
FINAL NOTICE

To: **Peter Bracken**

Of: **c/o Russell, Jones & Walker**
Solicitors
80-86 Gray's Inn Road
London
WC1X 8NH

Date: **7 July 2004**

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS ("the FSA") gives you notice about a requirement to pay a financial penalty.

THE PENALTY

The FSA gave you, Mr Peter Bracken ("Mr Bracken"), a Decision Notice dated 29 March 2004 which notified you that, pursuant to section 123 (Power to impose penalties in cases of market abuse) of the Financial Services and Markets Act 2000 ("the Act"), the FSA had decided to impose a financial penalty on you in the amount of £15,000 ("the penalty").

Pursuant to section 127(4) of the Act and by reference notice dated 28 April 2004, you referred the FSA's decision to impose the financial penalty to the Financial Services and Markets Tribunal.

On your behalf, your solicitor confirmed on 2 July 2004 your formal withdrawal of your reference notice and withdrawal of challenge to the penalty.

Accordingly, for the reasons set out below the FSA imposes a financial penalty on you in the amount of £15,000.

REASONS FOR THE ACTION

Introduction

1. The FSA has decided to impose this penalty as a result of trading by Mr Bracken in September and November 2002 in relation to the shares of Whitehead Mann Group Plc ("Whitehead Mann"), the ordinary share capital of which is and was at the relevant time traded on the London Stock Exchange ("the LSE").
2. On the basis of the facts and matters described below, the FSA has decided that:
 - (a) in respect of these matters Mr Bracken engaged in market abuse; and
 - (b) in all the circumstances it is appropriate to impose a penalty on Mr Bracken in the amount decided.

Relevant statutory provisions and guidance

3. Under section 123(1) of the Act the FSA may impose a financial penalty of such amount as it considers appropriate if the FSA is satisfied that a person has engaged in market abuse.
4. Section 118(1) of the Act defines "market abuse" as "*behaviour which...*
 - (a) *occurs in relation to qualifying investments traded on a market to which this section applies;*
 - (b) *satisfies any one or more of the conditions set out in subsection (2); and*
 - (c) *is likely to be regarded by a regular user of that market who is aware of the behaviour as a failure on the part of the person or persons concerned to observe the standard of behaviour reasonably expected of a person in his or their position in relation to the market.*"
5. Of the three conditions set out in section 118(2) the one relevant to this case is that:

" the behaviour is based on information which is not generally available to those using the market but which, if available to a regular user of the market, would or would be likely to be regarded by him as relevant when deciding the terms on which transactions in investments of the kind in question should be effected."
6. Shares in Whitehead Mann, being traded on the LSE, are qualifying investments and dealing in such shares is behaviour occurring in relation to such investments for the purposes of section 118(1) of the Act.
7. The term "regular user", in relation to a particular market, means "*a reasonable person who regularly deals on that market in investments of the kind in question*" (section 118(10) of the Act).
8. Under section 119 of the Act the FSA has issued the Code of Market Conduct ("the Code"), which contains guidance as to whether or not behaviour amounts to market abuse. Under section 122 of the Act, the Code may be relied on so far as it indicates whether or not

particular behaviour should be taken to amount to market abuse. In respect of this Final Notice, the FSA has had regard to MAR 1.2 of the Code which sets out guidance on the regular user and MAR 1.4 of the Code which sets out guidance on misuse of information.

9. In determining the appropriate level of penalty in this case, the FSA has had regard to Chapter 14 of the Enforcement Manual ('ENF 14'), headed: *Sanctions for Market Abuse*.

Findings of Fact

Background

10. Whitehead Mann is a publicly listed company whose shares are traded on the LSE and are a component of the FTSE SmallCap Index. Whitehead Mann provides executive search, selection and human resource consulting services through its offices in America, France, Germany, Hong Kong and the United Kingdom. Its head and registered office is located at 11 Hill Street, London W1J 5LG.
11. At all material times, Mr Bracken was employed by Whitehead Mann Limited, a subsidiary of Whitehead Mann. Mr Bracken joined Whitehead Mann Limited on 21 July 1997, and worked initially in the Consumer, Technology and Media practice groups before he moved to Whitehead Mann's Consulting Division in 2000. In 2001, Mr Bracken was appointed Group Head of Communications and was based at Whitehead Mann's London office.
12. As Group Head of Communications, his responsibilities included the production of all Whitehead Mann's marketing materials and brochures and dealing with general enquiries from the press. He would also assist in drafting public statements to be made by the Chief Executive Officer ('CEO') but would not take part in the drafting of RNS announcements. Mr Bracken reported directly to the then CEO, and they met in person approximately once every two weeks. Mr Bracken was also in regular working contact with the other members of Whitehead Mann's senior management team.
13. When Whitehead Mann was intending to issue an announcement, the CEO would inform Mr Bracken before releasing the same so that Mr Bracken would be in a position to respond to telephone inquiries once the announcement was published. Accordingly, Mr Bracken would regularly have access to information concerning the performance and business of Whitehead Mann, including non-public information.
14. Mr Bracken's employment at Whitehead Mann ended on 24 January 2003 for reasons unrelated to this Final Notice.
15. The FSA considers Mr Bracken to be a knowledgeable and experienced investor in shares listed on the LSE.

Announcement of 27 September 2002 ('the First Announcement')

16. At 8.15 am on 27 September 2002, Whitehead Mann issued the First Announcement via the Regulatory News Service, in which it was stated:

“Trading update

Since the Group’s Annual General Meeting [on 24 July 2002], trading conditions in all the Group’s markets have remained tough and continue to show no signs of improvement. As a result, the Group’s turnover for the six months ending 30 September 2002 is expected to be approximately £34.5 million, including the £1.5 million referred to below (2001 - £31.5 million).

The Group continues to invest in the development of its overseas operations (situated in the US, France, Germany and Hong Kong) in line with its stated strategy. At the same time the Group has adjusted its cost base and has incurred an exceptional charge of approximately £2.0 million. As a consequence, and taking account the disposal described below, the Board expects the Group’s profit before tax for the year ending 31 March 2003 to be at similar levels to last year.

Disposal of businesses

The Board announces that it has today disposed of the Baines Gwinner Training and Baines Gwinner Careers businesses (“Training and Careers”), acquired as part of the Group’s acquisition of Baines Gwinner Holdings Limited on 23 November 2001, to a management buyout team. The Group is receiving a consideration of £2.7 million in cash. Training and Careers contributed £1.5 million of the Group’s turnover during the period from 1 April 2002 until their disposal.”

17. Whitehead Mann has stated that the principal reason for the announcement was to update the market in respect of Whitehead Mann's likely outcome for the financial year ending 31 March 2003. At the close of trading on 26 September 2002 Whitehead Mann's share price was 202.5p. At the close of trading on 27 September 2002 the share price was 146.5p, representing a fall of approximately 28% following the First Announcement.

Mr Bracken’s trading in September 2002 before the First Announcement

18. At 9.51 am on 26 September 2002, Mr Bracken made a telephone call from Whitehead Mann's London office to the Manchester office of WH Ireland Ltd ('WH Ireland') and spoke to one of its stockbrokers. Mr Bracken had been a client of WH Ireland since 1997 and was known by its stockbrokers as a regular trader of shares.
19. Mr Bracken instructed the stockbroker to short sell 5,000 shares in Whitehead Mann, on an execution only basis, and to use account no C044554 for this purpose.
20. Account no C044554 was held in the name of Mr Bracken's wife and was used solely for the purpose of short selling. Mr Bracken had authority to use this account at all material times and had done so on several previous occasions.
21. The stockbroker executed the transaction by selling 5,000 shares in Whitehead Mann at 190p each, using account no C044554 and with settlement due on or before 10 October.

Mr Bracken's trading in September 2002 after the First Announcement

22. At 9.47 am, on 27 September 2002, Mr Bracken again telephoned WH Ireland in Manchester from Whitehead Mann's London office and spoke to the same stockbroker, instructing him to close out his short position by purchasing 5,000 Whitehead Mann shares.
23. The stockbroker executed the transaction by purchasing 5,000 shares in Whitehead Mann at a price of 138p. The resulting profit amounted to £2,430.50 net of commission and charges. Part of this profit was transferred to Mr Bracken's deposit account no D044554 at WH Ireland.

Information available to Mr Bracken on 26 September 2002

24. The Board of Whitehead Mann had met on 25 September 2002 and agreed with a recommendation from Whitehead Mann's Group Management Committee that, subject to advice from its stockbrokers, RW Baird, Whitehead Mann should issue a pre-close period announcement to the market which would include a negative trading statement. The Board appointed a sub-committee, comprising the CEO, the Finance Director and the Non-Executive Chairman, to consider professional advice and make a final decision on the timing and content of the announcement.
25. Mr Bracken met with the CEO at 8.30 next morning on 26 September. At this meeting, the CEO told Mr Bracken that Whitehead Mann was likely to issue a profit restatement and that Mr Bracken, as Group Head of Communications, should prepare himself to answer questions, both internally and externally. The meeting finished at approximately 9.00 am.
26. It was within one hour of the end of this meeting with the CEO that Mr Bracken telephoned WH Ireland in order to short sell 5,000 shares in Whitehead Mann.
27. Later on 26 September 2002, the Board sub-committee met with RW Baird to finalise the announcement and authorise its release next morning.

Announcement of 12 November 2002 ('the Second Announcement')

28. At 7.02 am on Tuesday 12 November 2002, Whitehead Mann issued the Second Announcement in which it set out details of its interim results for the half year ending 30 September 2002. The announcement also explained that Whitehead Mann had appointed a new CEO. Whitehead Mann's Chairman, commented that, "*the outlook continues to be uncertain, although recent recruits at senior levels are progressing well, helping us to develop our business in difficult market conditions.*"
29. At the close of trading on 11 November Whitehead Mann's share price was 130p. At the close of trading on 12 November the share price was 117.5, representing a fall of approximately 10% following the Second Announcement. On 13 November the share price fell by approximately 8.5% (10p) to 107.5p, where it remained until 20 November. It then dropped a further 2.3% (2.5p) to 105p. Whitehead Mann's share price therefore fell by almost 20% (25p) between 11 November and 21 November.

Mr Bracken's Trading in November 2002 before the Second Announcement

30. At approximately 8.30 am on 11 November 2002, the day before the Second Announcement, Mr Bracken telephoned WH Ireland's Burnley office and spoke to one of its stockbrokers about short selling Whitehead Mann shares. On being told that the largest transaction then possible was for 3,000 shares, Mr Bracken instructed the stockbroker to short sell that number of Whitehead Mann shares, on an execution only basis, and again to use account no C044554 for the purpose. The stockbroker executed the transaction by selling 3,000 Whitehead Mann shares at a price of 123p each, using account no C044554 and with settlement due on or before 25 November.

Mr Bracken's Trading in November 2002 after the Second Announcement

31. At 1.51 pm on 21 November 2002, Mr Bracken telephoned and instructed the same stockbroker at WH Ireland's Burnley office to purchase 3,000 Whitehead Mann shares, in order to close out the short position in account no C04454. The stockbroker executed the transaction by purchasing 3,000 Whitehead Mann shares at a price of 107p.
32. The resulting profit amounted to £393.95, net of commission and charges, which was again transferred to Mr Bracken's deposit account no D044554 at WH Ireland.

Information available to Mr Bracken on 11 November 2002

33. As Group Head of Communications, Mr Bracken was involved in the process leading to the publication of Whitehead Mann's interim financial results because he was responsible for the production of the 'glossy' version for circulation to shareholders and other interested parties. In the course of that involvement, Mr Bracken received the detailed figures set out in the Board version of the interim financial results on 1 November 2002.
34. On 8 November 2002 at 4.30 pm, Mr Bracken met with Whitehead Mann's Finance Director. The meeting was arranged at the latter's request, in order to inform Mr Bracken that the CEO would be stepping down for health reasons and that a new CEO would shortly be appointed. The Finance Director was concerned that there might be a leak of this information over the weekend and wanted to make sure that, if there were press enquiries, Mr Bracken would be in a position to manage the situation.

Mr Bracken's knowledge of the Whitehead Mann Share Dealing Code and Employee Policy Manual

35. At all material times, Whitehead Mann operated a Share Dealing Code which clearly stated that an employee who wished to deal in Whitehead Mann shares would have to seek permission from a designated director and any such permitted dealing had to take place through Whitehead Mann's brokers. This requirement was reiterated in the Employee Policy Manual which applied to all employees. The Share Dealing Code also forbade employees from short selling Whitehead Mann's shares.
36. Further, employees were not to deal in Whitehead Mann's shares in the two months before the preliminary announcement of its annual results or the announcement of its interim results. Each of these periods was a 'close period'. Strict compliance with the Share Dealing Code was a condition of Mr Bracken's employment contract with Whitehead Mann Limited.

37. Mr Bracken has stated that he was not aware of the requirements of Whitehead Mann's Share Dealing Code and Employee Policy Manual. The FSA considers it most implausible that a person in Mr Bracken's position would not have been fully aware of his employer's share dealing rules and requirements. In any event, Whitehead Mann would regularly remind all its staff of their obligations under the Employee Policy Manual and Share Dealing Code.
38. Furthermore the CEO had sent an email to all Whitehead Mann employees, including Mr Bracken, on 27 September 2002, in which he reminded all employees that Whitehead Mann was in a close period in advance of the announcement of its half-year results on 12 November 2002.
39. Mr Bracken did not seek permission for his trading either prior to the First Announcement or before the Second Announcement. Whitehead Mann has stated that, if he had sought permission at these times, it would have been refused.
40. The fact that Mr Bracken's trading was contrary to Whitehead Mann's Share Dealing Code and Employee Policy Manual does not of itself amount to market abuse. However, the FSA considers that Mr Bracken's failure to seek permission for his trading prior to the First Announcement and the Second Announcement, his failure to use Whitehead Mann's designated brokers and the fact that his trading in November 2002 occurred during a close period all provide evidence that Mr Bracken's trading was based on his misuse of relevant information and therefore amounted to abusive behaviour.

Market Abuse

41. The FSA considers that in this case market abuse occurred within the meaning of that expression in section 118 of the Act.
42. The behaviour of Mr Bracken considered by the FSA to amount to market abuse is:
 - (a) Short selling 5,000 shares in Whitehead Mann on 26 September; and
 - (b) Short selling 3,000 shares in Whitehead Mann on 11 November.
43. By reference to the three required elements under section 118(1) of the Act (which makes reference to section 118(2)), the behaviour of Mr Bracken, as described above, amounted to market abuse in that the behaviour:
 - (a) occurred in relation to Whitehead Mann shares, which are qualifying investments, being traded on the LSE which is a prescribed market for the purposes of the regime;
 - (b) was based on information which was not generally available to those using the market but which, if available to a regular user of the market, would have been or would have been likely to be regarded by him as relevant when deciding the terms on which transactions in such investments should be effected; and
 - (c) is likely to be regarded by a regular user of the LSE market as a failure on the part of Mr Bracken to observe the standards of behaviour reasonably expected of a person in his position in relation to the market.

Behaviour in relation to qualifying investments

44. The behaviour of Mr Bracken occurred "in relation to" qualifying investments (Whitehead Mann shares) traded on a market (the LSE) to which section 118 of the Act applies.

Misuse of Information

45. As noted at paragraph 5, under section 118(2)(a) of the Act, behaviour may amount to market abuse where it is based on information which is not generally available to those using the market but which, if available to a regular user of the market, would or would be likely to be regarded by him as relevant when deciding the terms on which transactions in investments of the kind in question should be effected.
46. As indicated in the Code (at MAR 1.4.4(4)), behaviour will amount to market abuse under section 118(2)(a) in circumstances where the behaviour satisfies the following tests:
- (a) the dealing must be based on information. The information must have a material influence on the person's decision to deal (but need not be the only reason for his dealing);
 - (b) the information is not generally available;
 - (c) a regular user of the market is likely to regard the information as relevant when deciding the terms on which transactions of the kind in question should be effected; and
 - (d) the information must relate to matters which the regular user would reasonably expect to be disclosed to users of the prescribed market.

Behaviour based on information

47. The timeliness of Mr Bracken's possession of the relevant information in relation to Whitehead Mann's two announcements and his short selling of Whitehead Mann shares coupled with the fact that he did not seek permission to trade, indicate that his short selling in advance of the First Announcement and the Second Announcement was materially influenced by and was therefore based on the information set out at paragraphs 24 and 25 and paragraphs 33 and 34 respectively. The FSA has further concluded that in each case such information had a material influence on his trading.

Information not generally available

48. The information set out at paragraphs 24 and 25 was not generally available in advance of the First Announcement. The information set out at paragraphs 33 and 34 was not generally available in advance of the Second Announcement. In neither case could the information that materially influenced Mr Bracken have been obtained by research or analysis conducted by or on behalf of users of the market. Nor had the information been generally available under the criteria set out under the Code (MAR 1.4.5). It was information that became available to Mr Bracken from his employment position as Group Head of Communications within Whitehead Mann.

Relevant information

49. In each case the information that materially influenced Mr Bracken, in relation to his trading, concerned the business affairs and prospects of Whitehead Mann. Such information is described by the Code as being an example of relevant information. Further, the information was obtained by Mr Bracken during the course of his employment with Whitehead Mann and was obtained directly in connection with the fulfilment of his duties as Group Head of Communications, which would suggest to the regular user that such information was reliable and therefore relevant.
50. The relevance of the information is further evidenced by market users' immediate reaction to the First Announcement and the Second Announcement, which saw falls in Whitehead Mann's share price of 28% and approximately 10% respectively.

Disclosable information

51. The information which materially influenced Mr Bracken for his September and November Trading related to matters which a regular user would reasonably expect to be disclosed to other users of the market. The information which materially influenced Mr Bracken was information relating to the financial performance of Whitehead Mann and/or the performance of its business. Information concerning such matters was required to be disclosed under Listing Rule 9.2 and was in fact disclosed in the First Announcement and the Second Announcement respectively.

Failure to observe standards of behaviour

52. The FSA considers that a reasonable person who regularly deals on the LSE would regard Mr Bracken's behaviour as a failure to observe the standard of behaviour reasonably to be expected of an employee of a listed company who was regularly entrusted with information which was not generally available and which was relevant. Being in such a position, Mr Bracken was well aware of the sensitivity of the information available to him and the impropriety of exploiting that information to his own advantage before it had been made available to investors in accordance with Whitehead Mann's obligations under the Listing Rules. Further, Mr Bracken's failure to comply with Whitehead Mann's Share Dealing Code and Employee Policy Manual is additional evidence of his failure to observe the standards reasonably expected of an employee in his position.
53. The Code makes clear (at MAR 1.4.3) that, where market users rely on the timely dissemination of relevant information (as in the case on the LSE) those who possess relevant information ahead of its general dissemination should refrain from acting on that information. Confidence in such markets depends, in part, on market users' confidence that they can deal with each other on the basis that they have equal, simultaneous access to information that is required to be disclosed.

Financial Penalties

54. In enforcing the market abuse regime, the FSA's priority is to protect prescribed markets from any damage to their efficiency caused by the misuse of information in relation to the market. The effective and appropriate use of the power to impose penalties for market abuse will help to maintain confidence in the UK financial system by demonstrating that high standards of

market conduct are appropriately enforced in the UK financial markets. The public enforcement of these standards also furthers the public awareness of the FSA's protection of consumers objective, deterring future market abuse (ENF 14.1.3).

55. In accordance with the FSA's published policy (ENF 14.4) in determining whether to take action in respect of market abuse, and in determining the level of any proposed penalty, the FSA has regard to all the circumstances, including the nature and seriousness of the abuse, the person's conduct following the abuse, the nature of the market that has been abused, the likelihood of abuse of the same type being repeated and the need to deter such abuse, and the previous history of the person concerned.
56. This is one of the first cases in which the FSA has decided to impose a financial penalty in respect of market abuse.
57. The FSA has taken all the relevant circumstances into account in deciding that it is appropriate to impose a financial penalty in this case and that the level of the penalty imposed is proportionate. The FSA has particular regard to the guidance set out in ENF 14.4, 14.6 and 14.7 and to the following considerations:
 - (a) Mr Bracken's net total profit from his trading in September and November was £2,824.45. The FSA would normally seek to impose a penalty that at a minimum deprived Mr Bracken of the benefits that he gained from his abuse;
 - (b) investors in Whitehead Mann, as with any investors, need to have confidence in the integrity of the processes by which shares are traded on the market. The misuse of information by an employee who obtains relevant information through the course of his employment must undermine investor confidence very seriously. It can result in significant financial gain and yet the detection of such abuse is very difficult. The FSA therefore considers it essential that the penalty imposed should be such as not only to deprive Mr Bracken of his improper gain but also to act as a powerful incentive to others to refrain from such abuse;
 - (c) the seriousness of this case is aggravated by the fact that Mr Bracken was Group Head of Communications for a publicly listed company. As such he was entrusted with highly sensitive information, a trust he abused through the use of that information in his trading in September and November 2002;
 - (d) Mr Bracken's behaviour was deliberate. It was carried out twice by an experienced investor and he failed to use Whitehead Mann's house broker in order to execute the trades in September and November;
 - (e) Mr Bracken has no previous history of misconduct and nor is he or was he an approved person.

CONCLUSION

58. The imposition of a penalty for market abuse is a very serious measure but the seriousness of the abuse in this case is such that the FSA considers the imposition of a penalty in the amount decided is appropriate.

59. The FSA recognises that the impact on Mr Bracken, as an individual, is likely to be very significant but considers that Mr Bracken's behaviour merits the imposition of a financial penalty of £15,000.

IMPORTANT NOTICES

This Final Notice is given to you in accordance with section 390 of the Act.

Manner of payment

The financial penalty of £15,000 must be paid to the FSA in full.

Time for payment

Mr Bracken must pay to the FSA, £5,000 of the penalty ("the first instalment") by no later than 20 July being not less than 14 days beginning with the date on which this notice is given to you. The remaining balance of the penalty ("the remaining balance") must be paid to the FSA by no later than 31 October 2004.

If the penalty is not paid

If all or any part of the first instalment and/or all or any part of the remaining balance is outstanding after the agreed date of payment, the FSA may recover the outstanding amount as a debt owed to you and due to the FSA.

Publicity

Sections 391(4), 391(6) and 391(7) of the Act apply to the publication of information about the matter to which this Final Notice relates. Under those provisions, the FSA must publish such information about the matter to which this Final Notice relates as the FSA considers appropriate. The information may be published in such manner as the FSA considers appropriate. However, the FSA may not publish information if such publication would, in the opinion of the FSA, be unfair to Mr Bracken or prejudicial to the interests of consumers.

The FSA intends to publish such information about the matter to which this Final Notice relates as it considers appropriate.

FSA contacts

For more information concerning this matter generally, you should contact George Davies at the FSA (direct line: 020 7066 1600/fax: 020 7066 9721).

Carlos Conceicao
Head of Market Integrity
FSA Enforcement Division