account of interest that should be payable at step 1, I propose to round the amount up by a small amount rather than down. Accordingly, the penalty that I shall impose upon DVI is £1.46 million.

Financial penalty upon Mineworld

236. According to the FCA, Mineworld received a payment of £200,000 from DVI as a profit share on DVI's trading during 2010; it received a payment of £55,287.45 as a profit share on DVPte's trading during 2011; and it made gross profits on its own trading during 2011 of £971,625.

237. The marked disparity in the profits made from trading on behalf of DVPte and on behalf of Mineworld during 2011 provides substantial support for Mr. Klein's contention that Mr. Banya and Mr. Pornye were doing precisely what Mr. Klein had earlier feared that they might do (and which they assured him that they would not), namely to engage in the most profitable trading for their own company rather than DVPte; or at very least that they had devoted the majority of their time and energy to trading on behalf of Mineworld rather than on behalf of DVPte.

238. Mr. Herberg invited me - on the basis of Mr. Beauchamp's evidence - to treat the profit shares received by Mineworld in respect of trading carried out by the Traders on behalf of DVI in 2010 (£200,000) and on behalf of DVPte in 2011 (£55,287.45) as amounts that should be disgorged by Mineworld at step 1. He also suggested that at step 2 I should base the amount representing the harm caused by Mineworld not only on the gross profits made by Mineworld whilst trading on its own account in 2011, but also on a share of the gross profits made by DVI and DVPte in 2010 and 2011.

239. I do not think that I can accept that approach. The clear (and indeed trenchant) evidence of Mr. Klein was that the agreement that he made on behalf of DVI and subsequently DVPte was with the Traders, and that he was opposed to any trading by or on behalf of Mineworld. It is also very clear that the trading on behalf of DVI and DVPte was carried out by the Traders through their named sub-accounts of DVI and DVPte, and was not trading by Mineworld. The only reason that the profit-share monies were paid by DVI and DVPte to Mineworld was because the Traders asked for it to be remitted off-shore.

240. I have already held that a penalty cannot be imposed under section 129 FSMA unless the person concerned has engaged in market abuse, and since I cannot conclude that Mineworld itself engaged in the market abuse committed by the

Traders on behalf of DVI and DVPte, I do not think I can impose any penalty upon it in respect of that trading.

241. As to Mineworld's own trading, because the FCA did not provide net calculations and neither Mineworld nor the Traders attended the trial, I do not have any details of the net trading profit for Mineworld's own trading during 2011. However, I do have the equivalent figures for DVPte during the same period: the FCA calculated that DVPte made gross profits of £239,770, and Mr. Klein's evidence was that DVPte made net profits of £79,390.25. On the assumption that this was on the basis of a 50/50 split of net profits between DVPte and the Traders, if I apply the same reduction to Mineworld's gross profits, this results in a net profit figure of £643,429.55 for Mineworld's trading on its own account in 2011. I recognise that there is a possibility that this understates Mineworld's net profits because of the Traders' allocation of the more profitable trading to it rather than to DVPte, but I will nonetheless proceed upon this basis at step 1.

242. At step 2, it is clear that the harm to market participants from the trading in the name of Mineworld during 2011 was £971,625. That number should be multiplied by a factor of 3 to reflect the seriousness of the case, which the FCA contends, and I agree, is at the higher end of level 4. There can be no doubt that, as the FCA submitted, and as I have found, Mineworld is to be attributed with the Traders' state of mind, and their market abuse was deliberate. That gives rise to a figure of £2,914,875 at step 2.

243. In relation to stage 3 - mitigating or aggravating factors – I see no mitigating features, and Mr. Beauchamp drew attention to the presence of a number of the aggravating factors listed in DEPP 6.5A.3(1), each of which I accept. First, as indicated above in connection with DVI, it is an aggravating feature of this case that the practice of layering and spoofing had been the subject of previously published guidance by the LSE and FSA. Secondly, even though the deliberate nature of the market abuse by the Traders has already been taken into account in fixing the level of seriousness in step 2 (and should not be double-counted) it is nevertheless an additional aggravating feature of the case that the Traders' abuse of the market on behalf of Mineworld took place after their earlier activities had been detected by BATS and Goldman Sachs in December 2010, right up to the intervention of the FSA in July 2011.

244. Thirdly, Mr. Beauchamp gave evidence that after the interim injunction granted by Mr. Justice Briggs on 12 July 2011 was notified to Mr. Banya by the FSA by email on 14 July 2011, on 15 July 2011 Mineworld (acting, it is believed, by Mr. Banya, who was the signatory on the account) transferred a total of £60,000 from a sterling account held at Ceskoslovenska Obchodni Banka to a euro account at the same bank and then made a cash withdrawal of €71,000. The same day, 15 July 2011, Mineworld also transferred £16,766.51 to its US$ account and then withdrew that whole amount, being US$26,398.74 in cash. Mr. Beauchamp therefore concluded, and in the absence of any evidence to the contrary, I accept that Mineworld took steps to arrange its resources to avoid disgorgement and/or payment of a financial penalty, which is an aggravating feature specifically referred to in DEPP6.5A.3(2)(e).

245. Although Mr. Beauchamp's evidence was that these aggravating factors would result in the FCA applying a 75% uplift at step 3, taking the step 2 figure from his amount of £4,203,543 to £7,356,200, I think that this is too high. Under the DEPP framework, the result of a case being classified as a case at the most serious level 5 rather than level 4 would be that a multiplier of 4 would be applied to the monetary figure for harm rather than a multiplier of 3. That is an increase from 300% to 400% of the harm figure at step 2. This must be borne in mind when considering what increase to apply for aggravating or mitigating features at step 3.

246. So, for example, I have accepted in relation to DVI that it was appropriate to apply an increase of 10% at step 3 to reflect the single aggravating feature of the case. That resulted in an overall increase from 300% to 330% of the harm (gross profit) figure used in the computation at step 2. But applying a 75% increase at step 3 to the overall figure reached at step 2 would result in a total of (300% + 225%) = 525% of the underlying harm figure. That is the equivalent of using the same multiplier (4) as if the case had been classified as the most serious level 5, and then some considerable amount more. I cannot see that this is appropriate. Whilst I think that the presence of aggravating or mitigating factors might, in a particular case, move the overall seriousness of the case within a level at step 3, or even so that it reaches the same result as would have been arrived at by classifying it as a higher level or lower level at step 2, I find it difficult to understand how the presence of the aggravating or mitigating features could move the case well beyond the adjacent level of seriousness.

247. In my judgment, the aggravating features of this case are sufficiently strong to move Mineworld's case up to the equivalent of a level 5 case. I would therefore apply an uplift to take the overall amount payable to a multiple of 4 times the harm (gross profit) figure used at level 2, being 4 times £971,625. That is a total of £3,886,500.

248. Adding the disgorgement figure from step 1, that results in a total penalty payable by Mineworld of £4,858,125. Given that this is much less than the total of £8,757,300 sought by the FCA, Mr. Herberg would invite me to consider a further uplift for deterrence at step 4. I cannot say with any confidence that the amount that I have arrived at would be an insufficient deterrent. However, I take into account the views of the FCA, together with the point that I have made above concerning interest on disgorged benefits. I also have in mind the unattractive feature that Mineworld's own trading profits appear to have been enhanced by the actions of Mr. Banya and Mr. Pornye so as to prefer it over the interests of DVPte. For these reasons, I shall slightly increase the figure that I have arrived at after step 3, and will impose a penalty upon Mineworld of <u>£5 million</u>.

<u>Financial penalty upon the Traders</u>

249. The FCA invited me to approach the imposition of a penalty upon the Traders on the basis that it was not possible to determine the extent to which they had each benefitted from the monies paid to Mineworld. For my part I take the view that because the Traders were engaged in a joint enterprise, they should, in the absence of any evidence to the contrary, be assumed to have been entitled to an equal share of the monies paid to them by DVI and DVPte in respect of the periods whilst they were trading for those companies. The fact that, doubtless in an effort

to avoid tax, they asked for their profit shares to be paid off-shore to Mineworld does not change the position. That would mean that each of the three Traders should be taken to have obtained one third of the £200,000 paid by DVI in respect of 2010, and Mr. Banya and Mr. Pornye would have divided the £55,287.45 paid by DVPte in respect of 2011 equally between them. Those figures would therefore be applicable at step 1.

250. Mr. Beauchamp's evidence also suggested that at step 2 the FSA would have proceeded on the basis that the Traders' market abuse was not referable to any employment. That seems to be correct. For the reasons set out above and applying DEPP6.5C.2(7)-(16), this was clearly at least a level 4 seriousness case. The resultant profit multiple at step 2 would therefore be 3 times the benefits indicated above, i.e. £282,931.17 for Mr. Banya and Mr. Pornye, and £200,000 for Mr. Brad.

251. So far as mitigating or aggravating features are concerned, I see no mitigating features, and there is the aggravating feature that the FSA and LSE had published materials containing concerns about layering and spoofing, and each of the Traders must have known about such matters due to their previous involvement with Swift Trade.

252. The amount of an appropriate uplift for aggravating factors in the case of an individual is not the subject of any guidance in DEPP 6.5C.3, and cannot be calibrated in the same way as in relation to firms (see above). Mr. Beauchamp's evidence was that the FSA would apply very substantial uplifts of 100% and 75% in respect of Mr. Banya and Mr. Pornye respectively on the basis that they had been "previously involved" in manipulative trading at Swift Trade. However, as I indicated above, they were not defendants to the regulatory proceedings in the Swift Trade case, and I did not have any specific evidence that they were the responsible traders in that case.

253. Accordingly, I shall apply a more modest uplift of 10% for each of the Traders at step 3. The result in respect of Mr. Banya and Mr. Pornye would therefore be £311,224.29, and in respect of Mr. Brad it would be £220,000. Adding the disgorgement number from step 1 gives figures of £405,534.67 for Mr. Banya and Mr. Pornye, and £286,666.66 for Mr. Brad. Rounding these figures up for the same reasons as already discussed in relation to DVI and Mineworld, the penalties I shall impose are £410,000 on Mr. Banya and Mr. Pornye, and £290,000 upon Mr. Brad. I am not concerned that these amounts exceed the amounts that Mr. Beauchamp indicated the FSA might have imposed upon the Traders. The increase is essentially due to the fact that (contrary to Mr. Beauchamp's view) it was the Traders rather than Mineworld who were entitled to benefit from the profit share arrangement with DVI and DVPte. In my view these penalties also more accurately reflect the true position, namely that it was the three individuals who were primarily responsible for the wrongdoing in this case.

Injunctions

254. As indicated above, the relevant jurisdiction to grant an injunction under section 381(1)(b) FSMA is exercisable if the court is satisfied,

> "that any person is or has engaged in market abuse and that there is a reasonable likelihood that the market abuse will continue or be repeated".

In such a case, the court may make an order "restraining … the market abuse".

255. I have, for the reasons set out above, found that each of the Defendants engaged in market abuse, so the question in each case is whether there is a reasonable likelihood that the market abuse will be repeated, and whether in all the circumstances it is appropriate to grant an injunction.

256. Dr. Peglow submitted that the requirement in section 381 that there be a "reasonable likelihood" of future market abuse means that there must be a more than 50% probability that it will occur in future – i.e. that it is more likely than not that market abuse will occur again in the future. Moreover, in his written closing Dr. Peglow went so far as to contend that the FCA could not demonstrate that there was a reasonable likelihood of repeated market manipulation unless "the person concerned has a history of market abuse and the manipulations have been almost identical in their execution". I do not accept that either proposition is correct or that the jurisdiction under section 381 is limited in this way.

257. The approach to interpretation of a statutory requirement cast in terms of likelihood was discussed in <u>Re H</u> [1996] A.C. 563 to which I have already referred. That case concerned the power of the court under section 31 of the Children Act 1989 to make an order placing a child in care if satisfied that the child concerned is "likely" to suffer significant harm. Lord Nicholls, giving the leading judgment, considered the possible meanings of "likely". He stated at page 584:

> "I shall consider first the meaning of "likely" in the expression "likely to suffer significant harm" in section 31. In your Lordships' House Mr. Levy advanced an argument not open in the courts below. He submitted that likely means probable, and that the decision of the Court of Appeal to the contrary in <u>Newham London Borough Council v. A.G.</u> [1993] 1 F.L.R. 281 was wrong. I cannot accept this contention.
>
> 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 am going 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?"

258. Lord Nicholls held that, for the purposes of the relevant subsection in the Children Act, "likely" meant "a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case". His reasoning was as follows:

> "In section 31(2) Parliament has stated the prerequisites which must exist before the court has power to make a care order. These prerequisites mark the boundary line drawn by Parliament between the differing interests. On one side are the interests of parents in caring for their own child, a course which prima facie is also in the interests of the child. On the other side there will be circumstances in which the interests of the child may dictate a need for his care to be entrusted to others. In section 31(2) Parliament has stated the minimum conditions which must be present before the court can look more widely at all the circumstances and decide whether the child's welfare requires that a local authority shall receive the child into their care and have parental responsibility for him. The court must be satisfied that the child is already suffering significant harm. Or the court must be satisfied that, looking ahead, although the child may not yet be suffering such harm, he or she is likely to do so in the future. The court may make a care order if, but only if, it is satisfied in one or other of these respects.
>
> In this context Parliament cannot have been using likely in the sense of more likely than not. If the word likely were given this meaning, it would have the effect of leaving outside the scope of care and supervision orders cases where the court is satisfied there is a real possibility of significant harm to the child in the future but that possibility falls short of being more likely than not. Strictly, if this were the correct reading of the Act, a care or supervision order would not be available even in a case where the risk of significant harm is as likely as not. Nothing would suffice short of proof that the child will probably suffer significant harm.
>
> The difficulty with this interpretation of section 31(2)(a) is that it would draw the boundary line at an altogether inapposite point. What is in issue is the prospect, or risk, of the child suffering significant harm. When exposed to this risk a child may need protection just as much when the risk is considered to be less than 50-50 as when the risk is of a higher order. Conversely, so far as the parents are concerned, there is no particular magic in a threshold test based on a probability of significant harm as distinct from a real possibility. It is otherwise if there is no real possibility. It is eminently understandable that Parliament should provide that where there is no real possibility of significant harm, parental responsibility should remain solely with the parents. That makes sense as a threshold in the interests of the parents and the child in a way that a higher threshold, based on probability, would not.

> In my view, therefore, the context shows that in section 31(2)(a) likely is being used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case."

259. Mr. Herberg submitted, and I accept, that similar reasoning should apply to the interpretation of section 381 FSMA. In deciding the sense in which the legislature has used the expression "reasonable likelihood" in section 381 FSMA, it is necessary to have regard to the potential harm to be guarded against, and then to assess whether that degree of potential harm indicates that a higher or lower probability of the harm occurring is required to be present before the court can intervene.

260. Market abuse can cause serious harm, not only to other market participants and the many millions of private citizens whose personal wealth and provision for retirement is invested on the financial markets, but also to the reputation of those markets more generally. Protecting the integrity and proper functioning of those markets is a matter of substantial importance to individuals as well as to national and international economic interests. The policy imperative to prevent and deter market abuse is very clear.

261. I do not, however, think that the fact that market abuse may already be penalised by criminal sanctions or result in a financial penalty should be taken to indicate that a higher level of probability of repetition is required before the civil courts can grant an injunction. The grant of an injunction can often provide a useful additional tool to deter unlawful behaviour. The point was clearly put by Mr. Justice Neuberger in Financial Services Authority v Robert Young (unreported, 23 November 2001), a case concerning an application for injunctions restraining contraventions of various sections of the Banking Act 1987. Section 93 of that Act empowered the court to grant an injunction if it was satisfied that there was a "reasonable likelihood" that any person would contravene the provisions listed in the section. Neuberger J stated,

> "Mr. Donaldson also wondered whether it was helpful to grant an injunction simply requiring somebody to obey the law. I think there are two answers to that. First of all, Parliament has provided for that in section 93 of the 1987 Act. Secondly, it is helpful, because it means that if someone breaches the injunction he is not only liable for sanction under the Banking Act but he can be dealt with as a contemnor and, in many cases, that is a desirable option."

262. In my judgment, the degree of potential harm caused by market abuse is sufficiently high that the legislature cannot have intended that the grant of an injunction under section 381(1)(b), with the sanction of contempt proceedings in the event of breach, should only be available in cases where the risk of repeat abuse is more likely than not: still less that an injunction should only be available upon satisfaction of the very restrictive "similar fact" test proposed by Dr. Peglow. I consider that the legislative intention was to enable the court to grant

an injunction under section 381 in an appropriate case if the risk of repetition of market abuse is a real possibility that cannot sensibly be ignored.

263. Applying that test, I am entirely satisfied that it is appropriate to grant an injunction against each of the Defendants. I have found that the Traders are serial market abusers who were not deterred by their experiences at Swift Trade, and in the case of Mr. Banya and Mr. Pornye, continued to engage in market abuse on behalf of DVPte and Mineworld even after their activities were detected in late 2010. Nothing is known of the Traders' present activities, and in the absence of clear evidence that they are no longer interested or engaged in trading, there must be a significant risk of repetition of market abuse by them.

264. The same reasoning also applies to Mineworld. Although I have been told that it has been struck off the register of companies in the Seychelles for non-payment of fees, there is no assurance that it cannot be restored. Whilst I accept that this may not be probable, I cannot simply ignore the possibility, and in the absence of any obvious prejudice to Mineworld in granting an injunction, I propose to do so.

265. I accept that DVI does not fall into the same category as the Traders and Mineworld. However, I cannot accept Dr. Peglow's submission that there is no real risk of repetition of market abuse by DVI. In support of his contention, Dr. Peglow pointed to the fact that there was no evidence that DVI's directing mind (Mr. Klein) had personally engaged in market abuse; he contended that the arrangement with the Traders had been a singular event; and he submitted that DVI was no longer in the business of day-trading.

266. I accept that I have not found that Mr. Klein consciously disregarded the possibility that the Traders were engaged in market abuse whilst they were acting on behalf of DVI. Nonetheless I have found that DVI wholly failed to take any adequate steps to ensure that market abuse was not being committed by those who acted on its behalf, and indeed that it was reckless in that regard. Moreover, whilst I have not found it necessary, given the demise of DVPte, to investigate whether Mr. Klein did turn a blind eye to what was going on during 2011, any submission that I can rely upon Mr. Klein to exercise due diligence to prevent employees or agents of DVI from engaging in market abuse in the future is plainly not enhanced by his failure to prevent further market abuse on behalf of DVPte.

267. In that regard I was also not impressed by Mr. Klein's reluctance to accept that what the Traders had been doing amounted to market abuse when he was cross-examined at the trial. As I have indicated in paragraph 193 above, even when faced with the extensive analysis of what had occurred by Mr. Norris and Dr. Aitken, Mr. Klein still preferred to advance the view that the Traders had simply been market-making rather than market manipulating.

268. I take account of the fact that DVI was prepared to offer (albeit at the end of the trial and without prejudice to its primary contention that no market abuse had occurred in 2010 at all), some detailed undertakings to the effect, (i) that it would not authorise anyone to trade on its behalf in relation to qualifying investments admitted to trading on a prescribed market in the UK without having first conducted "pre-trade due diligence" in relation to the trader and having provided a report on its due diligence to the relevant DMA service provider to be used; (ii)

that it would conduct its own "reasonable post-trade analysis", instructing its risk officer to look out for wash-trades and "unusually frequent position reversals"; and (iii) that in relation to intra-day trading it would not place specified types of orders in particular patterns so as to "move the price of the qualifying investment" or so as to "give a misleading impression that there is demand for or supply of the qualifying investment at that price" "other than for legitimate reasons and/or unless the trading strategy is accepted by regular users of the prescribed market as compliant with market regulation".

269. The FCA was not content that these undertakings would, if accepted, remove the risk of repeated market abuse by persons acting on behalf of DVI; and it submitted that the terms of the undertakings were not sufficiently clear and precise. The FCA urged me to impose an injunction in the form of a draft which was reformulated by Mr. Herberg at the trial following certain comments from me. That draft injunction includes a general "obey the law" paragraph couched in terms of section 118(5), coupled with a specific paragraph prohibiting the key elements of layering and spoofing, and is set out in Annex 3 to this judgment.

270. I note first that notwithstanding Dr. Peglow's submissions, no undertaking is offered by DVI not to engage in day-trading, and indeed the third part of the undertaking expressly reserves the right to engage in intra-day trading subject to certain conditions. I also agree with the FCA that whilst the undertakings offered by DVI are (rightly) designed to address some of the more obvious deficiencies that I have found proven in DVI's conduct in the past, they are not drafted in sufficiently clear terms to form the basis for a regime that can be scrutinised by the FCA or enforced by the court. For example, whilst "pre-trade due diligence", "reasonable post-trade analysis", and "unusually frequent position reversals" may be recognisable as general concepts, they are not defined terms and are likely to give rise to disputes about whether what DVI has done is sufficient.

271. I also cannot accept that it is appropriate for the undertakings in relation to intra-day trading to be drafted in such a way as to permit behaviour designed to "move the price" or "give a misleading impression" as to supply or demand if done "for legitimate reasons" and/or if "the trading strategy is accepted by regular users of the prescribed market as compliant with market regulation". I do not understand what legitimate reasons there might be for behaviour designed to move the price or to give a misleading impression of supply or demand, and I foresee considerable scope for dispute in that regard. Moreover, I cannot see why "regular users of the prescribed market" should be set up as the arbiters of what might or might not be lawful or compliant with applicable regulations, or indeed how their views might be ascertained.

272. In my view it is preferable for an injunction to be granted in the terms suggested by the FCA, and I will impose such an injunction when there is a hearing to consider the final form of order and any consequential matters arising out of this judgment. Until that time the existing interim undertakings and injunctions should continue.

273. One final point to note is that although the injunction that I propose to grant is a final injunction, it should be subject to an express permission to each Defendant to apply to the court, on the giving of written notice to the FCA, to vary or discharge

the order. That will enable any of the Defendants to apply if there is a material change of circumstances that would make the continuation of the injunction unnecessary or inappropriate.

Conclusion

274. For the reasons that I have given, I find the allegations of market abuse to be proven by the FCA. I will grant injunctions pursuant to section 381 FSMA in the form suggested by the FCA; and I will impose penalties upon the Defendants pursuant to section 129 FSMA in the following amounts: DVI £1.46 million; Mineworld £5 million; Mr. Banya and Mr. Pornye £410,000; and Mr. Brad £290,000.

ANNEX 1

# Summary analysis of the 27 incidents[1]

| No | Stock/ Date | Length of trading period (mins) and time of day | Saw tooth pattern of order entry[2] | No of net position reversals[3] | Corresponding share price movement[4] | % of ALL orders executed / cancelled[5] | % of trades opposite cum net order position[6] | % of ALL orders executed / cancelled – (adjusted)[7] | % of large orders / % of small orders[8] | % of large / small order executions / cancellations[9] – Large: Executed / cancelled | % of large / small order executions / cancellations[9] – Small: Executed / cancelled |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | 5 (13:13 to 13:18) | Yes | 2 | Yes | | | | | | |
| 1 | Weir Group PLC 09/09/10 | 7 (15:21 to 15:28) | Yes | 2 | Yes | 11.94 / 88.06 | 85.87 | 1.88 / 98.12 | 99.00 / 1.00 | 11.26 / 88.74 | 79.38 / 20.62 |
| | | 8 | Yes | 4 | Yes | | | | | | |

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[1] In certain incidents, the Defendants' activity took place at different times during the trading day. Other than in the case of Tullow (31.05.11) as footnoted below, each period of activity within an incident is given a separate row in the above table for the purpose of my analysis of the order entry pattern and corresponding share price movement.

[2] I have identified any incident involving at least one transfer of the Defendants' cumulative net order position from one side of the order book to the other in a clear and substantive manner as a "saw tooth pattern".

[3] This column refers to how many times the order entry pattern is reversed (i.e. a net order position built up on one side of the book before being reversed with an opposite position being built up on the other side of the order book).

[4] This column refers to whether or not share price movements in the stock appear to reflect the Defendants' pattern of order activity.

[5] This column shows the overall percentage of all orders executed versus all orders cancelled.

[6] This column shows the percentage of orders executed (i.e. trades) on the opposite side of the order book to the Defendants' net order position. It has been calculated by reference to the incident as a whole, rather than split between different individual periods of trading (where applicable). I have calculated trades by reference to the number of shares bought or sold.

[7] The figures have been adjusted to exclude those orders executed on the opposite side of the order book to the Defendants' cumulative net order position. This gives a more accurate picture of the cancellation rate for orders on the "layering" side of the order book since it does not include the "profit-taking" orders (which were frequently aggressive orders priced at a level that would execute immediately). By way of example: of the 11.94% orders executed for Weir Group PLC, 10.26% were executed when the Defendant's cumulative net order position was in the opposite direction to the shares traded i.e. selling shares when having placed cumulative net buy orders on the LSE and vice versa. Of the remaining 89.74% of orders, 98.12% were cancelled and 1.88% were executed.

[8] This column shows the percentage of large orders relative to small orders for each stock

[9] This column has been calculated by reference to the incident as a whole, rather than split between different individual periods of trading (where applicable) and again calculates trades by reference to the number of shares bought or sold.

| No | Stock/ Date | Length of trading period (mins) and time of day | Saw tooth pattern of order entry[2] | No of net position reversals[3] | Corresponding share price movement[4] | % of ALL orders executed / cancelled[5] | % of trades opposite cum net order position[6] | % of ALL orders executed / cancelled – (adjusted)[7] | % of large orders / % of small orders[8] | % of large / small order executions / cancellations[9] | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | Large | Small |
| | | | | | | | | | | Executed / cancelled | Executed / cancelled |
| 2 | Premier Oil PLC 22/09/10 | 6 (10:44 to 10:50) | Yes | 1 | Yes | 7.00 / 93.00 | 82.86 | 1.27 / 98.73 | 96.80 / 3.20 | 5.36 / 94.64 | 56.43 / 43.57 |
| | | 4 (15:45 to 15:49) | Yes | 1 | Yes | | | | | | |
| 3 | Charter International PLC 05/10/10 | 17 (10:18 to 10:35) | Yes | 5 | Yes | 10.11 / 89.89 | 94.12 | 0.66 / 99.34 | 91.19 / 8.81 | 5.11 / 94.89 | 61.83 / 38.17 |
| 4 | Fresnillo PLC 11/10/10 | 3 (10:12 to 10:15) | Yes | 1 | Yes | 9.33 / 90.67 | 94.02 | 0.61 / 99.39 | 98.40 / 1.60 | 8.35 / 91.65 | 69.78 / 30.22 |
| | | 7 (11:03 to 11:10) | Yes | 2 | Yes | | | | | | |
| | | 3 (12:51 to 12:54) | Yes | 1 | No | | | | | | |
| 5 | Johnson Matthey PLC 4/11/10 | 10 (11:12 to 11:22) | Yes | 2 | Yes | 14.93 / 85.07 | 74.72 | 4.25 / 95.75 | 98.06 / 1.94 | 13.94 / 86.06 | 65.26 / 34.74 |
| 6 | Wolseley PLC 08/11/10 | 14 (12:26 to 12:40) | Yes | 6 | Yes | 19.24 / 80.76 | 77.73 | 5.04 / 94.96 | 99.08 / 0.92 | 18.56 / 81.44 | 92.89 / 7.11 |
| 7 | Severn Trent PLC 25/11/10 | 22 (10:06 to 10:28) | Yes | 11 | Yes | 18.25 / 81.75 | 84.47 | 3.35 / 96.65 | 97.57 / 2.43 | 17.07 / 82.93 | 65.41 / 34.59 |

| No | Stock/ Date | Length of trading period (mins) and time of day | Saw tooth pattern of order entry[2] | No of net position reversals[3] | Corresponding share price movement[4] | % of ALL orders executed / cancelled[5] | % of trades opposite cum net order position[6] | % of ALL orders executed / cancelled – (adjusted)[7] | % of large orders / % of small orders[8] | % of large / small order executions / cancellations[9] | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | Large | Small |
| | | | | | | | | | | Executed / cancelled | Executed / cancelled |
| 8 | Aquarius Platinum Limited 06/12/10 | 39 (11:04 to 11:43) | Yes | 11 | Yes | 12.95 / 87.05 | 92.05 | 1.17 / 98.83 | 95.69 / 4.31 | 10.25 / 89.75 | 72.81 / 27.19 |
| 9 | Micro Focus International PLC 15/12/10 | 9 (10:03 to 10:12) | Yes | 2 | Yes | 9.72 / 90.28 | 91.46 | 0.91 / 99.09 | 85.05 / 14.95 | 0.00 / 100.00 | 65.03 / 34.97 |
| 10 | Carillion PLC 22/12/10 | 23 (10:10 to 10:33) | Yes | 6 | Yes | 8.10 / 91.90 | 93.88 | 0.54 / 99.46 | 83.69 / 16.31 | 0.00 / 100.00 | 49.68 / 50.32 |
| 11 | United Utilities Group PLC 22/12/10 | 23 (10:50 to 11:13) | Yes | 11 | Yes | 9.82 / 90.18 | 96.77 | 0.35 / 99.65 | 98.81 / 1.19 | 9.13 / 90.87 | 67.34 / 32.66 |
| 12 | Inmarsat PLC 28/02/11 | 14 (11:06 to 11:20) | Yes | 6 | Yes | 9.11 / 90.89 | 97.14 | 0.29 / 99.71 | 98.89 / 1.11 | 8.40 / 91.60 | 72.81 / 27.19 |
| 13 | Severn Trent PLC 17/03/11 | 10 (13:17 to 13:27) | Yes | 5 | Yes | 17.88 / 82.12 | 90.52 | 2.02 / 97.98 | 99.04 / 0.96 | 17.39 / 82.61 | 68.23 / 31.77 |
| 14 | Admiral Group PLC 18/03/11 | 33 (14:35 to 15:08) | Yes | 6 | Yes | 23.28 / 76.72 | 74.92 | 7.07 / 92.93 | 98.26 / 1.74 | 22.13 / 77.87 | 88.13 / 11.87 |

| No | Stock/ Date | Length of trading period (mins) and time of day | Saw tooth pattern of order entry[2] | No of net position reversals[3] | Corresponding share price movement[4] | % of ALL orders executed / cancelled[5] | % of trades opposite cum net order position[6] | % of ALL orders executed / cancelled – (adjusted)[7] | % of large orders / % of small orders[8] | % of large / small order executions / cancellations[9] | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | Large Executed / cancelled | Small Executed / cancelled |
| 15 | Serco Group PLC 21/03/11 | 7 (14:44 to 14:51) | Yes | 2 | Yes | 11.11 / 88.89 | 94.17 | 0.72 / 99.28 | 98.71 / 1.29 | 10.12 / 89.88 | 86.73 / 13.27 |
| 16 | Fresnillo PLC 23/03/11 | 17 (13:49 to 14:06) | Yes | 6 | Yes | 16.52 / 83.48 | 73.21 | 5.03 / 94.97 | 98.41 / 1.59 | 15.67 / 84.33 | 68.88 / 31.12 |
| | | 10 (16:25 to 16:35) | No | N/A | No | | | | | | |
| 17 | John Wood Group PLC 29/03/11 | 13 (13:51 to 14:04) | Yes | 5 | Yes | 13.73 / 86.27 | 93.34 | 1.05 / 98.95 | 99.10 / 0.90 | 13.02 / 86.98 | 92.06 / 7.94 |
| 18 | ICAP PLC 12/04/11 | 11 (10:19 to 10:30) | Yes | 5 | Yes | 11.74 / 88.26 | 94.02 | 0.79 / 99.21 | 96.01 / 3.99 | 8.99 / 91.01 | 77.87 / 22.13 |
| | | 2 (13:39 to 13:40) | No | N/A | No | | | | | | |
| 19 | Afren PLC 26/04/11 | 13 (13:54 to 14:07) | Yes | 4 | Yes | 23.43 / 76.57 | 81.24 | 5.43 / 94.57 | 81.13 / 18.87 | 25.37 / 74.63 | 15.10 / 84.90 |
| | | 16 (15:41 to 15:57) | Yes | 3 | No | | | | | | |
| 20 | John Wood Group PLC 10/05/11 | 11 (10:29 to 10:40) | Yes | 3 | Yes | 15.01 / 84.99 | 93.06 | 1.21 / 98.79 | 98.83 / 1.17 | 14.15 / 85.85 | 87.89 / 12.11 |
| | | 7 (15:29 to 15:36) | Yes | 3 | Yes | | | | | | |

| No | Stock/ Date | Length of trading period (mins) and time of day | Saw tooth pattern of order entry[2] | No of net position reversals[3] | Corresponding share price movement[4] | % of ALL orders executed / cancelled[5] | % of trades opposite cum net order position[6] | % of ALL orders executed / cancelled – (adjusted)[7] | % of large orders / % of small orders[8] | % of large / small order executions / cancellations[9] | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | Large | Small |
| | | | | | | | | | | Executed / cancelled | Executed / cancelled |
| 21 | Experian PLC 18/05/11 | 18 (12:18 to 12:36) | Yes | 3 | Yes | 16.36 / 83.64 | 82.85 | 3.25 / 96.75 | 98.36 / 1.64 | 15.40 / 84.60 | 73.64 / 26.36 |
| 22 | Tullow Oil PLC[10] 31/05/11 | 16 (11:12 to 11:28) | Yes | 7 | Yes | 17.03 / 82.97 | 84.27 | 3.13 / 96.87 | 98.35 / 1.65 | 16.08 / 83.92 | 73.35 / 26.65 |
| | | 7 (15:49 to 15:56) | Yes | 1 | Yes | | | | | | |
| 23 | Wolseley PLC 08/06/11 | 15 (12:20 to 12:35) | Yes | 7 | Yes | 11.86 / 88.14 | 82.37 | 2.32 / 97.68 | 98.86 / 1.14 | 11.07 / 88.93 | 80.33 / 19.67 |
| 24 | ARM Holdings PLC 09/06/11 | 9 (11:28 to 11:37) | Yes | 4 | Yes | 9.71 / 90.29 | 93.06 | 0.74 / 99.26 | 98.47 / 1.53 | 8.35 / 91.65 | 97.69 / 2.31 |
| 25 | BT Group PLC 24/06/11 | 9 (13:54 to 14:03) | Yes | 2 | Yes | 14.14 / 85.86 | 93.80 | 1.01 / 98.99 | 96.96 / 3.04 | 11.84 / 88.16 | 87.73 / 12.27 |
| 26 | Smith & Nephew PLC 08/07/11 | 15 (13:05 to 13:20) | Yes | 6 | Yes | 9.11 / 90.89 | 87.76 | 1.21 / 98.79 | 99.40 / 0.60 | 8.61 / 91.39 | 93.28 / 6.72 |

[10] There was one further time on 31/5/2011 when DVI PTE entered an order for Tullow Oil shares, entering a buy order for 2,500 shares at 13:37 before cancelling it 93 minutes later at 15:09. I have not included this activity in the above summary as it does not appear to relate to either of the trading periods undertaken during the day, nor to have any specific purpose.

| No | Stock/ Date | Length of trading period (mins) and time of day | Saw tooth pattern of order entry[2] | No of net position reversals[3] | Corresponding share price movement[4] | % of ALL orders executed / cancelled[5] | % of trades opposite cum net order position[6] | % of ALL orders executed / cancelled – (adjusted)[7] | % of large orders / % of small orders[8] | % of large / small order executions / cancellations[9] Large Executed / cancelled | Small Executed / cancelled |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 27 | WPP PLC 14/07/11 | 7 (11:10 to 11:17) | Yes | 3 | Yes | 9.15 / 90.85 | 89.92 | 1.00 / 99.00 | 99.47 / 0.53 | 8.78 / 91.22 | 78.91 / 21.09 |
| | | 5 (14:23 to 14:28) | Yes | 1 | Yes | | | | | | |
| | **AVERAGE** | **12.23 minutes** | | **3.95** | | **13.35 / 86.65** | **87.91** | **2.09 / 97.91** | **96.36 / 3.64** | **11.64 / 88.36** | **73.65 / 26.35** |

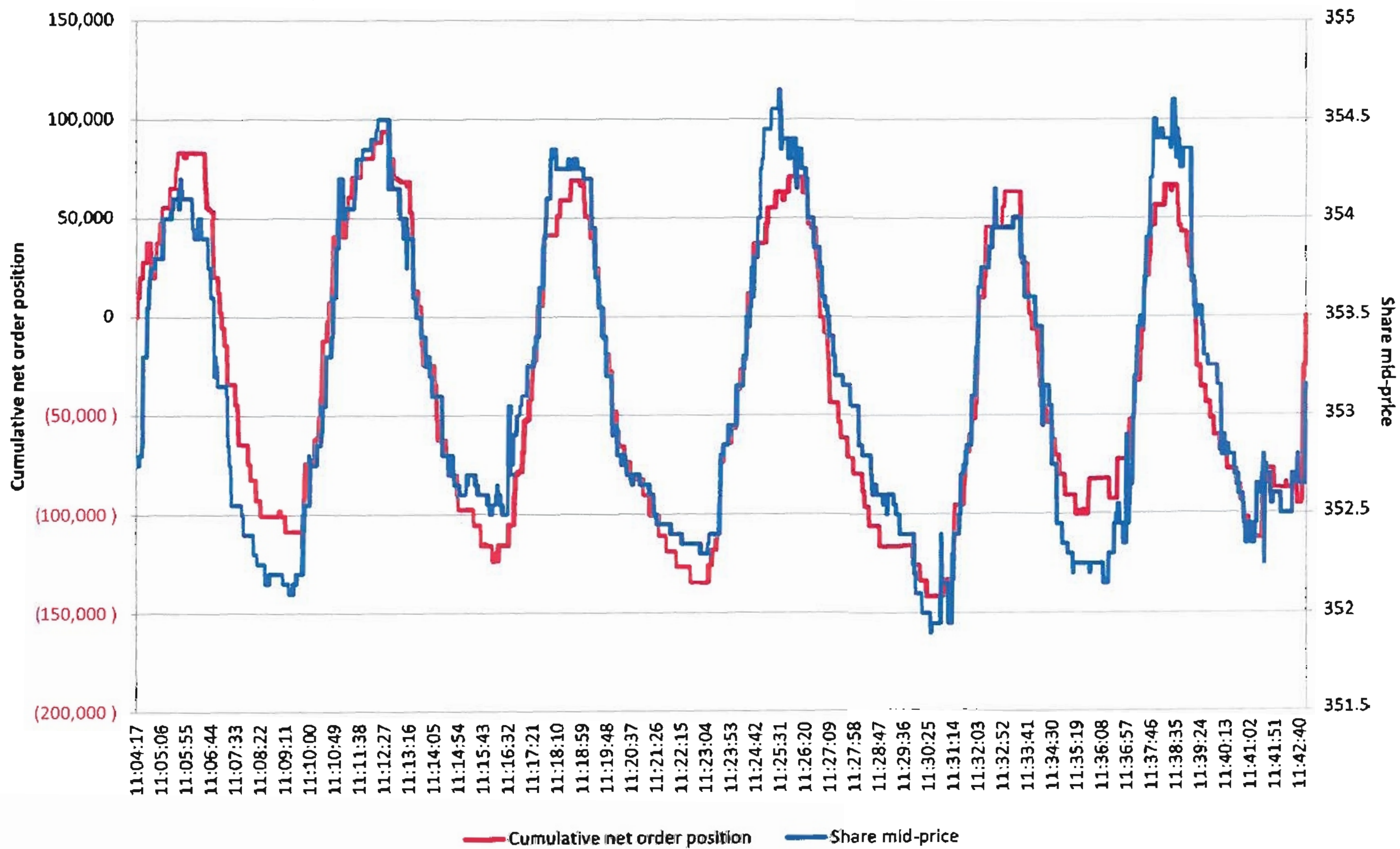
CHART 2
Aquarius Platinum Limited - 6 December 2010
Share mid-price versus DVI's cumulative net order position - trading period 11:04 to 11:43
Cumulative net order position
150,000
100,000
50,000
0
(50,000 )
(100,000 )
(150,000 )
(200,000 )
Share mid-price
355
354.5
354
353.5
353
352.5
352
351.5
11:04:17
11:05:06
11:05:55
11:06:44
11:07:33
11:08:22
11:09:11
11:10:00
11:10:49
11:11:38
11:12:27
11:13:16
11:14:05
11:14:54
11:15:43
11:16:32
11:17:21
11:18:10
11:18:59
11:19:48
11:20:37
11:21:26
11:22:15
11:23:04
11:23:53
11:24:42
11:25:31
11:26:20
11:27:09
11:27:58
11:28:47
11:29:36
11:30:25
11:31:14
11:32:03
11:32:52
11:33:41
11:34:30
11:35:19
11:36:08
11:36:57
11:37:46
11:38:35
11:39:24
11:40:13
11:41:02
11:41:51
11:42:40
Cumulative net order position
Share mid-price

## ANNEX 3

## DRAFT INJUNCTIONS

1. The Defendants must not, whether by themselves or their employees or agents, effect transactions or orders to trade in relation to a security which is admitted to trading on any prescribed market situated in, or operating in, the United Kingdom which:

    a. give, or are likely to give, a false or misleading impression as to the supply of or demand for, or as to the price of, the securities to which the transaction or order to trade relates; or

    b. secure the price of any securities at an abnormal or artificial level.

2. Without prejudice to the generality of paragraph 1 above, the Defendants must not, whether by themselves or their employees or agents effect any transaction or order to trade in relation to a security which is admitted to trading on any prescribed market situated in, or operating in, the United Kingdom which results in the submission of an order on a prescribed market or multilateral trading facility:

    a. to trade on one side of an order book in a manner that is intended (whether on its own or in conjunction with other orders) to move the price away from the existing market price;

    b. to trade on the opposite side of an order book in order to profit from the price resulting from any action falling within sub-paragraph 2(a) above.

3. Notwithstanding that this is a final order, each Defendant has a right to apply to the Court to vary or discharge the order.