Reference No: FIN/2009/0016

MARKET ABUSE – Insider dealing – Whether inside information prompted the dealing – Yes – Whether a rumour prompted the dealing – No – Penalty

THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
FINANCIAL SERVICES

ANDRE JOHN SCERRI **Applicant**

- and -

FINANCIAL SERVICES AUTHORITY **The Authority**

Tribunal: SIR STEPHEN OLIVER QC
SANDI O'NEILL
NICHOLAS DOUCH

Sitting in public in London on 21 May 2010

Richard Lee, British Legal Practice, Malta, for the Applicant

Andrew Hunter, counsel, for the Authority

DECISION

1. By this reference Mr A J Scerri, the Applicant, disputes a Decision Notice dated 23 July 2009 by which the FSA decided to impose a penalty of £46,062.50 on Mr Scerri pursuant to section 123 of the Financial Services and Markets Act 2000 ("the Act") in respect of conduct of his on 23 May 2007 which, the FSA contended, constituted market abuse under section 118 of the Act.

2. The case concerns dealings by Mr Scerri (who was a private investor) in an AIM listed oil and gas exploration company ("Amerisur"). In outline, the FSA contends that on 23 May 2007 Mr Scerri received inside information about this stock (that it would announce a placing at a discount to the market price the next day) first from a fellow shareholder (at 10.00am and 10.12am), and then from Amerisur's NOMAD (at 10.28am). The FSA's case is that, on the basis of this information, between 10.16am and 10.34am Mr Scerri placed sell orders selling down his existing long position in Amerisur in order to enable him to subscribe for shares at the cheaper placing price. The FSA contends that this conduct amounted to market abuse contrary to section 118 of the Act, namely dealing in an investment related to a qualifying investment on the basis of inside information relating to that investment.

3. The effect of the alleged market abuse of Mr Scerri was, say the FSA, to generate an immediate economic gain for him of at least £46,062.50 (or to avoid losses in this amount), and the FSA therefore contends that a financial penalty in at least this amount is appropriate.

4. Mr Scerri, represented by Mr Richard Lee, attended the hearing and gave evidence. The FSA did not call witness evidence.

5. The FSA's grounds for seeking to impose the penalty are based on the facts and circumstances that we now summarise.

The FSA's account of the relevant transactions

6. Mr Scerri was a private "retail" investor who, since about 2005, had been taking positions in various AIM shares, using MAN Financial as his broker and trading on execution only basis. Through a website "Bulletin Board" Mr Scerri had communicated with other individuals interested in AIM Shares. One such individual had been a Mr Brian Taylor. One of the shares which Mr Scerri traded was Amerisur. This is an oil and gas exploration company, which at the time was called Chaco Resources Plc. Mr Taylor was another shareholder in Amerisur.

7. At the start of trading on 23 May 2007, Mr Scerri had a long position in Amerisur through CFDs equivalent to 1,785,000 shares. At 9.27am Mr Scerri placed an order with his broker to increase this long position by purchasing CFDs equivalent to 150,000 shares at a price of 9.25p. At some point prior to 10.16am Mr Scerri cancelled that order.

8. At 9.35am on 23 May 2007, a Mr Keen of Amerisur's NOMAD (Blue Oar) telephoned Mr Taylor. Mr Keen provided Mr Taylor with confidential inside information about Amerisur. On that basis Mr Taylor became an insider having been made aware of his responsibilities of becoming an insider by Mr Keen. The inside information was that Amerisur would be announcing to the market the following day a placing of shares at 6p.

9. Very shortly after this call, Mr Taylor contacted Mr Scerri by a text message at about 10.00am. Mr Scerri telephoned Mr Taylor at 10.12am. This lasted just over two minutes. The fact of the text message and phone call are admitted. However no documentary record remains of the contents. Exactly what was said is in dispute, save that Mr Scerri admits that both the text and the phone call were concerned with Amerisur.

10. It is not in dispute that immediately after the text and telephone call with Mr Taylor, Mr Scerri placed an order with his broker at 10.16am to sell down his CFD position by the equivalent of 750,000 shares at a minimum price of 8.75p. And at 10.19am the same day, he placed a further order with his broker to sell down his CFD position by the equivalent of 250,000 shares at a minimum price of 8.75p. At 10.21am Mr Scerri telephone Mr Taylor on Mr Taylor's mobile phone. This call took place whilst Mr Taylor was on a call to his broker. Accordingly, Mr Taylor's side of the conversation was recorded and has been transcribed. Mr Taylor said:

> "I've had so many calls Andre yeah I know, just may be, so many calls coming through, I'm in the middle of work I'm trying to talk to my … They'll give you a call about it Andre, they will call you … I'm trying to speak to various people. It's not till tomorrow so don't panic but hold on a moment Andre".

At 10.28am on 23 May 2007, Mr Keen of Blue Oar telephoned Mr Scerri. Mr Scerri admits that in this phone call Blue Oar provided him with the specific inside information which they had previously given to Mr Taylor (i.e. that the placing of 6p would be announced the next day). He admits that he was told that this information was confidential and that it made him an insider. Mr Scerri admits that in the phone call he agreed to subscribe to 1.5 million shares at a price of 6p.

11. Immediately after this call, at 10.34am the same day, Mr Scerri placed an order with his broker to sell down the rest of his CFD position (i.e the equivalent of 785,000 shares) at a minimum price of 8.75p.

12. On 24 May 2007 Amerisur announced the placing at 6p per share. Mr Scerri, having cancelled all his open positions the previous day, subscribed to 1.5 million shares at 6p. The consequence of placing was that the market price on 24 May 2007 declined to 7.5p.

13. The FSA contends that the proper inference from those facts and circumstances is that, by the text message of 10.00am and the phone call at 10.12am,

Mr Taylor told Mr Scerri the specific details of the placing which had just been given to him by Blue Oar. The receipt of that information had prompted Mr Taylor to contact Mr Scerri with the purpose of tipping him off (even though he had been told not to do so). It was, the FSA contends. plain from the recorded conversation of 10.21am that Mr Taylor had already given firm details of the placing to Mr Scerri, i.e. "they'll give you a call about it Andre". Mr Scerri's conduct immediately after the text message and the phone call shows that he had been given specific information on which he had acted to close his long standing long position.

14. In the light of those facts, say the FSA, it should be inferred that Mr Taylor had told Mr Scerri that Amerisur proposed to announce a placing the following day at a discounted price. Moreover, the FSA points to Mr Scerri's dealing at 10.34, just after Blue Oar's call to him. The call had confirmed what Mr Taylor had already said and had made it clear that Mr Scerri would be able to participate in the placing. Mr Scerri's final sell instruction must have been prompted by the Blue Oar call.

Mr Scerri's account of the events

15. Mr Scerri admits that at 9.27am he had phoned his broker and placed a buy order for 150,000 shares in Amerisur. He says that the order was cancelled within a few minutes. Neither the purchase order nor the cancellation had been entered on the broker's system. We note from a statement made by the recipient of the purchase order that Mr Scerri had been alerted to the fact that his portfolio was already "overweight" in the stock We cannot form any view from the evidence as to what actually happened in relation to this purchase order.

16. The content of the text message of 10.00am was, said Mr Scerri, information from Mr Taylor of a rumour about a forthcoming placing in the shares of Amerisur. In the course of the 10.12am call between Mr Taylor and Mr Scerri, Mr Scerri sought to get further details of the rumour. Mr Scerri's evidence was that the information about the rumour of the placing had caused him to panic because of a previous experience; he had had an investment in a company about which a placing had been rumoured and the share price had plummeted. He had therefore decided, on this later occasion, to sell his full holding in Amerisur as soon as possible.

17. Mr Scerri said in evidence that he had decided, following the text message and the 10.12am call, to sell his entire holding. The decision to sell by two separate deals had been his decision in order to avoid losing out on the price by selling too many shares at one time. Mr Scerri went on to say that he had made the 10.21am call to Mr Taylor to see if the latter had managed to get any information as to where the rumour had originated and to see if Mr Taylor had confirmed the credibility of the source.

18. The 10.34am sell order for the remaining 785,000 shares had, Mr Scerri said, taken place to fulfil his settled decision to sell all his shares, being a decision taken before he had been made an insider following the Blue Oar telephone call (of 10.28am). Mr Scerri had not, he said, been made an insider by the earlier communications with Mr Taylor which had been about the rumour of the placing. He

had been interrupted by the Blue Oar call, but that had not caused the sale of the 785,000 shares.

19. Mr Scerri's case was, as noted, that he had acted in response to the potential damage to share values caused by the rumour. Mr Taylor, a trader with fifteen years experience, was unlikely to have committed the criminal offence of knowingly passing on insider information. Observing that he (Mr Scerri) had voluntarily disclosed the existence of the 10.00am text message and the 10.12am phone call before the FSA had come to Malta to interview him, he suggested that this would have been unlikely had he had something to hide.

Conclusions

20. By section 118(2) and 118A(1) of the Act, "market abuse" includes conduct: "where an insider deals or attempts to deal, in a qualifying investment or a related investment on the basis of inside information in relation to the investment in question", if such behaviour occurs in the UK or in relation to investments admitted to trading in the UK or related to such investments.

21. It is not disputed that CFDs in Amerisur are a related investment for the purposes of section 118, being investments related to shares in Amerisur which are qualifying investments (see section 118(1)(a)(iii) and section 130A). Nor is it disputed that Mr Scerri's dealings in CFDs in Amerisur on 21 May 2007 were in respect of investments related to a UK listed security and had occurred in the UK.

22. To determine whether market abuse by Mr Scerri took place we need to resolve two key issues. The first is what was said in the text message and in the phone call of 10.12am. Was it the case that Mr Taylor had informed Mr Scerri about the fact of the proposed placing and had given details including the placing price?

23. The other factual issue is – what prompted Mr Scerri's dealings in Amerisur CFDs in the period from 10.16am to 10.34am?

24. On the question of what Mr Scerri had been told by Mr Taylor, the evidence has not been specific. Mr Scerri's evidence is that, in the text and the 10.12am telephone call, Mr Taylor merely told him that there were rumours of a placing. We do not accept this. In our view the sequence of events that followed those communications shows that Mr Taylor had passed on to Mr Scerri specific details about the placing that he had received from Blue Oar.

25. Mr Taylor's communications with Mr Scerri followed shortly after Blue Oar had contacted Mr Taylor with details of the placing. They must, we think, have been passed on by Mr Taylor in order to tip Mr Scerri off about the placing. Mr Scerri's assertion that he was only told about a "rumour" is wholly inconsistent with the record of what passed between him and Mr Taylor when he called Mr Taylor at 10.21am. Although only Mr Taylor's side of the conversation is recorded, it is plain from what he said that he had already given firm details of the placing to Mr Scerri.

This follows from the answers that Mr Taylor gave over the telephone: "… they'll give you a call about it Andre, they will call you … . It's not till tomorrow so don't panic but hold on a moment Andre". Those words are consistent only with Mr Taylor having told Mr Scerri specifically that he himself had been informed by Blue Oar ("they") that the placing ("it") was taking place the following day. It is simply not consistent with Mr Taylor having talked only about a "rumour".

26. Moreover we think that Mr Scerri's immediate conduct after the text message and call reveals that he had been given specific information. As soon as the call had been concluded, he acted immediately and liquidated his long-standing long position. It is, we think, inconceivable that he would have been prompted to take such action by an unsubstantiated and unspecified rumour. We are driven by the combination of those factors to find that by the 10.00am text message and the 10.12am phone call, Mr Taylor had told Mr Scerri that Amerisur proposed to announce the placing the following day and that that placing would be at the discounted price of 6p.

27. Turning to the question of what prompted Mr Scerri to make the sales order in relation to Amerisur's CFDs in the period from 10.16am to 10.34am, we do not accept that these were the result of "rumours of a placing". The true position, we think, is that Mr Taylor had given Mr Scerri the key details about the placing. It is in addition clear from the sequence of events that Mr Scerri's final dealing at 10.34am had taken place just after Blue Oar's call to Mr Scerri. The significance of the Blue Oar call was that it confirmed what Mr Taylor had already said and it made clear that Mr Scerri would be able to participate in the placing at 6p. An inevitable inference from the timing of Mr Scerri's final sell instruction was that this was prompted by the Blue Oar call.

28. In common with the FSA we do not accept Mr Scerri's contentions. We find that it was the detailed information about the placing provided by Mr Taylor at 10.00am and 10.12am and then the confirmation of this and the invitation to participate by Blue Oar which caused Mr Scerri to engage in his dealings between 10.16am and 10.34am.

29. We are satisfied that the specific details given to Mr Scerri by Mr Taylor and then by Blue Oar were not in the public domain. The details were precise and were likely to have had a significant effect on the price of Amerisur shares. That information was therefore inside information within section 118C of the Act. We are satisfied also that Mr Scerri knew that the information was inside information. He has not disputed that he knew that this information about the placing was likely to affect the price of the shares in Amerisur and that the placing would not be announced to the public until the next day. Mr Scerri, we think, knew from the start (when he received the text) that that information was not in the public domain and this was confirmed by the Blue Oar telephone conversation. With those factors in mind we cannot resist the conclusion that he was fully aware that this information given him by Mr Taylor and then by Blue Oar was price sensitive and not yet in the public domain; it must have been inside information.

30. It follows that each of Mr Scerri's dealings in the CFDs after his phone call with Mr Taylor was prompted by his receipt of that inside information and was therefore a dealing by an insider "on the basis of" inside information.

31. Our conclusion therefore is that as a matter of law Mr Scerri committed market abuse as alleged by the FSA. We dismiss the reference and uphold the Decision in that respect.

The sanction

32. The appropriate amount of the penalty is a matter for the Tribunal.

33. We note that by DEPP 6.5.2G, the FSA will consider various matters when imposing a penalty. These include the amount of any gain made or loss avoided (6.5.2G(6)), the relevant guideline being that "*the FSA will impose a penalty which is consistent with the principle that a person should not benefit from the breach*". For the purpose of this guideline, the amount of the gain made by Mr Scerri was, on the FSA's calculation, £46,062.50 comprising:

> (1) The gain which he made on 1.5 million shares by closing his existing long positions at 8.875 pence and 8.75 pence so as to enable him to buy 1.5 million shares in the placing at the lower price of 6 pence. The gain in this regard is £42,500.
>
> (2) The gain which he made (by avoiding a loss) by closing the remaining position he held about 1.5 million (i.e. a CFD in respect of 285,000 shares) at the pre-announcement market price of 8.75 pence rather than the post-placement price of 7.5 pence. The gain in this regard is £3,562.50.

Mr Scerri contends that the profit or mitigation of loss should be based on the difference in the price at which he disposed of the shares and the price he would have been able to achieve had he not been guilty of market abuse, namely the selling price of the shares immediately after the public announcement of the placing, i.e. 7.5 per share.

34. We prefer the FSA's calculation which is based on the immediate result of the deals done on the basis of the inside information.

35. By the Decision Notice, the FSA imposed a sanction in the amount of £46,062.50, i.e. the amount of the gain but no more. The FSA's view was that whilst an additional penalty of £20,000 would have been appropriate, on the basis of a Statement of Means dated 20 February 2009 Mr Scerri did not have the resources to pay such additional sum. The penalty was therefore fixed in the amount of the gain. Any lower amount would permit Mr Scerri to retain some of the gain he made through his conduct. The fact that Mr Scerri might not have the resources to pay more is the only circumstance that weighs against imposing a greater penalty.

Information that came into the Tribunal's hands following Mr Scerri's application for legal assistance suggests that his Statement of Means of 20 February 2009 might have understated his resources. His resources may now be greater. That information was not made available to the FSA until after the hearing was under way. We will suspend deciding whether the penalty should be of an amount greater than £46,062.50 to enable the FSA to consider this information.

36. We will not publish our decision on the question whether Mr Scerri was guilty of market abuse for 21 days. The FSA are at liberty, within that 21 day period, to make written submissions whether the information about Mr Scerri's means obtained following his application for legal assistance should be taken into account by the Tribunal in determining what should be the proper amount of the penalty.

SIR STEPHEN OLIVER QC

RELEASE DATE: