Reference number FIN/2008/0016

MARKET ABUSE – Penalty – Determination of the level of financial penalty in market abuse case

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
FINANCIAL SERVICES

GRAHAM BETTON **Applicant**

- and -

THE FINANCIAL SERVICES AUTHORITY **Respondents**

TRIBUNAL: SIR STEPHEN OLIVER QC
IAN ABRAMS
CHRISTOPHER CHAPMAN

Sitting in Chambers in London to review information as to means provided by the Applicant

DECISION

1. Our Decision of 6 December 2010 followed a six day hearing; the Decision directed as the appropriate action the imposition of a prohibition order on Mr Graham Betton. Also referred to us, as part of the Decision Notice of 19 June 2008, had been the imposition on Mr Betton of a financial penalty of £100,000. The penalty had originally been set at £500,000 but had been reduced to take account of the economic impact of the prohibition order. We deferred our decision on the penalty until deciding whether a prohibition order was appropriate. We also needed to give Mr Betton the opportunity to lodge material as evidence of his current financial position.

2. We have already expressed the view that the market abuse, summarised in our Decision warranted a financial penalty of £500,000. Our Decision of 19 November 2010 records Mr Betton's position with SPBell. Paragraph 16 states that when Mr Eagle took over SPBell, Mr Betton was a member of its board. Shortly after that the two other directors of SPBell resigned and Mr Eagle and Mr Betton were its only two remaining directors. While there was some dispute over the exact date of this, Mr Betton became managing director and Mr Eagle the chief executive.". S P Bell received a public censure for its part in the market abuse. We understand that it would have received a fine had it not gone into liquidation. Quite separately, Mr Eagle has received a penalty notice of £2.8m. That amount comprises £1.5m as penalty and £1.3m representing the financial benefit he had obtained from the whole share-ramping exercise. The FSA's case was presented on the basis that Mr Eagle had designed and instigated the share-ramping scheme; he had acquired control of S P Bell and used S P Bell as a component but important part of his wider scheme.

3. The scheme left S P Bell's clients with over £9m of unsettled trades and the FSA expressed the view that this had been the most serious share-ramping scheme it had seen. We are, as already noted, satisfied that actions of S P Bell for which its two directors have been responsible have justified a £500,000 penalty at the lowest. Here, however, we are concerned with the actions amounting to market abuse that Mr Betton personally has been engaged in.

4. Mr Betton, it will be recalled, had been a broker with S P Bell for 2-3 years before Mr Eagle acquired control in order to use it as the instrument to achieve his share-ramping designs. The other directors then left S P Bell and Mr Betton was appointed chief executive. Mr Betton was, as we summarised in paragraph 72 of the Decision, actively involved in the share-ramping exercise and, we concluded, he appreciated that Mr Eagle's purpose had been to raise the price of the FEI shares artificially by misleading and distorting the market. "Although not a co-conspirator with Mr Eagle", we said, his involvement and knowledge had been sufficient to satisfy the tests in section 118(2)(b) and (c) of Financial Services and Markets Act 2000. In paragraph 78 we recognised that Mr Betton had responsibility as the only director of S P Bell authorised to deal but that he had little power in Mr Eagle's empire.

5. Bearing in mind that Mr Betton had been directly involved in the scheme over several months, we are satisfied that he carries a substantial part of the blame for S P Bell's participation in the market abuse. His penalty should therefore be determined from the starting point that his input into the market abuse, so far as it was attributable to the activities of S P Bell's officers, was substantial; but in our view Mr Eagle bore the greater part of the blame for those activities.

6. ENF 14 ("sanctions for Market Abuse") provides in 14.7.4G para (3) that it is relevant, when setting the amount of a penalty for market abuse to be imposed on an individual, to take account of the financial resources and other circumstances of that individual. In that respect it is relevant to take account of "verifiable evidence of serious financial hardship or financial difficulties if the individual were to pay the financial penalty that would, in the absence of this consideration, be imposed". Paragraph (4) states that the FSA may have regard "to the amount of profits accrued … as a result of the behaviour"; this is on the basis that the person in question "should not benefit from his behaviour". We address the latter consideration first.

7. For that purpose we note paragraph 33 of the Decision where we record that Mr Betton emphasised that he did not personally benefit from the scheme except to the very limited extent (outlined in paragraph 47) of making a £4,500 profit from one transaction in FEI shares on 11 November 2003. We accept that. Otherwise we accept that Mr Betton had no stake in the outcome of the share-ramping scheme or in any part of it. S P Bell paid him £75,000 a year as salary and no commission. He participated in the scheme because otherwise he feared that he would be sacked by Mr Eagle. Mr Betton was not (aside from the £4,500 profit) unjustly enriched from his participation in the scheme. He was driven by fear rather than greed.

8. We turn now to the financial hardship and the financial difficulties that Mr Betton would face if a penalty of, say, £166,000 (being one-third of £500,000) were imposed. We have received extensive evidence of means from Mr Betton and have taken account of the observations of the FSA on the material produced. Since S P Bell folded, Mr Betton has had low level jobs, usually for short periods. He does not own his home, though his wife owns a share in it; there was a mention in a letter from the FSA that part of his wife's share came from Mr Betton after the FSA started their original investigations, but this has not been pursued. Mr Betton has no car. It has not been easy to work out his free capital, but it seems to us that this cannot be more than £20,000. (The cost of legal advice and representation in the proceedings has been considerable.) Mr Betton still owns a residential property in Florida in the USA. He has been trying to sell it for nearly a year. The Florida property is charged as security for a debt which appears to be at least as much at the currently anticipated selling price of the property. As things are, therefore, Mr Betton is, to put it colloquially, "running almost on empty". The effect of the prohibition order will have been to seriously destroy Mr Betton's earning capacity.

9. The facts that Mr Betton made nothing out of the share-ramping exercise and that he is now not at all well-off in no way excuse him for the market abuse. He did,

after all, spend more than thirty years of his previous career in the financial services industry and he must have been aware of the implications of what he was doing. The seriousness of the behaviour demands a penalty. An amount of penalty that forces him into bankruptcy would, we think, be disproportionate and totally unproductive. A penalty of £25,000 would leave Mr Betton, who is approaching 60, with virtually nothing. Because of the seriousness of the "offence", a lesser amount would give a completely wrong message to other market users.

10. For those reasons we think that the appropriate course for the FSA to take is to impose a £25,000 penalty.

SIR STEPHEN OLIVER QC
JUDGE OF THE UPPER TRIBUNAL

RELEASE DATE: 25 May 2011