Reference number FS/2008/0011

MARKET ABUSE – Price positioning – Share ramping exercise – Sanction – Whether prohibition appropriate FSMA 2000 s.118

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
FINANCIAL SERVICES

GRAHAM BETTON **Applicant**

- and -

THE FINANCIAL SERVICES AUTHORITY **Respondents**

TRIBUNAL: SIR STEPHEN OLIVER QC (Judge)
IAN ABRAMS
CHRISTOPHER CHAPMAN

Sitting in public in London on 23, 26, 28-30 July and 7 September 2010

David Mawdsley, counsel, for the Applicant

Michael Green QC, for the Authority

DECISION

1. Mr Graham Betton has referred a Decision Notice (dated 19 June 2008) made by the FSA. The Decision Notice concerns the trading of shares in Fundamental-E Investments Plc ("FEI") on the Alternative Investments Market ("AIM") between September 2003 and July 2004 ("the relevant period"). During the relevant period Mr Betton was a broker and the managing director of the stockbroking firm, SP Bell Ltd.

2. The Decision Notice imposed a prohibition order pursuant to section 56 of Financial Services and Markets Act 2000 (all statutory references in this Decision are to that Act) and a financial penalty of £100,000 pursuant to section 118. (The penalty had originally been set at £500,000: it was reduced to £100,000 to take account of the economic impact of the prohibition order.)

3. The background to this case relates to trading in FEI shares during the relevant period that amounted to an unlawful and abusive share ramping exercise designed artificially to inflate the price of FEI shares by creating the impression that there was an extensive demand in the market at increasing prices. There were a number of elements to the scheme, including unauthorised trading on behalf of clients of SP Bell and the use of "rollovers" and "delayed rollovers", in breach of the London Stock Exchange ("LSE") Rules, so as to avoid settlement of their trades having to take place. The large volume of trades executed by SP Bell purportedly on behalf of its clients (which contributed to the share price rises) did not represent genuine demand for the shares.

The FSA's case in outline

4. The case has been presented by the FSA on the basis that a Mr Simon Eagle instigated and designed the scheme. The FSA's case against Mr Betton is that he (Mr Betton) actively participated in the scheme from the start of the relevant period and was integral to its implementation and success.

5. Mr Betton has had over thirty years experience as a stockbroker. He, unlike Mr Eagle, was authorised to execute the trades and was therefore needed by Mr Eagle to conduct the scheme. He and Mr Eagle were the only two directors of SP Bell. As a result of the scheme, FEI's share price rose from 2.5p in May 2003 to a high of 11.75p in July 2004. This however was a false price as investors and potential investors were misled as to FEI's true market price by the behaviour of those involved in the share ramping scheme. Eventually trading in the shares was suspended (on 15 July 2004); when it resumed on 23 July, the price was 4p but it dropped rapidly from then on to under 1p. SP Bell ceased trading and went into administration.

6. As the direct result of the share ramping scheme, genuine shareholders in FEI were left with shares worth considerably less than they believed when they bought them and Pershing Securities Ltd ("Pershing"), SP Bell's clearing firm, were left with unsettled trades by SP Bell's clients of over £9m which Pershing has sought to recover in collateral civil litigation. The FSA has stated that this was the most serious

share ramping scheme that it had seen and it led to an extensive investigation in which a number of persons were investigated.

Mr Betton's case in outline

7. While Mr Betton admits culpability in certain respects he was not, he says, culpable to the degree and extent alleged by the FSA. The prohibition order is not, having regard to his actual involvement, merited. Moreover, the sanctions imposed on him are, he says, inconsistent with the way other people who participated in the scheme have been dealt with. Mr Betton has accepted that he knew that trading in FEI shares was taking place on accounts for which no documentation had been provided and that he should have insisted that no trading took place until that documentation was in place. He acknowledges that it was obvious that many of the transactions had been pre-arranged between Mr Eagle and Winterflood Securities Ltd, the market makers: and he should, he said, have responded more strongly. He has accepted responsibility for executing rollover transactions in breach of LSE Rule 3050 (as in force at that time) and for executing 27 delayed rollovers. That those transactions were likely to give the regular user of the market a false or misleading impression with regard to the demand for or value of the shares in FEI is an outcome for which he has accepted responsibility. He accepts that he encouraged other SP Bell brokers to deal in FEI shares. Mr Betton's case (to use the words of Mr David Mawdsley, his counsel) is that there was "no evidence to suggest that he knew there was a share ramping scheme on the go or that Simon Eagle was seeking to use the market in an improper way".

8. Mr Betton contends that the prohibition order is in the circumstances disproportionate because he alone of the SP Bell brokers had been singled out by the FSA while others of those brokers had escaped sanctions: moreover two employees of Winterflood had had financial penalties imposed upon them but not prohibition orders.

The FSA's response to Mr Betton's case, in outline

9. The FSA contends that the evidence presented in the course of this reference amply demonstrates that Mr Betton knew and actively and improperly assisted in the share ramping scheme, that he was at least reckless as to whether the trading on behalf of SP Bell clients was authorised and that he knew that this was highly misleading to the market. On that basis he is not a fit and proper person to perform any function in relation to any regulated activity carried on by any authorised or exempt person or exempt professional firm. A prohibition order is not only appropriate but necessary.

Decision Notices relating to market abuse by others involved in the share ramping scheme

10. The investigation resulted in six Decision Notices being issued by which those who had participated in the share ramping scheme were found to have engaged in serious market abuse within section 118. Five were referred to the Tribunal and all

except Mr Betton's have been resolved. Final Notices have now been issued against the five as follows:

(1) Winterflood Securities Limited ("Winterflood"), a market-maker specialising in smaller company securities trading on AIM such as FEI. Winterflood challenged the FSA's decision only on a point of law as to the interaction between the Code of Market Conduct ("the Code") and the Financial Services and Markets Act 2000 ("FSMA") and whether it is necessary to establish an "actuating purpose" to mislead or distort the market. The Tribunal found against Winterflood and its appeal was dismissed by the Court of Appeal on 22 April 2010. A financial penalty of £4 million was imposed on Winterflood.

(2) Mr Stephen Sotiriou was employed by Winterflood and joined with Winterflood on its challenge purely on a point of law. A financial penalty of £200,000 was imposed on Mr Sotiriou.

(3) Mr Jason Robins was also employed by Winterflood and joined in the above challenge. A financial penalty of £75,000, reduced to £50,000 to take into account Mr Robins' financial circumstances, was imposed.

(4) Mr Simon Eagle, for whose principal benefit the share ramping scheme was being operated, acquired the stockbroking firm, SP Bell, in May 2003 and became a director of FEI in November 2003. Until recently Mr Eagle was pursuing his reference but only in relation to the penalty following a direction made by the Tribunal prohibiting him from challenging the facts after he failed to reply to the FSA's Statement of Case. However, on 30 April 2010, Mr Eagle withdrew his reference and the FSA issued a Final Notice against him on 18 May 2010 imposing a financial penalty of £2.8 million (comprising £1.3m disgorgement of financial benefit and £1.5m of penalty) and a prohibition order pursuant to s.56.

(5) SP Bell (in liquidation) has been issued with a Final Notice dated 25 June 2008 which has not been published so as not to prejudice the references made by the other parties. SP Bell received a public censure but would have received a substantial fine had it not gone into liquidation.

The Statutory Provisions

11. Market abuse is defined in section 118. At the material times, the relevant provisions were in the following terms;

"118(1) For the purposes of this Act, market abuse is behaviour (whether by one person alone or by two or more persons jointly 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.

118(2) The conditions are that:

(a) …

(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."

12. The Code provides various examples of behaviour that constitute market abuse, including artificial transactions and price positioning. The reason why a share ramping scheme is so abusive and detrimental to the proper operation of market forces and confidence in the market is explained in the following sections from the Code (as in force at the time):

Section 1.5.3E states:

"Prescribed markets provide a mechanism by which the price or value of investments may be determined according to the market forces of supply and demand. When market users trade on prescribed markets they expect the price or value of investments and volumes of trading to reflect the proper operation of market forces rather than the outcome of improper conduct by other market users. Improper conduct which gives market users a false or misleading impression results in market users no longer being able to rely on the prices formed in markets or volumes of trading as a basis for their investment decisions. This will undermine confidence in the integrity of the prescribed market and overall market activity may decrease and transaction costs may raise, or both, to the detriment of market users, including investors."

And s.1.6.3E

"The matters in MAR 1.5.3E apply with equal force in connection with behaviour which gives rise to market distortion. A person may not engage in behaviour that interferes with the proper operation of market forces and so with the interplay of proper supply and demand and so has a distorting effect. Distortion undermines confidence in the prescribed markets and damages efficiency to the detriment of market users, including investors."

Introduction to the rest of this Decision

13. As will have appeared from the brief summary of Mr Betton's case, the central factual issue is the extent of his knowledge of the share ramping scheme in which he admits playing a part. We start by summarising those parts of the scheme about which there is no real dispute. We will then focus on Mr Betton's involvement in the scheme and set that in the context of the statutory requirements for a finding of market abuse. For this purpose we will need to address at some length the key areas of dispute and, where appropriate, make our own findings of fact. We will then set out our conclusions on whether the statutory tests are satisfied. Finally we will turn to the question of what sanctions and penalties should be imposed by the FSA.

The evidence available to us

14. The FSA has served 11 witness statements. Mr Betton has required seven of the witnesses to be called. They are:

(1) Mr Samiullah Khan, who is currently the lead investigator in relation to this case. He has responded to certain issues raised by Mr Betton in his Reply by exhibiting various schedules and telephone and interview transcripts.

(2) Mr Patrick Spens, who is the FSA's Head of the Market Monitoring Division and provides specific evidence as to whether Mr Betton achieved the best terms for his clients and why the rollovers were misleading to the market.

(3) Mrs Dorothy Sheppard, who was Mr Betton's PA at SP Bell during the relevant period.

(4) Mr Daniel Lynch, who was, during the relevant period, the Consultant Compliance Officer and Money Laundering Reporting Officer at SP Bell.

(5) Mr Dennis Mc Guinness, who was employed by SP Bell in the Glasgow office between April and July 2004.

(6) Mr Shujahat Khawaja, who was, during the relevant period, an investment manager at SP Bell in the Manchester office with Mr Betton.

(7) Ms Tracey McDermott, who is currently the FSA's Head of the Wholesale Department in the Enforcement and Financial Crime Division. She provided evidence as to how financial penalties are calculated and when prohibition orders are appropriate. She has also explained the sanctions imposed by the FSA on Mr Betton.

15. The following FSA witnesses have not been required for cross-examination and we have taken their witness statements to have been accepted by Mr Betton:

(1) Mr Matthew Joynes, who explains how he was persuaded by Mr Eagle to become a client of SP Bell but that none of the trading in FEI shares that was purportedly done on his behalf was ever authorised. The first he knew about the trading was when Pershing demanded £190,000 from him after the market in FEI shares was suspended.

(2) Mr Anthony Hayden, who also explains how he became a client of SP Bell and the unauthorised trading on his account which led to a demand from Pershings for over £500,000 after the market in FEI shares was suspended.

(3) Mr John Newbury, who is currently a Manager of the UK Regulation Department of the London Stock Exchange ("LSE"). He provides definitive (and uncontested) evidence as to the differences between a "put-through" and a "rollover" and explains how the trades would be reported. Mr Betton asserted that a number of the transactions he conducted were "put-throughs" and so not in breach of Rule 3050. This was not part of his case before us.

(4) Mr Charles van der Merwe, who at the material time was joint Chief Executive Officer of Pershing. Pershing was SP Bell's clearing firm, settling its trades with the market makers and, as a result of the unauthorised trading by SP Bell and the share ramping scheme, was left with losses of just under £17 million. Mr van der Merwe exhibits his long statement from the proceedings brought by Pershing against SP Bell, Mr and Mrs Eagle and Winterflood and deals with the events leading to the suspension of trading in FEI shares on 15 July 2004.

Factual background

16. Mr Betton started as a stockbroker in 1968. He joined Seymour Pierce Bell in Manchester in 2000 and was appointed regional director in 2001. When Mr Eagle took over SP Bell (as it became known) in May 2003, Mr Betton was a member of its

board. Shortly after that, the two other directors of SP Bell, Mr John Bell and Mr Neil Dowdney, resigned and Mr Betton and Mr Eagle were its only two remaining directors. There was some dispute over the exact date of this, but Mr Betton became managing director of SP Bell and Mr Eagle the chief executive.

17. SP Bell was authorised by the FSA pursuant to section 31. Mr Eagle was approved by the FSA pursuant to section 59 to carry out the CF1 (director), CF3 (chief executive) and CF8 (apportionment and oversight) controlled functions on behalf of SP Bell. Mr Eagle was not approved by the FSA to carry out any controlled functions which permitted him to manage investments or give advice to clients. However Mr Betton was approved by the FSA pursuant to section 59 to carry out the CF1 (director), CF21 (investment adviser) and CF27 (investment management) controlled functions on behalf of SP Bell. The significance of Mr Eagle not being able to trade on behalf of SP Bell's clients and the consequential necessity for Mr Betton, or some other similarly authorised person, to execute trades on behalf of clients introduced by Mr Eagle is a topic to which we will return. Mr Betton was the designated account manager for all the clients introduced by Mr Eagle to SP Bell.

The share ramping scheme

18. We now summarise the essential features of the scheme. What follows is not in dispute between the parties to the present proceedings.

19. In May 2003 85% of the original share capital of FEI (140 million shares) was owned by two shareholders ("the original shareholders"), and there was little or no market demand for FEI shares. Mr Eagle was seeking to secure control of an AIM "shell" company as an investment vehicle to acquire electronic technology companies, and he identified FEI as suitable for this purpose. In May 2003 therefore Mr Eagle agreed with the original shareholders to arrange for their shares to be sold (he proposed to buy 10% for himself), and in July 2003 he arranged with Winterflood that the original shareholders, through other brokers, would approach Winterflood to sell their shares and that Mr Eagle would make arrangements to buy the stock from Winterflood.

20. Mr Eagle instituted a share ramping scheme in FEI shares, the effect of which was to inflate the share price from around 2.5p as at May 2003, to 4.13p by the end of December 2003, and to an eventual high of 11.75p by 15 July 2004. Having acquired 10% himself through Winterway Securities Ltd (a company wholly owned by him) and having successfully sold the other 75% of the original shareholders' shares, Mr Eagle was appointed as a director of FEI on 19 November 2003, later becoming executive chairman from 5 January 2004. Mr Betton, according to his Reply, knew of these appointments at the time they were made and was aware of Mr Eagle's potential conflict of interest that had necessarily arisen as a consequence of that.

21. We now turn to the key elements of the share ramping scheme.

Acquisition of SP Bell

22. Mr Eagle had to find buyers for 75% of FEI shares owned by the original shareholders (after his 10%). To do so, he needed to generate significant demand for FEI's shares. On 27 May 2003, Mr Eagle acquired SP Bell through a company controlled by him. Mr Eagle intended to find buyers for the remaining 75% of FEI shares and to maintain demand thereafter by, for the most part, selling to clients of SP Bell.

The campaign to sell to SP Bell clients

23. From the moment that Mr Eagle became involved with SP Bell, he together with Mr Betton, strongly encouraged all SP Bell brokers to recommend FEI to their clients. The trading in FEI shares was instigated by Mr Eagle who had attended the Manchester office of SP Bell and made a presentation about FEI and its stock. Mr Eagle kept up the pressure. Mr Betton admitted that he "led from the front" and did encourage the other brokers to recommend FEI stock to their clients. As a result some 35.7 million shares of the initial FEI transaction (140 million) were purchased by SP Bell clients, including some 16.1 million shares by Mr Betton's clients.

Introduction of the Eagle clients

24. As there was still insufficient demand to complete the initial FEI transaction, Mr Eagle introduced 50 new clients to SP Bell ("the Eagle clients"). Mr Betton was the designated accounts manager for the Eagle clients. We accept Mr Betton's explanation as to why. This was because he occupied a salary position earning no commission and so it cost the scheme nothing to have Mr Betton as the designated accounts manager in relation to those clients. Mr Eagle had little or no authority from such clients to conduct any trading on their behalf (this was partly why the rollover scheme, described below, was needed); this was accepted by Mr Betton. Mr Eagle procured 27 of the Eagle clients (all their accounts were used by Mr Eagle without them knowing) to purchase 60.7 million FEI shares of the initial transaction.

"The rollover scheme"

25. From September 2003, Mr Eagle instituted a scheme, carried out by SP Bell brokers for him, and in particular by Mr Betton, whereby the FEI shares bought by the Eagle clients were rolled over one to the other before the first purchase had to be settled. Specifically, SP Bell bought FEI shares for the account of a client on credit from Winterflood, typically on a T +10 settlement basis (that is ten days from the trade for settlement), and then sold those shares via the market maker to the account of another client at or before the date of settlement, typically on a T+2 settlement basis. A rise in share price during the intervening period covered the cost of purchase, and also left an apparent profit on the first account that could be used to purchase more FEI shares. This effectively deferred payment by the respective Eagle

clients indefinitely and covered for the fact that the trading was unauthorised. The rollover scheme required a rise in share price in order to operate successfully but, to a certain extent, the rollover scheme itself contributed to the price rising because it appeared to the market as though there were plenty of demand.

"Delayed rollovers"

26. From 5 January 2004, Mr Eagle refined the rollover scheme by the use of delayed rollover trades, whereby the size and price of the buy and sell legs of the rollover trade were agreed at the outset, but the two legs of the transaction were then executed at different times of day, and normally in different "shapes" (i.e. the number and size of the individual trades). 27 delayed rollovers, in a total volume of 190.37 million shares, were effected between 5 January and 19 March 2004, all by Mr Betton. Delayed rollovers cannot be identified by the market and have the effect of being particularly misleading. Mr Betton accepts that his involvement in the delayed rollovers constituted market abuse contrary to section 118(2)(b).

Consistent purchasing by SP Bell from January 2004 onwards

27. In order to ensure that the market would think that there was a constant source of buyers of FEI shares and no real sellers (and so a rise in share price), Mr Eagle had to be informed by Mr Betton and other SP Bell brokers if any SP Bell clients wished to sell their shares or if Winterflood were offering FEI shares in the market. Mr Betton took steps such that any shares in the market would be purchased by SP Bell on behalf of Eagle clients. Once so acquired by the Eagle clients, they would generally be entered into the rollover scheme. Over 900 million FEI shares were bought by SP Bell in this way predominantly on behalf of the Eagle clients.

Instigating increases in the bid-offer quote

28. The "endless" source of buyers coupled with a massive volume of trading and the rollover scheme combined to raise FEI's share price. Further, the self-perpetuating nature of the scheme led to favourable press comments including comments relating to various corporate acquisitions that FEI was able to make because of its rising share price. We have studied transcripts of the telephone calls between Mr Betton and the Winterflood dealers. There were at least five occasions when Mr Betton specifically asked Winterflood to increase its bid-offer quote and some of the purchases by SP Bell were done with a view to securing an increase in the bid-offer quote.

The relationship between Mr Eagle and Winterflood

29. The admitted evidence shows that there was an unusually close relationship between Mr Eagle and the Winterflood market makers, such that he frequently spoke to them on mobile (and so untaped) telephone lines in order to pre-arrange trades which would then be conducted by Mr Betton and others on a taped line. (Mr Betton admitted that Mr Eagle had often spoken first to Winterflood and he realised that this

was most unusual, yet he was prepared to go along with it.) In response to a question from the Tribunal, Mr Spens said that it was unusual for a broker to trade for a year and a half in a particular stock with just one market maker.

The effect of the FEI share ramping scheme on the market

30. The share ramping scheme had the effect of misleading the market as to the supply, price or value of and demand for FEI shares and of distorting the market in FEI shares. It caused the positioning of the FEI share price at an artificially high level, and resulted in an almost five-fold increase in the share price of FEI between May 2003 and July 2004. This was not disputed by Mr Betton.

31. On 15 July 2004, the share price of FEI fell sharply from 11.75p to 7.5p as the result of sustained selling. The London Stock Exchange also received information that substantial unsettled positions in FEI shares had accumulated within SP Bell. At 10.35am, the London Stock Exchange temporarily suspended the trading in FEI shares because it was of the view that the market was disorderly. The suspension of trading caused the unsettled positions in FEI shares at SP Bell to crystallise. Neither the clients of SP Bell nor SP Bell itself had sufficient funds to settle the resulting debt of over £9m.

32. On 23 July 2004, SP Bell ceased trading and was place into administration. Trading in FEI resumed the same day: the price of FEI shares fell to 4p by close of business and continued to fall steadily after that.

Involvement of Mr Betton in the share ramping scheme

33. Mr Betton has accepted a limited involvement in the share ramping scheme, but has confined this to the period from January 2004 onwards. He has, however, continued to deny that he knew that the purpose of the scheme was to raise FEI's share price artificially. He has not provided any other explanation as to what he did think the purpose of the scheme was and has emphasised that he did not personally benefit from the scheme except to a very limited degree making a profit of £4,500 in one transaction on 11 November 2003. In his witness statement he has admitted that his "response to the unfolding situation was tempered by the fear of being sacked by Mr Eagle". It is relevant to mention that his basic salary was £75,000 and that, unlike all the other SP Bell brokers, he was not on a commission.

34. For a finding of market abuse against Mr Betton we need to be satisfied that his behaviour fell squarely within section 118. In particular we need to be satisfied that his behaviour in assisting in the rollover scheme and executing rollover and delayed rollover trades, consistently buying FEI shares on Mr Eagle's instructions and instigating increases in the FEI share price was, among other things:

> (i) likely to give a regular user of the market a false or misleading impression as to the supply of, demand for, price or value of, FEI shares; and/or

(ii) such that a regular user of the market would, or would be likely to, regard the behaviour as that which would, or would be likely to, distort the market in FEI shares and

(iii) likely to be regarded by a regular user of that market who was aware of the behaviour as a failure on the part of Mr Betton to observe the standard of behaviour reasonably expected of a person in his position in relation to the market.

35. The reasons why the FSA say that Mr Betton's behaviour was likely to give a false or misleading impression and/or distort the market and fell short of the standard reasonably to be expected are now summarised. Following this summary, we will address the disputed areas of fact.

False or misleading impression and/or distortion of the market : Section 118(2)(b) and (c) conditions

36. The FSA point to the unauthorised trading carried out by Mr Betton on the instructions of Mr Eagle, purportedly on behalf of the Eagle clients. This, they say, gave the false impression to the market that there was a substantial and continuous demand for FEI shares when that was not in fact the case. The FSA contend that Mr Betton knew or should have known, from the unusual nature of the transactions and instructions he received, from the rollover scheme and from his awareness of Mr Eagle's substantial conflict of interest in giving such instructions together with his unusually close relationship with Winterflood, that such trading was unauthorised. In this connection we observe that Mr Betton has accepted that he knew that trading in the FEI shares was taking place on accounts for which no documentation had been provided. Mr Betton has not challenged the FSA's allegation that such trading was unauthorised. Mr Betton's position is that, despite the unauthorised trading, there was no evidence to enable the Tribunal to conclude that he knew there was a share ramping scheme being operated.

37. The volume of the rollover trades which the FSA say were not genuine transactions amounted to 80% of the volume of FEI trades reported by all firms between September 2003 and July 2004. They amounted to approximately ten times the issued share capital of FEI. Rollovers, the FSA pointed out, are reported to the market as separate transactions: hence, the fact that those trades were rollovers would not necessarily be apparent to a regular user as such. In particular that fact would not be apparent where a number of "shapes" were used to book the total size of one or both legs of the rollover. Execution of the rollovers thus gave an impression of the substantial and continuous demand for FEI shares that did not in fact exist. We accept that, and it was not disputed by Mr Betton. That appears to us to be inconsistent with Mr Betton's case (summarised at the end of paragraph 36) that there was no evidence on which we could conclude that he knew of the existence of a share ramping scheme. Moreover, and again this was not disputed, even if a regular user were to interpret any of the rollover trades as such, that regular user would assume wrongly that the trades were individual short term rollovers following which the trades were settled. In fact the rollovers were in breach of LSE Rule 3050. That rule was, we understand,

devised to ensure that trades were settled promptly prohibiting rolling over a position in a security more than once. The rollover scheme therefore concealed from the market the fact that a substantial number of FEI shares had not been paid for. Had the market known this, it is likely that the FEI share price would have fallen significantly. Mr Betton did not challenge that inference.

38. Regarding the execution of delayed rollover trades, the FSA pointed out that delayed rollovers were even more misleading than rollovers because the time lapse between the execution of the two legs of the trade made it impossible for a regular user to identify the trades as rollovers with any degree of certainty. This was compounded where the delayed rollover was asymmetrical and thus reported as unmatched multiple transactions. While delayed rollovers are rare, here the volume of these delayed rollovers executed by SP Bell in FEI shares was high. There had been 27 delayed rollovers in the space of 2½ months. That represented 44.5% of the volume (almost 190.4 million shares) of FEI trades reported by all firms in this period. This was equivalent to the entire issued share capital of FEI. Moreover, it was pointed out, the delayed rollovers were consistently transacted at the top end of the "touch price" (i.e. the top of the bid/offer spread) and only seven were completely symmetrical. Execution of the delayed rollovers, it was suggested by the FSA, gave an impression of substantial and continuous demand for FEI shares that did not in fact exist and that such demand was at increasingly higher prices when this was not in fact the case. Mr Betton admitted that his involvement in the delayed rollovers constituted market abuse. As already observed, it was his case that there was no evidence to support that he knew that there was a share ramping scheme or that Mr Eagle was seeking to use the market in an improper way.

39. It was not in dispute that there was a consistent purchasing of shares by SP Bell purportedly on behalf of clients and that this did not represent genuine demand for FEI shares. The regular user, however, would have had the impression that there were a substantial number of genuine buyers in the market actively seeking to acquire FEI shares. On that basis the effect would have been to support and increase the FEI shares at an artificially high level. Mr Betton has admitted that his behaviour in such respect between January and April 2004 constituted market abuse.

40. Finally in this connection the FSA point to the fact that Mr Betton had instigated increases in the FEI share price. The facts show that between January and July 2004 there were 43 upward moves in FEI's bid/offer quote from 3.75p/4.75p to 11.25p/12.25p. This had been caused by the share ramping scheme including the rollovers, delayed rollovers and the constant source of "buyers" for the shares. All those features contributed to the false impression in the market of substantial and continuous demand for FEI shares. What was more, and as already mentioned, the rise in price and apparent constant demand attracted favourable press attention which itself contributed to the share price increases. The evidence shows that on at least five occasions Mr Betton had actually asked Winterflood to increase its bid/offer quote. (We will deal with this later in this decision.)

The regular user test : section 118(1)(c)

41. Relevant to this test, the FSA contend, is Mr Betton's knowledge of the unauthorised trading. We list below certain facts and matters showing that there was a clear and substantial risk that many of the Eagle clients had not authorised their trading in FEI shares and that the apparently unlimited demand for FEI shares from Eagle clients was not genuine.

(a) Mr Betton has admitted that, by November 2003, he knew both that Mr Eagle was in a position of a conflict of interest (by virtue of his holding of shares in FEI through Winterway) and that a number of Eagle clients were by then unable to settle the trades on their accounts and were not complying with SP Bell's requirements that they maintain a minimum collateral of 33.33%.

(b) Mr Betton was aware that the purpose of the rollover scheme was to defer payment indefinitely by the Eagle clients; he must therefore have known that the effect on the market of the rollover scheme was to conceal that a significant number of shares had not been paid for.

(c) The evidence shows that Mr Betton and other SP Bell brokers had agreed to purchase substantial amounts of FEI stock being offered by Winterflood purportedly on behalf of Eagle clients but without first ascertaining whether there were any who actually wished to purchase such stock. The shares so purchased were simply added to the rollover scheme.

(d) Mr Betton admitted in his witness statement that he knew that trading had been taking place in the names of the Eagle clients when inadequate account opening and money laundering documentation had been provided.

(e) Despite being the designated account manager in respect of the Eagle clients and a director of SP Bell, Mr Betton took no steps to satisfy himself that the trades had been authorised and as a result executed numerous unauthorised trading transactions on the instructions of Mr Eagle.

42. The active assistance given by Mr Betton in the share ramping scheme was a further feature relied upon by the FSA in showing that the "regular user test" was satisfied. It is a fact that Mr Betton executed at least 75 rollover trades, including all 27 of the delayed rollover trades. He was, the evidence shows, aware of and involved in the monitoring of the rollover scheme by way of a rudimentary daily spreadsheet kept by him showing which Eagle clients had to rollover shares because their purchases were approaching the settlement date. The evidence shows also that Mr Betton ensured that whenever there were FEI shares on the market, or SP Bell clients

who wished to sell, that SP Bell brokers would buy such shares predominantly on behalf of the Eagle clients which were then entered into the rollover scheme. By so assisting in the rollover scheme and executing the rollover and delayed rollover trades, Mr Betton caused SP Bell to breach LSE Rule 3050 and concealed from the market that a significant number of FEI shares had not been paid for. We accept this and it was not disputed by Mr Betton. This behaviour gave the impression that there was a genuine and proper demand for FEI shares. It is consistent with the conclusion that Mr Betton knew that the rollover scheme was improper and misleading and part of Mr Eagle's share ramping scheme.

43. Then the FSA contend that the evidence shows that Mr Betton actually knew of the share ramping scheme. We are satisfied that he knew all the elements of the scheme as summarised earlier in this decision. He knew that there was a conflict of interest that Mr Eagle had in relation to trading in FEI shares. He willingly followed all of Mr Eagle's instructions in relation to purchasing the FEI shares on behalf of the Eagle clients, from September 2003, and as regards the operation of the rollover scheme. On the face of it, we think, Mr Betton must have realised that such trading and/or price positioning was intended to facilitate the positioning of FEI's share price at an artificially high level and therefore was likely to indeed give a regular user of the market a false impression as to the demand for, and/or price or value of, FEI shares and was likely to and did distort the market in FEI shares and would be regarded by a regular user of the market as likely to do so. Is that prima facie conclusion displaced when one comes to examine the disputed areas of fact?

Main areas of dispute

44. Mr Betton's case is essentially that his personal involvement in and knowledge of the share ramping scheme were so limited in nature as not to justify the sanctions imposed upon him by the FSA. In the course of the "pleadings" and during the hearing of the reference, Mr Betton has made a number of admissions. It was to have been his case that many of the transactions in FEI stock were "put-throughs" rather than rollovers. At one stage Mr Betton relied upon there being a significant difference between a rollover and a put-through transaction. He admits that some of the trades he had executed were indeed rollovers and no longer asserts that any of the relevant transactions were put-throughs.

45. Mr Betton says that he did not know the purpose of the transactions comprising Mr Eagle's plan; specifically, he did not know that the object was to increase the share price of FEI's stock to an artificial level. Between September and December 2003, he claims, the essential purpose of the scheme was to enable the purchase of the FEI stock from the original shareholders. And even when he started to effect the delayed rollovers early in January 2004, he claims that he did not know that these were essential parts of a share ramping scheme. The FSA's general observation on this is that by the time Mr Eagle came on the scene and acquired SP Bell, Mr Betton had been working in stockbroking for 35 years. With such experience and knowledge of the markets and trading he must have appreciated that the only point of the unusual activities instituted by Mr Eagle was to increase the

price of the FEI stock artificially. In the course of evidence Mr Betton referred to his having had certain "concerns" that he had communicated from time to time to Mr Eagle and that these had been allayed. There is, however, no suggestion that he had ever put to Mr Eagle that the latter had been artificially seeking to raise the price of the shares. That, said Mr Betton, was something that had never occurred to him. Viewing the circumstances as a whole and with particular reference to the content of the telephone conversations with the Winterflood staff, made when Mr Betton was seeking to effect rollovers and delayed rollovers, we are not satisfied that Mr Betton had only a limited involvement in and knowledge of the share ramping scheme. What follows are a series of points that have, between them, led us to this conclusion.

Mr Betton's involvement in the Scheme : examination of evidence

46. From the time that Mr Eagle had acquired control over SP Bell, he encouraged Mr Betton and other brokers to market FEI shares to their clients. Mr Betton has accepted that he "led from the front" on this and pushed the brokers to recommend FEI stock. He admitted that he had to support Mr Eagle; if he did not he would lose his job. He admitted that he knew about Mr Eagle's track record which had involved a similar but earlier scheme relating to shares in a company called Bowstead. Mr Betton sought to put his "leading from the front" into perspective. One broker, Mr Khawaja, had stated that he had only started dealing in FEI stock after Mr Eagle had made a presentation. Referring to a Mr O'Toole, a broker who had joined SP Bell in February 2004, Mr Betton relied on an interview by the FSA in which Mr O'Toole said that it was as the result of his own research into the FEI stock that he had dealt in it and he had been incentivised by another senior broker (Mr Hitchin) who had questioned his low sales performance. Mr Betton pointed to the fact that there had been no incentives offered by him to the brokers to deal in FEI stock.

47. The facts, we think, are that Mr Betton did indeed "lead from the front" in relation to the dealings in FEI stock. We cannot draw the inferences that Mr Betton invited us to draw that his knowledge of FEI was too limited to make him substantially involved in the scheme. From the start, in September 2003, he knew it was a speculative stock. We know from Mr Khawaja's unchallenged evidence that Mr Betton told him that the stock was on the market because a director of FEI was trying to sell his shares. He knew that Mr Eagle was pushing it hard. Mr Betton, who was in constant touch with Mr Eagle, must have become aware that Mr Eagle had not just an interest in the FEI stock but the reason for his interest. Mr Betton, as we have already noted, purchased 300,000 FEI shares as part of the purchase of 21 million shares on 11 November 2003. That was when Mr Eagle, through Winterway acquired his 10% stake at 2.5p per share. Mr Betton must, we think, have known this at the time, particularly as his purchase at 2.6p was below the market price (bearing in mind that the bid/offer quote that day was 3-4p). The large benefit to Mr Betton from this purchase demonstrates how close he must have been to Mr Eagle. We find ourselves unable to accept Mr Betton's denial of this.

48. We mention in this connection that Mr Betton monitored the FEI purchase and sale transactions (until early in 2004 when Mr Hitchin took over) using his own

rudimentary handwritten spreadsheet for the purpose. As well as that handwritten spreadsheet, we were told that a daily computerised spreadsheet was eventually produced that kept track of all the transactions in FEI stock. Whether Mr Betton actually had sight of each computerised spreadsheet was not established; we note from the evidence of Dorothy Sheppard, Mr Betton's PA, that she said she had never seen them.

49. Those features show Mr Betton's involvement as managing director of SP Bell in the implementation of the Scheme. We move on now to examine his relationship with Mr Eagle.

50. The evidence shows that Mr Eagle told Mr Betton that he should deal exclusively with Winterflood in relation to FEI. It appears that this instruction was accepted by Mr Betton; but, we infer, it would have conflicted with his obligation to provide "best execution" owed to his clients. Mr Khawaja stated that Mr Eagle and Mr Betton had been on the telephone "the whole time" and that Mr Betton would pressure the brokers to recommend FEI to their clients. In the circumstances, it is clear to us that Mr Betton was doing this at the behest of Mr Eagle.

51. An example of this is an early transaction that must, we think, have been effected to give a false impression to the market that there was a genuine demand for FEI shares. This took place on 25 September 2003. That was the first rollover trade in FEI shares conducted by Mr Betton. It appears from the taped record of the telephone call that he knew Mr Sotiriou at Winterflood reasonably well by this stage and it is clear that Mr Eagle had already spoken to Mr Sotiriou early in the day. Mr Betton executed the rollover with Mr Sotiriou at 11.33am by Mr Betton saying: "I want to do a little, um, deal in Fundamental E, both sides with you … I want to sell 3,852,000 … for T2 … at 3.4 … and I want to buy them back at 3.5, for T10". The FSA asked why the buy and sell legs were at such widely different prices (giving Winterflood a 0.10p turn for no risk) and why Mr Betton had put that transaction through at all. The transaction could have been "crossed" by SP Bell internally at the mid price. It must, we think, have been put through Winterflood as a pre-arranged "deal" to give the market the impression that there was a genuine demand for FEI shares.

52. Not long after that, Mr Eagle asked Mr Betton to monitor the trading in FEI shares by the Eagle clients. Mr Betton, as already mentioned, started to compile the rudimentary handwritten spreadsheet. From this he must have known that many of the Eagle clients were unable to pay for the shares bought in their names. Mr Betton admitted that in November 2003 he knew that debit balances had arisen on a number of the Eagle clients' accounts. He also knew at that time that trading was taking place on some Eagle clients' accounts with incomplete and inadequate account opening and money laundering documentation.

53. Also in November 2003, Mr Betton knew that Mr Eagle had, through Winterway, acquired a 10% shareholding in FEI and had been appointed a director of FEI. Bearing in mind that by then Mr Eagle had been putting pressure on SP Bell to

purchase the FEI shares, that there had been rollovers taking place for some two months, that the Eagle clients were being saddled with debit balances and that Mr Eagle himself was evidently in a position of conflict of interest, Mr Betton must have realised that Mr Eagle was endeavouring to push the FEI share price up. Moreover, the evidence shows that Mr Betton's instructions in relation to the Eagle clients came from Mr Eagle and that he (Mr Betton) never spoke to any of the Eagle clients for their direct instructions to execute any of the trades, Mr Betton must have suspected that Mr Eagle, with his conflict of interests and all the other problems concerning their accounts, did not actually have instructions from each and every one of them when he instructed Mr Betton.

54. Moving on to the delayed rollovers which started on 5 January 2004 we note that these were executed by Mr Betton for no apparent purpose other than that of misleading and distorting the market. Mr Betton offered no explanation as to what he thought the purpose of the delayed rollover was. From that one can fairly assume that he knew at the time that they were quite wrong and that he was acting at Mr Eagle's behest. The fact that he, with all his experience, was prepared to go along with such obviously improper trades indicates that he knew about the share ramping scheme and, for whatever reason, was content as a director of SP Bell and an approved person to allow it to continue and personally to assist in its implementation. Mr Betton not only continued to effect delayed rollovers but he, on occasions that will be identified later, asked for the price to be put up by Winterflood. Throughout the series of rollovers and delayed rollovers executed by Mr Betton, the information to the public was made more misleading as the result of Mr Betton's distortion of each side of the deal into different "shapes" and often more shapes than there were underlying clients. This indicates that Mr Betton knew that the relevant Eagle client had not actually ordered any of the transactions; moreover it falsely indicated to the market that there were more buyers of FEI shares than was in fact the case. In this connection we note the evidence of Mr Spens of the FSA that SP Bell generally bought in multiple shapes at the top of the touch price, which would add to the false impression that there were plenty of buyers of FEI shares who were willing to pay aggressively for their shares. Mr Betton offered no explanation as to those features of the transactions. Nor did he address the main points taken by the FSA in their Statement of Case.

Mr Betton's defence

55. Among the points taken by Mr Betton in his "defence" was his own moderation. He says that if he had been a party to the scheme he would have bought more shares personally himself. We do not find that persuasive. The question is whether he was involved in the share ramping scheme, not whether he profited from it.

56. Then Mr Betton drew attention to the fact that he had contacted two Eagle clients about administrative matters (e.g. documentation) in the course of November and December 2003. We do not find this persuasive. We note from the answers given by Mr Betton in the course of the hearing that he only wrote to Eagle clients if he was allowed to do so by Mr Eagle or if they rang him to ask for details as to where

to pay. He referred to a FSA visit to SP Bell's Harlow office on 5 February 2004. Mr Betton said that this had "minimised" in his mind the concerns he had in relation to FEI. But he knew that the delayed rollovers conducted by him were giving the market a false and misleading impression as to the price or value or demand for the FEI shares and so constituted market abuse. If that was one of the concerns in his mind, he must have known about the share ramping element of the dealings in FEI shares. Further, as already noted, that visit would have been an opportunity for him to make a full disclosure to the FSA. Moreover, the fact that the FSA's visit passed without their apparently spotting that the share ramping scheme was in operation might suggest that all concerned thought they could go on and get away with it.

57. Then Mr Betton pointed out that he and his PA, Dorothy Sheppard, had been chasing up missing documentation and, in particular, had been seeking documents and paperwork about Winterway's holdings in FEI. The inference from that, suggested for Mr Betton, was that he had been kept out of the loop as regards Winterway's participation in the scheme. We see it differently. The fact that the missing documentation was known to Mr Betton is consistent with the conclusion that he knew about Mr Eagle's scheme and was prepared to involve himself in its implementation.

58. Then it was urged on us for Mr Betton that, in determining the extent of his involvement in the market abuse, we should take into account the activities of the team working around Mr Eagle at Harlow. The Harlow office was where Mr Eagle had located his financial interests and where Mottram & Partners, a financial business with accounting and compliance responsibilities, operated. The staff at the Harlow office, it was said, knew exactly what was going on and had been prepared to turn a blind eye to compliance issues. Also guilty of turning a blind eye, it was suggested for Mr Betton, was Mr Lynch, a part of the Harlow team and the compliance officer responsible for SP Bell. It seems to us that, however informed and active the Harlow team may have been in initiating and progressing the share ramping scheme, this does not preclude a finding that by September 2003 Mr Betton knew enough about what was going on to enable him to conclude that he was playing an active part in the share ramping scheme and was instrumental in achieving its object. In this connection we mention that Mr Lynch gave evidence. Any conclusions we may have reached about his competence are immaterial; they would not displace our finding that Mr Betton knew he was playing a part in the share ramping scheme.

59. It was emphasised for Mr Betton that he had played no part in the original arrangements with the original shareholders, made in the first part of 2003, by which they agreed to sell and Mr Eagle agreed that their stock should be purchased through Winterflood at a price dictated by Mr Eagle. Nor did Mr Betton, unlike Mr Eagle who had apparently earned a commission of £1.2 million from the original shareholders in FEI, gain anything out of that. We accept that. But, as we have already observed, this does not affect the conclusion that by September 2003 Mr Betton was knowingly playing a part in the scheme. Then, looking at the later part of the scheme, it was pointed out for Mr Betton that it had continued without any participation on his part. Mr Hitchin had taken on the FEI dealing arrangements by

March 2004. We are aware that, by then Mr Betton had other responsibilities that took him away from SP Bell's Manchester office. The facts remain however that Mr Betton remained managing director and had effected the 2003 rollovers, the 27 delayed rollovers in 2004 and kept a documentary record of the positions produced by those deals. We fully acknowledge that Mr Betton had been following the instructions of Mr Eagle, but that feature serves only to underline the point that Mr Betton must have known, not just the steps, but the object of the share ramping scheme.

60. We were reminded that Mr Betton had placed all the rollover and delayed rollover transactions through Winterflood on a recorded line. Why, if he had known that he had been playing a part in an abusive share ramping exercise, did he not (asked counsel for Mr Betton) use his mobile phone? The answer must be that Winterflood could only legitimately carry out deals if the instructions were duly recorded. We were reminded, again for Mr Betton, that the FSA had paid a visit to the Harlow office on 5 February 2004. If Mr Betton had really known about Mr Eagle's share ramping plans, why did Mr Betton execute delayed rollovers on 2, 3, 4 and 5 February? We cannot draw any conclusions on that save to repeat our observation that the FSA visit would have been an opportunity for Mr Betton to have disclosed his concerns to the regulator.

Further findings of fact

61. We now refer briefly to the evidence of Mr S Khan, the FSA's investigator in relation to the present case. Mr Khan has analysed the telephone transcripts of the conversations between Mr Betton and market makers at Winterflood, many of which we have read and heard, with a view to assessing the extent of Mr Betton's involvement and knowledge of the share ramping scheme. We note from this that Mr Betton regularly asked Winterflood about the dealing book position with a view to buying in on behalf of the Eagle clients all the FEI stock available. We note also that when Mr Betton placed orders with Winterflood for trades purportedly by various SP Bell clients, Mr Betton gave Winterflood information that was inconsistent with the actual allocation of those shares among the SP Bell clients. These features indicate to us that he did not actually have any such orders at the time he was speaking to Winterflood but knew that he would be able to use Eagle clients and, if necessary, enter the shares into the rollover scheme. Further, it is clear to us that Mr Betton was entering into commitments to purchase large quantities of FEI shares without checking whether there was sufficient demand from SP Bell clients; this indicated that he knew he could use the Eagle clients' accounts and enter them into the rollover scheme. The text of the conversations indicates that there were occasions when Mr Betton knew that Mr Eagle required a rise in share price and that he wanted the scheme to continue to run smoothly, allowing Winterflood an overly generous turn.

Whether Mr Betton was trading on the best terms available to clients of SP Bell

62. The FSA has pointed to situations where, they say, instead of Mr Betton trading for his clients on the best available terms to them, he was not doing so because this was essential to keep Winterflood happy in order to ensure that the scheme could continue and succeed. Although Mr Betton did not challenge this in the course of the hearing, he had claimed in his reply to have been trading on the best terms available to those clients. We heard evidence from Mr Spens who identified that, although Winterflood appeared prepared to carry out the rollovers on a 0.05p spread, Mr Betton agreed to give it a 0.10p spread. He rolled over more than 18 million shares at 0.10p spread; consequently the apparent clients of SP Bell were some £40,000 worse off than would have been the case had he agreed a 0.05p spread. The facts show that the 0.05p spread related to ordinary rollovers which were risk free for Winterflood as the buy and sell legs were executed simultaneously. Mr Spens regarded this as an excessive turn taking into account the funding charge being levied on the SP Bell clients for giving credit. This, he observed, amounted to an annualised interest rate of 86%. In this connection we heard evidence from Mr McGuinness of SP Bell's Glasgow office who observed that he had been concerned when he realised how much Winterflood had been paid; and when Mr McGuinness complained to Mr Betton, the latter's response was that Mr Eagle wanted them to deal exclusively with Winterflood. In evidence before us Mr Betton was unable to give any satisfactory explanation for why he was giving Winterflood an excessive turn. His only comment was – "I just thought that this was the right price to give them".

63. Another deal that has satisfied us that Mr Betton was benefiting Winterflood at the expense of the Eagle clients took place on 20 February 2004. On this occasion he adjusted the terms of the deal after the event. It appears that the deal had been done while Mr Betton's back was turned. Realising that Winterflood stood to lose out he phoned Winterflood stating – "We've got the understudies together". (That referred to the fact that neither Mr Betton nor the Winterflood staff who were in the know had carried out the deal.) Mr Betton changed the price of the purchase from 5.75p to 6p to ensure that Winterflood did not lose out. This clearly was not in the best interests of the SP Bell clients, who happen to be Eagle clients.

Instigation of price increases

64. Our attention was drawn to a number of occasions when Mr Betton, in his telephone communications with Winterflood, sought to have the price of FEI stock increased.

65. In November 2003, at the time when Mr Betton had become aware of Mr Eagle being made a director of FEI and of the large debts accruing to the Eagle clients on their FEI trading, Mr Betton engaged with Winterflood to try to push the share price up. On 6 November 2003 he asked to "move them up slightly to upset them a bit": this was on the back of a rollover and Mr Eagle had asked Mr Betton "to try and get it". Then on 12 November 2003 Mr Betton asked to deal "as toppy as we possibly can". In the course of evidence before us Mr Betton agreed that this was not in the

best interests of the buying client, but this was an Eagle client and Mr Eagle was, he said, "trying to push his own stock". In the course of conversation with Winterflood on 21 November 2003, Mr Betton said that he was just trying "to keep the flow going".

66. 5 January 2004 was the day when Mr Betton got back from holiday. At 1.23pm he carried out the first delayed rollover. He spoke to Winterflood to arrange this. Having executed the first leg, Mr Betton said – "It'd be handy if you just sort of picked them up a touch, if you know what I mean". At 13.24 Winterflood increased their quote from 4p/5p to 4.25p/5.25p. We see this as an occasion on which Mr Betton had been acting on the instructions of Mr Eagle who had already organised the transactions with Winterflood.

67. Between 2 and 5 March 2004 there was a concerted effort on the part of Mr Betton to get the FEI price up with specific requests, following instructions from Mr Eagle. On 2 March 2004 at 12.24 Mr Betton spoke to Winterflood and said – "I wouldn't mind getting them up a bit … to take you out and someone else out … and sort of, you know by the end of the week, see em – see em 6p, not 5p". At 12.27 Winterflood increased their quote from 5/6p to 5.25p/6.25p.

68. At 08.26 on 3 March Mr Betton spoke to Winterflood to execute a delayed rollover and said – "when these are all sort of out of the way, perhaps you'll go a bit better". At 12.53, when executing the second leg of the delayed rollover, Mr Betton referred to the fact that he needed "to do quite a bit more [in FEI] but I'd rather do them at 6¼ with you"; he referred to the fact that Winterflood had earlier agreed to increase the quote; at 12.53, immediately after the conversation, Winterflood increased their quote from 5.25p/6.25p to 5.50p/6.50p.

69. At 15.49 on 3 March 2004, Mr Betton was executing the second leg of the delayed rollover and after doing so, Winterflood asked him – "do you want me to call them up in the morning" to which Mr Betton said – "I wouldn't mind actually". At 07.46 on 4 March Winterflood increased their quote from 5.5p/6.5p to 5.75p/6.75p.

70. On 15 March 2004 (at 15.05) Mr Betton spoke to Winterflood and was asked if he wanted the price increased. "Do you want me to go half bid for it?". To that Mr Betton responded – "That would be nice"; at 15.05 Winterflood increased their quote from 6.25p/7.25p to 6.50p/7p.

71. No attempt was made to explain to us those increases by reference to genuine demand in the market. It is evident that the price was positioned at an artificial level. Mr Betton must, we think, have known that the price increases on the back of rollovers and delayed rollovers could not be justified because they did not represent genuine demand. The consistent purchasing by SP Bell on behalf of Eagle clients of any stock held by Winterflood could not of itself have represented genuine demands; those transactions were just added to the rollover scheme.

Conclusions on Mr Betton's involvement in and knowledge of the share ramping scheme

72. Taking all the points made above into account, which show that Mr Betton was actively involved in the share ramping scheme, with particular reference to the delayed rollovers and the instigations of price increases, we are driven to the conclusion that he appreciated that Mr Eagle was seeking to raise the price of FEI shares artificially by misleading and distorting the market. Although not a co-conspirator with Mr Eagle, Mr Betton's involvement and knowledge are, we think, sufficient to satisfy the test in section 118(2)(b) and (c). Moreover, Mr Betton knew that there was a clear and substantial risk that many of the Eagle clients had not authorised their trading in FEI shares and he knew that the apparently unlimited demand for FEI shares from the Eagle clients was not genuine. That latter point serves to demonstrate that the "regular user" test in section 118(1)(c) has been satisfied. The conduct in which Mr Betton knowingly participated was, we think, likely to be regarded by a regular user of that particular market who was aware of Mr Betton's behaviour as a failure on the part of Mr Betton to observe the standard of behaviour reasonably expected of a person in his position in relation to the market.

Penalty

73. We turn now to the question of whether the proved market abuse justifies the conclusion reached by the FSA that Mr Betton is not fit and proper and the imposition of a prohibition order is appropriate. In this context we heard evidence from Ms McDermott who is currently the FSA's Head of the Wholesale Department in the Enforcement and Financial Crime Division. She commented that the FSA viewed the misconduct in the present case as "considerably more serious than any previous market abuse case decided by the Authority (or by the Tribunal)". Mr Betton claims to have been treated unfairly by comparison to other SP Bell brokers, namely Mr Hitchin and Mr Partridge (the latter of whom had been involved in transactions in FEI stock from SP Bell's Bristol office); neither of those two was pursued by the FSA. Mr Betton also claims to have been treated disproportionately when compared to the Winterflood employees, Mr Sotiriou and Mr Robins, who were fined.

74. Ms McDermott explained in evidence that when this case was first investigated and looked at by the Regulatory Decisions Committee of the FSA, it was the first one where it had been suggested that both a prohibition order and a financial penalty be imposed. Prohibition orders have since been imposed and the FSA is apparently seeking these in many cases going through the system.

75. Ms McDermott identified certain aggravating factors in relation to Mr Betton's behaviour. The first of these was that he was the only other director of SP Bell with Mr Eagle. He was the managing director and, as such, in a position of particular responsibility, as compared with the other brokers. We do not see it as surprising that, having regard to his responsibilities as a CF1 director who was instrumental in facilitating the share ramping scheme, a prohibition order has been

sought. While we recognise the acute pressures on Mr Betton, the fact is (as we have already found) that he allowed SP Bell to be exploited by Mr Eagle in order to carry out the share ramping scheme over a relative long period of time. And he actively participated in the scheme, being willing to act on Mr Eagle's instructions and ignoring all the warning notes that his experience should have told him indicated something improper going on.

76. Our conclusion overall was that Mr Betton's conduct went beyond carelessness or negligence on his part. He was instrumental in the trades in FEI shares without obtaining proper authority. And, as appears from our summary of the evidence set out above, he knew about the share ramping scheme and was therefore deliberately involved and active in it. Finally in this connection, we note that the prejudicial effect of Mr Betton's behaviour was that the shares were suspended causing confidence in AIM to be undermined and it caused losses of over £9 million to be incurred.

77. Mr Betton placed considerable emphasis on the fact that the FSA decided to take no action against Mr Hitchin who had taken over from him at the Manchester office in February 2004 and had seen the scheme through until July of that year. We note from the evidence that there were certain features about Mr Hitchin's involvement that distinguish him from the position of Mr Betton. Mr Hitchin provided information to the FSA immediately after the shares were suspended. He assisted the investigation generally and provided full explanations in his interview where he showed that "he accepted his wrongdoing … and he had learned from his mistakes". Mr Hitchin did not have CF1 responsibilities. His level of seniority was lower than that of Mr Betton and he was not a director of SP Bell. Mr Hitchin was involved in one delayed rollover and therefore to a greatly less extent than Mr Betton. By contrast Mr Betton has never accepted the full extent of his wrongdoing. It was only recently that he admitted involvement in all the delayed rollovers and that they seriously misled the market. Overall, we think, he was involved at a more important level than Mr Hitchin.

78. We accept that Mr Eagle's arrival on the scene and his implementation of the share ramping scheme through SP Bell put Mr Betton in an acutely difficult position. His livelihood was threatened if he blew the whistle on Mr Eagle. Nonetheless those factors exposed a lack of integrity on the part of Mr Betton and led to his deliberate involvement in the share ramping scheme. It would, we think, be wrong, damaging to market confidence and indeed unthinkable if Mr Betton were allowed to continue to operate in the financial services sector.

79. The position of Mr Sotiriou and Mr Robins of Winterflood were dealt with by Ms McDermott. She pointed out in her evidence that the Regulatory Decisions Committee had decided that neither of them had acted recklessly and that they had not received adequate support from their employer. Thus the RDC decided, contrary to the warning notices, not to withdraw their approval. In the case of SP Bell, it was Mr Betton who had "led from the front" in first encouraging the brokers to sell FEI stock to their clients and it was he who first executed rollovers and prepared the daily

spreadsheets used to monitor the rollover scheme. If a managing director sets such an example to other brokers in his firm and appears willing to participate fully in the scheme by agreeing to do whatever the chief executive (Mr Eagle) wants, we recognise that those other brokers may feel under some pressure to do as they were told. We recognise therefore that Mr Betton is in a separate category and that the absence of sanctions against those other SP Bell brokers does not call in question the decision to impose a prohibition order on Mr Betton.

The Financial penalty

80. This remains to be the subject of a further decision. We will determine this matter having given Mr Betton the opportunity to lodge further material enabling us to evaluate his financial position.

SIR STEPHEN OLIVER QC
JUDGE OF THE UPPER TRIBUNAL
RELEASE DATE: 19 November 2010