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ARDL
Association of Regulatory & Disciplinary Lawyers

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FSA ENFORCEMENT DECISIONS POST-LEGAL & GENERAL

The recent decision of the Financial Services and Markets Tribunal (the **Tribunal**) in Legal & General Assurance Society Limited (**L&G**) v The Financial Services Authority (**FSA**) has highlighted difficulties with the way in which the FSA, through its Enforcement staff and the Regulatory Decisions Committee, assesses the evidence against regulated firms before deciding to bring action against them. The case has shown that the evidence relied upon by the FSA will be held up to close examination by the Tribunal, and that the Tribunal is a robust body which is willing to criticise the FSA's evidence if it considers there to be grounds to do so.

In many enforcement cases it is likely that the evidence that supports the FSA's enforcement action will be sufficient to persuade the subject of the proceedings to reach a quick settlement, minimising costs and wasted management time, obtaining credit for cooperation and avoiding lengthy and harmful publicity. In the wake of the L&G decision, however, the willingness of firms and individuals to settle may be reduced as they will question whether the FSA has a proper evidential basis for its action and will regard the Tribunal as an effective check on the FSA's powers, as it was always meant to be. The challenge for the FSA will be to address scepticism about its decision making processes quickly in order to avoid a tide of regulatory activism.

In October 2003 the FSA, through the RDC, sought to impose a penalty of £1.1million on L&G for the mis-selling of with-profits mortgage endowment policies between 1997 and 1999. One of the key issues in the case was whether L&G's procedures were such as to ensure that customers who had been categorised as having a "low risk" appetite were properly advised of the risk that there may be insufficient investment returns to pay off their mortgages at maturity.

The FSA sought to impose the penalty as it considered that L&G's procedures were inadequate and that polices had been sold to customers who either were not prepared to accept the risk of a capital shortfall or did not fully understand that risk. These failures, according to the FSA, gave rise to a significant level of mis-selling. In order to assess the extent of the mis-selling, the FSA relied upon a report produced by PriceWaterhouseCoopers (**PwC**). PwC considered a sample of 250 sales to low risk customers and concluded that 60 out of the 152 customers who responded to their questionnaire (39 per cent.) fell into a "redress payable" category. PwC's conclusion was reached on the basis that they considered there was "*persuasive evidence for a judgment to be formed on whether the customer was risk-averse and/or did not understand the capital shortfall risk and may therefore have been sold a policy that was not suitable for them*" (emphasis added).

The FSA drew from PWC's findings two further conclusions upon which the RDC relied. First, that the rate of mis-selling within the sample reviewed was in fact 39%, notwithstanding the fact that PwC had indicated only that customers may have been sold unsuitable policies. Indeed in the decision notice the RDC referred to the fact that the FSA had concluded that the customers "*were sold policies that were unsuitable for them*" (emphasis added). Secondly, as the FSA did not consider a more extensive review to be realistic it considered itself to be "*obliged to rely on the sample review as being strongly indicative of the potential consequences of L&G's selling practices*".

Whilst the Tribunal found that some of L&G's procedures had been inadequate, it did not accept that this had given rise to significant mis-selling. In particular, the Tribunal did not agree with the FSA that 60 mis-sales had been established by the PwC review or that the proportion of mis-sales in that review could be said to be representative of any wider mis-selling. Of those cases considered as

part of the review, the Tribunal found that there had been only 8 mis-sales, albeit with the potential for 14 more.

Although the Tribunal expressed its criticism of the FSA, and in particular the RDC, in measured terms, it is quite clear that the Tribunal had serious misgivings about the way in which the FSA sought to prove its case. It was troubled by the FSA's paraphrasing of the PwC report in stronger terms that those in which it had been drafted and was even more concerned by the fact that the RDC had found L&G guilty of mis-selling in reliance on the PwC report when that report only concluded that L&G may have engaged in mis-selling. To rely on the PwC report in this way was considered by the Tribunal to be a *"significant error"* on the RDC's part, not least as this appeared to be the only material upon which the RDC was basing its mis-selling conclusion. In terms of proof, the Tribunal made it clear that the burden was on the FSA to prove that the rule breaches had occurred to the appropriate standard, namely, on the balance of probabilities. It was a problem for the FSA, not L&G, that the survey of 250 was too small a sample to permit wider extrapolation.

In view of this heavy criticism it comes as no surprise that the FSA has stated in its press release which accompanied its Business Plan for 2005/06 that it intends to review its procedures for investigations and making enforcement decisions. It is to be welcomed that it plans to give careful consideration to the comments of the Tribunal in L&G. However, it not yet clear how the FSA will resolve the tension between on the one hand speeding up the enforcement process, and on the other, ensuring that cases that are referred to the Tribunal are capable of withstanding scrutiny when stricter evidential standards are applied. The lessons for the FSA and the RDC seem clear. Enforcement staff should not cut corners in their investigations, must produce evidence which is capable of proving the case that the FSA is seeking to establish and should highlight to the RDC any potential evidential shortcomings in the FSA's case. For its part, the RDC needs to be more rigorous in its examination of the evidence relied upon and must ensure that its findings are supportable at the Tribunal stage.

In the short term, while the FSA revises its internal procedures and safeguards and considers the resource implications of the Tribunal's decision, one might expect to see a knock on effect on the FSA's willingness to bring cases to enforcement. As for the regulated community, we may well see that institutions or individuals who feel aggrieved by an FSA decision will be more inclined to consider references to the Tribunal than before.

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RUSCILLO – SELF-REGULATION UNDER SCRUTINY

The Court Of Appeal considered the cases of: Ruscillo v Council for the Regulation of Healthcare Professionals and the GMC and Council for the Regulation of Healthcare Professionals v NMC and Stephen Truscott between 26 and 28 July 2003. Judgment was handed down on 20 October 2004. In a controversial decision, the Court dismissed both appeals.

Ruscillo – The Facts

In October 2003 Dr Ruscillo appeared before the Professional Conduct Committee of the GMC to answer a charge of Serious Professional Misconduct. It was alleged by the Council that he had had an affair with a patient. The GMC had investigated the case for almost 18 months and on Dr Ruscillo's admissions, they chose not to call any evidence. Counsel for Dr Ruscillo made submissions that the admitted facts were insufficient to support a finding of Serious Professional Misconduct. In its determination, the Committee expressed concern that no evidence had been heard as to the circumstances or context of the relationship alleged but accepted the submissions of defence Counsel, and Dr Ruscillo was found not guilty of Serious Professional Misconduct. The Council for the Regulation of Healthcare Professionals ("the Council") appealed to the High Court.

At a preliminary hearing Mr Justice Leveson heard argument that section 29 of the National Health Service and Healthcare Professionals Act 2002 ("the Act") did not afford the Council the right to bring an appeal where no finding of Serious Professional Misconduct had been made. He rejected that argument and allowed the appeal to proceed. Dr Ruscillo appealed against this decision.

Truscott – The Facts

Mr Truscott was a nurse specialising in Paediatric Care at University College Hospital in London. He was charged by the NMC with having used a hospital computer to access sexually explicit and/or offensive websites. Mr Truscott admitted these offences and admitted that his actions amounted to misconduct. A 5 year caution was imposed. The Professional Conduct Committee stated that it had considered whether to remove Mr Truscott from the Register but had decided not to because there was no evidence of direct harm to patients. The Council appealed to the High Court because it considered the NMC's Committee had been unduly lenient. The Judge (Collins J) dismissed the Council's claims. The Council appealed.

The basis of the appeals

The appeals were heard together because they both concerned the meaning of Section 29 of the National Health Service and Healthcare Professionals Act 2002 (the Act). This gives the Council the right to appeal to the High Court against decisions of a medical/healthcare regulatory body. Section 29 (4) of the Act states "if the Council considers that –

(a) a relevant decision falling within subsection (1) has been unduly lenient, whether as to any finding of professional misconduct or fitness to practise on the part of the practitioner concerned (or lack of such a finding) or as to any penalty imposed, or both, or

(b) a relevant decision falling within subsection (2) should not have been made, and that it would be desirable for the protection of members of the public for the Council to take action under this section the Council may refer the case to the relevant Court."

Their Lordships stated that "the draftsman of this sub-section deserves no prizes", a comment which most regulatory practitioners would support. Nevertheless, they went on to say that despite this, the meaning was clear. They agreed that the Council could appeal an unduly lenient penalty, particularly if it considered that it did not fully reflect all the incidents of professional misconduct that should have been found.

The concern is that where for one reason or another the regulatory body chooses not to call any evidence and no finding of Serious Professional Misconduct ensues or indeed where the Committee does not consider that evidence presented is sufficient to support a finding, an appeal could nevertheless then be successfully brought by the Council.

In a case where errors of judgement have been made by the prosecution, why should the healthcare professional remain in the throes of litigation?

The Proper Meaning

Dr Ruscillo, Mr Truscott ,the GMC and the NMC argued that the High Court must dismiss an appeal by the Council unless persuaded that the decision under review was unduly lenient and that it is desirable to interfere for the protection of members of the public. The Council contended it had unrestricted access to the High Court, which could then make whatever order it considered appropriate. For example, where a disciplinary body had imposed a penalty, the Court could substitute a penalty considered more appropriate, even if the original penalty was not "unduly lenient". Furthermore, the Court could correct such findings of fact to reflect the gravity of the case even when the penalty was nevertheless considered appropriate.

Their Lordships disagreed and said it was clear that Section 29 was concerned only with correcting decisions not to impose a penalty or to one which was unduly lenient. Section 29(8) only permits the Court to vary decisions about penalties. However, this still means that the Council can bring an appeal incorporating grounds about findings of fact.

The issue of 'double jeopardy' for the practitioner was raised before their Lordships in the Ruscillo appeal. They were not impressed and indicated that "the object of the scheme is the protection of the public and the Council can only refer a decision to the High Court when it considers that this is necessary for the protection of the public". In situations where the protection of the public is at stake, the Court held that principles of double jeopardy should take second place.

Various definitions of 'undue leniency' were advanced by the parties in both appeals. However, the Court gave its own definition, stating that appeals should relate only to cases where the issue "is likely to be whether the Disciplinary Tribunal has reached a decision as to penalty that is manifestly inappropriate having regard to the practitioner's conduct and the interests of the public." The question remains : how do you decide whether a penalty decision was manifestly inappropriate? Will the Court have to consider all the evidence afresh whenever an appeal is brought, in order to assess for itself whether the decision on penalty was manifestly inappropriate? Probably, yes.

If the Council considers that there has been an under-prosecution of a case or that errors have been made by those bringing the prosecution, it was determined that it was appropriate for the Council to make enquiries of the relevant regulatory bodies to determine what has actually occurred. If it is in the public interest that additional evidence should be placed before the Court, it may be necessary to do so to ensure that "a practitioner does not escape the sanctions that his conduct has made essential if patients are not to be exposed to risk".

We are likely to see cases remitted to regulatory bodies for fresh decisions to be made in respect of penalty. Alternatively, the Court will substitute the penalty itself. However, it was their Lordships' opinion that if the High Court finds that there has been a serious procedural or other irregularity in the proceedings, it may be unable to decide whether the penalty was appropriate or not. In these circumstances, the Court would probably allow an appeal and remit the case to the disciplinary tribunal with

directions as to how to proceed. This may result in entire cases being heard afresh, rather than just the issue of penalty being redetermined. For example, we may see cases being remitted for re-hearing where the Court has indicated that certain evidence should have been put before the Committee.

This effectively means that cases will be reopened and reconsidered as if the previous hearing had not taken place.

The effect of these decisions on practitioners who have either been acquitted or otherwise dealt with by their regulatory bodies is potentially devastating. Practitioners are no longer able to consider that once their disciplinary hearing has concluded, they can resume their life or career. The Council is able to appeal decisions by regulatory bodies, even where no finding of Serious Professional Misconduct has been reached. In addition, and perhaps of more concern, where procedural errors have been made by those who prosecute it is the practitioner who takes the consequences. Has the right balance been struck between fairness to the practitioner on the one hand and protection of the public on the other?

Bear in mind, that there may be no limit on the number of times a case can be appealed, particularly if the Court considering the appeal remits the case back to the regulatory body for a fresh determination on penalty.

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LEGAL UPDATE

Three Rivers District Council v. Governor and Company of the Bank of England (No.6) [2004] 3 WLR 1274

In this case the House of Lords on 11th November 2004 finally decided the question of privilege and discovery of documents passing between the Bingham inquiry unit at the Bank of England and Freshfields. The House reversed the decision of the Court of Appeal, and restored the rule that it is desirable as a matter of public policy that communications between clients and their lawyers for the purpose of obtaining legal advice should be privileged from discovery notwithstanding that as a result cases might have to be decided in the absence of all relevant probative material.

The claimants, the liquidators and creditors of BCCI, in proceedings for misfeasance in public office against the Bank of England in respect of its supervision of BCCI before its collapse, sought an order for inspection and disclosure of communications passing between the Bank of England's inquiry unit and its solicitors during the course of the Inquiry set up to inquire into the Bank's supervision of BCCI. The House of Lords held that legal advice privilege extended to advice in the context of the presentation of a case to an inquiry, and that accordingly communications between the Bank's inquiry unit and its lawyers regarding presentation of its case to the Inquiry for the purpose of persuading it that its discharge of its public law obligations under the Banking Acts were not deserving of criticism were privileged. The test was whether the advice was given in a "relevant legal context". The House did not, however, express any view on the unhelpful decision by the Court of Appeal in an earlier hearing that, when dealing with a corporate entity, the "client" is the individual or group of individuals from that entity that is directly authorised to instruct legal advisors and receive their advice.

Johnson v. Medical Defence Union Limited [2005] 1 All ER 87.

The claimant consultant surgeon was involved in litigation with the Medical Defence Union which had decided not to renew his membership. He was forced to find alternative professional indemnity insurance cover and considered that his exclusion from membership of the MDU had blemished his professional reputation. The defendant's decision not to renew the claimant's membership was based upon its assessment of certain information concerning him. He believed that that amounted to improper processing of data which was actionable under the provisions of the Data Protection Act 1998.

In his particulars of claim, Mr Johnson sought relief under section 10 (right to prevent processing likely to cause damage), section 13(damages) and section 14 (rectification or erasure of data). The claimant applied to Laddie J. under the CPR for specific disclosure of documents which the defendant sought to resist. In an earlier ruling the learned judge had dismissed Mr Johnson's application under section 7 of the 1998 Act for access to personal data on the grounds that many of the documents did not focus on Mr Johnson or were not about him, and they were therefore not "personal" in the sense necessary to constitute personal data under the Data Protection Act, and that they had not recorded as part of a "relevant filing system" under the Act. Notwithstanding that, Mr Johnson launched the current application the major part of which consisted of an application for specific disclosure under the CPR.

The defendant did not suggest that the earlier application for disclosure made this application an abuse of process, but argued that the statutory provisions, particularly section 15 of the Act which governed access to personal data under section 7, precluded any right to further discovery. Laddie J. held that whilst section 15 expressly governed the Court's jurisdiction and procedure for

disclosure of documents and access to personal data, it did not contain a general prohibition on a data subject obtaining disclosure in an action where he claimed relief for breaches of data protection principles. Accordingly, the fact that Mr Johnson had failed to obtain the substantially identical information under the express provisions of the Act had no direct bearing on whether there should be disclosure under the CPR in proceedings where the data subject had made out an arguable case that there had been a breach of the data protection principles by the defendant data controller. Accordingly, the application would be allowed.

R (Napier) v. Secretary of State for the Home Department [2004] 1 WLR 3056

The claimant, a serving prisoner, was charged with a disciplinary offence of assaulting a prison officer contrary to rule 51(1) of the Prison Rules 1999. In disciplinary proceedings before the governor the charge was found proved and a penalty of 35 additional days was imposed. Following a decision of the European Court of Human Rights in another case the Secretary of State accepted that the adjudication by the governor amounted to the determination of a "*criminal charge*" for the purposes of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and that the disciplinary proceedings against Mr Napier had not complied with that article. Accordingly, the Secretary of State remitted the imposition of 35 additional days, but refused to quash the finding of guilt.

Mr Napier issued a claim for judicial review of the decision by the Secretary of State not to quash the governor's finding of guilt. Goldring J. held that on a proper reading of the decision of the European Court of Human Rights the decisive factor which determined that disciplinary proceedings against a serving prisoner amounted to a "*criminal charge*" was the imposition of additional days. The learned judge held that the imposition of the addition of days was why the boundary between administrative and criminal law was crossed and why the proceedings had to comply with Article 6. However, an adjudication and finding that the claimant had assaulted a prison officer contrary to the Prison Rules not involving the imposition of additional days was, stripped of its penal consequences, to be analysed as an administrative finding of fact rather than the stigma of a conviction. Accordingly, the Secretary of State's remission of the additional days was sufficient redress without the need to quash the governor's decision. The application for judicial review was refused.

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FORTHCOMING EVENTS

ARDL Annual Reception

Wednesday 8th June 2005

Venue: Barbican Centre

FURTHER DETAILS TO BE CIRCULATED TO MEMBERS SHORTLY

REQUEST FOR COMMENTS AND CONTRIBUTORS

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