SOME FINAL THOUGHTS ON INSIDER DEALING (III)

"Anybody who plays the stock market not as an insider is like a man buying cows in the moonlight."- attributed to a Daniel Drew, a 19th Century speculator, quoted in Money, Misery, Madness, E. Weber, B.T. Batsword Ltd.,1997.

by Dr David Fabri, LL.D.

Part II of this feature on insider dealing ended with a reference to an early episode of share manipulation by the spreading of false news, taken from the Alexander Dumas novel, The Count of Monte Cristo. This work was written around 1844. It is interesting to note the similarity between this fictitious episode and the facts in a real English court case R v. De Berenger which had been decided only some years earlier, in 1814, at the height of the Napoleonic wars. This English case also concerned an early example of market manipulation, rather than actual insider dealing. Apparently this De Berenger was quite a colourful and theatrical Frenchman who visited England and went around always dressed in military uniform and spreading gold as well as false rumours that Napoleon Bonaparte had been killed. He had earlier acquired substantial holdings of government gilts at a relatively low price occasioned by the uncertainty of the outcome of the wars. He now intended to exploit the circumstances of the time to make a quick profit.

"The rumour was confirmed by two of his accomplices who arrived wearing French army uniforms. Everyone expected peace. When the Stock Market opened a couple of days later the rumours caused a large price increase in the gilts market. De Berenger and his associates sold their holdings and made a large profit. They were prosecuted and convicted of conspiracy."

(M. Ashe & L. Counsel, Insider Trading, Tolley Publications, 1993)

The judge described the offence in these terms: "...the conspiracy is by false rumours to raise the price of the public funds and securities; and the crime lies in the act of conspiracy and combination to effect that purpose....The purpose itself is mischievous..." (R v De Berenger (1814) 105 Er536 as quoted in M. Ashe & L. Counsel).

The episode from The Count of Monte Cristo and the De Berenger case were early illustrations of a phenomenon which is not quite insider dealing, but is similar to it - the spreading of untrue information or rumours or other deceptive schemes intended to influence and manipulate the securities market. Both share manipulation and insider dealing are acts whereby persons profit illicitly at the expense of others in security transactions. Insider dealing has indeed often suffered from an identity problem occasioned by the careless use of the term - especially by journalists - to describe a number of other securities-related abuses, which strictly speaking are not really insider dealing offences at all.

It would be useful at this juncture to ask whether and how these wrongful practices, including share manipulation by the spreading of rumours or false news, employing deceptive devices, schemes or artifices, creating an artificial market and other contrivances, are tackled under our law? The Insider Dealing Act of 1994 was not concerned with these activities, while the Malta Stock Exchange Act of 1990 provisions which attacked insider trading made no reference to these other forms of abuse.

There may possibly be a case for suggesting that these acts may be prosecuted as fraud under the Criminal Code. However, there is more than a reasonable chance that allegations of share manipulation and spreading of false news would be difficult to attribute and to sufficiently prove beyond a reasonable doubt. A conviction in the Criminal Court requires a high level of proof often difficult to achieve in these cases. The chances of a conviction appear low.

Under our law, such practices are only specifically mentioned and regulated by a number of rules contained in Chapter 3 of the bye-laws issued by the Malta Stock Exchange. This chapter governs "Conduct of Business" by licensed stockbrokers and it lays down a list of wrongful activities which licensed stockbrokers, and their accredited representatives, are prohibited from undertaking. A breach of the bye-laws would only entail administrative-regulatory measures by the Council of the Malta Stock Exchange (e.g. the withdrawal of the stockbroker's licence) but would not entail criminal sanctions. There would seem to be no legal or practical reason why our law should not develop to a further stage where these acts would be prohibited as criminal offences in the same manner as insider dealing.

Italian law has opted, correctly in my view, to deal with all these various types of wrongdoing in one single law. Article 5 of the Norme relative all'uso di informazioni riservate nelle operazioni di valori mobili e alla Commissione nazionale per le societa'e la borsa which became law in 1991 provides for the following:

"Chiunque divulga notizie false, esagerate o tendenziose, ovvero pone in essere operazioni simulate od altri artifizi, idonei ad influenzare sensibilmente il prezzo di valori mobiliari, e' punito con l'esclusione fino a sei mesi e con la multa da lire un milione a lire trenta milioni." (L.17 Maggio1991n.157, G.U. 20-5-1991, n. 16)

Discussing the rise and fall of Ivan Boesky and Michael Milken, Martin Baker wrote:

"...the greedy insiders had to be pretty dumb to get caught. Why? Because the wind is basically in their favour. You have to try hard to get caught insider dealing. Consider the difficulties. Inside information is one thing, rumour is another. People trade on rumour, perfect market or no perfect market... Rumour is an actual, acknowledged force in persuading individuals to trade. To get caught means there has been a systematic, gross and obvious abuse of the law, for whatever reason - pride, arrogance, the simple thrill of believing yourself smarter than the rest.

Greed usually plays a significant part after the initial thrill of the first insider trade or two has worn off." (Martin Baker, A Fool and his Money, Orion Books Ltd, 1995).

So it gradually becomes clearer and more evident that insider dealing is often seen as yet another manifestation of man's greed and obsession with gain and wealth.

"The point is, ladies and gentlemen, greed is good. Greed works, greed is right. Greed clarifies, cuts through, and captures the essence of the evolutionary spirit - Gordon Gekko in Wall Street, by Oliver Stone, 1987 (See separate box).

Readers will recall that the first part of this feature began with a reference to man's original fall from grace as possibly the first example of insider dealing gone wrong. The purpose of this feature was to investigate a brighter side, possibly even a humorous angle, in what is usually a drab subject. Nonetheless, insider dealing remains a serious business, and it would be a mistake to lay back in the comfortable belief it could never happen here, or that it is a phenomenon reserved for other countries or for works of fiction ■

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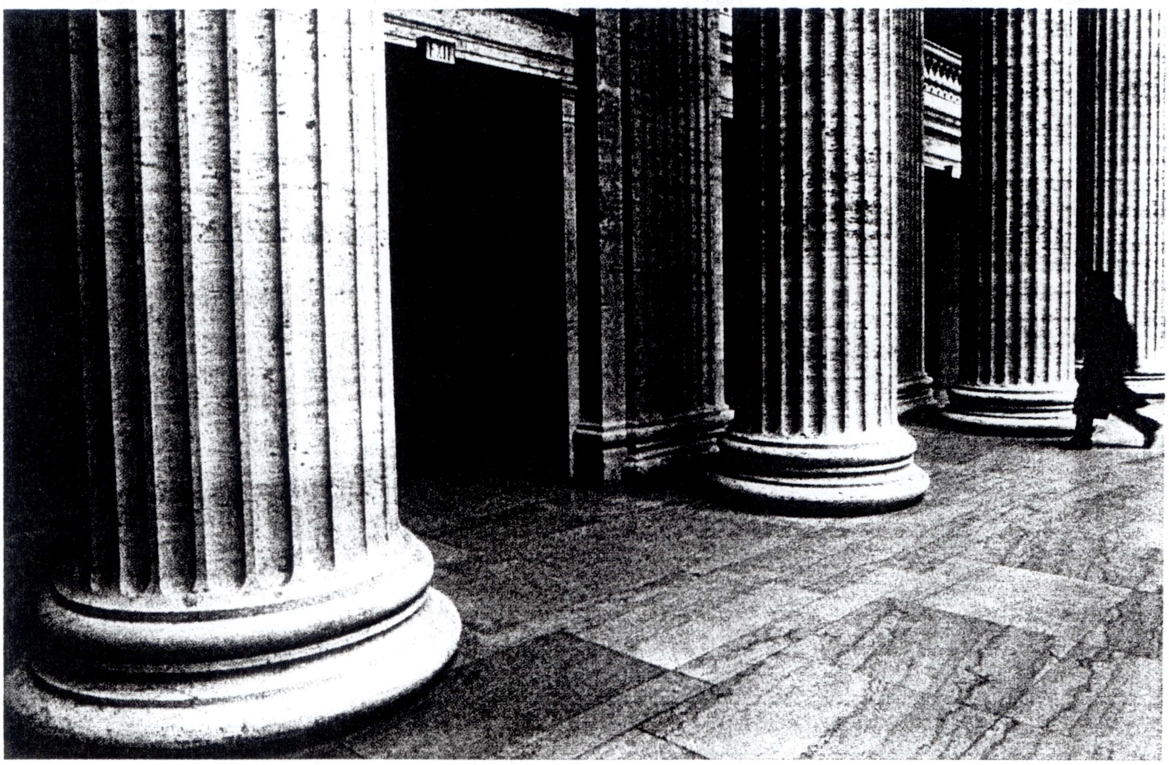
Wall Street – the film



1987 witnessed the release of Wall Street, a modern morality tale written and directed by Oliver Stone. The film was dedicated to Stone's late father, Lou Stone, who had been a stockbroker. It so happened that when this film was released in December 1987, the US stock market had just suffered its worst crash in recent history the previous October. This acquired for Oliver Stone's powerful film also an unexpected timeliness. One of his advisers on the film was an ex-broker who had been convicted of insider trading. Clearly, the expert inside information and other useful tips from the ex-convict enhanced the authenticity of the final product.

The protagonist in the film was an excellent Michael Douglas playing the role of Gordon Gekko, a charismatic, corrupt, Machiavellian, unscrupulous corporate predator. Other well-known actors included Charlie Sheen as Bud Fox, a young broker working with a New York investment firm who wishes to find the shortest route to wealth and the high-life, and is prepared to trade his soul and his information to Gekko.

The story was loosely based on actual events (involving people like the notorious Ivan Boesky and his accomplices) that had occurred in the United States a few years earlier. Towards the end of the film, Bud Fox is detected by officers from the Share Watch unit of the New York Stock Exchange trading heavily in a particular security during a trading session. He is investigated and arrested for insider dealing, he is led away in handcuffs from his office in the investment firm where he works. The moral is of course that 'crime does not pay' ■