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Bayliss & Co (Financial Services) Limited and Clive John Rosier v. Financial Conduct Authority
A3/2015/2782

Article by David Bowden

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Court of Appeal rules that firm aggrieved by FCA decision must bring new High Court claim
Bayliss & Co (Financial Services) Ltd & Clive Rosier v. Financial Conduct Authority - A3/2015/2782

Executive speed read summary

Mr Rosier was the sole director or Bayliss & Co (Financial Services) Limited which had been authorized to provide financial services for 30 years by the PIA, FSA and FCA. The FCA had been dissatisfied about the way Bayliss had communicated with it about its review of Geared Traded Endowment Policies. In a decision notice in May 2013 the FCA prohibited Mr Rosier from exercising any significant influence functions and fined him £10,000. The FCA issued a misleading press release. Mr Rosier referred the matter to the Upper Tribunal. In a lengthy 89 page judgment in May 2015 it found that Mr Rosier was '*unsuitable*' and upheld all but one of the FCA's findings against him. The UT refused to order the withdrawal of the prohibition because it found that Mr Rosier had not learned lessons and still asserted that his breaches were minor when they were not. However the UT heavily criticised the FCA and made a detailed series of recommendations for it to improve the handling of press releases about regulatory findings. Mr Rosier sought permission to appeal the Upper Tribunal's decision but Lord Justice Patten refused permission on the papers. At an oral hearing, Lord Justice Lewison also refused permission to appeal because the unsuitability finding made by the UT about Mr Rosier was a question of fact from which there is no appeal. He also rejected a submission that the UT had taken no heed of Mr Rosier's attempts to join a compliance network ruling that there was no trace of any evidence about this in the UT's decision. Lewison LJ ruled that Parliament had provided a redress route in section 415 of FiSMA so that Mr Rosier could bring an action against the FCA in the High Court in relation to any acts or omissions of the FCA made by it in the discharge or purported discharge of its functions under FiSMA. Lewison LJ rejected a submission that it was impracticable for Mr Rosier to bring a High Court claim.

Bayliss & Co (Financial Services) Limited and Clive John Rosier v. Financial Conduct Authority
A3/2015/2782 14 March 2017
Court of Appeal, Civil Division (Lord Justice Lewison)

What are the facts?

Bayliss & Co (Financial Services) Limited ('Bayliss') is an English company (number: 2014752) which was incorporated over 30 years ago on 28 April 1986. It trades as '*Money Matters'*. Its sole director is Clive Rosier although his wife had also acted as its company secretary in the past. It is a small company which qualified to file accounts accordingly at company's house. Bayliss's business was offering financial services advice.

Bayliss was first authorised over 20 years ago by the Personal Investment Authority ('PIA') on 26 September 1994 to provide financial services advice. The PIA's functions were then folded into the realm of the FCA's predecessor in title (the Financial Services Authority) which continued Bayliss's authorisation from 1 December 2001 onwards.

The FSA which had failed to act to prevent the financial crash had its more important functions removed from it which were placed in the steady hands of the Bank of England's Prudential Regulatory Authority instead. The vestiges of the FSA's functions were transferred to the FCA which assumed its reduced responsibilities from April 2013. The FCA continued to regulate Bayliss. Bayliss was also regulated by the FCA to provide insurance distribution services. Bayliss had these 2 firm authorisations from the PIA, FSA and FCA:

- **CF21** - Investment Adviser, and
- **CF27** - Investment Management.

The FCA authorised Mr Rosier and provided him with these authorisations within Bayliss:

- **CF1** – Director,
- **CF10** – Compliance oversight,
- **CF11** – Money laundering reporting office, and
- **CF30** - Customer

What regulatory action did the FCA take?

By its Decision Notice dated 23 May 2013, the FCA sought to do these 3 things in relation to Mr Rosier:

- To impose a financial penalty of £10,0000 on him pursuant to section 66 of the Financial Services and Markets Act 2000 ('FiSMA') for failing to comply with Statements of Principle 2 and 7 between 7 August 2004 and 25 September 2012 as an approved person,

- To make an prohibition order under section 56 of FiSMA prohibiting him from performing any '*significant influence'* function in relation to any regulated activity carried on by any authorised person on the grounds that he is '*not a fit and proper person'* to perform such functions, and
- To withdraw his approval to perform '*significant influence'* functions at under section 63 of FiSMA.

There was a lot of padding in the Decision Notice but the only specific matter that the FCA could actually pin Mr Rosier down on (despite his previous 30 year unblemished record) related to how it viewed Bayliss had communicated clearly with it about Bayliss' review of Geared Traded Endowment Policies.

The reference concerning the FCA's financial penalty was a '*disciplinary reference'* falling within the ambit of section 133(7A) of FiSMA (as amended). However the reference concerning the prohibition decision was a '*non-disciplinary reference'* falling within section 133(6) of FiSMA. The Decision Notice advised both Bayliss and Mr Rosier that they had a right to refer the matter to the Upper Tribunal under paragraph 2(2) of Schedule 3 of the Tribunal Procedure (Upper Tribunal) Rules 2008 within 28 days. Both Bayliss and Mr Rosier appealed.

What was the issue about the FCA's Press Releases?
After distributing its decision notices about Bayliss, the FCA published a press release which, it eventually acknowledged, was deficient and misleading. Nonetheless the FCA asked the Upper Tribunal to '*affirm and uphold'* its regulatory decisions.

On 4 November 2013, the FCA published the decision notices on its website. The decision notices prominently featured the following wording: '*This decision notice has been referred to the Upper Tribunal in order to determine the appropriate action for the FCA to take'*. In addition, the FCA's Press Office decided to publicise the decision notices by sending an email to certain media outlets. The wording of the FCA press email indicated that the FCA had '*fined and banned Mr Rosier'* and did not clearly explain that the decision notices reflected action that the FCA was '*proposing to take'* against Bayliss and Mr Rosier pending the determination of the matter by the Upper Tribunal.

The FCA press email also included a link to the decision notices which were erroneously described as '*final*' notices. Some of the media outlets that received the FCA press email published articles in relation to the decision notices which largely replicated the contents of the FCA press email, thereby giving the incorrect impression that the FCA's proposed action set out in the decision notices was final.

Mr Rosier heard about the FCA press email and complained to the FCA about its contents claiming that it gave media outlets a misleading impression of the status of the FCA's proceedings. The FCA initially denied that the FCA press email was inaccurate or defamatory to either Bayliss or Mr Rosier. Mr Rosier drew the FCA press email to the attention of the Upper Tribunal. The FCA then wrote to the Upper Tribunal and apologised for the FCA press email referring to Mr Rosier as being '*banned*' by it. The FCA offered no explanation or apology to Mr Rosier.

Several weeks later, the FCA wrote to Mr Rosier, acknowledging that its press email contained '*omissions and inaccuracies*'. The FCA apologised to Mr Rosier and offered to send a further email to the media outlets that received the initial press email to correct these omissions and inaccuracies.

What were the issues that the Upper Tribunal had to resolve?
The 4 issues which the Upper Tribunal had to decide were whether:

- the financial adviser's conduct had fallen below required standards,
- the financial penalty had been imposed out of time,
- the reference concerning the non-disciplinary matters had been properly dealt with, and
- what action the Upper Tribunal should take in response to the FCA's misleading press release.

The Upper Tribunal was exercising original jurisdiction in this matter and had to determine the evidence from the witnesses. This was not the more usual situation of the Upper Tribunal exercising an appellate jurisdiction over decisions referred to it from the First Tier Tribunal.

What decision did the Upper Tribunal make?
It dismissed both references**.**

The matter was heard by a 3 member panel of the Upper Tribunal comprised of Upper Tribunal Judge Timothy Herrington, and lay members Jo Neill and Mark White. The Upper Tribunal **[2015] UKUT 0265 (TCC**) gave these 4 reasons for dismissing the references:

- It found that Mr Rosier had failed to act with due skill, care and diligence and had contravened the FCA Statements of Principle and Code of Practice for Approved Persons. The tribunal upheld all but one of the FCA's findings against him.
- Mr Rosier's misconduct first came to light in April 2010. The key issue was whether (when the law changed on 8 June 2010 so as to extend the limitation period from 2 years to 3) he had an accrued right to have the investigation concluded within 2 years. The UT held he had not accrued such a right. The financial penalty had been issued in time. However for the FCA to have used almost the entire 3 year period to complete its investigation was '*excessive*'. The UT found that Mr Rosier's breaches demonstrated '*systemic and cultural failings'* in the way he managed Bayliss. The FCA had power to impose penalties on both firms and individuals. Those 2 powers should not be regarded as mutually exclusive, although the FCA had to take care to avoid double jeopardy. Mr Rosier was the controlling mind of Bayliss and he was personally culpable for the alleged failings. The penalty of £10,000 was appropriate.
- The Upper Tribunal's powers over the non-disciplinary reference were more circumscribed. Nevertheless, the non-disciplinary matters had been properly dealt with. There were no grounds for withdrawing the prohibition because Mr Rosier had not learned lessons and still asserted that his breaches were minor when they were not.
- The FCA did not appear to have appreciated the difference in the Upper Tribunal's powers over disciplinary and non-disciplinary references. The use of terminology such as '*affirm and uphold'* was inappropriate. The instant proceedings were new proceedings rather than appeals from the FCA's decisions. FiSMA (as amended) made clear that in disciplinary references the FCA should ask the Upper Tribunal for directions to impose a financial penalty.

What rulings had the Upper Tribunal previously made in *Arch* and *Burns*?
In *Arch Financial Products LLP* the Upper Tribunal (UTJ Timothy Herrington, Sandi O'Neill and Peter Freeman QC) **[2015] UKUT 13 (TCC)** on 21 May 2014 ruled that given that a FCA regulated firm had committed '*serious, repeated and prolonged breaches'* of FCA Principles (1, 3 and 8) it was clear that a public censure was justified.

In *Angela Burns*, the Upper Tribunal (UTJ Timothy Herrington) **[2014] UKUT 0509 (TCC)** on 1 May 2013 ruled that under section 391 of FiSMA there was a presumption that decision notices would be published. However, the Upper Tribunal had the power under the Tribunal Procedure (Upper Tribunal) Rules 2008 rule 14(1) to prohibit publication. In the exercise of its discretion, the UT had to carry out a balancing exercise between those factors that tended towards publication and those that would tend against it. However, in accordance with the open justice principle, that exercise started with the scales heavily weighted in favour of publication, with the burden on an applicant to produce cogent evidence of how unfairness might arise and how they could suffer a disproportionate level of damage to their livelihood if publication were not prohibited.

The UT should take the same legal approach in regard to its further power under Schedule 3 paragraph 3(3) of these rules to exclude the particulars of the reference from the register. The requirement of cogent evidence entailed that the mere possibility of severe damage or destruction of livelihood was Insufficient - the evidence should establish that there was a significant likelihood of such damage or destruction occurring. This decision is under appeal to be heard by the Court of Appeal over 2 days starting on 9 June 2017 before a panel of 3 Lord Justices.

What ruling did the Upper Tribunal make about the FCA's press releases?
Section 133A(5) of FiSMA allows the UT to '*make recommendations as to the FCA's… procedures'* when it considers a decision taken by it. The Upper Tribunal ruled that it had a clear interest in ensuring that no misleading impression was given about the status of disciplinary proceedings. In the light of the shortcomings that were identified by the UT in relation to the preparation, approval and circulation of its press email, the UT went on to make 6 recommendations as to how the FCA should strengthen its procedures relating to publicity regarding decision notices as follows:

- Particularly in the period before a reference was determined, the FCA had to consider the text of its communications very carefully and verify them as being '*true, fair and not misleading*',
- A communication falling short of a full press release still required the same rigorous approach,
- The provisional nature of a decision notice had to be clearly demonstrated in any publicity material,

- The Upper Tribunal would hold the FCA to account if it failed to practice such standards, and would take proceedings against the FCA for contempt of court in '*extreme cases'*. The press release in the instant case had been '*inadvertently misleading'* rather than deliberately so,
- In future, the FCA's enforcement division should operate a '*robust challenge process'* to material produced its press office. It should also produce clear guidance explaining to its press office why publicity relating to decision notices had to be different from that relating to final notices, and the importance of adhering to the guidance laid down in 2 previous UT cases (*Arch* and *Burns*), and
- All publicity should be approved by an experienced member of the enforcement division. Complaint should be immediately escalated to the head of department.

What was the application before Lord Justice Lewison?
Mr Rosier and Bayliss & Co in their Appellant's Notice advanced a number of Grounds for Appeal. However on 8 February 2016 Lord Justice Patten refused them permission to appeal on the papers. The application for permission to appeal was renewed to an oral permission hearing and by then only these 2 Grounds of Appeal were advanced:

- Whether the Upper Tribunal was right to conclude that the FCA was correct to withdraw his authorisation given that both the FCA and the UT knew he was negotiating to join a compliance network, and
- The Upper Tribunal was wrong not to have investigated what the FCA did more thoroughly in the light of its findings in relation to its mishandling of the press releases.

Lewison LJ noted at the outset that the Upper Tribunal had '*exercised its original jurisdiction rather than its appellate jurisdiction*' and that the proposed appeal was a question of law only. Lewison LJ correctly noted that the more stringent 2nd appeals test did not apply and that under CPR part 52.6 permission to appeal could be granted where:

- the court considers that the appeal would have a real prospect of success, or
- there is some other compelling reason for the appeal to be heard.

What did Lewison LJ rule on the point about joining a compliance network?
Lewison LJ started by reminding himself that '*in order to have authorisation a provider of financial services must satisfy the "*threshold conditions*" under Schedule 6 of FiSMA'*. The FCA needed '*evidence of "*appropriate resources*" under paragraph 2D of Schedule 6 of FiSMA*' and that '*resources of the applicant included non-financial resources'* which were to '*include human resources'*. Lewison LJ went on to rule that the Upper Tribunal had found that Mr Rosier was '*unsuitable*' and that this was '*a question of fact from which there is no appeal'*.

Lewison LJ reiterated these 2 key findings made below by the Upper Tribunal:

- He said the 'crux of that decision' is recorded in paragraph 288 where it UT said:
  '**288**. *We can deal with this very briefly. As set out in paragraphs 49 to 55 above, the Threshold Conditions which must be satisfied in order for a firm to continue to maintain its permission to carry out regulated activities include a requirement to have appropriate resources. This term includes human resources. Clearly if a firm had no suitably qualified person available to it to perform the required significant influence functions of director, compliance oversight and money laundering reporting it would fail to meet the Threshold Conditions,*' and
- Also at paragraph 289:
  '**289.** *That will be the position if Mr Rosier's approval is withdrawn and he is made the subject of a prohibition order in the terms set out in his Decision Notice as there is no other person connected with Bayliss who can perform these functions.*'

In the light of these findings by the Upper Tribunal, Lewison LJ ruled that '*on the face of it, this is a finding of fact not subject to be re-opened on appeal'*. As to Mr Rosier claims that '*he was negotiating on Bayliss's behalf to join a compliance network*', Lewison dismissed them noting that '*there is no trace of that evidence in the UT's decision*'. However Lewison LJ observed that '*had there been cogent evidence'* then '*it might be possible to suggest that the Upper Tribunal ignored relevant evidence'* but he ruled that there was '*no evidence of this'* and for that reason on ground 1 he '*cannot say that this ground of appeal has any realistic prospect of success'.*

What did Lewison LJ rule on the point about the Upper Tribunal not investigating more thoroughly?
Lewison LJ started by noting Mr Rosier's submission that the Upper Tribunal '*ought to have investigated more fully into the FCA'* and that Mr Rosier claims this represented '*malicious behaviour'* by the FCA. Mr Rosier accepts there is no express authorisation.

Lewison LJ reminded himself that the '*Upper Tribunal is a creation of statute. It can only do what the statute empowers it to do*'. In oral submissions Mr Rosier had submitted to Lewison LJ that there was '*no other avenue for his complaint'*. Lewison LJ vehemently disagreed pointing out that section 415 of FiSMA provides:

> '**415**. **Jurisdiction in civil proceedings.**
> *(1) Proceedings arising out of any act or omission (or proposed act or omission) of—*
> *(a) the Authority,*
> *(b) the competent authority for the purposes of Part VI,*
> *(c) the scheme manager, or*
> *(d) the scheme operator,*
> *in the discharge or purported discharge of any of its functions under this Act may be brought before the High Court or the Court of Session.*
> *(2) The jurisdiction conferred by subsection (1) is in addition to any other jurisdiction exercisable by those courts*.'

Although Mr Rosier had submitted that it was '*is impracticable to bring an action against the FCA with the resources that the FCA has available to it*', again Lewison LJ disagreed remarking that '*Parliament has provided that as the redress route*'. He went on to rule that in his *'judgment the powers of the Upper Tribunal (but not the High Court) are limited to an investigation of the referred right of the FCA decision'* but that the UT had '*wide ranging powers of investigation'*.

Did Lewison LJ grant permission to appeal? Why did he do this?
No. Lord Justice Lewison refused permission to appeal saying that he was '*not persuaded that either Ground of Appeal has a reasonable prospect of success*'.

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