Lexis®PSL **Pensions**

Upper Tribunal dismisses appeal by IFA who wrongly advised clients to transfer their pensions into SIPPs (Alistair Rae Burns v FCA)

12/09/2018

Pensions analysis: The Upper Tribunal dismissed a claimant's referral against a fine and bar from practice issued by the Financial Conduct Authority (FCA) for non-compliance with its requirements. The court, however, reduced the fine from £233,600 to £60,000 as part of the FCA's claim was time-barred. David E Grant, barrister at Outer Temple Chambers in London comments on what lessons can be learned from this case and considers the implications for pensions and financial services practitioners.

Original news

Alistair Rae Burns v Financial Conduct Authority [2018] UKUT 0246 (TCC), LNB News 01/08/2018 95

Mr Burns ran an independent financial adviser firm which advised its clients on transferring occupational or personal pension benefits into a self-invested pension scheme (SIPP). The FCA issued him with a decision notice dated 22 July 2016 that in its view he had failed to take reasonable steps to manage the firm's business to ensure that it complied with the FCA's requirements. The FCA imposed a financial penalty of £233,600. The FCA also made an order prohibiting Mr Burns from performing any senior management function.

Mr Burns referred the decision of the FCA to the Upper Tribunal in relation to the liability finding, the quantum of the penalty and the prohibition order. Following a seven-day hearing, the Upper Tribunal in its unanimous reserved judgment dismissed the reference but substantially lowered the financial penalty payable to £60,000 instead (partly because of an acceptance on behalf of the FCA that certain aspects of the FCA's case were time-barred).

What are the practical implications of this case?

The Upper Tribunal Decision is significant for those in the financial services and pensions industries and advisers in these ways:

- when scrutiny of those in the SIPP advice industry is increasing, the decision confirms that care must be exercise by those whose business model involves an authorised firm advising on regulated products and additionally an unauthorised firm advising on unregulated alternative investments
- it lays down markers that, to encourage the others, the FCA will seek to prohibit individuals from performing certain functions and impose penalties even if the individual was not the main decision maker
- it confirms that company directors cannot delegate certain aspects of the business such as compliance and then turn a blind eye
- the FCA may act on certain criticisms of the lack of clarity of the FCA handbook
- in order to be defeated by limitation, the FCA may be more vigilant in taking steps

What was the background?

Mr Burns was a director and had substantial financial interest in a number of businesses operating under the 'TailorMade' banner. This included:

- TailorMade Independent Ltd (TMI) which was an authorised advisor which provided pension transfer advice
- TailorMade Alternative Investments Ltd (TMAI) which was an unauthorised advisor introduced to TMI customers who had decided to purchase one or more alternative investments through TMAI

The underlying investment was in foreign property. Between January 2010 and January 2013, TMI provided advice to 1,661 retail customers. So far, the Financial Services Compensation Scheme (FSCS) has paid compensation totalling over £55.6m.

The FCA decided to impose a financial penalty of £233,600 and prohibit Mr Burns from performing a senior management function and any significant influence function in relation to any regulated authority. The Upper Tribunal dismissed a reference which Mr Burns made to it save that it reduced the fine to £60,000. This was done partly on recognition by the FCA that the part of the claim for a penalty was time-barred, in which case the FCA sought a reduced fine of £116,800.

What did the Upper Tribunal decide?

The Upper Tribunal made these findings:

- TMI's advice model was flawed and its personal recommendation process did not comply with the relevant requirements of the FCA
- TMI failed to identify and manage its conflict of interest
- in relation to both these findings, Mr Rae Burns was personally liable in that he failed to take reasonable steps to ensure that TMI's business complied with the FCA's relevant requirements
- as to limitation, the Upper Tribunal did have jurisdiction to direct that a financial penalty be imposed in a case regarding conflict of interest
- a reduction of 50% should be applied to the FCA's original penalty because the failings in relation to the conflicts of interest were not as serious as the failings in relation to the advice model
- there was no basis to interfere with the FCA's decision to prohibit Mr Burns from performing any senior management or significant influence function

Perhaps the most significant legal finding is that, where a firm advises on the merits of establishing a particular SIPP in circumstances where it knows that the customer's intention is that the SIPP will invest in particular assets which are not themselves specified investments for the purposes of the Regulated Activities Order, then advice on the merits of the underlying investments to be held within the SIPP is a component of the advice on the merits of establishing the SIPP and is therefore a regulated activity.

This confirms a move from the approach espoused in some quarters that advice on the wrapper is separate from, and does not involve, any advice as to the underlying investment.

David E. Grant is a barrister at Outer Temple Chambers, London. He practises primarily in pensions, financial services, professional negligence and private client law. Grant has extensive advocacy experience and regularly appears in the Court of Appeal, High Court and specialist Tribunals.

Interviewed by David Bowden of David Bowden Law.