Decision notice – third party rights – FSMA s393 – whether applicant identified in notice - no

FINANCIAL SERVICES AND MARKETS TRIBUNAL

JAN LAURY **Applicant**

- and -

FINANCIAL SERVICES AUTHORITY **The Authority**

Tribunal: ANDREW BARTLETT QC

Sitting in public in London on 18 July 2007

The Applicant appeared in person

Simon Gerrish for the Authority

DECISION

INTRODUCTION

1. This decision is concerned with whether a third party is entitled to pursue a reference to the Tribunal, challenging the contents of a notice issued to a firm of which he was formerly an employee. The hearing was a preliminary hearing held under rule 13 of the Financial Services and Markets Rules 2001.

2. On 12 January 2007 the FSA issued to W Deb MVL Plc, formerly known as Williams de Broe Plc ("the firm"), a Decision Notice which notified the firm that the FSA had decided to impose a financial penalty of £560,000 for breaches of the FSA Principles for Businesses and FSA Rules during the period from 1 December 2001 to 3 May 2005. This was followed on 15 January 2005 by a Final Notice requiring payment of the penalty. (The abbreviated time period between the Decision Notice and the Final Notice was the result of an agreed settlement with the firm.)

3. The applicant, Mr Laury, had been head of compliance at the firm up to 20 June 2002. He heard about the FSA investigation while it was in progress and contacted the FSA to inform them that he was available for interview if required. The FSA did not take up his offer.

4. He took exception to the Final Notice on the basis that it contained implied criticism of him, which was unjustified, and which he had had no opportunity to contest or correct. He complained to the FSA and, after some correspondence which did not satisfy him, he referred the matter to the Tribunal.

5. The Financial Services and Markets Act (FSMA) s393(4) provides:

> If any of the reasons contained in a decision notice to which this section applies relates to a matter which-
>
> (a) identifies a person ("the third party") other than the person to whom the decision notice is given, and
>
> (b) in the opinion of the Authority, is prejudicial to that third party,
>
> a copy of the notice must be given to the third party.

6. The FSA did not consider that s393(4) applied, and did not give Mr Laury a copy of the decision notice.

7. Section 393(11) provides:

> A person who alleges that a copy of the notice should have been given to him, but was not, may refer to the Tribunal the alleged failure and-

(a) the decision in question, so far as it is based on a reason of a kind mentioned in subsection (4); or

(b) any opinion expressed by the Authority in relation to him.

8. Mr Laury's reference to the Tribunal was made pursuant to s393(11).

9. Mr Laury needed an extension of time for the lodging of the reference. Given the particular course of events (which it is not necessary to describe) the FSA did not oppose the grant of an extension, and I considered it appropriate to grant it. I need say no more about the extension of time.

10. Mr Laury presented his case with clarity and skill. He had not seen the Decision Notice itself[1], and therefore developed his case by referring to the wording of the Final Notice. The FSA stated that the Final Notice was based on the Decision Notice, with only those changes required to reflect the different status and function of the Final Notice, and that the particular paragraphs complained of by Mr Laury were identical in both notices. For convenience, I shall simply refer to "the Notice" except where it is necessary to distinguish.

THE NOTICE

11. The Notice extends to some 25 pages and is not easily summarised. The full text of the Final Notice is published on the FSA's website. The firm's failings were principally in the areas of inadequate accounting systems and controls, and non-compliance with the FSA's Client Asset Rules. Mr Laury's complaints were in respect of paragraphs 2.1, 2.4, 2.10(1)(2), 4.29, 4.52 and 5.8 of the Notice. The text of those paragraphs, with the addition of the relevant headings and sub-headings to assist with the context, is set out in the Annex appended at the end of this Decision.

12. Mr Laury contended that he was impliedly identified and criticised in those paragraphs or, at least, that a person reading those paragraphs might think that the criticisms related to him.

THE LAW

13. The meaning of s393 was considered by the Tribunal in *Sir Philip Watts v FSA* 25 July 2003. In regard to the issue of identification the Tribunal concluded:

(1) The purpose of s393 is to ensure that third parties should not be identified and adversely criticised in a warning notice issued by the FSA without having had an opportunity to make representations in response. And if they are identified and criticised in a decision notice, they should have the right to challenge such criticisms in the Tribunal.

[1] See the restrictions in s391(1) and s348.

(2) Fairness does not require third party rights to be accorded where the identification of the individual concerned arises externally to the notice. Properly construed, s 393(4) affords third party rights to a person who is identified in the decision notice, not to a person who is identified in the "matter" to which the reasons in the decision notice relate as ascertained by looking at external sources. The "matter" referred to in subsection (4) is the issue or topic defined in the notice.

(3) Identification can be found from the entire notice, and not only from the reasons, or one of them.

(4) It is not helpful to superimpose a gloss on the words of the statute suggesting that the fundamental requirement as regards identification is that the third party must be picked out, referred to or singled out in the notice. The word "identifies" should stand without elaboration, at least until there is more experience of working through the kind of problems which the statutory provisions may throw up in practice.

(5) Identification can be effected where a third party is referred to in a notice other than by an express naming. Thus, for example, a reference to "the Chairman of the company" or "all of its directors" would be sufficient identification for the purpose of s393.

(6) Identification does not have to be by express naming, by job description, or by some collective reference to particular officers of the company. The question in each case will simply be whether the person concerned is identified in the relevant notice.

14. The Tribunal held in that case that the criticisms in the notice were made at the level of corporate personality, and not of individuals whether singularly or collectively, and that the notice did not identify Sir Philip Watts.

15. In the present case both parties relied on the *Watts* decision. Mr Laury relied on the proposition that identification need not be express and may be implicit. The FSA relied on the proposition that reference to external sources is not permissible.

16. At first sight these two propositions seem inconsistent. Suppose, for example, that a notice refers to, but does not name, the managing director of the firm. That is an identification other than by express naming. But how can one know who is the managing director without reference to external sources?

17. As I understand it, there is no true inconsistency. If the managing director is the subject of criticism in the notice, the description "managing director" is itself a sufficient identification and there is no need to go to outside sources to discover his or her name. What one is not allowed to do is to add material from external sources to the material in the notice in order to identify an individual as impliedly the subject of criticism.

ANALYSIS

18. Mr Laury helpfully summarised his argument as being that there were two ways in which he was identified in the Notice, one being by the references to compliance as a function and the other being by the references to key personnel who did not understand their roles.

19. Several preliminary observations are pertinent:

(1) In regard to several passages in the Notice Mr Laury's contention was not that they contained a positive implication that he was the subject of criticism but that, because they were loosely expressed (whether as to the time period or the persons referred to), a reader might possibly take them as referring to him. I do not consider that this argument is sufficient. Only a positive identification can satisfy the terms of s393 ("identifies a person").

(2) Where a particular function or particular department of a firm is referred to as having failings, it does not necessarily follow that a particular individual can be inferred to have been at fault, even if that individual was the head of the department or the person responsible for that function. Such a person may have competently and firmly advised and warned those to whom he reported, and may have been ignored or overruled. Or he may have competently instructed and supervised those under this direction, only to be let down by them.

(3) Mr Laury is nowhere referred to directly in the Notice, whether by name or by job description. Any identification can only therefore be by some sort of implication. This is particularly difficult, since the Notice nowhere states explicitly whether the firm even had a person in the specific role which Mr Laury fulfilled, namely a senior manager who was the head of compliance, and who reported to the Chief Executive.

20. Paragraphs 2.1 and 2.10(1) of the Notice are introductory and general in nature. In my judgment they are at far too high a level of generality to amount to an identification or criticism of Mr Laury.

21. Paragraph 2.4 states that the firm failed to properly apportion responsibility for accounting and compliance areas within the firm. This is referred to again in paragraphs 2.10(2), 4.52 and 5.8. There is nothing to indicate that the failure of proper apportionment is laid at the door of the head of compliance. A more natural implication, particularly in the absence of any particular knowledge about the internal structure of the firm, would be that there was some failing by one or more people at Board level who ought to have ensured a proper apportionment of responsibilities.

22. Paragraph 2.4 further states that the firm failed to "ensure that all key employees understood what areas within the Firm they were responsible for." Mr Laury argued that this indicated that he (as a key employee) did not understand what

his responsibilities were. I do not consider that this implication can be found in paragraph 2.4. The criticism is that not all key employees understood. That means that one or more did not understand. This is underlined by the express text of paragraph 4.52, which explicitly refers to "some" key personnel as not having a proper understanding of their roles. In similar vein, paragraph 5.8 referred to "confusion surrounding the roles of some key staff". These statements are entirely consistent with Mr Laury having had a full understanding of his responsibilities.

23. Parts 2 and 5 of the Notice are summaries and conclusions. To gain a fuller understanding of what is said one has to go to part 4 of the Notice, which is the part headed "FACTS AND MATTERS RELIED ON". If there is any identification and criticism of Mr Laury, one would expect it to be at its clearest and most specific in part 4.

24. Paragraphs 4.29 and 4.52 are the only paragraphs in part 4 of which Mr Laury complains. Paragraph 4.29 is a transitional paragraph in very general terms, indicating that the details of the relevant failures are "as described below". Paragraph 4.52 is therefore of particular importance in relation to the issue which I have to decide. In my judgment it is impossible to read the limited terms of paragraph 4.52, which is under a heading relating to corporate governance, and refers to *some* key personnel as not having a proper understanding, as containing any positive criticism or identification of Mr Laury. Paragraph 4.52 does not enable one to say that the particular person who was head of compliance until June 2002 was guilty of any shortcoming. There could be other reasons for the firm's failure, which do not reflect adversely on that person.

25. The FSA contended that Mr Laury was not identified in the Notice, and that he was neither explicitly nor implicitly criticised in it. For the reasons set out above, I accept the FSA's contention.

CONCLUSION

26. I find that Mr Laury is not identified in the Notice, whether expressly or by implication, nor is he criticised in it, whether directly or indirectly. I hold that s393(4) did not apply to the Decision Notice. Since Mr Laury is not the subject of any criticism and has nothing to complain of, his reference to the Tribunal under s393(11) must be dismissed.

ANDREW BARTLETT QC
CHAIRMAN

FIN 2007/0005

ANNEX: EXTRACTS FROM THE NOTICE

2. REASONS FOR THE ACTION

2.1 The FSA has decided to impose a financial penalty on the Firm for failures in its senior management arrangements, systems and controls and its failures to adhere to the regulatory requirements relating to accounting procedures and records, the Firm's own stock positions, client money and compliance. As a result of these failures, the Firm has acted in contravention of Principles 2, 3 10 and 11 and where referred to, applicable FSA rules.

Accounting Systems and Controls

...

2.4 The firm also breached Principle 3 because during the relevant period it failed to take reasonable care to establish and maintain adequate arrangements to oversee compliance with regulatory requirements. In particular, the Firm failed to properly apportion responsibility for accounting and compliance areas within the Firm and ensure that all key employees understood what areas within the Firm they were responsible for.

...

Seriousness of the Findings

2.10 The Firm's failings are viewed by the FSA as serious in that:

(1) There were systematic weaknesses in establishing, operating and maintaining adequate management systems and internal controls in relation to accounting procedures and records, the Firm's own stock positions, client money and compliance.

(2) The failure to apportion responsibility properly for accounting and compliance areas within the Firm and implement, operate and maintain appropriate compliance arrangements meant that there was a lack of key safeguards in place to ensure adherence to the Principles and the FSA Rules and to ensure the protection of consumers.

...

4. FACTS AND MATTERS RELIED ON

...

General Control Environment before 1 December 2001

...

4.29 It is the FSA's view that the weaknesses in the Firm's systems and controls identified prior to 1 December 2001 continued from that date and were manifested in the Firm's failure to adhere to the regulatory requirements relating to compliance, accounting procedures and records and client money as described below.

...

General control failures

...

Corporate Governance: Apportionment of responsibility and segregation of duties

...

4.52 It is the FSA's view that the Firm did not adequately apportion key responsibilities for accounting and compliance areas within the Firm and this led to internal confusion surrounding the roles of some key members of staff. Written job descriptions were inadequate and the roles and responsibilities of key members of staff were not documented through organisational charts and diagrams. Some key members of staff were unable to demonstrate a complete understanding of their roles and responsibilities.

...

5. RELEVANT GUIDANCE

...

Factors the FSA considers to be particularly relevant to this case

The seriousness of the misconduct or contravention

...

5.8 The failings resulted from systemic weaknesses in the Firm's systems and controls and its senior management arrangements. It failed to maintain a clear and appropriate apportionment of significant influence responsibilities which resulted in internal confusion surrounding the roles of some key staff. The absence of clear senior management responsibilities and appropriate compliance arrangements meant that there was a lack of key safeguards in

place to ensure adherence to the Principles and the FSA Rules and to ensure the protection of consumers.