Neutral Citation Number: [2020] EWCA Crim 1730

Case No: 201902750 B5
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IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SOUTHWARK CROWN COURT
HER HONOUR JUDGE KORNER CMG, QC.
T20170392

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2020

Before :

LORD JUSTICE DAVIS
MRS JUSTICE TIPPLES
and
MR JUSTICE WALL

- -

Between :

REGINA (THE FINANCIAL CONDUCT AUTHORITY)	**Respondent**
- and -	
FABIANA ABDEL-MALEK	**First Appellant**
WALID CHOUCAIR	**Second Appellant**

(Transcript of the Handed Down Judgment.
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Official Shorthand Writers to the Court)

Mr Julian Christopher QC and **Ms Catherine Rabaiotti** (instructed by **IBB Law LLP**) for the **First Appellant**
Mr Richard Wormald QC and **Mr Robert Morris** (instructed by **Peters and Peters Solicitors LLP**) for the **Second Appellant**
Mr John McGuinness QC, **Ms Sarah Clarke QC** and **Mr Tom Broomfield** (instructed by the **Financial Conduct Authority**) for the **Respondent**

Hearing dates: 19th and 20th November 2020

Judgment
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LORD JUSTICE DAVIS :

Introduction

1. This is the judgment of the court.

2. These are appeals against conviction, following verdicts returned in the Southwark Crown Court in June 2019, for offences of insider trading, contrary to s. 52 of the Criminal Justice Act 1993. The appeals, on analysis, raise no particular points of legal principle or wider legal importance. Rather, they are primarily, if not solely, based on issues of what is said to have been insufficient disclosure on the part of the prosecution (the prosecutor being the Financial Conduct Authority) in the light of events occurring at trial or in the light of events occurring after trial or both. It is argued that in consequence the convictions are unsafe.

3. It would be wrong to say that this case shines a spotlight, as such, on activities involving professional trading in listed shares undertaken as a result, so it is said, of the use of price sensitive information: insider trading. But it does perhaps cast at least some light on some of the murkier aspects of what can be involved where such trading is alleged.

4. The appeals cannot be said to have been under-argued. The Consolidated Grounds and Written Argument of the appellant Fabiana Abdel-Malek (FAM) amount to 63 paragraphs and 28 pages of text; those of the appellant Walid Choucair (WAC) to 245 paragraphs and 87 pages of text; those of the respondent to 142 paragraphs and 48 pages of text. The case clearly is, understandably, of very great importance to all the parties concerned.

5. The appellant FAM was before us represented (as below) by Mr Julian Christopher QC and Ms Catherine Rabaiotti. The appellant WAC was before us represented (as below) by Mr Richard Wormald QC and Mr Robert Morris. The respondent was before us represented (as below) by Mr John McGuinness QC, Ms Sarah Clarke QC and Mr Tom Broomfield. The arguments were presented to us most thoroughly, carefully and skilfully. In a case which, one can perhaps deduce, has given rise to rather entrenched views it is a tribute to the parties and to counsel that the appeal hearing itself was conducted in a wholly courteous and straightforward way.

6. We intend for convenience, and without disrespect to anyone, to follow the practice of the written arguments and refer to those principally involved by initials.

Background Facts

7. The background facts and issues arising are in summary (and we stress it is a summary only) these.

8. The appellants were both brought up in London, coming from very respectable home backgrounds. Both are highly intelligent and well-educated. Neither had any previous convictions (save, in WAC's case, for drink driving, which was immaterial for present purposes). They came to know each other from around 2002 as their respective mothers had come to be on very friendly terms. It was not suggested in evidence that the appellants were themselves at any stage involved in a romantic relationship.

9. After graduating, FAM pursued a career in the banking sector. At the relevant times she was employed by UBS Banking Group AG (UBS) at its office in the City of London. She had latterly been undertaking a role in its compliance department.

10. WAC had in due course, after graduating, started out in 2006 as a trader in shares on his own account, mainly working from home in London. It seems that he was on occasions to be described, although he did not himself agree at all with the description, as a "day trader": since many, even if not all, of his transactions were concluded very speedily. He focused primarily on stocks which were, or which were said to be, the subject of merger or acquisition activity, whether potential or actual. His substantial starting capital had derived from inheritances in the form of family trusts, his late father having apparently been a successful contractor in the Middle East. His trading activities would usually be undertaken by him through the medium of two British Virgin Islands registered companies, called Elstan and Valbury Capital. His buy and sell orders were placed through brokers.

11. WAC's trading was usually undertaken by use of contracts for difference. Use of these meant, amongst other things, that greater leverage was available. His particular modus operandi was to focus on the shares of companies which were about to be (or which were said to be about to be) the subject of a take-over bid. If, for example, such a proposed bid were thereafter to attract press or media reporting or if an actual bid eventuated then the share price of the target company could be expected to rise significantly. Accordingly, prior knowledge or information about a proposed takeover could be extremely valuable to a trader. In this regard, WAC was to say in evidence that he regularly received and shared tips and information from and with other international traders and journalists: as, in effect, associates of his.

12. Significant market abuse can occur in the case of unauthorised dissemination and use of price sensitive information. Insider dealing is made a criminal offence under the terms of s. 52 of the Criminal Justice Act 1993. That section provides as follows:

> "(1) An individual who has information as an insider is guilty of insider dealing if, in the circumstances mentioned in subsection (3), he deals in securities that are price-affected securities in relation to the information.
>
> (2) An individual who has information as an insider is also guilty of insider dealing if—
>
> > (a) he encourages another person to deal in securities that are (whether or not that other knows it) price-affected securities in relation to the information, knowing or having reasonable cause to believe that the dealing would take place in the circumstances mentioned in subsection (3); or
> >
> > (b) he discloses the information, otherwise than in the proper performance of the functions of his employment, office or profession, to another person.
>
> (3) The circumstances referred to above are that the acquisition or disposal in question occurs on a regulated market, or that the

person dealing relies on a professional intermediary or is himself acting as a professional intermediary.

(4) This section has effect subject to section 53."

"Inside information", "price-affected securities" and "insiders" are defined in s. 56 and s.57.

13. By 2013 FAM (who had joined UBS some years earlier, in 2007, on a graduate trainee scheme) had recently been transferred to a role as a Senior Compliance Officer within UBS. She was clearly trusted and very well regarded at work. She was at that time living in the family home in West London.

14. UBS is an extremely large bank, with an extensive international investment banking business. In that capacity, it would inevitably be heavily involved on a global basis in mergers and acquisitions activity (WAC was to describe it in evidence as "the Manchester United" of mergers and acquisitions transactional activity). This involved both "pitching" for business and, if the business was obtained, undertaking advisory and financing and other such work, either for the bidding company or for the target company. In such circumstances, the compliance systems of UBS necessarily would contain highly confidential and sensitive information about the many transactions on which UBS globally was working. Those systems would be periodically updated, depending on the progress of the transactions.

15. Shortly after being transferred to the compliance department, FAM in January 2013 started to search and access UBS's computer database in respect of its global mergers and acquisitions activity. She did not tell others at UBS that she was doing so. Since that database itself was being regularly updated, anyone accessing it could trace the details and progress of any particular transaction. The access of FAM was both to UBS's Global List System (GLS) and to its Banker Portal system.

16. It was not disputed that on a very significant number of occasions during 2013 and 2014 FAM accessed the GLS and Banker Portal with regard, in particular, to potential or actual merger or acquisition deals in which UBS was involved. Why she did so was much disputed at trial. As a compliance officer, she had unrestricted access to the GLS and Banker Portal. But, on the other hand, as a compliance officer with the particular responsibilities to which she had been assigned there was no obvious reason, let alone requirement, for her to do so. Her explanation in evidence was to be that, as a newly appointed compliance officer, she was seeking to educate herself in that role by gaining an understanding of the wide ranges and methods of the transactional activities of UBS. Indeed when in May 2014 it was first identified by UBS (for reasons entirely unrelated to the matters which were to become the subject of these proceedings) that she had been accessing the GLS and Banker Portal and this was queried with her, she gave that as her explanation; and that explanation was accepted, indeed it seems that it was commended. She in fact then continued thereafter to gain access, as before, to the GLS and Banker Portal in this way.

17. The indictment was to feature five particular transactions involving UBS which had been the subject of database access by FAM via the GLS and Banker Portal. It is to be noted, however, and as the defence stressed at trial, that in the great part of the overall period which was the subject of the indictment (3 June 2013 to 19 June 2014) FAM

had also accessed the systems very many times in respect of very many companies which did not feature at all in the indictment. Certainly the five transactions in question were never presented to the jury as sample counts or anything like that.

18. The five transactions were these:

(1) First, a proposed take-over by Vodafone PLC of Kabel Deutschland Holding AG. The indictment particularised the dates of FAM allegedly passing inside information and WAC allegedly using that information as between 3 June 2013 and 10 June 2013.

(2) Second, a proposed takeover by Essex Property Trust Inc of BRE Properties Inc: the relevant dates being 29 November 2013 to 4 December 2013.

(3) Third, a proposed takeover by LG Household and Healthcare Ltd. of Elizabeth Arden Inc: the relevant dates being 17 April 2014 to 22 April 2014.

(4) Fourth, a proposed takeover by American Realty Capital Partners of NorthStar Realty Finance Corporation: the relevant dates being 22 April 2014 to 25 April 2014.

(5) Fifth, a proposed takeover by Energy Transfer Equity LP of Targa Resources Corporation (with a related company called Targa Resources Partners LP): the relevant dates being 16 June 2014 to 19 June 2014.

19. At trial, it was common ground that FAM had no business reason as such for accessing the information on these five transactions. On the first transaction, a different compliance officer at UBS had been assigned: and the other four transactions did not involve the London office of UBS at all.

20. There was also no dispute at trial that FAM was to be deemed to be an insider and that she had obtained confidential price sensitive information with regard to each of these five transactions. There was also no dispute that WAC had, through his companies, traded in the stocks of each of the proposed target companies: and had made, it was said, some £1.4 million from his dealings in them. (It was, however, to be stressed on his behalf at trial that in this period he had also profitably engaged in many other trades relating to nearly a hundred other transactions, some of which, moreover, had involved UBS.) With regard to those five particular transactions, WAC had opened his position by in each case buying shares in the target company, by way of contract for difference, before the proposed takeover became the subject of any public announcement or media reporting. He then closed his position shortly thereafter by selling the shares once the proposed takeover became the subject of media reporting. That reporting had caused a spike in the share price of the target company in the interim.

21. The prosecution case, in a nutshell, was that WAC was enabled to trade in this way on each of these five transactions, and thereby to make significant profits therefrom, because he had received relevant price sensitive information from FAM, as an insider, derived from her access to the computer database on the GLS and Banker Portal.

22. The prosecution case was in all its essentials circumstantial. It was heavily based on telephone and text communications, as well as other alleged communications, between FAM and WAC at critical times before WAC made his purchases and before the transactions became the subject of media reporting. The prosecution was at trial to present to the jury in electronic form a graphics pack showing the details of the access by FAM to the information on the GLS and Banker Portal. The prosecution also, and in conjunction with that, presented by way of time-line an electronically accessible analysis of the many hundreds of texts and calls passing between FAM and WAC in this period. Such contacts were in some periods relatively sporadic; but the total number of such contacts was, on any view, striking (especially when no romantic relationship was propounded). However, the actual content of such messages and calls had not been retrievable and so could not be before the jury.

23. It was a feature of the prosecution case that, after an initial period, all such contact between FAM and WAC was by way of Pay-as-you-Go phones (or "burner" phones, as they are sometimes called). It was alleged that this was deliberately designed to frustrate the tracing of such calls. The prosecution was to say that if such calls were entirely innocent, as the defence were saying, then there simply was no reason for avoiding use of contract phones in the usual way.

24. But there was more than that. It was accepted that throughout this period the SIM cards for these phones were, at the behest of WAC, frequently changed: and WAC regularly provided new ones to FAM. Further, for work purposes FAM had a Blackberry 9300 phone, issued to her by UBS. Initially, for the purposes of her contact with WAC, FAM had been provided by WAC with, and had used, a Nokia phone. But WAC then replaced that, for the purposes of their contacting each other, with a version of the 9300 Blackberry phone which was identical to the one with which she had been issued at work. Further, when in July 2014 UBS replaced that Blackberry phone with an updated model, the 9720 version, WAC then promptly proceeded to provide FAM, by way of replacement, with that identical updated 9720 model.

25. The prosecution was to say that that too was highly significant: it was designed to avoid drawing attention to FAM when she phoned or texted WAC from work. So far as FAM was concerned, she was to say in evidence that she thought it a bit "weird" that WAC should insist on Pay-as-you-Go phones as the exclusive means of contact, and with regular replacement of SIM cards: but as she considered him to be a rather unusual person she was prepared to go along with his wishes, without asking questions. So far as WAC was concerned, he was to say that he had initially been sensitive about appearances, given his own position as a share trader, when he learned that FAM had started to work in compliance at UBS. Further, all his telephone calls and texts with brokers and fellow-traders were, he was to say, by use of Pay-as-you-Go phones (as indeed, he said, was his telephone contact with his own mother). He said that he greatly valued privacy. As for his providing FAM (twice) with identical versions of her office Blackberry phone, each was to say that that was, in effect, coincidence.

26. In addition, it was identified that in respect of two of the five transactions (as well, it should be said, as other entirely unrelated ones) FAM had actually printed out price sensitive information obtained from her accessing the GLS. It was alleged that she personally had, on the evening of 2 December 2013, communicated such information

relating to one such transaction to WAC. It was also alleged that she was personally to provide further information to WAC relating to a further transaction at a meeting on the evening of 22 April 2014. Although there was no dispute that WAC and FAM did quite often meet personally from time to time, their alleged meeting on these two occasions nevertheless was strongly disputed at trial.

27. As to the first meeting, there was evidence that FAM had indeed printed out, among other documents, a price sensitive document relating to BRE Properties on the afternoon of 2 December 2013. Cell-site evidence and texts placed FAM in the vicinity of Lancaster Gate (not an area where she lived) that evening. Cell-site evidence also showed the phone of WAC accessing the same mast at those times: thus indicating his phone as being in that same vicinity. Both, however, denied meeting that evening: it was, they said, coincidence that they were in the same locality. WAC was to say that he was probably at a nearby hotel. The prosecution, however, was among other things to rely on a subsequent WhatsApp message from FAM to a relative later that week in which FAM referred to having met WAC "on Monday" (2 December being a Monday). She was to say in evidence that that had been erroneous. She was herself to rely on other such messages as indicating that she had in fact not met WAC for a while.

28. As to the alleged second meeting, FAM and WAC denied meeting each other on the evening of 22 April 2014. She was, she said, viewing a flat in Kensington with her parents. It was coincidence that cell-site evidence put her phone and his phone in the same vicinity (WAC himself lived in Kensington). As to how, on the face of it, rather remarkably, her phone came the next day to have in it a SIM card shown to have been activated on his phone on the previous day by WAC, he was to say that he had bought and activated it earlier on 22 April 2014. He had then given it to his mother, who he knew was seeing FAM's mother that evening, with a view to it being passed on to FAM.

29. It is not necessary (or, indeed, practicable) for present purposes to go in detail through the time-line aspects, as relied on by the prosecution, of FAM's many text and call contacts with WAC at times when she was also accessing, via the GLS and Banker Portal, price sensitive information relating to these five transactions. They inevitably featured prominently at trial.

30. As to those actual five transactions, the position, in summary, was this.

31. The indictment was formulated in pairs of counts. Thus count 1 related to FAM allegedly disclosing, and count 2 related to WAC allegedly receiving, price sensitive information relating to the Kabel Deutschland transaction: and so on. There thus were 10 specific counts overall.

32. On each such transaction, it was not disputed that FAM was regularly accessing the UBS systems (quite often at times when, as it transpired, there had in fact been no updates entered). On her case, of course, it was with a view to educating herself in her new compliance role. Some of her searches were "general" searches. Others were more specific.

(1) <u>Kabel Deutschland (Counts 1 and 2)</u>

33. So far as this transaction was concerned, FAM had made an initial search on GLS in January 2013. Market rumours about a possible takeover began to circulate. She made some more searches on GLS. On 3 June 2013, at 1.15pm, she accessed price sensitive information which by now had been added to the GLS. She then left the office for a period. Some 30 minutes after she had accessed that information WAC placed with his broker a first order to buy shares, by way of contract for difference, in Kabel. He increased his buy order (to a total of 15,000, albeit having at one stage proposed a purchase of 20,000 shares) during that day.

34. On 4 June 2013, that is, the following day, Vodafone made an offer to Kabel. That was not made public. FAM continued her searches, accessing the transaction on the GLS four times on 4 June 2013. Overall, she accessed it on 24 occasions. On 11 June 2013 Bloomberg then published a leaked story on the potential deal. Vodafone publicly confirmed the story on 12 June 2013. WAC then sold, for a significant profit, all his shares on 12 June 2013. In the event, on 24 June 2013 Vodafone then made a revised offer, which it was thereafter announced was accepted. Points made by the defence were, among others, that WAC would have made yet more money had he held on; and further, that on four occasions after he had sold FAM continued, via the GLS, to access the transaction.

(2) <u>BRE (Counts 3 and 4)</u>

35. UBS had been retained as advisers to Essex Properties with regard to a possible takeover of BRE (both companies being in the United States of America). From July 2013 FAM had started regularly to access that proposed transaction on the GLS. By 29 November 2013 further price sensitive information had been placed on the GLS regarding, among other things, financing and the time for bidding. The GLS was accessed by FAM on that day. There was phone contact between FAM and WAC on 1 December 2013. Further price-sensitive information was posted on the GLS on 2 December 2013. FAM printed out a copy by way of Word document. The prosecution, as indicated above, were to allege that she disclosed the information contained in it at the (strongly disputed) meeting shortly after 7pm on the evening of 2 December 2013. At all events, the fact was that WAC placed a first order to buy BRE shares at 7.41 that evening. The following day, FAM made further specific searches against the BRE transaction on the GLS; and WAC purchased more shares in BRE during the day.

36. On 4 December 2013 Bloomberg published a story about the proposed takeover. The share price rose in consequence. On that day WAC then sold most of his shares. He also met FAM for dinner that evening.

(3) <u>Elizabeth Arden (Counts 5 and 6)</u>

37. UBS had in 2014 been retained as advisor to LG Holdings, a Korean company. On 17 March 2014 FAM started to access, via the GLS, that transaction. She also did so the following day, a day on which she exchanged texts with WAC.

38. Bids for Arden (an American company) were supposed to have been due by 2 April 2014, as revealed on the GLS entries. As the defence stressed, WAC had made no purchase by then. Further price sensitive information, however, was then posted on the GLS: which FAM continued to access. On 17 April 2014 she accessed

information about potential acquisition financing very shortly after 1pm. She made two short calls seeking to contact WAC. At 1.39pm she had a telephone conversation with WAC lasting 8 minutes, in the course of which she had left the office albeit returning when the call was finished. There then followed the Easter break. She returned to work on 22 April 2014 and accessed the GLS. There was then (on the prosecution case, in reliance on the cell-site evidence but as was hotly disputed) the meeting on the evening of 22 April 2014. There was also the exchange of the SIM card.

39. During that evening of 22 April 2014, WAC had called his broker and placed an order for the purchase, by way of contract for difference, of shares in Arden (and also in NorthStar). That purchase was completed by 9.15pm. The following morning, that is to say on 23 April 2014, a story was published about the proposed acquisition on Reuters and in a Korean newspaper. WAC then sold all his Arden shares during that day. In the event, the shares for a while climbed yet further: although ultimately the whole takeover was in fact called off. FAM had in the meantime twice accessed the transaction on 23 April 2014; and, after WAC had sold his shares, she also made one further search on the GLS.

(4) NorthStar (Counts 7 and 8)

40. In 2014 UBS had been retained to act for NorthStar in respect of a proposed acquisition of American Realty Corporation. Both companies were American.

41. On 22 April 2014 FAM made a general search on the GLS for merger and acquisition transactions. As a result, NorthStar was identified by her. She searched specifically against that transaction. That search revealed price sensitive information about the proposed acquisition. There were texts passing between the two that afternoon. At 7.19pm that day WAC called his broker to discuss a purchase at the same time as he also discussed a purchase of shares in Arden (see above). He then purchased shares in NorthStar. In total, he was to acquire the underlying equivalent of 500,000 shares.

42. In the course of the afternoon of 24 April 2014, and then again during 25 April 2014, FAM made further searches against (among others) NorthStar. In addition, at around this time she had printed off a document from the GLS containing price sensitive information about NorthStar. That was later found in a handbag in her room at her home. That evening she met WAC at Tramp nightclub. On 28 April 2014 a story about the proposed acquisition appeared in the Financial Times. The share prices rose. WAC then sold all of his shares in NorthStar between 29 April and 1 May 2014.

(5) Targa Resources (Counts 9 and 10)

43. In this matter, UBS had in 2014 been retained to act for the prospective buyer, Energy Transfer Equity. Both advisory work and substantial bridging loan facilities were involved. Here too both corporations involved were American.

44. Price sensitive information on this transaction was entered on the GLS on 12 June 2014. On 16 June 2014, just after 6pm, FAM made a general mergers and acquisitions search, under the heading "Acquisition Financing." This was followed by a specific search on the Targa transaction. Thereafter that evening there were then 22 texts

passing between her and WAC: the indications being that some of them, indeed, must have been exchanged whilst she actually had Targa up on the screen before her.

45. A further search was made by FAM the following day, 17 June 2014, shortly after 5pm. There were text messages between the two. At 5.30pm WAC contacted his broker. At 5.49pm he instructed his broker to buy, by way of contract for difference, 100,000 shares. Such a quantity was not available for immediate purchase, the market for such shares not being very liquid. More searches were made by FAM the following day; further texts passed between her and WAC; and WAC himself, in his instructions to his broker, increased the price that he was willing to pay in order to obtain the desired total of 100,000 shares. Some of the shares in fact were purchased in Targa Resources Partners LP, the two companies being connected companies.

46. On 19 June 2014 a leaked story about the proposed transaction appeared on Bloomberg. On that day, WAC instructed a sale of some of his shares, which took some time to conclude. In the result, WAC made a profit on his dealings in the Targa Resources Corporation shares but made a loss on his dealings in Targa Resources Partners LP. There was an overall profit. Ultimately – and perhaps because of the leaked story – the proposed takeover did not in fact proceed. As for FAM, she went away on holiday on 19 June 2014. Following her return, she made one further search against Targa on 7 July 2014.

47. That, then, is an outline – and we stress it is only an outline – of the five transactions which were the subject of the ten counts.

48. Suspicions had been aroused. Investigations were made. In due course, each of FAM and WAC was interviewed under caution, in the presence of a solicitor. WAC made no comment to all questions asked. FAM, when interviewed in September 2015, answered questions in a way essentially in line with her subsequent evidence at trial. But in the course of her interview FAM told what were subsequently said to be two lies. First, she denied any use of Pay-as-you-Go phones in her contact with WAC. That was in due course admitted by her to have been a lie. Second, she claimed that she had no knowledge of WAC's trading activities, in effect saying that she did not really know what he did. At trial, she was to accept that was at least not the whole truth. She however disputed that that was an outright lie: rather, it was more an incomplete answer. At trial, she was to say that she had lied or made incomplete admissions through panic and out of fear of being thought to be closely mixed up with WAC. In due course, the trial judge was in her summing up to give a full *Lucas* direction.

49. As to motive, the prosecution said that WAC had a clear motive – significant financial gain. So far as FAM was concerned, there was no evidence adduced before the jury of any bribe or other financial inducement being offered to or accepted by her (and the defence were in a position to point to her antecedents and upbringing as being wholly against such a notion). But the prosecution in any event disclaimed so stereotypical a motivation. They pointed to an abundance of evidence suggestive of FAM being very appreciative of her (and her friends) being taken on occasion by WAC to impressive venues such as the night club Tramp: particularly when in her upbringing that would not have been readily achievable and when WAC was presumably viewed by her family as a suitable escort. Thus the social capital, as it were, so acquired could be viewed as one motivation, along with a desire to please WAC. On the prosecution

case, therefore, WAC had in effect, in commercial terms, flattered and groomed FAM into accessing valuable price sensitive information on his behalf.

The respective cases

50. The prosecution case sufficiently emerges from the above summary, we think. That case had a number of strands. These included in particular: (1) the fact that on each of these five occasions WAC swiftly, by selling after the story appeared in the media, traded at a substantial profit in shares of companies the subject of merger and acquisition transactions in which UBS was involved (the judge in due course in fact gave a cross-admissibility direction); (2) the access by FAM to price sensitive information relating to each of these transactions when, as a compliance officer, she had no obvious need or reason to engage in such access; (3) the time lines relating to telephone contact and the sheer level of contact (including the alleged meetings also) between the two at around the time of WAC's purchases; (4) the use of the Pay-as-you-Go, burner, phones virtually for the entirety of their telephone contact; (5) the regular provision by WAC to FAM not only of replacement SIM cards but also (twice) of a model identical to the phone she officially used on business at the office; (6) the lies of FAM in interview.

51. As for the respective defences, FAM was among other things able to point to her positive good character and to the lack of any identified financial inducement for providing inside information to WAC. Her case was, in short, that she had never provided such information to WAC. She gave her account of her reasons for accessing the GLS and Banker Portal – in essence, educational and extending to very many more transactions than just these five – and of her reasons as to why she went along with WAC's suggestion of use of Pay-as-you-Go phones and regular replacement of SIM cards. The provision of Blackberry phones of a model identical to her work phones was, as we have indicated, said in effect to be coincidence. Her lies in interview, to the extent that they were lies, were explained as born of panic, again as we have indicated.

52. WAC's defence, in a nutshell, corresponded to that of FAM. Just as she had never disclosed any price sensitive information to him so he had not received or acted on any such information from her. Amongst other points that could be made on his behalf were not only his (effective) good character but also, for instance, the fact that in the indictment period he was engaged in much trading in other shares in unrelated transactions.

53. One particular point which WAC vigorously pursued was this. It was developed over the original Defence Statement and three subsequent iterations of it (the prosecution, and to an extent the judge, were critical of the way in which this aspect of his defence emerged and evolved; but we regard that criticism as not particularly material to this appeal). One strand of the prosecution case had been to stress the apparent coincidence, among other apparent coincidences, of WAC trading so successfully in each of these five transactions in respect of which UBS was involved and in respect of which FAM had accessed price sensitive information. WAC, however, was to say that, in addition to his own expertise and researches, he had relied on tips and information from other well-connected and experienced traders known to him. These were identified by him as Yomi Rodrig (YR), via WAC's friend Nathaniel Glas (NG), in respect of the Kabel transaction (Count 2); Alex Kuperfis (AK) in respect of the

BRE transaction (Count 4); Ben Harrington (BH), a financial journalist, in respect of the Arden transaction (Count 6); Alshair Fiyaz (AF) in respect of the NorthStar transaction (Count 8); and Jeff McCracken (JM) a Bloomberg journalist, and AF in respect of the Targa transaction (Count 10). WAC was also to say in evidence, and it was for the jury to assess, that he had not at the time believed that the information which they were giving him was illegally obtained price sensitive information; although he believed that now. He was to say, in effect, that at the time he had turned a blind eye as to how his associates had obtained their information.

54. He was further to explain that the reason why these well-placed and highly successful associates, with far greater resources than his, were prepared to include him in the information sharing was because of his own valuable connection with JM, a senior financial journalist at Bloomberg: with the prospect of articles on potential takeovers thereby appearing on Bloomberg, after contact by him with JM, which could then cause a spike in the share price. (The judge, in her subsequent sentencing remarks, was to refer to "one of the more unsavoury aspects of the evidence" being the "unhealthy relationship" which seemed to exist between some financial journalists and traders.) Of course, it was also open to the prosecution in turn to say that one further reason why these altogether more powerful and better resourced associates would be prepared to share their information with WAC was because he (WAC) could now also bring to the table a very valuable asset in the form of a compliance officer of UBS with access to price sensitive information on its merger and acquisition transactions.

55. In making his points, WAC among other things also relied on a disclosed covert recording, made by the National Crime Agency, of discussions between WAC and AF at a meeting between the two at the Four Seasons Hotel in London on 17 June 2014. It was an Agreed Fact that WAC was not himself under surveillance at the time. The obvious inference thus was that AF, presented as an immensely wealthy businessman and investor who was based in Monaco, was under surveillance. In that discussion, WAC is also recorded as having, in the presence of AF, discussions with JM at Bloomberg about Targa. In addition, as WAC was to say, he was exchanging information with AF on the Targa prospective take-over. In evidence at trial, WAC was in fact to say that he would usually be in contact with AF on an almost daily basis.

56. In addition to that, based primarily on disclosure from the prosecution, WAC at trial put in, and placed considerable reliance on, a schedule of trading in the indictment stocks variously undertaken by YR, AK, AF and NG in Kabel, BRE, NorthStar and Targa at relevant times. He also placed considerable reliance on a detailed schedule of his phone contacts (Pay-as-you-Go phones invariably being used, so the actual contents of the texts and messages were not known) involving various of his associates at the times when he himself traded in these stocks.

57. It can be said, especially given the seemingly rather self-righteous nature of some of WAC's answers in evidence (this court having been provided with a transcript of the entirety of his oral evidence at trial) and given also the tone of some of the written arguments advanced on his behalf on this appeal, that this was a disreputable defence on the part of WAC. WAC had not, he said, received any price sensitive information from FAM; rather, he said, he had received it from others. That is not impressive. But, that said, it matters not. The prosecution had charged these as specific counts,

involving alleged receipt and use by WAC of price sensitive information derived from FAM. Conspiracy had not been charged. Consequently, if what WAC (and FAM) said was, or might be, right in the assessment of the jury then he (and she) were entitled to be acquitted on all the counts with which they had been charged.

The course of proceedings in the Crown Court

58. The convictions which are the subject of the present appeals were the outcome of a retrial. At the first trial, which had started on 22 October 2018, the jury had been unable to agree on verdicts. They had been discharged on 12 December 2018. The trial judge at both trials was Judge Joanna Korner CMG, QC.

59. At the outset of the proceedings the prosecution had prepared a lengthy Disclosure Management Document dated 8 September 2017, which was subject to a subsequent Addendum. Amongst other things, it was indicated that trading records relating to individuals who were not named in the indictment were deemed not relevant, save where there was a demonstrable link to the defendants. Although some criticism was raised before us of this Disclosure Management Document and of the Addendum, we consider them perfectly reasonable as matters stood. Of course, further disclosure then had to be made as and when, in particular, details of WAC's dealings with his associates emerged in the various iterations of WAC's Defence Statement.

60. For the purposes of the first trial, the judge had given rulings on various applications for disclosure made by the defence under s.8 of the Criminal Procedure and Investigations Act 1996. She also had to deal with a Public Interest Immunity application by the prosecution. In this respect, one aspect of WAC's defence had been that there was material to suggest that AF may have had a corrupt source or sources within the National Crime Agency in a position, so it was suggested, to influence any investigation into AF and, by extension, WAC. It was said that further disclosure was among other things needed in that regard: either to advance the defence case or to advance a possible abuse of process argument. The judge by a ruling delivered on 20 August 2018 refused to order the requested disclosure. The judge had, however, in the meantime variously ordered disclosure of any adverse regulatory findings made with regard to any of WAC's named associates. She also had ordered disclosure from various other financial institutions involved in the takeover transactions which were the subject of the counts on the indictment as to any investigations into unauthorised use of price sensitive information.

61. As matters developed, and on further application for disclosure being made, the judge made a Disclosure Order dated 2 November 2018. That provided as follows:

> "1. Prosecution should disclose, to both defendants, any material in their possession and, in the case of material which is to their knowledge in possession of another prosecuting authority, should seek disclosure, which:
>
> - Might reasonably be considered capable of suggesting, that WAC or his associates i.e. Fiyaz, Kuperfis, Glas, Rodrig, McCracken and Harrington had an 'insider' i.e. someone with access to price-sensitive information, in UBS, outside FAM, who provided price-sensitive

information, during the period 1 January 2013 – 31 December 2014.

- Might reasonably be considered capable of suggesting, that WAC or his associates had an 'insider' in any of the financial institutions who were advising the companies concerned in the merger/acquisitions negotiations which underlie the trades of the subject of the indictment.

2. For the purposes of this order "material" means:

- Telephone intercepts obtained by an authority outside the UK
- Suspicious Activity/Transaction Reports
- Evidence of meetings between WAC or his associates and persons with access to price-sensitive information in any of the financial institutions who were advising the companies concerned in the merger/acquisitions negotiations which underlie the trades the subject of the indictment."

We were told by Mr McGuinness that the prosecution in fact chose to interpret paragraph 2 rather more widely than the use of the word "means" strictly might connote. No criticism of this Order, as we were informed in oral argument, is now pursued: although criticism is made of the prosecution's alleged non-compliance with it. At all events, following that Order the prosecution gave disclosure of a quantity of materials, including a significant number of Suspicious Transaction Reports filed by brokers in respect of WAC, AF, AK, YR and (to a much lesser extent) NG.

62. In the result, as we have said, the jury at the first trial could not agree on verdicts and were discharged. The re-trial was listed to commence on 15 April 2019.

63. Further disclosure issues in the meantime arose. In particular, there was an ongoing issue as to the scope of the prosecution listing of material in the non-sensitive schedule of unused material (form MG6C). The prosecution at all events thereafter gave notice on 13 March 2019 of a further Public Interest Immunity application. There was then a hearing, at which the defence were not present. By her ruling of 15 March 2019, supplemented on 17 March 2019, the judge declined to order any further disclosure. She ruled that the material and evidence provided at the Public Interest Immunity hearing did not weaken the prosecution case or strengthen the defence case, nor would it support any abuse of process application. She declined a defence suggestion that special counsel be appointed to review the Public Interest Immunity material.

64. The judge also had to deal with further disclosure applications made by the defence. Amongst other things, she had to deal with a request for a disclosure schedule listing details of all non-sensitive unused material obtained during the investigation which (put shortly) had a bearing on any offence under investigation; details of the trading of the named associates of WAC during 2013 and 2014 and of any telecommunications data in relation to such associates in 2013 and 2014; and details of any investigations pursuant to previously disclosed Suspicious Transaction Reports. By her ruling dated

26 March 2019, the judge did not accede to all such requests. But she did order as follows:

> "….the prosecution should re-evaluate, for the purpose of listing on the MG6C, any material in their possession, arising from this, or associated investigations, which, in the light of issues raised during the trial, is capable of having an impact on this case. This re-evaluation should include, but is not limited to, consideration of telecommunications material relating to the named associates of WAC."

65. Thereafter the trial started. During it, the judge, by a ruling given on 12 May 2019, refused a yet further s. 8 application by the defence for more disclosure. She also refused – as she had at the first trial – an application by the defence to cross-examine the officer in the case as to whether the investigations had extended to the information (if any) available from other institutions in respect of trading by WAC's associates. In her detailed ruling, the judge among other things noted that the prosecution had previously agreed that it would disclose any material in its possession reasonably capable of suggesting that WAC or his named associates had an insider either in UBS (other than FAM) or in another financial institution connected with the transactions which underlay the indicted trades. She rejected, however, as unreasonable and disproportionate, the suggestion that the prosecution was obliged to carry out and disclose investigations into the share dealings of the associates in the indictment period in transactions which were unconnected with the five transactions which were the subject of the indictment. She considered the defence request to be without merit.

66. As to the renewed request to cross-examine the officer in the case in the stated respects, the judge confirmed her previous ruling at the first trial on this. She considered that such questioning would not be relevant to the issues raised; would be unnecessary and speculative; and would simply operate as a distraction of the jury away from what was relevant.

67. Perhaps something of the flavour of things can be gathered from the fact that, the judge having so ruled, both FAM and WAC, through counsel, then applied for the proceedings to be stayed on the ground that they could not receive a fair trial, given the restrictions on cross-examination of the officer in the case. Unsurprisingly, given her prior rulings, the judge rejected that application. She said that if her ruling had been wrong, the proper forum for such a submission, in the event of a conviction, was the Court of Appeal (Criminal Division). As to the fairness of the trial, she held that the defendants could indeed continue to receive a fair trial.

68. There then were developments which can be said to be at the heart of the present appeals.

69. On 14 May 2019 (very shortly before FAM was due to give oral evidence) the prosecution received information, on a confidential basis. It clearly was of potential relevance to the trial. Investigations were urgently undertaken and certain statutory notices directed at Citigroup (a major investment bank) were issued. It had been already identified that Citigroup had had an involvement in the transactions which

were the subject of the indictment counts – in three cases through acting in an advisory capacity and in two cases, as it transpired, through having "pitched" for the investment banking business prospectively involved. In such capacities, it was to be presumed that Citigroup would have had access to price sensitive information relating to each transaction.

70. On 23 May 2019, following receipt of information from Citigroup, the prosecution provided a Disclosure Note (subsequently amended) to the defence teams. That Disclosure Note read as follows:

> "Pursuant to the second bullet point of the first paragraph of the Court's Order dated 2 November 2018, the prosecution makes the following disclosure.
>
> The prosecution has recently received intelligence that Alshair Fiyaz had via an intermediary a source at Citibank. As a result of the intelligence, the prosecution has recently acquired further material. This material provides limited support for the credibility of the intelligence received to the extent that the prosecution cannot exclude the possibility that for a period of time Alshair Fiyaz did have an insider at CitiGroup and that period may have included 2013-2014."

71. The defence pressed for more details. In addition, concern was being expressed that, particularly in the light of the Order of 2 November 2018, the "further material" should previously have been obtained, given the identification by WAC of AF's alleged involvement and given the knowledge that Citigroup had been a financial institution involved in the transactions reflected in the indictment counts. A Request for Disclosure was made and in some respects answered. Further Public Interest Immunity issues were then raised by the prosecution. In the meantime the trial – which then was at a stage when WAC himself was in the middle of giving oral evidence – was adjourned.

72. A further Public Interest Immunity hearing took place over 29 and 30 May 2019 on notice. Initially the hearing was inter partes and then, and in substance, it was in chambers in the absence of the defence.

73. On 31 May 2019 the judge orally announced her decision in open court. She stated that she had indicated to the prosecution what she considered to be a minimum which was to be disclosed, by way of Disclosure Note. She pronounced her conclusion, with regard to the Disclosure Note which had been prepared in consequence by the prosecution, "that the information which is contained in the note is all that needs to be disclosed". She rejected a yet further application to reopen the issue of cross-examining the officer in the case. She stated that her full written reasons would follow at a later stage.

74. Those reasons unfortunately were not in fact provided before the trial concluded and indeed (because of pressure of other work) were not provided by the judge until 15 November 2019. Those reasons were, however, full. By them, she explained that she

had considered that the material disclosed to her at the Public Interest Immunity hearing on 29 and 30 May 2019 did not weaken the prosecution case or strengthen the defence case other than in the respects for which she had ordered disclosure. She repeated her previously expressed views that requests for disclosure in respect of suspected insider dealings in *any* stocks, or of an inside source in *any* financial institution, irrespective of whether they were linked to the indictment transactions, was too wide-ranging and speculative. She held that the materials disclosed and the Disclosure Note of 31 May 2019 had "provided the defence with the factual basis to have the matters placed before the jury in support of their respective cases." She also maintained her previous view that cross-examination of the officer in the case would have been "entirely speculative." She further held that the prosecution had complied with its obligations in respect of listing non-sensitive unused material.

75. The Disclosure Note which had been provided to the defence teams on 31 May 2019 had provided as follows:

> "1. On 14 May 2019, an informant provided the FCA with information concerning a person said to be an 'intermediary' between Alshair Fiyaz ('ASF') and a 'source' at Citibank.
>
> 2. As a result of the information provided the FCA conducted its own inquiries and gathered material which identified an individual consistent with the information as to who the alleged 'source' was.
>
> 3. That identification has been further supported by:
>
> (a) Limited telephone contact between the intermediary and the individual in 2015 and 2017 (no records are available for the indictment period).
>
> (b) Other material provided on a confidential basis by another source.
>
> 4. The identified 'source' was employed by Citigroup, during the indictment period, in a position which would have given him access to PSI.
>
> 5. Providing the names of the intermediary and/or the 'source' carries a substantial risk of identifying the original informant who may be endangered by such identification."

76. In the light of that Disclosure Note, and the materials provided with it by the prosecution, the parties then entered by counsel into discussions as to how the position was to be presented to the jury. In the result, the position was, by consent, presented to the jury in the form of additional Agreed Facts. These were drafted as follows:

> 183. On 14 May 2918, an informant provided the FCA with information concerning a person said to be an 'intermediary' between Alshair Fiyaz ('ASF') and a 'source' at Citibank.

184. As a result of the information provided, the FCA conducted its own inquiries and gathered material which identified an individual consistent with the information provided as to who the alleged 'source' was.

185. That identification has been further supported by:

(a) Limited telephone contact between the intermediary and the individual in 2015 and 2017 (no records are available for the indictment period)

(b) Other material provided on a confidential basis by another source

186. The identified 'source' was employed by Citigroup, during the indictment period, in a position which would have given that individual access to Price Sensitive Information.

187. Such material as has been obtained from Citigroup indicates that the individual did not themselves have computer access to Price Sensitive information in respect of the 5 indictment deals (although given the short time available it has not been possible to carry out the sort of detailed investigation that has been carried out in respect of the UBS computer systems), and the Prosecution in the short time available cannot exclude the possibility that the individual had access to such Price Sensitive Information in another way (such as by the FCA reviewing emails or making enquiries with Citigroup employees).

188. On 23rd May 2019, the Prosecution asked Citigroup whether any Citigroup entity advised on the Kabel/Vodafone deal and/or the Targa Resources Corp and Partners/Energy Transfer deal. The response from Citigroup indicates that:

i. Citigroup were engaged in pitching to advise Vodafone in both the proposed take over of Kabel and the equity stake-building role (helping Vodafone buy Kabel shares in the market); and,

ii. Citigroup acted as advisors to both Targa Resources Corp and Targa Resources Partners in the merger with Energy Transfer Equity.

77. The oral evidence of WAC then resumed on 3 June 2019. It concluded on 6 June 2019.

Summing-up

78. The judge gave a split summing-up. At the first stage, she gave full and accurate directions of law (in writing and orally) on all relevant aspects, including the approach

required for cases founded on circumstantial evidence. She summarised the legal elements of the counts on the indictment. Having done so, she then said this:

> "What matters in relation to any count on the indictment is whether you are sure that Mr Choucair received inside information from Ms Abdel-Malek, dealt in the securities to which that information related (and securities just means shares or stocks – it is just a different way of describing them) whilst he was in possession of that information, and if you are sure of that it matters not whether you find also that Mr Choucair did or might have received information, or tips, or even inside information directly or indirectly from an 'associate'. That is in inverted commas because there are various people he has named as associates of his – for example, Mr Al Fiyaz or Mr Roderick, whom you have just heard an admission read out about – although in Mr Roderick's case he says he was the one he knew the least. In any event, it would not matter if you came to the conclusion that he was also getting information from his other sources, from his other associates, or the journalists, or whoever it was he was talking to, if you were sure that Ms Abdel-Malek had given him that information, so I hope that is clear."

79. In the course of her initial directions, she also referred at some length to the recently agreed paragraphs 183-188 of the Agreed Facts. Having done so, she went on, as transcribed, to say this:

> "The defence suggest that these agreed facts demonstrate that it was or could have been Fiyaz and not Ms Abdel-Malek who passed inside information to Choucair in respect of NorthStar and Targa. This only applies to Northstar and Targa because those are the only two where Mr Choucair says I traded … well, he said I traded in a number of factors, but I got information largely [inaudible] trade off Fiyaz."

She then went on to give full legal directions on topics such as lies and good character.

80. In the second stage of the summing-up, following speeches, the judge counselled the jury to focus on the evidence and not to speculate. She then gave a summary of the prosecution case, of FAM's case and of WAC's case. She identified the issues arising, and the principal points made, before proceeding to a more detailed summary of the evidence which had been given: in particular as to the trading in respect of each of the transactions, as to the timelines and as to the evidence of each of the appellants. As we see it, the judge is to be commended for clearly and concisely summarising the respective cases and relevant issues and then clearly and concisely marshalling her summary of the evidence to those issues.

81. The jury retired on 14 June 2019. A majority direction was given on 21 June 2019. On 25 June 2019 the jury, by a majority, returned guilty verdicts on Counts 1 and 2 (Kabel), Counts 3 and 4 (BRE) and Counts 9 and 10 (Targa). Thereafter the judge on

25 June 2019 gave a *Watson* direction. On 26 June 2019 the jury returned, by a majority, guilty verdicts on Counts 5 and 6 (Arden). On 27 June 2019 the jury then returned, by a majority, guilty verdicts on Counts 7 and 8 (NorthStar). On all verdicts the majority had been 10-2.

82. The judge sentenced on that day. She reviewed the situation fully. She found that WAC had persuaded FAM, who until then had "led a hardworking and virtuous life", into this criminality. The judge found that FAM enjoyed and took every advantage of her entry into the "rather louche" lifestyle offered by WAC. FAM had, in breach of the trust placed on her by UBS, played her part in the scheme "to the full": as evidenced by her numerous searches on the GLS for deals that might interest WAC. As to WAC, the judge found that he was motivated by greed and also by a desire to impress his even wealthier trading associates by pooling information to enable him and them to make large profits. Each was sentenced to three years' imprisonment.

Events following conviction

83. In factual terms, at least, it might have been expected that matters would rest there. But they did not.

84. On 28 June 2019 (the day after the final verdicts were announced and sentence passed) a lengthy article – which must have been at least in an advanced state of preparation before the trial in London ended – appeared in the Wall Street Journal entitled: "Burner Phones: Leaks to Journalists: Regulators Probe Suspected Insider-Trading Scheme".

85. This article stated that a former Citigroup employee, David Johnson (DJ), was the alleged middleman in an insider trading scheme, "according to people familiar with the matter and disclosures in a UK court case that wrapped up on Thursday". It was said that the Financial Conduct Authority and the Securities and Exchange Commission were investigating whether DJ (who had left Citigroup at the beginning of 2013) had collected details about impending deals from a former colleague and then passed them on to traders.

86. The article went on to refer to an investigation into DJ's relationship with AF as well as with an "unidentified Citigroup employee", according to "the people familiar with the matter". It was said that DJ himself lived in a £12.5 million London home, owned, through a British Virgin Islands company, by AF. Comments of spokespersons for AF rebutting the claims were quoted in the article, as also were comments provided by DJ to the newspaper. Extensive reference was also made in this article to the trial at Southwark Crown Court. As to the Disclosure Note of 31 May 2019, it was said of the reference there to an intermediary: "That intermediary is Mr Johnson, according to the people familiar with the matter." Further, reference was made in the article to WAC saying that AF said that he had "three people working for him at the National Crime Agency" – an assertion said to have been derived from "people familiar with those conversations" – and the article included reference also to a translator at the National Crime Agency said to be working for AF. Reference was also made to WAC's asserted contact with JM. JM, as was Bloomberg, was reported in the article as declining to comment.

87. This article gave rise to a reappraisal of matters both by the prosecution and by the defence teams. Grounds of Appeal were lodged. Disclosure requests relating to DJ and to the Wall Street Journal article were in due course made to the prosecution.

88. On 3 February 2020 the prosecution served a Respondent's Notice in opposition to the Grounds of Appeal. Included in that, by way of further disclosure, were the following paragraphs:

> "81. In light of the publication of the article, the Respondent confirms, by way of disclosure, that the intermediary referred to in the Amended Disclosure Note dated 23 May 2019 and the Further Disclosure Note dated 31 May 2019 (see paragraph 75 above) is David Johnson. The Respondent also confirms that in respect of the home address of David Johnson referred to in the article:
>
> a) The property is 42 Chester Square, Belgravia, London SW1W 9EA;
>
> b) Since 14 August 2014, the freehold title to the property has been registered to Redfox Management Limited, company registered in the BVI; and
>
> c) The beneficial owner of that company is Alshair Fiyaz.
>
> 82. Since the retrial ended, the FCA has received intelligence that the same source at Citibank (referred to in the above Notes) was also a source, via David Johnson, for Yomi Rodrik and this may have been during the indictment period.
>
> 83. Since the retrial ended, the FCA has received intelligence that there were occasions when Alshair Fiyaz received information that originated from an insider and would provide that information to other traders before he traded in the stock.
>
> 84. In light of the disclosures made in the previous three paragraphs, the Respondent has considered whether there is material in its possession which, subject to the public interest, requires further disclosure to be made to the Applicants. The Respondent makes the following disclosures:
>
> a) In April 2011 there were four communications between a contract mobile telephone number that has been attributed to David Johnson and a contract mobile number attributed to Alshair Fiyaz;
>
> b) David Johnson and Yomi Rodrik met at The Berkeley Hotel in London on 25 November 2016;
>
> c) Between 9 October 2016 and 18 January 2017 there were communications using unregistered PAYG numbers attributed to David Johnson and Yomi Rodrik;

d) On 18 January 2017 (the date on which Yomi Rodrik was arrested on suspicion of insider dealing by an officer of the NCA acting on behalf of the FCA) use of an unregistered PAYG mobile telephone number attributed to David Johnson ceased;

e) Between 4 October 2016 and 18 January 2017 there were communications between unregistered PAYG mobile telephone numbers attributed to David Johnson and contract mobile telephone number attributed to Ben Harrington; and

f) During the period 2013-2014, the FCA received 13 Suspicious Transaction Reports (STRs) of trades in stocks on accounts in the name of David Johnson. These included trades in BRE (and in Essex) and NorthStar (both indicted transactions). Information from Dealogic and within the FCA suggests that Citi advised on 6 of the relevant deals. The Respondent will provide the Applicants' legal representatives with (i) copies of the STRs and (ii) copies of the trading data relating to the trades in BRE/Essex and NorthStar – each within 7 days of the filing of this Respondent's Notice."

89. Shortly after that, the prosecution provided to the appellants various Suspicious Transaction Reports provided by brokers relating to DJ.

90. Now another development arose. It appears that a man called Marc Demane Debih had pleaded guilty in the United States District Court in 2019 to a number of counts of insider trading. He was in due course, in January 2020, then to give evidence on behalf of the prosecution at a subsequent trial in the Southern District of New York in an insider trading case brought against a Mr Telemaque Lavidas (Mr Lavidas was convicted).

91. The case in New York did not concern any company with which the London proceedings had been concerned. But in the course of his evidence, Mr Demane Debih had referred to his sharing inside information with a number of other international share traders, whom he named. These, according to him, included YR. An application on behalf of WAC to adduce on this appeal the transcript of Mr Demane Debih's evidence in the New York proceedings was then made on 24 February 2020, supported by a *Gogana* affidavit from his solicitor.

The Decision of the Single Judge

92. The applications for leave to appeal were considered by the Single Judge on the papers. It is wholly evident from his ruling of 7 April 2020 that the Single Judge (Edis J) must have considered the papers with the greatest of care. His decision to grant leave to appeal, and consequential directions, have to a considerable extent moulded the shape of the actual hearings in this court. Accordingly, we need to refer to them in a little detail.

93. In the first paragraph of his ruling, the Single Judge made this remark, with which we entirely agree:

> "When considering whether the convictions are arguably unsafe, it is better to start with the meat of the issue, rather than to examine minutely rulings which were given before the issue became starkly apparent. In my judgment this appeal is not only about whether the judge's rulings were justified at the time when she made them or not, but about whether material now exists which shows that the convictions were unsafe."

94. The Single Judge further noted that paragraphs 81-84 of the Respondent's Notice really amounted to fresh evidence on which the appellants were now seeking to rely. In paragraph 2 of his ruling he directed the filing of a witness statement on behalf of the prosecution, in order to give the Full Court a "fuller factual picture of what exactly was disclosed, when it was obtained by the investigation and why it was not disclosed before". The Single Judge went on to comment that this was a "strong circumstantial case"; but that, in effect, what was now revealed meant that it was arguable that paragraphs 183-188 of the Agreed Facts at trial had not put the matter as favourably to the defence as it should have been put. He also queried why the material contained in paragraph 84 of the Respondent's Notice had not been "flushed out" before the conclusion of the trial.

95. The Single Judge referred the applications to introduce fresh evidence to the Full Court. He also directed that the Full Court should review the trial judge's various Public Interest Immunity and disclosure rulings.

96. The Single Judge, however, refused leave to appeal on grounds asserting that the trial judge had unfairly intervened in the questioning of each of FAM and WAC and had improperly disparaged the defence cases in the summing up. Whilst those grounds may, perhaps, be an indicator of the heightened sensitivities on behalf of those involved in this case, those grounds have, realistically, not been renewed before this court. Mr Wormald on behalf of WAC has, however, renewed a ground of appeal, for which the Single Judge refused leave, relating to the appropriateness of giving a *Watson* direction.

97. One other matter arises from the decision of the Single Judge. He, wholly exceptionally, granted bail (on conditions) to the appellants. He considered that there was no real risk of absconding. He was concerned that by the time that the appeal came on for hearing their early release dates may have passed. He was also concerned about the impact of the Covid situation on prison conditions. In granting bail, however, the Single Judge explicitly said that he was not to be taken as indicating any view on the merits of the appeals and that the appellants should have no false hopes.

Events following the ruling of the Single Judge

98. There had been further developments following the ruling of the Single Judge, both by reason of the compliance with the directions which he gave and by reason of other matters arising.

99. First, in compliance with paragraph 2 of the ruling of the Single Judge, Lee Craddock, the Manager at the Financial Conduct Authority with responsibility for these investigations, made a detailed witness statement dated 5 June 2020. (He also made further witness statements on 30 July and 31 July 2020.) No cross-examination of him was sought. We would shortly say that we have no reason to reject what he there says. Indeed, having regard also to the knowledge which the members of this court have derived from reading all the papers, including the Public Interest Immunity materials and transcripts, we have every reason to accept it.

100. In the course of his very lengthy first witness statement of 5 June 2020, Mr Craddock accepted that the prosecution by March 2019 knew of the identity of DJ, knew that he had been employed by Citigroup until 2 January 2013, knew that he had been subject to thirteen Suspicious Transaction Reports during the indictment period, knew that he had associations with AF and YR and knew that he had lived in a house in Belgravia beneficially owned by AF. All that, as Mr Craddock said (correctly), had been referred to the judge at the Public Interest Immunity hearing in March 2019. He also referred to events occurring, and enquiries made by the Financial Conduct Authority of Citigroup, following receipt of the information on 14 May 2019.

101. He went on to state that 88 pages of materials (in some cases redacted) were then supplied to the defence teams on 29 May 2019, with two more items supplied the following day. As to the Agreed Facts, he explained in detail that some of the information there contained derived from materials assessed (in our judgment, properly) as sensitive and so not listed in form MG6C. Prior to the point arising, certain of such materials had previously been assessed (again, in our judgment, properly) as not relevant to the issues in the case as then identified and not within the ambit of the Order of 2 November 2018. He confirmed (correctly) that the materials underlying the information contained in the Agreed Facts had been placed before the trial judge at the third Public Interest Immunity hearing in May 2019. The subsequent disclosure to the appellants in the Respondent's Notice of the identity of DJ, and related matters, had been occasioned by these matters having been put in the public domain by the article in the Wall Street Journal following the trial. Such matters had not previously been disclosed, as he said, for fear of identifying the informant(s).

102. In addition, on 5 June 2020 disclosure was made, as a result of information obtained following conviction, that DJ and his late wife Sarah Johnson (who, we were told, had previously been employed as a lawyer at the Financial Conduct Authority) had a connection with a house in East Molesey owned by a British Virgin Islands company beneficially owned by AF.

103. On 2 July 2020 the prosecution made further disclosure. This now identified as David Basra (DB) the individual within Citigroup as the alleged possible "source" for whom DJ had, allegedly, been "intermediary" as stated in the Disclosure Note of 31 May 2019. This disclosure of 2 July 2020 read as follows:

> "On 31 May 2019, the Prosecution disclosed that;
>
> *On 14 May 2019, an informant provided the FCA with information concerning a person said to be an 'intermediary' between Alshair Fiyaz ('ASF') and a 'source' at Citibank,*

> *As a result of the information provided the FCA conducted its own inquiries and gathered material which identified an individual consistent with the information provided as to who the alleged 'source' was.*
>
> An individual named "David Basra" was the individual referred to in the 31 May 2019 Disclosure Note as being "*consistent with the information provided as to who the alleged Citibank source was*."
>
> The Prosecution has obtained further material from Citigroup. Of the material that has been reviewed to date, there is no evidence that David Basra accessed price sensitive information relating to the five deals which were the subject of the Trial Indictment.
>
> Consequent to the Prosecution's decision to identify David Basra, and the receipt of material from Citigroup, additional disclosure will be made concerning connections between David Johnson and David Basra."

104. This was the subject of the further witness statement of Mr Craddock of 30 July 2020. He there explained that by the end of May 2019, following receipt of the information from 14 May 2019, the name of DB had been identified. It had been raised at the Public Interest Immunity hearing in May 2019 with the judge (as indeed it had been). It had been assessed at that time that revealing his identity was believed sensitive, in that disclosure would create a real risk of serious prejudice to an important public interest. However, a subsequent risk assessment, post-dating Mr Craddock's first statement of 5 June 2020, caused that view to be changed: hence the Disclosure Note of 2 July 2020. We accept, from our knowledge of the papers, the validity of that approach.

105. In this witness statement, Mr Craddock also explained that during June 2020 the prosecution had received and reviewed over 10,000 items from Citigroup relating to DB from 8 May 2012 to 30 June 2014. Amongst other things, it had been revealed by these that DJ and DB co-owned an apartment in Verbier, Switzerland. The further disclosure by Citigroup, however, had not revealed any matters relevant to the Grounds of Appeal. Moreover, he said that previous appraisal of communications between DB and Mrs Sarah Johnson had been viewed, in our judgment properly, as initially not relevant and then latterly sensitive. The judge had been informed of these matters in May 2019.

106. On 31 July 2020 the prosecution made its own application to adduce fresh evidence pursuant to s. 23 of the Criminal Appeal Act 1968. It made clear that it did not oppose reliance by the appellants, in effect by way of fresh evidence (and which we formally receive as fresh evidence), on the contents of paragraphs 81 to 84 of the Respondent's Notice and the other post-conviction disclosure given by the prosecution. But it sought itself to rely on fresh evidence in the form of a further statement by Mr Craddock dated 31 July 2020 (which cross-referred to his statement of 30 July 2020)

and witness statements, also dated 31 July 2020, from Mr Craig Wallace and Mr Tim Hudson, both senior employees of Citigroup.

107. By his witness statement of 31 July 2020, Mr Craddock indicated, among other things, that the Financial Conduct Authority had reviewed the emails since extracted from DB's corporate mailbox at Citigroup. The conclusion was that "there is nothing to indicate from those that DB was in possession of price sensitive information in relation to any of the indictment deals."

108. As for the statement of Mr Wallace, he is Global Co-Chief Administrative Officer of the relevant division at Citigroup. He stated that he had undertaken a review in order to ascertain whether DB might have been aware of the five transactions which were the subject of the indictment. DB had at that time been a senior employee at Citigroup, with responsibility for debt financing for the Europe, Middle East and Africa division for Corporate and Investment Banking. As such, DB was deemed to have been an insider.

109. Mr Wallace had, by himself or through colleagues, undertaken a detailed search into the relevant systems and records of Citigroup. He explained his methodology as being that if there was no financing element to the transaction in question the conclusion was that DB was unlikely to have been aware of the transaction; that if there was a financing element, and it related to Europe, Middle East and Africa, the conclusion was that DB was likely to have been aware of the transaction; and that if there was a financing element but there was no connection to Europe, Middle East or Africa then it was possible that DB might have been aware of the transaction.

110. On that basis, the assessment was as follows:

(1) On Kabel (where Citigroup had unsuccessfully pitched on the "buy" side) there was no financing element and no reason for, or record of, any involvement of DB. It was concluded that he was unlikely to have been aware of the transaction.

(2) On BRE, on which Citigroup had acted, this was a wholly American transaction, with no Europe, Middle East or Africa nexus and no mention in the records of DB being involved. However, a financing element was involved. Accordingly it was considered possible that DB might have been aware of the transaction.

(3) On Arden, where Citigroup had acted, there was no Europe, Middle East or Africa connection and no reason for DB to have been involved. However, there was a financing element. Accordingly it was considered possible that DB might have been aware of the transaction.

(4) On NorthStar, where Citigroup had made a pitch, there was no Europe, Middle East or Africa nexus and no financing element. It was thus considered that DB was unlikely to have been aware of the transaction.

(5) On Targa, where Citigroup had acted, there was again no Europe, Middle East or Africa nexus and no financing element. It was thus considered that DB was unlikely to have been aware of the transaction.

(Mr Wallace did also assess the position with regard to various other, non-indictment, transactions: but we do not think, for present purposes, that really advances matters.)

111. As for the statement of Mr Hudson, he is Citigroup's Chief Compliance Officer. He set out DB's employment history. He stated that DB had worked at Citigroup from 10 March 1997 to 10 June 2016. Examination of Citigroup's systems and records showed that DB had not had any role in any of the five indictment transactions and had not been part of any of the teams who had. Not being part of the deal team, DB would have had no access to Citigroup's CGS Compliance system. Further, with regard to Kabel and Arden (where Citigroup had unsuccessfully pitched) there were no entries in Citigroup's Deal Management System; and as to the other three transactions, DB (not being a member of the deal teams) would have had no access to information on the Deal Management System or the Client Relationship Management system or the conflict check system known as Transaction Registration Unified Electronically System. Nor would DB have had access to price sensitive information on such transactions stored in any Secure Deal Folder.

112. In addition, Citigroup had examined and retrieved many thousands of emails from 8 May 2012 to 30 June 2014 on DB's mailbox. It was by reference to a review of these that Mr Craddock had stated that it was concluded that there was nothing found in them to indicate possession by DB of price sensitive information relating to any of the five indictment transactions.

113. In response to this proposed further evidence, if it was to be received, there was sought, on behalf of WAC, to be adduced the expert report of Mr Simon Jaquiss. This was dated 18 September 2020.

114. Mr Jaquiss has very considerable experience in investment and commercial banking. He had been asked, among other things, to consider whether someone of DB's seniority could access price sensitive information without leaving a "digital footprint"; whether DB could have been aware of the relevant transactions informally, even where no financing element was involved; and whether it could be said that it was "unlikely" that DB had access to inside information. He was also asked to comment on the Financial Conduct Authority's investigations in these respects.

115. Mr Jaquiss did not consider it likely that DB would have gained knowledge by hacking into the bank's secure systems. But he among other things stated that information regarding sensitive details "can be and is passed around colleagues via the informal media of daily meetings, ad hoc discussions, overheard conversations and so on". He stated that it was "fairly likely or likely" that DB "could have had access" to inside information notwithstanding a lack of computer access.

116. His conclusions included the proposition that "Mr Basra would likely have had access to information on the Indictment Trades due to his position at Citi, albeit on a mixture of formal and informal basis" (what this "formal basis" was is not really explained by Mr Jaquiss). He went on: "It seems more likely that Mr Basra would have gained this knowledge via informal communication means, for example daily meetings, over-heard conversations etc, rather than by way of hacking into the bank's secure systems". He also commented: "Given Mr Basra's level of experience, he would not have required a great deal of information on the Indictment Trades in order to form or

make trades off the back of that information". He also stated his opinion that the investigations of the Financial Conduct Authority "do not … go far enough."

117. We will make our appraisal of the applications to adduce fresh evidence later in this judgment. But we record here that no one sought to cross examine any of the witnesses. We also record that, as we stated in court at the time, we received all this evidence in the first instance de bene esse.

Applicable legal principles

118. The provisions of s.23 of the Criminal Appeal Act 1968, and the principles to be applied on applications to adduce fresh evidence on appeal, are too familiar to require setting out here. We have borne them in mind.

119. So far as disclosure is concerned, the core statutory provision is s.3 of the Criminal Procedure and Investigations Act 1996. That among other things requires the prosecution to disclose to the defence any material which might reasonably be considered capable of undermining the case for the prosecution or of assisting the case for the accused. Further, s.7A makes it clear there is an ongoing duty of review for the purposes of disclosure throughout the case.

120. Under the Code of Practice issued pursuant to that Act, there is a wide definition of "material" for the purposes of the Code. It is provided that material may be relevant to an investigation if it appears to an investigator or officer in charge or disclosure officer that it has some bearing on any offence under investigation or any person being investigated or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case. Section 6 of the Code extends to the listing on a schedule of non-sensitive material and of sensitive material. Reference may also be made to the Attorney General's Guidelines on Disclosure; to Part 15 of the Criminal Procedure Rules; and to the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases. That Judicial Protocol among other things stresses the importance of fair disclosure. At the same time, that Protocol also stresses that the trial process is not to be overburdened or diverted by inappropriate disclosure of unused material and that the burden of disclosure must not be allowed to render the prosecution of cases impractical. In more complex cases, where disclosure can be a particular problem, "robust case management" is enjoined by the Judicial Protocol.

121. We were referred to a number of authorities relating to disclosure. Here too the principles are well established. One authority much pressed on us (as, indeed, on the judge) was the decision of a constitution of this court in *Gohil & Preko* [2018] EWCA Crim 140, [2018] 1 Cr. App. R 30. Amongst other things, that decision emphasises that the test for disclosure by the prosecution is not to be regarded as not passed simply because the prosecution takes the view that it can rebut any inferences which might otherwise be drawn from the material in question as undermining the prosecution case or assisting the defence case: see paragraph 134 of the judgment. As the court went on to stress in that case, and as is well established, considerations of fairness underpin disclosure obligations: paragraph 145.

122. As to the ongoing obligations of disclosure in the event of an appeal, the applicable principles are set out in *R (Nunn) v Chief Constable of Suffolk Police* [2014] UKSC 37, [2014] 2 Cr. App. R 22.

123. Finally for these purposes, on the issue of Public Interest Immunity we were referred, among other cases, to the familiar principles set out in *H* [2004] UKHL 3, [2004] 2 Cr. App. R 10 and to the series of questions required to be addressed by the court in such a situation: see in particular paragraph 36 of the opinion of the Committee, delivered by Lord Bingham.

124. We have throughout sought to bear in mind in these respects all the relevant principles and authorities. It is evident that the judge had herself throughout sought to do so.

Grounds of Appeal

125. On behalf of FAM, Mr Christopher advanced two grounds of appeal:

(1) First, FAM was not provided with, and was wrongly prevented from placing before the jury, evidence of the limitations of the investigation; and was thereby deprived of an opportunity to undermine the inference that she had disclosed price sensitive information.

(2) Second, there was a material failure to disclose at trial the facts set out in paragraph 84 of the Respondent's Notice in so far as they related to the intermediary referred to in paragraph 183 of the Agreed Facts.

126. The grounds advanced by Mr Wormald on behalf of WAC to a significant extent mirrored these advanced on behalf of FAM. But they were more wide-ranging. Those grounds were formulated as follows:

> 1. The judge erred in failing to require the Prosecution to list all non-sensitive material gathered during its investigation into the Appellant and his trading associates upon its MG6C and by limiting the disclosure test, thereby preventing the Appellant from obtaining material likely to assist him.
>
> 2. The judge erred in preventing the Defence from cross-examining the Officer in the Case to demonstrate the "holes" in the Prosecution case and the limits of the investigation.
>
> 3. The judge erred in by declining to order disclosure of the name of the informant, the intermediary and the insider who the FCA were told connected AF to a financial institution which had price sensitive information in respect of all five Indicted stocks.
>
> 4. The judge erred in by not requiring the Prosecution thereafter to disclose all of the material it had in its possession which tended to suggest that AF was involved in insider dealing.
>
> 5. The judge erred in by not requiring the Prosecution to disclose material which suggested that AF had engaged in corrupt activities in respect of the investigation and

had been fed information from the NCA: furthermore, by not permitting the Appellant to give evidence about these matters before the jury.

127. In addition, Mr Wormald renewed the application for leave to appeal on the ground challenging the decision of the judge to give a *Watson* direction. He also sought to rely on the disclosure (following trial) contained in the Respondent's Notice. This demonstrated, as it was said, that DJ had also acted as an intermediary for YR. In addition it demonstrated, as it was said, the modus operandi of AF in letting others trade before he did. It was said that this was relevant, as at the trial the prosecution had said that WAC was generally the first to trade in the indictment transactions: indicative, it was suggested, of him being the first to have the relevant price sensitive information (viz. from FAM). Mr Wormald further sought leave to adduce as fresh evidence the transcript of Mr Demane Debih's evidence in the New York criminal proceedings. He also (in the event that the prosecution was granted leave to adduce the evidence in the form of the third statement of Mr Craddock and the statements of Mr Wallace and Mr Hudson) sought leave to adduce in evidence the report of Mr Jaquiss.

Disposal

128. The form which the appeal hearing took was, as we have indicated, to a considerable extent shaped by the ruling and directions of the Single Judge.

129. In the first week allocated to this appeal, each member of this court over several days read into the voluminous papers. In particular, each member of this court familiarised himself/herself with the disclosure process and rulings and with the Public Interest Immunity materials placed before the trial judge, including the transcripts of those hearings.

130. There was then a hearing with regard to the Public Interest Immunity aspects on Friday 13 November 2020. The court in this respect had previously received written arguments from Mr Christopher and Mr Wormald. It also was addressed shortly by them in open court. Following that, the court went into a private hearing and considered the Public Interest Immunity aspects and the submissions of Mr McGuinness. Having done so, and having reached a decision, the court then sat in open court late that afternoon. We informed Mr Christopher and Mr Wormald that, whilst the prosecution was prepared to give an amount of further disclosure voluntarily, the court, having carefully made its own review, would not order any further disclosure.

131. The parties thus prepared for the substantive appeal hearing on the basis of what had previously been disclosed. The appeal hearing took place on 19 and 20 November 2020. At the conclusion of the hearing it was indicated that the court would reserve its decision. Bail for FAM and WAC was renewed, without objection from the prosecution, until judgment or further order in the meantime, on the same terms as imposed by the Single Judge.

132. We propose to express our essential reasons as to our disposal of these appeals relatively shortly by comparison with the highly detailed and elaborate arguments presented to us. We are, we make clear, not going specifically to discuss in this

judgment – which will be quite long enough as it is – every individual point raised. But we also make clear that we have taken into account all points advanced before us, whether orally or in writing.

133. Two matters, in particular, we think, need to be emphasised at the outset.

134. First, it simply does not follow, and as the judge herself had pointed out in the summing up, that if WAC may have received price sensitive or other information from his associates in respect of all or any of the transactions then he cannot have received price sensitive information from FAM. It is important, we think, to stress that: since aspects of the arguments presented below and of the written arguments on this appeal were at stages seemingly suggestive of the contrary. The prosecution case, however, had never been presented in such binary terms. The prosecution had not, indeed, sought positively to challenge the proposition that WAC may also have received relevant information on these transactions from one or more of his associates. If the jury were sure that WAC had knowingly received and acted on price sensitive information disclosed to him by FAM, then he (as was she) was guilty, whether or not he had also received and been influenced by information derived from his associates. Of course, if the jury thought it possible that he had indeed received information on each of the transactions from one or more of his associates, as he was saying, that could assist the defence case: in particular in explaining the success of his trading. But it was by no means of itself necessarily determinative.

135. Second, we think that there is very great force in the observations of the Single Judge to the effect that it is appropriate to examine the safety of these convictions by reference to all the material now extant (in addition to what was available at trial). If the totality of what is now available indicates that there was a material irregularity or unfairness such that the convictions are unsafe then minute analysis of the judge's various rulings on matters as they then stood at trial serves, as a stand-alone point, little purpose. If, on the other hand, the totality of the material now available indicates that there is no material irregularity or unfairness then it is hardly likely that the position can nevertheless be assessed as different in substance at trial. Thus in one sense the course of events at trial and the judge's various rulings then become primarily contextual.

Ground 1

136. In advancing his first ground Mr Christopher in oral argument made clear that he did not pursue his written submission that there had been a "systemic failure" in prosecution disclosure. But he identified five categories of material identified from disclosure made after the trial which he said should have been disclosed prior to or during the trial. These were formulated as follows:

> (A) David Johnson ("DJ") was employed at Citi within the M&A department between 2nd November 2006 and 2nd January 2013;
>
> (B) there was evidence of a close connection between DJ and Alshair Fiyaz ("AF", to whom Walid Choucair ("WAC") in his evidence attributed the information leading to his trading in the fourth and fifth indicted trades (Northstar and

Targa)), including telecommunications in 2011, and AF's ownership of DJ's home address in Belgravia;

(C) DJ and Yomi Rodrig (to whom WAC in his evidence attributed the information leading to his trading in relation to the first of the five indicted trades (Kabel Deutschland)) had had telephone and face-to-face contact in 2016 (including over unregistered PAYG telephones);

(D) DJ had telephone communications, using unregistered PAYG telephones, in 2016 with the journalist Ben Harrington (to whom WAC attributed information leading to this trading in relation to the third of the five indicted trades (Arden)); and

(E) DJ had himself carried out trades in relation to Essex Property Trust Inc "Essex" and BRE, and Northstar Realty Finance Corporation, in circumstances which suggested that he had access to price sensitive information in relation to the transactions that were the subject of Counts 3 and 7 on the indictment (the second and fourth indicted trades), respectively."

137. Mr Christopher further complained that there was both a failure of listing for the purposes of form MG6C (and also form MG6D) and a failure of disclosure. Indeed he submitted that the prosecution had wrongly conflated the applicable required approaches as to listing on the one hand and as to disclosure on the other hand, in these respects.

138. In assessing these submissions we have had the advantage of having been able to apprise ourselves of the materials and transcripts of arguments and evidence presented during the trial to the judge, including at the various Public Interest Immunity hearings conducted before her. Having done that, we are of the firm view that the judge's conclusions and disposals following such hearings relating to disclosure were justified and, having regard to the requisite balancing considerations, were fair to the defence. We consider that the judge's various rulings on disclosure throughout the proceedings were proper.

139. Further, this court has the advantage, having that knowledge, of assessing the first two witness statements of Mr Craddock (as directed by the Single Judge) explaining the prosecution approach to disclosure prior to and at trial. As we have indicated, we accept that evidence and the explanations there given.

140. Of the categories identified by Mr Christopher, Mr McGuinness among other things submitted, as to item (A), that DJ had ceased to be employed at Citigroup by January 2013 (before the indictment period): and he did not fall in the relevant respects within the ambit of the Order of 2 November 2018 as to disclosure. As to (B), the prosecution had not been in a position to give more disclosure because of valid Public Interest Immunity considerations. As to (C), that only became disclosable as a result

of post-trial intelligence (reflected in paragraph 82 of the Respondent's Notice). Broadly the same points applied to (D). As to (E), Mr McGuinness accepted that there could have been disclosure of the Suspicious Transaction Reports relating to DJ: but he submitted that in themselves they were of limited value. He made the same point about reliance on a previously disclosed communication relating to an associate of AK dated 2 March 2014 which was suggestive of some sort of contact, or attempted contact, on the part of DJ with AK on an unspecified previous occasion.

141. We accept these submissions of Mr McGuinness. In our view, in fact, in practical reality these points really are to be taken as subsumed into what we see as the critical issue: whether, in the light in particular of what has since emerged, matters were sufficiently put before the jury in the form of paragraphs 183-188 of the Agreed Facts. Those Agreed Facts undoubtedly are now to be assessed in the light of the subsequent disclosure following trial and in the light of the contents of the Respondent's Notice.

142. It was also maintained, in this context, on behalf of the appellants that the judge had been wholly wrong to refuse the defence permission to cross-examine the officer in the case about the ambit of the investigations undertaken, in particular into the dealings of the associates. Although these submissions were advanced strenuously and with seeming enthusiasm by Mr Christopher and Mr Wormald, we have no hesitation in rejecting them.

143. This trial was, in essentials, about the conduct of FAM and WAC with regard to the five transactions identified on the indictment. To permit cross-examination of the officer in the case about investigation (or, as the case may be, non-investigation) into the activities of others, and with regard to other share dealings and other financial institutions, would have involved an extremely wide-ranging and entirely speculative fishing exercise of no directly obvious evidential value but liable to give rise to the making of speculative comments to the jury as to what may not have been done or investigated. Indeed, it would potentially have operated to distract the jury from the issues which really mattered. It is the proper function of a trial judge, seeking to achieve the overriding objective, to be astute to prevent such a position arising. This, as we consider, ultimately was a matter of trial management by the judge. Moreover, this was a judge who knew this case backwards. Her ruling on this aspect was also consistent with her prior rulings on disclosure. We see no proper basis for interfering with her decision.

144. Accordingly we reject Mr Christopher's first ground of appeal; and, with it, we reject also the associated grounds of appeal of Mr Wormald.

Ground 2

145. It is convenient next to go to Mr Christopher's second ground of appeal, which links with various of Mr Wormald's other grounds of appeal. As will have been gathered, we consider that it is these grounds which really, on examination, are to be regarded as at the heart of these appeals.

146. We have upheld the judge's decision, as matters then stood following the Public Interest Immunity hearing on 29 and 30 May 2019, to direct the (limited) disclosure that was given to the defence teams at that time. That resulted, as we have said, after negotiations between counsel in paragraphs 183-188 of the Agreed Facts being placed

before the jury. The issue then in essence becomes this. There has since been the subsequent disclosure following the trial, contained in paragraphs 81-84 of the Respondent's Notice (and as reflected also in items (A) – (E) as identified by Mr Christopher), and as explained in the statement of Mr Craddock of 5 June 2020. There has also been the further disclosure such as the naming of DB as the (alleged) source within Citigroup for whom DJ was said to be intermediary and DB's seeming close connection to DJ (as illustrated by the co-ownership of the Verbier property in Switzerland). The real issue therefore is whether this further material renders the Agreed Facts placed before the jury inadequate and insufficient properly and fairly to place the defence case on these matters before the jury for its consideration. It is said on behalf of the appellants that the Agreed Facts were rendered inadequate. It is said on behalf of the appellants that the respective defences were thereby deprived of the chance to put their "best foot forward", in the words of Mr Wormald. Accordingly, it is said, the convictions cannot be regarded as safe.

147. It was also pointed out that the information disclosed after trial indicated that DJ, although by then no longer employed at Citigroup, had himself traded in respect of two of the indictment transactions: trading both in Essex and in BRE and then also trading in NorthStar. That was, it was said, consistent with him having a source at Citigroup. Further, it having been identified that Citigroup had, one way or another, an involvement in all of the five indicted transactions, it was said that DB himself had, or potentially may have had, access to price sensitive information in respect of all five transactions.

148. Further, DJ had had telephone contact with AF in 2011. He latterly had lived in a house in Belgravia which was owned by a British Virgin Islands company beneficially owned by AF. Moreover, the intelligence linked the alleged source (DB) via the intermediary (DJ) to YR; and there had been contact in 2016 and 2017 between DJ and YR. In 2016 and 2017 there had also been contact between DJ and BH. The information could also be added to the previously disclosed communication of 2 March 2014, suggestive of DJ having also been in previous contact with AK.

149. Further, it was emphasised that WAC's evidence had been, and as had been so summed up to the jury, to the effect that AF had provided information to WAC on two of the transactions (NorthStar and Targa). But, so it is said, this further disclosure was supportive of the suggestion that price sensitive information could have been derived by one or more of the other associates from the source with regard to the other transactions: not necessarily just by AF. And that was consistent with WAC's case that he had received information (via NG) from YR on Kabel; from AK on BRE; and from BH on Arden.

150. Mr Wormald further submitted that at trial the prosecution had placed some reliance on WAC seemingly having been the first to trade on such transactions: a point further mentioned in the summing up (WAC, on the other hand, among other things had riposted that the others were trading in much larger sums). It is said that the disclosure in the Respondent's Notice also undermined that prosecution point.

151. The difficulty with all these submissions, on analysis, is that it is very hard to see how *in substance* the further disclosed matters added *materially* to what the jury already knew from paragraphs 183-188 of the Agreed Facts. Certainly it cannot be said that the newly disclosed material opened up an entirely new defence for the appellants. To

the contrary, such material related to a line which the defence were already actively pursuing at trial. That of course, we readily accept, is not a conclusive consideration. But it is a consideration all the same.

152. At all events, on behalf of the appellants it was said that more "colour and detail" was now available. We note that we were not in fact presented with a revised written version of how the Agreed Facts could and should, in the light of the subsequent disclosure, have read. In truth, counsel rather struggled in oral argument before us to identify how the further details could meaningfully have been drafted into the Agreed Facts so as to make a material difference to the Agreed Facts as placed before the jury.

153. The jury at all events knew full well that WAC was saying that his associates variously had, or may have, participated in the five transactions and had shared information with him. He had produced his schedule of their various dealings in the indictment stocks. He had produced a schedule of telephone graphics of his various phone contacts with the associates at these times. The jury knew that he was attributing to these associates possession of inside information (albeit he claimed that he had not appreciated at the time that it was unlawful inside information). The jury further knew that he was saying that on each transaction he had acted on information provided to him from them: YR (via NG) on Kabel; AK on BRE; BH on Arden; AF on NorthStar; and JM and AF on Targa.

154. Mr McGuinness in fact asserted that the provision of information on 14 May 2019 leading up to the disclosure on 31 May 2019 was very opportune for the defence (on the footing that we rejected, as we do, the submission that there should have been earlier disclosure by the prosecution): perhaps seeking to imply that the prosecution was thereby required to accept something against its interest at that late stage of the trial. Be that as it may, it resulted in the further Agreed Facts; and those enabled the defence then to submit to the jury, as the judge also recorded in the summing up, that paragraph 183 of the Agreed Facts of itself should almost make the jury unsure that WAC had obtained any information from FAM.

155. The nub of the Agreed Facts, it is to be noted, was that there was information concerning a person said to be an "intermediary" between AF and a "source" at Citibank; and that it was possible that the individual (that is, the source) had price sensitive information in respect of the five indictment transactions. It is to be noted that paragraph 187 of the Agreed Facts extended to all five transactions.

156. That in truth, in our judgment, has in essentials remained the position following the further disclosures after trial. The fact that names have now been given and the fact that colourful details, for example with regard to a Belgravia property and so on, have emerged is not, on analysis, we consider, actually of material importance in terms of the jury's consideration.

157. It was stressed on behalf of the appellants, however, that the Agreed Facts had focused on the intermediary, and thereby the source, as being connected with AF: and not with the other associates. It was also pointed out that, in dealing with the Agreed Facts in the summing up, the judge had linked those Agreed Facts to two transactions (NorthStar and Targa): in respect of which two transactions WAC had indeed stated in evidence that he had received information from AF. But the subsequent disclosure,

as it is said, now also linked the alleged intermediary (DJ) to the other transactions as well.

158. There are, in our opinion, several points in answer to that.

159. First, it may be observed that the jury in fact convicted on the NorthStar and Targa counts. Second, the Agreed Facts had enabled the defence to say to the jury (as recorded in the summing up) that there was, by extension of the link between the intermediary and AF, a possibility of the necessary inside information also coming to WAC via the other associates on all five transactions: paragraph 187 of the Agreed Facts had, as we have indicated, been entirely open-ended as to the source's possible knowledge of all five transactions. Third, contact between YR and DJ and between BH and DJ, as set out in the Respondent's Notice, post-dated the indictment events by a considerable period of time: and it would have been necessary to avoid engaging in speculation, as opposed to potential reasonable inference. Likewise, the previously disclosed message of March 2014, potentially indicative of one previous contact between DJ and AK, says nothing about the nature of that previous contact. Further, as to DJ himself, whilst the fact of DJ trading in some of the relevant stocks would potentially have been admissible (although it is to be borne in mind that he himself was no longer working at Citigroup in the indictment period), it can be strongly queried that the opinion of the relevant broker that the relevant trade was suspicious would have been admissible as bad character evidence, having regard to the provisions of s. 100 of the Criminal Justice Act 2003 (cp. *Braithwaite* [2010] EWCA Crim 1082; [2010] 2 Cr. App. R 18).

160. We also did not, with respect, find cogent Mr Wormald's submission that the further disclosure contained in paragraph 83 of the Respondent's Notice bore materially on the point raised by the prosecution at trial as to WAC trading first. That, however, could only, on WAC's own case so far as AF was concerned, relate directly to the NorthStar and Targa dealing; and WAC had given his explanations to the jury on that. The overall picture was in any event sufficiently conveyed, we consider, within the Agreed Facts. We do not, overall, consider this point to be one of significance.

161. It is to be borne in mind that what mattered to WAC on this aspect of the case – and there were, it must never be forgotten, many other aspects of the case – was that it was possible that he was getting the necessary trading information on these transactions from his associates and not, whether in whole or in part, from FAM. *How* his associates had obtained their information was no direct part of his evidence in the case: even though his case doubtless might be assisted if it appeared, and as he was saying in his own evidence, that the associates may indeed have had price sensitive information on the five indictment transactions. It was precisely that possibility which the defence also could say and did say at trial was the subject of, and capable of being inferred from, the Agreed Facts of themselves. But the jury did not agree. In our opinion, that is in reality determinative.

162. We reach our conclusion on these grounds (that is, to reject them) quite apart from the proposed fresh evidence. But in our opinion that conclusion is entirely consistent with the fresh evidence.

163. It was accepted that fresh evidence could in principle be admitted on an appeal at the behest of the prosecution under s.23 of the Criminal Appeal Act 1968. Objection,

however, was taken to the admission of the third statement of Mr Craddock and the statements of Mr Wallace and Mr Hudson. It was among other things said that such evidence could have been obtained at trial. But it is unrealistic to think that so detailed an investigation, as recorded by Mr Wallace and Mr Hudson, could have been undertaken and assimilated at trial following the receipt of the information on 14 May 2019 (as indeed the actual drafting of paragraph 187 of the Agreed Facts in effect confirms). Overall, having regard to the provisions of s. 23 of the Criminal Appeal Act 1968, we conclude that it is in the interests of justice for this court formally to receive this evidence. It follows, on the application of WAC, that we also will formally receive the report of Mr Jaquiss in evidence.

164. It is clear from the evidence of Mr Craddock, Mr Wallace and Mr Hudson that there has been located no document to suggest that DB did in fact access any price sensitive information with regard to any of the five transactions. Further, DB was not part of any Citigroup team on any such transaction: and four of those transactions were not even handled in the London office. In three of the transactions, which involved no financing element, it was assessed that he was "unlikely" to have been aware of the deal; on the other two, where there was a financing element, it was assessed that it was "possible" that he was so aware. Further, the undisputed evidence was that DB would have had no access to the price sensitive information stored on Citigroup's systems with regard to any of these transactions. All this is cogent.

165. As to Mr Jaquiss, he accepted that it was improbable that DB would have hacked into Citigroup's systems on these transactions. His stated conclusion thereafter that it was "fairly likely or likely" that DB could, due to his position, have had access to such information, and "would likely have had" access to information on the transactions by gaining such knowledge "via informal communication means, for example daily meetings, overheard conversations etc" seems, with respect, to be close to bald assertion and to be speculative. Moreover, it is of some concern that Mr Jaquiss does not really seem to confront the fact that DB himself had no role or involvement of any kind in such deals; that four of those deals were not even handled by the London office; and that the one that was (Kabel) involved a pitch only.

166. We assess the fresh evidence, read overall, and indeed the evidence of Mr Jaquiss of itself, as indicating that the possibility that DB may have acquired price sensitive information on one or more of the transactions could not be excluded. And that accords precisely with paragraph 187 of the Agreed Facts.

167. We do not propose to say more on these grounds. We reject them.

Other grounds of appeal

168. Mr Wormald (although not Mr Christopher) submitted that it would have assisted the defence to know the identity of the informant or informants and thus the identity should have been disclosed. But for obvious reasons courts are generally very wary about disclosing the identities of informants in the absence of good reason. No such reason was given to us; and the Public Interest Immunity materials give good reason to the contrary. And the suggestion that the informant(s), if made known to the defence, could have been approached with a view to providing statements or some other leads seems to depart from the bounds of reality.

169. Mr Wormald also pursued his ground of appeal to the effect that the judge should have ordered disclosure of material suggestive of AF engaging in corrupt activities in respect of the investigation and of having been fed information about the investigation by the National Crime Agency. Further, it was submitted that WAC should have been permitted to give evidence on this aspect at trial.

170. This particular defence tactic on behalf of WAC was striking (and perhaps revealing): someone being accused, in effect, of a sort of corruption alleging that the prosecution itself was tainted by corruption. The point had at all events been raised in the first Defence Statement and maintained in subsequent iterations.

171. This prospective allegation was based on what WAC had said that he had been told by AF in various discussions (fully set out in the Defence Statements). These were also to be the subject, in part, of what WAC had written, after the investigation had started, in a long draft undated letter addressed to the mother of his then girl-friend. That letter was never sent but was found concealed in his flat. This draft letter contained a number of lurid statements. WAC also stated in it, among other things, that AF had told him that he "now had 3 people working for him at the agency"; that if he (WAC) paid €1 million he "would be safe"; and that AF's cousin in Dubai was "in contact with a woman working for the agency as a translator". Some of these allegations, of course, were in due course to appear in the Wall Street Journal article.

172. Quite how this sort of hearsay material was to be adduced in evidence, not least having regard also to the bad character requirements of s.100 of the Criminal Justice Act 2003, remains obscure. But the assertion nevertheless was to the effect that WAC believed that the investigation had been compromised and corrupted; that bribes had been paid; and that he (WAC) had been falsely targeted to divert attention away from others (not least AF).

173. We ourselves, of course, have had the benefit of knowing what emerged at the Public Interest Immunity hearings before the judge. We have reviewed the materials. It suffices to say that in our opinion there was no proper basis whatsoever for allowing these allegations to be aired in evidence at trial before the jury or to be used to advance a stay of proceedings on the grounds of abuse of process. Whatever WAC's state of mind by now was (or is), his personal belief and assertions cannot of itself be translated into admissible or relevant evidence. These allegations would in truth have been simply another irrelevant distraction from the real issues in the case. This ground is therefore rejected.

174. Mr Wormald, as we have said, also renewed his ground of appeal by reference to the judge giving a *Watson* direction on 25 June 2019. The point was addressed very fully in the written grounds. Mr Wormald did not seek to supplement them orally. He accepted that the point could not bear on the verdicts relating to count 2 (Kabel), count 4 (BRE) and count 10 (Targa) which had been pronounced by the jury prior to the *Watson* direction.

175. The jury had overall been out for a very long time indeed. A further long period had also elapsed since the majority direction was given. The judge had also received various notes from the jury. It was, in our opinion, a matter for the judge's discretion in a case of this kind as to whether to give a *Watson* direction at the stage that she did. Further, she followed precisely the procedure indicated as appropriate in cases such as

Logo [2015] 2 Cr. App. R 17. We consider that the Single Judge was quite right to refuse leave on this ground.

176. Finally, there was the application on behalf of WAC to adduce as fresh evidence the transcript of the evidence of Mr Demane Debih in the New York criminal proceedings which we have outlined above and which related to insider trading in the shares of a company entirely unconnected with the present case. The obtaining of such transcript can be taken as illustrative of the commendable efforts of WAC's legal team to leave no stone unturned on his behalf. The difficulty, however, is that it is impossible to identify any sensible basis as to how such proposed evidence could afford a ground of appeal or could lawfully or properly be received: whether by reference to relevance, materiality, applicable bad character provisions under s.100 of the Criminal Justice Act 2003 or otherwise. We do not propose to say more. We refuse leave to adduce it under s.23 of the Criminal Appeal Act 1968.

Conclusion

177. We add some concluding general observations.

178. The first is this. Trials of this nature can be highly charged affairs. The views of the parties themselves can become entrenched; and sensitivities as to unfairness, perceived or imagined, can become heightened. That is in its way understandable. This court, at all events, cannot recreate for itself the "feel" of the trial. But what it can do, and is required to do, is to approach matters objectively and to view the case overall. As stated at paragraph 106 of the judgment of a constitution of this court in *Alibhai* [2004] EWCA Crim 681:

> "Of course, at the end of an appeal this court must stand back and look at the overall state of the case. That is something much easier for this court to do than the participants in a lengthy and complex trial…."

179. The second point is linked to the first. The principal, even if not sole, focus of these particular appeals has been on disclosure issues – whether disclosure as given before or at trial or disclosure as given after trial or both. But those disclosure aspects, and the related Agreed Facts, in their fundamental respects relate to but part of one issue in the case: whether WAC may have derived his information, aside from his own researches and expertise, from one or more of his associates before entering into these trades. The allegation that those associates (in particular, but not necessarily only, AF) may have had, via an intermediary, a source at a financial institution other than UBS which was involved in all five transactions went to that issue. Further, we repeat that the possibility that WAC may, via his associates, have had access to price sensitive information by no means necessarily meant that he did not also have access to, and used, price sensitive information obtained from FAM.

180. It would be wholly wrong to take the view that, because these appeals have focused so heavily on that issue, then that must have been the central issue in the trial. But it was not. The case has to be viewed objectively and overall. This issue related to but one strand of the prosecution case. The prosecution had sought to highlight all the various

coincidences, on its case, inherent in the defence cases. These included the proposition that WAC had, by and large, traded so successfully in these five transactions precisely at a time when FAM was herself accessing price sensitive information on the transactions. But there were also, we repeat, many other strands: the fact that FAM, although it was no part of her role or responsibilities as a compliance officer at UBS, regularly, and privately, had accessed price sensitive information relating to merger and acquisition transactions on the GLS and Banker Portal; the fact of the (unchallenged) timeline, coupled with the alleged (challenged) meetings, detailing FAM's many contacts with WAC before he traded; the in itself remarkable fact that, for the purpose of what were asserted by the defence to be in essence purely social conversations and contacts, WAC nevertheless had not only insisted on the use of Pay-as-you-Go, "burner", phones (and as to which FAM then told lies in interview) but also had insisted on frequent changes of SIM cards; the in itself remarkable fact that phones used by FAM in her discussions with WAC were exchanged by him for models identical to the ones with which she was officially provided at work; and so on.

181. Of course, and as we have also indicated, there were a number of points to be made on behalf of each of the appellants at trial. These were duly made at trial and repeated in the written arguments on this appeal. This was, viewed overall, in our opinion, nevertheless a powerful prosecution case which in reality called for an explanation from each of the appellants at trial. They gave their explanations over many days of oral evidence. The jury, having evaluated their evidence, did not believe them. The jury were made sure, on all the evidence, that the counts of insider trading on the indictment had been proved. It may be that FAM and WAC strongly disagree with the jury's conclusions. But these were matters for the jury. There is no proper basis for the appellate court interfering with those conclusions of the jury.

182. In the judgment of this court, there was no irregularity or unfairness, whether arising as a result of events and disclosure before and at trial or arising as a result of events and disclosure occurring after the trial, or both, such as to render these convictions unsafe. Accordingly, and notwithstanding all the efforts, to which we pay tribute, of Mr Christopher and Mr Wormald and the defence teams, we dismiss both of these appeals. FAM and WAC will be required to surrender to their local police station in order to serve the balance of their custodial sentences.