

FSA Update

Last week at the FSA:-

Insider dealers ordered to pay over £1.5 million in confiscation

Further to their convictions for insider dealing offences in October 2010, confiscation orders totalling £1,534,000 have been made (on 20 August) against **Christian Littlewood** and **Angie Littlewood**. The orders, made under the Proceeds of Crime Act 2002 ("POCA"), have been made in addition to the terms of imprisonment to which Mr and Mrs Littlewood were sentenced (three years and four months immediate imprisonment and twelve months imprisonment suspended for two years respectively in February 2011).

Because of the punitive method used to calculate defendants' "benefit" for the purposes of confiscation under POCA, the amounts confiscated significantly exceed the profits made in connection with the transactions for which they were prosecuted.

These orders follow separate confiscation proceedings against a co-defendant, Mr Helmy Omar Sa'aid (who was sentenced to two years imprisonment for his part in the insider dealing), and bring the total amount confiscated to over £2.1 million. They are the final part of protracted proceedings brought by the FSA both as criminal prosecutor and regulatory enforcement authority, which have also involved prohibition orders being made against Mr and

Mrs Littlewood in June 2012 (see FSA Update – 11 June 2012).

<http://www.fsa.gov.uk/library/communication/pr/2012/082.shtml>

<https://onlineservices.cliffordchance.com/online/freeDownload.action?key=OBWlbfGnhLNomwBl%2B33QzdFhRQAhp8D%2BxrlGRel2crGqLnALtlyZe1lVCrup1TWLzZHywghNSLTP%0D%0A5mt12P8Wnx03DzsaBGwsIB3EVF8XihbSpJa3xHNE7tFeHpEbaelf&attachmentsize=164206>

Upper Tribunal strikes out challenges to prohibition orders

The Upper Tribunal has (in a judgment released on 20 August) upheld the FSA's decisions to withdraw the approval of and impose prohibition orders on **John Quarrell** and **Susan Beaumont** (together "the Trustees") and the decision of The Pensions Regulator ("TPR") to prohibit them and **Quarters Trustees Limited** ("Quarters") from acting as trustees of any occupational pension scheme.

The Upper Tribunal agreed with the FSA and TPR that the Trustees and Quarters had, by repeatedly failing to file replies to the FSA's and TPR's statements of case, failed to cooperate to such an extent that it was not possible to deal with the references fairly and justly. It also found, on the basis of admissions made by the Trustees and Quarters and conclusions drawn by the Solicitors Disciplinary Tribunal ("SDT") in separate proceedings, that the references had no reasonable prospect of success.

The decisions by the FSA and TPR to impose prohibition orders were based in part on the transfer of cash holdings amounting to over £20 million belonging to 150 members of self invested personal pension schemes (SIPPs) administered by Freedom SIPP Limited ("Freedom SIPP") from one bank to another without those members' consent. Freedom SIPP is a pensions administration firm, which is currently in liquidation, of which the Trustees are directors. The FSA took action in 2008 (under section 45 of the Financial Services and Markets Act 2000) to vary Freedom SIPP's permission based upon these and other concerns.

The FSA and TPR also based their decisions to impose prohibition orders upon failures by Quarters to pay monies received from HM Revenue & Customs to the administrators of two occupational schemes for the benefit of the members of those schemes. Both regulators were further concerned that some of these monies were paid to the solicitors' firm in

Key issues

- Insider dealers ordered to pay over £1.5 million in confiscation
- Upper Tribunal strikes out challenges to prohibition orders
- FSA proposes ban on promoting UCIS and similar products to most retail investors
- FSA reports on systemic risk caused by hedge funds

which the Trustees were both partners.

Following an investigation by the Solicitors Regulation Authority and proceedings before the SDT, they had (in October 2011) made admissions in respect of ten instances of breaches of the Solicitors Accounts Rules. The SDT also found that the various transfers set out above amounted to breaches of the Solicitors' Code of Conduct. Those proceedings led to the removal of Mr Quarrell's name from the Roll of Solicitors, the revocation of the recognition of Quarters as a "recognised body" and the imposition of a prohibition on Ms Beaumont from being registered as a foreign lawyer.

Neither the FSA nor TPR, in seeking to impose prohibition orders, relied upon any allegations of misappropriation, dishonesty or impropriety. TPR maintained that both of the Trustees lacked "competence and capability" and "financial soundness" for its purposes under the Pensions Act 1995. The FSA went further, arguing that the circumstances also illustrated a lack of integrity and reputation (as defined under its Fit and Proper Test for Approved Persons ("FIT")). Neither the FSA's nor TPR's arguments were challenged by the Trustees or Quarters.

Comment

Several important points arise from the complex facts of this case.

The Upper Tribunal has re-affirmed that it is willing and able to rely upon the findings of other disciplinary tribunals (in this case, the SDT). It has also sent a strong message that, whilst it will give applicants substantial latitude when considering references, it is not prepared to allow its process

to be used to unreasonably delay or frustrate regulatory action.

The case also illustrates the overlapping responsibilities owed to multiple regulators by firms and individuals involved in operating and acting as trustees of pension schemes. The additional argument advanced by the FSA that the failings indicate a lack of integrity and reputation underlines the comparatively robust view which the FSA takes towards policing its section of the perimeter in this area.

http://www.tribunals.gov.uk/financeandtax/Documents/decisions/Quarrell_Beaumont_Quarters_Trustees_v_TPR_FSA.pdf

<http://www.fsa.gov.uk/library/communication/statements/2009/freedom.shtm>

Other Final Notices: -

The FSA has (on 22 August) cancelled the Part IV permission of **Tony Sanham (formerly trading as Tony Sanham Associates)** as he has not conducted any regulated activity since voluntarily varying his permission in June 2010.

http://www.fsa.gov.uk/static/pubs/final/tony_sanham.pdf

FSA proposes ban on promoting UCIS and similar products to most retail investors

The FSA has (on 22 August) published a consultation paper (CP 12/19) proposing changes to its Conduct of Business Sourcebook ("COBS") which would restrict the promotion of Unregulated Collective Investment Schemes ("UCIS") and similar products to sophisticated investors.

Specifically, the FSA proposes to change the marketing restriction contained in COBS to remove a number of categories of customer to which firms may promote UCIS, qualified investor schemes, securities issued by pooled investment special purpose vehicles and traded life policy investments ("TLPs"). The effect of removing these categories would be to remove the flexibility currently allowed to firms to assess whether products such as these are suitable for retail customers in some circumstances.

The FSA has invited firms to respond to the proposals by 14 November 2012.

Comment

The FSA has, since September 2010, published 20 Final Notices relating to UCIS failures. These have involved the imposition of financial penalties totalling over £300,000 and, in a number of instances, removals of permissions and approvals and prohibition orders. Most of these cases have involved the promotion of unsuitable UCIS products by smaller firms and individual advisers to ordinary retail customers.

The proposed rule changes also respond to major events such as the collapse of Keydata Investment Services Limited ("Keydata") in 2009. Since then, the FSA has taken significant enforcement action (which remains ongoing) in respect of the promotion of bonds listed on the Luxembourg stock exchange to retail investors. Those bonds, although not UCIS, would be likely to fall within the proposed wider range of investment products which would be subject to tighter restrictions under the proposals.

The proposals are the latest example of the FSA's interventionist approach towards the protection of retail investors. It has already made its position on the promotion of TLPs abundantly clear by issuing finalised guidance (FG12/12) in April 2012, indicating that it does not consider that they should be promoted to the vast majority of retail investors.

In the statement accompanying that guidance, it also stated that it would amend the rules governing the promotion of TLPs and other non-mainstream investments to retail customers. This consultation paper brings forward those proposed changes.

However, the FSA's interventionist approach appears unlikely to end with the implementation of these changes to COBS. Under the Financial Services Bill, which is currently progressing through the House of Lords, its successor organisation, the Financial Conduct Authority ("FCA"), is due to receive significant powers to prohibit firms from entering into specified types of agreements where it considers that they will cause serious harm to consumers.

Recent public statements from senior FSA figures suggest that these powers, when they come into force (expected to be in early to mid 2013), are likely to be used sparingly, but that it remains, and the FCA will remain, committed to intervening early to prevent rather than react to consumer detriment.

<http://www.fsa.gov.uk/static/pubs/cp/cp12-19.pdf>

http://www.fsa.gov.uk/consumerinformation/firmnews/2010/keydata_faq.shtml#1

<http://www.fsa.gov.uk/static/pubs/guidance/fq12-12.pdf>

<http://www.fsa.gov.uk/library/communication/pr/2012/041.shtml>

FSA reports on systemic risk caused by hedge funds

The FSA has (on 21 August) issued a report detailing the findings of its Hedge Fund Survey and Hedge Fund as Counterparty Survey (conducted in March and April 2012 respectively).

The FSA concluded from the results of the surveys that the risks posed by hedge funds to financial stability were limited at the time when the surveys were carried out. Specific findings included that: -

- aggregate assets under management increased in the survey period, predominantly due to positive returns, but also helped by generally positive net subscriptions;
- the footprint of surveyed hedge funds is modest in most markets when measured by the value of their exposures and by turnover – possible exceptions are the convertible bond, interest rate derivative and commodity derivative markets;
- leverage remains largely unchanged and modest for most funds;
- counterparty exposures of surveyed hedge funds remain fairly concentrated among five banks; and
- measures of portfolio concentration, including qualifying funds' top ten positions as a percentage of gross market value and the number of open positions, has remained largely

unchanged for most surveyed funds.

The FSA has indicated that it intends to repeat the surveys in September and October 2012.

<http://www.fsa.gov.uk/static/pubs/other/hedge-fund-report-aug2012.pdf>

Authors



Roger Best
Partner

T: +44 20 7006 1640
E: roger.best
@cliffordchance.com



Matthew Newick
Partner

T: +44 20 7006 8942
E: matthew.newick
@cliffordchance.com



Martin Saunders
Partner

T: +44 20 7006 8630
E: martin.saunders
@cliffordchance.com



Carlos Conceicao
Partner

T: +44 20 7006 8281
E: carlos.conceicao
@cliffordchance.com



Luke Tolaini
Partner

T: +44 20 7006 4666
E: luke.tolaini
@cliffordchance.com



Chris Stott
Professional Support Lawyer

T: +44 20 7006 4231
E: chris.stott
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ
© Clifford Chance LLP 2012

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh* ■ Rome ■ São Paulo ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Clifford Chance has a co-operation agreement with Al-Jadaan & Partners Law Firm in Riyadh.