The issue regarding conflict of interest law company business partnership essay

Law

Student Number: 11001852Module Code: C339Assignment: TMA02February 12, 2013In examining the scenario presented, there are a number of legal and regulatory violations that have been presented. This paper will examine the violations with a view to critically appraising each key point. In assessing the scenarios presented the main issues identified are insider dealing and market abuse. According to (Ryder, Gkoutzinis & Cynon-Davis, 2012, pg. 21), inside information is any information that is not public knowledge relating to particular company or securities and would cause a likely benefit of using this information. Therefore insider dealing is any non-public information, illegally shared by employees of a company or anyone who have knowledge that such information is non-public and where they have used this classified price-sensitive information for their own benefit or the benefit of their associates (Sealy & Worthington, 2010). The first point to note is the issue regarding conflict of interest as it relates to Mr. Sharp as an advisor to an entity in which the company he is currently employed to may have an interest especially as it relates to the refinancing of entity. Sharp being a portfolio manager at Morrison Ventures Fund which is in the business of buying and selling bonds knew that a conflict of interest would occur if he were in receipt of the restricted information in connection with the financing of Oblique. Mr. Sharp by nature of his position knew that it was unethical for him to be the recipient of such vital information and that it would likely have a significant impact on the bond price had this information made public. In the case of Dirks vs. SEC 1984, the concept of " Constructive insiders" considered as lawyers, investments bankers and other professionals in receipt of confidential information from an entity while providing a service to

that entity. The case highlights the liability of such insider dealing violation if the entity giving the information expected it to remain confidential. The second key point identified in the scenario is one where Mr. Sharp agreed to get restricted information knowing that once this information is received, he would now have a fiduciary duty to keep this information confidential and would now be classified as an insider to Oblique PLC. The fact that the information being provided would be non-public or confidential is evident in the telephone conversation where Mr. Sharp was asked whether or not he wish to receive restricted information relating to the refinancing of Oblique PLC, for which he accepted. Mr. Sharp being a portfolio manager would have known that having access to this information would now make him an insider; hence he was not allowed to use this information for the benefit of himself, his company or any associates. Mr. Sharp had other option if he had wish for Morrison Equity Capital Management Limited to be a part of the refinancing as he could have rejected they offer for the restricted information. This reasoning is evident in case of SEC v Texas Gulf Sulphur Co. (1966) where the court held that anyone who is in the possession of inside information must either make such information public or do not trade in such securities. Having examined the scenario, it is fair to draw the assumption that Mr. Sharp wanted the restricted information for his personal use as a portfolio manager within Morrison Ventures Fund. It must be noted that in the space of 35 minutes of the second conversation, the purchase was made. It is clear that Mr. Sharp uses the restricted information received to benefit his organization although he did not benefit personally. Based on this, there is now a legal and regulatory issue as Mr. Sharp himself with the

information received instructed his colleague to purchase the bonds based on this information from which the company benefitted with an illegal profit of £44, 000. 00. It could be argued that there was an unfair practice as the information used to purchase the securities was not public information and Mr. Sharp could be charged for the use of such information. There is also the rule of market manipulation in this scenario as it has been suggested in the scenario that the price of the 10. 50 bonds would have been impacted had the information disclosed to Mr. Sharp made public. The question must be asked though as to whether or not the staff of Northside Bank PLC who gave the information was authorized to disclose such price sensitive information to anyone and whether or not that staff member could be held liable for insider trading. This is even so important as the staff member would have known the existing circumstances as it relates to Mr. Sharp being in the business of trading securities and may have an interest in such dealings. This does not however negate the fact that Mr. Sharp agreed to have restricted information making him liable for disclosure of such information. Another key point is the issue of Mr. Sharp being overheard by another portfolio manager Mr. Bowen. While Mr. Sharp cannot be held accountable for information overheard by another, the individual who overheard this information, knowing it is confidential would now be third party to the information and has a fiduciary duty; that individual would now be considered an insider. As in the case of Mr. Bowen, although the information was not communicated directly to him by Mr. Sharp, the fact that he overheard the information; knowing that the information ought to confidential, he now have a fiduciary duty to refrain from disclosing such

information to anyone or choose use it to his or his associates gain. Having acted on the information overheard, Mr. Bowen violated the law even though he received this information by innocently overhearing Mr. Sharp, about the refinancing of Oblique, the fact that Mr. Bowen used this sensitive information that was not public information is a market abuse and could also constitute insider dealing. Although Mr. Bowen was not told directly by Mr. Sharp, Mr. Bowen action was in violation to regulation as it relates to the use of information that would not have been public information. Additionally, Mr. Bowen request that his brother in law purchase the bond on his behalf of which the pair profited from the refinancing in the amount of £379, 500. By virtue of Mr. Bowen's position as portfolio Manager, Mr. Bowen exploited his access to information regarding the refinancing of oblique PLC to the benefit of himself and his brother in law. Based on the information presented, it is clear that both Mr. Bowen and his brother in law could be held liable for violation of the law as outline in the case of (R. v McQuoid Christopher, 2009). In this case Christopher McQuoid, a solicitor gave private information to his father-in-law, James Melbourne, who bought shares two days before a public announcement was made. The father-in-law benefited by £50, 000 and half of the proceeds was received by McQuoid. It was held that they were both involved in market manipulation and insider dealing and both were sentenced. (Insider Dealing, 2010). The consideration for the insider dealing were the nature of the defendant's employment, the involvement and how he came to be in possession of the information considered confidential. This section of the paper will address the key legal and regulatory rules that have been violated in relations to the points mentioned

above. The Criminal Justice Act (CJA) 1993 provides guidance for individuals who may seek to be involved in conduct not considered to be ethical or may be unfair practice in the market of securities. The Act identifies three prohibitions which are as follows: The Act prohibits price sensitive securities being affected as a result of inside information. The Act forbids the dealing in securities mentioned above or the act of encouraging others to enter into a transaction based on inside information. The Act also bars persons from disclosing inside information knowingly to others. There are two elements which must be demonstrated to corroborate an offence according to CJA 1993; it is important to ascertain the status of the insider and the type of information that is in the possession of the individual to be considered inside information. The Act stipulates that a person who has access to non-public information as an insider is guilty of inside dealing if he uses this information to deals in securities for which the price can be affected with the disclosure of this information. The Act also stipulated that an individual can become liable of insider dealing if he gives non-public information to others and encourages them to deal in securities whether or not the associates is aware that such information can affect the price of the security and in essence the security market. A liability could also be held if an individual discloses restricted information outside of the performance of his regular duty or profession to another person. Based on the key points identified above, it is clear that Mr. Sharp could be held liable for the use of the information from which the company of which he is a manager had profited; although he himself did not profit directly personally. Financial Services and Market Act (FSMA) 2000 states that an individual who is or has been connected with an

associate of the securities in the preceding twelve months should not deal in any securities if by any mean he is associated or is in possession of information not generally accessible to the public but if it were would have affected the price of those securities. In this case advice was being sought from Mr. Sharp on the same day that Mr. Sharp advises his colleague to purchase the bonds. Clearly Mr. Sharp breaches the regulation of the Act in using the restricted information to deal in the securities of that company. According to the United Kingdom regulation on market abuse, if an individual is an insider who possess inside information, obtained by whatever means, the individual is prohibited from dealing in the same securities to which he possesses the information. Another rule that has been violated is that of the misappropriation theory which holds that an individual can commit fraud in relation to transaction involved securities where confidential information has been misappropriate to enable trading of securities in breach of a fiduciary duty owed to North British Bank PLC. Another point of concern is the use of information by Mr. Bowen, although overheard, this is considered an encouragement offence in accordance to CJA 1993 Section 52(2) (a) which prohibits an individual from encouraging another to deal in securities based on non-public information known to him. Whether or not the individual to which the information is being passed or to who is being encouraged to purchase the bond knew of that the information is restricted information, and the bonds being purchased are price affected securities, he can be held liable as the CJA 1993 does not require such information. Mr. Bowen could be held liable for disclosing non-public information to his brother in law. Not only did he disclose the information but he also encourages him to purchase

the bonds on behalf of himself as well. If convicted Mr. Bowen could be sanctioned the profit of the transaction and may also be sentence to do time. Based on the Financial Securities Management Act (FSMA) 2000, if it can be proven that an individual has been involved in market abuse or encourage others to do so, an unlimited civil fine may be imposed, a public statement made regarding the individual and a restraining order placed on such person to prevent them from engaging in such practice in the future. It may also require the individual to part ways with the profit made and compensate victims if necessary. Secondary insider is also a key point seen in this scenario as in the case of Mr. Bowen's brother in law. The bonds were purchased based on information that his brother in law possess of which they both profited. Although it may be argued by Mr. Ralph that he was not privy to the inside information or was not aware that such information was price affected, he may still be liable in accordance to the CJA 1993 which states that whether or not the associates is aware that such information can affect the price of the security and in essence the security market, they have a duty and would have violated the regulation of insider trading and market abuse. In the case of Dirks v. SEC a fundamental decision was made regarding this type of insider dealing. In Dirks the Court held that the tip recipients could be charged with insider trading liability if the individual had knowledge that disclosing such information violated the fiduciary duty of others and personally profited from this act (Cornell University Law School, 2013). Clearly, this case has indicated that both Bowen and Ralph could be charged with insider liability and could be asked to part with amount profited. Another case that highlighted this scenario is the case of FSA v

Uberoi (2009). In this case Matthew learned of confidential information which was price sensitive about a number of the organization's clients in which he got a university placement for six months. This information he shared with his father who profited in the amount of £110, 000 as a result. The court held that they were both liable for insider dealing and Matthew was convicted for passing the information and his father convicted for using this information. (Insider Dealing, 2010)The final point to note is the deciding factor as to whether the staff at North British Bank PLC was authorized to share this information and was the information shared only for advice purpose of whether or not North British Bank PLC had the Authority to disclose price sensitive information to Mr. Sharp. If the information were given to Mr. Sharp purely as an advisor to which it was not the intention of the tipper for it to be used, the tipper may still be liable. However from the scenario, it would appear that the information was given solely on the basis of seeking advice as the staff member ask Mr. Sharp if he wish to receive restricted information which now makes Mr. Sharp an insider. In concluding a number of violations have occurred in the scenario manly the sharing of non-public information considered insider dealing and market abuse of price sensitive securities for the benefit of a number of person and organization. While it has been a difficult task in getting conviction of a number of these cases, the following scenario having the recorded information could see a number of persons being prosecuted for their action if this scenario was brought to court. FSA v Uberoi (2009)R v McQuoid [2009] 4 All ER 388SEC v. Dirks [1983] 463 US 646SEC v Texas Gulf Sulphur Co. (1966)