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Feeling the burn as Court of Appeal grants permission to appeal £100,000 costs order made against the FCA

Angela Burns v. Financial Conduct Authority
A3/2015/4343

Article by David Bowden

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Executive speed read summary

The majority of the FCA's complaints made against Ms Burns were thrown out by the Upper Tribunal who substituted a financial penalty of £20,000 in lieu of the disproportionate penalty of £154,800 levied against her by the FCA's internal Regulatory Decisions Committee. The UT lambasted the FCA for trying to spin an interpretation of a benign email sent by Ms Burns that was 'against common-sense'. The UT said that if the FCA's approach had been more 'moderate' then this case 'could have been resolved more satisfactorily and with less expense'. As a result the UT made an adverse costs order against the FCA of £100,000 to reflect its condemnation of the way it had hounded Ms Burns. This order was made under rule Rule 10(3)(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008 which gives the UT power to make an adverse costs order where a party has 'acted unreasonably in bringing, defending or conducting the proceedings'. Permission to appeal this adverse costs order was refused both by the UT and Lord Justice Lewison the papers.

However at an oral permission hearing, Lady Justice Gloster has granted permission to appeal on the basis that this is a significant issue for the FCA and the appeal is reasonably arguable. She was concerned about the 'chilling effect' of an adverse costs order against the FCA noting that how the FCA conducts future prosecutions could be affected if it is exposed to costs sanctions unless it can satisfy a 'cogency test'. Ms Burns has also appealed the UT's liability ruling. Both appeals will now be heard together in June 2017.

Angela Burns v. Financial Conduct Authority
A3/2015/4343 23 November 2016
Court of Appeal, Civil Division (Lady Justice Gloster)

What are the facts?

There was a board meeting on 25 February 2009 at MGM. Ms Burns was a non executive director of MGM. At this meeting Vanguard was mentioned and Mr Burns was concurrently soliciting a non executive director post with Vanguard as well as consulting work.

The FCA claimed that Ms Burns sought to create a situation where she would have a personal interest which could conflict with the interests of MGM or Teachers (unless she had made either prior disclosure or obtained consent of MGM or Teachers).

The FCA relied on Ms Burns' emails:

- to Vanguard dated 24 and 26 February 2009.
- to Teachers, based on her email to Vanguard dated 5 November 2010.

The FCA claimed Ms Burns had turned a blind eye to the ethical issues which arose. It is common ground that Ms Burns did not receive any personal benefit from the breaches. If matters had progressed further in her hoped-for relationship with Vanguard, Ms Burns said she would eventually have made proper disclosure, albeit later than she ought to have done.

What regulatory action did the FCA take?

By a decision notice dated 28 November 2012 the FCA's predecessor in title imposed on Ms Burns a financial penalty of £154,800 and made a prohibition order pursuant to section 56 of the Financial Services and Markets Act 2000. These sanctions were based on findings by the FCA that she had misused non-executive director positions to seek to advance her own commercial interests and failed to disclose conflicts of interest, so that she was in breach of Statement of Principle 1 (approved person must act with integrity in carrying out controlled function) and lacked fitness and propriety under the '*fit and proper'* test for approved persons. Ms Burns denied the FCA's allegations and referred the case to the Upper Tribunal ('UT').

What happened before the FSA's Regulatory Decisions Committee?

It imposed a financial penalty on Ms Burns of £154,800.

What happened when this case came before the Upper Tribunal?

The FCA initially accepted that Ms Burns' badly worded email dated 5 November 2010 was not a demand for money but then in its amended Statement of Case it claimed this email was presented as a solicitation of payment for introducing Vanguard both to MGM and to Teachers notwithstanding a clear

conflict of interest. In effect the FCA claimed there was a corrupt payment. This interpretation was actively pursued at the hearing. The UT did not uphold the FCA's contention.

There were 10 discrete allegations of misconduct pursued by the FCA. Following an oral hearing in the UT, in its decision dated 15 December 2014 **[2014] UKUT 0509 (TCC)** it upheld or partly upheld only 4 of the allegations and completely dismissed the other 6 six allegations. The UT concluded that Ms Burns was in breach of APER Principle 1 and was not a fit and proper person to carry out the CF2 function.

The UT overturned the financial penalty awarded by the RDC and substituted a substantially lesser penalty of £20,000 instead.

What order did the Upper Tribunal make as to costs?
By its decision dated 3 November 2015 **[2015] UKUT 601 (TCC**) the UT said that it had

> *'come to the conclusion that the Authority acted unreasonably in reintroducing the corrupt payments allegation into the proceedings. We also consider that this unreasonably increased the gravity of the proceedings and increased Ms Burns' legal costs; in the absence of the amendment the proceedings would have cost less than they did. In these circumstances we judge that we ought to make an award of costs to Ms Burns pursuant to rule 10(3)(d), despite the fact that in overall terms she was the loser in the proceedings'.*

The UT then assessed these costs due to Ms Burns by the FCA at £100,000.

What comments did the Upper Tribunal make about this case?
In its concluding remarks the UT remarked in trenchant terms that neither party had covered themselves in glory here. It said:

> *'While we have upheld Ms Burns' application on one point, we wish to state that we deplore the fact that she has seen fit to make unsubstantiated and intemperate allegations of malicious wrongdoing against the Authority and its lawyers. The Authority wisely concentrated in its submissions on costs on the matters of greater substance. However, we also deplore the Authority's own failure to retain a sense of proportion in its approach to this case. While Ms Burns was guilty of failing to make timely disclosure, that was all the true case amounted to. The interpretation which the Authority sought to put on the email of 5 November 2010 was against common-sense. She received no improper benefit from anyone. She did not misuse her influence in her positions with MGM or Teachers. We concluded that Vanguard's withdrawal was its own decision. The evidence did not establish that Vanguard, if it had not withdrawn, would ultimately have taken over the Teachers mandate. If the Authority's approach had been more moderate, and if Ms Burns for her part had not persisted in disputing that she had failed in her obligation to make disclosure, the whole matter could have been resolved more satisfactorily and with less expense.'*

What happened with the FCA's application for permission to appeal the costs order?
The UT refused the FCA's application for permission to appeal this adverse costs order. Lord Justice Lewison in the Court of Appeal also refused on the papers the FCA's application for permission to appeal ruling that the UT '*did not apply the wrong test. It simply reached a value judgment on the question of whether the FCA's pursuit of 1 allegation was unreasonable. It was a value judgment and question of fact. The Court of Appeal is unwilling to overturn decisions of expert tribunals.'* Lewison LJ also ruled that '*a different tribunal may have come to a different decision but it was within the wide ambit of its discretion.'*

What was the application before Lady Justice Gloster?
Initially the FCA in its Appellant's Notice advanced 3 Grounds for Appeal but heeding the warning from Lewison LJ sensibly abandoned all but its 1st ground before Gloster LJ. The FCA sought permission to appeal only on this Ground

> "*The Upper Tribunal's conclusion is based on an erroneous approach to Rule 10(3)(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008. The Upper Tribunal applied wrongly applied a test of "*cogent*" basis taken by the Regulatory Decisions Committee*.'

What submissions did the FCA make?
The FCA submitted that the gravity of the £100k costs order and the UT's conclusion was **solely** based on what it says is an erroneous view that the UT took of Rule 10(1)(b) which says:

> ***'Orders for costs***
> *10.(1) The Upper Tribunal may not make an order in respect of costs … except—*
> *…*
> *(b) in proceedings other than on appeal from another tribunal ….— …*

> *(ii) if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings'*

The FCA submitted that UT applied a more stringent test by approaching the matter on the basis that was originally open to the FCA to re-introduce a serious allegation relating to the email in circumstances where the FCA had additional evidence and produced that evidence on a 'cogent' basis. The FCA submitted that the UT directed itself that unless the subsequent evidence on its own could be sufficiently cogent for the RDC, the FCA would be acting unreasonably and accordingly an order for costs against the FCA should not be made.

The FCA submitted that restating the test as to whether further material was 'cogent' is impermissible as a matter of law because it was a 'gloss' on the Rule 10(1)(b) criteria. With irony that appears to have been lost on it, the FCA submitted that this impermissible gloss and corresponding costs order against it will have a '*chilling effect'* on how the FCA conducts future prosecutions if there is a risk that the FCA is exposed to costs sanctions unless it can satisfy a 'cogency test'.

Did Gloster LJ grant permission to appeal? Why did she do this?
Yes, Gloster granted permission to appeal. However she made clear that ordinarily she would have done exactly what Lewison LJ had done.

Ms Burns appears to have shot herself in the foot here by seeking to appeal the liability order of the UT. If she had not done so, that would have been the end of the matter. However when Gloster found out that Ms Burns' appeal was before the Court of Appeal next year meaning that it would have to rake over all the embers of this case, then that would mean that it would have sufficient material and time to look at whether the adverse costs order was correctly made by the UT or not.

What reasons did Gloster LJ give for granting permission to appeal?
She gave her reasons shortly saying that she had '*been persuaded by Mr Hunter of the significance of this issue for the FCA and it is appropriate to grant permission to appeal. It is reasonably arguable*.' She also said that she was '*also concerned that there is an appeal by Miss Burns on limited grounds and that this will be dealt with in any event by this court'* and said therefore that she will '*grant permission to appeal on Ground 1*' and directed that '*this appeal be listed with the other matter **A3/2015/0320'*.**

What is happening in relation to Ms Burn's appeal?
Ms Burns has appealed against the liability ruling made by the UT in its ruling dated 15 December 2014 **[2014] UKUT 0509 (TCC)** in which the UT made its evidential findings and partially upheld some of the FCA's complaints against her. However she was only granted limited permission to appeal.

When will this appeal be heard?
The Court of Appeal has listed both appeals to be heard over 2 days starting on 9 June 2017 before a panel of 3 Lord Justices.

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