

PERMISSION TO APPEAL – Tribunal reduced penalty imposed by Authority from £150,000 to £146,000 - application by Authority for permission to appeal to the Court of Appeal – limited permission granted - FSMA 2000 s137; Financial Services and Markets Tribunal Rules 2001 SI 2001 No. 2476 r24

THE FINANCIAL SERVICES AND MARKETS TRIBUNAL

THE FINANCIAL SERVICES AUTHORITY

Appellant

- and -

FOX HAYES

Respondent

**Tribunal : DR A N BRICE (Chairman)
MRS C E FARQUHARSON
MISS S C O'NEILL**

Sitting in Chambers on 23 April 2008

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DECISION

The application

1. On 31 March 2008 the Financial Services Authority (the Authority) applied for permission to appeal to the Court of Appeal from the decision of the Tribunal disposing of this reference. The decision of the Tribunal consists of both a First Decision (which was released to the parties on 24 September 2007 with a corrected version being released on 8 October 2007) and a Final Decision (which was released on 6 March 2008).

The legislation and the Rules

2. Section 137 of the Financial Services and Markets Act 2000 (the 2000 Act) provides that a party to a reference may, with permission, appeal to the Court of Appeal on a point of law arising from a decision of the Tribunal disposing of the reference. "Permission" means permission given by the Tribunal or by the Court of Appeal.

3. Rule 23(2)(b) of the Financial Services and Markets Tribunal Rules 2001 SI 2001 No. 2476 (the Rules) provides that an application to the Tribunal for permission to appeal may be made by way of written application filed not later than fourteen days after the decision is sent to the party making the application. With the consent of Fox Hayes, the Tribunal allowed an application by the Authority for an extension of time until 31 March 2008 in which to lodge its application.

4. Rule 24(1) and (2) provides that an application to the Tribunal for permission to appeal may be decided by the Chairman without an oral hearing. This application was decided by the full Tribunal without an oral hearing but after reading representations from both parties. Rule 24(3) provides that the decision of the Tribunal on an application for permission to appeal, together with the reasons for the decision, shall be recorded in writing. This document records both the decision of the Tribunal and the reasons for it. Under Rule 24(4) a copy of this document will be sent to the Authority and to Fox Hayes, who is the other party to the reference. Under Rule 24(5) this document contains a direction that, if the Authority wishes to seek a wider permission from the Court of Appeal it must do so within fourteen days of the release of this decision.

Background

5. On 17 October 2006 Fox Hayes referred to the Tribunal a Decision Notice issued by the Authority on 29 September 2006. The Decision Notice stated that the Authority had decided to impose a penalty on Fox Hayes of £150,000 because, in the view of the Authority, Fox Hayes had not taken reasonable steps to ensure that certain financial promotions (which it had approved for some overseas companies) were clear, fair and not misleading as required by Rule 3.8.4R1 of the Conduct of Business Rules and also because, in the view of the Authority, Fox Hayes had reason to doubt that the overseas companies would deal with customers in the United Kingdom in an honest and reliable way as required by 3.12.6R (2) of the Conduct of Business Rules.

6. After the reference had been made the Authority also argued that Fox Hayes had not arranged for the confirmation exercises (that the financial promotions complied with the rules) to be carried out by an individual with appropriate expertise as required by rule 3.6.1R.2 of the Conduct of Business Rules and that Fox Hayes had not conducted its business with due skill, care and diligence as required by Principle 2 of the Principles for Businesses published by the Authority. Fox Hayes disputed all the arguments of the Authority and also argued that the amount of the penalty was excessive.

7. The Tribunal sat for eight days from 5 to 14 June 2007 and heard oral evidence from two witnesses for Fox Hayes and two witnesses employed by the Authority. Written statements by six other witnesses employed by the Authority were also produced. In addition the Tribunal heard oral evidence given on behalf of the Authority by seven investors who had purchased shares from the overseas companies and written statements by three other such investors were also produced.

8. In its First Decision the Tribunal decided:

(1) that Fox Hayes did take reasonable steps to ensure that the promotions were clear, fair and not misleading within the meaning of Rule 3.8.4R1 of the Conduct of Business Rules made by the Authority under the power given by section 138 of the 2000 Act;

(2) that Fox Hayes initially did not have reason to doubt that the overseas companies would deal with customers in the United Kingdom in an honest and reliable way within the meaning of Rule 3.12.6R(2) of the Conduct of Business Rules; however, the Tribunal also decided that by mid-November 2003 Fox Hayes did have reason to doubt and should then have ceased to act for the overseas companies until the doubts had been removed;

(3) that Fox Hayes did arrange for the confirmation exercises (that the promotions complied with the rules) to be carried out by an individual with appropriate expertise within the meaning of Rule 3.6.1R2 of the Conduct of Business Rules; and

(4) that Fox Hayes did conduct its business with due skill, care and diligence within the meaning of Principle 2 of the Principles for Business made by the Authority.

9. Because of the relevance of some evidence which only emerged on the penultimate day of the hearing in June 2007 the Tribunal in its First Decision did not finally decide whether the amount of the penalty was excessive. Some views were expressed in the First Decision but further submissions were invited on the question whether some commissions paid to the senior partner of Fox Hayes should be treated as profits of Fox Hayes for the purpose of determining the amount of the penalty.

10. A further hearing was held on 4 February 2008 and in its Final Decision released on 6 March 2008 the Tribunal decided that the commissions paid to the senior partner were to be treated as profits of Fox Hayes for the purpose of determining the amount of the penalty. On the basis that the commissions would have been received as gross profit

the Tribunal adopted the same basis to find the net profit as had been adopted by the Authority in calculating the original penalty, namely that net profit was 16.8% of gross profit. In the light of this, and all other relevant circumstances, the Tribunal decided that the amount of the penalty should be reduced to £146,000.

The arguments

11. In applying for permission to appeal the Authority sent a short written application and a copy of its Grounds of Appeal which was a more lengthy document. These documents put forward seven grounds of appeal, namely:

- (1) that Fox Hayes did not take reasonable steps to ensure that the letters and research reports sent by the overseas companies to investors in the United Kingdom were clear, fair and not misleading;
- (2) that Fox Hayes had reason to doubt prior to November 2003 that the overseas companies would deal with customers in the United Kingdom in an honest and reliable way;
- (3) that Fox Hayes had been reckless or negligent;
- (4) that Fox Hayes did not act with due skill, care and diligence in the inquiries it made of the overseas companies;
- (5) that Fox Hayes and/or Mr Manning profited to the full extent of the commissions and not just by 16.8% of them;
- (6) that no credit should have been given by the Tribunal for certain actions taken by Fox Hayes; and
- (7) that there had been unwarranted criticism of the Authority.

12. On 4 April 2008 Fox Hayes sent some observations on the Authority's application. These argued that the grounds of appeal stated by the Authority were primarily matters of fact. An appeal could only be made to the Court of Appeal on a matter of law and the Authority had not identified any single arguable error of law. Fox Hayes accepted that, if the Tribunal had made a finding of fact which was wholly unsupported by the evidence, then that was an error of law but argued that there was no such finding. Fox Hayes also argued that the application was seeking permission to appeal in order to revisit matters on which the Tribunal had not accepted the submissions of the Authority; that the quantification of the amount of the penalty was a matter for the discretion of the Tribunal and not a matter of law; and that it would not be fair to Fox Hayes, who had already had to bear very significant costs involved in the reference, if the Court of Appeal were to be troubled on other than good grounds.

Reasons for decision

The legislation

13. In considering the arguments of the parties we start with the legislation. Section 137 of the 2000 Act provides that an appeal to the Court of Appeal must be on a point of law. Section 137 also makes it clear that if the Tribunal does not give a permission to appeal then the Court of Appeal may do so. Otherwise neither the 2000 Act nor the

Rules mention the principles which the Tribunal should apply when deciding whether to grant permission to appeal to the Court of Appeal.

14. Accordingly we have referred to the Civil Procedure Rules at 52.3 in order to identify the principles which should be applied. Although the Civil Procedure Rules do not apply to the Tribunal they do contain guidance about appeals to the Court of Appeal and we have found them helpful. Rule 52.3(6) and (7) provides:

- “(6) Permission to appeal may only be given where:**
 - (a) the court considers that the appeal would have a real prospect of success; or**
 - (b) there is some other compelling reason why the appeal should be heard.**

- (7) An order giving permission may:**
 - (a) limit the issues to be heard; and**
 - (b) be made subject to conditions.”**

15. CPR 52.3.7 discusses the basic criteria for granting permission. The grant of a permission is a discretion which must be exercised in accordance with the overriding objective in Rule 1.1. It is necessary to consider whether there is a realistic, as opposed to a fanciful, prospect of success. The alternative of “other compelling reason” could include the public interest or an issue of law which requires clarifying so long as the clarification could affect the outcome of the appeal. CPR 52.3.11 states that permission may be granted more sparingly for appeals from specialist tribunals. CPR 52.3.13 states that a permission to appeal may limit the issues to be heard.

16. With that legislative background in mind we turn to consider the application for permission to appeal in the light of section 137 of the 2000 Act (which provides that permission can only be given to appeal on a point of law) bearing in mind that a finding of fact which is unsupported by the evidence raises a point of law. We agree with Fox Hayes that some of the grounds of appeal mentioned by the Authority appear to raise points of fact rather than of law.

17. We have therefore considered whether it is open to us to give a limited permission to appeal only on points of law. There is little authority to guide us but, on balance, we have concluded that this course is open to us mainly because that is the only way in which we can fully comply with section 137. We appreciate that if we do give a limited permission it will still be open to the Authority to apply to the Court of Appeal for a wider permission if it wishes to do so.

18. From the Grounds of Appeal prepared by the Authority we have identified three points of law which could affect the outcome of the appeal.

19. The first concerns the meaning of the words “reasonable steps to ensure that a non-real time financial promotion is clear, fair and not misleading” which appear in Rule 3.8.4R1 of the Conduct of Business Rules made by the Authority under the power given by section 138 of the 2000 Act. In paragraphs 122 to 127 of the First Decision the Tribunal decided that the promotions approved by Fox Hayes were clear, fair and not misleading. The Authority wish to argue that the promotions were not clear, fair and not misleading as they did not disclose that the purpose of the promotions was to obtain the

consent of investors to be contacted by the overseas companies who would then try to sell high risk illiquid US shares to the investors. In paragraph 127 of the First Decision the Tribunal stated that there was nothing in the Conduct of Business Rules which would prevent this and there was nothing in the Rules to prevent the overseas companies from gaining access to United Kingdom investors in this way. The scope of the Conduct of Business Rules raises a point of law.

20. The second point of law arising from the Grounds of Appeal prepared by the Authority concerns the meaning of the words “has no reason to doubt” which appear in Rule 3.12.6R(2) of the Conduct of Business Rules. In paragraphs 130 to 148 of its First Decision the Tribunal considered what information was in the possession of Fox Hayes and then decided whether that information should have meant that Fox Hayes had reason to doubt. The Authority wish to argue that this was the wrong approach and that direct evidence of unreliable dealings was not necessary as the reason to doubt was inherent in the scheme from the outset or, alternatively, that the reason to doubt arose before mid-November 2003 (without identifying when it did arise).

21. The interpretation of the words “has no reason to doubt” is a matter of law and the question whether a subjective or objective approach should be adopted is also a matter of law. However, it appears that if the Tribunal adopted the right approach to the meaning of the words, then the actual date upon which the doubt arose is a matter of fact unless the Authority argue that such a finding is unsupported by the evidence.

22. The third point of law concerns the question whether, in deciding that Fox Hayes conducted its business with due skill, care and diligence, the Tribunal came to an unreasonable conclusion on the evidence. The words “due skill, care and diligence” occur in the Principles for Business made by the Authority. In paragraphs 152 to 169 of the First Decision the Tribunal considered this issue. In particular, at paragraphs 154 to 157 the Tribunal considered the adequacy of the enquiries made by Fox Hayes about the overseas companies and concluded, on balance, that they were adequate. The Authority wish to argue that on the evidence it was not open to the Tribunal to reach these findings.

23. It seems to us that in each of these three cases there is a public interest in the clarification of the law which has not previously been considered by the higher courts and could affect the outcome of the appeal.

24. However, it also seems that the other matters raised by the Authority in its Grounds of Appeal are points of fact rather than points of law and could not affect the outcome of the appeal.

Decision

25. We therefore grant the Authority limited permission to appeal to the Court of Appeal on points of law which we have identified as:

- (1) whether the Tribunal erred in law in deciding that the promotions approved by Fox Hayes were “clear, fair and not misleading” within the meaning of Rule 3.8.4R1 of the Conduct of Business Rules;

(2) whether the Tribunal erred in law in deciding that before mid-November 2003 Fox Hayes had no reason to doubt that the overseas companies would deal with investors in the United Kingdom in an honest and reliable way within the meaning of Rule 3.12.6R(2) of the Conduct of Business Rules or, alternatively, whether the finding that the reason to doubt arose in mid-November 2003 was unsupported by the evidence; and

(3) whether the Tribunal's finding that Fox Hayes conducted its business with due skill, care and diligence was unsupported by the evidence.

Direction

26. Under Rule 24(5) WE DIRECT that if the Authority wishes to seek a wider permission from the Court of Appeal it must do so within fourteen days of the date of the release of this Decision.

27. This is a unanimous decision.

DR A N BRICE

CHAIRMAN

RELEASE DATE

FIN/2006/0015
28.04.08