Conduct of Business Rules-approvals by solicitors of promotions by unauthorised overseas companies-'boiler rooms'- alleged absence of adequate guidance by FSA-recklessness- sanction- level of financial penalty

CONSOLIDATED CASE NO. FIN/2009/0007

IN THE FINANCIAL SERVICES
AND MARKETS TRIBUNAL

Financial Services and
Markets Tribunal
43-45 Bedford Square
London WC1

Monday 1 March 2010

B e f o r e

HIS HONOUR JUDGE MACKIE CBE QC

MR K R PALMER

MR C A CHAPMAN

B E T W E E N:

ATLANTIC LAW LLP

and

ANDREW GREYSTOKE

Applicants

and

THE FINANCIAL SERVICES AUTHORITY

The Authority

Sitting in public in London on 1-10 March 2010

MR ALEXANDER CRANBROOK appeared on behalf of the Applicants.

MR TIMOTHY DUTTON, QC and MR RICHARD COLEMAN appeared on behalf of the Authority.

DECISION

1. This is a case about the responsibility of a solicitor and his firm when acting as an authorised person in approving promotions by unauthorised overseas companies.

2. The Applicants have referred to the Tribunal two decisions of the Financial Services Authority ("FSA") given by Notices dated 14 May 2009.

3. The FSA imposed a penalty on Atlantic Law LLP of £200,000.00 under section 206 of the Financial Services and Markets Act 2000 ("FSMA") for breaches of Principle 1 of the FSA's Principles for Businesses and of Conduct of Business Rules ("COB") 3.8.4R(1) and COB 3.12.6R(2).

4. The FSA also made an Order as against the second Applicant, Mr Greystoke, first under section 56 of FSMA prohibiting him from performing any function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm, and secondly under Section 63 withdrawing approval given to him to perform control functions. The FSA also imposed a penalty under section 66 of FSMA of £200,000.00 for him being in breach of Principle 1 and being knowingly concerned in Atlantic Law LLP's breaches of the COB.

The Applicants

5. Mr Greystoke is a solicitor of high intellectual ability and considerable experience. He obtained a Double First in Law at Cambridge, an LLM from Harvard and qualification at both the New York and English Bars. He was for a period a member of eminent Barristers' chambers and he then moved on to prominent roles in banking and finance. His career suffered reverses and following litigation with Lloyd's of London he was made bankrupt in 1996. He was however permitted to go into practice as a solicitor, specialising in corporate finance for small and medium-sized UK and US companies. In 1999 Mr Greystoke founded Atlantic Law, a firm of solicitors that transferred its business to Atlantic Law LLP on 8 December 2005. From 8 December 2005 Mr Greystoke was approved to perform certain controlled functions at Atlantic Law and, from the same date, that firm was authorised by the FSA in respect of various matters entitling it to approve financial promotions under Section 21 of FSMA. In this Decision we refer to both firms as 'Atlantic Law '.

6. The penalties imposed by FSA on the Applicants relate to fifty financial promotions approved by Atlantic Law between 8 December 2005 and 2 March 2007 on behalf of four unauthorised overseas companies ("the Spanish Companies") who targeted private customers in the UK. Those companies were Price Stone Group SL ("Price Stone"), Anderson McCormack Group SL ("Anderson McCormack"*),* City Allied Group SL ('City Allied')and Eagle Star International Group SL ("Eagle Star"). Under the promotions the Spanish companies targeted individuals who owned shares and offered a free research report on the company concerned. Anyone accepting the report authorised the company to make telephone contact and that opportunity was then used to conduct high pressure selling of high-risk illiquid shares. Investors lost heavily and some of these gave evidence to the Tribunal, although the FSA submits that their experience and losses were probably just tips of an iceberg. The FSA says that the promotions which the Applicants approved were not clear, fair and not misleading because they disguised the true purpose of the

communication and that this was known to the Applicants. The position of the Applicants, at least until the start of the hearing before us, was that they were at all times operating within the law, the company reports provided to investors were genuinely useful and they had no idea that the Spanish companies were acting improperly. They say that they acted on the basis of the knowledge available to them and the law as it was perceived to be by both them and by the FSA. They also contend that the FSA failed to advise them and thus to protect consumers. The Applicants' position was refined as a result of the evidence at the Hearing.

The relevant law

7. By the end of the hearing the relevant law was common ground between the parties and those provisions centrally relevant are as follows:-

(a) Under s21(1) and 25 of FSMA a person commits a criminal offence if a person… in the course of business, communicates an invitation or inducement to engage in investment activity - i.e. a financial promotion - unless permitted to do so under the Act. The prohibition applies to communications originating outside the UK if they are capable of having effect within the UK (s21(3)).

(b) "Engaging in investment activity" includes (per s21(8)) "entering or offering to enter into an agreement the making or performance of which by either party constitutes a controlled activity".

(c) Controlled activities are widely defined: they are specified in schedule 1 of The Financial Services and Markets Act 2000 (Financial Promotions) Order 2005 S.1. 2005/1529 ("the FPO"), and include dealing in securities and contractually

based investments (paragraph 3), advising on investments (paragraph 7) and arranging deals in investments (paragraph 4).

(d) The section 21 prohibition does not apply to financial promotions of an authorised person (21)(2)(a), or approved by authorised persons: section 21(2)(b).

(e) The Spanish companies in this case obtained approvals for their written promotions from Atlantic Law LLP as an authorised person purportedly under s21(2)(b)

(f) By COB 3.8.4.R a firm must be able to show that it has taken reasonable steps to ensure that a non-real time financial promotion is clear fair and not misleading. The promotions in this case were all 'non-real time'.

(g) By COB 3.12.6R, a firm must not approve a specific non-real time financial promotion which relates to an investment or service of an overseas person unless two conditions are satisfied:

i. The financial promotion makes clear which firm has approved it and, where relevant, explains:

1. That the rules made under FSMA for the protection of private customers do not apply;

2. The extent and level to which the compensation scheme will be available, or if the scheme will not be available, a statement to that effect; and

3. If the communicator wishes, the protection or compensation available under another scheme of regulation; and

ii. The firm has no reason to doubt that the overseas person will deal with private customers in the UK in an honest and reliable way. This is an objective test.

j. A person who acts with reckless disregard for the Rules lacks integrity for the purposes of Principle 1 of the FSA's Statement of Principles

Role of the Tribunal.

8. The party against whom the Authority makes orders as were made in this case has a right under Section 57(5) of the Act to refer the matter to the Tribunal which under Section 133 (4) must *"determine what, (if any), is the appropriate action of the Authority to take in relation to the matter referred to it".* We are not hearing an appeal against the Decisions of the Authority but reviewing from the start the facts and matters which led to it. This case has therefore been a complete rehearing of the issues which gave rise to the Decisions.

9. It is for the FSA to prove its case to a civil standard on the balance of probabilities. In applying such a standard, the Tribunal will require persuasive evidence before being satisfied that a person has behaved fraudulently or in a reprehensible manner.

Fox Hayes

10. Both parties rely on the decision of the Court of Appeal in Financial Services Authority-v-Fox Hayes [2009] EWCA Civ 76 and as we mention some important passages from it below we summarise briefly what it was about. Fox Hayes, a medium size firm of solicitors in Leeds approved promotions by unauthorised companies, mainly from Spain, which involved the same free research report approach as was adopted in this case. The facts have other echoes of this case but were different in that, in particular, the partner responsible for the promotions took undisclosed commissions of almost £500,000 from the companies and the investors sent their money to the solicitors to be held in a so called 'escrow account'. On a successful appeal from the Tribunal by the FSA the Court of

Appeal held as follows. First those authorised to approve promotions had to take reasonable steps to ensure that the communications were clear, fair and not misleading. This meant that the purpose of the promotion should not be disguised. The firm knew that the purpose of the promotion was to get at investors to invite them to buy shares but this had been disguised. So it followed that that there had been a failure to take the relevant reasonable steps. Secondly it followed from this and the knowledge of the firm as a whole that the firm had reason to doubt that the companies would deal with their customers in an honest and reliable way. The Court also made observations about the importance of protection for non real time promotions and the relevance of an authorised person seeking advice from a regulator. Further the Court also gave guidance about penalty. We refer to some of these matters in more detail below

Facts agreed or not greatly in dispute

11. As the Hearing developed it became clear that many of the facts were either agreed or no longer greatly in dispute. As Mr Cranbrook, Counsel for the Applicants, pointed out, the real factual dispute concerns the knowledge and state of mind of Mr Greystoke and Atlantic Law at particular points.

12. In recent years UK consumers have been increasingly targeted by what are often known as “boiler rooms”, unauthorised overseas companies using high pressure improper sales techniques (including deceit, bullying and harassment) to sell high risk illiquid shares. The FSA has issued warnings and alerts from time to time (which the Applicants say were inadequate). On 30 May 2000 and on 24 May 2002 the FSA issued specific warnings about a boiler room scheme involving the offer of a free research report in a company in which investors held shares with a view to obtaining that investor’s consent to being telephoned about further “services”. Many customers who requested the report would be flooded with calls and subjected to unpleasant sales efforts. The alerts appeared on the

FSA website, were about a page and a half long and contained links to other relevant messages. Thus the 24 May 2002 alert begins:-

> *"The Financial Services Authority FSA is warning investors not to play Russian Roulette with their savings by dealing with unauthorised firms. The renewed warning has been prompted by a surge in the number of enquiries and complaints that the Authority has received about unauthorised overseas firms that have targeted UK-based investors in the last twelve months. The FSA previously warned about such firms in May 2000".*

13. In 2002 Atlantic Law approved some 104 promotions for six Spanish companies who approached UK investors with the offer of a free research report. Mr Greystoke's evidence was that his firm ceased to approve financial promotions for these companies when he discovered that the Serious Fraud Office was investigating their operations.

14. The files of Atlantic Law for each of the Spanish companies contained a copy of a pamphlet entitled *"Fly-by-night operations"* issued by the Spanish Regulator, the CNMV dated October 2002. The pamphlet warns investors against promotions taking a similar form to those approved by the Applicants. Mr Greystoke did not accept that he saw these documents.

15. At the end of January 2003 Atlantic Law started to approve further promotions for another Spanish company Hoffman Philips. Mr Greystoke wrote on 31 January to solicitors in the City who represented or were in touch with Hoffman Philips seeking some documents, including Counsel's opinion and any FSA correspondence. His letter referred to *"a number of concerns I have arising out of our past experience with Raun Austin and the companies associated with him"* and he referred them to the need to be *"satisfied as to the overall manner in which Hoffman Philips conducts its business."* He then turned to the fees his firm would charge.

16. On 24 February 2003 Mr Greystoke wrote to Hoffman Philips direct in Barcelona seeking various assurances and representations. There is no evidence that these were provided. On 30 April 2003 the FSA published an updated list of *"unauthorised firms that are, or have been, targeting UK investors".* The forty firms included Hoffman Philips. Atlantic Law was aware of this as it wrote to Hoffman Philips on 2 May 2003 following publication of the list in the Financial Times. Following a visit by the FSA to a number of firms including Atlantic Law Mr Greystoke wrote to Mr Duck of the FSA on 5 September 2003. He said that Atlantic Law had been approached to approve a further promotion and *"at this stage see no reason why we should not proceed on the same basis as before".* The letter sought guidance and added *"needless to say… if the FSA felt it was not appropriate for us to continue so to do, subject to giving our clients proper time to find alternative persons to approve the financial promotions, we would act in accordance with the wishes and guidelines of the FSA and not approve such financial promotions".* On 18 September 2003 Mr Clark of FSA wrote back to say that the FSA had not recommended any changes to procedures. He added this:-

> *"I would confirm that this is a commercial decision for your firm and that we would expect you to have mechanisms in place to ensure that you comply with the requirements of the Senior Management Arrangements, Systems and Controls Handbook and that you have assessed any risks to both the Statutory Objectives and your own internal risk management systems. As a minimum we would expect full diligence is conducted into clients for whom you would offer such a service".*

Mr Clark reiterated that responsibility for compliance rested with Atlantic Law.

17. Mr Tony Hetherington, a financial journalist at the Mail on Sunday had taken an early interest in boiler rooms and had published concerns about Hoffman Philips in late 2002 and in November and December 2003 he wrote to Mr Greystoke challenging Atlantic

Law's approval of these promotions. He also pointed to links between Hoffman Philips and one of the Spanish companies discredited in 2002. Amidst this controversy, Mr Greystoke wrote to Mr Duck on 5 January 2004 stating that as *"part of the annual review of this firm's business"* Hoffman Philips had been carefully considered and:-

> *"As a matter of policy we have determined that in future this firm will generally only approve Financial Promotions where these are for corporate clients and are incidental to a larger corporate transaction. This policy will come into effect from 1 February 2004. It follows that this firm will no longer approve financial promotions for Hoffman Philips…"*

Mr Greystoke accepted in evidence that he wrote that letter to reassure the FSA. He has also however placed emphasis on the word "generally" and suggested that the passage concerns, or at least includes approval work not just incidental to a larger transaction, such as a company listing but also one incidental to a larger range of business provided by an introducer of work. As we see it Mr Greystoke's letter of 5 January 2004 would have left any reader with the impression that he was ceasing to approve promotions for Hoffman Philips and would in future only be involved in financial promotions ancillary to a wider corporate transaction on which legal work was being done. Although Mr Greystoke has placed emphasis on the use of the word "generally" in the letter of 5 January 2004 that qualification was not contained in his further letters of 11 February or 5 May.

18. We emphasise that the approval activities of Atlantic Law to this point are not themselves the subject of this reference but form part of the background which the FSA says informed the transactions which are in issue.

19. On 7 March 2005 the FSA published an alert *"to all investors"* against dealing with Price Stone. Members of the public were advised that the company was not authorised and that

the FSA believed that the firm "may be targeting UK customers". The Alert cross-refers to the warnings of May 2000 and May 2002 and to other matters. The FSA does not suggest that inclusion of a firm on the warning list of itself prohibits an authorised person from approving its financial promotions

20. On 5 May 2005 Mr Greystoke met Mr Benjamin Mauerberger for breakfast and wrote to him (by email only - not to a postal address). The letter was about a range of potential business including the China Growth Trust. The last three paragraphs of the letter were as follows:-

> *"As far as approving Investment Advertisements, I mentioned to you that I have had past dealings with Mr Hetherington and in that context I would need to be very cautious but I am not actually saying no.*
>
> *Could you please give me some specimens of the documents that you would like approved and the legal opinions affording the operations of the relevant parties.*
>
> *I look forward to working with you"*

21. As appears from the website of the New Zealand Securities Commission, Mr Mauerberger had been involved with a firm in Thailand against which the local authorities had taken action in July 2001. In 2003 Mr Mauerberger was convicted of failing to comply with the Securities Commission summons and fined NZ$30,000.00 by the Auckland High Court. Mr Mauerberger was due to appear before the Commission on 17 January 2003 to answer questions about the activities of one of his companies and his links with another but he left the country and did not turn up. He later gave undertakings to the Commission which issued a statement in October 2003.

22. Mr Greystoke accepted that he conducted an internet search on Mr Mauerberger and discussed the action taken by the New Zealand authorities with him in detail. Mr Greystoke said that Mr Mauerberger told him that he felt that he was not going to have a fair trial in New Zealand. Mr Greystoke says that Mr Mauerberger was an introducer, not a client, and attaches importance to that. We will return to this but the correspondence seems consistent with dealings between solicitor and client - see for example, the letter to Mr Mauerberger of 13 December 2005 and Mr Greystoke's description of him to the FSA (albeit through what he describes in evidence as a *"slip of the pen")* as a *"valued client".*

23. From May 2005 until March 2007 Atlantic Law, on the introduction of Mr Mauerberger, approved more than 50 promotions for the four companies identified above, particularly for Price Stone and Anderson McCormack. There are signs that Anderson McCormack was closely connected to Price Stone. For example sales people, who appear to have operated under false names, moved from one to the other.

24. Atlantic Law's efforts to satisfy itself about the bona fides of its clients, or of the authority of those purporting to represent them were very inadequate. The absence of these basic checks is striking, particularly within a firm of solicitors. The files of Atlantic Law contain copies of the incorporation documents of each company in Spanish. Mr Greystoke gave evidence that he reads sufficient Spanish to understand these. Checks of the passports and addresses of directors of the clients were superficial. Neither Mr Greystoke nor anyone else at Atlantic Law met the directors, obtained references for any individuals associated with the company or sought any evidence of the company's experience and track record. Mr Greystoke wrote in September 2005 and in May 2006 to one of the clients to say that a visit from a representative of his firm to their offices was important. Neither visit took place because, it is said, of personnel difficulties. In evidence Mr Greystoke drew a distinction between *"important"* and *"critical".*

25. The Applicants dealt with their four clients entirely through a Mr Ian Wakefield but they never met him or checked out his background or his authority to represent the companies.

The form of the promotions

26. The financial promotions consisted of a letter offering the UK investor a free research report in the company in which the investor held shares, a response form which he was invited to return, to a London address, indicating his consent to be contacted about unspecified services the Spanish company provided and the research report itself, although this was not always sent to the investor. The wording used was very similar in all promotions. At the bottom of the response form above the investor's signature were the words *"I understand that I may be contacted from time to time with information on the services that you provide, however this does not place me under any obligation to transact any business with you"*. At the bottom of the *"Terms & Conditions"* appears *"Price Stone Group has the right with your consent on the Response Form to contact you with advice by post or by phone, Monday to Friday, between 9.00am and 9.00pm".* At the foot of the first page of the letter in a box appeared wording similar to the following:-

"The attached letter and response form ("the Documents") have been issued by Price Stone Group SL ("Price Stone") and approved by Atlantic Law Llo ("Atlantic Law"). Price Stone is a Spanish registered company. Its registered office address, is Gran Via IZDA 4. Madrid, 28013, Spain. Its registration number is B-84196575. Price Stone is not regulated in the United Kingdom. The rules made under the Financial Services and Markets Act 2000 for the protection of private customers do not apply in respect of the Documents or any other communication from Price Stone. No compensation under the Financial Services Compensation Scheme or any other scheme, in the United Kingdom or elsewhere will be available in connection with anything you do or omit to do as a result of such communications. Atlantic Law is authorised by the Financial Services Authority to approve financial promotions. Its address is One Great Cumberland Place, London, W1H

7AL. All expressions of opinion in the Documents or any other communication are the opinions of Price Stone and not of Atlantic Law. This Financial Promotion was approved on 25 April 2006 and is valid for 60 days. FRN: ALP05124".

27. The overall pattern of these promotions is very similar to those made in the years before 2005 but in some respects the letters were more misleading because the earlier ones had referred specifically to dealings in shares and other securities not simply to *"services".*

28. It is unclear who wrote the research reports. The FSA contends this was done by Mr Wakefield but the evidence indicates only that he was responsible for providing them. The reports were signed by people who described themselves as "Senior Analyst" and "Head Analyst Small Companies". Atlantic Law does not seem to have checked up on any of these individuals. It seems likely that false names and job titles were used as they were elsewhere in these schemes.

29. Atlantic Law, mainly through Mr Matthew Thompson, an assistant solicitor of limited experience, clearly worked to improve the quality and accuracy of some of the reports. Mr Thompson told FSA investigators that sometimes the reports *"were just terrible and poorly written and badly sourced …"* Mr Greystoke accepted that Mr Thompson would have told him of these concerns.

30. Once the potential investor had returned the form sales people from one of the companies would start to telephone often persistently and, when met with resistance, in unpleasant and harassing terms. We refer to this in more detail when dealing with evidence from consumers. The shares sold by the sales people were almost all high risk illiquid shares in small US companies for which a prospectus had not been registered with the US Securities and Exchange Commission. Their resale in the US was subject to significant restrictions that affected their liquidity and value such as the requirement to remove a "restricted" stamp from the share certificate which could only be done with the issuer's consent. Few of the companies could be traded on any official public stock market and

almost all have declined very significantly in value as is clear from statistics produced by an FSA witness Ms de Navacelle. The Spanish companies were unregulated in any jurisdiction. Although initially the Applicants denied that the companies were "boiler rooms" Mr Greystoke accepted in evidence that they were. Each promotion was approved and signed off by Mr Greystoke personally.

Events in 2006 and 2007

31. There were developments in 2006 which the FSA says were or should have been warnings to the Applicants about the activities of the Spanish companies. In May 2006 City Allied took over the Eagle Star operation much as Anderson McCormack succeeded Price Stone. In the same month Mr Thompson complained to Mr Wakefield about a particularly bad research report on Genus Plc. On 27 June 2006 an investor Mr BB sent to Atlantic Law a copy of a letter he had written to Price Stone complaining about shares in three companies for which he had paid some US$20,000. He complained about the restrictions on the sale of the shares, the *"hard sell bullying tactics*", the absence of a share certificate and Price Stone's refusal to repay him money. Miss Zuzova of Atlantic Law forwarded the letter to Mr Wakefield, and sent a copy to Mr Greystoke. Mr Wakefield's draft reply suggested that the relevant sales person had been disciplined and a refund had been made. On 19 August Mr Sagoo wrote to tell Atlantic Law that he had not heard from Price Stone. Mr Greystoke says that he did not see this letter, because of an administrative error, until December 2006. No reply was ever sent to Mr Sagoo's letter. Mr Greystoke recollects that he spoke promptly on the telephone to Mr Wakefield and obtained appropriate assurances but there is no note or other record of their conversation.

32. On 23 June 2006 a Mr KK sent to Atlantic Law a copy of material received from City Allied pointing out that a Google search had revealed nothing about either City Allied or the person described as Head of Research. Mr Greystoke accepted that this complaint would probably have come to his attention. On 11July 2006 Mr Hetherington wrote to Mr

Greystoke to point out amongst other things that Price Stone appeared on a warning list of unauthorised firms issued by the FSA and that the FSA had issued an alert warning against dealing with Price Stone on 7 March 2005. The letter was not answered but if Atlantic Law had been unaware of the alert before they had clear knowledge by July 2006.

33. On 30 July 2006 the Mail on Sunday published an article by Mr Hetherington highly critical of Price Stone describing Mr Mauerberger as *"a notorious operator"* of boiler rooms and also critical of Atlantic Law. Mr Greystoke accepts that he would have seen that article.

34. On 4 August 2006 a similar Alert was published about Anderson McCormack. It was seen by the Applicants as they wrote to Mr Wakefield at Anderson McCormack enclosing a copy of the Alert and adding only *"Can I please have a formal response from you to the contents of the Alert?"* There was no reply.

35. On 15 September 2006 Miss Zuzova faxed to Mr Greystoke at an hotel in New York complaints about Price Stone from a Mr Brown and a Mr McLoughlin.

36. On 24 September Mr Hetherington wrote another critical article referring to a boiler room mailshot endorsed by Atlantic Law. On 29 September someone at Atlantic Law printed out warnings about Price Stone and Mr Mauerberger from CNMV and the Hong Kong Securities and Futures Commission.

37. On 29 September 2006 FSA made a supervisory visit to Atlantic Law. On 20 October Mr Thompson visited the offices of Price Stone, Anderson McCormack and City Allied. Mr Thompson prepared notes of each of these visits and on 30 October sent an email to Mr Wakefield asking to see all complaints forms and procedures and all training material for the Spanish companies. This was never provided. Mr Thompson's file notes are similar (although not the same), for each company and while referring to salesmen, "the Training Officer" and the "Head Manager", remarkably, do not disclose anyone's name.

38. On 14 October 2006 The Guardian published a letter from an investor complaining about Price Stone with an article from Mr Tony Levene naming Mr Greystoke in the context of a Price Stone boiler room operation.

39. An exchange of emails between Miss Zuzova and Mr Wakefield on 2 November 2006 revealed to Atlantic Law that an unapproved report had already been sent to over 600 clients.

40. On 14 November 2006 FSA notified Atlantic Law by telephone that it was going to investigate possible breaches of the COB by the Applicants in approving the financial promotions and confirmed this in writing on 16 November.

41. On 1 December 2006 a Mr Richards complained to Atlantic Law about Price Stone placing an order for the purchase of shares in his name without his knowledge or permission.

42. Throughout this time Atlantic Law had been approving financial promotions. It approved further promotions on 21 December 2006 and 22 January, 1 February and 1 March 2007.

The hearing and the evidence

43. The hearing took place between 1 and 10 March with a break so that counsel could prepare final submissions. Twenty two witnesses gave evidence, much of which was not disputed. We therefore refer only briefly to most of the witnesses. Although the investor witnesses gave evidence in an open public hearing under their full names the FSA has requested that they be referred to by initials in this Decision. The Applicants have not objected to that course and we are sure that it is in the public interest to take it.

Evidence from actual and potential investors

44. Mr AA is a 69 year old farmer who retired from the Army as a Lieutenant Colonel in 1984. He ran a dairy herd until April 2000 and had been allocated shares in Dairy Crest. He

described himself as an informed amateur investor who had occasionally in the past dealt with and trusted stockbrokers. He received an unsolicited telephone call from a "Mr Eugene" of Price Stone offering advice about his Dairy Crest shares. This advice was declined but the salesman continued to call persistently and in a badgering way. Over the course of time Mr AA invested and has lost £854,000. The salesman made claims about the potential for the shares, boasting of his own wealth and importance and the comparative insignificance of Mr AA's investment. He threatened, after the first investment that if more was not invested there would be no return on existing shares. Thus when Mr AA wanted money to make a down payment on a house for his daughter "Mr Eugene" said that he could not have the money unless he invested a further £126,000. Mr AA taped a number of the calls and extracts were played to us. Mr Greystoke himself rightly described the conversations as *"appalling"* containing as they did threats, blackmail, derision and insult. We are grateful to Mr AA for recording and thus preserving evidence of these cruel and evil calls.

45. Mr BB, a Chartered Engineer is 42 and younger than most of the victims who gave evidence. His experience followed a similar pattern but he was able to retrieve about half of his losses of some US$20,000.

46. Mr CC and his brother kept an eye out for their late mother who was contacted by Price Stone in about 2006 when she was 86 years old. Despite having been told by Mr BB of his mother's age, Price Stone later returned to the attack making threats including *"to come to see her … and gang rape her".*

47. Mr DD, a 74 year old retired farmer, received similar calls as a result of having a holding in Dairy Crest but, partly as a result of learning that the farming community was being targeted, did not make an investment.

48. Mr EE is a 61 year old manual farm worker who despite low pay has saved a little over his 35 years of hard work. He received similar treatment from Price Stone and lost £3,122.

49. Mr FF MBE is a retired local government officer. As a result of his treatment at the hands of Price Stone he has lost £52,500, about half his life's savings.

50. Mr GG is a 63 year old chartered accountant. He has lost £58,134 in a similar fashion.

51. Mr HH is 76 and before he retired 16 years ago worked for Allied Dunbar as a financial consultant. He lost the equivalent of US$22,000. He complained to, amongst others, Atlantic Law but received no response from them.

52. Mr JJ is 66, and like other witnesses he had experience of investing in the UK equity markets but not in the type of companies offered by Price Stone. He was persuaded to make investments as a result of which he lost some £33,000.

53. Mr KK is a dairy farmer from Whitby. He was persuaded to buy shares for which he paid some £9,900 and US $29,000, all of which he believes he has lost.

54. None of this important evidence was disputed. The witnesses showed courage in coming forward to admit in public what might have seemed embarrassing losses. We were impressed by the dignity with which they accepted what in some cases were devastating personal setbacks.

55. We return later to the question of the size of the losses caused by the Spanish companies to their victims.

FSA Witnesses

56. Mr Jonathan Phelan is the head of the Unauthorised Business Department within Enforcement at the FSA. He described the overall experience of the FSA with boiler rooms and how it seeks to alert consumers and also maintain on its website a list of unauthorised overseas firms. An FSA survey in 2006 found that victims of boiler rooms lose an average of £20,000. They tend to be older, male, experienced investors. There are difficulties in

establishing the extent of damage caused by boiler rooms because of the reluctance of many losers to complain. Of those who did come forward 236 consumers complained to the FSA about the four Spanish companies. But only 130 of these gave information about the amount invested totalling £2,196,709 and US $1,552,615. Mr Phelan was cross-examined about the adequacy of the alerts and other warnings provided by the FSA. He explained that a balance had to be struck between the need to protect consumers on the one hand and the importance of not publicising unfounded allegations without good cause. The FSA had recently moved from taking some action after six or seven complaints about a firm to doing so after three or so complaints had come in.

57. Ms Tracey McDermott is head of Wholesale Enforcement. She gave evidence about correspondence between the FSA and the Applicants in 2003 and 2004. She also dealt with the controlled function approval granted in August 2004. Some records of that approval process are missing. It is clear that the FSA Regulatory Transactions Committee and the FSA staff had concerns about the Applicants. A letter may have been sent to Mr Greystoke on about 19 August 2004 seeking confirmation and information. In the event the approval was apparently given without the FSA completing its checks. To the extent that the Applicants place reliance on the authorisation by the FSA to Atlantic Law LLP in December 2005, Miss McDermott says that the FSA had no significant new information not before it in 2004. This issue seems to us to be a distraction. The FSA's handling of this exercise was unsatisfactory but the granting of an approval could not reasonably have been seen by the Applicants as an endorsement of their activities in approving the promotions.

58. Miss Vivien Bailey is a supervisor in the Wholesale Banks and Investment Firms Department at the FSA. Her evidence concerned the supervision visit to Atlantic Law in September 2006 and matters relating to the investigation. These were very controversial at one point and seen as important by both sides. They were rightly not raised much at the hearing. As regards Miss Bailey's evidence we mention only that an allegation made by Mr

Greystoke as part of a complaint to the FSA that Miss Bailey had lied about certain matters was not put to her in cross-examination. It is not clear to us whether this is because the allegation is now seen to be irrelevant or whether it is no longer pursued.

59. Mr Richard Lawes is a solicitor in Financial Promotions within a Division of the FSA. His evidence concerned a supervision visit and subsequent correspondence and was not material to the central issues remaining in dispute by the time of the Hearing

60. Miss Georgina Philippou is head of Retail Enforcement within the Enforcement Division at the FSA. She gave evidence and was cross-examined about the decision to refer Atlantic Law to Enforcement, the investigation, delays in its conduct which she attributed to Atlantic Law and to Mr Greystoke, the question of time limits to which we refer later and about other matters no longer directly in issue. She also explained how the investigation team reviewed consumer complaints by doing a survey. She stated that the fact that Mr Hetherington of the Mail on Sunday is a member of the Financial Services Consumer Panel had no affect on the decision to investigate or on the form the process took.

61. Miss Florence de Navacelle is a financial investigator in the Enforcement Division at the FSA. She provided detailed information about the value and liquidity of the shares sold to investors by the Spanish companies. She also provided a second witness statement addressing the financial resources of Mr Greystoke to which we refer later.

Evidence of the Applicants

62. Before turning to Mr Greystoke, the central witness in this case, we mention the other witness called by the Applicants.

63. Miss Veronika Zuzova has worked at Atlantic Law since October 2004. She began as a receptionist and later became a paralegal. She was for a period a trainee solicitor but has reverted to a para legal role. She became broadly familiar with the approval process in

August 2005 at which time Mrs Sarah Taylor was employed part-time as a solicitor. The approval process had involved consideration of a number of documents which were reviewed by solicitors, Mrs Taylor and later Mr Matthew Thompson. They had in time been joined by a trainee solicitor, Miss Karani.

Evidence of Mr Greystoke

64. Mr Greystoke submitted three witness statements of which the first sets out his case. It is fair to point out that this witness statement was prepared when Mr Greystoke was representing himself and the document perhaps understandably combines submissions with evidence. He sets out his academic distinction, his past career and the breadth and depth of his experience and that of his firm. That is not in dispute. He claims that Atlantic Law followed its standard due diligence processes. He is *"deeply disappointed and distressed"* that the FSA did not give him information which it had about the Spanish companies. He is critical of the FSA's dealings with his firm and the inadequacies of alert which is at issue. He asserts that Mr Mauerberger was no more than a contact and an introducer. He records *"very open"* discussions with Mr Mauerberger, and Mr Greystoke being satisfied that *"whatever had happened had been a learning experience for him …."* Mr Greystoke emphasised that full due diligence was extremely important to him albeit he apologises for the failure of his firm to observe what he describes as *"some of the formalities*". He does not accept that the promotion letters were mere hooks to obtain investors telephone numbers and asserts that shareholders obtained a detailed and valuable research report. He saw it as critically important to him that every single complaint was dealt with immediately and properly. Mr Greystoke was cross examined about all these matters

65. Mr Cranbrook, for the Applicants, has correctly pointed out there are few if any disputes between the parties about primary facts. There are however disputes about claims that Mr Greystoke has made at various times about what he did and did not do and about his state

of mind. The FSA invites us to reject most of the claims made by Mr Greystoke in evidence.

66. Before turning to our evaluation of disputed matters we first point out that many of the conclusions which we reach follow almost self- evidently from the undisputed facts which we have listed above. Mr Greystoke knew that Spanish companies were operating as boiler rooms in 2002 and rightly stopped approval work once the SFO was involved. He saw or should have seen the FSA's warnings about boiler rooms in 2002. He obviously knew that he had to conduct full due diligence particularly where there were doubts about the bona fides of a company or a transaction. No assertion by Mr Greystoke changes the fact that he chose in 2005 to start an approval process on the introduction of someone he had spoken to at length and knew to have a shady past, of clients about whom he made only rudimentary enquiries, with whom he dealt at one remove and only through Mr Wakefield whom he had never met or even checked out. He saw the complaint from Mr BB which should have put Atlantic Law on alert. Even though he twice wrote that it was important for his firm to visit the Spanish companies Mr Greystoke failed to see that was done until after the FSA had made a supervisory visit in September 2006. The Applicants continued to approve promotions even after the FSA had begun an investigation and further matters of concern had come to light. These facts speak for themselves.

67. We turn now to our impression of Mr Greystoke's truthfulness as a witness. We bear in mind that the issue is not simply whether Mr Greystoke is a truthful person but whether the FSA has proved the charges. Evaluation of Mr Greystoke's evidence is not simply a matter of deciding whether he is a generally untruthful person. The Tribunal evaluates oral testimony bearing in mind the circumstantial evidence, in particular the documents, and ordinary probabilities as well as the impression made by the witness.

68. There are few if any notes to support claims that Mr Greystoke has made about due diligence, about his discussions with Mr Wakefield, and about how he dealt with the

complaint of Mr BB. He explained this on the basis that his firm did not take attendance notes. While there may be room for legitimate debate between solicitors about the quality and quantity of notes that are required it is an almost universal habit of professional people to place decisions and encounters of significance on record. The fact that the negotiation of commercial transactions does not necessarily require this, a point that Mr Greystoke made, does not explain the absence of such records on quite different types of transaction.

69. Documents that do exist on Atlantic Law's files record matters such as complaints which Mr Greystoke says he never saw and the warnings issued by the Spanish Regulator. Atlantic Law is and was a small firm and Mr Greystoke was, as regards these matters, its sole principal responsible personally for every approval. It is improbable that such documents did not come or were not drawn to his attention.

70. When faced with assertions by Mr Greystoke that he looked to the FSA for advice and did not see or pursue site alerts on the web about his clients we bear in mind that he is a solicitor of long experience with close and up to date knowledge of developments in this particular area of financial services practice. Similarly, where Mr Greystoke or his clients are mentioned in the national press it is improbable that these would not come to his attention and cause him some concern. Where letters are written, for example seeking assurances from a client who has been the subject of a FSA alert, we would expect that if a response had been received it would, if in writing have been retained, and if given orally made the subject of a careful record.

71. When considering whether what Mr Greystoke said in evidence causes us to change what would otherwise be the natural and logical conclusion to draw from the available material it is unfortunately clear that he has made claims in this application that he must have known to be untrue. The FSA emphasises two examples.

72. When writing to Mr Hetherington in 2003 Mr Greystoke claimed that leading counsel had advised on the wording of the Hoffman Philips financial promotions. If Mr Greystoke had taken that advice he would certainly have remembered it. He would have remembered, at least in broad terms, identifying a member of the Bar who was suitable, preparing instructions and obtaining advice. Mr Greystoke obtained no such advice from Leading Counsel. He did however have, from Altheimer and Gray, a copy of an opinion provided by Michael Blair QC to that firm, which did not advise on the wording of the financial promotions. When cross-examined Mr Greystoke recalled, apparently for the first time, that he may have been referring to a conversation with Eben Hamilton QC. That seemed to be an example of a witness caught out telling one untruth seeking to cover it up by telling another.

73. In paragraphs 22 and 24 of the Amended Reply on these references Mr Greystoke, who was personally responsible for the document, volunteered that he had never been the subject of professional criticism. He had made a similar statement to the RDC that he had *"never been criticised"* by the Law Society. In fact he has been the subject of two findings by the Solicitors Regulatory Authority, of a criticism by The Takeover Panel and of another by the PLUS Market. The FSA obtained evidence from Mr Stanley of the Law Society about two findings made against Mr Greystoke by the SRA. The FSA produced other material relating to the Take Over Panel and the PLUS Market. Mr Greystoke sought to diminish the significance of these criticisms, as might be expected. He also claimed that the lack of truth in paragraphs 22 and 24 had occurred to him in the middle of the night a couple of days before the hearing which is why he had corrected the position in a witness statement. This could not be true. He had drafted the amended reply himself. He had volunteered the statement so his belief that it was or might not be significant is hard to accept. He attended a preliminary hearing on 15 January 2010 when he said he would amend his pleading to deal with the matter. In the end Mr Greystoke accepted he had been untruthful and apologised and had no explanation. There is some pattern in Mr

Greystoke's conduct of making inaccurate claims and, when found out, apologising to the minimum degree and expecting to move on.

74. There are other matters listed in Section C of the FSA's closing submissions which, taken with the material we have mentioned, prevent us from accepting exculpatory claims made by Mr Greystoke which are not supported in writing or by other witnesses. It follows that we reject the evidence of Mr Greystoke where it is inconsistent with the surrounding material and the probabilities.

Alleged breaches of the Rules and Principles

75. The FSA claims that Atlantic Law cannot show that it complied with COB3.8.4R(1) and that it took reasonable steps to ensure that the letters and the research reports were clear, fair and not misleading. FSA makes four claims about the letters.

76. First they did not disclose to customers that the purpose in offering a research report to the investors was to sell them shares and that these would be high risk and illiquid. So the purpose of the promotion was disguised. This conclusion follows from the decision of the Court of Appeal in Fox Hayes where, in very similar circumstances, it was held (at Paragraph 22) that the failure of the letters to disclose that purpose meant they were not clear, fair and not misleading .

77. By the end of the hearing the Applicants did not appear to challenge this point. Mr Greystoke had earlier in his witness statement argued that the real purpose was to provide information to shareholders and to obtain the right to contact potential investors but it is obvious from the evidence which has emerged that the companies' purpose was to sell shares. The Applicants argue that they were not privy to the details of the companies whose shares were being sold, but that is no answer. The issue is the purpose of the letter, not the identity of the shares. Moreover any absence of knowledge about the nature of the shares resulted from a failure by the Applicants to make obvious enquiries. Further,

as we have concluded, it must have been obvious to Mr Greystoke given his background and experience and the circumstances of his firm's involvement in these promotions that the shares would be doubtful investments.

78. Secondly the FSA contends that the letters gave the impression that the companies carried on business providing independent research reports to a professional standard which would be useful to UK consumers. The enquiries made by the Applicants were inadequate and what the Applicants learned about the inadequacy of these reports as time went by should have alerted them.

79. Thirdly the FSA says that the letters contained statements indicating that it was in the investors' interest to learn about recent changes affecting their investment and that the company had recently written an independent research report on the topic. Atlantic Law did not attempt to check whether the statements were well founded and its own work showed them to be false. That is linked to a fourth related point that the letters suggested that the research reports would analyse the impact of the changes on the customers investment but the Applicants knew that no such analysis was in the reports. The FSA makes similar claims as regards the contents of the research reports themselves. The FSA said that no investor saw the reports of being of any use, even if they were factually correct.

80. The Applicants respond that having approved the initial financial promotion following the normal due diligence checks they had no reason to doubt that their clients were conducting their business in a fair and proper manner. The position would have been different if the FSA had alerted them to the numerous complaints that were being made.

81. In our view there are clear and serious breaches of COB3.8.4R(1) which are, to a limited extent, now admitted by the Applicants. The letters and the research reports were unclear, unfair and misleading and Atlantic Law did not take reasonable steps to ensure that they were not. The true purpose of the letters and research reports must have been blindingly

obvious to the Applicants given their experience and expertise. The due diligence was inadequate and cursory.

Alleged breaches of COB3.12.6R

82. The FSA contends that Atlantic Law had reason to doubt from the time it approved the first financial promotion that the Spanish companies would deal with private customers in the United Kingdom in an honest and reliable way.

83. First since the Applicants knew that the Spanish companies were not disclosing to the private customers the purpose for which they were seeking their consent to be contacted, it follows that there was relevant reason to doubt. The FSA submits that this is an inescapable conclusion following what is said in Fox Hayes at paragraph 28:-

"On any sensible view the answer to this question must follow from the answer to the previous question. If Fox Hayes knew what the purpose of the promotion was but that purpose was disguised so that the promotion was not 'fair clear and not misleading', it must follow that Fox Hayes had reason to doubt that the overseas companies would deal with their customers in an honest and reliable way. If an overseas company is promoting a scheme without fairly setting out its purpose, there is every reason to doubt that the overseas company will deal with UK customers reliably or, even, honestly."

Secondly the FSA relies on the knowledge of the Applicants that the Spanish companies were unregulated in any jurisdiction and that the scheme which they used had been discredited following the experiences of 2002 and 2003 and of Hoffman Philips. Thirdly the Applicants became aware at some point of the warning by the Spanish authorities in October 2002 and fourthly they knew that the overseas companies were all introduced by Mr Mauerberger whom they knew to be dishonest. The FSA relies fifthly on the fact that the Spanish companies' device would involve illegal communications in breach of Sections 19 and 20 of FSMA. Sixthly the Applicants were aware that the companies

were boiler rooms targeting UK investors. The FSA also contend that as time went by between 2005 and 2007 the Applicants became aware of numerous warnings, complaints and other matters that would have confirmed or strengthened their reason to doubt that the companies would deal with customers in an honest and reliable way.

84. The Applicants do not contest the inevitability of such a finding given the guidance in Fox Hayes but they dispute the gravity attributed to these matters by the FSA. Mr Greystoke denies being aware of the warning of the Spanish CNMV but Atlantic Law clearly knew because the relevant documents were on its files. The Applicants claim that concerns about Mr Mauerberger which would have arisen had he been a client did not arise because he was a mere introducer. We have already found that Mr Mauerberger was on occasions probably a client or almost so. Further there was no valid distinction between the roles of client and introducer given the minimal enquiries and checks made by the Applicants about the companies. Moreover no one with the expertise of the Applicants and aware of the background who was considering the approval of these promotions and who knew of Mr Mauerberger's shady past in this very sector could reasonably have concluded that the companies would deal with private customers in an honest and reliable way.

85. The Applicants could not have reasonably concluded that any of the Spanish companies would deal with private customers in an honest and reliable way given that they were all adopting the same approach, were all introduced by Mr Mauerberger and apparently run by Mr Wakefield.

Recklessness

86. The FSA contends that the Applicants acted recklessly in relation to the breaches of the COB. It is said that the Applicants consciously and unreasonably ran the risks that their conduct did not comply with the rules and that customers would be exposed to harm. It submits that Mr Greystoke, when approving each of the promotions, knew or suspected that:-

(a) The Applicants had not taken reasonable steps to ensure that they were clear, fair and not misleading.

(b) There was reason to doubt that the Spanish businesses would deal with private customers in the UK in an honest and reliable way.

(c) In consequence Atlantic Law was breaching the COB.

(d) There was a risk that the Spanish businesses were boiler rooms.

(e) Atlantic Law's approval of the financial promotion would give them a veneer of propriety and would help the Spanish companies to gain the confidence of and sell shares to customers in the United Kingdom and

(f) That Atlantic Law's actions would expose private customers in the UK to the serious risk of financial loss and would cause them distress.

87. In support of these submissions the FSA relies on four factors. First since the Applicants knew that the purpose behind the letters to the investors was not being disclosed their position is similar to that of the Applicants in Fox Hayes where the Court of Appeal held (at paragraph 49) that the approval by a person of a promotion that it knew did not disclose its true purpose was at least reckless. Secondly Mr Greystoke must have known that it was not appropriate to approve financial promotions if Mr Mauerberger was behind them. Thirdly the Applicants knew their obligations under the COB but chose not to comply with them. The FSA relies on Mr Greystoke's acknowledgment that against the background of the SFO's inquiry in 2002, the dealings with Hoffman Philips and the Hetherington correspondence he needed to be *"very cautious*" about approvals and mentioned this at the time in correspondence. Mr Greystoke knew from the FSA's letter of 18 September 2003 that full due diligence was required and indeed informed them in his 5 January 2004 letter of what was to be their more cautious approach to promotions. Despite appreciating

the importance of due diligence and of visits to the client Mr Greystoke twice postponed these. The only visit took place after it had been prompted by the FSA's supervisory visit on 29 September 2006. Fourthly Atlantic Law continued approving financial promotions even after the supervisory visit and after having been notified that an investigation about potential breaches of COB was in hand. The FSA points out that as Mr Greystoke accepts that he had overall responsibility for Atlantic Law's compliance and signed off each promotion, he was as involved with these contraventions as Atlantic Law itself.

88. The Applicants dispute the charge of recklessness. They point out that following a meeting with the FSA and Atlantic Law about Hoffman Philips Mr Greystoke wrote that *"If the FSA felt it was not appropriate for us to continue ... we would act in accordance with the wishes and guidelines of the FSA and not approve such financial promotions."* The FSA did not respond helpfully. It stated merely that the matter was a commercial decision for Mr Greystoke and that full due diligence was required of clients. Mr Greystoke said *"It certainly was not a red light and I did not even regard it as a particularly amber light".* There was no guidance after that.

89. Mr Greystoke points out that his correspondence with Mr Hetherington about Hoffman Philips had been sent to Mr Duck at the FSA on 11 December 2003 and despite the fact that he mentioned a complaint as an issue the FSA never told him of any that had been made. He ceased acting for Hoffman Philips because *"doubts had been raised and had not been dispelled satisfactorily"* and would have taken the same decision had doubts been raised about the Spanish companies.

90. Mr Greystoke says that he had no reason to believe that there had been any failing in the procedures his firm carried out for full due diligence in relation to the promotions. Further his approach was apparently endorsed when his application in 2004 for approval to carry out controlled functions was approved by the FSA. It was reasonable for him to assume that if there were doubts about him he would not be granted the compliance role for which

he had applied. Mr Greystoke also says that he carried out full diligence by obtaining copy passports of the directors of the firms and conducting company searches and obtaining the relevant incorporation documents. In 2006 Mr Thompson had visited Spain and made careful notes about the work of all the clients. Mr Greystoke stresses that he had no reason to believe that there were large numbers of complaints. The FSA informed him of none. The only significant complaint of which Mr Greystoke had been aware was that of Mr BB. Mr Greystoke checked the matter immediately by telephone with Mr Wakefield and believed that Mr BB had received a full refund. He would have been happy to reimburse Mr BB from his own funds if necessary. Further some of the investors, such as Mr GG, were aware of the type of firm they were dealing with and had placed no reliance on the fact that the financial promotion had been approved by Atlantic Law.

91. The Applicants argue that the FSA alerts provided no assistance to Mr Greystoke because they said no more than that a named firm was unauthorised. It remained Mr Greystoke's view that he need have no concerns about the overseas clients and as late as 1 November 2007 was given further controlled function authority to exercise a customer function.

92. It follows from our findings of fact that none of these points answer the central submissions of the FSA. When the letters of the FSA are read as a whole and in context it is clear that they provided no assurance but rightly advised Mr Greystoke to take steps which as a solicitor he would have known he should take anyway. The warning signs to Mr Greystoke over the Spanish companies were at least as bright and large as those for Hoffman Philips. So doubts must have been raised. It would have been obvious to any qualified solicitor, let alone to someone with Mr Greystoke's immense experience, that due diligence had been superficial and inadequate. To some extent he accepted this in cross-examination. The granting of Mr Greystoke's applications for approvals by the FSA, as he must have known, was no endorsement of activities about which that body knew little. The

Applicants' points about the authorisation given on 1 November 2007 do not carry weight as it relates not to a new authority but to the redesignation of an existing one.

93. In our experience it is not the practice of regulators to give specific advice or guidance in the absence of full disclosure of all relevant facts. The position was put beyond doubt (although in our view, contrary to the submissions of the Applicants, in describing current reality not creating new law) at paragraph 41 of Fox Hayes: - *"Regulators may often find themselves in a somewhat difficult position when they are expressly asked for advice or guidance. It cannot be a legitimate criticism of a regulator that he decides not to give advice or guidance. It is the duty of the authorised person to comply with any relevant rule not the duty of the regulator to advise whether conduct of a particular kind does or does not constitute compliance with or contravention of a rule. The most that can, in my view, be said is that, if advice or guidance is given and it subsequently transpires that it was wrong, that may have an effect on the penalty for any transgression. One can only say that it "may" have an effect upon penalty because it is likely to be only the authorised person who knows the full factual picture; usually the regulator will not. Any advice or guidance given can only be relied on if the full facts are before the regulator when the advice or guidance is given."* Paragraph 49 of Fox Hayes is also instructive;

> *Deliberate or reckless misconduct. Although the misconduct in the present case was the "failure to take reasonable steps to ensure" that the promotion was fair and not misleading, it does not follow that the misconduct was merely negligent rather than reckless or deliberate. The finding of the Tribunal was that the firm knew that the purpose of the promotion was to obtain the agreement of customers to be contacted for the purpose of trying to sell them OTC Bulletin Board shares; despite that knowledge Fox Hayes approved the wording of the letters which disguised that purpose. Mr Manning and Mr Jones obviously read the letters and must have appreciated that the true purpose of the promotion was not being stated. That is, at least, reckless and, in my view, deliberate. It is not necessary for the FSA, of course, to show that Fox Hayes or*

any of its partners intended investors to lose money or were reckless in that regard. The FSA need only show that the actual misconduct was deliberate or reckless and it is impossible to avoid the conclusion that it was".

94. Essentially the FSA gave general advice to Mr Greystoke but it was not taken. He knew of at least some complaints and had access to the alerts. Any intelligent and educated person reading the alerts would have turned to the other links provided and appreciated their significance. Any professional person aware of an alert would have made enquiries of his clients and pursued the matter until these were satisfactorily answered. We accept that if Mr Greystoke had become aware of the numerous complaints received by the FSA he would probably have ceased acting for the clients but there were in any event other serious warning signs.

95. It therefore follows that we accept the case of the FSA that Mr Greystoke acted recklessly. He knowingly took very obvious risks, he ignored the clearest warning signs and approved the promotions with the result that the Spanish companies were able to exploit vulnerable consumers who lost very large sums of money.

Integrity

96. Although as this Tribunal pointed out in Vukelic v FSA [13.03.09] it is unwise to attempt a comprehensive definition of integrity there is useful guidance in Hoodless and Blackwell v FSA *"that a person lacks integrity if he/she acts in a way which, although falling short of dishonesty, lacks moral soundness, rectitude and steady adherence to an ethical code".* For this purpose a person may lack integrity even through it is not established that he/she has been dishonest. There was no dispute at the hearing about the meaning of integrity. It follows inevitably from the seriousness of what we have found to be Mr Greystoke's reckless conduct that he lacked integrity.

97. In the light of these findings we turn to the question of sanction.

Sanction –relevant powers of the FSA

98. If it appears to the FSA that an individual is not fit and proper to perform functions in relation to a regulated activity carried on by an authorised person the FSA may make an order prohibiting him from performing some or any functions – see Sections 56(1) and (2) of FSMA. Guidance about the making of prohibition orders is set out in Chapter 9 of the Enforcement Guide. The FSA may exercise the power where it considers that it is appropriate to achieve its regulatory objectives to prevent an individual from performing various functions. The FSA must consider all the relevant circumstances which may include certain specified matters. The scope of a prohibition order will depend on the range of functions that the individual concerned performs in relation to regulated activities, the reasons why he is not fit and proper and the severity of risk which he poses to consumers or the market generally. The criteria for assessing an individual's fitness and propriety are contained in The Fit and Proper Test for Approved Persons. This provides that the FSA will have regard to a number of factors when assessing the fitness and propriety of a person to perform a controlled function. The most important considerations will be the person's:

(a) honesty, integrity and reputation;

(b) competence and capability; and

(c) financial resources. In assessing fitness and propriety, the FSA will also take account of the activities of the firm for which the controlled function is or is to be performed, the permission held by that firm and the markets within which it operates.

The FSA may withdraw an approval given under Section 59 if it considers that the relevant person is not fit and proper to perform the function to which the approval relates – see Section 63(1).

99. Sections 56 and 206(1) give power to the FSA to impose financial penalties. The FSA is required to prepare and issue a statement of policy with respect to the imposition of penalties under Sections 66 and 206 as to their amount: see Section 69(1) and 210(1). The FSA's policy is contained in the Decision Procedure and Penalties Manual. This states that the principal purpose of imposing a financial penalty is to promote high standards of regulatory and/or market conduct by deterring people who have committed breaches from committing further breaches, helping to deter other people from committing similar breaches, and demonstrating generally the benefits of compliant behaviour. Financial penalties are tools that the FSA may employ to help to achieve its regulatory objectives. The FSA's regulatory objectives are:

(a) Market confidence

(b) Public awareness

(c) The protection of consumers and

(d) The reduction of financial crime

Relevant matters include the nature, seriousness and impact of the breach, the extent to which the breach was deliberate or reckless, whether the person on whom the penalty is imposed is an individual, the size, financial sources and other circumstances of the person on whom the penalty is to be imposed and the amount of benefit gained or loss avoided. The Court of Appeal in Fox Hayes considered that in a case where ordinary investors had lost many millions of pounds it would be inappropriate, other things being equal, to fix a penalty of less than £750,000. That figure was reduced to £500,000 as it was to some extent a test case. The commission wrongly received by one of the partners was then added to produce an overall amount of £954,770. The Court of Appeal referred back to the Tribunal the question of whether the penalty should be diminished because of the financial circumstances of some of the relevant partners.

Prohibition Order

100. The FSA contends that a prohibition order is inevitable when Mr Greystoke has committed reckless conduct and demonstrated a lack of integrity. He has failed to comply with the Statements of Principle and been knowingly concerned in Atlantic Law's contravention of the COB Rules. Boiler rooms are a serious threat to consumers. The losses are substantial. Mr Greystoke is not a person fit and proper to perform functions in relation to regulated activities and a prohibition order should be made.

101. Mr Cranbrook recognises that if the Tribunal reaches a finding of recklessness and a lack of integrity the Tribunal is very likely to make a prohibition order.

102. In view of the findings which we have made about the seriousness of the contraventions in this case, which we do not repeat, justice requires that there be a prohibition order against Mr Greystoke. Having made that order it is unnecessary to consider the Section 59 approval further.

Financial penalty - limitation

103. The Applicants argue in their Amended Reply that action by FSA against Mr Greystoke is time-barred because of Section 66(4) of FSMA which provides:-

> *"The Authority may not take action under this section after the end of the period of two years beginning with the first day on which the Authority knew of the misconduct, unless proceedings in respect of it against the person concerned were begun before the end of that period."*

Mr Cranbrook has maintained that position although he recognises that Section 66(4) applies only to a financial penalty imposed on Mr Greystoke. The relevant investigation in this case did not begin until 14 November 2006 albeit that the FSA considered that Atlantic Law may have failed to comply with Rules from 8 December 2005. That was less than two years before the warning notice and the FSA would not have acquired the requisite knowledge for some

time after that. The FSA obtained copies of some documents on 29 September 2006 but other papers were not available until 31 October 2007 as a result of the position adopted by the Applicants. Interviews took place in June 2008 resulting in the warning notice on 24 September 2008. The warning notice was issued in time and the limitation point fails.

Financial penalty

104. It is not disputed that 236 consumers reported the issue to the FSA, 130 provided information about what they had invested totalling £2,196,709 and US$1,552,615. Mr Phelan of FSA gave evidence that with schemes such as this, consumers often did not report their losses, through embarrassment or for other reasons. It is clear from information disclosed in criminal proceedings in Hong Kong against a Mr Hertzberg that proceeds obtained by representatives of Price Stone between June 2005 and March 2007 totalled the equivalent of some £48 million. Following recent arrests a press release by the Serious Fraud Office has announced charges against seven people (none of whom work or have worked with Atlantic Law) in connection with operations by Price Stone, Anderson McCormack and another company. Losses caused to investors by Spanish companies are said to be of the order of US$100 million. The Tribunal cannot make an accurate determination of the losses caused as a result of sales calls made in the 50 relevant promotions approved by Atlantic Law. We conclude however in broad terms, that while losses may not approach the figures referred to in Hong Kong and by the SFO they are likely to be substantially more than the amounts disclosed by the 236 consumers who complained directly to FSA.

105. In seeking a substantial penalty against both Mr Greystoke and Atlantic Law the FSA points to the deliberate and reckless conduct, the fact that the breaches were committed over an extensive period and the serious consequences which have followed in terms of loss. The FSA also points to the Applicants having received fees of £200,000 for their approval work in the relevant period. We bear in mind that the fees were gross and that the net return for the Applicants would be less. The FSA invites the Tribunal to deprive the

Applicants of their gain and also impose a deterrent and punitive element as the Court of Appeal did in Fox Hayes. The FSA does not itself seek a higher penalty than that imposed by the RDC.

106. Mr Cranbrook for the Applicants recognises that, isolated from the financial circumstances of his clients the penalties imposed by the RDC, £200,000 upon each Applicant are arguably not excessive. He points out however that both fines would, in effect be personal liabilities for Mr Greystoke and that he is in no position to pay what is in effect a fine on him personally of £400,000. He suggests that a fine of £50,000 would be more appropriate. He points to the FSA's guidance (bundle E tab 17 page 9) that *"the purpose of a penalty is not to render a person insolvent or to threaten the person's insolvency".*

107. In his first witness statement and in later witness statements produced following an order of the Tribunal dated 15 January 2010 Mr Greystoke gives information about his finances. He says that Atlantic Law has been operating at a cash flow deficit for many years and has continued in operation only as a result of large loans from his wife. These reflect her confidence that shares and securities obtained by way of fees should, when realised, be adequate to repay the loans and put the practice on a sound footing. He says that Atlantic Law is entirely dependant upon his wife for support. Mr Greystoke was declared bankrupt in June 1996. The order was terminated in 1999 since which he has had no interest in any real property and does not own a car or other valuable assets. He, on behalf of himself and Atlantic Law, owns shares in a variety of small companies the value of which is either relatively low or difficult to quantify. Atlantic Law currently owes Mr Greystoke's wife £650,000 and he himself has guaranteed the firm's borrowing in the amount of £50,000. Mr Greystoke said he has no trusts or similar arrangements or other sources of income beyond what he receives directly or indirectly from his wife and from offshore companies owned by her. He has no knowledge of his wife's financial position other than that she owns companies which operate two schools. Mr Cranbrook points to

this evidence and suggests that the FSA's contention that there is something surprising in his client not holding assets ten years after the end of his bankruptcy is misconceived. He also points to the potential risk of blameless employees of Atlantic Law losing their jobs if Atlantic Law goes out of business

108. The FSA responds that the Applicants' real lack of means has not been substantiated and that this evidence should be discounted.

109. As Mr Greystoke correctly points out, his wife is not obliged to disclose her means to this Tribunal even though she appears to be the source of his income and he and his practice have substantial liabilities to her and/or her offshore companies. We therefore have no verifiable evidence of the Applicants' real financial situation and less material than would generally be before a court in similar circumstances. We recognise that there is a possibility that imposition of financial penalties of the range fixed by the RDC may result in the insolvency of the Applicants and in Atlantic Law going out of business. The decision as to payment of these and other debts is it seems dependent on whether Mr Greystoke's wife chooses to lend more money.

110. The fact that the purpose of imposing a financial penalty is not to bring about insolvency does not mean that the Tribunal cannot and should not fix a penalty which may have that unfortunate result. Victims of boiler room schemes have to take the financial consequences of the losses perpetrated upon them. Those who help cause those losses do not deserve special protection. The need for the seriousness of breaches of the rules to be publicly recognised may outweigh the potential consequences for individuals. In our view it does so in this case. It would send out the wrong message for the Tribunal not to impose a substantial financial penalty. The starting point in Fox Hayes was £750,000. There are respects in which this case is less bad than Fox Hayes (for example no commissions or deposits were received by the Applicants) and respects in which it is worse (for example in the experience and sophistication in financial services of Atlantic Law and Mr Greystoke compared with those at Fox Hayes). But it is our duty to impose a

suitable penalty not extrapolate in detail from the facts of other cases. Having regard to the gravity and consequences of the breaches in this case but also giving some recognition to the Applicants' financial position, the right course is neither to increase nor decrease the penalty imposed by the RDC. It follows that there will be a financial penalty of £200,000 imposed on each Applicant, the total being £400,000. It follows that these two applications are dismissed and that the orders and financial penalties imposed by the FSA will take effect.

His Honour Judge Mackie CBE QC

Chairman