FCA Case Failures Highlight Value Of Robust Investigation

By **Tom Bushnell and Olivia Dwan** (August 18, 2023)

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The U.K. Serious Fraud Office's repeated failure to convict individuals after entering deferred prosecution agreements with companies it is investigating is a well-acknowledged phenomenon and an ongoing problem for the agency.

But the SFO is not the only law enforcement body grappling with how to weigh the benefits of accepting a corporate's account of disputed events against its obligation to respect the rights of accused individuals.

The U.K. Financial Conduct Authority recently suffered a significant loss in the Upper Tribunal, the tribunal responsible for appeals against FCA decisions, which allowed three references by former employees of the Julius Baer Group Ltd., who had all been given prohibition orders by the FCA.[1]

The judgment in Thomas Seiler, Louise Whitestone and Gustavo Raitzin v. The Financial Conduct Authority, published on June 12, raises a number of interesting issues, sure to be explored again in future cases.

Of particular note, however, was the tribunal's criticism of the FCA for accepting a narrative advanced by the firm when settling enforcement action, which proved to be wrong when the case came to be considered.

There are clear parallels between the FCA's travails in the Julius Baer case and those of the SFO in its various deferred prosecution agreement-related prosecutions. The tribunal's ruling merits close reading by anyone interested in securing the rights of accused individuals in financial crime-related investigations.

FCA Claims

The enforcement action against Julius Baer's U.K. entity Julius Baer International, or JBI, earlier this year and its then-employees Thomas Seiler, Louise Whitestone and Gustavo Raitzin related to the group's dealings with an individual within the OJSC Yukos Oil Company group of companies.

It was alleged by the FCA that the individual introduced Yukos to Julius Baer companies, in return for commission or finders' fees paid through three "vastly inflated foreign exchange transaction charges levied to Yukos by Julius Baer."[2]

The FCA claimed JBI must have appreciated the risk that these arrangements might amount to facilitating or participating in financial crime. It accused the named JBI employees of lacking integrity by recklessly disregarding the risk that Yukos' funds were being misappropriated via these arrangements.

As is often the way, the FCA's investigation came after JBI was alerted to the potential misconduct and had commissioned its own external investigations into the matter.

JBI engaged Touche Tohmatsu Ltd. and Eversheds Sutherland and provided the results of these investigations to the FCA. The upper tribunal ruling is clear that the FCA heavily relied upon them in its own probe.

The FCA case against JBI culminated in the company admitting breaches of the FCA's principles for business.

The factual basis for these breaches was agreed between JBI and the FCA, and largely followed the findings of the external investigations. It included criticisms of the three individuals, and attribution of their conduct to the firm. Those findings were recorded in a final notice dated February 2022.[3]

Contesting the Proceedings

While JBI agreed to the FCA's ruling, its employees Thomas Seiler, Louise Whitestone and Gustavo Raitzin did not.

Between 2019 and 2021 the trio contested the proceedings before the FCA's regulatory decisions committee. They were unsuccessful, and were each given prohibition orders, which they referred to the upper tribunal.[4]

The tribunal took a different view to the FCA. It found that none of the individuals had acted recklessly, and therefore none should have been prohibited. Its findings of fact also differed markedly to those agreed between the FCA and Julius Baer.

Most dramatic of all was the FCA's case on the so-called third FX transaction. Prior to the issue of the original warning notices, the firm had already admitted to a version of events in relation to this transaction, which was used by the FCA in the warning notices against the firm and the individuals.

The individuals, however, disagreed with that account and pushed for disclosure. The disclosed documents revealed that the authority's case in relation to the third FX transaction was completely wrong. In response, the FCA substituted a different transaction as forming the basis of the third FX transaction.

To make matters worse, it appears that the FCA had been sent a list of those crucial documents by the firm five years earlier, but not obtained them. With typical judicial understatement, the upper tribunal called this an embarrassing situation for the FCA.

While the FCA was able to correct itself on the third FX transaction during its own internal enforcement proceedings, the tribunal was less forgiving: It declined to give the FCA permission to rely on this aspect of its case on the appeal.

Meaning for FCA's Final Notice Against the Firm

The net result of the individuals' success before the upper tribunal is that the JBI final notice, published in February, differs markedly from the upper tribunal's findings published four months later.

However, because the action against the firm was not referred to the upper tribunal, there was little that the tribunal could do. It pointed out that having the firm's final notice published in full on the FCA's website would clearly be unfair to the individuals and

suggested the FCA consider publishing a new summary of its findings against the firm instead.[5]

It appears that the FCA disagreed. JBI's final notice remains in full on the FCA's website, alongside a — triumphant — press release.[6]

However, the FCA has added a note saying that the findings in the notice are not the subject of any judicial finding; that the upper tribunal had found that none of the named individuals had acted with a lack of integrity and indeed had rejected all the FCA's findings to that effect; and that the FCA had decided to take no further action against them.

The FCA's public acknowledgment of its failure is undeniably embarrassing, and its decision to take no further action a public vindication of the individuals' refusal to accept JBI's account.

The FCA's Position

At the heart of a number of the FCA's difficulties appears to have been its acceptance of JBI's version of events, and its preference for that over the denials of the individuals. This is an easy trap to fall into. When a corporate is under investigation and wishes to resolve matters and move on, the temptation will often be to blame ex-employees.

Nonetheless, the trap is avoidable. In this case, the tribunal pointed out that given the conflict between the interests of the firm and individuals, "the allegations regarding the activities of the Applicants … could easily have been divorced from the allegations against the firm and investigated thoroughly and independently by the Authority."[7]

Echoes of the SFO

This is not the first time a law enforcement agency has been criticized for placing too much weight on the admissions of a corporate and failing to prove the same case against senior individuals.

Many argue that the SFO has fallen into this trap repeatedly following deferred prosecution agreements. Since 2014, deferred prosecution agreements have been a mechanism by which a company can avoid prosecution if it accepts guilt, complies with certain conditions and cooperates with the investigation.

For a corporate to be guilty, it is often necessary to establish wrongdoing on the part of its directing mind and will, i.e. senior individuals. Sometimes, therefore, individuals get prosecuted following a deferred prosecution agreement.

The SFO does not enjoy a good record in those prosecutions. Since 2014 it has only secured one conviction of an individual following a deferred prosecution agreement. And it has suffered a series of high-profile losses: For example, the SFO's second-ever deferred prosecution agreement — with Sarclad Ltd. in 2016 — was followed three years later by the acquittal of three associated individuals.[8]

Tesco Stores Ltd. signed a deferred prosecution agreement in April 2017 relating to fraud and false accounting. The subsequent prosecution of the individual senior executives blamed for the wrongdoing was thrown out at half-time.

The U.K. Court of Appeal upheld the trial judge's decision in the 2019 case of R v. Bush and

Scouler[9] and noted more than once that the SFO had failed to call any independent expert accounting evidence. Was the reason for that failure the fact that the SFO was too blinded by Tesco's previous admissions?

In 2019, the SFO entered a deferred prosecution agreement with Güralp Systems Ltd. in relation to bribery allegations. The same year, three executives from within the company were acquitted by a jury. All three had been named in the deferred prosecution agreement's statement of facts agreed between the SFO and the company.[10]

Most recently, in March, the SFO was forced to abandon its prosecution of three G4S executives following a deferred prosecution agreement with G4S Care & Justice Services (U.K.) Ltd in relation to the same conduct. One of the defendants said that by agreeing to the deferred prosecution agreement, G4S had signed a false confession.[11]

The simple reality is that corporates facing enforcement action by the SFO or FCA have different priorities to individuals whose liberty, livelihoods or reputations are on the line. It is incumbent on law enforcement agencies to avoid being lured into a case theory that comes easily to a corporate, but that might not fairly reflect the underlying evidence.

Conclusion

How, then, can the FCA avoid making this a habit as the SFO appears to have done? One solution might be to sidestep the problem entirely.

If law enforcement agencies were to investigate only those corporate failings that do not require proof of wrongdoing by individuals, then some of the challenges identified above would be avoided.

It is notable that in the Seiler, Whitestone and Raitzin case, the tribunal was at pains to say that, notwithstanding its vindication of the individuals, the firm deserved the action taken against it by the FCA for other, wider corporate failings.[12]

If current plans in the Economic Crime and Corporate Transparency Bill for a new corporate failure to prevent fraud offense become law, the SFO will have a significant new offense that does not require proof of wrongdoing by senior individuals.[13]

However, while this corporates'-only approach may appear superficially attractive, it has a major flaw. It would enable individual wrongdoers within corporate environments — both inside and outside the financial services industry — to avoid the consequences of their actions.

Far better, in our opinion, to follow the advice of the upper tribunal in the Seiler, Whitestone and Raitzin case, which stated that

the Authority should consider the appropriateness of conducting contested proceedings against individuals on the basis of its acceptance of a version of events put forward by the employer… without the Authority conducting its own rigorous investigation into the individuals concerned.[14]

In short: Do not let admissions by the firm get in the way of a proper, robust and independent investigation. Only then can agencies like the FCA and SFO be confident that they are targeting the correct individuals in their enforcement action.

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Hickman & Rose successfully defended individuals prosecuted by the SFO following both the Tesco and G4S investigations. Tom Bushnell acted on both cases, while Olivia Dwan acted on the G4S matter.

[1] https://assets.publishing.service.gov.uk/media/648836cab32b9e0012a96653/Seiler__Whitestone_and_Raitzen_v_The_FCA_Decision_for_release_to_Parties.pdf.

[2] Thomas Seiler, Louise Whitestone and Gustavo Raitzin v The Financial Conduct Authority [2023] UKUT 00133 (TCC).

[3] https://www.fca.org.uk/publication/final-notices/julius-baer-international-limited-2022.pdf.

[4] https://www.fca.org.uk

[5] Thomas Seiler, Louise Whitestone and Gustavo Raitzin v The Financial Conduct Authority [2023] UKUT 00133 (TCC) para 931.

[6] https://www.fca.org.uk/news/press-releases/fca-fines-julius-baer-international-limited-ps18m-and-publishes-decision-notices-three-individuals.

[7] Thomas Seiler, Louise Whitestone and Gustavo Raitzin v. The Financial Conduct Authority[2023] UKUT 00133 (TCC) para 143.

[8] https://www.sfo.gov.uk/cases/sarclad-ltd/.

[9] R v. Bush and Scouler [2019] EWCA Crim 29.

[10] https://www.sfo.gov.uk/2019/12/20/three-individuals-acquitted-as-sfo-confirms-dpa-with-guralp-systems-ltd/.

[11] https://news.sky.com/story/fraud-case-against-three-ex-g4s-executives-collapses-after-no-evidence-offered-12830195.

[12] Thomas Seiler, Louise Whitestone and Gustavo Raitzin v The Financial Conduct Authority [2023] UKUT 00133 (TCC) para 142.

[13] https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-factsheets/factsheet-failure-to-prevent-fraud-offence.

[14] Thomas Seiler, Louise Whitestone and Gustavo Raitzin v The Financial Conduct Authority [2023] UKUT 00133 (TCC) para 926, emphasis added.