David Bowden Law®

ideas are always in credit

Feeling the burn as Court of Appeal upholds £100,000 costs order made against the FCA but upholds its prohibition order

Angela Burns v. Financial Conduct Authority
[2017] EWCA Civ 2140

Article by David Bowden

BAR STANDARDS BOARD
REGULATING BARRISTERS

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*'. The Court of Appeal has upheld this costs order. Lord Justice Kitchin in delivering a lengthy judgment of the court has ruled that it was '*entirely satisfied that the Upper Tribunal made no error in arriving at its conclusion in the present case*' and that the Upper was entitled to find that '*the FCA acted unreasonably in introducing the corrupt payment allegation into the proceedings and that this unreasonably increased their gravity and Ms Burns' legal costs*'. The Court of Appeal also dismissed Ms Burns appeal from the Upper Tribunal in which it had found that she was not a fit and proper person to be a non-executive director of a FCA regulated firm. Ms Burns had been a non-executive director of Marine and General Mutual Life Assurance Society and Teachers Provident Society Limited. Through her business (Aktiva) Ms Burns had done a substantial piece of consultancy work for Vanguard Asset Management advising it on how to set up a UK operation. Whilst a board member at both Teachers and Marine, Ms Burns had introduced Vanguard to other directors. Vanguard obtained substantial business from Marine and had pitched for business from Teachers. Ms Burns failed to disclose her interests with Vanguard to the other board members and she also voted on the board proposal to give the work to Vanguard. Ms Burns had tried to obtain more consultancy work or a non-executive board role at Vanguard without success. The Court of Appeal ruled that Ms Burns had breached her director's duties because Marine and Teachers needed to be able to count on her undivided loyalty at a time when she was making undisclosed overtures to Vanguard for her own benefit. Until October 2008 Ms Burns had also been employed by Pearl for 2 years but she did not tell either Teachers or Marine about this. Ms Burns also omitted her employment at Pearl from FCA's Form A which she was required to submit in order to obtain her CF2 authorisation. Ms Burns claim for unfair dismissal and sex discrimination against Pearl was dismissed following a lengthy employment tribunal claim. The Court of Appeal agreed that the non-disclosure of the Pearl employment was not relevant to the core charges as to whether Ms Burns had breached her director's fiduciary duties or not.

Angela Burns v. Financial Conduct Authority
[2017] EWCA Civ 2140 21 December 2017
Court of Appeal, Civil Division (Lords Justices Kitchin, David Richards and Henderson)

Who is Angela Burns, what is her background and business interests?
Angela Burns has a first class degree in Economics from the LSE and a 30 year career in investment management. In February 2005 she set up in business on her own account in a company called Aktiva Limited ('Aktiva'). Through Aktiva Ms Burns provided consultancy services to those in the investment management sector.

What was Ms Burns' role with Pearl Group Management Services Limited? How did that end?
From December 2006 Ms Burns was employed by Pearl Group Management Services Limited ('Pearl') to provide fund structuring advice for a salary of £100,000 a year plus bonus. This employment ended nearly 2 years later on 17 October 2008 when her position was made redundant.

What did Ms Burns do after her redundancy from Pearl?
Ms Burns brought an Employment Tribunal claim against Pearl for sex discrimination and unfair dismissal. This contested claim was heard over 9 days during January 2010. One allegation made by Pearl against Ms Burns in this ET case was that she had attempted to persuade senior executives to use an organisation called '*Wisdom Tree*' without also declaring that she had a personal interest in it. In its reserved judgement handed down on 29 March 2010 the Employment Tribunal dismissed her claim. The FCA received a copy of the ET judgment on 10 July 2013. The findings of the Employment Tribunal were not appealed.

What work had Ms Burns done for Vanguard Asset Management Limited in the past?
In 2006 Ms Burns' company Aktiva was instructed to draft a report for Vanguard Asset Management Limited ('Vanguard'). It is a US asset manager which was then considering the feasibility of a proposed entry into the UK investment market. Ms Burns completed her report in July 2006 and charged Vanguard a fee of £30k.

What hopes did Ms Burns harbour for the future with Vanguard?
In July 2006 Ms Burns e-mailed Vanguard asking for the opportunity to turn her proposal into a successful UK business. In 2007 Ms Burns met James Norris (Vanguard's managing director of international operations). He told her that Vanguard planned to enter the UK market in 2008. Ms Burns expressed interest in possible consultancy work. On 13 December 2008 Ms Burns wrote to Mr Norris and Mr Thomas Rampulla (Vanguard's managing director) asking them to let her know if she could be of any further assistance to Vanguard either in a consulting capacity or as a non-executive director. Ms Burns sent an e-mail to Mr Rampulla on 24 February 2009 again making a pitch to become a non-executive director of Vanguard. A similar email offer was sent to Mr Norris on 26 February 2009 which he rejected the next day. In her email dated 5 November 2010 to Mr Norris of Vanguard Ms Burns asked to become a non-executive director of Vanguard's Dublin funds and asking that matters be progressed with Vanguard's counsel.

What was Ms Burns' role with Marine and General Mutual Life Assurance Society? How did that end?
2008 Marine wished to recruit a non-executive director. Following a competition, Marine notified Ms Burns on 9 December 2008 that it wished to appoint her. She was also appointed the chair of its investment committee and a non-executive director of a Dublin subsidiary. Ms Burns was approved as a CF2 by the FCA on 19 January 2009 and attended her first board meeting on 21 January 2009. Ms Burns did not disclose her prior role at Pearl. She resigned as a non-executive director 2½ years later on 22 May 2011.

What was Ms Burns' role with Teachers Provident Society Limited? How did that end?
In February 2010 Teachers offered Ms Burns a role as a non-executive director. Ms Burns applied to the FSA for CF2 approval which it granted. Ms Burns did not disclose her prior role at Pearl. On 10 June 2010 Teachers confirmed Ms Burns' appointment at an annual fee of £21,500. Ms Burns resigned as a non-executive director 1½ years later with effect from 31 May 2011.

What documentation did Ms Burns have to submit to the FCA in order to be an approved non-executive director?
The FCA refers to a non-executive director role at a regulated firm as a controlled function (in this case CF2). Applicants for a CF2 role are required to complete FCA's Form A. This includes the following:

- A full 5 year employment history for the candidate their current employment with all gaps explained, and
- A declaration which must be signed by the individual confirming that the details submitted are correct.

What business introductions had Ms Burns made that benefitted Marine?
On 19 February 2009 Ms Burns (as non-executive director of Marine) had a meeting with Craig Fazzini-Jones, Marine's executive director. This was to explore the possibility that Vanguard would be in a position to provide investment services for a Marine product launch (ABA) in July 2009. On 25 February 2009 Marine's board (including Ms Burns) met to consider the ABA project. Mr Fazzini-Jones presented a paper, told the board that the passive option could be placed with Vanguard and the board approved the business case. On 10 June 2009 Marine's investment committee (chaired by Ms Burns) considered a paper presented by Mr Fazzini-Jones about the proposed ABA investment. He had recommended that Vanguard be appointed as the product provider, his recommendations were agreed by the committee and then approved by Marine's full board.

What business introductions had Ms Burns made that benefitted Teachers?
In 2010 Teachers' existing investment manager (LGIM) tried to increase its fees. Teachers looked at replacing LGIM who had a £750million mandate. On 10 June 2010 Ms Burns suggested Vanguard as one of 3 possible managers to consider. On 14 June Teachers' finance director (Mr Ian Blanchard) attended an initial meeting with Vanguard to talk about the possibility of Vanguard managing Teachers' funds. On 23 August 2010 Ms Burns became chair of Teachers' investment committee. Arrangements were made for Vanguard to make presentations to that committee on 22 November 2010. However

Vanguard decided it should formally withdraw from the tender process which it did on 18 November 2010. It did not explain its reasons to Teachers.

What disclosures of a potential conflict of interest did Ms Burns make to either Teachers or Marine?

Ms Burns was provided with the following:

- Marine's 'Approved Persons Manual' which said '*Approved Persons must exercise care to ensure that there is no conflict between their personal interests and those of the Society or its customers. If such a conflict arises, or appears likely to arise, an Approved Person should discuss the matter with… the Chairman.*'
- Her Teachers' appointment letter acknowledged that she had external interests and had declared any conflicts that were then apparent but in the event that she became aware of any potential conflicts of interest she was told that these '*should be disclosed to the Chairman and Company Secretary*'.

Ms Burns had told Marine's Mr Fazzini-Jones that she had done work for Vanguard in the past but that they were no longer a current client. Ms Burns did not disclose that she had approached Vanguard about becoming a non-executive director or doing further consultancy work for Vanguard before any of the board meetings at either Marine or Teachers at which Vanguard's proposals were discussed. Ms Burns did not recuse herself from voting on Vanguard's proposals.

What are the critical facts and important emails?

The FCA relied on these emails that Ms Burns had sent to Vanguard:

- dated 24 and 26 February 2009 (in relation to Marine), and
- dated 5 November 2010 (in relation to Teachers).

The FCA claimed Ms Burns had turned a blind eye to the ethical issues which arose. It was 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. The 5 November 2010 email said:

> *'Later in the month, Vanguard will present to Teachers Assurance, where I am NED and chair of the Investment Committee, with a view to taking in a £700m+ passive equity and bond mandate. This follows on from the £350m mandate secured from MGM Advantage, where I am also chair of the Investment Committee. I am delighted to help secure new institutional mandates for Vanguard UK, having played a role in introducing Vanguard to the UK market via consultancy work in 2006. Given that my NED positions have facilitated potentially some £1bn of new assets to your new enterprise, I feel it appropriate to reprise our earlier discussions. We had discussed previously both the prospect of my receiving one bps [basis point] for new monies secured, on an ad valorem basis, and my becoming an NED of your Dublin funds. The MGM Advantage mandate would amount to £35k pa, with the TA [Teachers Assurance] mandate taking it to £110k pa. An NED position in Dublin would add a further £20k. Could we progress matters with your counsel?*'

How did the FCA become aware that something was wrong?

Vanguard tipped off the FCA about Ms Burns because it had concerns about a '*huge*' conflict of interest which was apparent in this email. In January 2011 the FSA's Supervision Division referred her to the Enforcement Division. Ms Burns was contacted on 3 February 2011 by the FSA, a formal investigation was carried out and she was compelled to attend for interviews.

What happened before the FSA's Regulatory Decisions Committee?

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.

In relation to the FSA's allegation that Ms Burns email represented an attempt to obtain '*corrupt payments*', the RDC on 28 November 2012 ruled:

> '*The FSA accepts that the 5 November email was not a demand for money. In coming to this conclusion, the FSA has accepted the frank admission that the email was poorly worded. The extent of how poorly worded it was is measured by the reaction of the Investment Manager and their withdrawal of interest from seeking the*

> *mandate. However, it does not matter whether this was a demand for money or not. The conflict is in the motive behind the communication without disclosure. The fact that Angela Burns tried immediately to correct the misunderstanding does not affect this.*'

What decisions were made by the Upper Tribunal?
Ms Burns continued to deny the FCA's allegations and on 20 December 2012 referred the case to the Upper Tribunal ('UT'). Ms Burns made an application in March 2013 to the UT that details of her case should remain private but the UT rejected this privacy application. However the Upper Tribunal made these 3 decisions in this case:

- its main decision dated 15 December 2014 on the merits of the FCA's complaint - **[2014] UKUT 0509 (TCC)** (UTJ Andrew Bartlett QC, Lay members Catherine Farquharson and Mark White who also determined the subsequent penalty and costs decisions),
- its penalty decision dated 15 May 2015 - **[2015] UKUT 0252 (TCC),** and
- its costs decision dated 5 November 2015- **[2015] UKUT 0601 (TCC).**

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 main decision **[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 in its penalty decision - **[2015] UKUT 0252 (TCC).**

What order did the Upper Tribunal make as to costs?
By its costs decision **[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 grounds of appeal were advanced by Mrs Burns against the liability ruling?
Mrs Burns had these 2 grounds of appeal:

- Did the Upper Tribunal apply the correct standard of conduct in finding that she had breached the duties which she owed as a director to MGM and Teachers? and
- Was the Upper Tribunal in error in relying on the allegations concerning the non-disclosure of her employment by Pearl and its termination?

What grounds of appeal were advanced by the FCA against the costs order?
The FCA had only 1 ground of appeal, namely was the decision by the Upper Tribunal to award Ms Burns the sum of £100,000 + VAT in respect of her legal costs on the basis that the FCA had acted unreasonably highly unusual or wrong?

Did either party issue a Respondent's Notice? Were there any applications to adduce further evidence?
No party issued a Respondent's Notice. Ms Burns issued an application in the Court of Appeal to adduce further evidence. Although the Court looked at it, in the end it dismissed her application to introduce it saying that in their '*view none of this material, even assuming it to be admissible, could provide any real support for Ms Burns' case. The issue turns upon an objective appraisal of what actually happened in the present case, so testimonials about Ms Burns' conduct in different business relationships could be of no more than marginal relevance*'.

What does the Companies Act 2006 have to say about conflicts of interest?
There are 2 relevant provisions in the 2006 Act as follows:

- **Section 175** – Duty to avoid conflicts of interest, and
- **Section 177** - Duty to declare interest in proposed transaction or arrangement

This latter provision states:

> '***177****(1) If a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with a company, he must declare the nature and extent of that interest to the other directors.*
> *(2) The declaration may (but need not) be made –*
> *(a) at a meeting of the directors, or*
> *(b) by notice to the directors in accordance with –*
> *(i) section 184 (notice in writing), or*
> *(ii) section 185 (general notice).*
> *(3) If a declaration of interest under this section proves to be, or becomes, inaccurate or incomplete, a further declaration must be made.*
> *(4) Any declaration required by this section must be made before the company enters into the transaction or arrangement.*
> *…*
> *(6) A director need not declare an interest -*
> *(a) if it cannot reasonably be regarded as likely to give rise to a conflict of interest;*
> *(b) if, or to the extent that, the other directors are already aware of it (and for this purpose the other directors are treated as aware of anything of which they ought reasonably to be aware); or*
> *(c) if, or to the extent that, it concerns terms of his service contract that have been or are to be considered–*
> *(i) by a meeting of the directors, or*
> *(ii) by a committee of the directors appointed for the purpose under the company's constitution.*'

Is the position under the Friendly Societies Act 1992 or the Building Societies Act 1986 different?
It is very similar but a little stricter. Teachers is incorporated under the Friendly Societies Act 1992. Schedule 11 part II paragraph 9(1)(b) of the 1992 Act incorporates section 63 of the Building Societies Act 1986. This paragraph is headed '*Directors to disclose interests in contracts and other transactions'* and provides as follows:

> *'**63** (1) It is the duty of a director of a [friendly] society who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the society to declare the nature of his interest to the board of directors of the society in accordance with this section.*
> *(2) In the case of a proposed contract, the declaration shall be made -*
> *(a) at the meeting of the directors at which the question of entering into the contract is first taken into consideration; or*
> *(b) if the director was not at the date of that meeting interested in the proposed contract, at the next meeting of the directors held after he became so interested.'*

Is pre-2006 case law now of any relevance on conflicts of interest?
Yes.

Although the 2006 Act was a consolidating measure it specifically provided that existing common law rules and equitable principles were to continue to apply. Section 170 of the Companies Act 2006 is headed 'Scope and nature of general duties' and it says:

> *'(1)The general duties specified in sections 171 to 177 are owed by a director of a company to the company.…*
> *(3) The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in a place of those rules and principles as regards the duties owed to a company by a director.*
> *(4)The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties.…'*

What authorities are referred to the judgement?
These authorities (listed chronologically) are referred to in the Court of Appeal's judgement:

Aberdeen Railway Co v. Blaikie **(1852) 15 D (HL) 20; (1854) 1 Macq 461** (House of Lords - Lords St Leonards LC and Brougham)

It is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter in to engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interest of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.

Boulting v. Association of Cinematograph, Television and Allied Technicians **[1963] 2QB 606** (Court of Appeal – Lord Denning MR, Upjohn and Diplock LJJ)
The rule that a man shall not place himself in a situation where his interests conflict with his duty is for the protection of the person to whom the duty is owed who can release it. The rule cannot be used as a shield by the person owing the duty. There is not such a conflict of duty as would render the plaintiffs' contract of membership of the union void as being corrupt and illegal. If it was voidable it was only voidable at the option of the company.

Boardman v. Phipps **[1967] 2 AC 46** (House of Lords – Viscount Dilhorne, Lords Cohen, Hodson, Guest and Upjohn. By a majority – Dilhorne and Upjohn dissenting)
The appellants had placed themselves in a special position, which was of a fiduciary character, in relation to the negotiations with the directors of the company relating to the trust shares. Out of such special position and in the course of such negotiations the appellants obtained the opportunity to make a profit out of the shares and knowledge that the profit was there to be made. A profit was made and they were accountable for it. The appellants had acted openly, but mistakenly, in a manner which was highly beneficial to the trust and accordingly were entitled in the circumstances to payment on a liberal scale for their work and skill.

Rolled Steel Products (Holdings) Ltd v. British Steel Corporation **[1986] Ch 246** (Court of Appeal – Lawton, Slade and Browne-Wilkinson LJJ)
The claimant's directors were acting in breach of its articles of association and their fiduciary duties to the claimant in purporting to authorise and execute a guarantee and debenture. As the defendant company and the receiver had notice of that breach when they received the claimant's assets, they were accountable to the claimant as constructive trustees. The claimant was entitled to declarations that the guarantee and the debenture were not deeds of the claimant and that the purported appointment of the receiver was void. The claimant was under an obligation to repay the sum it had borrowed and could not seek redress against the defendants on the basis that such sum had been improperly paid to the defendant corporation.

In re Lo-Line Electric Motors Ltd **[1988] Ch 477** (High Court, Chancery, Companies Court, Sir Nicolas Browne-Wilkinson VC)
The primary purpose of section 300 of the Companies Act 1985 was to protect the public against the future conduct of companies by persons whose past records as directors of insolvent companies showed them to be a danger to creditors. Since the power to disqualify involved a substantial interference with freedom and penal consequences, natural justice required that a person facing disqualification should know the case he had to meet. Since there had been a fundamental change in the official receiver's case concerning the company without the director being given proper notice of the new and modified allegations of misconduct, the director had not been given an opportunity to put in evidence to meet the new charge. The court would not consider that charge in determining whether it should make a director's disqualification order. In considering whether a person was unfit to be a director under section 300, only his conduct 'as director' was relevant.

In re Sevenoaks Stationers (Retail) Ltd **[1991] Ch 164** (Court of Appeal – Dillon, Butler-Sloss and Staughton LJJ)
It was clear from the judgment below that taken as a whole the judge was satisfied that the director was unfit to be concerned in the management of a company. It was immaterial that he did not say so in terms. The matters alleged and proved showed the director to have been guilty of incompetence or negligence in a very marked degree and were amply sufficient to render him unfit to be concerned in the management of a company. The disqualification order had rightly been made. Although the court had a discretion to allow the official receiver to rely on allegations different from or additional to those set out in the affidavits in support of the disqualification application or in the official receiver's report, provided that could be done without injustice to the accused director, the period of disqualification was to be fixed only by reference to matters properly alleged and proved.

Re Dominion International Group Plc (No.2) **[1996] 1 BCLC 572 (High Court, Chancery, Knox J)**
The receipt by a director of scholarship money and his failure to disclose that interest were not sufficient to make him unfit to act as a director. The vesting of the shares in a company was for the benefit of an unknown person and the court would have no jurisdiction to wind up the subsidiary company. The director's conduct in relation to the subsidiary company would not, of itself, be enough to merit a disqualification order against him. The court would not however look at the matter in isolation and where a director of both a holding and a subsidiary company acted in a way that damages the holding company he was in breach of his duties.

Foster Bryant Surveying Ltd v. Bryant **[2007] EWCA Civ 200** (Court of Appeal – Buxton, Rix and Moses LJJ)
A director while acting as such had a fiduciary relationship with his company, so that he had an obligation to deal towards the company with loyalty, good faith and avoidance of the conflict of duty and self- interest. A requirement to avoid a conflict between duty and self-interest meant that a director was precluded from obtaining for himself (either secretly or without the informed approval of the company) any property or business advantage either belonging to the company or for which the company had been negotiating -

especially where the director or officer was a participant in the negotiations. A fiduciary relationship did not continue after the determination of the relationship which gave rise to it. After resigning a director was precluded from obtaining any maturing business opportunities sought by the company where the resignation might fairly be said to have been prompted or influenced by a wish to acquire for himself those opportunities and where it was his position with the company (rather than a fresh initiative) that led him to them. In considering whether an act of a director breached this principle the factors to take into account included the position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or indeed even private, the factor of time in the continuation of the fiduciary duty where the alleged breach occurred after termination of the relationship with the company and the circumstances under which it was terminated. The underlying basis of the liability of a director who exploited after his resignation a maturing business opportunity of the company was that the opportunity was to be treated as if it were the property of the company in relation to which the director had fiduciary duties. By planning to exploit the opportunity after resignation he was acting in bad faith. A director would not be in breach of his duty where either the company's hope of obtaining the contract was not a maturing business opportunity, and it was not pursuing further orders, or where the director's resignation was not itself prompted or influenced by a wish to acquire the business for himself. The issue whether a director had breached his fiduciary duty was highly fact-sensitive. It was necessary for the court to apply the rules with care and sensitivity having regard to other principles such as that of personal freedom to compete. The defendant's resignation and his acceptance of the offer of future employment had been innocent of any disloyalty or conflict of interest. There had been no finding of any property or maturing business opportunity taken or exploited by the defendant and the judge had been correct in holding that the defendant had not been in breach of his fiduciary duty.

Hobbs v. FCA **[2013] EWCA Civ 918** (Court of Appeal - Rimer, Ryder and Stanley Burnton LJJ)
'The matter' which a person subject to a decision notice was entitled to refer to the tribunal under section 57 of the Financial Services and Markets Act 2000, included the facts and evidence referred to in the decision notice on the basis of which the FCA had concluded that the person in question was not a fit and proper person and that a prohibition order was appropriate. It was important for the tribunal to consider all the facts and evidence put before it on a s57 reference because there was a public interest in ensuring that those who were not fit and proper persons to perform functions in relation to a regulated activity were precluded from doing so. Further it might be difficult for the FCA to rely in future on allegations which had been put before the tribunal but which had been improperly excluded. It was apparent from the FCA's decision notice that as well as market abuse the trader's lying had been one of the bases for the FCA's conclusion that he was not a fit and proper person to work in financial services. It had been incumbent on the tribunal to address this aspect of the decision notice. The matter would be remitted to the tribunal to consider whether a prohibition order was appropriate

Allen v. FCA **[2014] UKUT 0348 (TCC)** (Upper Tribunal - UT Judge Colin Bishopp, Lay members Maurice Bates and John Woodman)
The FCA in a case against an unrepresented applicant was permitted to amend its statement of case to rely on the conclusions of a judge in another case involving the applicant. The UT noting it was in an '*unprecedented position'* ruled it should consider if the applicant should face a prohibition order based not only on evidence which was not before the FCA's Regulatory Decisions Committee but also on claimed facts which were not foreshadowed by either the FC's warning notice or its decision notice. However, there is merit in not requiring the FCA to re-start the process by issuing a further warning notice and in not subjecting the applicant to the expense and delay of prolonged proceedings.

Carrimjee v. FCA **[2016] UKUT 447 (TCC)** (Upper Tribunal - UTJ Timothy Herrington, Lay Members Gary Bottriell and Sandi O'Neill)
There was nothing to prevent the UT from taking account of evidence that the fund manager had received additional training since the FCA's decision. Here 'the matter' was whether the fund manager was a fit and proper person to perform the relevant functions. He claimed that he had learned his lessons and had the fundamental skills and judgement to perform those functions. There was nothing in FiSMA 2000 section 133(4) or elsewhere in FiSMA which indicated that he might only rely on the circumstances which prevailed at the time of the decision notice. The correct approach was for the UT to consider whether the decision to prohibit him from performing the relevant functions fell within the range of reasonable decisions that were open to the FCA. The UT's role in relation to the further evidence was to make such findings as were relevant to the question of the fund manager's competence and capability in performing the compliance oversight and money laundering functions. It followed that it was open to the UT to make findings as to the degree of competence and capability which the fund manager possessed. Those were findings of fact which s.133(6) envisaged might be made by the UT. It would still be for the FCA to decide whether it was appropriate to make a prohibition order once it had considered the UT's findings. The fund manager's failings had been basic, fundamental and serious. In the absence of strong evidence that he had adequately addressed those failings, the FCA's decision to impose a limited prohibition order had clearly been within the range of reasonable decisions. There was evidence that the fund manager understood the seriousness of his oversight. The fund manager had been unable to provide specific examples of steps that he had taken to support his assertion that he was now confident in his ability and possessed the skills to perform the relevant

functions. He had been vague in explaining how he would interact with the compliance function and what procedures and processes he would put in place. The training came very late in the day and his decision to undertake it was indicative of an approach of waiting for someone else to point out a problem in his approach before taking steps to address it. Punishment of a wrongdoer and deterrence of others was primarily achieved through the imposition of financial penalties. A prohibition order was a non-disciplinary sanction. Here a financial penalty had been set at an appropriate level to achieve credible deterrence. It would be improper to impose a prohibition order as a means of further punishment when that was not necessary in order to protect the public. The FCA had not decided to prohibit for an improper purpose.

What FCA rules or principles are relevant?
For the Court of Appeal, only these 3 parts of the voluminous and bloated FCA handbook have any relevance:

- Statement of Principle 1 (**Integrity)** – '*A firm must conduct its business with integrity'*,
- **FIT** 1.3.1G (**Assessing fitness and propriety**) - '*The FCA will have regard to a number of factors when assessing the fitness and propriety of a person to perform a particular controlled function, as more particularly described in FIT 2 (Main assessment criteria)*', and
- **APER** Statement of Principle 1 – '*an approved person is to act with integrity in carrying out his or her controlled function*'.

What did the Court of Appeal rule was the correct standard of conduct in relation to Ms Burns' breach of director's duties she owed to Marine and Teachers?
The Court of Appeal ruled that the Upper Tribunal applied the correct test.

Marine
Lord Justice Kitchin started by observing that '*the substantial body of existing case law in which those rules and principles have been stated, developed and refined continue to apply with undiminished authority in relation to the interpretation and application of the statutory duties'*. With early promise for Ms Burns Kitchin LJ noted that '*on a literal reading'* it would seem that the Companies Act 2006 section 175 duty did '*not apply in relation to any conflict of interest to which Ms Burns may have been subject in relation to the proposed transaction'* between Marine and Vanguard. However any hopes for Ms Burns were dashed when Kitchin LJ ruled that it was '*is enough that on any view'* that '*the duty in section 177 of the 2006 Act was clearly in play*'. Probing further Kitchin LJ noted that the '*2006 Act contains no definition of "*interest*" or what constitutes being "*interested in*" a proposed transaction'* and so the '*question therefore has to be answered by reference to the case law*'.

Kitchin LJ then started with a case law review from *Aberdeen Railway* going through *Boulting*, *Boardman*, *Foster Bryant* and ending up with *Dominion International*. From the case law, Kitchin LJ ruled that '*the critical point that the duty owed by Ms Burns was one for the protection'* of Marine which was '*entitled to her undivided loyalty'* but the duty could '*be relaxed'* by Marine but only '*after full disclosure of any actual or potential conflicting interest*'. Further Kitchin LJ said the test was an objective one noting that Ms Burns '*was actively soliciting a remunerative relationship with Vanguard, for her own personal benefit, at the very same time as she owed an undivided duty of loyalty to Marine to consider Vanguard's possible future business relationship with Marine dispassionately and with her mind unclouded by any potential conflict of interest'* and that in the Court of Appeal's view there was '*clearly a sufficient likelihood of a conflict of interest*'.

Kitchin KJ rejected all attempts made and submissions made by Ms Burns to '*escape from this conclusion*'. He specifically rejected a submission that the '*possibility of appointing Vanguard was merely speculative in February 2009' saying this could not 'be reconciled with the fact that the full board'* considered Mr Fazzini-Jones' paper on 25 February and it '*approved the business case'*. Kitchin LJ said that the '*point was not whether she actively favoured Vanguard in the competitive process, but whether Marine could count on her undivided loyalty at a time when she was making undisclosed overtures to Vanguard for her own benefit*'.

Teachers
Lord Justice Kitchin started by observing that the duty of disclosure under section 63(1) of the Building Societies Act 1986 '*as it applies to a friendly society such as Teachers, is clearly very similar to the duty of disclosure which applies to directors under section 177(1) of the 2006 Act*' and that also Ms Burns was '*contractually bound by the terms of her appointment letter to disclose any potential conflicts of interest of which she became aware to the Chairman and Company Secretary'*. Kitchin LJ then noted that the UT had '*acquitted Ms Burns of any intention to obtain a corrupt payment when she sent the e-mail of 5 November*' but he ruled that '*the fact remains that she was clearly soliciting Vanguard for paid work at a*

time when Vanguard was about to tender for a valuable contract with Teachers'. He agreed with the FCA's counsel that '*the solicitation of non-corrupt benefits needs to be disclosed when those benefits would create a potential conflict*'. He ruled that it seemed clear to the Court of Appeal that '*Ms Burns was indirectly interested in a proposed contract or arrangement between Vanguard and Teachers, with the consequence that it was her duty to declare the nature of her interest to the board'* noting that Ms Burns had failed to do so and the UT was 'fu*lly justified in finding that she had breached her duties to Teachers'*.

Lord Justice Kitchin again rejected Ms Burns' submissions that her '*involvement of Vanguard was still wholly speculative'* ruling instead that '*Ms Burns' duty of undivided loyalty to Teachers required that she should have no undisclosed interest in Vanguard, yet by her e-mail of 5 November she actively sought to bring about a situation where she would have such an interest'* and that '*the act of solicitation itself*' was '*sufficient to give Ms Burns an indirect interest within the meaning of section 63(1), and also within the scope of the underlying equitable principle'*.

What did the Court of Appeal rule on the non-disclosure by Ms Burn of her employment by Pearl?
Lord Justice Kitchin started by observing that there could be '*no doubt that the Upper Tribunal attached some significant weight to the omission of any reference by Ms Burns to her employment by Pearl in her applications*' to the FSA for CF2 approval. Kitchin LJ ruled that the non-disclosure of the Pearl employment was relevant to whether he evidence to the UT '*had been in some respects deliberately untruthful*' and also whether it was '*highly material to whether she was fit and proper for the CF2 function'*.

However Kitchin LJ agreed with the UT that '*whilst 'the non-disclosure by Ms Burns of her employment by Pearl and her untruthful evidence about it to the Tribunal were relevant to whether she was a fit and proper person, they could not constitute misconduct under Statement of Principle 1'*. Kitchin LJ then went on to consider how the non-disclosure issue crept back into the FCA's case against her including the way that Ms Burns was cross-examined on this issue at some length ('*27 pages of transcript*') by leading counsel then instructed by it at the UT. Kitchin LJ noted (but did not seem to either affirm or reject) the UT's prior decision in *Allen* that the FCA '*will not be confined to its original case*' where '*important new evidence unexpectedly comes to light or there are other special circumstances*'. Kitchin LJ then confined himself to a limited review of director's disqualification case law (*Rolled Steel, Sevenoaks Stationers* and *Lo-Line Electric*) and the approach adopted there to late changes or additions to a pleaded case noting that in the Court of Appeal's view '*a similar approach should guide the Upper Tribunal in considering whether to permit the FCA to rely on allegations not contained in its statement of case'*.

Kitchin LJ noted that the FCA '*became aware of Ms Burns' employment by Pearl in July 2013'* but that '*there was no attempt by the FCA to include in its statement of case any allegation of non-disclosure by Ms Burns of her employment by Pearl'* and this this non-disclosure of the Pearl employment was mentioned by the FCA's counsel in the UT '*in his written opening submissions, but not as in any way forming part of the FCA's case on misconduct, integrity or fit and proper person'*.

However Kitchin LJ went on to observe that the FCA's counsel changed course and did put the non-disclosure of the Pearl employment to the FCA in issue in his closing speech to the UT. Kitchin LJ made these rulings on this:

- the UT was entitled to take account of the Pearl non-disclosure and Ms Burns' evidence on it in assessing the credibility of her evidence on those issues which formed part of the FCA's case,
- the UT was entitled to take account of Ms Burns' deliberately untruthful evidence to it in reaching its conclusion on whether she was a fit and proper person,
- it was fair for the allegations of non-disclosure to form part of the case to be decided by the UT because Ms Burns:
    - could have challenged the late change to the FCA's case but chose not to do so, and
    - was given and took the opportunity to adduce new evidence and to advance new submissions on the non-disclosure.
- Ms Burns brought proceedings against Pearl in the Employment Tribunal and the motive suggested by the UT for her non-disclosure was '*a desire to conceal that she had been in dispute with Pearl*', and
- None of Ms Burns' witness statements (including superseded drafts) '*deal with the non-disclosure question*'.

However Kitchin LJ rejected a submissions made by the FCA that in considering whether an applicant is a fit and proper person, the UT should consider all matters arising out of the evidence before it,

'*irrespective of whether it formed part of the FCA's pleaded case'* or not. Further Lord Justice Kitchin lambasted the FCA for these failures:

- the way it '*presented its case on non-disclosure'* was he ruled '*not satisfactory'*,
- the FCA could have applied to amend its case to plead non-disclosure but it did not, and
- it was '*not satisfactory that the non-disclosure was treated as going only to credit'* and then only after the evidence had closed '*to treat it as a substantive allegation'* and that the '*onus lay on the FCA to take that step, so that the matter could be properly argued and considered'* including whether the hearing should be adjourned.

What did the Court of Appeal rule on costs?
Lord Justice Kitchin rejected the FCA's appeal from the UT where it ordered it to pay Ms Burns £100,000 + VAT in costs for its '*unreasonable behaviour'*.

Kitchin LJ started by saying that the Court of Appeal had '*no difficulty accepting that the award of costs made by the Upper Tribunal was unusual, and particularly so where, as here, the party in whose favour the award was made had been found guilty of wrongdoing'*. The FCA submitted the adverse costs order was wrong in law for these reasons:

- the hearing of a reference from the RDC to the UT is heard afresh and is not an appeal,
- the FCA is entitled to plead allegations which are reasonably arguable,
- it is a matter for the FCA which reasonably arguable allegations to advance, and
- the UT misdirected itself on the correct test.

All these submissions were rejected by the Court of Appeal. Lord Justice Kitchin ruled that 'the FCA must have a proper basis for making any allegation' and where the FCA '*intends to advance an allegation of a particularly serious nature, such as an intention to solicit a corrupt payment, then the strength and quality of the evidence available in support of it must be such that there is a real prospect that it will be established*'. Going on he said that if the RDC has '*rejected an allegation of a particularly serious nature then the FCA should consider with care whether it has a proper basis for advancing it all over again'*.

Kitchin LJ said that all 3 Court of Appeal judges had '*given anxious consideration to the decision of the Upper Tribunal in this case*' but they were '*not persuaded that, read in context, it contains a material misdirection of the kind for which Mr Vineall contends'*. He ruled that the UT was '*acutely conscious of the very serious nature of the allegation of corrupt intent that the FCA chose to introduce and that to make it good would require cogent evidence and necessarily involve a careful if not critical examination of the facts*'. Kitchin LJ rejected a submission that the UT was '*purporting to lay down any new rule of general application*' but instead he said it was merely '*making a parenthetical observation that, the more serious the allegation, the more cogent the evidence must be to overcome the inherent improbability that it occurred'*. Kitchin LJ cautioned that the FCA '*should consider with great care whether it is appropriate to advance such an allegation, and particularly so in circumstances where it has been considered and rejected by the RDC'*

Finally Kitchin LJ ruled that the Court of Appeal was '*entirely satisfied that the Upper Tribunal made no error in arriving at its conclusion in the present case*' and that it was '*highly improbable that Ms Burns was ever intending to seek a corrupt payment*' noting that '*someone acting with corrupt intent would hardly request that the matter be placed before the company lawyer'*. Going on Kitchin J ruled that it was '*incumbent upon the FCA to consider with the greatest of care whether it had available to it any evidence which would support an allegation that Ms Burns did, despite the terms of the email, have a corrupt intention'* adding that there was '*no such evidence before the RDC and accordingly the FCA needed to assess whether or not the further evidence available to it provided a sound basis for coming to a conclusion different from that of the RDC'*. Kitchin LJ added that the UT '*was entitled to find that these matters were not capable of providing a sound basis for reading the email in a way that would flout common sense*'. Concluding on this issue Kitchin LJ ruled that the UT was entitled to find that '*the FCA acted unreasonably in introducing the corrupt payment allegation into the proceedings and that this unreasonably increased their gravity and Ms Burns' legal costs'*.

What issue did the Court of Appeal leave open?
Lord Justice Kitchin ruled that it was unnecessary for the Court of Appeal '*to express a concluded view on the precise scope and purpose of the exception in section 175(3)*' of the Companies Act 2006 (which deals with the '*Duty to avoid conflicts of interest*'). He said that not having heard full argument on the question, he preferred '*to leave it open'*.

Will there be a final appeal?
The ruling was handed down on 21 December 2017 and the time to lodge an appeal with the Supreme Court expires on 11 January 2018.

What are the implications of this ruling?
The Court of Appeal took 6 months to come to this ruling and Kitchin LJ is at pains to point out that the judgment is one of the court '*to which each of us has made a substantial contribution'*. There are these 6 issues that those involved in FCA litigation need to consider:

- Evidence to support allegations,
- Amendments to FCA statement of case,
- CV cleansing,
- Chilling effect of costs orders,
- Precedent value of this judgement for costs orders, and
- Anonymity orders in the Upper Tribunal

Evidence to support allegations
The FCA would do well to heed Lord Justice Kitchin's warning that it has the necessary evidence and that the more serious the allegation the more cogent the evidence will need to be. Here the RDC had specifically rejected the corrupt payment solicitation allegation but the FCA then tried to re-introduce this by the back door into the UT proceedings.

Amendments to FCA statement of case
It is disappointing that the Court of Appeal has taken a narrow and quite generous view of the ability of the FCA to amend its statement of case against a regulated firm or individual. This is in stark contrast to 20 years of jurisprudence from the Court of Appeal in relation to amending civil claims before a court subject to the Civil Procedure Rules 1998.

The starting point is the Court of Appeal's 1998 decision on a late application to amend a party's case. In *Worldwide Corporation v. GPT Limited* **1998 WL 1120764** (later cited with approval by Lord Justice Lloyd in *Swain-Mason v. Mills & Reeve* **[2011] EWCA Civ 14),** Lord Justice Waller in giving the judgement of the court said this:

> *'… in previous eras it was more readily assumed that if the amending party paid his opponent the costs of an adjournment that was sufficient compensation to that opponent. In the modern era it is more readily recognised that in truth the payment of the costs of an adjournment may well not adequately compensate someone who is desirous of being rid of a piece of litigation which has been hanging over his head for some time, and may not adequately compensate him for being totally (and we are afraid there are no better words for it) "mucked about" at the last moment. Furthermore the courts are now much more conscious that in assessing the justice of a particular case the disruption caused to other litigants by last minute adjournments and last minute applications have also to be brought into the scales….Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants? …. The court is concerned with doing justice, but justice to all litigants, and thus where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one on the amending party to show the strength of the new case and why justice both to him, his opponent and other litigants requires him to be able to pursue it.'*

Although the Tribunal rules differ to the CPR 1998, they too contain the same over-riding objective. It is difficult to see a clear rationale why the Upper Tribunal on a reference should not adopt the same robust approach. After all a firm or individual which has faced a FCA investigation, then an appeal to the RDC and then a reference to the UT also does not want to be '*mucked about at the last moment'*.

CV cleansing
Ms Burns set up her own business Aktiva in February 2005. She worked at Pearl from December 2006 to October 2008. In a sense Ms Burns was not hiding anything as she had continued with her freelance business whilst working for Pearl. It is not clear whether Ms Burns role at Pearl required FSA authorisation or not. Although there is a public register of firms that the FCA regulates, when the FSA was abolished, it is not clear what happened to its public register. It has not been possible to check if Ms Burns had authorisation from the FSA. If she did, it would ring very hollow indeed for the FCA to claim it did not know about her prior Pearl employment. The FCA has to do more than merely process forms that are submitted – it holds a vast database of information and it should be expected to be pro-active in the way it uses it.

Chilling effect of costs orders

This was argued with much force by the FCA by Mr Andrew Hunter QC at the oral permission hearing before Lady Justice Gloster on 23 November 2016. Mr Hunter submitted that a costs order against the FCA would have a '*chilling effect'* on how the FCA conducts future prosecutions or pursues allegations rejected by the RDC if there is a risk that it is exposed to costs sanctions '*unless it can satisfy a cogency test*'. Mr Vineall QC argued the case for the FCA at the 2 day Court of Appeal hearing in July 2017. It is telling that Lord Justice Kitchin makes no mention of this '*chilling effect'* all.

Precedent value of this judgement for costs orders

Lord Justice Lewison refused the FCA permission to appeal the UT's adverse costs order on the papers with detailed reasons. At the oral permission hearing Lady Justice Gloster said that here first reaction was to agree with Lewison LJ and also to refuse permission. However the scales were only just tipped when Gloster LJ was told that Ms Burns had obtained permission to appeal and the appeal had already been listed. It is telling in the end that 3 more Court of Appeal judges have rejected the FCA's appeal against the adverse costs order. The sensible thing would have been for the FCA to have accepted the UT's ruling. Instead it has appealed a ruling on a case that was not good for the FCA on adverse costs facts and where 2 judges in the Court of Appeal at permission stage had said it did not have a real prospect of success. The FCA now has a clear ruling from the Court of Appeal that the UT will have to follow in future cases. The Court of Appeal has endorsed the making of an adverse costs order against the FCA even in an unusual case where the regulated person had lost in the UT. Time will tell whether this will embolden other UT judges to make similar adverse costs orders against the FCA.

Anonymity orders in the Upper Tribunal

Ms Burns made an application in March 2013 to the UT that details of her case should remain private but the UT rejected this privacy application. Details of cases heard by the RDC are kept confidential. It is disappointing that the UT has not also released its judgment or reasons as to why it refused the confidentiality application. There seems to be no reason in principle why the UT should not adopt a similar approach to confidentiality that the RDC has always adopted. It has to be noted here that 6 out of the 10 allegations made by the FCA were rejected by the UT.

5 January 2017

David Bowden is a solicitor-advocate and runs David Bowden Law which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.