MARKET ABUSE — senior accountant employed by listed company — knowledge of company's difficult relations with major customer and likely effect on turnover and profit — knowledge that talks about takeover of company by larger competitor abandoned — whether informed or able to conclude that profit warning to market inevitable in near future — whether information relevant — yes — whether information generally available — no — whether knowledge influenced Applicant's sales of shares and spread betting in advance of announcement leading to dramatic fall in price of company's shares — yes — whether Applicant's conduct part of an existing strategy amounting to a safe harbour — no — FSMA ss 118, 119, 122, 123 — COMC — burden and standard of proof — reference dismissed

PENALTY — principles to be applied in determining amount of financial penalty — FSMA s 124 — ENF 14 — recovery of abusive profit — measure of additional penal element — penalty reduced to reflect true level of abusive profit but penal element substantially undisturbed

THE FINANCIAL SERVICES AND MARKETS TRIBUNAL

JAMES PARKER

Applicant

and

THE FINANCIAL SERVICES AUTHORITY

Respondent

Tribunal: Colin Bishopp (Chairman)
Sandi O'Neill
Nicholas Douch

Sitting in public in London on 24 to 28 April, 2 to 5 May and 8 to 11 May 2006

The Applicant in person

Timothy Dutton QC and George Davies, counsel, instructed by, and for, the Respondent

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DECISION

Introduction

1. The Applicant, James Parker, has referred to the Tribunal a decision notice addressed to him by the Authority's Regulatory Decisions Committee ("RDC") on 24 March 2004. The notice recorded the RDC's conclusion that Mr Parker had engaged in market abuse between 27 February and 4 March 2002 when dealing in and spread betting on shares in his employer, Pace Micro Technology plc ("Pace"), which was at all material times listed on the London Stock Exchange, and its decision to impose a penalty of £300,000 upon him for that conduct. Mr Parker denies that he has been guilty of market abuse and he also contends that if, despite his denial, he is liable to a penalty, the amount imposed by the Authority is excessive, that it has been determined by reference to an inflated perception of his profits, and that the RDC dealt with him in an unfair manner which is inconsistent with its approach to failings of Pace itself.

2. The Authority's case, in summary, is that Mr Parker, a chartered accountant who was at the relevant time employed by Pace as its credit risk and treasury manager, sold holdings of shares in his and his wife's names, adjusted spread bets he had previously placed and placed new spread bets in the short interval between his learning on 27 February 2002 that a possible takeover of Pace by a much larger competitor had been abandoned and that Pace, for other reasons, was very likely to issue a profit warning within the next few days, and the publication of that warning early on the morning of 5 March 2002. It says that the information was not generally available, that Mr Parker relied on it, and that he did so in order to reduce or eliminate losses he would otherwise have suffered, and in order to gain by his spread betting, when (as in fact happened) the price of Pace shares fell substantially following the publication of the profit warning.

3. Mr Parker agrees that the transactions identified by the Authority took place. He denies that he relied on information which was not generally available; it was, he argues, all in the public domain. Additionally, he says, he was carrying out a pre-conceived strategy of hedging shares he and his wife owned and share options which had been granted to him, that the transactions do not reveal any change in his strategy on and after 27 February 2002, and that in consequence he has a safe harbour. He accepts that he did profit from the fall in the share price (although, taken individually, some of his transactions led to losses) but he disputes the Authority's assessment of his abusive profit (assuming that there was any abuse). The transactions, and the profit or loss to which each led, are agreed; the dispute between the parties relates to the question whether there was any abuse and, if so, to the determination of the items to be included in the calculation of the abusive profit. The RDC's perception, when the penalty was imposed, was that Mr Parker's net profit amounted to £153,942, and that it should be treated as abusive, but in its re-re-re-amended statement of case the Authority acknowledges that this was the extent of Mr Parker's net profit in the whole of the quarter to March 2002 (which Mr Parker agrees) and advances the argument that the abusive profit may have amounted to as much as £164,617. It accepts that this figure too may not be correct; we will return later in this decision to the determination of the

profit. The penalty of £300,000 was designed to recover the profit and to include an additional, purely punitive, element.

4. Mr Parker represented himself at the hearing, while the Authority was represented by Timothy Dutton QC, leading George Davies. We had a considerable volume of documentary evidence, and heard oral evidence from several witnesses. We are grateful to Mr Dutton for his careful presentation of the Authority's case, and we should record too that Mr Parker, despite his lack of legal training, presented his own case with moderation and skill. His marshalling and presentation of documentary evidence was exemplary, and most helpful.

5. We heard evidence from the following witnesses:

- Edmond Warner, an expert on spread betting, engaged by the Authority ;
- Anthony Dixon, Pace's company secretary;
- Nicholas Williams, then Pace's financial controller and Mr Parker's immediate superior;
- Jonathan Bown, also an accountant employed by Pace who reported directly to Mr Williams;
- Andrew Bartles and Andrew McCarthy, the joint heads of BPR Financial Management, the financial services division of a firm of chartered accountants based in Yorkshire;
- Roger Hambury, Peter Martin, Darren Sinden and Giles Wilkes, at the time relevant to this reference all employees of IG Index plc or IG Markets Limited (together, "IG");
- Ian Hooper, a broker employed by Redmayne Bentley, stockbrokers;
- Andrew Paxton, Redmayne Bentley's compliance officer;
- Ian West, then a strategic adviser employed by NTL Group, the parent of a United Kingdom subsidiary ("NTL"), at the time one of Pace's largest customers if not its largest;
- Stewart Kinloch and David Major, employees of a company then known as Gerling NCM NV ("NCM"), which provided trade credit insurance to Pace;
- Mr Parker; and
- John Rufford, a barrister employed by the Authority, who participated in the investigation.

We had also the statements of Colin Hatton, another employee of NCM who was prevented by illness from attending the hearing, and of Steve Law and David Hacon, officers of the Authority, whose evidence was purely formal. Mr Parker had produced statements from his wife, Timothy Gill, a colleague who was also acquainted with him socially, and Maureen Roberts, Pace's credit control manager, who had reported directly to Mr Parker, but the statements were not agreed and none of the three witnesses gave oral evidence.

6. We intend to deal first with the law relating to market abuse since the significance of much of the evidence will be difficult, and in some cases impossible, to grasp without an understanding of the legal principles. Thereafter we deal with the burden and standard of proof. We come next to the facts. In describing them we do not intend to set out the evidence of the witnesses, one after the other (indeed, we do not need to mention some of the witnesses by name), but instead to deal with the facts (many of which were agreed) on a topic-by-topic, rather than chronological, basis, identifying those matters of dispute which arose, describing the evidence relating to those matters, and setting out our findings. We then draw the law and the facts together in our consideration of Mr Parker's conduct and of the allegation that it amounted to market abuse. Finally we deal with the law, code of conduct and practice relevant to the imposition of a penalty, and address the amount of the penalty which it is appropriate to impose in this case, if market abuse is established.

The law relating to market abuse

The Financial Services and Markets Act 2000

7. The starting point for identifying the meaning of the term "market abuse", and the various matters we must bear in mind when deciding whether Mr Parker is guilty of it in relation to any of his transactions, is section 118 of the Financial Services and Markets Act 2000 ("the FSMA"). The section was amended substantially in 2005, to reflect a European Directive, but the amendment has no retrospective effect. At the material time it read:

> "(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)—
>
> (*a*) which occurs in relation to qualifying investments traded on a market to which this section applies;
>
> (*b*) which satisfies any one or more of the conditions set out in subsection (2); and
>
> (*c*) which is likely to be regarded by a regular user of that market who is aware of the behaviour as a failure on the part of the person or persons concerned to observe the standard of behaviour reasonably expected of a person in his or their position in relation to the market.
>
> (2) The conditions are that—
>
> (*a*) the behaviour is based on information which is not generally available to those using the market but which, if available to a regular user of the market, would or would be likely to be regarded by him as relevant when deciding the terms on which transactions in investments of the kind in question should be effected;
>
> (*b*) the behaviour is likely to give a regular user of the market a false or misleading impression as to the supply of, or demand for, or as to the price or value of, investments of the kind in question;
>
> (*c*) a regular user of the market would, or would be likely to, regard the behaviour as behaviour which would, or would be likely to, distort the market in investments of the kind in question.

(3) The Treasury may by order prescribe (whether by name or by description)—

(*a*) the markets to which this section applies; and

(*b*) the investments which are qualifying investments in relation to those markets.

(4) The order may prescribe different investments or descriptions of investment in relation to different markets or descriptions of market.

(5) Behaviour is to be disregarded for the purposes of subsection (1) unless it occurs—

(*a*) in the United Kingdom; or

(*b*) in relation to qualifying investments traded on a market to which this section applies which is situated in the United Kingdom or which is accessible electronically in the United Kingdom.

(6) For the purposes of this section, the behaviour which is to be regarded as occurring in relation to qualifying investments includes behaviour which—

(*a*) occurs in relation to anything which is the subject matter, or whose price or value is expressed by reference to the price or value, of those qualifying investments; or

(*b*) occurs in relation to investments (whether qualifying or not) whose subject matter is those qualifying investments.

(7) Information which can be obtained by research or analysis conducted by, or on behalf of, users of a market is to be regarded for the purposes of this section as being generally available to them.

(8) Behaviour does not amount to market abuse if it conforms with a rule which includes a provision to the effect that behaviour conforming with the rule does not amount to market abuse.

(9) Any reference in this Act to a person engaged in market abuse is a reference to a person engaged in market abuse whether alone or with one or more other persons.

(10) In this section-

'behaviour' includes action or inaction;

'investment' is to be read with section 22 and Schedule 2;

'regular user', in relation to a particular market, means a reasonable person who regularly deals on that market in investments of the kind in question."

8. Two kinds of transaction are relevant in this case: the sale of Pace shares, and the placing of spread bets, also on Pace shares. It was common ground that Pace shares are "qualifying investments", and that they are (and at the relevant time were) "traded on a market to which this section applies", namely the London Stock Exchange: see also the Financial Services and Markets Act 2000 (Prescribed Markets and Qualifying Investments) Order 2001 (SI 2001/996), made in accordance with subsection (3). It was further common ground that Mr Parker's sales of shares and, by virtue of subsection (6)(*a*), his spread betting constitute "behaviour … in relation to qualifying investments" and that the activities must therefore be judged against the standards laid out in the section. Taking subsection (1) first, we must consider whether Mr Parker failed to observe

the standards reasonably to be expected of a person in his position and, if so, whether in so failing he has offended subsection (1)(*c*). The essential questions then are whether any of the conditions in subsection (2) is satisfied—in the event, only condition (*a*) is in issue here—and, if so, whether Mr Parker is afforded a defence by either or both of subsections (7) and (8).

9. The basis of the Authority's allegations against Mr Parker is that he acted on (to paraphrase section 118(2)(*a*)) "relevant information not generally available", or "RINGA", when dealing in Pace shares or spread betting on them: it contends that he knew, from the information which came into his possession in the course of his employment, but which was not generally known or available, that a significant fall in the value of Pace shares was likely, and that he acted on that information for his benefit and to the detriment of other market users. Mr Parker's counter-argument is that he did not rely on that information but that in any event all the information he had was available to anyone who took the trouble to examine and interpret what was in the public domain; alternatively, that it was not RINGA. Moreover, far from relying and acting on RINGA, he was continuing with a strategy on which he had decided before any of the information on which the Authority relies came into his possession.

10. We will return to section 118(1)(*c*), (2)(*a*) and (7) when we have dealt with the facts. Subsection (8), which is the foundation of Mr Parker's second argument, leads on to section 119 which, so far as material and as it was in force at the relevant time, read:

> (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.
>
> (3) The code may make different provision in relation to persons, cases or circumstances of different descriptions.
>
> (4) The Authority may at any time alter or replace the code."

11. The code—"MAR 1: The Code of Market Conduct" or COMC—was duly produced by the Authority. The version with which we are concerned was published in December 2001. Its effect is prescribed by section 122 of the 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 the 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."

12. The code itself, at paragraph 1.1.10, makes it clear—in our view correctly—that this section must be interpreted as meaning that if a particular kind of conduct is said by the code not to amount, in the Authority's opinion, to market abuse that opinion is conclusive in favour of a person engaging in that conduct; conduct of this kind is known as a "safe harbour". By contrast, if the code indicates that any kind of conduct does, or may, amount to market abuse, or is to be taken into account in determining whether a person has engaged in abusive behaviour, that indication may be relied on (and is important and persuasive guidance) but it is not conclusive against a person whose conduct is under consideration. We will examine the relevant parts of the code when we consider Mr Parker's conduct, after setting out our findings of fact.

The burden and standard of proof

13. A direction was made at an early stage of this reference that we should decide, as a preliminary to the other issues which arise, whether an allegation of market abuse requires the Tribunal to determine a criminal charge, within the meaning of article 6 of the European Convention on Human Rights, and if so where does the burden of establishing the charge lie, and what is the appropriate standard of proof. We can deal with this issue more briefly than might otherwise have been the case, partly because it quickly emerged that there was, in reality, little between the parties' positions and partly because, since the hearing, the decision of the Tribunal in *Davidson and Tatham v Financial Services Authority* (2006, Decision 031) has been published. That decision deals with the same issue in detail, and there is no need for us to go over the same ground: we agree with the Tribunal's conclusions and for the same reasons. (The issue was also considered, though in less detail, in *Legal and General Assurance Society Ltd v FSA* (2005, Decision 015) and in *Arif Mohammed v FSA* (2005, Decision 012) where the Tribunal adopted a "sliding scale" approach to the standard of proof.) However, there is a direction that we determine the issue and we think too we should deal with some matters argued before us which do not seem to have been raised in *Davidson and Tatham*.

14. Neither the FSMA nor the Financial Services and Markets Tribunal Rules 2001 (SI 2001/2476) say anything about either the burden or the standard of proof before this Tribunal. However, for the Authority Mr Dutton accepted from the outset that the burden of proof lay on it. In any case in which a penalty has been imposed, apart perhaps from a minor penalty occasioned by a technical regulatory breach and with no suggestion of moral turpitude, that must be right, regardless of article 6.2 of the European Convention on Human Rights (which provides that anyone charged with a criminal offence is to be presumed innocent until proved guilty). So far as we are aware there is no authority which suggests the contrary.

15. Mr Dutton did not, however, concede that an allegation of market abuse does give rise to a criminal charge within the meaning of article 6: he maintained that such an allegation is civil in nature. The significance of the distinction

between civil and criminal proceedings lies in its impact—or possible impact—upon the standard of proof.

16. Mr Parker argued that we should apply the criminal standard; that is, we must determine the reference in his favour unless we are satisfied beyond reasonable doubt of his guilt. He pointed out that the Authority could have prosecuted him; it had decided against a prosecution not because there is any difference in what it must prove in a factual sense in a criminal court and before this Tribunal, but because of its perception of his supposed wrongdoing—at least, assuming it followed its own guidance, as that is set out in its Handbook at ENF 15.7.2. The criteria identified there indicate that the more serious the offence, the more likely it is that a prosecution will be brought. The Authority had decided not to prosecute but nevertheless maintained—as Mr Dutton's skeleton argument itself made clear—that this was a serious offence, justifying a high penalty. The Authority could not, he said, have it both ways, by seeking to emphasise the gravity of his supposed offence while contending that it need establish his guilt only to the lower, civil standard. There is some obvious merit in that argument.

17. While he acknowledged the force of the decision of the Court of Appeal in *Han and others v Customs and Excise Commissioners* [2001] 1 WLR 2253, on which the Tribunal laid much emphasis in *Davidson and Tatham*, Mr Dutton relied on the later case, also Court of Appeal authority, of *Fleurose v The Securities and Futures Authority Ltd* [2001] EWCA Civ 2015 which, he said, was more closely in point. The case does not seem to have been cited to the Tribunal in *Davidson and Tatham* and we should deal with it in deference to Mr Dutton's arguments. Mr Fleurose was a "registered person" subject to the jurisdiction of the Disciplinary Tribunal and Disciplinary Appeals Tribunal of the SFA. The SFA's responsibilities have since been assumed by the Authority, and the Disciplinary Tribunal and the Disciplinary Appeals Tribunal, in broad functional terms although the analogy is not exact, find their equivalents in the RDC and in this Tribunal respectively. Mr Fleurose was suspended from acting as a registered person for two years and ordered to contribute £175,000 towards the SFA's costs because of his improper conduct as a trader in manipulating the FTSE 100 Index.

18. In *Fleurose*, Schiemann LJ, giving the judgment of the court, quoted extensively from the judgment of Potter LJ in *Han and others*, mentioning in particular the three criteria he had extracted from the jurisprudence of the European Court of Human Rights. These are the categorisation of the allegation in domestic law, whether the offence is one which can be committed by any member of the public or only by a member of a closed group, and the nature of the penalty which may be imposed. The categorisation of conduct by domestic law as a civil offence only is not decisive. An offence which can be committed by anyone is more likely to be properly regarded as criminal than is one which can be committed only by a member of a closed group, particularly so if the group consists of persons who have consented to place themselves within a disciplinary regime. If a punitive and deterrent penalty can be imposed (even if imprisonment and the acquisition of a criminal record are not possible) the offence is likely to be regarded, for Convention purposes, as criminal in character. Although the court's reasoning is rather briefly set out, it appears that the facts that only a registered person was subject to the disciplinary authority of the tribunals, and that no

punitive or deterrent penalty was imposed—that is, the application of the second and third of Potter LJ's criteria—led it to the conclusion that the offence in *Fleurose* was not criminal in character. A similar view has prevailed in other cases relating to disciplinary tribunals: see *Pine v Law Society* [2001] EWCA Civ 1574 (where it was accepted without argument that the Solicitors' Disciplinary Tribunal exercises a civil jurisdiction) and *Rayner and Townsend v FSA* (2004, Decision 009), a decision of this Tribunal.

19. Mr Dutton's second point related to the rules relating to the evidence which this Tribunal may admit when considering an allegation of market abuse. They are to be found in section 133(3) of the FSMA and in rule 19(3) of the Financial Services and Markets Tribunal Rules 2001. The former permits the Tribunal to consider "any evidence", and the latter provides that "[e]vidence may be admitted … whether or not it would be admissible in a court of law …". Those provisions, Mr Dutton argued, applied whatever the nature of the subject-matter of a reference—there was no special evidential rule in a penalty case—and were consistent only with the classification of the proceedings as civil.

20. Here, in our view, the analogy with the disciplinary tribunal cases is weak, and Mr Parker's position is much closer to that of the appellants in *Han and others*. In that case and here the conduct in question, if proved, may lead to the imposition only of a civil penalty but, as Mr Parker correctly pointed out, may also expose the person to criminal prosecution (in the instant case, by reason of the FSMA section 402(1)(*a*) and the Criminal Justice Act 1993, section 52). One does not need to be a member of a closed group to become subject to a penalty; Mr Parker is not and, as far as we know, never has been an approved person who has voluntarily chosen to be regulated by the Authority or any of its predecessors. His being an approved person is not a factor relevant to the liability itself (although there may be circumstances in which the fact that the person concerned is approved will be relevant to the standard of behaviour reasonably to be expected of him, and it would almost always be a relevant factor in the determination of the amount of any penalty). The penalty imposed on Mr Parker is both punitive and deterrent in character, and (as the Authority itself makes clear) is intended so to be. For those reasons we agree with the Tribunal in *Davidson and Tatham* that an allegation of market abuse, even when punished in accordance with section 123 of FSMA and therefore by a route which is classed as civil for domestic law purposes, has to be treated, for Convention purposes, as a criminal charge.

21. Quite what the standard of proof in cases of this kind should be has been the matter of some debate, even before the coming into force of the Human Rights Act 1998 and the incorporation of article 6 of the Convention into domestic law. We do not, however, need to dwell on the point since, as the hearing proceeded, it became clear that each party was, in fact, content with the approach which, as we now know, was adopted by the Tribunal in *Davidson and Tatham*. That is that although the standard is properly described as the balance of probability, the concept requires some refinement in its application. As Lord Nicholls put it in *Re H* [1996] 1 All ER 1 at pp 16-17:

> "Where the matters in issue are facts the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance

> of probability. This is the established general principle … The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities 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. Fraud is usually less likely than negligence … Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
>
> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas J expressed this neatly in *Re Dellow's Will Trusts, Lloyds Bank Ltd v Institute of Cancer Research* [1964] 1 WLR 451 at 455:
>
>> 'The more serious the allegation, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.'"

22. As the Tribunal explained in *Davidson and Tatham*, the fact that conduct of a particular kind exposes the person committing it to what is regarded, for Convention purposes, as a criminal charge even though its classification in domestic law may be civil does not lead to the conclusion that the standard of proof must be the domestic criminal standard. Article 6 of the Convention bestows various rights and protections on an accused person; the requirement that the prosecuting authority establish the charge beyond reasonable doubt is not among them. The standard of proof is, therefore, not dictated by the Convention and one can look only to the domestic law.

23. However, there can be no doubt, in our view, that an allegation that an individual has been guilty of conduct for which he should be punished by the imposition of a penalty of £300,000 is a very grave charge. As *Re H* shows, compelling evidence must be adduced if it is to be established. Put another way, if one applies the "sliding scale" suggested in *Arif Mohammed,* the slide must be very close to the upper end of the scale. In a practical sense, even if not semantically, it is difficult to draw a meaningful distinction between the standard we must apply and the criminal standard.

Reference to the Tribunal

24. We should also mention, briefly, the function and powers of this Tribunal. We do not exercise a merely supervisory jurisdiction, deciding whether the Authority could reasonably have adopted the course it did. We have an entirely original jurisdiction, to be exercised on the evidence available to us (whether or not it was available to the Authority). The Authority must, if it is to succeed, satisfy us that Mr Parker was guilty of market abuse (and it must do so in respect of each of his relevant acts and omissions). If we are so satisfied in respect of any one or more of his acts and omissions, we must determine for ourselves what is

the appropriate penalty—or whether, instead, a statement should be published, or no action at all should be taken. In determining the amount of any penalty which may be appropriate, we are not bound by the Authority's own practice (which we may, if we see fit, recommend it to change), still less its approach in this case, but, in the interests of consistency and fairness, we must respect the statement of policy published in accordance with section 124 of the FSMA and take account of the penalties imposed in comparable cases. We take those propositions from what has gone before in this decision, and from sections 123(3) and 133(3) to (5) and (8) of the FSMA. We shall return to these principles later in this decision.

The facts

Pace and its business

25. Pace grew rapidly in the years immediately preceding the period with which we are concerned. Mr Parker joined it in 1992, as its financial accountant. It was formed as a private company in 1982 but in 1996 it was admitted to listing on the London Stock Exchange, and it remains so listed. Its business was the manufacture and sale of what are commonly known as set-top boxes, that is devices which are capable of accepting a digital television signal and converting it into a form which can be interpreted by an analogue television set, video recorder or similar device, or which act as the interface between a cable or satellite signal and a householder's television apparatus. At first, its products were manufactured in the United Kingdom but, we understand, by 2001 most, if not all, of its production took place overseas. Its administrative headquarters remained, however, in Saltaire, West Yorkshire, where Mr Parker and the other Pace employees who gave evidence were based.

26. At the time with which we are concerned, Pace had a non-executive chairman, three executive directors—the chief executive officer, Malcolm Miller, the group finance director, John Dyson, and one other—and five non-executive directors. Mr Dixon was not a director but, as company secretary, he attended all board meetings.

27. Pace had an unusual accounting year, from 3 June in one year to 2 June in the next. Routine announcements of Pace's results were made six-monthly, after its annual accounts were prepared and at the half-year stage. The announcements accompanied the publication of the annual accounts in July of each year and the half-year results in January. The announcements included forecasts of Pace's turnover and profits for the following period. We shall deal in more detail with announcements relevant to this decision at a later stage.

28. Pace's customers included cable television companies. At the times with which we are concerned both Telewest and NTL, which between them had almost all the United Kingdom cable television market, were major customers and in 2001 NTL was probably Pace's largest customer by value of sales. Pace also sold extensively to overseas customers. The typical pattern of Pace's business was that it would secure a customer, make substantial sales to it for a limited period—typically up to three years, by which time the customer had saturated its own market—when the relationship would end, or continue but only on a much

attenuated basis. Although, worldwide, there were comparatively few manufacturers of set-top boxes, the market was extremely competitive. Manufacturers had to price their product keenly, and also found it necessary to grant extended credit, take equity in the customer rather than immediate payment, or negotiate and grant other concessions to the buyer.

29. It is apparent that the risk that a customer would be unable to pay for goods supplied to it was significant, but Pace was able to insure against that risk for most customers with NCM. The cover provided by NCM had an overall monetary limit, and individual limits for some identified customers, of which, at the material time, NTL was one. Adjustments to the level of cover could be made from time to time, either by Pace seeking and obtaining a higher limit generally or for a particular customer (and, no doubt, conversely when it lost a customer) and by NCM reducing the level of cover either generally or in respect of a particular customer. It was a term of the policy that Pace should keep NCM informed of the value of its outstanding debtors at any time, and of defaults in payment by individual debtors. Pace was also restricted in the period of credit it could grant to its customers if its sales were to be covered by the policy, though it could if it wished trade with a customer without the benefit of insurance.

30. NCM also had the right to withdraw cover altogether in respect of an identified customer, but it could not reduce or withdraw cover in respect of sales which had already been made within the terms of the policy. Pace could continue to make sales to a customer in respect of whom cover had been withdrawn (or above the monetary limit which NCM was willing to grant or otherwise outside the terms of the policy), but it did so at its own risk. The insurance policy provided that payments received from the customer should be applied first in reducing the customer's indebtedness in respect of insured supplies, and only when that indebtedness had been fully discharged could payments be applied to the uninsured debt. Thus if cover was withdrawn in relation to an individual customer but Pace continued to make sales to that customer it could not "earmark" payments to the later sales, but bore an increasing risk of bad debt.

Mr Parker's position within Pace

31. In 1996, Mr Williams joined Pace as its financial controller and, we understand, at about the same time Mr Parker became responsible for the credit risk and treasury department (although he liked to style himself group treasurer), reporting to Mr Williams, who in turn reported to Mr Dyson. Mr Parker's responsibilities included the management of Pace's credit risks, including its relations with its trade credit insurers, NCM. He handled relations with NCM himself, although occasionally there was contact with NCM by Pace personnel senior to Mr Parker. Additionally, he handled Pace's exposure to foreign exchange movements, and developed a hedging and advance currency purchase strategy designed to reduce the risks to Pace of adverse currency movements. He was also responsible for the collection of outstanding debts from Pace's customers, although that task was generally undertaken by a team of five credit controllers, of whom the senior was Mrs Roberts. Day-to-day contact with customers relating to their outstanding debts was dealt with by Mrs Roberts and her team, but Mr Parker was expected to, and did, become involved in the case of

major customers or where the amount of the outstanding debt was substantial. NTL fell into the latter category, on both counts.

32. It was apparent from the evidence that Mr Parker was well thought of within Pace and that his abilities were respected. He had frequent contact with Mr Williams and could, and did, make direct approaches to Mr Dixon and Mr Dyson when it was appropriate to do so. Mr Parker told us that he believed that Mr Williams felt some animosity towards him, because of a somewhat distasteful task Mr Parker had undertaken, as equality officer, several years ago and because of what he perceived to be a critical appraisal. The former incident did not reflect on Mr Williams in any way and we did not understand why it should have been the cause of any animosity on his part against Mr Parker. We have considered Mr Williams' appraisal of Mr Parker. There is one comment in it which might be taken as critical (though in our view Mr Parker was unduly sensitive about it) but overall it is in approving terms. We also did not detect any animosity towards Mr Parker as Mr Williams gave his evidence; on the contrary, he was complimentary about him. It is clear that Mr Williams and Mr Parker had no more than a business relationship but we do not accept Mr Parker's suggestion that Mr Williams' evidence was coloured by reason of any supposed antipathy.

33. At the time with which we are concerned, Mr Parker's basic salary was approximately £50,000 per annum, in addition to which he had various fringe benefits, including the share options to which we come in the next section of the decision. Although, as we shall later explain more fully, we heard little evidence about Mr Parker's means, it appears from such information as was made available to us, including Mr Parker's replies to the Authority's investigators in the course of his interviews, that at the relevant time he was in comfortable circumstances, from a financial point of view, and well able to afford to spread bet in the manner we shall later describe.

34. Mr Parker's work gave him access to unpublished information about Pace's financial standing, although he had direct access only to records relating to its outstanding debts. Some information about pending and prospective sales was made available to him because of his duties; he needed such information in order to negotiate the levels of credit risk insurance Pace obtained from NCM, in order to arrange any currency hedging which might be necessary and in order to make cash flow forecasts. That information, however, was provided in quite general terms, and Mr Parker was more intimately concerned with sales which had already been made, and the collection of payment for those sales.

35. Monthly management reports—referred to as "F1", "F2" and so on, "F" representing forecast and the number the month of Pace's accounting year—were prepared by Mr Bown. As one might expect, the reports gave details of Pace's performance during the year to date, with forecasts of its likely performance during the rest of the year and the following year, and with comparative figures for the previous year. It was clear from the evidence that they were considered to be important by Mr Dyson and the remainder of the board and that they involved a great deal of work by Mr Bown. As soon as one report had been presented to the board, he began to prepare the next. Although he was responsible for producing the monthly reports, contributions were made by Mr Williams and Mr Dyson,

both of whom often suggested amendments before the reports were presented at the monthly board meetings. Mr Parker might sometimes contribute to the reports by providing information about outstanding debtors and cash flow to Mr Bown, but he did not do so on every occasion, and only when asked, and he played no part in producing the reports themselves. Copies were not routinely supplied to him. We were told that he would have been provided with copies if he had asked, but it was evidently not expected that he would ask for them without good reason, and in practice he did not do so. He could not see them by interrogating Pace's computer system as they were kept in a section to which he had no access.

36. There is, however, no doubt that Mr Parker was aware, in general terms, of the content of the forecasts since he discussed them with Mr Bown who, Mr Parker told us, readily volunteered his opinion about them. He told Mr Parker that the forecasts within the F9 report he had prepared in February 2002 were "disastrous", or "catastrophic" (both adjectives seem to have been used at different times). But, Mr Parker said, Mr Bown had habitually spoken in such terms about the forecasts and what he said about F9 did not differ in any significant way from what he had said about other reports during the year. The impression we gained from Mr Bown's evidence was that the reports had become progressively less good, but F9 was the first which contained forecasts of turnover and profit which the board would be forced to address as they were significantly below those which had been indicated to the market in Pace's earlier public announcements (with which we deal at paragraph 62 below).

Pace's share option schemes

37. Pace granted share options to certain of its employees. Some options were granted as discretionary, performance-related bonuses; others were available to employees generally. The latter were made by means of savings-related share option schemes which required the employee to save a fixed amount, up to £250 per month, in a save-as-you-earn ("SAYE") account with Halifax plc for a period of three years. At the end of the period, the employee could either cash in his savings, to which a pre-determined amount of interest was added, or buy Pace shares with the accumulated capital and interest at a price which was set at the middle market value on the day preceding the offer of the option, less 20%. An employee is permitted (by the general law rather than any rule peculiar to Pace) to contribute to only one such savings scheme at any time; likewise it is the law which restricts the discount to 20% and the maximum monthly payment to £250. An SAYE option has to be exercised during the six months beginning at the expiry of the three-year savings term. We understood that employees granted discretionary options were usually able to exercise them between three and ten years from the date of the grant.

38. Mr Parker had been granted discretionary options on several occasions, and he also took up his right to SAYE options on most of the occasions when they were offered—he told us that in his early days at Pace he had insufficient spare money but latterly he had taken his maximum possible entitlement. Those options relevant here are as follows:

- On 24 September 1998 Mr Parker was granted a discretionary option to buy up to 20,000 shares at 64p each;

- On 1 April 1999 he took up the right to save for options to buy 11,532 shares at 84p each;
- On 7 July 1999 he was granted a discretionary option to buy up to 10,000 shares at 200p each;
- On 24 July 2001 he was granted a further discretionary option to buy up to 5,000 shares at 375p each; and
- On 30 January 2002 he took up the right to save for options to buy 3531 shares at 269p each. The first payment would be made in April 2002, after the option taken up in April 1999 matured.

39. The discounted price of 269p in respect of the last of those options reflected a market value of Pace shares on 29 January 2002 of 336p. Historically, the price of Pace shares had been very volatile, a fact reflected in the wide variations in the exercise price of the different options. Between mid-2000 and early 2002, the shares reached a high point of about 1250p and a low point of about 200p, with several peaks and troughs in between, and large differences between those peaks and troughs. The volatility was due in part to the market sector—the so-called "hi-tech" sector—in which Pace traded, which had been particularly susceptible to the "dot com" phenomenon, in part to its own changes of fortune, and in part to its relatively small size, which had the consequence that dealings in its shares, which were comparatively infrequent, affected their price to a greater extent than would be so in the case of a larger company. That volatility was a fact of which Mr Parker was very well aware (he emphasised it himself) and which—as was not disputed—affected his behaviour. As it happens, the price of Pace shares was relatively stable during the early weeks of 2002 but on 5 March 2002, the day on which the profit warning to which we have referred was published, the price opened at 304p, but fell immediately to about 100p, where it stood at the close of the market. We were provided with details of Pace's share price from 5 March to 31 May 2002 which show that the price did not recover during that period. There was also no significant fall on 5 March 2002 in the price of shares generally, or of shares in companies in Pace's market sector.

Pace's relations with NTL and NCM

40. In 2001 and 2002, it was common knowledge that NTL was in acute financial difficulty. Although most of its business was conducted in the United Kingdom, it had an American parent. There were persistent rumours that the parent would enter into Chapter 11 bankruptcy protection in the United States (as in fact happened), and that the UK subsidiary would itself seek similar shelter from its creditors. We were provided with copies of several press reports—some but not all in the financial sector—demonstrating that NTL's debt burden and its efforts to trade itself away from possible insolvency were matters of continuing general interest and concern. Pace's dependence on NTL, as a major customer, was also well-known.

41. Despite NTL's financial difficulties—of which Pace was of course well aware—Pace agreed in October 2001 to sell 450,000 set-top boxes to NTL, for delivery in equal quantities in January, February and March 2002. The boxes were intended to enable NTL to convert its remaining analogue customers to digital.

This was at that time the largest single order Pace had ever received and its total value was correspondingly large (in the region of £75 million excluding VAT). Hitherto NTL had been allowed 30-day credit terms but, partly because of the size of the order and partly because it believed it was being unfairly treated by comparison with Pace's other customers, it demanded initially 90-day, and then 120-day, terms. At this time, Pace's policy with NCM had an overall limit of £70 million, of which a specific counterparty limit of £45 million was attributed to NTL. The policy itself limited the credit period to 30 days. Mr Parker, as Pace's link with NCM, asked for an increase in the limit in respect of supplies to NTL to £75 million, with a corresponding increase in the overall total, and for an extension of the permitted credit period to 120 days. NCM, however, was already concerned about NTL's worsening financial position and its ability to pay, and was closely monitoring NTL's payment pattern. Pace's request for more generous terms was refused and, in fact, NCM (as the policy permitted) imposed more stringent conditions so far as Pace's future sales to NTL were concerned. Despite the refusal of an increase in the insurance cover, Pace agreed in December 2001 to supply the boxes on 120-day credit terms (without informing NCM that it had done so, which was a breach of the terms of the policy).

42. The order for 450,000 boxes to be manufactured, supplied and paid for (as Pace originally assumed) in its current financial year was obviously good news, but events turned out rather differently. First, NTL had a change of mind, and in late 2001 it reduced its order to 300,000 boxes (with a value of about £50 million excluding VAT). It insisted that the schedule of delivery of the remaining boxes should be spread over five rather than the originally agreed three months, and it demanded that its credit terms be extended even further, with payments beginning in, at the earliest, November 2002 and continuing into 2003. Pace agreed to the reduction in the quantity (it appears that NTL had a contractual right to demand a reduction to that extent; it had originally attempted to cancel two thirds of the order but Pace refused to agree) and, albeit with obvious reluctance, Pace conceded NTL's demand that deliveries be deferred, though there was no immediate agreement about the scale of the deferment. The question of extended credit was to be the subject of prolonged negotiation, to which we shall return shortly. By this time, Pace had entered into obligations of its own for the buying in of components, and production had been scheduled.

43. At about the same time, that is the autumn of 2001, NTL's pattern of payments to Pace in respect of invoices rendered for goods already ordered and delivered deteriorated markedly. Payments were made late, for sums less than the amount due, and in some cases not at all. NTL demanded extensions of previously agreed credit terms; but even when they were conceded, it did not honour the renegotiated terms. In mid-February 2002 NTL made a number of complaints about the quality of the products and about Pace's after-sales service. It became clear to us from the evidence that, while the complaints were not entirely spurious, they were not made for their own sake but were designed primarily as a means of buying time, although they were also used as a means of driving down the price which Pace could charge for boxes it might sell to NTL in the future (NTL was at this time also in negotiations with other potential suppliers).

44. Mr Parker was closely involved in Pace's discussions with NTL about the outstanding (and increasing) debt, although some of the negotiation was carried out by Mr Williams or Mr Dyson. Mr Parker monitored the debt continually and was in contact with NTL on a daily, or almost daily, basis, putting constant pressure on NTL to make the payments which were due or, more often, overdue. The principal negotiator for NTL was Mr West, whose evidence made it clear that his role was to drive as hard a bargain as possible. His aim was to secure an adequate supply of boxes for NTL's continuing needs, in order that it could continue servicing its own customers, while deferring payment to Pace (and, we deduce, its other suppliers) for as long as possible, with the aim of conserving its liquidity and protecting itself from insolvency.

45. Pace's own position was difficult. It could not afford to jeopardise its continuing relationship with NTL, at least at this stage. NTL was its largest customer, and Pace's sales to it represented a significant proportion of its projected turnover. Its forecasts, of both turnover and profit, for its current financial year were dependent on its sales to NTL, including those originally agreed in October and later reduced; we shall come to Pace's profit forecasts and warnings in due course. Boxes Pace had manufactured for NTL but had not yet delivered could not be readily sold to another customer as they were designed specifically for NTL. They could be reworked for sale elsewhere so would not be entirely lost if NTL cancelled the order altogether, or Pace were obliged to exercise its retention of title clause, but reworking would entail a cost which would be irrecoverable. Pace's advance purchases of components, too, assumed manufacture of boxes specific to NTL's requirements.

46. During the autumn of 2001 Mr Parker kept NCM informed about the deterioration in NTL's debt to Pace, as the policy conditions required. NCM became increasingly concerned, and monitored the level of debt ever more closely. It was clear from the evidence of the NCM personnel we heard that Pace was regarded by NCM as an important insured customer and that NCM recognised the problems which withdrawal of insurance cover would cause for Pace, but NCM had to consider its own exposure first. Considerable efforts were made by NCM to accommodate NTL's debt within the policy, but after several indications of its increasing anxiety, on 19 December 2001 NCM withdrew cover in respect of Pace's future sales to NTL. Sales in respect of which invoices had been properly rendered before 19 December 2001 remained insured, but any sales which Pace decided to make to NTL in the future—including those which satisfied existing orders—were not covered by insurance.

47. Negotiations between Pace, NTL and NCM continued after the withdrawal of cover in December 2001. Contrary to its usual practice NCM, with Pace's encouragement, made a direct approach to NTL, but it was initially rebuffed: NTL's attitude was that its trade credit insurance was Pace's concern alone. NTL then relented and entered into a dialogue with NCM as well as Pace, but its promises of payment were still frequently dishonoured, in whole or in part, and the insured debt reduced more slowly than NCM expected, while the uninsured debt continued to mount. NCM's anxiety grew and on 20 February 2002 it wrote to Pace, requesting it to instruct its solicitors to inform NTL that if all the outstanding, overdue debt was not paid within the next 24 hours, Pace would

petition for NTL's winding up. It was apparent from Mr West's evidence that he did not take the threat of a winding up petition seriously—he regarded it as no more than a negotiating tactic—while NCM was, in fact, in earnest. We heard from Mr Kinloch that the loss which NCM would have suffered had NTL defaulted—at the time its exposure amounted to £18 million—would have had a significant impact on NCM's profit.

48. In the event, Pace did not carry out the threat to issue a winding-up petition—Pace's directors were most unwilling to take such action against a major customer, and NTL paid just enough to allow the directors to persuade NCM that it should not force Pace to commence winding-up proceedings.

49. The discussions continued despite the threat of a winding up petition. They centred on the redrawing of Pace's retention of title conditions, with a view to enhancing its protection in a manner which Pace's board believed might persuade NCM to restore policy cover. It was thought within Pace towards the end of February 2002 that terms had been agreed, in principle, with NTL about the retention of title condition, delivery of the boxes and payment for them. A letter prepared by Pace's solicitors and signed by Mr Parker was sent by him to NTL on 28 February 2002 in the hope that NTL would also sign it, but that hope proved to be excessively optimistic and final agreement was not reached, we understand, until May 2002. The agreement in principle, if such it was, did not persuade NCM to restore cover. NTL's poor payment history continued.

50. Mr Parker was, of course, well aware of the level of the outstanding debt. On 20 February 2002, he sent an email to Mr Williams and Mr Dyson, pointing out that Pace was in danger of exceeding its overdraft facilities if it could not rely on regular, timely, payments from NTL and suggesting means by which Pace might avoid infringing its banking terms. On the following day, he sent a further email recording that NTL then owed £29 million of which £21 million was overdue; £8 million of the total was uninsured. Though we do not think he would have had access to detailed figures, Mr Parker accepted when he gave his evidence that he recognised the likely impact of NTL's failure to pay its outstanding debts on Pace's turnover and profit for the year. He was aware also of NCM's request that winding up proceedings should be threatened and he was under no illusion about the difficulty of Pace's relationship with NTL.

51. The withdrawal of insurance cover was a serious development from Pace's point of view, although it must be assumed that the directors either did not fully appreciate its significance, or closed their eyes to it. Their actions and the tenor of their communications with NTL and NCM suggest that they thought, at least until late February 2002, that the withdrawal of insurance cover was a temporary measure and that cover would be restored in a short period. Mr Parker, who had dealt with NCM for several years, was evidently not surprised that cover was withdrawn in December and realised that its restoration would not be easily achieved. It was quite clear to us from the evidence we heard from NCM's personnel, particularly Mr Kinloch, that he was right. Some time previously Mr Parker and Mr Major had dealt with the possible collapse of a Brazilian customer, when NCM had taken a pragmatic view and, rather than insist upon a strict application of the policy condition which required payments to be applied first in

the reduction of insured debt, had agreed that payments should be shared between insured and uninsured debt. The outcome was that Pace could continue to make supplies with a reasonable expectation of payment and the customer was able to trade out of its debt. That experience seems to have led Pace's directors to assume that a similar solution could be achieved in respect of NTL's debt, but Mr Parker was much less optimistic: he recognised that the Brazilian customer and NTL presented different problems. He repeatedly conveyed his view that the two situations were not comparable and could not be expected to lead to the same result to Mr Williams and Mr Dyson, but they effectively ignored him.

52. In either September 2001 or January 2002 (we had conflicting evidence about the date, though it is not necessary to decide it) Pace began storing manufactured boxes destined for NTL but not yet delivered in a warehousing facility which enabled it to retain control over the boxes until they were delivered. Such was the importance to Pace of maintaining its projected turnover, heavily dependent as it was on its making the forecast sales to NTL, that it started the practice of generating an invoice for the goods as they were placed into store, and of recording the invoice in its accounts as if the goods had been delivered to NTL, but it did not send the invoices to NTL; again, we had conflicting evidence about the date when that practice began. By doing so it was able to give the impression that it was maintaining its sales to NTL. Pace was exposed to the risk that NTL would not take delivery of the boxes, because of its insolvency or for any other reason, although it retained control of the boxes which (after reworking) might be sold elsewhere. We should mention that, to his credit, Mr Parker protested, on several occasions and in forceful terms, to Mr Williams and Mr Dyson about the practice of generating and recording invoices for boxes which had not been delivered, but his protests were ignored. The practice was not made known to NCM; Mr Kinloch told us that had he become aware of it at the time, he would have regarded it as a material breach of Pace's policy with NCM.

Project Pluto

53. During 2001 Pace was engaged in discussions with a much larger American competitor about the possibility that the competitor would make an agreed takeover bid. The discussions were suspended in September 2001, because of a dispute about the value of Pace's shares, but then resumed in early December 2001. Although there were rumours about a possible takeover circulating among Pace employees and, perhaps, in the Saltaire area, it seems that the rumours were very vague: it was thought that a takeover was in the offing, but whether by Pace of another company or *vice versa* was itself the subject of speculation. The identity of the possible purchaser was not generally known (although there seems to have been some speculation about it too). The various press comments, brokers' analyses and other similar contemporaneous documents shown to us indicate that, while Pace was commonly thought of as the potential target of a takeover, this particular possible takeover was not known to the market. It was known by those within Pace who were privy to the discussions as Project Pluto.

54. Mr Parker became aware that discussions were in progress in December 2001, when Mr Williams asked him to provide information which would be considered by the acquiring company in the course of its due diligence process.

Mr Williams could not recall, when he gave evidence, how much he told Mr Parker, though it is clear he did not give him a great deal of information. However, although we are sure Mr Parker would not have been able to work out all the details for himself, we are equally sure that he knew perfectly well why the information Mr Williams had requested was required and, indeed, he did not suggest the contrary. Mr Parker was not further involved in Project Pluto but (as he accepted) he was aware that the negotiations were continuing into 2002, not least because of Mr Williams' prolonged and otherwise unexplained absences from the office. He knew too that Pace was the intended target; the information which he provided would not have been necessary had Pace been the acquiring company.

The events of 26 and 27 February 2002

55. On 26 and 27 February 2002 Pace's directors and most senior employees—those one rung below board level—attended what was described as an "away day" at a Cheshire hotel. Mr Williams and Mr Dixon were present; Mr Parker was not. The away day was a biannual event, fixed some time in advance, and there is no significance for present purposes in the event itself. During the late afternoon or early evening of 26 February, a message was received by the board from the company which was considering its acquisition that it did not wish to proceed with the discussions "at that time". The message evidently came as an unpleasant surprise: a great deal of time and money (particularly in professional fees) had been expended on Project Pluto, on both sides, and there had been, we understand, considerable optimism within Pace's board that it would come to a satisfactory conclusion. Although the message apparently left open the possibility that negotiations might resume, both Mr Williams and Mr Dixon told us they considered that Project Pluto was dead, and that revival of the discussions was highly improbable.

56. On the following morning, Mr Williams made several attempts to speak to Mr Parker by telephone. His evidence was that he succeeded; Mr Parker said he did not, and that he managed only to speak to Mrs Roberts, who habitually answered Mr Parker's telephone when he was away from his desk, and left a message with her that he wanted Mr Parker to return the call, which he did not do. We spent some time hearing evidence on this topic, and examined Pace's telephone logs, which recorded the dates, times and provenance or destination of calls received and made by its staff. The logs were unfortunately not conclusive. It is not of fundamental importance whether or not Mr Williams managed to speak to Mr Parker, but it does have a bearing on our conclusions and the issue also goes to credibility.

57. Mr Williams told us, and Mr Parker accepted, that he was in the habit of speaking to those of Pace's staff who reported to him on a daily, or near-daily, basis, in person if he was at Saltaire and by telephone if he was not. There was nothing unusual, therefore, about his seeking to speak to Mr Parker on the morning of 27 February, but he was in any event anxious to ensure that Mr Parker was doing all he could to ensure that NTL was making payments to Pace even though, as he agreed, he thought Mr Parker was already doing all that was possible. He was sure that he had made those remarks to Mr Parker and, during

the course of the conversation, told him that Project Pluto had foundered. Mr Parker simply denied that the conversation took place.

58. There was one other matter of controversy about the conversation, or alleged conversation, namely whether Mr Williams told Mr Parker that the board might soon issue a profit warning. It is pleaded by the Authority in its re-re-re-amended statement of case that he did, while Mr Parker's case was that no such indication was given to him, either in the conversation (which of course he denies took place) or otherwise. Mr Williams' recollection was that he had told Mr Parker that he thought a statement was likely, though it was at that stage no more than his own opinion, and not something which any member of the board had discussed with him. He used his opinion as a means of strengthening Mr Parker's resolve to collect the outstanding NTL debt. That evidence is consistent with what he told the Authority during the course of the investigation, though it is fair to say that he had had the opportunity of refreshing his memory from the transcripts of his interviews before he gave his evidence to us.

59. We did not find Mr Williams a wholly satisfactory witness. The practice of Pace's internal "invoicing" of goods destined for NTL but merely put in store and his disregard of Mr Parker's warnings do not reflect well on him, and he gave his evidence defensively. It is also true, as Mr Parker pointed out, that he did not mention his conversation, or alleged conversation, with Mr Parker to the Authority's investigators when he was first interviewed (we were provided with transcripts of interviews with most of the witnesses from whom we heard). Mr Williams' explanation was that he was not asked about it, and that its significance was not then apparent to him. We accept that explanation; Mr Williams would not, we think, have recognised that the call was of importance at that time, and despite the reservations we have expressed we are satisfied that Mr Williams' evidence about the conversation is reliable. Moreover, if we reject the claim that Mr Williams is motivated by animosity, there is no evident reason why he should invent a conversation which did not take place—it would not be a cause for criticism that he failed to make contact with Mr Parker and had to leave a message with Mrs Roberts. As we shall later explain we have no doubt that Mr Parker has concocted a conversation with Mr Dixon which, had it in fact taken place, would have favoured his case; here, we are satisfied that he has denied a conversation which harms it. He did not explain why he had been unavailable to take any of Mr Williams' calls, nor did he explain why he had not returned them. Absent any such explanation it seems to us much more likely than not that contact was established by Mr Williams. By contrast, and despite the passage of four years since the relevant events, Mr Williams gave a cogent and entirely plausible account of his attempts to speak to Mr Parker and of the manner in which he finally did so.

60. We have, nevertheless, considered why Mr Parker might deny a conversation which took place. He volunteered that he knew about the abandonment of Project Pluto from Mr Bown, to whom he had spoken in the early afternoon of 27 February. That evidence does not, however, coincide with Mr Bown's own evidence: he had been told by Mr Williams that Project Pluto was not to proceed but had, he said, not discussed the matter with Mr Parker as he did not know whether Mr Parker was aware of the existence of Project Pluto. Mr

Parker was already aware of Mr Bown's view that the F9 forecast was very poor even though, he claimed, he discounted it because Mr Bown was pessimistic about every forecast. What he denied was that he knew from Mr Williams that a profit warning was imminent (information which Mr Bown, even had he known, would almost certainly not have passed on: at least, neither he nor anyone else suggested that he might). Although the imminence of a warning may have been no more than Mr Williams' opinion, it is nevertheless significant that a Pace employee of his level was of that view. Mr Parker, as we are satisfied, must have realised that Mr Williams would not say such a thing lightly and that, however reluctantly, the board were likely to be obliged to heed his opinion.

61. We have already rejected Mr Parker's suggestion that Mr Williams felt animosity towards him; we reject too his assertion that Mr Williams has invented the conversation. We also do not think that Mr Williams' memory has let him down and we accept his recollection of what was said. We are therefore satisfied that by the late morning of 27 February, Mr Parker knew from Mr Williams that Project Pluto had been abandoned, that there was continuing pressure to collect NTL's debt, and that a profit warning was a real possibility.

Pace's announcements to the market

62. We have already observed that Pace's share price was volatile, in part because of its market sector and in part because of its own performance. As we mentioned at paragraph 39, the price moved between wide boundaries over a relatively short time, and its movement was greater than that of its market sector. This was, it seems, due to Pace's dependence on a narrow customer base (and correspondingly on its ability to secure large and regular orders) and upon the variable nature of its turnover and profitability.

63. On 9 July 2001 its annual report and results for the year to 2 June 2001 were published. Its turnover, at £524 million, was 55% greater than in the previous year, and profit before exceptional items was up by 56% to £43 million. The forecast for the future set out in the report itself, though lacking detail, was very optimistic. A simultaneous announcement added that growth in the first half of the year 2001-2002 was expected to be slower, but that it would pick up in the second half. The annual report included the sentence "To offset the impact on Pace that would result if a major customer were to fail, the Group maintains a credit insurance programme over its customer portfolio".

64. At the time of the annual general meeting in September 2001, a further announcement was made: it indicated that, while the greater part of the increase would occur in the second half, overall growth in the year was expected to increase by 10% on the previous year (that is, to about £575 million). Despite the optimistic tone and rather veiled message of the announcement, it was considered in financial and investment circles to herald a poorer year than that forecast in July and it was taken as a profit warning, even if a fairly mild one.

65. The interim results for the half-year ended 1 December 2001 were published on 8 January 2002. Turnover and profit were shown by the accounts to have increased over the corresponding period of the previous year, but the forecast for the remainder of the year was much more cautious: by now, Pace was recording

growth in the first half, but (because of downward pressure on its selling prices) forecasting turnover for the whole year comparable to that in the previous year, while still expecting increased profit because of improved margins. Nothing was said about Pace's relations with NTL, nor was it disclosed that NCM had withdrawn insurance cover in respect of Pace's future sales to NTL. The forecasts were, self-evidently, less optimistic than those made in September, and much less optimistic than those made in July. Although, again, it was not described as one, this announcement too must be regarded as a profit warning.

66. At the same time, Pace's public relations consultants made a presentation to a number of stock broking analysts, and thereafter produced a report of the analysts' reactions; we were provided with a copy. It was clear from the report that the interim results were regarded as disappointing, a fact reflected in an immediate fall in the share price, although most of the loss was soon recovered. The main cause of the disappointment was reported to be the less than predicted level of Pace's penetration of the American market, though some concern about its exposure to a slowing United Kingdom market is recorded. The report mentioned a number of unattributed comments made by the brokers who attended the presentation, among which was included "The Pace share price is quite frankly wrong either 50% one way or the other", a further indication of its volatility. Although Pace's dependence on NTL (and other similar companies) is mentioned, it is not a central feature of the broker's comments, as they are recorded in the report. There is no hint that the brokers were aware that Pace was engaged in difficult negotiations with NTL, or that NCM had withdrawn cover.

67. We were provided also with copies of two independent analyses of Pace's results, by WestLB and Commerzbank, both prepared and published in January 2002. WestLB's report was cautious (emphasising the likely decline in new UK sales and Pace's dependence on new US business) but optimistic for the longer term. It mentioned the possibility of a further profit warning in the second half of Pace's financial year. The Commerzbank analysis was, superficially, more pessimistic but in fact it too stressed difficulties in the short to medium term while expressing the view that Pace's long-term prospects were good. Because of the short-term difficulties investors were recommended to sell their shares, though the view was expressed that a price of 300p was fair. NTL's increasing debt to Pace was mentioned, but it was recorded that "Pace has stated that almost all of the receivables are insured and only £5m is at risk". The report does not indicate when that claim was made but by 21 January, when the analysis was published, it was plainly untrue. Again, it seems clear that at this stage there was no general awareness of Pace's difficult relations with NTL or of its exposure to the risk of bad debt.

68. Mr Parker referred us to the minutes of meetings of Pace's board and of its audit committee on 4 January 2002. At the first, there was mention of speculation about Pace's relations with NTL (though the nature and extent of the speculation are not described), and some concern was expressed at the meeting about the withdrawal by NCM of insurance cover in respect of future sales to NTL and about NTL's determination to renegotiate the terms on which future sales were to be made. The fact that manufactured boxes were being stored in a Pace-controlled warehouse was noted, but there would, we think, be no significance to that fact if

the practice of invoicing boxes before delivery had not yet begun (we have mentioned already the conflicting evidence we heard). The audit committee meeting took place immediately after the board meeting. It was attended by Pace's external auditors, and its purpose was to review the interim results for the period to 1 December 2001 before those results were published. Mr Parker drew our attention to the record in the minutes that at the end of November 2001 the uninsured debt amounted to £9 million and to the auditors' advice that it was unnecessary to mention this fact in the interim results report.

69. Pace's next board meeting took place on 19 February. We were not provided with a copy of the minutes, nor any other evidence about the topics discussed. A substantive, general, board meeting was held on 26 February, before the start of the "away day" at the Cheshire Hotel. The minutes show that although there was concern about the continuing negotiations with NTL, there was optimism that all of NTL's overdue debts and all its other indebtedness to Pace in respect of sales made before 30 November 2001 would be paid by 30 April (that is, comfortably before the end of Pace's financial year), and there was no, or at least no minuted, discussion of a possible profit warning.

70. Over the next two or three days Mr Miller and Mr Dyson, both of whom were evidently closely involved in the discussions with NTL and NCM, came to recognise that the optimism about the payment of NTL's overdue debts expressed at the board meeting on 26 February was misplaced, and that, far from considering the restoration of cover, NCM was pressing Pace hard to instruct solicitors to wind up NTL if the whole amount outstanding was not paid immediately. By this time, there was no room for believing that NCM was not in earnest. It was also clear by then that there was no prospect that NTL would clear its existing debt by the end of April, nor that it would pay for any of the 300,000 boxes by the end of May (as Mr West told us, NTL did not have any means of doing so). There was increasing concern about Pace's US sales. Mr Miller and Mr Dyson clearly recognised that Pace's latest turnover and profit forecasts could not be met and that Stock Exchange rules made an announcement, containing a profit warning, inescapable. They convened an emergency board meeting, conducted by telephone, and secured the agreement of the board to the making of an appropriate announcement, in a form agreed between Mr Miller, Mr Dyson and Pace's professional advisers, as soon as possible. (It is conspicuous and surprising that Pace's being close to exhausting its banking facilities, of which Mr Parker had warned, is not minuted as having been mentioned at the board meetings on 26 February and 4 March.)

71. At 7.00 am on 5 March 2002, therefore, Pace made the announcement which led to the dramatic fall in its share price. That fall occurred despite the bland and somewhat obscure nature of the announcement. Its main feature was the forecast that turnover for the year would be "around £350 million", which compared unfavourably with the £575 million which had been indicated in September 2001 (that prediction was merely hinted at in the March announcement) and with the announcement made in January when the half-year results were published. It was also well below the average of the stockbrokers' expectations, at about £522 million, which emerged from the presentation made by the public relations consultants in January. It was suggested in the 5 March

announcement that Pace would still make a profit in the second half of the year, and the projection for the year 2002-2003 was optimistic. The Annual Report and Accounts for the year 2001-02 show that Pace's actual turnover for the year was £352 million, but that it made a loss in the second half of that year: that loss reduced but did not eliminate the profit declared at the interim stage in January 2002. The March announcement contained the sentence "The difficult trading environment has been exacerbated by a reluctance on the part of Pace's trade credit insurers to increase their exposure at this time". That sentence can only be regarded as misleading: as we have already mentioned, NCM had actually withdrawn cover in respect of Pace's largest debtor and Pace was attempting to have cover restored, rather than increased. The statement also blamed problems encountered in developing products for the US market.

72. It is perhaps not surprising that the announcement was not taken at face value by the financial press, and during the course of the same day Mr Miller, as Pace's chief executive, made statements to the press in which rather more of the background to the announcement was revealed. The only point presently relevant is that it became clear from what he said that Pace's difficult relations with NTL and NCM's withdrawal of cover (which was now disclosed) had left it in an exposed position. Indeed, Mr Miller focussed on these factors as the reasons behind the profit warning, rather than the other matters mentioned in the announcement. The misleading nature of the announcement made in January 2002, so far as it related to Pace's trade credit insurance, also became apparent. The circumstances surrounding the making of the January announcement led to an enquiry by the Authority into Pace's announcements, and the imposition on it of a penalty; we will make further mention of that penalty later in this decision.

Pace's share dealing rules

73. In common with other quoted companies, Pace was required to, and did, prohibit dealing in its shares by its directors and those of its employees who had, or might have, access to information which was not publicly available. The prohibition was not complete: there was a blanket prohibition at sensitive times, essentially the period between the end of a half-year and the publication of the results for that half-year (a "close period"), and a more selective prohibition at other times. Relevant employees were required to seek prior permission to deal, even at times when share dealing was not prohibited. Those employees who were subject to the prohibition and who were required to obtain permission before dealing were on a "restricted list". Mr Parker, because of his access to information about Pace's finances, was on the restricted list at all material times.

74. A reminder of the prohibition and of the need to obtain permission was sent by internal email to all members of the restricted list at appropriate times. Nominally it was sent by Mr Dixon, but in practice it was sent out by his assistant, usually in his name. By way of example, the email sent to the restricted list in December 2001 was in these terms:

> "The purpose of this note is to remind you that the Company has entered a close period for dealing, and as you are covered by the Pace Share Dealing Rules you are restricted from dealing in Pace shares until after publication of the Interim Results for the period ended 1 December 2001, which is expected to occur on 8 January

> 2001. You should endeavour to ensure that persons connected to you do not deal during this period.
>
> You are reminded that permission to deal is, in any event, required at all times and you must not deal at any time when in possession of unpublished price sensitive information relating to the Company's shares."

75. At the end of the close period, in January 2002, Mr Dixon's assistant sent on his behalf a further email in these terms:

> "The purpose of this note is to inform you that the Company is no longer in a close period for dealing, and subject to the Pace Share Dealing Rules you are no longer prevented from dealing in Pace shares so long as you do not hold unpublished relevant or price sensitive business information relating to Pace.
>
> You are reminded that permission is deal is, in any event, required at all times and you must not deal at any time when in possession of unpublished relevant information relating to the Company's business or shares. When obtaining permission to deal you should state whether you intend to buy or sell and the maximum number of shares involved. You should submit requests to deal in writing or by e-mail to Anthony Dixon. The Company is required by the listing rules to keep a record of all individuals seeking permission to deal in Pace shares and the details of any permission given in writing.
>
> Under the terms of the Financial Services and Markets Act 2000, legislation which came into effect on 1 December 2001, the Financial Services Authority is empowered to investigate any matters which it believes may constitute market abuse and this can include circumstances which involve dealings by employees of listed companies when they do not have proper permission to deal. Accordingly, please make every effort to ensure you comply with the requirements of the Pace Share Dealing Rules."

76. Nominally, permission to deal was given by the board rather than by the company secretary but, except when the person seeking permission was a director or there was something unusual about the request, Mr Dixon granted (or refused) permission under delegated authority. It was clear to us, not only from his oral evidence but from the documentation we saw, that Mr Dixon took the share dealing rules seriously, and they were not applied in a merely formal manner. He did not always grant permission when it was requested, and when he did grant it, he seems generally to have imposed a time limit. After the expiry of the time limit an employee wishing to deal would need to seek further permission if he had not dealt within the limit, or wished to deal again; the further permission could not be taken for granted. Mr Dixon considered that the exercise of an option to purchase Pace shares—that is, an option granted to an employee by Pace itself—amounted to dealing and required permission. Nevertheless, although we are satisfied that Mr Dixon set out to apply the rules carefully, there were some significant lapses, as for example when Mr Parker successfully applied for permission without specifying whether he intended to buy or sell, and without specifying the number of shares involved, and there was no mechanism, even by spot checks, by which Mr Dixon could determine whether permission had been sought when required, or that the terms of any permission were respected, nor even whether a person on the restricted list had dealt during a close period. The system relied on the voluntary compliance of those subject to the rules.

77. Mr Parker agreed that he was well aware of the restrictions on his ability to deal, and had been since long before 2002. He told us that, mindful of the restrictions, he asked Mr Dixon whether they extended to his spread betting on Pace shares. He produced a note, in his own handwriting, which purported to record his conversation with Mr Dixon on 27 November 2000 when, according to the note, Mr Dixon advised him that, as spread betting did not amount to dealing in the shares themselves, permission was not required. Mr Dixon told us he had no recollection of any such conversation but, if Mr Parker had asked him whether permission was required for spread betting, he would not have given an immediate answer since he would himself have needed to take advice, from the board and probably Pace's solicitors.

78. We have no hesitation in preferring Mr Dixon's evidence on this issue. We are satisfied that Mr Parker has invented the conversation and manufactured the note. Mr Dixon's evidence rang true, and we have no doubt, from the tenor of his evidence generally, that he would indeed have sought advice before giving Mr Parker an answer; it was not a field in which he could claim any special knowledge. It is conspicuous that, although Mr Parker was at the time in frequent email contact with both Mr Dixon and his assistant about his share dealings (and other matters), he did not record by email the advice Mr Dixon had supposedly given him orally, nor did he ask him to confirm that advice. His failure to do so is difficult to understand against the background of his having asked Mr Dixon at other times, by email, for clarification of the share dealing rules. Indeed, he made another enquiry about the rules by email on the very same day (27 November 2000) when Mr Dixon advised him, though perhaps a little ambiguously, that a standing instruction to a broker to sell shares if the price dropped to a certain level must be suspended during a close period. We observe too that Mr Parker placed five of his known spread bets on Pace shares before his alleged conversation with Mr Dixon; the first took place some nine months earlier.

79. Even were we to accept that Mr Parker did think, on reasonable grounds, that he did not need permission to spread bet, and even were we to accept that he believed too that he could spread bet in a close period (and he did not claim to have sought advice on that point) it is conspicuous that, on several occasions, he failed to seek the permission he accepts he knew he should obtain when buying and selling Pace shares, and failed to respect the expiry date of permission he was given on one occasion when he did obtain it. Additionally, there were several occasions on which he dealt in Pace shares in a close period, when he clearly knew that permission would not be granted if he had sought it.

80. Mr Parker acknowledged that he had no real excuse for his failures. The explanation he offered was that he was pursuing a pre-arranged strategy, but even if that is so it cannot justify his failure to comply with straightforward rules of which he was well aware. The text of the emails sent to those on the restricted list which we have set out is typical of those which had been sent on previous occasions, save that the reference to the FSMA was new. Mr Parker could easily have planned his sales and purchases so as to avoid dealing in a close period. He did not suggest that permission might have been refused at other times for any but proper reasons; indeed, the evidence we heard suggested that, outside close periods, permission was not often refused although, as we have indicated, it may

have been granted only for a limited period. One oversight on Mr Parker's part might be forgiven; the frequency of his failing to obtain permission, and his willingness, repeatedly, to deal in a close period can lead only to the conclusion that he deliberately and consciously ignored the rules.

81. We should add Mr Parker's point that, had he asked for permission to sell his and his wife's Pace shares at the end of February 2002, the permission would have been granted. That may well be right; we are aware that other Pace employees on the restricted list (including, it seems, Mr Bown who had probably even greater access to sensitive information than Mr Parker) were granted permission at that time. The circumstances in which that permission was given—which have been the subject of enquiry by the Authority—were not explained to us, and it may be that there are good reasons why other individuals were given permission to deal. However, if Mr Parker is correct in saying that, had he asked, permission would have been given, it is all the more difficult to understand why he did not request it.

82. We add parenthetically that it would not, in our view, have been appropriate to grant permission to deal to Mr Parker had he asked for it on 27 February; nor, had he obtained it, ought he to have taken advantage of it in order to deal. As the extracts from the emails we have set out above correctly state, the obtaining of permission to deal does not give the recipient *carte blanche* to do so; if his dealing is to be legitimate he must also satisfy the condition that he is not in possession of price-sensitive information. In our view, as we shall explain, Mr Parker plainly was in possession of such information. Whether permission should have been granted to others, and whether they should have exercised the permission if granted, are not matters on which we are required to adjudicate, and nothing we say about Mr Parker should be taken to reflect on those matters, one way or the other.

Mr Parker's investment strategy

83. During the period with which we are concerned, Mr Parker bought and sold Pace shares and placed and adjusted spread bets, also on Pace shares. The two activities cannot be considered separately since it is his case that his spread betting, or at least some of it, was a means of hedging his holdings of Pace shares and his unexercised options. We will come to his dealings in Pace shares (we include dealings he conducted in his wife's name: he had her authority to deal in her shares), and the individual spread bets, at a later stage; at this point we consider the underlying strategy, as he described it to us.

84. Most, though not all, of Mr Parker's acquisitions of Pace shares derived from the share options which were granted to him. Although, as we have mentioned, he declined an offer of options early in his career with Pace, more recently his practice was to take up all the options which were offered. He then exercised the options when they matured, but generally sold the shares he obtained within a fairly short time. When he bought shares on the open market he seems usually, if not always, to have held them for no more than a few weeks before selling them. However, while he owned the shares or had "in the money" options (that is, options to buy shares in the future at a price lower than the present-day prevailing market price) he had both the opportunity of making a gain

if the price rose and the risk of suffering a loss if it fell. His strategy was to hedge against that possible loss.

85. He explored the possibility of hedging by buying options in the market, or by entering into contracts for differences, but he decided that both were expensive and not altogether suitable, and options on Pace shares were also not readily available. Spread betting, however, was a comparatively inexpensive means of hedging, and was easy to access. Mr Parker established contact with IG in May 2000, initially with the intention of entering into contracts for differences, but it soon became apparent that IG did not offer contracts for differences with the protection of guaranteed stops, as Mr Parker required, nor suitable options (though for a short period he did spread bet on options on Pace shares until IG ceased to offer bets on Pace options), and after some further discussions with IG he decided to spread bet on Pace shares themselves. He did not claim to confine himself to hedging, but additionally created straddle positions (or, as he termed them, “synthetic straddles”).

86. It is probably appropriate that we include at this point a brief description of spread betting. It can be adapted to many situations (it was first used as a means of betting on sporting events) but we need to deal here only with its application to share prices. The intending gambler bets with the spread betting house on a movement in the share price. He may bet that a rise will occur (a “long” or “up” or “buy” bet—the terms are synonymous) or that the price will fall (a “short” or “down” or “sell” bet). The spread betting house quotes to him a price for a fixed future date (a “strike” price) for the share: one price for a long bet, and a lower price for a short bet. The difference between the two prices is the spread, hence the term spread betting. The spread is generally larger in the case of a volatile share than in the case of a share whose price is more stable. A bet is placed by reference to each “point” (or penny) movement in the price, and is measured in pounds per point. A bet of £1 per point (a very small bet) is equivalent to the ownership of 100 shares—as a penny movement in the price of a share results in a gain or loss of £1 for the owner of 100 shares, so a £1 spread bet results in a gain or loss of £1 for each penny of movement in the price of the share on which the bet has been placed.

87. The principal advantage to the customer of spread betting is that it is possible to obtain exposure to movements in share prices without the expense of buying and selling the underlying shares. Instead, the spread betting house requires a deposit, called “margin”, from its customer (Mr Parker opened an account with IG and made the necessary payments) but the margin required is measured by the possible loss rather than by the cost of the share. There is the further advantage that betting gains do not attract tax (though losses cannot be set off against other income or gains). Additionally, at least at the time with which we are concerned, the customer might protect himself by placing guaranteed stops on his bets, so as to limit his losses. For example, a customer who placed a long bet could add a stop at a price below the strike price; if, rather than rise, the price fell to the stop the bet was automatically closed and his loss did not increase further. Ordinarily a bet lasts for three months (a fixed end date is necessary if the transaction is to be regarded as a bet, since an “event” is required) but it may be closed earlier, either by the operation of a stop or because the customer chooses to

close it. A bet may be “rolled over” at the expiry of the three month period, but this has to be done by closing the existing bet (taking any profit or meeting any loss in which it has resulted) and opening another on identical terms, save for the expiry date.

88. We learnt that in 2001 and 2002 the spread betting houses were rather less sophisticated in their approach to bets on shares than is the case now. Spreads were determined less scientifically, and stops were placed at no, or negligible, cost to the customer even though the spread betting house increased its own level of risk by its agreeing to place stops—that is, the customer’s prospect of winning was undiminished while the amount he might lose was restricted and it was more difficult for the spread betting house to hedge a bet with a guaranteed stop. At the time with which we are concerned, customers such as Mr Parker were allowed by IG to move stops without cost, a facility of which he availed himself on several occasions. We were told by IG employees that no fee was charged for the placing of stops for reasons of competition. We understand, too, that guaranteed, absolute, stops are no longer available from IG. A guaranteed stop at (say) 200p would protect a customer even if the share fell from 250p to 150p in one movement; thus the spread betting house was offering a guarantee against which it had no means of protecting itself. Only “best endeavours” stops, which provide some protection for the spread betting house in the event of sudden market movements of that kind, are currently offered by IG.

89. Mr Parker’s bets placed for hedging purposes were fairly straightforward. In order to protect the value of shares he held, or “in the money” options, he bet on a downward movement in the share price. By that means, if the share price rose he gained by reason of his underlying holding, though he lost the amount of his spread betting stake. Conversely, if the share price fell, the value of his underlying holding fell, but he was protected by the gain he made on his bet. He did not always protect himself by placing a stop on his bet; when he began spread betting he seems rarely to have placed a stop, but increasingly did so as time passed.

90. His straddles, or synthetic straddles as he preferred to call them, consisted of two matching bets, one long and one short. Mr Parker’s use of the phrase “synthetic straddle” was explained by the fact that this spread betting technique did not exactly replicate a more traditional “straddle”. Such straddles are effected by way of the purchase of a put and call option on an asset for the same amount. To the extent that his two spread bets were not matched in size, Mr Parker would have an open directional position as well as a “synthetic straddle”. A straddle bet was not placed to hedge a share but in order to benefit from significant movement in the share price, whether that movement was up or down. By appropriate placing of stops Mr Parker believed he could guarantee a profit on one bet, provided there was sufficient movement in the share price in the direction favoured by that bet, while limiting the loss to which the same movement would lead on the other bet. If the movement was large enough he could, irrespective of the direction of movement, be certain of a profit provided only that the share price was not so volatile that his stops were triggered before the gain was made. It appears, in fact, that Mr Parker took advantage of this means of profiting before IG had understood his strategy, though there is no suggestion that he was doing anything improper. Of course, if there was insufficient movement in either

direction, or the price merely moved up and down within narrow limits, he made no gain and lost the spread between his buy and sell bets. Straddles of the kind effected by Mr Parker also have the disadvantage that if one of the bets is automatically closed by the operation of a stop, the gambler remains exposed to the other and may suffer substantial losses.

91. In rather simplified terms, but sufficient for illustrative purposes, the cost of placing a straddle is the spread multiplied by the pounds per point of the bets. Thus, to take one of Mr Parker's straddle bets as an example, a long bet with a strike price at 315p and a short bet at 299p gave a spread of 16p; at £250 per point there was a cost of £4000 (16 x £250). In order to win, Mr Parker needed a movement in the share price which led to a gain on one "leg" of the straddle which exceeded the loss, restricted by a stop, on the other by more than £4000. The cost is notional: Mr Parker was not required to pay £4,000 to IG (he had instead to deposit the requisite margin, although in some cases, particularly if the price of the underlying asset was very volatile, the margin might exceed the notional cost) and it may not be equivalent to the loss sustained on an unsuccessful bet (which would depend on the amount of movement and the placing of stops) but it is the amount the gambler must win in order to break even.

92. Mr Warner was instructed by the Authority to prepare a report and give evidence about spread betting, and to express views about Mr Parker's betting strategy, particularly whether it could properly be regarded as hedging. We accept Mr Warner, who is currently the chief executive officer of a spread betting house and who has 20 years' experience in the financial services industry, as an expert in the relevant fields. He agreed that spread betting was an acceptable, even if rather unusual and crude, method of hedging. He was, however, critical of Mr Parker's transactions, which he considered went further than was necessary for a true hedging strategy, and he was also critical of his underlying reasoning. We think his criticism was a little harsh in some respects, but sound in others.

93. Mr Parker did not place bets which exactly matched his holdings, but in round numbers, generally higher than his holding. Mr Warner accepted that bets would not be placed so as to cover a holding precisely (his report assumes "rounding" to the nearest £5, equivalent to 500 shares) but criticised Mr Parker for his much coarser rounding, to the nearest £50 or sometimes more. That, he said, was not consistent with true hedging. Additionally, Mr Warner considered that Mr Parker could not justify keeping a bet designed to protect an option in place, as a hedge, once the option had moved "out of the money", that is, the market price of the share had fallen below the price at which the option could be exercised. At that point, he said, there was nothing to hedge since the option ceased to have any value.

94. At first sight there is substance in the first of those observations. However, we bear in mind that Mr Warner is an experienced professional with ready access to sophisticated financial tools and information while Mr Parker was an interested amateur (albeit one with experience of hedging his employer's exposure to foreign currency movements), and one should not be too ready to criticise errors due to inexperience. Nevertheless, while we accept that an investor setting out to protect the value of his shares, and no more, would normally aim to match the

value of his hedge to the shares or options to be protected with rather greater accuracy than Mr Parker in fact achieved, we are not persuaded that his rather “rough and ready” approach, in itself, casts doubt on his claimed motives. We accept that Mr Parker did, as he claims, seek to hedge the value of his shares and options; on the other hand, as will later become apparent, we do not accept that his motive for some of his bets was hedging alone.

95. In addition, we are not persuaded that, as Mr Warner’s evidence implies, Mr Parker should immediately have closed his hedging bet once an option became out of the money. First, Pace’s share price was volatile, and a drop below the exercise price of an option which was being hedged might easily have been reversed within a short time; the closing of one bet, with the prospect that another might need to be opened very soon, could well prove unnecessary and expensive. Second—though it is perhaps the same point put another way—we do not agree with Mr Warner that “out of the money” options have no value at all; there remains a time value which will be larger the longer the option has to run to expiry, though smaller the further the market price falls against the option strike price. Third, we see no reason why Mr Parker should not legitimately retain a bet he had placed as a hedge against an option, even when it ceased to serve that purpose, in the hope that he might gain by a further fall.

96. Mr Parker did not suggest that his “synthetic straddles” were anything but speculative positions, though he did claim that, throughout, they were neutral, in that they did not favour either a rise or a fall in the price of Pace shares; he was seeking no more than a significant movement in one direction or the other. He had experimented in order to develop a strategy (and had placed straddles by reference to shares in companies other than Pace—although it is apparent that his bets on other shares were comparatively small) and, like his hedges, his straddle bets were what he described as “delta neutral”, a term with which Mr Warner was familiar. Although it has a rather more technical meaning, for present purposes it is sufficient to say that “delta neutral”, when used in conjunction with a straddle, is roughly equivalent to “balanced in relation to the direction of any price movement”—in other words, the gambler expects, or hopes for, a significant movement in one direction or the other, but has no preference—it is the magnitude rather than the direction of the movement which will lead to his making a profit, provided the movement is large enough.

97. Mr Parker told us that some of the transactions he effected between 27 February and 4 March 2002 formed part of a “pyramid” strategy. An investor constructing such a strategy progressively adds to and adjust bets as movement occurs with the intention of increasing his exposure to continuation of that movement, while reducing his exposure to a reversal. Mr Warner was, in our view correctly, of the opinion that Mr Parker’s actions were not those of an investor building a pyramid. There was very little movement in the Pace share price between 27 February and 4 March, and such movement as there was did not indicate that the price was set to move in one direction rather than the other. We agree with Mr Warner that Mr Parker was doing no more than increasing the amount by which he would gain should the fall in the share price he expected materialise.

98. We have no doubt that Mr Parker did have a strategy, though not the strategy he claimed. He had read a great deal about options trading, spread betting and hedging strategies (at the hearing he produced, with several passages marked for us to read, a book called *Option Volatility and Pricing*, by Sheldon Natenberg, one of several he seems to have read) and it is quite obvious he was fascinated, even obsessed, with the subject. He had also devoted an enormous amount of time to planning his own bets. As we have said, we do not doubt that the bets he placed were, in part, designed to hedge the value of his and his wife's shares and options. Though we shall comment later about the wisdom of his making them, we accept too, though with some reservations which we shall also explain later, that in the period before 27 February 2002 Mr Parker's straddle bets were designed to profit from significant movements in the price of Pace shares, in whichever direction they might be and with no marked preference for either. However, we are equally satisfied that Mr Parker was not telling us the truth when he claimed that none of what he did had any other motive. His efforts to persuade us that the new bets he placed, and the changes he effected to his existing bets, on or after 27 February 2002 were designed to preserve his "delta neutrality" and were merely the continuation of his pre-existing strategy as well as his claim that he was building a pyramid strategy were, we are satisfied, due to his desire to provide some justification for his actions. We are quite sure he was attempting to construct a technical explanation of his actions in the hope that we would find it plausible; in fact we are satisfied it is illusory. We shall return to this topic when we have described the transactions themselves.

Mr Parker's investment advisers

99. During the period with which we are concerned Mr Parker was in contact with two firms which offered investment advice—Redmayne Bentley, stockbrokers, and BPR Financial Management, an investment and financial adviser. He conducted all his spread bets through IG, to which we will come in the next section of this decision.

100. Mr Parker had been a client of Redmayne Bentley for some years when Mr Hooper joined the firm, at its Leeds office, in 1999. Until late 1999, Mr Parker used Redmayne Bentley's execution-only service, but he then decided to use its advisory service, and Mr Hooper became his adviser and point of contact. At that time Mr Parker had a portfolio of shares, although Pace shares predominated. Mr Hooper took the view that Mr Parker was over-exposed to Pace and advised him to diversify his holdings; the advice was repeated on several occasions. Mr Parker actively sought Mr Hooper's advice about shares he might buy but then ignored the advice he received. Rather than diversify he instructed Redmayne Bentley on an execution-only basis, in March 2000, to sell all of his shares other than those in Pace and to buy Pace shares with the proceeds. Mr Hooper steadfastly continued to advise Mr Parker to diversify but he, equally steadfastly, disregarded the advice, and dealt only in Pace shares. We should, however, add that one of his acquisitions occurred in September 2001 when he exercised an option which had then matured to buy 20,000 Pace shares which he subsequently sold, in parcels of 5000 shares each, in October and November 2001. Mr Parker cannot be criticised, we think, for an acquisition of Pace shares by the exercise of an option.

101. Surprisingly, Mr Hooper learnt only in October 2001 that Mr Parker was Pace's credit risk and treasury manager. As it is apparent from other evidence that Mr Parker did not set out to conceal the nature of his employment from those with whom he came into contact, we have concluded that Mr Hooper must have omitted to ask for details of his employment, or to check Redmayne Bentley's existing records. As soon as he became aware that Mr Parker was employed by Pace in a sensitive position he recognised that the fact must be recorded by Redmayne Bentley's compliance department, and he sent an appropriate notification to Mr Paxton, the compliance officer. Redmayne Bentley's rules also required him to monitor Mr Parker's dealings, particularly those which took place shortly before the publication of Pace's results or other significant information.

102. Despite Mr Hooper's advice that he should diversify his portfolio away from Pace shares, Mr Parker bought 1450 Pace shares for his wife's ISA account on 18 January 2002, again on an execution-only basis. On 28 February 2002 he sold those shares and 5467 shares in his own name, the residue of his holding (although he still had some options which had not matured). We will return to the sales at a later stage; here, we need only to record the fact that, rather than instruct Mr Hooper to arrange the sale, Mr Parker telephoned Redmayne Bentley's broking room and gave instructions for the sale on an execution-only basis. When Mr Hooper learnt of Pace's announcement on 5 March 2002 he checked Mr Parker's account, as Redmayne Bentley's rules required, and discovered that the sales had taken place. He reported them to Mr Paxton (who may additionally have discovered them for himself). Mr Paxton concluded that the sales were suspicious (the fact that Mr Parker had used the broking room rather than Mr Hooper was itself regarded as suspicious, although he had done this previously without raising suspicion) and made a report to the Stock Exchange which, in turn, appears to have referred the matter to the Authority.

103. Mr Parker's acquaintance with BPR Financial Management began on 12 December 2001 when, at his own request, he met Mr Bartles. He later attended another meeting on 10 January 2002 at which Mr McCarthy was also present. BPR used information about the historical price movements of shares, reduced to charts, rather than analysis of companies' results and forecasts as a means of predicting future movements, a technique which had—as Mr Bartles, Mr McCarthy and Mr Parker all told us—been remarkably successful. The method, and its application to a number of securities, including Pace shares, were discussed at the meetings but, although Mr Parker signed an engagement letter, he did not in fact instruct BPR to advise him about investments. Mr Bartles recommended that Mr Parker buy an insurance investment bond in which he initially expressed some interest but, despite Mr Bartles' repeated reminders, he did not do so.

104. Mr Parker told us that he had been advised by Mr Bartles, in an off-the-cuff remark, that he should "go short" on Pace shares, that is put himself in a position to profit from a fall in price. Mr Bartles told us he had no recollection of making any such remark, nor could he think of any reason why he might have done so, though it was possible that he was responding in a non-committal way to a comment that Mr Parker made to him. It is quite obvious, not only from Mr Bartles' evidence but also the contemporaneous correspondence that, from a point

very soon after the second meeting, he was trying to sell the bond and was offering no other service or advice to Mr Parker. Again, we have concluded that the alleged suggestion is an invention of Mr Parker's, designed to justify his later conduct. It is conspicuous that the first bets he placed after the alleged recommendation were long rather than short.

105. It seems to us quite clear from the evidence that Mr Parker hoped to pick Mr Hooper's, Mr Bartles' and Mr McCarthy's brains in his discussions with them, but had no serious intention of paying for any advice he received. None of the advice they offered was followed and we are sure nothing any of them said had any influence over Mr Parker's actions between 27 February and 4 March 2002.

IG Index

106. So far as we are aware, Mr Parker placed all of his spread bets—and certainly all those which were identified to us—with IG. We will describe the spread bets themselves later in this decision; at this point we deal with Mr Parker's contention that personnel of IG Index and of its sister company IG Markets (there was some movement of personnel between the two) offered him advice about his strategy. IG is a spread-betting company offering an execution-only service, and no other facility; indeed, the nature of its business is such that it is prohibited from offering advice about specific bets, since it invariably has a conflict of interest with its customers, though it is not precluded from offering advice about the mechanics of spread betting.

107. The four employees of IG who gave evidence all denied that they had offered any advice to Mr Parker, save for technical advice about the bets which he could place and the manner in which he could open, close and adjust them. They knew of and followed the rule prohibiting the giving of advice about specific bets; while they would listen politely to Mr Parker and any other customer, they avoided making any comment which might be construed as advice. Mr Parker's contention was that, while they did not offer overt advice about individual bets he might place, they had made hints, and they had also advised about his overall strategy.

108. Almost all of Mr Parker's contact with IG was by telephone. IG's policy was to record all telephone conversations between customers and its brokers, in case of dispute about the terms of any bet which was placed, and we were provided with transcripts of most of Mr Parker's conversations. A few of the records could not be traced or were corrupted, but we are sure that there is nothing sinister in that and that the transcripts we do have are typical. They bear out the evidence of IG's employees, that they listened to Mr Parker, sometimes making polite but neutral remarks. Nothing they said could in our view reasonably be construed as the giving of advice, other than technical advice about the mechanics of placing a bet.

109. In particular, although it is certainly true that Mr Parker made it clear from the outset to those IG employees to whom he spoke that he was engaging in a hedging strategy, as we have already described it, and it is not inconceivable that he thought they were advising him about his strategy, we are satisfied that they were in fact doing no more than to indicate to him whether or not what he had in

mind could be achieved by one means or another and, sometimes, which of two possible means would be more suitable. We are in no doubt that they did not recommend a particular bet, or adjustment of a bet, to him save in the sense that they might indicate that he could achieve the objective he had already described to them more effectively in one way rather than another, but that he was left to make his own choices about the shares on which he would bet, whether he would take a long or short position, the size of the bet and the placing of any stops. Similarly, he made his own decisions about the subsequent adjustment of stops and the closing of bets.

110. We are, in fact, satisfied that IG did not really have any understanding of what Mr Parker was doing until shortly before the sharp fall in Pace's share price on 5 March 2002. Mr Wilkes, who was a senior dealer, had his attention drawn by a junior dealer in his team to Mr Parker's bets and the disadvantageous position in which IG found itself as a result—disadvantageous in that, as we have already mentioned, IG was exposed in a manner against which it could not fully protect itself. Mr Wilkes was suspicious of Mr Parker's deals and, after the price of Pace shares fell on 5 March, he reported the deals to IG's compliance department (which also reported them to the Authority). It is, in our view, wholly implausible that IG employees would advise Mr Parker to deal in a way which was so detrimental to IG's interests. For these reasons, too, we reject his claim that they did advise him.

Mr Parker's actions between 27 February and 4 March 2002

111. On the morning of 27 February, Mr Parker owned 5,467 Pace shares, and his wife held 1,450 shares in her ISA. Mr Parker had unexercised options to buy 30,063 shares, at various dates in the future: at that point, all but 5,000 were "in the money". The options include the new SAYE option which Mr Parker had taken up in January but to which he could not contribute until April, when an existing SAYE option matured. His open spread bets on Pace shares were:

a. A long bet, placed on 19 February, of £250 per point, at a strike price of 315p and with a stop at 250p (which had originally been placed at 290p);

b. A short bet, also placed on 19 February, of £250 per point, at a strike price of 299p and with a stop at 324p;

c. A long bet, placed on 25 February, of £250 per point, at a strike price of 299p and with a stop at 225p;

d. A long bet, placed on 25 February, of £250 per point, at a strike price of 314.5p and with a stop at 250p; and

e. A short bet, also placed on 25 February, of £250 per point, at a strike price of 297.5p and with a stop at 350p.

Bets *a* and *b* together, and bets *d* and *e* together, constituted "synthetic straddles". Bets *a* and *b* notionally cost Mr Parker £4,000, as we explained in paragraph 91 above. Bets *d* and *e* notionally cost £4,250. Bet *c* was a consolidation of five £50 per point long bets which Mr Parker had opened on different dates between 16 January and 15 February. His net position, taking spread bets alone, was £250 per point long. If any of his short spread bets should be regarded as a hedge relating to his or his wife's shares and options, his net spread betting position was longer still. We agree with Mr Warner that his position, at that point, was consistent with an expectation that Pace's share price was more likely to rise than fall and that it was not, as Mr Parker claimed, "delta neutral", although his preference for a rise was not marked. His bets were not consistent with his having hedged his holdings of shares and options, and having taken an additional speculative but neutral position. Mr Parker's position on the morning of 27 February was consistent with his believing that Project Pluto would succeed, but we read no more into it than that.

112. Mr and Mrs Parker had arranged a skiing holiday in France, to begin on Saturday 2 March 2002. They had decided to travel by train, and left their home on the morning of Friday 1 March, breaking their journey and staying overnight in Paris. Mr Parker had already arranged that he would leave work at about lunchtime on 28 February, presumably in order to prepare for an early departure the following morning. Despite the need (one assumes) to finish any of Pace's work which he had not already completed, he found the time to undertake a number of transactions, during working hours, on the afternoon of 27 February and the morning of 28 February. He did not seek (nor did he already have) permission, within the Pace share dealing rules, to effect any of them.

113. The first was the closing, at 2.35 pm on 27 February, of the £250 per point long bet he had placed with IG on 25 February (bet *c* in the list above). In the same telephone call he instructed IG to move the stops on his two other long bets, *a* and *d*, from 250p to 270p. The effect of the first transaction was to remove both his opportunity to gain from a rise in the price of Pace shares and his exposure to a loss if the price fell, and of the second to reduce his losses (by closing the bets sooner and at a higher level) if the fall occurred.

114. Seven minutes later, he made another call to IG, opening a new short bet of £250 per point, at a strike price of 297.5p, with a stop at 330p—at this time the market price of Pace shares was just above 300p. After a further seven minutes he called again to place a second bet, identical save that the strike price was 299.5p. Thus by the end of that day Mr Parker had open long bets of £500 per point, and short bets of £1,000 per point.

115. At 11.41 am on 28 February, Mr Parker placed a further short bet of £10 per point at a strike price of 291p (he accepts that this was a mistake—his intention was to place a bet of £100 per point). He did not arrange a stop to protect him if the share price should, after all, rise and he was, if only theoretically, exposed to the risk of an unlimited loss. Four minutes later he telephoned Redmayne Bentley and arranged the sale of his and his wife's remaining Pace shares. By the end of the day, he had short bets of an aggregate value of £1010 per point, long bets of £500 per point and no shares, though he still had unexercised (and at that time unexercisable) options to buy 30,063 shares. His bets were £610 net short; of that only just over £300 could be attributed to his hedging his options (and only £250 if, with Mr Warner, one discounts the options which were "out of the money"). The change in his position—from his modestly net long position on the morning of 27 February to his net short position by the afternoon of 28 February—is not

consistent, therefore, with a hedging strategy; nor can we accept Mr Parker's claim that his position remained delta neutral throughout. There was an unambiguous and substantial switch of preference from a rise in the share price to a fall.

116. On 1 March, while he was travelling to his holiday, Mr Parker made no fewer than nine calls to IG, eight of which were (as we are sure) designed to discover whether there had been significant movement in Pace's share price. However, in one call, at 8.15 am, he placed another short bet, of £100 per point at a strike price of 288p with no stop, on Pace shares, and in another call he opened a spread bet on Astra Zeneca shares. He appears to have undertaken no other transactions on that day. On the next two days, Saturday and Sunday, the markets were closed.

117. On the following Monday, 4 March, when Mr Parker had begun his skiing holiday, he made four calls to IG, though he appears to have given instructions relating to bets only once, when as early as 8.02 am he asked IG to move various stops. Those on his two long bets (each at £250 per point: the stops were then at 270p) were moved to 265p and 260p respectively: those adjustments increased the amount he would lose if the share price fell significantly. However, at the same time he arranged that the stops on his short bets be moved. That arrangement had no effect on his ultimate position and it is not immediately clear why he asked that those stops should be moved. Certainly we do not accept that the moves were part of a "pyramid" strategy, as Mr Parker suggested. Rather, we think the moves may have been designed to conceal from IG the fact that there was a significant change in the directional preference of his open spread bets.

118. Pace's profit warning was published at 7 am, UK time, on Tuesday 5 March. Mr Parker learnt of it by means of a telephone call from his father during the course of the morning or early afternoon. As we have already indicated, the price of Pace shares fell almost immediately the announcement was made, from 304p to about 100p, the level at which it stood at the close of the market. As early as 8.04 am (that is, a few minutes after the market opened), both of Mr Parker's long bets had automatically closed, because the stops were triggered.

119. During the day Mr Parker rang colleagues at Pace, in order to find out more about the terms of the announcement, and he also spoke to IG on three occasions. At 1.49 pm, UK time, he made the first of his calls to IG, in order to close the £100 per point short bet he had placed on 1 March, thus crystallising the profit he had made on it, and to adjust the stops on those four of his short bets which had stops in place (at that time at 320p, 325p, 330p and 335p respectively) in order that they should close at 145p, 150p 155p and 160p—that is, he kept them open so that he would gain from any further fall in the price, while they would close and crystallise most of his gains if the price should recover. It is apparent from the transcript of that call that he was elated about the dramatic fall in the share price Less than two hours later he telephoned IG in order to lower the stops again, to 130p in two cases and 135p in the other two, reducing the risk of erosion of his profit still further. In his third call he attempted to lower the stops again, but it was by then too late in the day; the adjustment was made following a further call at

8.14 the next morning; he then had two stops at 130p, one at 125p and one at 120p.

120. Mr Parker's remaining bets were closed on 6, 7 and 12 March. Two bets at £250 per point closed automatically when the stops were reached—they should in fact all have been closed on 6 March but, apparently because of a failure of IG's system, two were not closed until the next day. Mr Parker telephoned IG to close the £10 per point bet, which had no stop, on 12 March. By then, he had returned from his holiday. He had received an enquiry from IG about his dealings on 11 March and answered, in a long fax, on 12 March. On the following day he spoke, by telephone, to IG's compliance officer. Mr Parker is shown by the transcript of the call to have recognised that his actions might appear suspicious, and to have been at pains to insist that he had no inside information. It is also apparent from the transcript that IG's compliance officer had felt obliged to report Mr Parker's dealings about which he had heard from Mr Wilkes to the Authority. We deduce too, that Redmayne Bentley's concerns had by then reached the Authority.

121. Early on the morning of 14 March, Mr Parker was asked to attend a meeting with Mr Williams, Mr Dixon and Maggie Pedder, Pace's director of personnel. It is clear from the minutes of the meeting that it was prompted by an approach to Mr Dixon by the Authority. Mr Parker was asked about his dealings. He was adamant that he had done nothing wrong but he was nevertheless suspended from work and escorted from the premises. We understand that he never returned and in July 2002 ceased to be employed by Pace, though we were not made aware of the terms on which his employment was terminated.

The Pace Final Notice

122. On 24 January 2005 a Final Notice was sent to Pace, because the RDC had decided it should suffer a penalty of £450,000. It was considered (so the Final Notice recorded) that Pace had failed to take reasonable care to ensure that the announcement of its interim results on 8 January 2002 did not omit relevant information; and that Pace ought to have made an announcement about its expected turnover for the financial year on or soon after 4 February 2002. These failings were said to amount to breaches of Listing Rules 9.3A and 9.2(c) respectively. Pace accepts, as Mr Dixon told us, that the Final Notice is factually correct.

123. Mr Parker's case was that there are inconsistencies between what is alleged by the Authority against Pace, and what is alleged against him. He is aggrieved that he has suffered a penalty which is as much as two thirds of that imposed on a quoted company, and he is aggrieved too that no penalty has been imposed on Pace's officers or on others on the restricted list who dealt in Pace shares between 27 February and 5 March. As we have observed elsewhere in this decision, the conduct of others is not before us in this reference, and it is not appropriate for us to express any opinion about that conduct. We do, however, need to deal with Mr Parker's contention that the Authority's position is inconsistent.

124. In our view, his argument is misconceived. The question addressed in the Pace Final Notice is whether Pace made appropriate and timely announcements when required by the Listing Rules to do so. It is true that the FSA acknowledges,

in that Notice, that some information about Pace's financial position, beyond that contained in formal announcements, was in the public domain (so much is in any event apparent from the brokers' comments and the two analyses of January 2002 to which we have referred) and that some of the information, such as the withdrawal of trade credit insurance, was not of a character which demanded an announcement. But that is not to the point. The questions for our determination in this reference are whether, between 27 February and 4 March 2002, Mr Parker had information which was not available generally and which was relevant, and whether he acted on it. The two critical pieces of information are that a profit warning was imminent and that Project Pluto had failed. There plainly was no market knowledge of these two facts. There may have been some general awareness that Pace's financial position was not as good as the earlier announcements had suggested, but there is no evidence that a warning was generally expected. We recognise that WestLB, in its January analysis, had mentioned that a warning was a possibility, but its view was expressed in imprecise and tentative terms and does not seem to have been shared by others: on the contrary, the dramatic fall in the share price, and the absence of any recovery in it, clearly show that the market as a whole was taken by surprise when Pace made its announcement on 5 March. Mr Parker laid much emphasis on the fact that Project Pluto was not announceable (so that it should, he said, be left out of account) but, as we shall later explain, we are satisfied that this is not the correct way to view the matter and that the failure of Project Pluto is of considerable importance.

125. There is, in our view, nothing in the Pace Final Notice which assists Mr Parker. Indeed, if, as the Notice implies, Pace had withheld from the market information which Mr Parker had, his position is worse rather than better, but as we are not required to make any findings about the Notice, and have heard no evidence directly relating to it, we have left those considerations out of account.

Whether market abuse is established

126. The characteristics of market abuse are prescribed by section 118 of the FSMA, which we set out at paragraph 7 above. In summary, in the context of this case, the Authority must satisfy us (there being no dispute that the relevant transactions occurred and that his conduct related to qualifying investments traded on a market to which the section applies) that Mr Parker was in possession of relevant information not generally available (RINGA), that his behaviour was based on that information, and that his conduct fell below the standard reasonably to be expected by a user of the market of a person in his position. It is incumbent on the Authority to satisfy us of those three matters in respect of each of the impugned transactions. It is not, however, necessary to show that Mr Parker's conduct was dishonest, nor that he gained by it; dishonesty and gain (or intended gain) may be common features of market abuse, and may constitute evidence of it, but they are not mentioned in section 118 and are not essential ingredients of market abuse.

Did Mr Parker have RINGA?

127. As we have already explained, at paragraph 10 above, it is necessary to judge a person's conduct not only against the requirements of FSMA itself, but by the standards and other criteria set out in COMC. A summary of those standards and criteria appears at paragraph 1.4.4 in these terms:

> "Behaviour will amount to market abuse (unless MAR 1.4.20C – MAR 1.4.31C apply) in that it will be a misuse of information where a person deals or arranges deals in any qualifying investment or relevant product where all four of the following circumstances are present:
>
> (1) the dealing or arranging is based on information. The person must be in possession of information and the information must have a material influence on the decision to engage in the dealing or arranging. The information must be one of the reasons for the dealing or arranging, but need not be the only reason;
>
> (2) the information must be information which is not generally available. Criteria for determining whether information is generally available are set out in MAR 1.4.5E;
>
> (3) the information must be likely to be regarded by a regular user as relevant when deciding the terms on which transactions in the investments of the kind in question should be effected. Such information is referred to in this Code as 'relevant information'. Factors which are to be taken into account when determining whether information is relevant information are set out in MAR 1.4.9E to MAR 1.4.11E;
>
> (4) the information must relate to matters which the regular user would reasonably expect to be disclosed to users of the particular prescribed market. As explained further below at MAR 1.4.12E and MAR 1.4.13E, this includes both matters which give rise to such an expectation of disclosure or are likely to do so either at the time in question, or in the future."

128. It is apparent from that summary that the enquiry must begin with an analysis of the information available to the person concerned. The information must be relevant in that it influenced the person's conduct and would also be regarded by a regular market user as relevant and disclosable. Information available to a person about his own circumstances might be regarded by him as relevant, and may motivate his actions, but would not satisfy the second condition. COMC, at paragraphs 1.4.9 and 1.4.10, expands on the meaning of relevant information:

> "1.4.9 Whether, in a particular case, a particular piece of information would, or would be likely to, be regarded as relevant information by the regular user will depend on the circumstances of the case. In making such a determination, the regular user is likely to consider the extent to which:
>
> (1) the information is specific and precise;
>
> (2) the information is material;
>
> (3) the information is current;
>
> (4) the information is reliable, including how near the person providing this information is, or appears to be, to the original source of that information and the reliability of that source;

> (5) there is other material information which is already generally available to inform users of the market; and
>
> (6) the information differs from information which is generally available and can therefore be said to be new or fresh information.
>
> 1.4.10 In the case of information relating to possible future developments (which do not currently give rise to an expectation of disclosure (MAR 1.4.4E(4)), the following additional factors are to be taken into account when determining the relevance of that information (see example in MAR 1.4.18E):
>
> (1) whether the information provides, with reasonable certainty, grounds to conclude that the possible future developments will, in fact, occur; and
>
> (2) the significance those developments would assume for market users given their occurrence."

129. What the regular user might reasonably expect to be disclosed is described in paragraphs 1.4.12 to 14:

> "1.4.12 Information will only fall within MAR 1.4.4E(4) if it is either:
>
> (1) information which has to be disclosed in accordance with any legal or regulatory requirement (referred to as 'disclosable information'); or
>
> (2) information which his routinely the subject of public announcement although not subject to any formal disclosure requirement (referred to as 'announceable information').
>
> In case of information relating to possible future developments (MAR 1.4.4E(4) and MAR 1.4.10E), which may lead to a disclosure or an announcement being made, the following additional factor is to be taken into account when determining whether the information is to be treated as disclosable information or as announceable information, namely whether the information provides, with reasonable certainty, grounds to conclude that the possible future developments will, in fact, occur and accordingly that a disclosure or announcement will, in fact, be made (see example in MAR 1.4.18E).
>
> Examples of disclosable information include:
>
> (1) information which is required to be disseminated under the Takeover Code or SARs on, or in relation to, qualifying investments traded on prescribed market;
>
> (2) information relating to officially listed securities which is required to be disclosed under the Listing Rules;
>
> (3) information which is required to be disclosed to a prescribed market under the rules of an RIE".

130. The Authority's case, in a nutshell, is that by the middle of the day on 27 February 2002 Mr Parker knew: that Pace had not been able to persuade NCM to restore insurance cover of NTL's debt (and also knew that restoration in the near future was very unlikely); that NTL's uninsured debt to Pace was large; that sales were being made to NTL in respect of which payment could be expected on hitherto indeterminate dates months in the future; that the F9 forecast was extremely poor; that a profit warning would probably be issued in the near future; and that Project Pluto had foundered. Mr Parker did not deny that he knew all those things save for the imminence of a profit warning, although we should also

repeat his evidence that the F9 forecast was—at least according to Mr Bown—much the same as its predecessors. His contention, in summary, was that NTL's precarious financial state and Pace's dependence on NTL, as its major customer, were well known in the market and that any additional information he had was no more than supplementary detail, adding nothing of substance to what could be readily determined by research and analysis (so that section 118(7) protected him); that Pace, NTL and NCM had come to an agreement recorded in the letter he had himself sent to NTL and which he confidently expected to be signed by NTL; that he had no greater reason to believe than anyone else that Pace would soon issue a profit warning; and that Project Pluto was irrelevant.

131. Although paragraphs 1.4.9 and 1.4.10 of COMC do not have the same statutory significance as the paragraphs which deal with behaviour (see paragraph 12 above), it is, we think, necessary to measure the information which a person is said to have had against the criteria they identify (though not taking those criteria as exhaustive): in other words, the mere fact that a person relies on information not generally available is not enough. Where it can reasonably be argued that the criteria are not satisfied the person in possession of the information should not be exposed to the imposition of a penalty. We propose therefore to identify and to eliminate from the information Mr Parker had, that material which was generally known or readily discovered, and then to consider what remained.

132. It is certainly true that Pace's dependence on NTL was well-known in the market, and it was equally well-known that NTL was experiencing acute financial difficulties. Pace had, however, been less than candid about its trading relations with NTL, and about the withdrawal by NCM of Pace's insurance of NTL's debt. It is apparent from the public relations consultants' report and the analyses of West LB and Commerzbank that these facts were not generally known in January, and there was no evidence before us to suggest that the position changed before 5 March 2002—on the contrary, the news seems to have come as a surprise to all outside Pace. Mr Parker, however, knew very well that NCM had withdrawn cover and, perhaps more than anyone within Pace—including Mr Miller and Mr Dyson—he realised that restoration of cover in the near future was highly improbable. He knew, whereas the market did not, that Pace had resorted to generating invoices in respect of boxes which had been manufactured for NTL but which had not been delivered, and he must have realised the effect the release of that information, were it to occur, would have on Pace's share price. In fact, that information did not, we think, become public knowledge (if indeed it ever did) until long after 5 March. There is nothing in the analyses we have mentioned, nor in the consultants' report to Pace following the presentation at the time the interim results were released, which might indicate that Pace's problems were as acute as in fact they were. Project Pluto, as was common ground, never became generally known. It goes without saying that no-one outside Pace, apart from its professional advisers, knew before it was made that a profit warning was imminent (WestLB's opinion was no more than an opinion). The mere fact that the profit warning led to a fall, of about two thirds, in the price of Pace shares speaks for itself: it is consistent only with the market having been taken by surprise. The fact that the share price remained depressed for weeks after the announcement shows too that the sudden fall was not due to temporary over-

reaction: the market plainly saw the announcement as a reflection of a significant and permanent change in outlook for Pace. The argument that an astute analyst could have worked out for himself all that Mr Parker knew is unsustainable.

133. We have already recorded that the telephone conversation of 27 February 2002 between Mr Williams and Mr Parker is not of fundamental importance. Although Mr Parker was not privy, by that stage, to all of the detail, he was in no doubt that Pace's prospects of receiving from NTL on time all the payments on which its turnover and profit forecasts were based were negligible, that Pace was close to breaching its banking covenants and that its credit risk insurance on the outstanding uninsured and any new NTL debt was most unlikely to be restored in the near future. Mr Parker accepts that he knew of the abandonment of Project Pluto, even though his evidence about the source of that information is at odds with the other evidence. We are satisfied that, even without Mr Williams' comment that a profit warning was imminent, Mr Parker would have worked out for himself that Pace could not conceivably achieve the turnover and profit for the year it had indicated to the market in January.

134. Had the takeover of Pace proceeded, the prospects of a profit warning would have been of limited importance—almost certainly Pace's difficulties, if news of them were released, would not have led to a fall in the price of its shares, which one might instead expect to rise once the takeover was disclosed. Without the takeover, a fall was inevitable. The significance of Mr Williams' comment that a profit warning was imminent was that Mr Parker would realise from it that, without the contrary effect of the takeover, a drop in the share price was highly likely within the near future. We have concluded that he has denied the conversation because it indicates clearly that he did have information capable of prompting his actions on 27 and 28 February 2002, and which undoubtedly was not in the public domain.

135. We come, therefore, to consider whether a regular market user would regard the information as relevant. There is, at first sight, some merit in the contention that Project Pluto was not relevant. As Mr Parker correctly said, it was never announced to the market, either when talks were under way or when they collapsed and, as far as we are aware, it remains generally unknown. It was certainly not "announceable" since, by the time they were called off, the discussions had not reached the stage at which either Pace or the prospective acquirer needed to disclose them to the market (at least, that can be deduced to be the opinion of the boards of the two companies who were both guided by professional advice: we were given very little information about the discussions and the stage they had reached when they were finally called off). Those considerations, however, seem to us to be beside the point. Paragraph 1.4.13 of COMC makes it clear that information relating to possible future developments which may lead to a disclosure—as an agreed takeover of Pace plainly would—is relevant, provided that the information indicates that the future event is reasonably certain to occur. The important and relevant information in Mr Parker's possession, however, was not that Project Pluto would come to fruition—we are quite willing to accept that he did not know, and had no means of knowing, how likely that was—but that it definitely would not occur. The significance of the information is that Mr Parker knew that the prospective takeover would not now

prevent the fall in the share price which could be expected to follow the profit warning, and that it would not make a profit warning unnecessary.

136. The relevance of the remaining information is, in our view, impossible to challenge. Each item—NTL's increasingly overdue debt, the withdrawal of insurance cover, the continuing difficult negotiations with NTL and the inflation of Pace's apparent sales by the invoicing of boxes which had not been delivered—undermined Pace's hopes of meeting its earlier forecasts; cumulatively they made it obvious that the results for the year would be significantly lower than had been projected.

137. The information was also specific and precise, correct and different from that available generally. It was reliable: some, such as the cancellation of the insurance cover, came to Mr Parker first hand; other items, such as Mr Williams' prediction of a profit warning, came to him from people in a position to know. The fact that the share price fell once an announcement prompted by that information had been made can, again, lead only to the conclusion that the information was material. We have, therefore, no doubt that Mr Parker was in possession of RINGA, as that term is to be construed in accordance with COMC, on 27 February 2002.

Was Mr Parker's behaviour based on RINGA?

138. The Authority relies on inference in its contention that Mr Parker's conduct between 27 February and 4 March was based on the RINGA which we have found he had. It relies on the facts that, within a very short time of his learning that Project Pluto had been abandoned and that a profit warning was likely, he entered into a number of transactions, that he did so without seeking or obtaining permission to deal and that his position—that is, his aggregate holdings of shares and options, taken with his spread bets—changed from one mildly favouring a rise in Pace's share price to one distinctly favouring a fall. The facts, it says, speak for themselves: there is no other rational explanation for Mr Parker's conduct than that he acted upon the RINGA he had acquired, and that the requirements of section 118(1) and (2) of FSMA are satisfied.

139. Mr Parker's case is as we have already described it: that he was continuing with a pre-determined strategy of hedging his options and building a straddle (and thereafter a pyramid straddle) position with a view to his benefiting from the inherent volatility in Pace's share price and that even if, contrary to his denial, he was in possession of RINGA, he did not rely on it.

140. In our view the Authority's argument is compelling. We agree with Mr Warner that Mr Parker's position changed from one which would, on balance, benefit from a rise in Pace's price but which could be regarded, in part, as a hedging position and otherwise, even with some reservations, as a neutral, or nearly neutral, speculative position designed to profit from a swing in either direction, to one which strongly favoured a fall in Pace's share price. The transactions Mr Parker effected from the afternoon of 27 February onwards, as we have already described them, were virtually all in one direction, increasing his exposure to a fall (and therefore his opportunity to gain from it) while decreasing his exposure to a rise (and therefore reducing both his opportunity to gain and his

risk of loss should a rise occur). Those transactions are entirely consistent with Mr Parker's having acted upon the information which came into his possession on the morning of 27 February (combined with the information he already had); they are not consistent with what he had done before, or the continuation of an essentially directionally neutral hedging and speculative strategy. We add for completeness that we can see no grounds for distinguishing between the transactions—we are satisfied that all were undertaken for the same reasons.

141. We should also add that we find other features of Mr Parker's explanation of his conduct unconvincing. The first reason he gave for his sale of his and his wife's shares on 28 February was that he wished to take advantage of their capital gains tax allowances for 2001-02. His wife had made neither a gain nor a loss of any consequence (she had held the shares since January, and the price had moved very little). Her shares were in any event held within an ISA, and any gain she made or loss she suffered would attract no tax or allowance. Mr Parker was, additionally, unable to explain to our satisfaction why he thought it necessary to effect a sale in the hours before he left for his holiday. If capital gains tax truly was a consideration, he had until 5 April to sell the shares. No doubt realising that this explanation made no sense, Mr Parker claimed instead that he was so disillusioned with the management of Pace that he decided to seek other employment—which, he said, he would do as soon as he had exercised his options which matured in March and July 2002—and to dispose of his and his wife's remaining shares. That claim is a little difficult to reconcile with his having accepted, very recently, another offer of options (though we recognise that the sums he was required to contribute would be returned to him with interest if he left Pace before the options matured). He still had no real explanation of his having effected the sale in the short time left before his holiday; had he genuinely not thought a sharp fall in Pace's share price was imminent, he could have waited until his return. The combination of Mr Parker's change of explanation, the precipitate nature of the sale and the fact that he did not go through Mr Hooper (though the latter may be of little consequence in itself) leads us to the conclusion that the true reason for the sale was that Mr Parker, correctly, expected a substantial fall in the price and sold the shares before they dropped in value. In other words, he relied on RINGA.

142. Similarly, Mr Parker's adjustments of his spread bets can be explained in no other way. Although, as we have said, we do not go so far as Mr Warner in his contention that the hedges should have been removed as soon as the shares were sold and the options became "out of the money", Mr Parker did not merely leave his bets in place until he returned from his holiday. Had his motive for selling his and his wife's shares as soon as 28 February been genuine, he could justifiably have left his spread bets in place, and made the necessary adjustments, at leisure, on his return. His actions are consistent only with his recognising that he must act quickly if he was to benefit from (and protect himself against) the imminent fall in the share price. That Mr Parker confidently expected a fall is borne out by the tone of his comments in his first telephone conversation with IG on 5 March. It is clear to us that his elation is attributable to the size of the fall, and not the fact that it had occurred. We are quite certain that Mr Parker was confident that a fall of some size would occur.

143. We conclude with the—in our view serious—obstacle in Mr Parker's way, since it adversely affects both his credibility and the plausibility of his claim that he was merely pursuing a strategy. It is that he did not seek permission, within the Pace share dealing rules, to effect any of the relevant transactions. Had they been, as he contends, no more than a continuation of his existing strategy, it is impossible to understand why he did not do so. It will be apparent from what we have already said that Mr Parker simply ignored the rules whenever it suited him. Though a failure to obtain permission is not, taken alone, sufficient to establish market abuse, we have come to the conclusion that Mr Parker's persistent failure to obtain permission (and not merely between 27 February and 5 March 2002 but at other times as well) was deliberate and, moreover, dishonest, in that he did not wish it to become apparent to anyone (particularly Mr Dixon) that he was dealing in Pace shares, and spread betting on them, in a manner which he suspected (we think with good reason) would have led Mr Dixon to look very carefully at his requests for permission. In other words, Mr Parker knew very well that he was not complying with the rules. There is nothing inherently wrong about taking a speculative position, even on the shares in one's own employers (although many might question the wisdom of doing so, particularly in the case of a person in Mr Parker's position with access to sensitive information); but a failure to act scrupulously within the relevant rules inevitably leads to the suspicion, if no more, that the dealing is not altogether above board. Here, we are quite satisfied there is more than suspicion.

Did Mr Parker's behaviour fall below the standard to be expected?

144. There is, in our view self-evidently, only one possible answer to this question. Mr Parker used information which had come to him in order to place bets to his advantage and to the detriment of IG, which he knew had no access to the same information. Using ordinary language, that is cheating and it would be recognised by any reasonable person as such. Mr Parker is professionally qualified and was employed by a listed company in a senior position of trust. It is impossible to argue (and Mr Parker did not attempt to do so) that conduct of this kind does not fall below the standard reasonably to be expected of a person in his position.

Does Mr Parker have a safe harbour?

145. Mr Parker relies on paragraphs 1.4.21 and 22 of COMC, which are in the following terms:

> "1.4.21 Dealing or arranging deals will not amount to a misuse of information if the person's possession of relevant information that is not generally available did not influence the decision to engage in the dealing or arranging in question.
>
> 1.4.22 It will be presumed for the purposes of MAR 1.4.21C that the person's possession of the information in question did not influence his decision to deal or arrange deals if:
>
> (1) the person had taken a firm decision to deal or arrange deals before the relevant information was in the person's possession; and

(2) the terms on which the person had proposed to enter into the transaction(s) did not alter the receipt of the information."

146. We can deal with his argument very briefly. It inevitably follows from our rejection of Mr Parker's claim that he was merely continuing with his pre-existing strategy, and our conclusion that he deliberately set out to profit from the RINGA in his possession, that he cannot bring himself within the safe harbour which these paragraphs provide. We are, therefore, satisfied to the high standard which is necessary that the Authority has established that Mr Parker was guilty of market abuse.

The penalty

The power to impose a penalty

147. The Authority's power to impose penalties is conferred on it by section 123 of the FSMA. So far as relevant to the instant case, it reads as follows:

"(1) If the Authority is satisfied that a person …

(*a*) is or has engaged in market abuse, …

it may impose on him a penalty of such amount as it considers appropriate.

(2) But the Authority may not impose a penalty on a person if, having considered any representations made to it in response to a warning notice, there are reasonable grounds for it to be satisfied that—

(*a*) he believed, on reasonable grounds, that his behaviour did not fall within paragraph (*a*) … of subsection (1), …

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

148. The power to impose a penalty is, therefore, wholly discretionary. Even if the Authority is satisfied that market abuse has taken place, and that subsection (2) does not prevent it from doing so, it is not obliged either to impose a penalty or to publish a statement, and the section provides no guidelines about the circumstances in which it might respectively take no action, publish a statement or impose a penalty, nor about the amount of any penalty which may be imposed where one is appropriate. The Authority is required, by section 124, to make public its policy regarding the imposition of penalties, and some parts of section 124 are of importance. They provide:

"(1) The Authority must prepare and issue a statement of its policy with respect to—

(*a*) the imposition of penalties under section 123; and

(*b*) the amount of penalties under that section.

(2) The Authority's policy in determining what the amount of a penalty should be must include having regard to—

(*a*) whether the behaviour in respect of which the penalty is to be imposed had an adverse effect on the market in question and, if it did, how serious that effect was;

(*b*) the extent to which that behaviour was deliberate or reckless; and

(*c*) whether the person on whom the penalty is to be imposed is an individual.

(3) A statement issued under this section must include an indication of the circumstances in which the Authority is to be expected to regard a person as—

(*a*) having a reasonable belief that his behaviour did not amount to market abuse; …

(6) In exercising, or deciding whether to exercise, its power under section 123 in the case of any particular behaviour, the Authority must have regard to any statement published under this section and in force at the time when the behaviour concerned occurred."

The Authority's published policy

149. The statement envisaged by section 124 was duly produced. It forms Chapter 14 of the Authority's Enforcement Manual and is entitled "ENF 14: Sanctions for market abuse". The version in force at the material time was published on 1 December 2001. It is lengthy and we do not propose to set it out; instead we shall quote selectively from, or paraphrase, it as we examine its provisions.

150. We have already observed that three possible course of action are open: in ascending order of severity, no action at all, the publication of a statement and the imposition of a monetary penalty. At paragraph 14.4.1 of ENF14, the Authority puts its own view in this way:

> "Not all cases involving market abuse or requiring or encouraging will warrant enforcement action. The FSA will consider all the relevant circumstances of the case when deciding whether to seek to impose a financial penalty or, where it is entitled to impose a financial penalty, whether a public statement would be more appropriate."

151. The manual goes on to list a number of factors which the Authority will take into account when making its decision. The list, which expands and develops section 124, is not exhaustive, and is indicative rather than prescriptive. It includes the nature and seriousness of the behaviour, whether it was repeated, its impact on the affected market, the sophistication of the person concerned and of affected market users, the amount of any gain made or loss avoided by the behaviour, and the conduct of the person concerned after the behaviour was identified, particularly his attempts to put matters right.

152. Though there may be exceptional cases, it would, we think, usually be appropriate to take no action at all (that is, no publicly known action—a private warning might be given) only in the case of a minor or merely technical breach, or one which has occurred inadvertently (or, at least, neither deliberately nor recklessly) and where either no loss was occasioned to any other person, or any loss which was occasioned has been voluntarily and promptly made good by the offender. This is plainly not such a case.

153. As section 123(3) makes clear, a statement that a person has committed market abuse may be published only if he is liable to a penalty and therefore, before considering whether it should instead publish a statement, the Authority must first be satisfied that a penalty might properly be imposed. If it is so satisfied, it will, as paragraph 14.6.1 of the manual puts it, "consider whether to publish a statement that market abuse has occurred instead of imposing a financial penalty where it considers that such a statement may more appropriately address the particular behaviour in question". The manual then lists a further series of criteria the Authority will take into account, which include the person's having made a profit or avoided a loss (the point is made that a person should not be allowed to benefit from market abuse), the seriousness of the behaviour, whether it has been admitted, the degree of cooperation the person has offered, his compliance history, the impact of a penalty upon him and consistency with previous cases; again, the list is expressly stated not to be exhaustive.

154. Section 14.7 of the manual describes the Authority's practice in determining the amount of any penalty which is to be imposed if it decides that is the appropriate course. Paragraphs 14.7.1 and 2 read as follows:

> "14.7.1 The FSA's approach to financial penalties in market abuse cases will be consistent with its approach to financial penalties in other disciplinary cases concerning firms and approved persons.
>
> 14.7.2 The FSA will take into account all the circumstances of a case when it determines the appropriate level of penalty, if any. The FSA does not propose to use a tariff of penalties for market abuse cases, given the wide range of different types of behaviour that may amount to market abuse …"

155. Those paragraphs, in our view, set out a fair and reasonable general policy. Successive paragraphs refer to the requirements of section 124 (which we have set out at paragraph 148 above) and list, again in a non-exhaustive manner, a number of criteria which are identified as likely to be relevant. They include the nature and severity of the effect on the relevant market, proportionality, both in relation to losses suffered and the nature of the behaviour, whether the conduct was deliberate or reckless, whether the person concerned is an individual (and his financial resources), the amount of any gain made or loss avoided, his conduct after the behaviour occurred and his disciplinary record, the last being relevant primarily to persons who are or have been regulated in some way by the Authority, its predecessors and other regulatory bodies.

156. The criteria identified by the Authority are, we think, relevant and appropriate provided that any other factors which arise in an individual case are given equal consideration (though not necessarily equal weight). However, one consequence of the Authority's (entirely proper) decision to eschew the application of a tariff is that section 14.7 of the manual merely lists the principles and the criteria while giving little indication of how, in practice, the amount of any monetary penalty will be determined. In this case, the RDC concluded that the nature of the abuse, and the magnitude of Mr Parker's profit, were such that the publication of a statement was not the appropriate course and that a monetary penalty must be imposed. It went on to determine that the penalty should include two elements: the first, designed to recover the profit, then considered to be £153,942, and the second, a punitive and deterrent element of about the same

amount but rounded down to bring the aggregate penalty to the £300,000 which was imposed.

What was the Authority's proper course?

157. We agree that in this case it was appropriate to impose a financial penalty. As we have indicated, it is clearly not a case in which the Authority, nor we as the Tribunal seised of the reference, could properly conclude that it would be sufficient to take no action. Nor, as we also agree, would it have been appropriate merely to publish a statement. While the effect on the market may have been negligible (Mr Parker's conduct is unlikely to have had any impact on the price of or demand for Pace shares) IG suffered a loss because it agreed to take, or adjust, bets when, had it been in possession of the same information as Mr Parker, it would probably have acted differently. As we have said elsewhere, Mr Parker was cheating, by taking advantage of information he had but his counterparty did not have and could not obtain. The conduct was, as we have found, deliberate, and repeated. Mr Parker is, of course, an individual and he is not a regulated person (although he is professionally qualified), but we do not find those factors of great significance: conduct of this kind is not mitigated merely because the perpetrator is an individual. The aggregate of the profit made and loss avoided, even if one takes the lowest total achieved by the possible approaches, was substantial. Mr Parker has made no admissions but has sought throughout to justify his conduct. The Authority would, in our view, be failing in its duty if it did not impose a financial penalty in a case of this kind. A mere statement is manifestly insufficient.

158. We agree also that one purpose of a penalty is to deprive the person concerned of the profit he has made by his conduct, where he has not already divested himself of it by making good the losses suffered by those with whom he dealt. Mr Parker has not attempted to make any kind of restitution (and IG has paid his winnings to him) and the starting point, therefore, must be the amount by which he gained, either by making a profit or by avoiding a loss by abusive conduct. We deal with the identification of that amount in the next section of this decision. We shall deal with the second, punitive, element of the penalty thereafter.

159. We need first, to mention a direction which was made at an interlocutory stage of this reference. The fact that Mr Parker sold his and his wife's remaining shares in Pace on 28 February was either unknown to the RDC at the time it made the decision which is the subject of this reference or, if it was known, was not taken into account. The decision did not refer to the sale, and did not assert that it was an incident of market abuse. For the same reason it was not taken into account when the amount of penalty was determined. In October 2004 the Tribunal refused an application by the Authority for permission to amend the statement of case in order to add an allegation that the sale amounted to market abuse. The grounds for the refusal were, in summary, that the decision referred to the Tribunal was that made by the RDC, which could not be amended once it had been referred, and that the introduction of a new allegation might affect the amount of penalty in a manner adverse to Mr Parker—that is, the Tribunal might feel obliged to increase it. On the other hand, the Tribunal then concluded that

there was no reason why evidence of and about the sales should not be admitted. We have, of course, dealt with that evidence, and have recorded our conclusion that Mr Parker's sale of his and his wife's shares was in fact abusive. However, we shall leave the sale entirely out of account in our consideration of the appropriate penalty, not only in determining what was the abusive profit but also in our consideration of the punitive element.

The abusive profit

160. As we indicated at the beginning of this decision, the RDC's initial view was that Mr Parker's abusive profit amounted to £153,942 and the penalty was fixed by reference to that figure. It is agreed that—whether abusive or not—Mr Parker's bets earned him a net profit (that is, after taking all of his losses into account) in the quarter to March 2002 of £153,942, but it is now recognised that that figure is not the proper measure of the abusive profit. In its statement of case, the Authority suggests a maximum amount of £164,617 but it accepts that other views are possible, and that the true measure of the abusive profit may be only £101,992, a figure which Mr Parker agrees is correct if, as we have found, he was guilty of market abuse, though he asserts nevertheless that various losses should be set off against it.

161. We bear in mind that this is a penalty case and that, as a matter of principle, doubts should be resolved in Mr Parker's favour. At the risk of stating the obvious, we should also make it clear that we regard as abusive only those profits which were clearly made, and those losses which were clearly avoided, by reason of Mr Parker's use of RINGA. If it could reasonably be argued that he would have acted in the same way, irrespective of his possession of RINGA, his conduct should not be regarded as abusive in relation to that transaction. On the other hand, we are not persuaded that losses should simply be offset against gains. If a loss was sustained as a necessary consequence of making the profit (that is, the gain could not have been made at all if Mr Parker had not exposed himself to the risk of loss) it would be proper to take only the net gain. Where, however, the loss was suffered because Mr Parker failed to remove a risk of loss to which it was not necessary to expose himself, or (as we think he may have done) left an almost certainly loss-making bet in place in order to conceal what he was doing, he should not have the benefit of that loss in the calculation of his abusive profit. For those reasons we reject Mr Parker's argument that all of his losses should be offset against his gains.

162. The first, chronologically, of Mr Parker's abusive transactions was the closing of the long bet of £250 per point he had opened on 25 February (bet *a* in the list at paragraph 111 above). We are satisfied that Mr Parker closed the bet in order to avoid the loss he would suffer if he left it open and if, as he confidently expected, Pace's share price fell. By closing the bet he made a modest profit of £875, and this is the sum the Authority has included in its calculation of his abusive profit. If, instead, Mr Parker had left the bet open without adjustment (which is what he, as a person in possession of price-sensitive information, should have done), it would have closed when the stop, at 250p, was hit, resulting in a loss to him of £12,625. We have concluded that the abusive profit from this action is the aggregate of the profit made and the loss saved, namely £13,500, and that

Mr Parker should not benefit from the Authority's failure to include the true total in its calculation. The proper approach is to determine the difference, in monetary terms, between what would have been the result had the person concerned acted properly, and what was the actual result.

163. We deal next with the relatively uncontroversial series of short bets which Mr Parker placed: £250 per point on 27 February closely followed by another at £250 per point, the third at £10 per point on 28 February and the fourth at £100 per point on 1 March. None of these bets should have been placed: Mr Parker was, as we have found, then in possession of price-sensitive information and, even on his own case, it is impossible to accept that they formed part of a pre-existing strategy. The shares he might have hedged had been, or were about to be, sold, there was no change in his holding of options (and none had moved in or out of the money over the preceding few weeks) and there was no attempt to balance any of these four short bets with corresponding long bets. Indeed, Mr Parker accepted that if he was guilty of market abuse at all, he could not defend these bets. The gains he made from all four of these bets must therefore be regarded as abusive profits. The total gain was £101,992.

164. The controversial area is the treatment of two straddles which Mr Parker had placed on 19 and 25 February and whose stops he adjusted on several occasions, between 27 February and 4 March, before they were closed on 5 March (the long bets, automatically) and 6 March (the short bets, by his choice). On one view, these transactions led to abusive profits, in the aggregate of £61,750; on the other to a profit of only £6,250.

165. The former view—which was that taken by the Authority—is derived from taking the actual gains Mr Parker obtained from the short bets, deducting the losses he suffered on the long bets, and treating the difference as wholly abusive profit. The lower figure of £6,250 is achieved by comparing the result of the bets had Mr Parker done nothing by way of adjustment between 27 February and 4 March, and the outcome he actually achieved. As in the case of the closing of Mr Parker's long bet, with which we have already dealt, the latter must be the correct approach. Just as he should not have adjusted his other existing bets or placed new ones, so he should have taken no action with regard to these. The measure of his abusive gain must be the difference between the outcome he should have achieved, and that which actually occurred. Conceptually, it is impossible to conclude that a gain which Mr Parker would have made had he acted correctly (that is by doing nothing about his short bets) is nevertheless abusive. The measure of the abusive profits is therefore the loss saved on the long bets by the adjustment of the stops, namely £6,250.

166. We have not dealt with the detailed arithmetic of the abusive profit, since the calculations were agreed. The figure advanced in the Authority's statement of case was based on the aggregate of £875, £101,992 and £61,750, namely £164,617; in our view £13,500 should be substituted for £875 and £6,250 for £61,750, with the result that we determine the abusive profit at £121,742.

The punitive element

167. While identification of the abusive profit, though it may involve some element of judgment, is a largely arithmetical process, the criteria by which the amount of any additional punitive and deterrent element of a penalty should be determined are not well established. There are comparatively few precedents, largely because the treatment of market abuse as a civil offence began only with the coming into force of the FSMA in December 2001. The Tribunal has considered only one other case involving an individual, *Arif Mohammed v FSA* (2005, Decision 012) to which we shall come shortly, but we were provided with copies of several Final Notices directed by the RDC to individuals found to have committed market abuse. (The Tribunal made some observations about the penalty in *Davidson and Tatham*, but on a hypothetical basis and that case and this are not directly comparable.) Penalties imposed on individuals for different kinds of conduct can be a useful guide, though caution is necessary, but limited assistance is to be derived from cases involving corporate offenders (including Pace itself), as the nature of the conduct is different and there is usually no approximation of financial resources.

168. While the penalty imposed by the RDC in this case may be the starting point—if only because it has been referred to us—it was common ground that we were not bound by it in any way, but must make our own assessment of the correct amount. Again, we may take into account information not available to the RDC when it made its own decision: see the FSMA section 133(3).

169. It seems to us indisputable that market abuse is, in principle, a serious matter. It has been recognised as an offence for many years. It undermines confidence in the financial markets, which are of particular importance in the United Kingdom. It is not a victimless offence, even in those cases in which identification of the victim is difficult. We agree with the Authority's guidance to which we have already referred: it is wholly appropriate that the penalty for market abuse, in any but a trivial case, should not merely recover the abusive profit where that has not already been given up, but should in addition include a punitive and deterrent element.

170. We have come to the conclusion that this is as serious a case of market abuse of its kind, that is the use by an individual of inside information for the purpose of personal gain, as one might imagine. Mr Parker's behaviour was unscrupulous: he set out to earn for himself a substantial profit at the expense of IG. We have no doubt that, armed with the information he obtained in the course of his employment, he confidently expected a large fall in the price of Pace shares and deliberately and consciously sought to gain from that information. This was not an isolated, single episode, but a calculated course of conduct. Mr Parker was successful because, as we are satisfied, he is an intelligent and resourceful man who knew exactly what the probable consequences of his actions were, and intended those consequences. He has shown no remorse, has made no attempt to return his profits, and has sought throughout to justify his conduct by, as we have found, spurious means. We have considered whether he might simply not understand that what he did was wrong, but we are sure that is not the case—he is

professionally qualified, and no novice in the financial markets, and the manner in which he gave his evidence is inconsistent with simple naivety.

171. Mr Parker did not contend that, if we were to find that he had committed market abuse, his offence was modest, nor did he advance any mitigating arguments. He did, however, say that the punitive element of the penalty which had been imposed was disproportionate, and that it was not consistent with penalties imposed in other cases. These arguments overlap, and can, we think, be dealt with together.

172. It is, we think, an uncontroversial proposition that any penalty should be proportionate to the gravity of the offence it is designed to punish and discourage. A significant factor must be the financial advantage the person committing the abuse set out to obtain, which will not necessarily be the same as the gain actually made or the loss actually avoided. A course of conduct designed to yield a large profit, even if it is ultimately unsuccessful, must almost always be considered to be more serious than one which could only ever result in a modest gain. One problem which arises here is that it is impossible to calculate the advantage which Mr Parker set out to obtain; although he knew, as we have found, that a large fall in Pace's share price was likely, he could not predict the magnitude of the fall. Other factors which arise in this case are the facts that Mr Parker was in a position of trust and that his actions were calculated and repeated.

173. The most obvious difficulty we encountered when considering the various precedents to which we were referred was that there is no clear pattern: although there is some correlation between seriousness of behaviour and size of penalty it is far from exact. Penalties ranging from £1,000 to £25,000, most inclusive of the recovery element, have been imposed in cases which, though in our view less serious than this, are nevertheless incidents of market abuse committed by persons in positions of trust. Of those, we will mention individually only the single case of this kind which has previously come before the Tribunal, *Arif Mohammed*, in which the applicant made a single, small purchase of shares in a company which he knew was likely to be the subject of a takeover. He was employed by the potential target's auditors, and was, like Mr Parker, a chartered accountant. His purchase was relatively modest, as was his profit of £3,750 when the takeover was announced. Like Mr Parker, he had frequently ignored his employer's share dealing rules, though there was no suggestion that any other transaction in which he had engaged was abusive. He showed no remorse and attempted to justify his conduct. The Tribunal upheld the RDC's imposition on him of a penalty of £10,000, less than the £15,000 the RDC had originally proposed because of the applicant's poor financial position. We are bound to say that, despite the modest value of the transaction and the applicant's poor financial position, we consider that the penalty imposed in that case was lenient, as it was in some of the other cases to which we were referred.

174. In two other cases, however, much more substantial penalties were imposed. In one, a trader (an approved person) undertook several transactions on behalf of a client when he knew, or at least should have realised, that the client was probably engaged in market manipulation. He did not, it seems, stand to make any direct personal gain. There were mitigating factors, among which was the person's loss

of a substantial annual bonus. The penalty imposed was £70,000. In the other, the person concerned failed to prevent a serious breach of the Authority's Principles for Businesses when he could and should have done so; again, there was no suggestion of personal gain and there was loss of bonus. The penalty imposed was £350,000. The offenders in those two cases were professional traders and they are not directly comparable with Mr Parker.

175. We have come to the conclusion that it would be wholly inappropriate to impose, for conduct such as that we have found Mr Parker committed, no more than a modest punitive penalty within the range of £1,000 to £25,000 we have mentioned. Such a penalty cannot mark the gravity of the offence; nor would it act as a sufficient deterrent to others. We have already indicated that the two higher penalties we have briefly described arise from cases which are not truly comparable, and we intend, therefore, to adopt our own approach.

176. We have mentioned the significance of the advantage Mr Parker set out to achieve, and the difficulty of determining its value. In such a case, we think it is legitimate to pay heed to the advantage actually achieved, though using it only as a guide. Additional factors are the repetitious and calculated nature of the conduct, the abuse of trust, the repeated flouting of the share dealing rules, Mr Parker's complete (as we are satisfied) understanding of what he was doing, his persistent and determined attempts to conceal, or explain away, his conduct and his complete lack of remorse. On the other hand, we are aware of no other allegation of market abuse against Mr Parker. Taking all those factors into account, the appropriate punitive and deterrent element of the penalty in this case is, in our view, £150,000.

177. Mr Parker said nothing about mitigation. So far as the offence itself is concerned, it seems to us there is little he could have said. He has cooperated only superficially with the Authority's investigation (that is, he attended interviews but he steadfastly denied any wrongdoing) and has made no attempt of any kind to put matters right. Although we learnt during the course of the hearing that he had been declared bankrupt, on his own petition, in early April 2006, his financial position during the period of his abusive conduct was, by his own account, very comfortable. Mr Parker did not provide any information about the circumstances which led to his being declared bankrupt, despite being invited to do so, other than to say that he had not worked since he left Pace as his full time occupation had been that of preparing for this case, and we have no means of knowing whether, on closer examination by his trustee, his financial position will prove to be poor or his bankruptcy was designed merely as a means of giving us that impression. Mr Parker did not disclose what he has done with his abusive winnings. In those circumstances we proceed upon the basis that we have no information about Mr Parker's present means, while bearing in mind that they were ample at the time the offences were committed.

178. The punitive element of the penalty as it was imposed by the RDC was £146,058: that is, £300,000 less the abusive profit, as the RDC erroneously perceived it, of £153,942. The Authority, however, argued that the abusive profit was £164,617; if that had been the correct figure, the punitive element of the aggregate penalty would amount to £135,383, and, in order not to prejudice Mr

Parker, we shall assume that this was the intended amount. The Tribunal should, we consider, be slow to increase a penalty, save in a case where the RDC has plainly misdirected itself and the penalty imposed falls substantially below a proper amount, since its doing so might otherwise act as a disincentive to the making of meritorious references. Although, were the issue entirely at large, we might think it appropriate to direct the Authority to impose a penalty including a punitive element of the £150,000 we have mentioned, we do not intend to make a direction which has the effect of increasing one element of the penalty. The aggregate of the abusive profit as we have determined it, of £121,742, and the punitive element of the penalty we have assumed is £257,125. We have concluded that that figure should be rounded down to £250,000 but that any lesser sum would not be adequate to mark the gravity of Mr Parker's conduct as we see it.

Conclusions

179. Our conclusions, which are unanimous in all respects, are that:

- Mr Parker engaged in market abuse from 27 February 2002 to 4 March 2002, by dealing in and spread betting on Pace shares;
- By so doing he made an abusive profit of £121,742; and
- The appropriate aggregate penalty is £250,000.

180. Save that we direct the Authority to reduce the aggregate penalty accordingly, the reference is dismissed.

181. Mr Parker had made it clear in advance of the hearing that he intended to ask us to make a direction for costs in his favour, on the grounds that, he said, the Authority's decision to impose a penalty of as much as £300,000, and the manner in which it had reached that decision, were unreasonable, to the extent that paragraph 13(2) of Schedule 13 to the FSMA (which enables us to direct that the Authority pay an opposing party's costs) was engaged. We indicated at the conclusion of the hearing that we would entertain a costs application, if Mr Parker wished to make one, after this decision was released. It might help if we make it clear that, although we do not agree with the Authority in every respect, we will require some persuasion that it has acted unreasonably to the extent that a largely unsuccessful applicant should receive an award of costs. Mr Dutton indicated that the Authority was unlikely to seek a direction in its favour.

COLIN BISHOPP
Chairman
Release Date: