It-Tribunal Dwar Servizzi Finanzjarji

Pierre Lofaro LL.D – Chairman

Joseph Azzopardi FCCA, FIA, CPA, MBA (Warwick) – Membru

Joseph M. Sammut Dip. Law & Adm., LL.D – Membru

FST5/09

James Blake

vs.

L-Awtorità Għas-Servizzi Finanzjarji ta' Malta

Illum, 21 ta' Ottubru 2020

It-Tribunal,

Ra r-rikors ta' l-appell intavolat mill-appellant James Blake fil-25 ta' Novembru 2009, liema rikors jaqra hekk:

> That the Malta Financial Services Authority ('**the Authority**') had, in virtue of a letter dated 9th January 2009 (**Document 'JB1'**) written to appellant, advising him that the Authority was looking into whether any breach of the provisions of the Prevention of Financial Markets Abuse Act, 2005 ('**PFMA**') may have occurred, with reference to the selling activity undertaken by appellant from the 10th December up to the 20th December 2007.
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> That by means of a letter dated 19th January 2009 (**Document 'JB2'**), appellant provided the Authority with a detailed explanation, intended to satisfy the Authority that appellant's trading activity did not represent a breach of the provisions of the PFMA.

That the above initial correspondence was followed by other exchanges between the Authority and the appellant, as follows:

a. letter dated 6th April 2009 (**Document 'JB3'**) by the Authority;

b. letter dated 20th April 2009 (**Document 'JB4'**) by appellant;

c. letter dated 9th June 2009 (**Document 'JB5'**) by the Authority;

d. letter dated 30th June 2009 (**Document 'JB6'**) by appellant;

e. letter dated 17th August 2009 (**Document 'JB7'**) by the Authority;

f. letter dated 1st September 2009 (**Document 'JB8'**) by appellant.

That in virtue of a decision taken by the Supervisory Council of the Authority on the 26th October 2009, the Authority found that appellant breached article 6 of the Prevention of Financial Markets Abuse Act, 2005, by trading in shares of GlobalCapital plc ('**GC**') when, (allegedly) as an insider, appellant was in possession of inside information of a significant nature which was disclosed in the Board of Directors' meeting of GC held on the 7th December, 2007 and which was not available to the public.

That for the above mentioned breach, the Supervisory Council of the Authority decided to impose an administrative penalty of €6,600 against the appellant, in terms of article 22 of the PFMA.

That appellant feels aggrieved by the above decision and wishes to exercise his right, in terms of Article 22(2) of the PFMA, to appeal against such a decision.

That appellant's grounds for his appeal are the following:

1. **Authority's reasoning behind its decision**

The Authority based its decision on the argument that appellant breached article 6 of the PFMA by trading in GC shares when, as an insider, he possessed inside information of a significant nature which was disclosed in the Board of Directors' meeting of GC held on the 7th December 2007 and which was not available to the public.

Such inside information is defined by the Authority as:

"*specific information indicating an actual loss before tax for the period January to September 2007 of €1,844,934 compared to:*

a. a budgeted profit before tax for the same period of €2,253,252; and

b. an actual figure of profit before tax over the same period in 2006 amounting to €4.913,378".

Consequently, the Authority's decision can only be upheld if it is proven that:

a. the appellant had inside information;

b. the inside information was of a significant nature;

c. the inside information was not made available to the public;

d. the appellant made use of such information to trade in GC shares.

2. **Specific Information which was available to the Public**

The Authority cannot dispute that:

a) the actual figure of profit before tax for the period January to June 2006 – amounting to **Lm1,074,667 (€2,503,301)** – was made available to the investing public on the 11th September 2006 – **(Document 'JB9')**;

b) the actual figure of profit before tax for the period January to December 2006, amounting to **Lm3,171,685 (€7,388,039)**, was announced to the general public on the 23rd March 2007 – **(Document 'JB10')**;

c) the actual figure of profit before tax for the period January to June 2007 was declared to the investing public on the **24th August 2007 – (Document 'JB11')**. This profit amounted to a mere **Lm143,880 (€335,150)** and which showed a significant drop to the actual profits before tax for the corresponding period of January to June 2006 as well as the annual profits before tax for the period of January to December 2006.

Such published results provided unequivocal and factual information to the investing public to the period **up to the 30th June 2007** on the negative situation of GC when compared to the previous year.

Appellant is hereunder providing a simple statistical comparison which each member of the investing public would have undoubtedly carried out, either on such member's own initiative or with the assistance of competent financial advisors, within a short time after the **24th August 2007** and relative to the same corresponding period between January and June of each respective year:

	1 Jan – 30 Jun 06	1 Jan – 30 Jun 07	Decrease	Decrease
	Lm	Lm	Lm	%
Profit before tax	1,074,667	143,880	(930,787)	-86.61%
Profit after tax	735,180	388,919	(346,261)	-47.10%
Date of Publication	11th Sept 2006	24th August 2007		

In addition to the above statistical information, the appellant highlights that, **up to the 15th November 2007,** the public was also made aware of the following GC announcements, which were made by GC pursuant to its obligations under article 9 of the PFMA and regulation 4 of the Prevention of Financial Markets Abuse (Disclosure and Notification) Regulations, 2005:

a. CA 24.08.07 (Document 'JB12')

GC's public announcement on the 24th August 2007, which accompanied published results that GC's profits had suffered a significant downtrend when compared to the same period in the preceding year, contained manifest negative information of the performance of GC by reference to the "*significant fair value losses ... attributable to negative market conditions which prevailed during the year*", apart from being concluded with manifestly highlighted awareness that the "*recent stock market volatility and global economic uncertainty may effect trading and investment performance*".

It is appellant's firm argument, with specific reference to this particular announcement, that:

i. the published interim results provided manifest proof of the negative performance of GC shares, when compared to the previous year;

ii. GC's Interim Directors' Statement ('Company Announcement') must be read in conjunction with the factual results and other information which is regularly provided by GC; and

iii. the investing public does not solely rely on announcements alone, and is mature enough to obtain the advice of experienced and qualified advisors and stockbrokers, who would undoubtedly have given due prominence (markedly missing in the Authority' assessment!) to the interim financial results which were published in August 2007.

b. CA 15.11.07 – (Document 'JB13')

GC's public announcement on the 15th November 2007 clearly identified the "*adverse effect on the Group's portfolio of financial investments*" due to the "*downturn in the local and international markets*" – to the extent of spelling out that "*this factor has led to a **negative impact** on the Group's profitability for the period under consideration.*"

Indeed, the same announcement even goes as far as to provide an unequivocal warning that "*if the downturn in the financial markets persists it is expected to impact on this year's results.*"

This announcement of the 15th November 2007 sent a clear message to the public and to the market regarding the negative situation of the GC Group, such that it immediately

triggered off a **highly active volume of trading, involving a substantial number of individual shareholders**.

Basing appellant's argument, once again, on **simple** statistics, a total of **1,017,926 GC Shares (out of a total of 13,207,548 shares in issue)** were traded in the period between the 15th November 2007 and the 31st December 2007. **This statistic represents a trading activity over a period of one month and a half representing a percentage of 78.22% of total trades in 2007, and is to be compared to**:

a. in the **ten and a half month remaining period** between 1st January 2007 and the 14th November 2007, **only 283,420 GC shares** were traded (21.78% of total 2007 Trades);

b. in the period between the 1st January 2008 and the 2nd April 2008, **only 100 shares** were traded;

c. in the period between the 3rd April 2008 (on the date of publication of 2007 annual results) and the 31st December 2008, **only 39,479 shares** were traded (0.30% of total shares in issue);

d. the trading activities in the period between the 15th November 2007 and the 31st December 2007, were carried out between **an estimated 96 transferring shareholders and only 6 individuals transferees**;

e. the number of investing shareholders in GC shares, in the period between 31st December 2006 **significantly dropped from 1610 shareholders** (1600 on the 10th March 2007) **to 1477 shareholders as at the 31st December 2007 –** whereas in actual fact the number of investing shareholders **increased to 1488 by the 20th June 2008**.

The above factual, statistical information should provide ample evidence that:

i. the results published in August 2007, relative to the first two quarters of the year, already indicated a considerable negative downtrend in the performance of GC;

ii. the investing public also had a sufficiently clear indication of the company's investment portfolio through the publication of the interim results on 24 August 2007;

iii. the November 2007 announcement effectively confirmed the continuity in the downward trend of GC;

iv. one must not necessarily forget that, at that moment in time, the general public was also fully aware of the global adverse conditions in the financial sector and the significant downturn in all financial investments worldwide;

v. the investing public and stockbrokers would have also carried out a careful review and analysis of the November 2007 announcement, following the negative

performance revealed in the August 2007 published results, and evidently concluded that the moment had come for some of the GC shareholders to dispose of their GC shares; and finally

vi. the end result of all the above considerations triggered off a voluminous activity in the disposal of GC shares by tis shareholders, only to a few interested purchasers, with the resultant consequence that the number of investing shareholders in GC shares, in the period between 31st December 2006 significantly dropped from 1610 shareholders to 1477 shareholders as at the 31st December 2007 – which all goes to demonstrate (even by the marked disproportion in the number of sellers as opposed to the number of buyers, as well as the significant decrease in investing shareholders) the negative public sentiment in the future profitability of GC shares.

To conclude on this argument therefore it is appellant's firm opinion that the Authority is **effectively incorrect in its allegation that the investing public was not privy to specific information concerning the profits/losses of GC.**

As the above statistical information reveals, the investing public was as at the 24th August 2007, fully aware of the significant downtrend in the financial situation of GC as at the 30th June 2007, and was subsequently kept abreast with the continued negative performance of GC **up to the 15th November 2007,** when the GC public announcement triggered off (as evidence of the importance given by the investing public to such an announcement) voluminous trading by a considerable number of shareholders, which not only persisted, but actually increased at an unprecedented rate (during that year), until the end of 2007, **independently of the GC board meeting in December.**

3. **GC's budgetary information**

Appellant has been accused by the Authority of possessing specific information "*indicating an actual loss before tax for the period January to September 2007 of €1,844,934, compared to a **budgeted** profit before tax for the same period of €2,253,252*".

A budget (in other words, a plan or a projection) cannot ever be interpreted as a **factual significant price-sensitive information**, nor can it be considered to fall within the definition of "*inside information*" given that budgets are **never** disclosed to the public, notwithstanding the "issuer's" statutory obligation to issue a public announcement of any inside information which directly concerns the said issuer.

Indeed, the basis of such a line of argumentation would (since budgets are never disclosed to the shareholders) effectively mean that a director can never trade in shares (in the company in which he holds such a post), as he would be constantly aware of the company's performance in comparison to its projected budget. In other words, a director would be in possession of such so-called "*inside information,*" throughout his period of tenure as a director within the company.

In the light of the considerations given, both in respect of the significant information given to the investing public as well as the budgetary information which was not disclosed to the public, it is humbly submitted that the Authority was incorrect in concluding that the appellant had any inside information of a significant nature which was not available to the public.

Apart from the above submission, it is also appellant's belief that the Board minutes in question effectively also carried positive prospects for the future of GC, which have been totally ignored by the Authority.

4. **Appellant's use of inside information to trade**

Appellant firmly denies that he made use of any information, which was not disclosed to the public, in taking his decision to trade in GC shares between the 10th and 20th December 2007.

As recited under the Commission Directive 2003/124/EC of 22nd December 2003, a reasonable investor bases his investment decisions on information which is already available to him, that is to say, on ex ante available information. On the other hand, ex post information may be used to check the presumption that the ex ante information was price sensitive, **but should not be used to take action against someone who drew reasonable conclusions from ex ante information available to him.**

Appellant has already provided ample evidence to demonstrate that:

a. **as at the 24th August 2007**, the reasonable investor was fully aware of the significant downtrend in the financial situation of GC as at the 30th June 2007, via the published GC results;

b. **as at the 15th November 2007**, the reasonable investor was made aware of the continued downward trend in GC shares, with an added unequivocal warning for the future that "*if the downturn in the financial markets persists it is expected to impact on this year's results*";

c. based on such publicly-available information, **96 reasonable investors** (including the appellant), decided to sell their investments in GC in the period between the 15th November 2007 and the 31st December 2007;

d. such number of reasonable investors traded a total of **1,017,926 GC shares (out of a total of 13,207,548 shares in issue)** within the aforementioned period – the appellant only traded in 46,800 GC shares **representing a proportion of a mere 4.6% of GC shares traded within such period**;

e. **the publicly available information as at the 15th November 2007** triggered off **a percentage of 78.22% of the total trades in 2007** and a **significant drop from 1610 shareholders** in December 2006 (1600 on the 10th March 2007) **to 1477 shareholders as at the 31st December 2007.**

These **unarguable facts** obviously beg the question whether the Authority's accusations in appellant's regard would therefore extend to each of the other 95 shareholders who likewise traded during such a period?

This issues to be determined therefore, is whether the appellant had, as at the 10th December 2007, sufficient ex ante publicly available information to reach the reasonable conclusion – which was similarly reached by 95 other investors – to trade in his GC shares. In appellant's opinion, the above statistics speak for themselves and the onus lies

on the Authority to explain why it is their conclusion that the appellant did not rely solely on such publicly available information in his decision whether to trade in his GC shares during the period in question.

The Authority appears to base its argument against such a presumption, by reference to ex post information, consisting in the change which occurred in the price of GC shares in **April 2008.** As explained above, such ex post information cannot, in the first place, be used by the Authority to take action against the appellant, unless the Authority can prove that the appellant could not have drawn reasonable conclusions from ex ante information available to the public.

Besides, appellant firmly contends that, even in this case, the Authority is incorrect in looking at the price in isolation. Apart from the fact, that such an analysis is inappropriate in a highly illiquid market, appellant believes it extremely pertinent to add that, in April 2008, there were no trading limit ranges (as opposed to the situation existing in November/December 2007) and this would certainly cause a significant variation in the price of GC shares at that time.

After all, in this latter period, there were only 3 sellers and 3 purchasers which is hardly a representation of the investing public. It is ludicrous to state and reason that '*the investing public considered the information (contained in the CA dated 3 April 2008) – **Document 'JB14'** – as price sensitive information, given that further to the issue of the said announcement there was a sharp decrease in the price of GC shares*' when as an Authority it should be fully aware of the anomalies with the way small trades (as has happened for the GC share price) can significantly affect the market price. Apart from the above, it is also to be emphasised that the number of investing shareholders in GC shares **effectively increased from 1477 shareholders as at the 31st December 2007 to 1488 by the 20th June 2008 –** a statistical reference which certainly does not support the Authority's claim that the investing public considered the information announced by GC in April 2008 as any additional (other than that already announced previously) negative price-sensitive information.

Indeed:

a. the falling price of GC shares were not, in any way, attributable to the investing public's perception of the negative information provided under the April 2008 announcement, when one bears in mind the insignificant volume of shares traded in this period;

b. the report disclosed in April 2008, only confirmed the highlighted awareness contained under the Interim Directors' Statement in November 2007, that the year's results were being adversely impacted by the persistent downturn in the financial capital markets; and

c. it was the negative information disclosed in November which effectively triggered off the investing public to show an active interest in disposing of their investments.

Apart from the above considerations, appellant also believes the need to emphasise that, contrary to the Authority's assertion (contained under the attached exchange of correspondence), appellant did not dispose of a **material** part of his holding in GC shares. In fact:

i. appellant disposed of practically all his non GC investment portfolio, before proceeding to dispose of a small proportion of his GC holdings (**Document 'JB15'**);

ii. even if one had to consider appellant's holdings in GC holdings alone, appellant disposed of **14.45% of his total holdings in GC shares.**

In order to provide more accurate statistics, appellant transferred 46,800 shares when compared to a total trading by the general public involving no less than 540,900 GC shares in the period between the 10th December and the 20th December 2007. This represents a proportion of **8.65% of the total number of trading activities which occurred within the period in question**.

Moreover, if one had to compare such trading activities to the total number of shares (1,017,926) which were traded between the 16th November and 31st December 2007, appellant's trading activity represents a proportion of **4.6% of the total trading activities within the indicated period.**

Besides, appellant **effectively only disposed of a minor part of his GC holdings and this for reasons which were not even instigated by any considerations relating to the future profitability/loss of GC shares, but solely for personal financing reasons**. In fact, appellant did, in his letter addressed to the Authority on the 19th January 2009 (**Document 'JB2'**) offer a clear explanation that his decision to sell some of his GC shares was ultimately solely driven in utmost good faith before December 2007 owing to the financial commitments outlined in the same letter.

In other words, the Authority could not simply disregard such a rationale – to be read in conjunction with other **material facts** emphasised under this appeal – by insisting on the accusation that appellant nevertheless had inside information. Ultimately, the Authority is duly expected to examine **all** the relevant facts of the case, including therefore the rationale behind the shareholder's decision to dispose of a **minimal** number of his shares, in order to establish whether the appellant did effectively make use of anything other than publicly-available information in reaching his decision to trade in GC shares.

5. **Appellant's reputation**

Appellant has been actively involved within the financial services sector since its inception in Malta and, with his full knowledge of the constantly-evolving laws and regulations in this specific field, it would be ludicrous to think that he would even attempt to scar his untainted reputation and consequently jeopardise his future in the financial services arena, which ultimately represents his own livelihood.

On the other hand, the Authority regrettably failed to give due consideration to all the deliberations which were exchanged prior to its final decision and, above all, to give due consideration to the fact hat the outcome of its findings could indeed bear significantly upon appellant's reputation and career. Suffice it to mention in this regard, that in its concluding decision of the 26th October 2009, the Authority failed to offer a hint of reply to the statistical and other submissions made by appellant in his last letter of the 1st September 2009, notwithstanding the seriousness of the accusations levelled against appellant.

Furthermore, the Authority did not even endeavor to meet up with appellant in order to further understand appellants representations.

For all the above reasons, appellant, whilst reserving the right to make further submissions and to present pertinent evidence in support of his grievances, humbly requests the Financial Services Tribunal to pronounce the decision taken, and the administrative sanction imposed, by the Supervisory Council of the Authority on the 26th October 2009 in appellant's regard, as an abuse of discretion and/or manifestly unfair, and to consequently reverse such decision and administrative sanction, by declaring that the appellant did not breach article 6 of the Prevention of Financial Markets Abuse Act, 2005.

With all legal rights reserved to appellant in terms of law.

Ra r-risposta ta' l-appell imressqa mill-Awtorita' appellata fit-23 ta' Diċembru 2009, li permezz tagħha opponiet għat-talbiet ta' l-appellant, u esponiet is-segwenti raġunijiet għall-oppożizzjoni tagħha:

1. Preliminary Submissions

Article 21 of the Malta Financial Services Authority Act provides that a decision of the Authority may only be successfully challenged if it is proven by the appellant that the Authority, in taking such decision, has abused its discretion, wrongly applied the law or acted in a manifestly unfair way. The Authority's discretion may not, so long as it has been exercised properly, be queried by this Tribunal.

In his appeal, while requesting this Tribunal to declare the Authority's decision as an abuse of discretion and / or as manifestly unfair, the appellant fails to show in a satisfactory manner how or why the said decision constitutes an abuse of discretion or is manifestly unfair, as is required in terms of the aforementioned article 21 of the Malta Financial Services Authority Act.

Accordingly, the Authority submits that this appeal is without any basis at law and invalid and should be rejected.

2. **Submissions on the merits**

Without prejudice to the above, and on the merits, the Authority rejects the appellant's version of the facts, for the reasons which shall be outlined in the following paragraphs, and further elaborated during the proceedings as necessary.

According to the appellant, the general public had been adequately informed of Global Capital's bad financial state by means of two company announcements dated 24th August and 15th November 2007. Thus, the appellant argues, the information discussed at the board meeting held in December 2007 did not constitute information of a precise nature which was not disclosed to the public in terms of the Prevention of Financial Markets Abuse Act. The Authority strongly disagrees with this version of the facts and repeats its findings that as an insider, Mr Blake was in possession of inside information that had not been completely made available to the public.

A reading of the two company announcements in question reveals that the information contained therein was worded in such a way that the negative information was not given the prominence it should have warranted. The company announcement of the 24th August emphasized the company's increase in operating profit of 21.9% and unequivocally stated that "*The directors expect that the levels of trading activity experienced during the six months to June 2007, which show an overall improvement in turnover over the corresponding period last year, should be sustained in the latter half of the current year.*" Of course, when one analyses the company announcement word for word, one could argue that a hint of negative information was there. However, it is unquestionable that the overall message of this company announcement was positive, namely that while Global Capital's financial year that far was not as successful as 2006, it was still faring well and outlook was favourable.

The company announcement of the 15th November went even further, as it stated off by stating that "... *during the period between 1 July 2007 and the date of this announcement, no material events and transactions have taken place that would have an impact on the financial position of the Group, such that would require specific mention...*". It then proceeded to inform the general public that "... *Global Capital Investments Limited .. has recently acquired a financial institutions licence ... It is anticipated that this new licence will help further diversify Global Capital's revenue streams and is expected to start contributing to the Group's results during 2008.*"

The reality of the company's financial situation and prospects was however significantly different from the picture shown to the general public in these two company announcements. Indeed, Global Capital's financial situation continued to deteriorate, and during the December 2007 board meeting it transpired that the company had suffered an actual loss of €1,844,934 when it had projected a vastly more optimistic operational profit of €2,253,252. It is an incontestable fact that before April 2008, the general public was not privy to the actual financial situation of Global Capital, which was of an undeniably serious nature. Thus, before April 2008, this information remained inside information reserved to company insiders, including Mr Blake. By that stage, the appellant had already – in the Authority's findings – breached article 6 of the Prevention of Financial Markets Abuse Act, which clearly prohibits trading while in possession of inside unpublished information.

Following the eventual publication of this inside information, the price of Global Capital shares fell by 43.69%. it must be emphasised that this drop was not temporary, but was also sustained in the following months. Accordingly, the appellant's attempt to justify such a significant drop in price by stating that there were only a very small number of trades is, with all due respect, irrelevant and potentially misleading. The share price as at April 2008 was not only not sustained, but dropped even further in the subsequent months. This is clear proof that, having analysed the contents of the April 2008 company announcement, the market deemed the value of the company to have dropped accordingly. This did not occur when company announcements were released in August and November 2007.

It is also important to point out that, contrary to what is being suggested by the appellant, the Authority did not use ex post information to take action against him. The ex post information, that is the fact that Global Capital's price per share dropped in April 2008, is a mere confirmation that the Authority's reasoning was correct when it established that the information to which the appellant as an insider was privy in December 2007, and which was not available to others, was new information of a precise nature that potentially exercised a significant effect on the price of shares if made public.

In this context, the question which must be asked is: "*Would the fact that Global Capital grossly missed its financial targets and registered a considerable loss have a bearing on a reasonable investor's decision to invest / divert of its shares?*" The Authority believes that in the light of what has been said above, the answer to this question is self-evident, that is 'yes'. It is unacceptable to leave ordinary non-insider investors to base their decision on incomplete and insufficient information, while insiders enjoy the privilege of such knowledge.

It is also no justification for the trades carried out by Mr Blake to claim that a budget cannot be interpreted as factual and significant price-sensitive information because it is a mere target and because budgets are never disclosed to the public. The fact alone that this mere "*plan or projection*" had been so grossly missed made their circumstance a very important piece of inside knowledge.

The Authority considers as disturbing Mr Blake's protest that under the existing legal framework, a director such as he might find that he cannot trade at will during his tenure because he will always have some sort of inside information. This is a sweeping statement that might reveal lack of awareness of his duties under the law regulating insider dealing. The law requires directors who like Mr Blake enjoyed privileged access to inside, confidential and price sensitive information to refrain from trading in company shares while having inside information. This is one price that companies like Global Capital and its directors (and other officials with access to such information) pay in order to gain and retain an official listing for their shares on the Stock Exchange. Directors may however trade when in possession of information that is not of a precise, price-sensitive nature, and therefore does not fall foul of the legal prohibitions and restrictions. Directors like Mr Blake cannot presume to make their own rules but, rather, they are obliged to set an example of correct dealing in terms of the applicable Listing Rules and insider dealing legislation. Mr Blake's attempt to picture himself as just one of many other ("96") investors who traded fails because under the law he – unlike them – is a director and an insider.

In any event, once it has been established that the appellant was privy to precise information of a price-sensitive nature that had not been disclosed to the public, other considerations become secondary. Once a person is in possession of inside information, the law prohibits him from using that information by trading, and the onus is on him to prove otherwise, and not on the Authority as erroneously proposed by the appellant. Other justifications such as the one being brought forward by the appellant that he "*did not dispose of a material part of his holding*" and that others also sold shares in the period between November to December are totally irrelevant and do not excuse the illegality that was committed.

It is also irrelevant and indeed surprising for appellant to argue that the Authority "*failed to give due consideration to the fact that the outcome of its findings could indeed bear significantly upon appellant's reputation and career.*" Global Capital performs regulated activities on a regulated market. This means that it is obliged by law to have a far greater level of transparency than other companies and business entities, so as to ensure the highest level of consumer protection possible for investors and prospective investors. By trading shares while in possession of price-sensitive information and by using such information to his advantage, the appellant clearly breached his duty towards his company's investors – current or prospective – and fell short of his loyalty to the financial market in general.

Finally, it should also be noted that the appellant failed to justify his convenient assertion that he sold shares in Global Capital simply in order to raise money for the purchase of an immovable property. This is another surprising attempt at an excuse. In his letter to the

Authority dated 19th January 2009 and presented to this Tribunal with his appeal, the appellant states that he entered into the preliminary agreement to purchase the property in question way back in March 2004. This date is no less than a full forty-five (45) months prior to the period in which the shares were actually sold. The timing of his trades remains suspect and the excuse is very simplistic seeing that more than three years had already elapsed. The Authority submits that the appellant had had ample time, prior to December 2007, and prior to or after any applicable blackout period under the Listing Rules, to dispose of his shares in order to raise the money required for this purchase, if he really needed to. The facts show that he traded and sold his shares when convenient for him seeing that at the time of selling he was in possession of useful inside information. The link between the preliminary agreement and the trades seems extremely tenuous.

Accordingly, and for the reasons explained above, the Authority respectfully asks the Tribunal to reject the appellant's requests, with all costs to be borne by the said appellant.

Ra l-verbal tat-22 ta' Marzu 2010 li permezz tiegħu kien hemm qbil li l-eċċezzjonijiet preliminari jiġu ttrattati flimkien mal-mertu.

Sema x-xhieda mressqa mill-partijiet u qara t-traskrizzjoni tal-istess xhieda, kif ukoll qara l-affidavits illi ġew ippreżentati.

Ra u eżamina d-dokumenti kollha illi ġew esibiti mill-kontendenti.

Ra l-atti kollha tal-appell, inkluż:

(a) Il-verbali;

(b) Id–deċiżjoni mogħtija mit-Tribunal fit-28 ta' Settembru 2012 li permezz tagħha ċaħad it-talba tal-appellant li jzid aggravju ieħor fl-appell tiegħu; u

(c) Id-deċiżjoni mogħtija mit-Tribunal fid-9 ta' Ottubru 2014 li permezz tagħha ċaħad it-talba tal-Awtorità appellata sabiex '*titħalla tesebixxi estratt mill-management accounts ta' Settembru 2007 (Q3) li ġew preżentati waqt laqgħa tal-Board tad-diretturi ta' Global Capital Plc li seħħet fis-7 ta' Diċembru 2007 kif ukoll kopja tal-minuti tal-istess board meeting*."

Sema t-trattazzjoni tad-difensuri tal-partijiet u qara t-traskrizzjoni relattiva.

Ra li l-appell ġie mħolli għal-lum għall-prolazzjoni tad-deċiżjoni.

Ikkunsidra:

Illi huwa opportun li qabel xejn isir riepilogu tal-fatti kif irriżultaw mix-xiehda li nstemgħet waqt dawn il-proċeduri.

L-appellant huwa direttur tal-kumpannija GlobalCapital plc (minn hawn 'l quddiem imsejħa "GC"), u ilu wkoll azzjonista ta' GC sa mill-bidu ta' din il-kumpannija. Huwa xehed illi qatt ma ddispona mill-azzjonijiet tiegħu qabel is-sena 2007, u li preċedentement żied il-kapital azzjonarju miżmum minnu permezz ta' diversi akkwisti matul iż-żmien. Sa Novembru 2007, l-appellant kellu 323,800 azzjonijiet f'GC, li jikkorrispondi għal 2.45% tal-kapital azzjonarju kollu ta' GC.

Irriżulta li permezz ta' *company announcement* tal-11 ta' Settembru 2006, GC ippubblikat din l-informazzjoni għall-attenzjoni tal-pubbliku:

> **Quote**
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> At a meeting held on 8 September 2006, the Board of Directors of Global Capital p.l.c. (the 'Company') considered and approved the attached Interim Financial Statements for the six (6) months ended 30 June 2006.
>
> An interim dividend of 2 cents per share gross of tax has been declared by the Board of Directors in respect of the six months ended 30 June 2006. All shareholders on the Company's register of members on Friday, 15 September 2006, will be paid this interim dividend on 29 September 2006.
>
> **Unquote**

Fl-istess perjodu, ġiet ippubblikata informazzjoni illi GC rreġistrat profitt qabel it-taxxa għall-ewwel sitt xhur tas-sena 2006 fl-ammont ta' LM1,074,667, mentri l-profitt qabel it-taxxa dikjarat għall-istess perjodu tas-sena preċedenti kien ta' LM674,588. Il-profitt wara t-taxxa għas-sena 2006 ġie reġistrat bħala ammontanti għal LM735,180, filwaqt li l-profitt wara t-taxxa għall-istess perjodu tas-sena preċedenti kien riportat fl-ammont ta' LM528,470.

Illi fit-23 ta' Marzu 2007, il-Bord tad-Diretturi ta' GC approva *company announcement* ulterjuri ai termini tal-*Listing Rules* 8.7.4 u 8.7.21. Dan l-*announcement* kien jaqra kif ġej:

Quote

The Board of Directors of GlobalCapital p.l.c. (the 'Group') has today, Friday 23 March 2007, met and approved the Group's financial statements for the year ended 31 December 2006 and resolved to lay the same for the approval of the shareholders at the forthcoming Annual General Meeting to be held on 29 June 2007. A preliminary statement of annual results for the financial year ended 31 December 2006 is attached herewith.

The Board of Directors has also resolved to recommend to the shareholders, in the Annual General Meeting, to approve the declaration of a final dividend of 1 cent gross per ordinary share (0c65 net of tax) and a special dividend of 5c gross per ordinary share (3c25 net of tax), giving a total final dividend of 6c gross per ordinary share (3c9 net of tax). Subject to approval at the Annual General Meeting, the net total final dividend of 3c9 per ordinary share shall be paid not later than 6 July 2007.

The Board of Directors has established the 29 May 2007 as the Effective Date on which all shareholders then on the register of members shall be entitled to receive notice of and attend the Annual General Meeting, be paid dividends declared by the General Meeting and appoint directors or vote at the election of directors.

Unquote

Illi fl-istess waqt, GC ħabbret lill-pubbliku li għas-sena 2006, hija rreġistrat profitt qabel it-taxxa fl-ammont ta' LM3,171,685, imqabbel ma' l-ammont ta' LM2,625,603 minnha irreġistrat għas-sena 2005.

Illi fl-24 t'Awwissu 2007, il-Bord tad-Diretturi tal-kumpannija GlobalCapital plc approva l-*interim financial statements* għas-sitt xhur li ntemmu fit-30 ta' Ġunju 2007. Dina l-approvazzjoni ġiet pubblikata permezz ta' *company announcement* meħtieġ ai termini tal-*Listing Rules* 8.7.4 u 8.7.21. Tajjeb li jiġi hawnhekk riprodott l-*Interim Directors' Report*:

> "GlobalCapital p.l.c. ('the Company') registered a profit after tax for the six months ended 30 June 2007 of Lm388,919 compared to a corresponding result last year of Lm735,180. The main highlights of the reporting period's results were:
>
> - Increase in operating profit of 21.9%;
> - Continued healthy returns on the international investment property portfolio of the Company and its subsidiaries;
> - Significant fair value losses on securities held by the Company and its subsidiaries, including the life insurance company, attributable to negative market conditions which prevailed during the year to date.
>
> The directors expect that the levels of trading activity experienced during the six months to June 2007, which show an overall improvement in turnover over the corresponding period last year, should be sustained in the latter half of the current year. However, recent stock market volatility and global economic uncertainty may affect trading and investment performance.
>
> The directors do not recommend the payment of an interim dividend."

Illi mill-imsemmija *interim financial statements*, kontestwalment pubblikati, jirriżulta li għall-ewwel sitt xhur tas-sena 2007, GC irreġistrat profitt ta' qabel it-taxxa fl-ammont ta' Lm143,880.

Illi fil-15 ta' Novembru 2007, il-Bord tad-Diretturi tal-kumpannija GlobalCapital plc wettqet *Company Announcement* oħra, din id-darba ai termini tar-Regola 9.51 tal-*Listing Rules*. Dan l-*Announcement* kien jgħid kif ġej:

Quote

Interim Directors' Statement

GlobalCapital p.l.c. (the 'Group') hereby announces that during the period between 1 July 2007 and the date of this announcement, no material events and transactions have taken place that would have an impact on the financial position of the Group, such that would require specific mention, disclosure or announcement pursuant to the applicable Listing Rules.

During the first nine months of the year the Group registered increased turnover levels, over the corresponding period last year, predominately on its life insurance business and property portfolio, whilst investment fee income has experienced a decrease compared to the corresponding first nine months of 2006. The Group's health Insurance division has also registered positive results which, barring any unforeseen circumstances, are expected to be sustained throughout the remaining months. The downturn in the local and international capital markets persisted during the third quarter of the current financial year and this has invariably had an adverse effect on the Group's portfolio of financial investments. This factor has led to a negative impact on the Group's profitability for the period under consideration and if the downturn in the financial markets persists it is expected to impact on this year's results.

GlobalCapital Investments Limited, one of the Group's subsidiaries, has recently acquired a financial institutions licence in terms of the Financial Institutions Act, 1994. It is anticipated that this new licence will help further diversify GlobalCapital's revenue streams and is expected to start contributing to the Group's results during 2008.

Unquote

Illi l-appellant ressaq provi illi matul il-perjodu bejn il-15 ta' Novembru 2007 u l-31 ta' Diċembru 2007, l-ishma ta' GC li ġew trasferiti telgħa minn 18,000 għal aktar minn 1,000,000. Irriżulta wkoll li dawn it-trasferimenti saru minn 96 azzjonist ta' GC favur sitt persuni li akkwistaw l-istess azzjonijiet. Dan meta GC kellha f'dik l-epoka 1,400 azzjonist. Irriżulta li fis-sena 2007 kien hemm trasferiment ta' 1,301,346 azzjonijiet f'GC. Fis-sena 2006 kien hemm 802,236. Fis-sena 2005 kien hemm 466,292. Fis-sena 2004 kien hemm 121,830. Fis-sena 2003 kien hemm 292,198. Minnaħa l-oħra, fis-sena 2008 kien hemm biss 39,579 mentri fis-sena 2009 kien hemm biss 19,046 (ara folio 111). Irriżulta li, matul is-sena 2007, sal-pubblikazzjoni ta' l-*interim financial statements* ta' GC fl-24 t'Awwissu 2007, kienu ġew trasferiti 264,810 azzjonijiet. Minn dakinhar sakemm ġie ppubblikat l-*interim statement* tal-Bord tad-Diretturi fil-15 ta' Novembru 2007, ġew trasferiti 18,610 azzjonijiet. Wara l-15 ta' Novembru 2007, ġew trasferiti 1,017,926 azzjonijiet (folio 110).

Illi l-appellant ikkonferma bil-ġurament tiegħu li l-Bord tad-Diretturi ta' GC jiltaqa' xi ħamest idrabi fis-sena. B'referenza għal-laqgħa tal-Bord li saret f'Diċembru 2007, il-laqgħa preċedenti kienet dik ta' l-24 t'Awwissu 2007. Jgħid li waqt il-laqgħa tal-Bord li saret f'Diċembru 2007 ġew diskussi kemm affarijiet pożittivi u kemm affarijiet negattivi dwar l-andament ta' GC. Jilmenta li l-Awtorità appellata spigolat dak li kien negattiv mill-minuti ta' dik il-laqgħa mingħajr ma tat każ ta' dak li kien pożittiv. Huwa jgħid li waqt il-laqgħa tal-Bord ta' Diċembru, issemmew diversi fatturi pożittivi li kienu pertinenti għal GC, fosthom tkabbir fil-*balance sheet* tal-kumpannija, "*positive performance of the properties that it holds in its portfolio*", l-akkwist ta' liċenzja għal istituzzjonijiet finanzjarji u affarijiet oħra. Huwa jiċħad kategorikament illi l-informazzjoni li huwa kellu dwar GC kien fattur fid-deċiżjoni tiegħu li jiddisponi mill-azzjonijiet li huwa kellu f'GC.

Illi l-appellant spjega li matul Novembru u Diċembru 2007, huwa ddispona minn 46,800 azzjonijiet ta' GC, u żamm għalih 277,000 azzjonijiet. Qal li huwa ta struzzjonijiet biex jinbiegħu dawn l-azzjonijiet lill-*in-house broker* ta' GC, wara li għarraf lis-Segretarju tal-kumpannija kif kien fid-dmir li jagħmel. Huwa spjega li

apparti dawn l-azzjonijiet, huwa sid ta' diversi azzjonijiet oħra ta' kumpanniji pubbliċi oħrajn, fosthom Bank of Valletta plc. L-appellant jgħid li kien iddeċieda li jinvesti fi proprjetà, u ddeċieda li jiffinanzja l-akkwist ta' din il-proprjetà billi jbiegħ il-*portfolio* intier ta' azzjonijiet pubbliċi li kellu, salv dawk pertinenti għal GC. Jgħid li biegħ diversi minn dawn l-azzjonijiet pubbliċi u żamm biss dawk li kienu wisq tajbin biex ibiegħhom. Dawn it-trasferimenti, madanakollu, ma wasslux għal finanzjament meħtieġ, u għalhekk l-appellant kellu jiddeċiedi jkompliex ibiegħ mill-*portfolio* ta' azzjonijiet li huwa kien fadallu, jew jekk jitlobx finanzjament bankarju. Jgħid li ltaqa' ma' rappreżentanti ta' HSBC Bank Malta plc u ddiskuta l-possibilità ta' finanzjament bankarju, iżda wara li għamel is-somom tiegħu, wasal għall-konklużjoni li ma kienx jaqbillu jimxi b'dan il-mod. Jgħid li l-uniku finanzjament bankarju li talab u ottjena kienet faċilità ta' overdraft. L-appellant spjega wkoll li l-proprjetà li fuqha huwa ddeċieda li jinvesti swietu Lm230,000, u Lm60,000 addizzjonali biex ilestiha minn kollox. Jgħid li biex ottjena din il-faċilità, huwa ta garanzija lill-Bank permezz ta' rahan fuq azzjonijiet tiegħu f'GC. Spjega li meta wasal iż-żmien li ċertu pagamenti li kellu jagħmel saru dovuti, huwa pprefera li jbiegħ kapital azzjonarju milli jmur il-Bank biex jingħata estensjoni tal-faċilità li diġà kellu. L-appellant sostna li f'dik l-epoka kien hemm suq għall-azzjonijiet ta' GC, kuntrarjament għas-sitwazzjoni prevalenti fejn l-azzjonijiet ta' GC jkunu sikwit illikwidi. L-appellant jispjega li hekk kif biegħ numru ta' azzjonijiet tiegħu f'GC – liema tranżazzjoni proprju wasslet għal dawn il-proċeduri – huwa ħallas lura għas-saldu l-faċilità ta' overdraft li kellu mal-Bank.

L-appellant spjega li l-proprjetà li hu nvesta fiha kienet għadha mhux mibnija fiż-żmien meta għamel il-konvenju. Fil-fatt, dik il-proprjetà kienet għadha konsistenti f'bini antik li kellu jiġi demolit. L-appellant iffirma konvenju fl-24 ta' Marzu 2004 li permezz tiegħu huwa ntrabat li jakkwista arja li kellha tiġi żviluppata f'appartament, u dan fi Sliema, kif ukoll żewġ *car spaces*. Kontestwalment mal-konvenju ħallas depożitu ta' Lm23,000. Fis-7 ta' Ġunju 2005, l-appellant ħallas depożitu ulterjuri ta' Lm22,000. Fit-2 t'Ottubru 2006, l-appellant ħallas it-tielet depożitu fl-ammont ta' Lm110,000. Fit-18 t'Ottubru 2007 ħallas depożitu ulterjuri ta' Lm40,000. Spjega li l-

ħlas ta' dawn id-depożiti ġie dejjem finanzjat permezz tal-bejgħ ta' azzjonijiet pubbliċi li kellu. Il-kuntratt finali tal-bejgħ sar fis-16 ta' Lulju 2008, meta l-appellant jgħid li ħallas Lm40,000 oħra. Madanakollu, fil-kuntratt tissemma biss il-figura ta' €60,563.71 bħala ħlas li sar mal-kuntratt. L-appellant jispjega li fil-frattemp huwa kien qed iħallas somom oħra għall-*finishings* tal-proprjetà, li swewlu daqs Lm60,000 oħra. Fil-kuntratt jingħad illi l-appartament kien qed jinbiegħ "*in an advanced shell state*" skont l-ispeċifikazzjonijiet elenkati f'dokument anness ma' l-att notarili ta' bejgħ u xiri.

Irriżulta wkoll li GC wettqet eżerċizzju ta' rivalutazzjoni tal-proprjetà mmobbli tagħha, li skont l-Awtorità appellata kellu effett kbir fuq l-ammont ta' telf li ġie dikjarat fil-*financial statements* ta' GC. Fil-laqgħa tal-Bord tad-Diretturi li nżammet f'Diċembru 2007, l-appellant isostni li GC kienet qed tipprevedi u tipprovdi fil-*budgets* tagħha qliegħ ta' Lm1.8 miljun għas-sena 2008, u qliegħ f'ammonti simili għas-snin 2009 u 2010.

Illi rriżulta li l-Awtorità appellata kienet ilha numru ta' snin twettaq skrutinju tat-trasferiment ta' l-azzjonijiet ta' GC, b'mod partikolari fejn dawn kienu jinvolvu lil Christopher Pace, li fl-epoka kien *Chairman* tal-Bord tad-Diretturi. Wara t-trasferimenti li saru fl-aħħar kwart tas-sena 2007, l-Awtorità wettqet *compliance visit* fl-uffiċini ta' GC, fejn talbet li tingħata l-minuti ta' laqgħat tal-Bord tad-Diretturi fl-aħħar nofs tas-sena. Fost it-tagħrif provdut lill-Awtorità mis-Segretarju tal-kumpannija, kien hemm dokument intitolat "*GlobalCapital plc – Review of Q3 Results 2007 and budgetary proposals 2008-2010*" li kien ġie preżentat lill-Bord fil-laqgħa tas-7 ta' Diċembru 2007. Minn dan id-dokument kif ukoll mill-*management accounts* irriżulta lill-Awtorità appellata li GC kienet irreġistrat telf qabel it-taxxa fl-ammont ta' €1,844,934.

Illi l-informazzjoni preċiża dwar it-tnaqqis fil-profitti ta' GC ġiet avżata lill-pubbliku f'April 2008, wara liema żmien il-prezz ta' l-azzjonijiet f'GC niżel minn €5.15 għal €2.90. Il-*financial statements* għas-sena sħiħa ta' l-2007 ġew ippubblikati f'April ta' l-

2008, u minnhom jirriżulta li GC għamlet profitt qabel it-taxxa fl-ammont ta' Lm151,862.

Permezz ta' ittra datata 26 t'Ottubru 2009, l-Awtorità appellata għarrfet lill-appellant illi hija kienet waslet għall-konklużjoni li huwa kien kiser l-Artikolu 6 tal-Prevention of Financial Markets Abuse Act, 2005 ('l-Att') meta wettaq tranżazzjonijiet ta' strumenti finanzjarji meta huwa kien ir-reċipjent ta' *insider information* li ma kienetx disponibbli għall-pubbliku, u konsegwentement ġiet imposta fuq l-appellant is-sanzjoni amministrattiva ta' €6,600. Dina d-deċiżjoni kienet preċeduta minn skambju ta' korrispondenza li permezz tagħha, wara li l-Awtorità għarrfet lill-appellant b'dak li kien qed jiġi allegat fil-konfront tiegħu b'ittra tad-9 ta' Jannar 2009, l-appellant ressaq ir-rappreżentazzjonijiet tiegħu biex ixejjen tali allegazzjonijiet.

Billi l-appellant ma qabilx ma' din id-deċiżjoni, interpona dawn il-proċeduri.

Ikkunsidra:

Illi l-appellant, fl-appell tiegħu, jesponi diversi raġunijiet għaliex, skont hu, id-deċiżjoni mpunjata għandha tiġi revokata. Brevement, huwa jsostni li hu ma kellu ebda tagħrif li ma kienx disponibbli għall-pubbliku, li tagħrif rigwardanti l-*budget* tal-kumpannija qatt ma jista' jikkostitwixxi *insider information* għal finijiet tal-liġi, u li hu m'għamilx użu minn *insider information* fit-tranżazzjonijiet ta' l-azzjonijiet pubbliċi li wasslu għad-deċiżjoni mpunjata. L-appellant għalhekk isostni li d-deċiżjoni mpunjata għandha tiġi revokata, billi hija vizzjata b'abbuż ta' diskrezzjoni u hija manifestament inġusta. Essenzjalment l-appellant isostni li huwa ma wettaq l-ebda *insider trading*, u jagħti raġunijiet estensivi għal dan.

Illi t-tribunal qabel xejn iqis li ma jkunx inopportun li jirreferi għall-Artikolu 21(9) tal-Kapitlu 330 tal-Liġijiet ta' Malta. Din id-disposizzjoni hija dik li tirradika l-kompetenza tat-tribunal, u li tistabilixxi l-parametri tad-diskrezzjoni tiegħu. It-tribunal se jiċċita din id-disposizzjoni għall-faċilità ta' referenza.

(9) The question for the determination of the Tribunal shall be whether, for the reasons adduced by the appellant –

(a) the competent authority has, in its decision wrongly applied any of the provisions of this Act; or
(b) the decision of the competent authority constitutes an abuse of discretion or is manifestly unfair:

Provided that the discretion of the competent authority may not, so long as it has been exercised properly, be queried by the Tribunal.

Illi t-tieni proviso ta' din id-disposizzjoni mhux rilevanti għall-każ odjern u għalhekk mhux qed tiġi riprodotta. Kwindi l-liġi tagħti tlett raġunijiet għaliex deċiżjoni ta' l-Awtorita' tista' tiġi mwarrba, u dawn huma:

(a) applikazzjoni ħażina tad-disposizzjonijiet tal-Kapitlu 330 tal-Liġijiet ta' Malta (u mhux ta' l-Att);
(b) li d-deċiżjoni tkun manifestament inġusta;
(c) li d-deċiżjoni tkun tikkostitwixxi abbuż ta' diskrezzjoni.

Illi għalhekk huwa ċar li l-liġi riedet tirrestringi d-diskrezzjoni tat-tribunal, b'mod li l-istess tribunal jiġi prekluż milli jissostitwixxi d-diskrezzjoni tiegħu għal dik ta' l-Awtorità appellata, ħlief fejn tikkonkorri waħda mir-raġunijiet appena elenkati.

L-appellant qiegħed isostni li d-deċiżjoni ta' l-Awtorità tikkostitwixxi abbuż ta' diskrezzjoni u/jew hija manifestament inġusta. M'huwiex qiegħed jallega applikazzjoni ħażina tad-dispożizzjonijiet tal-Kap.330.

Illi dwar l-abbuż ta' diskrezzjoni, it-tribunal huwa tal-fehma li hawnhekk il-liġi qiegħda tirreferi għall-kunċett appartenenti għall-kamp tad-dritt amministrattiv. Fil-fatt l-abbuż ta' diskrezzjoni ilu minn żmien twil meqjus bħala raġuni u bażi ta' l-istħarriġ ġudizzjarju ta' għemil amministrattiv. Jinsab mgħallem illi "*Judicial review of administrative action was founded upon the premise that an inferior tribunal or*

administrative public authority is entitled to decide wrongly, but is not entitled to exceed the jurisdiction it was given by statute. The statutory jurisdiction (later referred to also as "vires") permitted the public authority to make errors of fact, or errors of law within *its jurisdiction, provided that such an error of law was not "manifest on the face of the record". In this respect, judicial review is to be distinguished from an appeal. It was largely restricted to review for* excess *of jurisdiction, while an appeal would usually enable errors either of fact or of law to be rectified. Ultra vires, or excess of jurisdiction, in the narrow or strict sense, was thus the organising principle which both justified judicial review (by declaring all power to be derived power) and constrained it (by permitting a degree of autonomy to the reviewed public authority)*"[1]. "*In essence, the doctrine of ultra vires permits the courts to strike down decisions made by bodies exercising public functions which they have no power to make*"[2]. Minn dawn il-prinċipji, jitnissel ukoll il-prinċipju, illum paċifiku, li "*In requiring statutory powers to be exercised reasonably, in good faith, and on correct grounds, the courts are still working within the bounds of the familiar principle of ultra vires. The analysis involves no difficulty or mystique. Offending acts are condemned simply for the reason that they are unauthorised. The court assumes that Parliament cannot have intended to authorise unreasonable action, which is therefore ultra vires and void*"[3].

Illi kif ġie ritenut mill-Qorti ta' l-Appell fil-kawża **Frank Pace vs. Kummissarju tal-Pulizija et**[4], "*Il-poter delegat mill-liġi lill-Kummissarju – bħal kull delegazzjoni u kull mandat – huwa strettament ċirkostrett mit-termini preċiżi li bihom dik id-delegazzjoni, dak il-mandat, huma espressi*". Ifisser dan illi wieħed irid iħares u jixtarr sew il-kliem li permezz tiegħu inħolqot dik is-setgħa sabiex jiddetermina il-portata, il-parametri u konsegwentement il-limiti ta' dik is-setgħa. Kif jgħidu **Wade & Forsythe** [op cit, pg.219], "*Public administration is carried out to a large extent under statutory powers, conferred upon public authorities by innumerable Acts of Parliament.*

[1] DeSmith's Judicial Review, 6th Edition, Sweet & Maxwell 2007, para.4-002.
[2] Ibid, para.4-011.
[3] Wade & Forsyth, Administrative Law, Oxford University Press, 8th Edition, pg.346-347.
[4] 18/11/1994.

Statutory duties, imposed similarly, also play their part, but it is a minor one in comparison with powers. This is because powers confer discretion to act or not to act, and also, in many cases, what action to take, whereas duties are obligatory and allow no option. It is the element of discretion which raises the most numerous and most difficult problems in the law. When the question arises whether a public authority is acting lawfully or unlawfully, the nature and extent of its power or duty has to be found in most cases by seeking the intention of Parliament as expressed or implied in the relevant Act".

Illi għalhekk, biex tirriżulta fondata raġuni ta' appell lil dan it-tribunal u bażata fuq il-mottiv ta' abbuż ta' diskrezzjoni, irid jirriżulta li l-Awtorità, fid-deċiżjoni tagħha, tkun abbużat mis-setgħa tagħha billi tkun eċċediet il-limiti mposti fuqha mil-liġi għall-eżerċizzju ta' dik id-diskrezzjoni. Hija ġurisprudenza assodata li l-eċċess tal-limitu tas-setgħa ikun jissussisti anke fejn id-diskrezzjoni tkun ġiet eżerċitata b'mod irraġjonevoli, u dan stante li l-ebda setgħa ma tista' titqies eżerċitata skont il-liġi meta tiġi eżerċitata b'mod irraġjonevoli, jew fejn ma jkunux ġew osservati l-prinċipji ta' ġustizzja naturali[5].

Illi dwar il-mottiv ta' nġustizzja manifesta, it-tribunal iqis li dan jista' jkun sodisfatt biss jekk l-appellant juri għas-sodisfazzjoni tat-tribunal, sintendi, li d-deċiżjoni tkun waħda li, fiċ-ċirkostanzi, it-teħid tagħha ma jistax ħlief isarraf f'inġustizzja ċara. B'referenza għall-fattispeċi tal-każ odjern, it-tribunal iqis li d-deċiżjoni mpunjata tkun manifestament inġusta jekk l-appellant juri li l-Awtorità ma kellhiex raġjonevolment u legalment tasal għall-konklużjoni li waslet għaliha, u dan qed jingħad anke tenut kont tal-fatt illi dak addebitat lill-appellant ma huwa xejn għajr reat kriminali, *ut sic*. Huwa biss f'każ li l-Awtorità tkun waslet għall-konklużjoni li tkun legalment u raġjonevolment eskluża li tkun saret inġustizzja manifesta.

Illi eżaminati l-parametri tad-diskrezzjoni ta' dan it-tribunal, se jiġi issa eżaminat l-aggravju proprju ta' l-appellant.

[5] Mary Grech vs. Ministru tax-Xogħlijiet et (Appell, 29/1/1993).

Ikkunsidra:

Illi permezz tad-deċiżjoni appellata, l-Awtorità sabet lill-appellant ħati ta' *insider trading*, ai termini ta' l-Artikolu 6 ta' l-Att[6]. L-ewwel subinċiż ta' din id-disposizzjoni tipprovdi li:

> No person shall use inside information to trade in any financial instrument admitted to a regulated market or in any other way to acquire or dispose of, or attempt to acquire or dispose of such financial instrument, whether for his own account or for the account of a third party, either directly or indirectly, if he is in possession of information related to such financial instrument by virtue of:
>
> (a) his membership of the administrative, management or supervisory bodies of the issuer;
> (b) his holding in the capital of the issuer;
> (c) his having access to the information through the exercise of his employment, profession or duties; or
> (d) his criminal activities.

Illi l-liġi għalhekk tipprojbixxi persuna milli tagħmel użu minn *inside information* biex jinnegozja fi strument finanzjarju jew biex jakkwista jew jiddisponi, jew jipprova jakkwista jew jiddisponi, minn tali strument finanzjarju, kemm għalih innifsu u kemm fl-interess ta' terz, kemm direttament jew indirettament, jekk huwa jkun fil-pussess ta' tagħrif relatat ma' dak l-istrument bis-saħħa ta' waħda miċ-ċirkostanzi elenkati fl-istess subinċiż.

Illi huwa paċifiku li l-appellant kien persuna li nnegozja fi strumenti finanzjarji fl-interess tiegħu innifsu, u li l-appellant kien diriġent importanti fit-tmexxija tal-kumpannija GlobalCapital plc. L-appellant faċilment jikkwalifika bħala waħda mill-persuni li rċeviet tagħrif minħabba l-fatti elenkati fil-paragrafi (a) u (c) ta' l-ewwel subinċiż ta' l-Artikolu 6 ta' l-Att. Dan kollu huwa paċifiku.

[6] L-Artikolu 6 ta' l-Att huwa mudellat fuq l-Artikolu 2 tad-Direttiva 2003/6/EC.

Illi dak li huwa kontestat huwa li l-appellant għamel użu minn *inside information* sabiex innegozja fl-istrumenti finanzjarji in kwistjoni. M'hemmx dubju li dan l-element huwa wieħed indispensabbli sabiex ikun jista' jinstab ksur ta' l-Artikolu 6, u kien proprju fuq dan l-element li kkonċentraw il-partijiet matul is-smiegħ ta' dan l-appell.

Illi biex dan l-element ikun sodisfatt irid jintwera mhux biss li l-persuna mixlija kellha *inside information*, imma anke li dik il-persuna tkun **użat** dik l-informazzjoni biex wettqet in-negozju projbit. Dan kuntrarjament għat-tieni subinċiż ta' l-Artikolu 6, li jipprojbixxi atti li persuna tista' tagħmel meta tkun fil-pussess biss ta' *inside information*. Pero' t-tieni subinċiż ma jiċċentra xejn mad-deċiżjoni mpunjata, billi l-appellant ġie mixli u kkundannat b'konsegwenza ta' tranżazzjonijiet li huwa għamel għalih innifsu, u mhux għall-atti elenkati fl-imsemmi tieni subinċiż.

Illi huwa biss ovvju li trid tiġi eżaminata t-tifsira ta' *inside information*. L-Att fil-fatt jipprovdi definizzjoni, li se tiġi hawn taħt kaptata għall-faċilita' ta' referenza:

> "inside information" means information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, including information regarding any takeover offer for a company, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments; being information which a reasonable investor would be likely to use as part of the basis of his investment decisions.
>
> For the purposes of this definition, information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments; for persons charged with the execution of orders concerning financial instruments, inside information shall also mean information conveyed by a client and related to the client's pending orders, which is of a precise nature, which relates directly or

> indirectly to one or more issuer or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments; being information which a reasonable investor would be likely to use as part of the basis of his investment decisions

Illi l-ewwel paragrafu ta' din id-definizzjoni hija meħuda kelma b'kelma mid-definizzjoni ta' *inside information* provduta fl-Artikolu 1(1) tad-Direttiva 2003/6/EC, b'dan li l-leġislatur malti żied il-frażi "*being information which a reasonable investor would be likely to use as part of the basis of his investment decisions*", liema frażi hija meħuda mill-Artikolu 1(2) tad-Direttiva 2003/124/EC.

Illi l-proviso rigwardanti x'għandu jitqies bħala "preċiż", huwa mudellat fuq l-Artikolu 1(1) tad-Direttiva 2003/124/EC.

Illi fid-deċiżjoni appellata, l-Awtorità qieset illi l-appellant kien fil-pussess ta' *inside information* meta fil-laqgħat tal-Bord tad-Diretturi tal-kumpannija GlobalCapital plc, huwa sar jaf, mill-*management accounts* tal-kumpannija, li kien sar telf ta' madwar 1.8 miljun Ewro.

Illi huwa fatt li l-minuti tal-laqgħa tal-Bord tad-Diretturi in kwistjoni ma ġewx eżebiti, kif lanqas ma ġew eżebiti il-*management accounts* li ġew preżentati lill-Bord fl-istess laqgħa. Dan in-nuqqas ta lok għall-kontroverżja oħra bejn il-partijiet, li għandha neċessarjament tiġi epurata minn dan it-tribunal.

Illi l-appellant isostni li skont ir-regola ta' l-aħjar prova, kif espressa fl-Artikolu 560 tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili, dan it-tribunal ma jistax jieħu qies tax-xiehda orali prodotta waqt is-smiegħ ta' dan l-appell bħala fonti probatorja għat-tagħrif li joriġina mill-imsemmija minuti u *management accounts*. L-Awtorità appellata, sintendi, targumenta proprju l-kuntrarju.

Illi fil-fehma ta' dan it-tribunal, il-konvinċiment tal-ġudikant dwar il-fatti mertu tal-vertenza tista' ssib il-fonti tagħha minn kull element probatorju preżenti fl-atti. Dan fis-sens li kull element ta' prova preżenti fil-proċess jista' jagħti lok għal tali konvinċiment. "*Tajjeb f'dan l-istadju li jiġi preċiżat illi l-prinċipju tal-oneru tal-provi ma jfisserx illi d-dimostrazzjoni tal-fatti kostituttivi tad-dritt pretiż trid tiġi rikavata esklussivament minn provi offerti minn min huwa gravat b'dan l-oneru. Dan għaliex dejjem jistgħu jiġu utilizzati elementi probatorji oħrajn akkwiżiti fil-proċess, in kwantu fl-ordinament ġuridiku tagħna jvigi l-prinċipju li r-riżultanzi istruttorji jistgħu jiġu ottenuti bi kwalsiasi mod, anke indipendentement mill-inizzjattiva tal-parti, basta jikkonkorru flimkien u indistintament għall-konvinċiment tal-ġudikant*"[7].

Illi per konsegwenza, fl-apprezzament tal-provi prodotti, it-Tribunal jista' jieħu bħala bażi tal-konvinċiment tiegħu kwalsiasi prova prodotta purche' din tkun tali li twasslu għall-konvinċiment morali meħtieġ skont il-liġi. Hija regola bażilari tad-Dritt proċesswali illi min jallega jrid jipprova, u kwindi l-oneru tal-prova tinkombi fuq il-parti li qed tallega. L-applikazzjoni ta' din ir-regola għall-proċedura odjerna twassal lit-tribunal għall-konklużjoni li fl-aħħar mill-aħħar kien l-appellant li kellu l-oneru tal-prova li juri li d-deċiżjoni li dwarha qed jilmenta hija waħda żbaljata fit-termini ta' l-Artikolu 21(9) tal-Kap.330, għaliex din hija l-allegazzjoni tiegħu li neċessarjament trid tiġi eżaminata f'dan il-proċediment.

Illi l-fatt li l-appell sar b'konsegwenza ta' deċiżjoni li permezz tagħha l-Awtorità appellata għamlet allegazzjonijiet fil-konfront ta' l-appellant ma tbiddilx din il-konklużjoni, u dan billi l-iskop ta' dan il-proċediment m'huwiex li tiġi ippruvata l-allegazzjoni ta' l-Awtorità kontra l-appellant, imma li tiġi ippruvata l-allegazzjoni ta' l-appellant li d-deċiżjoni ta' l-Awtorità hija manifestament inġusta u/jew li dik id-deċiżjoni tikkostitwixxi abbuż ta' diskrezzjoni. Dan huwa hekk f'kull qasam tad-Dritt amministrattiv, fejn huwa ċ-ċittadin li jallega l-eċċess jew in-nuqqas ta' *vires* ta' att amministrattiv li jrid jipprova l-istess, u mhux il-kuntrarju. Tant hu hekk illi fil-

[7] Mario Mifsud vs. Carmelo Mifsud, Appell Inferjuri, 12/11/2003.

proċedimenti quddiem dan it-Tribunal, huwa proprju l-appellant li jibda jressaq il-provi tiegħu.

Illi hija wkoll il-fehma tat-tribunal li, fl-apprezzament tal-provi li jkunu prodotti lilu, huwa jista' joqgħod fuq dawk il-provi li fil-verità ma kienx hemm kontestazzjoni dwarhom. Fejn fatt ikun paċifiku bejn il-partijiet, ma hemmx ħtieġa ta' provi rigoruż fir-rigward. In *subjecta materia* jinsab mgħallem li:

> Hu prinċipju kardinali ben affermat fid-duttrina proċedurali illi l-ġudikant hu fid-dmir li jiddeċiedi iuxta alligata et probata. Li jfisser, illi d-deċiżjoni tiegħu għandha tkun estratta unikament in bażi għall-allegazzjonijiet tal-partijiet u taċ-ċirkustanzi tal-fatti dedotti u provati għab-bażi tat-talba jew tal-eċċezzjoni. S'intendi, tali prinċipju hu maħsub biex ikun assikurat illi ħadd mill-partijiet ma jiġi sorpriż b'deċiżjoni bażata fuq fatti jew difiżi mhux dedotti jew provati, u li dwarhom il-partijiet ma kellhomx lanqas il-possibbilita` li jirreaġixxu bi prontezza u fil-mument opportun għalihom".
>
> Dan qed jiġi rilevat, u sottolinejat ukoll, għaliex fil-ħsieb tal-Qorti, minn dak riskontrat mill-atti tal-każ preżenti, **l-atteġġjament difensiv tal-konvenut bir-risposta tiegħu għat-talba attriċi u dik tal-kondotta proċesswali minnu assunta, almenu sal-mument tad-dibattitu orali, ma setax ma jnissilx il-konvinzjoni illi kellu jkun presuppost illi hu aċċetta li kien il-leġittimu kontraddittur, u allura li kienet paċifika s-sussistenza tan-ness konnettiv tiegħu mal-pubblikazzjoni. F'liema każ, l-attur ma kellux ħtieġa li jġib prova dwarha, u, anzi, kien eżonerat mill-oneru li hekk jagħmel**. Ir-raġuni il-għala dan hu hekk m'għandhiex għalfejn tiġi riċerkata fil-profond. **Meta konvenut jimposta l-linja difensjonali tiegħu b'mod li minnha jista' razzjonalment jitraxxendi li ċertu fatt huwa paċifiku għax mhux speċifikament kuntrastat, il-kontro-parti m'għandux għalfejn iġib prova ta' dak il-fatt għax l-eżistenza tiegħu hi inkontroversa** u tali joħroġ dak l-istess fatt mill-ambitu ta' l-aċċertament dwaru[8] (sottolinear u enfażi in calce miżjud mit-tribunal)

[8] **Perit Carmel Mifsud Borg v. Kurt Farrugia,** Qorti ta' l-Appell (Sede Inferjuri), 11/12/2009.

Illi minn eżami ta' l-atti proċesswali ma jirriżultax illi l-appellant qatt ikkontesta l-asserzjoni fattwali ta' l-Awtorità illi "*This information* (ċioè l-informazzjoni provduta lill-Bord tad-Diretturi ta' GC fil-laqgħa li nżammet f'Diċembru 2007) *included specific information indicating an actual loss before tax for the period January to September 2007 of €1,844,934, compared to* ***[i]*** *a budgeted profit before tax for the same period of €2,253,252; and* ***[ii]*** *an actual figure of* ***profit before tax*** *over the same period in 2006 amounting to €4,913,378*" (ara l-ittra mibgħuta mill-Awtorità lill-appellant u datata 9 ta' Ġunju 2009, immarkata Dok JB5 u anness mar-rikors ta' l-appell). Fl-ittra li biha l-appellant wieġeb lill-Awtorità (datata 30 ta' Ġunju 2009 u eżebita bħala JB6 mar-rikors ta' l-appell), l-istess appellant illimita ruħu li jikkontesta l-interpretazzjoni li l-Awtorità appellata tagħmel dwar dan il-fatt, imma ma kkontestax il-veraċità tiegħu. Fl-ebda mument l-appellant ma allega li t-tagħrif imsemmi mill-Awtorità bħala l-bażi tad-deċiżjoni tagħha kien fattwalment skorrett, u kwindi dan it-tribunal ma jistax jikkonsidra favorevolment is-sottomissjoni ta' l-appellant li m'hemmx prova adegwata dwar dan it-tagħrif.

Illi fuq kollox, kif ġia' osservat *supra*, l-oneru tal-prova kien jinkombi fuq l-appellant, u b'hekk jekk huwa ma kienx qed jaqbel mal-premessi fattwali tad-deċiżjoni appellata, huwa kellu jressaq il-provi biex juri li tali premessi kienu żbaljati.

Illi għalhekk u in vista ta' dawn il-konsiderazzjonijiet kollha, it-tribunal qed iqis li t-tagħrif mogħti lid-diretturi ta' GC waqt il-laqgħa ta' Diċembru 2007 kien jinkludi informazzjoni fis-sens illi GC għamlet telf qabel it-taxxa fl-ammont ta' €1,844,934.

Ikkunsidra:

Għalhekk l-ewwel kwistjoni li t-tribunal irid jeżamina hija jekk l-Awtorità setgħetx raġjonevolment tasal għall-konklużjoni li dik l-informazzjoni kienet tikkostitwixxi *inside information* kif imfissra fl-Att.

Illi l-elementi identifikati mil-liġi sabiex informazzjoni titqies *inside information* huma s-segwenti:

(a) li tkun preċiża min-natura tagħha;
(b) li ma tkunx saret pubblika;
(c) li tkun tirrigwarda, direttament jew indirettament, strument finanzjarju jew mittent ta' strument finanzjarju;
(d) li tkun tali li jekk tiġi reża pubblika, probabbilment ikollha effett sinjifikanti fuq il-prezz ta' dak l-istrument finanzjarju;
(e) li tkun tali li investitur raġjonevoli probabbilment jagħmel użu minnha bħala bażi tad-deċiżjonijiet tiegħu dwar investiment.

Illi l-informazzjoni rigwardanti t-telf magħmul minn GC sa Settembru tas-sena 2007 ċertament tirrigwarda strument finanzjarju kif ukoll il-mittent ta' strument finanzjarju. Dwar dan m'hemmx kuntrast bejn il-partijiet.

Illi l-kwistjoni jekk din l-informazzjoni kienetx magħrufa lill-pubbliku jew le kienet punt ta' kontestazzjoni bejn il-partijiet. L-appellant jikkontendi li bl-avviżi maħruġin minn GC, diġa' ċitati *verbatim* fil-korp ta' din id-deċiżjoni, u bil-pubblikazzjoni ta' l-*interim financial statements* għall-ewwel sitt xhur tas-sena 2007, huwa nieqes l-element ta' indisponibilità għall-pubbliku li huwa ndispensabbli biex informazzjoni tiġi ritenuta *inside information*. It-tribunal iħoss li huwa doveruż għalih li jeżamina bir-reqqa dawn is-sottomissjonijiet.

Illi fl-24 t'Awwissu 2007, sar is-segwenti *company announcement* meħtieġ ai termini tal-*Listing Rules* 8.7.4 u 8.7.21:

> "GlobalCapital p.l.c. ('the Company') registered a profit after tax for the six months ended 30 June 2007 of Lm388,919 compared to a corresponding result last year of Lm735,180. The main highlights of the reporting period's results were:
>
> - Increase in operating profit of 21.9%;

- Continued healthy returns on the international investment property portfolio of the Company and its subsidiaries;
- Significant fair value losses on securities held by the Company and its subsidiaries, including the life insurance company, attributable to negative market conditions which prevailed during the year to date.

The Directors expect that the levels of trading activity experienced during the six months to June 2007, which show an overall improvement in turnover over the corresponding period last year, should be sustained in the latter half of the current year. However, recent stock market volatility and global economic uncertainty may affect trading and investment performance.

The directors do not recommend the payment of an interim dividend."

Illi t-tribunal huwa tal-fehma li dan l-*announcement* bl-ebda mod ma jista' jinftiehem jew jiġi nterpretat bħala l-ekwivalenti tal-pubblikazzjoni ta' l-informazzjoni li l-kumpannija għamlet telf ta' €1.8 miljun. Qabel xejn, jiġi nnutat li dan l-avviż jiftaħ b'dikjarazzjoni fis-sens li l-kumpannija għamlet profitt, purche' huwa ndikat espressament li dan il-profitt huwa inqas minn dak reġistrat fil-perjodu korrispondenti tas-sena preċedenti. Dikjarazzjoni li sar profitt ma tistax tinftiehem li hija ammissjoni li sar telf, *multo magis* telf f'ammont sinjifikanti.

Illi anke d-dikjarazzjonijiet li l-kumpannija soffriet *fair value losses* jew li mhux rakkommandat li jitħallas *interim dividend* ma jistgħux jitqiesu bħala ekwivalenti għall-informazzjoni li l-kumpannija soffriet telf sostanzjali. Dan għaliex dawn id-dikjarazzjonijiet ma humiex biżżejjed ċari biex jagħtu l-istampa ċara li titnissel mill-informazzjoni li kien hemm telf fl-ammont ta' €1.8 miljun. F'din il-konklużjoni, it-tribunal huwa ulterjorment fortifikat mill-fatt li meta wieħed iqis dawn id-dikjarazzjonijiet flimkien mad-dikjarazzjoni li l-kumpannija għamlet profitt (anke jekk inqas mis-sena preċedenti), qarrej ta' intelliġenza ordinarja ma jistax jasal għall-konklużjoni li l-kumpannija għamlet it-telf sostanzjali in kwistjoni.

Illi fil-15 ta' Novembru 2007, il-Bord tad-Diretturi ta' GC wettqet *Company Announcement* oħra, din id-darba ai termini tar-Regola 9.51 tal-*Listing Rules*. Dan l-*Announcement* kien jgħid kif ġej:

Quote

Interim Directors' Statement

GlobalCapital p.l.c. (the 'Group') hereby announces that during the period between 1 July 2007 and the date of this announcement, no material events and transactions have taken place that would have an impact on the financial position of the Group, such that would require specific mention, disclosure or announcement pursuant to the applicable Listing Rules.

During the first nine months of the year the Group registered increased turnover levels, over the corresponding period last year, predominately on its life insurance business and property portfolio, whilst investment fee income has experienced a decrease compared to the corresponding first nine months of 2006. The Group's health Insurance division has also registered positive results which, barring any unforeseen circumstances, are expected to be sustained throughout the remaining months. The downturn in the local and international capital markets persisted during the third quarter of the current financial year and this has invariably had an adverse effect on the Group's portfolio of financial investments. This factor has led to a negative impact on the Group's profitability for the period under consideration and if the downturn in the financial markets persists it is expected to impact on this year's results.

GlobalCapital Investments Limited, one of the Group's subsidiaries, has recently acquired a financial institutions licence in terms of the Financial Institutions Act, 1994. It is anticipated that this new licence will help further diversify GlobalCapital's revenue streams and is expected to start contributing to the Group's results during 2008.

Unquote

Illi dan it-tieni avviż jibda billi jiddeskrivi li l-kumpannija kellha dħul aħjar minn dak tas-sena preċedenti fil-kamp tal-proprjetà u ta' l-assikurazzjoni fuq il-ħajja u fuq is-saħħa, filwaqt li kellha tnaqqis fir-rigward ta' dħul minn *investment fees*. L-istess

avviż ikompli jgħid li l-profitabilità tal-kumpannija ġiet affettwata mill-kundizzjonijiet negattivi tas-suq, u jingħad li dan il-fattur hu mistenni li jaffettwa r-riżultati għal dik is-sena. Jingħad ukoll li waħda mis-sussidjarji tal-kumpannija akkwistat liċenzja ġdida li kienet mistennija li tikkontribwixxi għad-dħul tal-Grupp matul is-sena ta' wara. Dan hu, fil-qosor, dak li qed jingħad f'dan l-avviż.

Illi t-tribunal hu tal-fehma li dan it-tagħrif huwa wisq ambigwu u ambivalenti sabiex jiġi nterpretat bħala ekwivalenti għat-tagħrif mogħti lill-appellant waqt il-laqgħat tal-Bord tad-Diretturi matul l-ewwel jiem tax-xahar ta' Diċembru 2007. Minn qari ta' dan l-avviż biss, anke jekk moqri fid-dawl ta' l-avviż pubblikat preċedentement u eżaminat *supra*, qarrej ta' ntelliġenza ordinarja ma jistax jasal biex jifhem l-entità tat-telf li għamlet il-kumpannija f'dik is-sena, b'liema entità ġie mgħarraf l-appellant qabel għamel it-tranżazzjonijiet in kwistjoni.

Illi l-*interim financial statements* ta' l-ewwel sitt xhur tas-sena 2007 kienu disponibbli għall-pubbliku qabel il-laqgħa tal-Bord tad-Diretturi ta' Diċembru. Minn dawn l-*istatements* jirriżulta li l-profitt qabel it-taxxa ta' GC għal dak il-perjodu kien jammonta għal Lm143,880, filwaqt li l-istess profitt għall-perjodu korrispondenti ta' l-2006 juri li l-profitt ta' qabel it-taxxa kien jammonta għal Lm1,074,667. Wara t-taxxa, il-profitt għall-ewwel sitt xhur tas-sena 2007 kien Lm388,919, filwaqt li għall-istess perjodu tas-sena 2006, l-profitt kien Lm735,180. Jidher li l-akbar differenza bejn iż-żewġ perjodi kienet li fis-sena 2007, GC soffriet telf f'dak li huwa *net investment (expenses)/income*, kif ukoll telf riferibbli għal *balance on the long term business of insurance technical account before tax.*

Illi l-appellant qed jissottometti li dawn il-*financial statements* kienu jagħtu stampa ċara lill-pubbliku dwar il-qagħda finanzjarja ta' GC, b'mod li t-tagħrif mogħti lilu fil-laqgħa tal-Bord tad-Diretturi ta' Diċembru 2007 ma kienx jikkostitwixxi tagħrif li ma kienx disponibbli għall-pubbliku.

Illi t-tribunal qabel xejn jirrileva li mid-definizzjoni tat-terminu "inside information", għandu jirriżulta li l-liġi hija diretta lejn tagħrif partikolari, u mhux tagħrif ġeneriku, kif donnu qed jippretendi l-appellant. L-appellant isostni illi għax il-pubbliku kien jaf li GC kellha profitti inqas mis-sena preċedenti, it-tagħrif li skont il-*management accounts* il-kumpannija soffriet telf issa, u mhux profitt ridott, ta' aktar minn €1,800,000, għandu jitqies li kien tagħrif pubbliku. Dan it-tribunal ma jaqbilx. Ibda biex tgħid li hemm distinzjoni netta bejn profitabilità (purche' ridotta) u telf, liema distinzjoni hija tant evidenti li dan it-tribunal lanqas għandu għalfejn jidħol fiha.

Jirriżulta ippruvat illi l-appellant, bħala direttur ta' GC, kien jaf – kif *del resto* kien jaf il-pubbliku tramite l-pubblikazzjoni ta' l-imsemmija *interim financial statements* – illi GC kellha profitti li kienu inqas minn dawk perċepiti matul is-sena preċedenti. Minkejja dan it-tnaqqis ta' profitt, xorta waħda kien hemm profitt, li jfisser li fl-aħħar mill-aħħar l-assi tal-kumpannija żdiedu, u mhux ittieklu minn ġewwa. Madanakollu f'Diċembru 2007 l-istess appellant sar jaf li sa Settembru 2007, is-sitwazzjoni marret għall-agħar b'mod drastiku tant illi l-kumpannija kienet qed tirreġistra telf enormi. B'dan it-telf u bl-estensjoni ta' dan it-telf, il-pubbliku ma kienx jaf ghax ma ġiex mgħarraf.

Illi huwa evidenti li kwalsiasi tagħrif mogħti lill-appellant permezz tal-*management accounts* u tal-laqgħat tal-Bord tad-Diretturi huwa *inside information* (naturalment previa li jkunu sodisfatti r-rekwiżiti kollha tat-tifsira ta' *inside information*), sakemm dak it-tagħrif ma jkunx ġie fis-sostanza tiegħu reż pubbliku. Huwa ċar li t-telf enormi li bih ġie nformat il-Bord tad-Diretturi f'Diċembru 2007 ma ġiex reż pubbliku qabel April 2008, u għalhekk fiż-żmien meta seħħew it-trasferimenti ta' l-azzjonijiet ta' l-appellant, dak it-tagħrif ma kienx pubbliku.

Illi l-appellant jargumenta li tant il-pubbliku kien konxju u konsapevoli dwar is-sitwazzjoni finanzjarja ta' GC li in segwitu għall-*interim directors' statement* tal-15 ta' Novembru 2007 seħħew trasferimenti ta' azzjonijiet ta' GC f'volumi li ma kellhom

ebda preċedent fl-istorja tagħha, salv fl-epoka li fiha hija amalgamat ruħha ma' soċjetà oħra estera.

Illi tassew li l-volum ta' trasferiment ta' azzjonijiet ta' GC kien wieħed għoli ferm, u ferm aktar għoli mil-livelli ordinarji. Pero' b'daqshekk ma jfissirx li l-pubbliku kien jaf bil-kontenut tal-*management accounts* dwar il-perjodu Jannar-Settembru 2007. It-tribunal huwa tal-fehma, u dan fuq bażi ta' probabbilità, illi il-likwidita' sorprendenti ta' l-azzjonijiet ta' GC f'dik l-epoka kienet dovuta għall-fatt li l-*interim financial statements* għall-ewwel sitt xhur tas-sena 2007 kienu qed juru li s-sena finanzjarja korrenti ma kienetx se tkun tajba daqs dik preċedenti għal GC. Però kif diġa' osserva dan it-tribunal, hemm differenza bejn "inqas profitt" u "telf", u proprju għalhekk – la hu stabbilit li f'Diċembru 2007 l-appellant kien jaf bit-telf – allura l-appellant kien ir-reċipjent ta' *inside information*.

Illi waqt il-kors tal-kawża saru sottomissjonijiet mill-appellant fis-sens li bl-interpretazzjoni ta' l-Awtorità, direttur ma jista' qatt ibiegħ jew jixtri azzjonijiet fil-kumpannija li mit-tmexxija tagħha jifforma parti, u dan għaliex direttur kważi dejjem ikun fil-pussess ta' tagħrif mhux disponibbli għall-pubbliku. It-tribunal jirrileva li mhux kull tagħrif iġib il-projbizzjoni in diżamina, imma biss dak it-tagħrif li "*would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments; being information which a reasonable investor would be likely to use as part of the basis of his investment decisions*". F'każ li t-tagħrif ikollu dik il-kwalità, mela allura iva, id-direttur ma jistax ibiegħ jew jixtri azzjonijiet qabel ma jagħmel pubblika dik l-informazzjoni. Jekk jagħżel li ma jagħmilx dik l-informazzjoni pubblika, mela allura huwa jrid isoffri il-projbizzjoni dwar *insider trading*.

Illi għalhekk din il-projbizzjoni hija tali li tipprova ssib bilanċ bejn id-dmirijiet tad-direttur lejn il-pubbliku investitur, u d-dmirijiet tad-direttur lejn il-kumpannija li hu qed imexxi.

Illi t-tribunal lanqas ma huwa qed jaċċetta s-sottomissjonijiet dedotti mill-appellant fis-sens li ma kien hemm ebda *inside information* minħabba l-pubblikazzjonijiet li saru f'ċertu gazzetti lokali dwar l-andament ta' GC. It-tribunal iqis li biex tagħrif ma jibqax ikkunsidrat bħala *inside information*, dak it-tagħrif irid jiġi reż pubbliku mid-diretturi tal-kumpannija jew mill-kumpannija innifisha, u minn ħadd iktar, speċjalment minn persuni li m'għandhom ebda konnessjoni konkreta mal-kumpannija.

Illi għalhekk it-tribunal qed jikkonkludi li f'Diċembru ta' l-2007, l-appellant kien fil-pussess ta' *inside information*.

Illi t-tribunal iqis ukoll li dan it-tagħrif huwa tali li kieku ġie reż pubbliku, probabbilment ikollu effett sinjifikanti fuq il-prezz ta' dak l-istrument finanzjarju, u huwa wkoll tali li investitur raġjonevoli probabbilment jagħmel użu minnu bħala bażi tad-deċiżjonijiet tiegħu dwar investiment. Din il-konklużjoni qed tiġi raġġunta għaliex il-profitabilità *o meno* ta' istituzzjoni finanzjarja hija, fil-fehma tat-tribunal, fattur li ċertament jiġi kkunsidrat minn persuna raġjonevoli qabel tagħmel deċiżjoni dwar l-investiment tagħha. Bl-istess mod, dik il-profitabilità – anke għax tinfluwenza d-deċiżjoni ta' investituri prospettivi – tagħmel effett fuq il-prezz ta' l-istrumenti finanzjarji immessi minn dik l-istituzzjoni, b'mod li strument immess minn istituzzjoni li qed tagħmel it-telf ma jistax ikollu prezz ekwivalenti għal dak immess minn istituzzjoni li qed tagħmel profitti.

Illi t-tribunal wasal għal din il-konklużjoni wara li qies li l-liġi trid li l-possibbilità ta' dawn l-effetti, appena menzjonati, ma tkunx waħda assoluta, imma biss probabbli, b'mod għalhekk li informazzjoni tista' titqies bħala *inside information* jekk "probabbilment" ikollha dawk l-effetti, u mhux jekk "ċertament" ikun hemm dawk l-effetti. F'dan is-sens, is-sottomissjonijiet kollha ta' l-appellant dwar it-tnaqqis fil-prezz fis-suq rilevanti matul il-perjodu in kwistjoni huma kollha rrilevanti, għaliex huwa possibbli li informazzjoni tibqa' *inside information* anke fejn din effettivament jirriżulta li ma kellha l-ebda impatt fuq il-prezz, jew fejn din effettivament jirriżulta li ma tiġix ikkunsidrata minn investitur raġjonevoli. Il-mera probabbilità li jkun hemm

dawn il-konsegwenzi hija suffiċċjenti sabiex dik l-informazzjoni żżomm il-karattru tagħha ta' *inside information* ai termini ta' l-Att.

Illi jonqos biss l-element li dik l-informazzjoni tkun waħda "preċiża". Biex informazzjoni titqies li hija preċiża, trid tkun tali li "... *it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments...*". Dwar din it-tifsira, huwa nteressanti dak innutat mill-Qorti Ewropeja tal-Ġustizzja fis-segwenti bran:

> In the light of the foregoing considerations, the answer to the second question is that Article 1(1) of Directive 2003/124 must be interpreted as meaning that the notion of 'a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so' refers to future circumstances or events from which it appears, on the basis of an overall assessment of the factors existing at the relevant time, that there is a realistic prospect that they will come into existence or occur. However, that notion should not be interpreted as meaning that the magnitude of the effect of that set of circumstances or that event on the prices of the financial instruments concerned must be taken into consideration[9].

Illi għalhekk biex informazzjoni titqies preċiża, trid tkun tirreferi għal ċirkostanzi eżistenti jew li raġjonevolment għandhom jitqiesu li se jiġu fis-seħħ. Meta l-appellant sar jaf bit-telf tal-kumpannija f'Diċembru 2007, huwa kien qed jiġi nfurmat b'ċirkostanza eżistenti, u li f'dak il-perjodu tas-sena, kellha taffettwa mhux bi ftit il-figuri finanzjarji tal-kumpannija. Din l-informazzjoni kellha l-karattru ta' ċertezza li l-liġi, fit-tifsira tagħha, tekwipara mal-kelma "preċiża", u għalhekk it-tribunal ma jistax ħlief jikkonkorri ma' l-Awtorità appellata li l-informazzjoni li kellu l-appellant kellha titqies bħala *inside information*. Kif ingħad fid-deċiżjoni ċitata, mhux neċessarju, għal

[9] Markus Geltl vs. Daimler AG, C-19/2011, 28/6/2012.

fini li informazzjoni titqies preċiża, li jiġi kkunsidrat l-effett li dawk iċ-ċirkostanzi jistgħu ikollhom fuq il-prezz ta' l-istrumenti finanzjarji kunċernati.

Illi stabbilit allura li l-appellant, fil-mument li wettaq it-tranżazzjoni fl-azzjonijiet tal-kumpannija GlobalCapital plc, kellu *inside information*, imiss issa li jiġi eżaminat jekk dak li għamel hu jinkwadrax ruħu fit-tifsira ta' *insider dealing*, kif spjegata fl-Artikolu 6(1) ta' l-Att.

Illi l-Artikolu 6(1) ta' l-Att jipprojbixxi persuna milli tuża *inside information* biex tinnegozja f'istrument finanzjarju, jew biex takkwista jew tiddisponi minn strument finanzjarju, kemm fl-interess tiegħu jew ta' terz.

Illi diġà rajna li fil-fatt l-appellant kellu f'idejh *inside information*, u li huwa ddispona u nnegozja fi strument finanzjarju fl-interess tiegħu personali. Huwa stabbilit ukoll li l-informazzjoni nkriminanti ġiet ottenuta mill-appellant minħabba ċ-ċirkostanzi identifikati fl-Artikoli 6(1)(a) u 6(1)(c).

Illi kif diġa' rrileva t-tribunal, biex ikun hemm ksur ta' l-Artikolu 6(1) mhux biżżejjed li jintwera li persuna fil-pussess ta' *inside information* wettqet tranżazzjoni fi strumenti finanzjarji. Irid jintwera wkoll li dik il-persuna tkun, fit-tranżazzjoni nkriminanti, għamlet użu minn dik l-*inside information*. Fir-rigward ta' dan l-element ta' l-użu, it-tribunal isib li huwa siewi ħafna l-insenjament tal-Qorti Ewropea tal-Ġustizzja fir-rigward, u għalhekk se jiċċita estensivament mill-istess:

> 30 By its second and third questions, which need to be examined together and prior to the others, the referring court requests the Court of Justice to interpret the expression 'use of inside information' in Article 2(1) of Directive 2003/6. That provision provides that the Member States are to prohibit any person referred to in the second subparagraph thereof (a 'primary insider') who 'possesses inside information from using that information by acquiring or disposing of, … for his own account or for the account of a third party, either directly or

indirectly, the financial instruments to which that information relates' or from trying to enter into such a transaction on the market. More precisely, the referring court seeks to determine whether it is sufficient, for a transaction to be classed as prohibited insider dealing, that a primary insider in possession of inside information trades on the market in financial instruments to which that information relates or whether it is necessary, in addition, to establish that that person has 'used' that information 'with full knowledge'.

31 Article 2(1) of Directive 2003/6 does not stipulate that prohibited transactions must be carried out 'with full knowledge of the facts' but merely prohibits primary insiders from using inside information when entering into market transactions. That article defines the constituent elements of such prohibited transactions by referring expressly to two such elements, namely, the persons likely to fall within its scope and the material actions which constitute that transaction.

32 By contrast, that provision does not expressly set out the subjective conditions in relation to the intention behind those material actions. Article 2(1) of Directive 2003/6 does not state whether the primary insider must have been driven by a speculative intention, must have had a fraudulent intention or must have acted either deliberately or negligently. That article does not expressly state whether it is necessary to establish that the inside information was decisive in the decision to enter into the market transaction at issue, or whether the primary insider had to be aware that the information in his possession was inside information.

33 In that regard, it should be noted that, in drafting Directive 2003/6, the Community legislature sought to fill in some of the gaps identified in Directive 89/592. Article 2(1) of Directive 89/592 sought to prohibit 'any person who … possesses inside information' from entering into a market transaction in relation to the transferable securities concerned 'by taking advantage of that information with full knowledge of the facts'. The transposition of that provision into national law gave rise to variances in the interpretation by the Member States of the expression 'with full knowledge of the facts', which in certain national legal systems was assimilated to a requirement of a mental element.

34 In that regard, the Proposal for a Directive of the European Parliament and of the Council on insider dealing and market

manipulation (market abuse) (2001/0118 (COD)), submitted by the Commission of the European Communities on 30 May 2001, was based on the wording of Article 2(1) of Directive 89/592 while removing the expression 'with full knowledge of the facts', on the ground that 'by nature [primary insiders] may have access to inside information on a daily basis and are aware of the confidential nature of the information that they receive'. In addition, the subsequent preparatory work referred to in point 58 of the Advocate General's Opinion shows that the Parliament, in accordance with the objective approach of the notion of insider dealing favoured by the Commission, sought to replace the verb 'to take advantage of' with the verb 'to use' in order to remove any element of purpose or intention from the definition of insider dealing.

35 The above shows that Article 2(1) of Directive 2003/6 defines insider dealing objectively without the intention behind such dealing being referred to explicitly in its definition. This was done with a view to achieving uniform harmonisation of the law of the Member States.

36 The fact that Article 2(1) of Directive 2003/6 does not expressly provide for a mental element can be explained, first, by the specific nature of insider dealing, which enables a presumption of that mental element once the constituent elements referred to in that provision are present. To begin with, the relationship of confidence which links the primary insiders referred to in Article 2(1)(a) to (c) to the issuer of the financial instruments to which the inside information relates implies, on their part, a specific responsibility in that regard. Next, entering into a market transaction is necessarily the result of a series of decisions forming part of a complex context which, in principle, makes it possible to exclude the possibility that the author of that transaction could have acted without being aware of his actions. Finally, where such a market transaction is entered into while the author of that transaction is in possession of inside information, that information must, in principle, be deemed to have played a role in his decision-making.

37 The fact that Article 2(1) of Directive 2003/6 does not expressly provide for a mental element among the constituent elements of insider dealing can be explained, second, by the purpose of Directive 2003/6, which, as is pointed out, inter alia, in the second and twelfth recitals in the preamble thereto, is to ensure the integrity of Community financial markets and to enhance investor confidence in those markets. The Community legislature opted for

a preventative mechanism and for administrative sanctions for insider dealing, the effectiveness of which would be weakened if made subject to a systematic analysis of the existence of a mental element. As pointed out by the Advocate General in point 55 of her Opinion, only if the prohibition on insider dealing allows infringements to be effectively sanctioned does it prove to be powerful and encourage compliance with the rules by all market actors on a lasting basis. The effective implementation of the prohibition on market transactions is thus based on a simple structure in which subjective grounds of defence are limited, not only to enable sanctions to be imposed but also to prevent effectively infringements of that prohibition.

38 Once the constituent elements of insider dealing laid down in Article 2(1) of Directive 2003/6 are satisfied, it is thus possible to assume an intention on the part of the author of that transaction.

Omissis

45 The establishment of an effective and uniform system to prevent and sanction insider dealing with the legitimate aim of protecting the integrity of financial markets has thus led the Community legislature to adopt an objective definition of the constituent elements of prohibited insider dealing. The fact that Article 2(1) of Directive 2003/6 does not expressly provide for a mental element does not, however, mean that that provision needs to be interpreted in such a way that any primary insider in possession of inside information who enters into a market transaction, automatically falls within the prohibition on insider dealing.

46 As pointed out by the Italian and United Kingdom Governments, such an extensive interpretation of Article 2(1) of Directive 2003/6 would entail the risk of extending the scope of that prohibition beyond what is appropriate and necessary to attain the goals pursued by that directive. Such an interpretation could, in practice, lead to the prohibition of certain market transactions which do not necessarily infringe the interests protected by that directive. It is therefore necessary to distinguish 'uses of inside information' which are capable of infringing those interests from those which are not.

47 To that end, reference needs to be made to the purpose of Directive 2003/6. As is apparent from its title, that directive seeks to tackle market abuse. The second and twelfth recitals in the preamble thereto state that, following the example of

Directive 89/592, it prohibits insider dealing with the aim of protecting the integrity of financial markets and enhancing investor confidence, a confidence which depends, inter alia, on investors being placed on an equal footing and protected against the improper use of inside information (see, by analogy, Case C-384/02 *Grøngaard and Bang* [2005] ECR I-9939, paragraphs 22 and 33).

48 Thus, the purpose of the prohibition laid down by Article 2(1) of Directive 2003/6 is to ensure equality between the contracting parties in stock-market transactions by preventing one of them who possesses inside information and who is, therefore, in an advantageous position vis-à-vis other investors, from profiting from that information, to the detriment of those who are unaware of it (see, by analogy, Case C-391/04 *Georgakis* [2007] ECR I-3741, paragraph 38).

49 In its explanatory memorandum accompanying the proposal which led to the adoption of Directive 2003/6, the Commission thus stated that 'market abuse may arise in circumstances where investors have been unreasonably disadvantaged, directly or indirectly, by others who … have used information which is not publicly available to their own advantage or the advantage of others … This type of conduct can create a misleading appearance of trading in financial instruments and undermine the general principle that all investors must be placed on an equal footing … in terms of access to information. Insiders are in possession of confidential information. Trades based on such information lead to unjustified economic advantages at the expense of "outsiders"'. Thus, the proposal for a directive was based on the will to prohibit insiders from drawing an advantage from inside information by entering into market transactions to the detriment of the other actors on the market who do not have access to such information.

50 Consequently, there is a close link between the prohibition on insider dealing and the concept of inside information, the latter being defined by Article 1 of Directive 2003/6 as 'information of a precise nature which has not been made public', relating to issuers of financial instruments or to financial instruments and which, 'if it were made public, would be likely to have a significant effect on the prices of [the] financial instruments [concerned] or on the price of related derivative financial instruments'.

51 In order to strengthen legal certainty for market participants, Directive 2003/124 specified the definition of two key elements of inside information, namely the precise nature of that information

and the extent of its potential impact on prices. Article 1(1) of that directive thus provides that information '[is to] be deemed to be of a precise nature if it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments'. Article 1(2) of that directive defines information likely to have a significant effect on the price of financial instruments as information which 'a reasonable investor would be likely to use as part of the basis of his investment decisions'.

52 Owing to its non-public and precise nature and its ability to influence the prices of financial instruments significantly, inside information grants the insider in possession of such information an advantage in relation to all the other actors on the market who are unaware of it. It enables that insider, when he acts in accordance with that information in entering into a transaction on the market, to expect to derive an economic advantage from it without exposing himself to the same risks as the other investors on the market. The essential characteristic of insider dealing thus consists in an unfair advantage being obtained from information to the detriment of third parties who are unaware of it and, consequently, the undermining of the integrity of financial markets and investor confidence.

53 Consequently, the prohibition on insider dealing applies where a primary insider who is in possession of inside information takes unfair advantage of the benefit gained from that information by entering into a market transaction in accordance with that information.

54 It follows that the fact that a primary insider who holds inside information trades on the market in financial instruments to which that information relates implies that that person 'used that information' within the meaning of Article 2(1) of Directive 2003/6, but without prejudice to the rights of the defence and, in particular, the right to be able to rebut that presumption.

55 However, in order not to extend the scope of the prohibition laid down in Article 2(1) of Directive 2003/6 beyond what is appropriate and necessary to attain the goals pursued by that directive, certain situations may require a thorough examination of the factual circumstances enabling it to be ensured that the use of the inside information is actually unfair so as to be prohibited by

the directive in the name of the integrity of financial markets and investor confidence.

56 It should be noted, in that regard, that the preamble to Directive 2003/6 provides several examples of situations in which the fact that a primary insider in possession of inside information enters into a transaction on the market should not in itself constitute 'use of inside information' for the purposes of Article 2(1) of that directive.

57 Thus, the 18th recital in the preamble to Directive 2003/6 states that use of inside information 'can consist in the acquisition or disposal of financial instruments by a person who knows, or ought to have known, that the information possessed is inside information'. That hypothesis is expressly provided for in Article 4 of that directive, which extends the prohibition on insider dealing to persons who know, or ought to have known, that the information in their possession is inside information. None the less, the automatic application of those criteria to certain professionals in the financial markets, who are required to hold inside information relating to transactions carried out on the market by third parties, risks leading to a situation in which such persons are prohibited from carrying out their activity, an activity which is both legitimate and useful for the efficient functioning of the financial markets. The 18th recital in the preamble to that directive states, in that regard, that the assessment of what a reasonable person knows or should have known 'in the circumstances' is to be carried out by the competent authorities.

58 In addition, that recital states that the mere fact that market-makers, bodies authorised to act as counterparties, or persons authorised to execute orders on behalf of third parties with inside information confine themselves to entering into market transactions legitimately and dutifully 'should not in itself be deemed to constitute use of such inside information'.

59 The 29th recital in the preamble to Directive 2003/6 states that having access to inside information relating to another company and using it in the context of a public take-over bid or a merger proposal 'should not in itself be deemed to constitute insider dealing'. The operation whereby an undertaking, after obtaining inside information concerning a specific company, subsequently launches a public take-over bid for the capital of that company at a rate higher than the market rate cannot, in principle, be regarded as prohibited insider dealing since it does not infringe the interests protected by that directive.

60 The 30th recital in the preamble to Directive 2003/6 states that, since the carrying out of a market transaction necessarily involves a prior decision on the part of its author, the carrying out of that transaction 'should not be deemed in itself to constitute the use of inside information'. If that were not the case, Article 2(1) of that directive could, inter alia, lead to a situation in which a person who decided to launch a public take-over bid would be prohibited from executing that decision since it would constitute inside information. Such a result would not only go beyond what may be regarded as appropriate and necessary to achieve the goals of that directive, but could even adversely affect the efficient functioning of the financial markets by preventing public take-over bids.

61 It follows from the above that the question whether a primary insider in possession of inside information 'uses that information' within the meaning of Article 2(1) of Directive 2003/6 must be determined in the light of the purpose of that directive, which is to protect the integrity of the financial markets and to enhance investor confidence. That confidence is based, in particular, on the assurance that they will be placed on an equal footing and protected from the misuse of inside information. Only usage which goes against that purpose constitutes prohibited insider dealing.

62 Therefore, the answer to the second and third questions must be that, on a proper interpretation of Article 2(1) of Directive 2003/6, the fact that a person as referred to in the second subparagraph of that provision, in possession of inside information, acquires or disposes of, or tries to acquire or dispose of, for his own account or for the account of a third party, either directly or indirectly, the financial instruments to which that information relates implies that that person has 'used that information' within the meaning of that provision, but without prejudice to the rights of the defence and, in particular, to the right to be able to rebut that presumption. The question whether that person has infringed the prohibition on insider dealing must be analysed in the light of the purpose of that directive, which is to protect the integrity of the financial markets and to enhance investor confidence, which is based, in particular, on the assurance that investors will be placed on an equal footing and protected from the misuse of inside information.[10]

[10] Spector Photo Group NV, Chris Van Raemdonck vs. Commissie voor het Bank-, Financie-, en Assurantiewezen (CBFA), 23/12/2009, C-45/2008.

Illi għalhekk, skont il-Qorti Ewropeja tal-Ġustizzja, il-fatt li persuna tinnegozja fi strumenti finanzjarji fil-mument li tkun fil-pussess ta' *inside information*, joħloq preżunzjoni li dik il-persuna użat dik l-informazzjoni, b'dan pero' li l-mixli għandu jkollu kull opportunità sabiex jirribatti dik il-preżunzjoni permezz ta' provi. Huwa ċar għalhekk li l-oneru tal-prova jinsab proprju fuq il-mixli. L-imsemmija Qorti waslet għal din il-konklużjoni billi qieset li l-iskop tal-projbizzjoni kontra *insider dealing* huwa li persuni li jkollhom vantaġġ fis-suq minħabba l-pożizzjoni tagħhom fi ħdan istituzzjoni finanzjarja ma jieħdux vantaġġ minn dik il-pożizzjoni meta jiġu biex jinnegozjaw ma' persuna karenti minn vantaġġ bħal dak jew vantaġġ ieħor konsimili. Dan bl-iskop li tiġi mantenuta l-fiduċja fis-swieqi finanzjarji, liema fiduċja tista' tiġi nieqsa fejn persuna f'pożizzjoni vantaġġjuża, kif spjegat, titħalla tinnegozja liberament meta tkun munita b'dik l-informazzjoni.

Illi t-tribunal jifhem illi l-iskop ta' l-Artikolu 6 ta' l-Att, kif interpretat mill-Qorti Ewropeja tal-Ġustizzja, huwa l-manutenzjoni tal-bilanċ bejn il-persuni kkunsidrati bħala *insiders* (u ċioe' l-persuni elenkati fis-subparagrafi (a) sa (d) ta' l-ewwel subinċiż ta' l-Artikolu 6) u l-persuni li m'humiex *insiders*. Bilanċ li jista' jiġi miżmum liberament billi l-persuni kkunsidrati bħala *insiders* jassikuraw ruħhom li jipprovdu lill-pubbliku dik l-informazzjoni li tikkwalifika bħala *inside information*, liema informazzjoni proprju titlef dak il-karattru hekk kif tiġi esposta għall-pubbliku. Dan ma jfissirx li istituzzjoni finanzjarja għandha l-obbligu li tesponi lill-pubbliku kollox – però jekk tagħżel li ma tagħmilx tali espożizzjoni, l-uffiċċjali tagħha jkunu prekluzi milli jinnegozjaw fl-istrumenti finanzjarji tagħha – sakemm ma jurux illi f'tali negozjati huma ma għamlux użu minn *inside information*.

Illi l-appellant odjern issottometta li d-deċiżjoni tiegħu li jbiegħ numru ta' azzjonijiet li kellu f'GC ma kellha x'taqsam xejn mat-tagħrif li huwa rċieva fil-laqgħa tal-Bord tad-Diretturi f'Diċembru 2007. Huwa jsostni li l-bejgħ t'azzjonijiet li hu għamel f'Diċembru 2007 kien parti minn eżerċizzju ikbar li permezz tiegħu huwa kien qed ibiegħ numru t'azzjonijiet li kellu f'diversi kumpanniji pubbliċi. Huwa jsostni li dan l-eżerċizzju kien qed jagħmlu sabiex jiffinanzja l-akkwist ta' proprjeta' fi Sliema u

sabiex jiffinanzja wkoll il-finituri ta' dik il-proprjetà. It-tribunal sejjer issa jeżamina dawn is-sottomissjonijiet ta' l-appellant.

Mill-provi prodotti jirriżultaw is-segwenti fatti:

- B'konvenju datat 24 ta' Marzu 2004, l-appellant intrabat li jixtri mingħand il-kumpannija Strandfort Limited appartament u żewġ *car spaces* – li fl-epoka kienu għadhom mhux kostruwiti – fi blokk bini f'The Strand, Sliema, u dan versu l-prezz ta' Lm198,000. Ġie stipulat, fost ħwejjeġ oħra, li l-appartament kellu jinbiegħ fi stat ta' *advanced shell state* skont l-ispeċifikazzjonijiet elenkati fid-dokument anness mal-ftehim u msejjaħ "document number 1". Il-*car spaces* kellhom jinbiegħu fi stat *finished*. Dan il-konvenju kellu jibqa' validu sal-31 ta' Diċembru 2006, salv il-proroga "awtomatika" kontemplata hemmhekk.
- Il-kuntratt finali sar fis-16 ta' Lulju 2008 (Dok ND9). Hemmhekk ġie dikjarat illi l-appartament u l-*car spaces* kienu qed jiġu konsenjati lill-appellant fl-istat stipulat fil-konvenju. Il-prezz finali mħallas fuq il-kuntratt kien ta' €60,563.71. Il-parti rimanenti tal-prezz tħallas qabel.

Illi l-appellanti, waqt id-depożizzjoni tiegħu tat-13 ta' Lulju 2010, spjega hekk: "*So what you can see is a correlation between the upcoming liabilities I had to pay for my property and the sales I made on the Stock Exchange. What I did basically was cleared my overdraft. I came to a position that once I transacted those 46,000 shares I cleared my overdraft with the bank*" (paġna 10 tad-depożizzjoni).

Illi l-appellanti eżebixxa wkoll dokument intitolat "Summary of Payments" (Doc "SP1"), li permezz tiegħu huwa elenka l-pagamenti magħmula minnu b'rabta mal-proprjetà akkwistata minnu, u meta saru l-istess pagamenti. Minn dan id-dokumenti jirriżulta li, fl-epoka mertu tal-kawża, l-appellant għamel pagament ta' Lm40,000 lil Strandfort Limited fit-18 t'Ottubru 2007. L-ewwel pagamenti li sar wara dik id-data kienu ta' Lm26,000 lil Strandfort Limited, u ta' Lm7,922 lil Kummissarju tat-Taxxi

għall-boll dovut fuq il-kuntratt t'akkwist. Entrambi pagamenti saru fit-30 ta' Lulju 2008.

Huwa evidenti minn dan l-elenku, eżebit mill-appellant stess, illi meta huwa biegħ l-azzjonijiet in kwistjoni, f'Diċembru 2007, ma kellu ebda ħtieġa li jagħmel pagamenti qabel diversi xhur wara. Huwa jispjega pero', kif jirriżulta mill-bran tax-xiehda kaptat hawn fuq, li kellu jagħmel pagamenti biex isalda l-faċilità ta' overdraft konċessa lilu mill-Bank. L-appellant jispjega illi, meta ġie biex jieħu deċiżjoni dwar kif se jiffinanzja l-akkwist tal-proprjetà mmobbli, "*And what I started to do rather than get finance from the Bank I tried to support my purchase through systematically selling all my holdings with the exception of Global Capital. So I disposed of the majority of my Government stocks, I kept a few holdings which I believed were too good to sell and a couple of holdings in equities*" (paġna 9 tad-depożizzjoni tat-13 ta' Lulju 2010). Ikompli jispjega li, "*So I did seek a facility from the bank. I got it. I pledged Global Capital shares in that regard but when further payments came due and a big payment came due at the time of my trades rather than going back to the bank because the overdraft facility was limited to a certain amount I decided to utilise my shares and liquidate some of my shares on the Stock Exchange*" (paġna 9-10 ta' l-istess depożizzjoni).

Illi diġà rajna kif, skont l-elenku tal-pagamenti imħejji mill-appellant stess, f'dik l-epoka l-appellant kellu pagament kbir x'jagħmel f'Ottubru 2007, ċioe' xahrejn qabel il-bejgħ ta' l-azzjonijiet tiegħu, u kellu pagament kbir x'jagħmel f'Lulju 2008, u ċioe' seba' xhur wara l-bejgħ ta' l-azzjonijiet in kwistjoni. L-appellant xehed ukoll li mir-rikavat tal-bejgħ ta' l-azzjonijiet tiegħu, huwa ħallas il-faċilità ta' overdraft għas-saldu, pero' ma preżenta ebda dokument biex jissostanzja din l-affermazzjoni tiegħu. Lanqas ma pproduċa bħala xhud lir-rappreżentanti bankarji biex jikkonfermaw li f'dik l-epoka huwa għamel pagamenti mdaqqsa.

Illi l-appellant issottometta li l-fatt illi huwa biegħ ammont żgħir mill-azzjonijiet li huwa kellu f'GC jimmilita favur it-teżi tiegħu li huwa biegħ biss biex jiffinanzja l-

akkwist tal-proprjetà tiegħu. It-tribunal josserva li, għalkemm huwa minnu li l-appellant biegħ biss ċertu ammont mill-azzjonijiet tiegħu, fil-verita' l-ammont ta' azzjonijiet mibjugħa huwa irrilevanti għaliex il-liġi ma teskludiex mill-applikazzjoni tagħha trasferimenti skont l-ammont ta' azzjonijiet involuti. Dak li huwa rilevanti huwa għaliex l-appellant biegħ meta biegħ, u t-tribunal mhux sodisfatt li d-deċiżjoni ta' l-appellant li jbiegħ f'dik l-epoka kienet indipendenti mill-*inside information* li huwa kellu. Wieħed irid jirrileva wkoll li l-appellant lanqas kieku ried ma setgħa jbiegħ l-azzjonijiet kollha tiegħu, għaliex numru indeterminat minnhom kienu miżmumin b'rahan bħala garanzija għall-faċilità ta' *overdraft* konċessa lilu mill-Bank. Għax l-appellant għażel li ma jressaqx provi dwar din il-faċilità, it-tribunal huwa sprovvist minn riżultanzi probatorji suffiċċjenti biex jasal għall-konklużjonijiet tiegħu fir-rigward, meta l-produzzjoni ta' tali riżultanzi probatorji kienu fl-interess u l-oneru ta' l-appellant.

Illi huwa importanti hawnhekk li t-tribunal josserva li biex jiġi determinat jekk direttur għamilx użu minn *insider information* biex biegħ strumenti finanzjarji, huwa neċessarju li jiġu eżaminati l-mottivi tad-direttur meta huwa fforma d-deċiżjoni tiegħu li jbiegħ, biex min huwa mgħobbi bil-piż tad-deċiżjoni jqis jekk dak l-element jirriżultax. Hija l-fehma tat-tribunal illi wieħed jitqies li għamel użu minn *inside information* biex ibiegħ strumenti finanzjarji meta dik l-informazzjoni tkun b'xi mod ikkontribwiet – anke jekk minimament – fil-formazzjoni tad-deċiżjoni tiegħu li jbiegħ.

Illi t-tribunal m'huwiex sodisfatt illi l-appellant odjern biegħ meta biegħ – u ċioe' ftit tal-jiem biss wara l-laqgħa tal-Bord tad-Diretturi ta' Diċembru 2007, mingħajr ma għamel użu minn *inside information* li huwa ċertament kellu f'Diċembru 2007. Għalkemm huwa probabbli illi l-appellant verament iddeċieda li jbiegħ azzjonijiet tiegħu f'GC sabiex jiffinanzja l-pagamenti li kellu jagħmel, it-tribunal huwa tal-fehma li l-appellant għażel li jbiegħ f'Diċembru għax kien jaf li dik kienet l-epoka li setgħa jġib l-aħjar prezz għal dawk l-azzjonijiet, u ċioè qabel il-pubblikazzjoni tal-*consolidated audited accounts* ta' GC għas-sena 2007 li wisq probabbli kien se jkollhom l-effett li jwaqqgħu il-prezz ta' l-azzjonijiet. Lanqas ma ressaq prova l-

appellant illi huwa ddeċieda li jbiegħ l-azzjonijiet tiegħu f'GC f'mument meta ma kienx ir-reċipjent ta' *inside information*, liema prova kienet tikkontribwixxi mhux ftit biex tingħeleb il-preżunzjoni ta' l-użu ta' *inside information*.

Isegwi minn hekk illi d-deċiżjoni ta' l-Awtorità appellata ma tistax titqies li ingħatat b'abbuż tad-diskrezzjoni tagħha, jew li hija manifestament inġusta.

Għal dawn il-mottivi kollha, it-tribunal qiegħed jiċħad l-appell ta' James Blake u jikkonferma d-deċiżjoni ta' l-Awtorita' appellata tas-26 t'Ottubru 2009 kif ukoll is-sanzjoni hemmhekk inflitta, bl-ispejjeż kollha jkunu a karigu ta' l-imsemmi appellant.