Questioning a fact-find—drawing a line between regulated and exempt activites

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Financial Services analysis: Where is the line to be drawn between regulated and exempt activities under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001? David Bowden, freelance independent consultant, notes the submissions made to the Court of Appeal in Simplysure Limited v Personal Touch Financial Services Ltd and talks to Russell Kelsall, partner at TLT LLP, about the implications of this case for financial services practitioners.

Original news

Simplysure Limited & another v Personal Touch Financial Services Limited (Unreported)

The first three questions on a fact-find document for private medical insurance were completed by an unqualified adviser. It was then handed on to advisers who were Financial Conduct Authority (FCA) authorised. Following a compliance audit, these breaches were unearthed and the distribution contract was terminated. A claim for damages alleging wrongful contractual termination was brought. HHJ Nigel Bird in the Manchester Mercantile Court gave judgment for the claimant Simplysure Limited (SS) on 23 March 2015. Personal Touch Financial Services (PTFS) appealed against this ruling to the Court of Appeal, Civil Division which has heard submissions and reserved judgment.

What is the significance of this case?

David Bowden (DB): This is the first time a case has reached the Court of Appeal on this topic so it will have to interpret the ambit of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544 (RAO 2001). In particular, the Court of Appeal will have to decide what RAO 2001, art 25 means when it refers to 'making arrangements' and whether the completion of introductory questions on a fact-find constitutes making arrangements or not. This is a matter of some importance because conducting regulated activities within the scope of RAO 2001 without permission from the FCA or Prudential Regulation Authority is a criminal offence.

What are the facts?

DB: PTFS provided private medical insurance. It entered into a distribution agreement with SS. Both organisations had regulatory authorisation from the FCA. SS had a fact-find document and unqualified advisers completed the first three questions. It was then passed to advisers who were FCA authorised to complete the fact-find. There were arrangements between PTFS and SS in relation to commission sharing and this extended to renewal commissions where policies were renewed.

Following a compliance audit, PTFS established that the fact-finds were not completed in full by FCA authorised advisers. PTFS terminated the contract for this breach. SS brought a claim alleging the contract had been terminated unlawfully or without valid reason and sought damages for this breach.

What ruling did HHJ Bird give?

DB: On 23 March 2015, judge Bird upheld the claim and gave judgment for SS for damages to be assessed.

What were the issues the Court of Appeal was asked to address?

DB: PTFS appealed contending that Judge Bird was wrong. PTFS said the compliance breaches were sufficiently serious to allow it to terminate the contract with SS. PTFS said it had never consented to SS conducting its fact-finds in this manner. PTFS said completing the initial three questions on the fact-finds amounted to 'making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment' and fell within RAO 2001, art 25(1).

What does the appellant private medical insurer provider say?

DB: SS said the first three questions on the fact-find were bland or innocuous and that gathering contact information on prospects did not fall within 'making arrangements'. SS said it was not in breach of the RAO 2001 because the questions on the fact-find which did fall within RAO 2001, art 25 were completed by FCA authorised persons. SS claimed that PTFS always knew its fact-finds were completed in this manner and waived its right to complain about it at a later date.

Are there any prior authorities on what is a regulated activity?

DB: There are only two prior High Court authorities which deal substantively with this. In *Re Inertia Partnership LLP* [2007] EWHC 502 (Ch), [2007] All ER (D) 316 (Feb), Deputy Judge, Jonathan Crow QC ruled that 'arrangements' within RAO 2001, art 25 was 'capable of having an extremely wide meaning' and that the 'availability of the exception in art 26 is essentially a question of fact'.

In *Watersheds Ltd v Da Costa* [2009] EWHC 1299 (QB), [2009] All ER (D) 140 (Feb), Holroyde J found that corporate finance advisers were not carrying out activities caught by RAO 2001, art 25, even though they were making more than a bare introduction to a third party.

What does the claimant distributor say?

DB: PTFS say that Judge Bird is wrong and that his judgment did not analyse the material before him properly. PTFS says that SS was not carrying out the fact finds properly in using unqualified staff to complete part of them and that it was entitled terminate its SS contract.

What interventions did the judges make? What points seem to be troubling them?

DB: All judges were concerned about the way the case had been conducted below. The court expressed concern that the pleadings below did not contain allegations of waiver or estoppel by PTFS that SS was now seeking to run in oral argument.

McFarlane LJ said the touchstone in this case was where was the line to be drawn? The panel looked at the FCA's Perimeter Guidance Manual (PERG) which said that mere displays of literature for pet insurance in a veterinary surgery would be regarded as 'arrangements not causing a deal' under RAO 2001, art 26, but this exemption under PERG would not apply if the vets were displaying leaflets for car or home insurance.

What lessons can financial services practitioners learn from this case?

Russell Kelsall (RK): One of the many problems with PERG is that it provides non-binding guidance from the FCA. While this is often helpful, PERG has its limitations when it comes to technical issues like the extent of the perimeter. A firm considering authorisation will often consider PERG and—even if its activities squarely fall within PERG—it must always be remembered that the guidance is non-binding and the FCA, or a court, is entitled to take a different view. This is often a difficult concept for firms where legislation uses words with a potential wide meaning, like 'arrangements', and where the sanction for non-compliance is a criminal one.

What should lawyers do next?

RK: Lawyers should continue to monitor this decision very closely. While it is solely concerned with the ambit of RAO 2001, art 25 it may provide useful guidance on the interpretation of PERG and the meaning of the word 'arrangements' in financial services legislation generally.

This may be important for consumer credit lawyers because the FCA has recently issued a call for input on the retained provisions in the Consumer Credit Act 1974 (CCA 1974) and whether those should, for example, be transferred into the FCA Handbook. If they are phrases like 'arrangements' in the context of claims under CCA 1974, s 75, they may need to be reconsidered in light of the Court of Appeal's judgment in this case.

Interviewed by David Bowden.

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