IN THE ENFORCEMENT COMMITTEE
ESTABLISHED IN TERMS OF SECTION 97 OF THE SECURITIES SERVICES ACT, 36 OF 2004

CASE NO: **1/2007**

In the matter of:

THE FINANCIAL SERVICES BOARD	The Referring Party
and	
BERMAN, MICHAEL	First Respondent
STACEY, NEIL	Second Respondent

DETERMINATION OF THE ENFORCEMENT COMMITTEE

Before The Hon Mr Justice C F Eloff; Ms C Dlepu; R G Cottrell; Ms C Maynard; E A Moolla and H M S Msimang.

The Hon Mr Justice C F Eloff: The Panel has considered all the aspects of the case and I am now in a position to give its reasons and its final conclusions.

This enquiry was initiated by the Directorate of Market Abuse who then, acting in terms of section 94(e) of the Securities Services Act, 2004, referred the matter to this Committee.

The function of this Committee is to adjudicate on the charges laid against the two Respondents, Michael Berman and Neil Stacey.

The essence of the charges is that the two Respondents participated on 31 March 2005 in the use of manipulative, false or deceptive practices of trading on the Johannesburg Stock Exchange in the shares of two listed companies, namely Ifour Properties Limited ("Ifour") and SA Retail Properties Limited ("SA Retail"). The manner in which they allegedly participated in the said practices is as described in section 75(3)(b) to (h) of the Act which provides:

"75(3) Without limiting the generality of subsection (1), the following are deemed to be manipulative, improper, false or deceptive trading practices:

(a) …

(b) Approving of entering on a regulated market an order to buy or sell a security listed on that market with the knowledge that an opposite order or orders of substantially the same size at substantially the same time and at substantially the same price, have been or will be entered by or for the same or different persons with the intention of creating –

(i) a false or deceptive appearance of active public trading in connection with; or

(ii) an artificial market price for,

that security;

(c) approving or entering on a regulated market orders to buy a security listed on that market at successively higher prices or orders to sell a security listed on that market at successively lower prices for the purpose of unduly or improperly influencing the market price of such security;

(d) approving or entering on a regulated market an order at or near the close of the market, the primary purpose of which is to change or maintain the closing price of a security listed on that market;

(e) …

(f) …

(g) …

(h) employing any device, scheme or artifice to defraud any other person as a result of a transaction effected through the facilities of a regulated market; or

(i) engaging in any act, practice or course of business in respect of dealings in securities listed on a regulated market which is deceptive or which is likely to have such effect. ..."

Details of the alleged practices and of the relevant facts are set out in the Particulars and documentation served on the Respondents.

In response to the charges the First Respondent admitted his contravention of section 75 "by intentionally manipulating the price of shares in Ifour Properties Limited and SA Retail Properties Limited." He accepted the correctness of the summary of his conduct as set out in the charge. He mainly dealt with the quantum of the administrative penalty suggested by the Directorate of Market Abuse.

The Second Respondent also filed an affidavit in the conclusion of which he submitted that by reason of the circumstances set out he was not guilty of the alleged contravention.

Section 102(3) of the Act requires this Panel to "consider" the documentary evidence submitted to it;

Section 102(4) enjoins it to make a "just decision"; and, finally

Section 104(1) provides that "if satisfied" that the contraventions were proved, to set an administrative penalty.

It should in this regard be noted that while the Directorate of Market Abuse is only the referring party to this enquiry, it engaged counsel to assist in the enquiry. The Panel granted counsel full rights of audience and found his contribution to the debate very useful.

This Committee resolved that the issues involved in the matter would be considered in the joint hearing, bearing in mind of course that the circumstances concerning the two Respondents differed

The first main question is that of the guilt or otherwise of the Respondents.

As regards the First Respondent, his admissions are amply supported by the evidential material placed before the Committee and no more need be said on the issue at this stage.

As regards the Second Respondent, the issues are mainly factual. The question of standard of proof was considered by the Panel. Its ruling is that proof on a balance of probability is indicated. That will accord with the criteria laid down by various disciplinary bodies in this country, and will meet the needs of natural justice. It should be stressed that this is an administrative enquiry and not a criminal case and proof beyond a reasonable doubt is not required.

The evidential material before the Committee includes a transcript of the interrogation of the Respondents by the Financial Services Board as also

of the recorded telephonic discussions of the Respondents late in the afternoon of 31 March 2005. It is in this context necessary to point out that the Second Respondent did not challenge the general correctness of the transcription of the telephonic discussions.

The following background facts emerge from the documentation.

The First Respondent was at the relevant time the key individual of a financial services provider of a company styled Velocity Trading (Pty) Limited ("Velocity Trading"). In that capacity he managed investments on behalf of clients of Velocity Trading and of the trust fund styled Mayibentsha Velocity Fund Trust ("Mayibentsha Fund").

The Second Respondent is a securities trader employed by HSBC Securities (South Africa) (Pty) Limited in the position of Head of Equities Trading in the Sales Trading department. In his affidavit the Second Respondent records that Velocity Trading became a client of HSBC in 2001. He met First Respondent once and thereafter communicated with him telephonically.

We interpose to point out that the recorded telephonic discussion shows that they were on a first-name basis and spoke as though there was a friendly relationship. Various share dealings were conducted at the behest of Velocity Trading and it can be inferred that the Second Respondent

knew who the parties were on behalf of whom the First Respondent traded.

The Second Respondent states that although he was the securities trader in the trades alleged to be fraudulent or deceptive, he had no knowledge that the trades were tainted. He notes the confession of the First Respondent but avers that he did not "knowingly" play a part.

It accordingly becomes the task of this Panel to decide whether the necessary intent has been proved. Proof of intent, as in most cases, is a question of reasoning by inference from the proved facts. Our task in this regard necessitates subjecting the transactions and discussions involved to thorough scrutiny. All of these were done on 31 March 2005 shortly before the close of trade by the Johannesburg Stock Exchange at 17:00.

It is in this regard relevant that the Second Respondent conceded during his interrogation that this was the close of a quarter with the attendant risk of "window dressing" particularly of hedge funds. At 16:28 First Respondent instructed the Second Respondent to buy 4 000 Ifour shares. At that stage the last recorded transaction was at 870cps, a factor of which Second Respondent was aware. First Respondent asked "can you buy all the way up to 940cps". This clearly shows that the intention was to buy all the way up to 940. Buying 4 000 shares was merely the means by which this was to be achieved ("… do it like this").

The Second Respondent would clearly have understood that the instruction to buy 4 000 shares amounted in effect to an instruction to purchase all the 2 788 shares offered at 870cps, to purchase all 1 000 offered at 885cps and to purchase a mere 212 of the 19 930 shares offered at 940cps.

During his interrogation the Second Respondent admitted, we think logically and correctly, that if he had been given a discretion to trade he would not have bought the 212 shares at 940cps. He responded to the instruction by seeking clarification that First Respondent was going to end up at 940cps. The reply was "that's what I want to do". In other words, the First Respondent made it clear that he was not so much interested in buying 4 000 shares but to achieve a recording of the price at 940cps. It is not surprising that the Second Respondent commented "4 000 I bought (inaudible) the market probably thought what the f...".

The Second Respondent must have realised that the objective of the First Respondent was to move the ifour price up to 940cps. Then, at 16:41:53, someone entered an offer to sell 88 Ifour shares at 840cps. That meant that the last trading price was back at 840cps. The First Respondent phoned the Second Respondent again, asking if he could buy 200 Ifour shares at 940cps. That prompted the Second Respondent to comment "someone is paying the game with you". First Respondent's response was that they wait a little, to which Second Respondent suggested "let's do something closer to the bell". This suggestion goes far to show that the

Second Respondent recommended that they should strive to ensure that the last recorded sale on 31 March 2005 would be at 940cps. So, at 16:57, some two minutes before the close of the market, Second Respondent on instructions from First Respondent, entered the bid to buy 200 Ifour shares at 940cps. The result was that the last recorded price of Ifour shares was at the level of 940cps. This shows that the mutual intent of the Respondents was to affect the closing price and to prevent the other party from frustrating their plans. About 15 minutes later, and five minutes into the auction period, the First Respondent again phoned the Second Respondent at 16:55 to instruct him to buy 100 Ifour shares at 940cps. This typical small purchase must have been aimed at manipulating the closing price.

We turn now to the deals in SA Securities. Still in the afternoon of 31 March 2005, the First Respondent telephonically instructs the Second Respondent to offer to sell SA Retail shares on behalf of Velocity Trading at 875cps. At the same time, 16:35:05, he instructs Second Respondent to buy the same shares for the Mayibentsha Fund at 875cps. At that time the SA Retail shares were traded at 800cps. According to the recorded conversation the First Respondent introduced the discussion by saying "I want to do some doctoring here". The Second Respondent duly entered the offers with the result that at 16.37, because the SA Retail shares were illiquid, that is they were traded infrequently and in small quantities, the price of 875cps became the reference price for its shares on 31 March 2005.

In considering whether the Second Respondent can really be heard to say that he did not know what the First Respondent was up to, other factors have to be considered. Rule 5.25 of the Rules of the Johannesburg Stock Exchanges casts certain obligations on the Second Respondent. He may not knowing participate in the use of any manipulative or deceptive methods of trading or which might create false of misleading appearances or an artificial price for a security. He is bound to give consideration to the circumstances of orders "and shall prima facie be responsible for the integrity of such orders".

Transactions such as those which I have described are deemed to be manipulative or deceptive methods of trading. In the face of these requirements it is significant that the Second Respondent did not enquire from the First Respondent what he was up to and what he meant by "doctoring". The inference is that the Second Respondent did not enquire because he knew full well that the First Respondent was trying to manipulate the market. It is possible to assume that at the very earliest stages of the discussions on that day the Second Respondent may not have been alive to what the true intention of the First Respondent were but as the discussions ensued he must have realised what was going on.

In his answering affidavit the Second Respondent explains that he was very busy in the afternoon of 31 March 2005 and may not have paid close attention to what was going on. In our judgment the recorded telephone

conversation shows that the Second Respondent was fully alive to what was involved in each trade.

It will be recalled that the Second Respondent's explanation regarding the initial purchase of the 4 000 shares, including 212 shares at 940cps, was that he believed that this was a "balancing transaction". To his knowledge, after the price had fallen back to 840cps, the First Respondent had raised with him a possible purchase of 200 shares at 940cps but they had agreed to "rather do something closer to the bell". Closer to the bell, the instruction was to buy 100, not 200 shares. If the 4 000 shares had been purchased as a balancing transaction, why would a further 200 be required a few minutes later? Moreover, why would 100 be sufficient to balance when only a few minutes before 200 were necessary to balance? We hold that the truth is that the Second Respondent never believed in the balancing theory and was well aware of the market manipulation objective.

In our view the protestations in the answering affidavit cannot survive a thorough analysis and evaluation of the relevant circumstances. Efforts by the Second Respondent to explain his understanding of "doctoring" in his explanation that the market would think "what the f..." and his explanation concerning "close to the bell" are not acceptable or credible.

The statements in his affidavit by the Second Respondent that he derived no reward from the First Respondent and would not have risked his reputation are adequately met by the clear inferences from the facts.

Our final analysis is that the circumstances, established by facts which were common cause or beyond dispute, attract the inference that the Second Respondent was a willing participant in the schemes of the First Respondent. He is found to have committed the acts charged. Our conclusion therefore is that both Respondents are found to have committed the contraventions alleged in the charge.

That brings us to the question of the penalties to be imposed. Section 104(8) of the Act requires us to consider, firstly, the nature and seriousness of the contravention in question. It is also necessary to consider whether the contravention was deliberate.

In our view the contravention was deliberate and very serious. Not only was there a great potential of harm but it could prompt investors in the market to question the trustworthiness and credibility of the market. Subsection (c) raises the question of the quantum of losses suffered due to the contravention. In a case such as the present it is not possible to ascertain any exact figures. It can however be recorded that the contraventions involved significant levels of dishonesty and have the effect of adjusting the aggregate market capitalisation of the relevant shares by more than R300 million. And as I have said, the question of potential harm is relevant.

Then we are required to consider the level of profit derived by the perpetrators. As far as Second Respondent is concerned, we accept that he did not receive any monetary reward for his role in the ventures. As far as the First Respondent is concerned, Mr Shapiro indicated that he probably made something between R4 000 and R16 000 from his scheme. We accept, referring to subsection (e), that Respondents have clean records. And then we are required to take account of "any factor that the panel considers relevant" subsection (f).

In our opinion a relevant factor is that of the deterrent effect of the imposition of a large penalty. Counsel for Respondents urged that it is significant that the Act does not in so many words spell out that deterrence is a factor. That is irrelevant. In our judgment this is such a self-evident fact that it need not have been said. It is in the context of the deterrent effect important that we are here concerned with a market in which huge amounts are frequently traded by persons with considerable resources. Only if an amount, large by any standard, is fixed, will it have an adequate effect, or to put it more plainly, will it not make commercial sense for any other person to endeavour to embark upon similar schemes.

We consider it relevant also that the Act by section 115, which provides for a fine of R50 million, indicates an order.

We also consider it imperative to satisfy investors that the market is well regulated and trustworthy and that a very serious view is taken of transgressions.

The Act indicates that the personal circumstances of the Respondents should be considered.

As far as the First Respondent is concerned, we take careful note of the evidential material aduced. We accept that to impose a penalty of the order suggested by the Directorate of Market Abuse will be ruinous. It is in this context, of course, also a fact that the imposition of administrative penalty well in excess of the tendered amount of R250 000 might also well be ruinous.

As far as the Second Respondent is concerned we accept that he has a good and unblemished record, but we do not accept that he was unaware what the First Respondent was up to. His role was not simply a passive one and regard should be had to the reality that by his participation could the First Respondent indulge in his schemes.

The complaint by the First Respondent that he cannot afford a penalty in excess of R250 000 cannot be sustained. Counsel's argument stopped just short of saying that the poorer the transgressor the smaller the penalty.

In any event, in our view the overriding factor is that of the deterrent effect. The imposition of a large amount is indicated.

In regard to the First Respondent the amount of the administrative penalty is fixed at R2 million.

In favour of the Second Respondent is the fact that he was not the author of the schemes. Nevertheless, a trader such as he plays a vital role in transactions such as those under discussion. The fact that he disregarded the obligations cast on him by the Johannesburg Stock Exchange is an aggravating feature.

We fix the administrative penalty in his case at R2 million.

Lastly, we were asked to consider the question of costs. We decline to make any order in this regard. This was the first enquiry of its kind, and if the Directorate of Market Abuse intends to raise the question of costs, it should establish proper procedures to achieve that result.

CHAIRPERSON

31 October 2007