May 23, 2012

Skadden

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates

UK Financial Services Authority Bans Executive Over Alleged Staff Poaching

On May 16, 2012, the UK Financial Services Authority ("**FSA**") decided to ban Anthony Verrier from performing any function in relation to a UK regulated activity. It found that he was not a fit and proper person to perform such functions. In effect, the FSA intends to ban Verrier from pursuing any meaningful role in the UK financial services industry.

The FSA based its decision on an English High Court ruling (subsequently upheld by the Court of Appeal) that BGC Brokers LP ("**BGC**") had unlawfully poached brokers employed by Tullett Prebon Plc ("**Tullett**").

Verrier has indicated publicly through his advisers that he will exercise his right to refer the matter to the UK's Upper Tribunal (the "**Tribunal**"), a judicial body that will hear the case afresh. It is possible that the Tribunal will take a different view from the FSA and decide not to uphold Verrier's ban.

We give more detail below on the reasons for the FSA's decision. The case is of interest because it is the first time that the FSA has attempted to ban an individual based on a commercial court judge's findings in a civil case concerning the poaching of staff from a rival firm.

Disputes between financial services firms over alleged staff poaching are relatively common. If the FSA is able to persuade the Tribunal that its approach is justified, there could be three main consequences:

- it will show market participants that the FSA expects more professional standards of conduct and will look to take draconian action if market participants fall below those standards;
- it will demonstrate that the FSA will expand its supervisory and enforcement reach as far as it can, which also acts as a deterrent; and
- it could deter those considering the poaching of individuals and whole teams. This may provide some reassurance to an investment management firm concerned about losing portfolio managers who would rather leave with their team than remain at their current firm with low prospects of regaining high-water mark levels, and where the restrictive covenants may not be as powerful as the investment manager would like.

The case's facts are unusual, and there is no certainty that the Tribunal will uphold the FSA's decision. However, even if the Tribunal does decide to overturn the FSA's decision, the FSA will have won some respect and fear through another warning shot to the market. The FSA does not necessarily have to win all its cases in order to drive up standards. Most firms and individuals will wish to avoid an enforcement investigation and proceedings altogether, rather than being vindicated a number of years later following the costs and stress of taking a case to the Tribunal.

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Allan Murray-Jones
London
+44.20.7519.7199
allan.murray-jones@skadden.com

Patrick Brandt
London
+44.20.7519.7155
patrick.brandt@skadden.com

James Anderson
London
+44.20.7519.7060
james.anderson@skadden.com

Stephen G. Sims
London
+44.20.7519.7127
stephen.sims@skadden.com

* * *

40 Bank Street, Canary Wharf, London, England
Telephone: + 44.20.7519.7000

Four Times Square, New York, NY 10036
Telephone: +1.212.735.3000

WWW.SKADDEN.COM

The Civil Proceedings

Tullett and BGC are competitors in the business of inter-dealer broking. Verrier was Tullett's second-most senior executive and left to join BGC in 2009. As soon as he joined BGC, he put into action a plan to recruit Tullett brokers. Verrier persuaded 13 brokers to sign "forward contracts" with BGC, although three later changed their minds and remained with Tullett.

Tullett commenced proceedings against BGC, Verrier and the 10 brokers who had resigned as a result of the poaching. The brokers claimed that they were constructively dismissed by Tullett.

The High Court rejected the constructive dismissal claims and held that Verrier *"had participated in an unlawful means conspiracy, the unlawful means including the inducement of the broker defendants to breach their contracts of employment with Tullett by leaving early without lawful justification."* BGC's appeal was dismissed by the Court of Appeal.

Judicial Criticism of Verrier

The FSA's Decision Notice quoted from the High Court judgment. The High Court found that Verrier had departed from the truth *"with equanimity and adroitness where the truth was inconvenient."* The Judge also summarised Verrier's *"illegal and dishonest conduct"* as follows:

- his use of a desk head to bring over his desk in breach of duties owed to Tullet;
- the attempt by Verrier through a desk head to get the brokers to write complaint letters, which contained matters that the brokers thought were untrue;
- the intention of Verrier to have all the brokers leave Tullett regardless of whether they had honest claims for constructive dismissal; and
- the use by Verrier of a legal adviser to act as the adviser to the brokers, when that adviser's loyalties were divided between Verrier and the brokers.

The Court of Appeal also made some unfavourable comments:

- *"The conspiracy and the ruthless implementation of [the poaching] were the subject of a vast quantity of evidence."*
- *"No doubt more [of the evidence] would have been preserved if Mr Verrier had not orchestrated the 'disappearance' of a number of mobile phones and Blackberries."*
- *"However cunning and cautious Mr Verrier had been in his choice of words at… [a meeting with a Tullett broker]…it is clear from the Judge's findings that then and afterwards he succeeded in communicating the reality that he and BGC were set upon bringing about a mass early departure, whether or not lawful grounds existed."*
- *"Mr Verrier's intentions (in this case to overstep legal boundaries to the extent necessary to achieve his conspiratorial aim) were relevant to the issue of his repudiatory breaches …"*

The FSA's Findings

The FSA rejected the following representations made by Verrier:

- he had no intention of being a senior manager or approved person in a UK regulated firm and, therefore, the prohibition order would serve no purpose as he posed no risk to market confidence. The FSA countered that its power to make a prohibition order was not dependent on whether the claimant intends to carry on regulated activities, citing the Court of Appeal's ruling in *Regina (Davies and others) v Financial Services Authority* [2003] EWCA Civ 1128;
- the FSA exceeded its reach because the conduct in question related to a civil tort (and not a criminal matter), did not give rise to consumer detriment and did not relate to FSA regulated activities. The FSA disagreed and said that an assessment of fitness and propriety does not depend on whether a criminal offence has been committed;
- a fitness and propriety assessment should be based on the actual findings made and, therefore, the FSA should have exercised more caution before relying on the court's findings. The FSA noted the lengthy trial, the fact that Verrier had given evidence over a period of five days and the Court of Appeal's comment that the High Court Judge had *"produced a meticulous judgment;"*
- the FSA had improperly delegated its statutory responsibility to assess fitness and propriety to a High Court Judge and did not conduct its own investigation. The FSA was satisfied that it did not need to conduct further investigations given the court proceedings referred to above and Verrier's representations to the FSA; and
- he had done nothing to justify a prohibition order being made against him. The FSA believed, to the contrary, that the respective courts' findings showed that he did not demonstrate the requisite honesty, integrity and reputation.