COLLAS CRILL

Burns v FCA [2017]

APRIL 2018

Late last year in a case brought by the Financial Conduct Authority (FCA), *Burns v FCA [2017]*, the English Court of Appeal handed down a decision on conflicts of interest which should be of significant interest to local industry. This will be particularly relevant for NEDs and senior fund administrators who hold a portfolio of board posts.

Collas Crill will be welcoming senior silk Nick Vineall QC, who argued the case on behalf of the FCA before the Court of Appeal, to present at our annual risk conference on the 24th April in Jersey and 25th April in Guernsey.

The Facts

Angela Burns was an experienced investment professional. Relevantly, she sat on the board of two mutual societies and was chair of each of the mutual societies' investment committees.

Prior to her appointment to these boards, Burns had worked on a discrete project with a large international fund manager. Following the conclusion of that project she had remained in contact with the fund manager over a number of years in an attempt to secure further work on the fund manager's UK & ROI based investment funds. This led to the submission of a formal consultancy proposal in September 2008.

In late 2008 and 2009, the following occurred:

1. On 9 December 2008, Burns was informed she had been selected for appointment to the board of one of the mutual societies, MGM.
2. On 16 December 2008, she contacted the fund manager to advise of her board appointment to MGM and made a further attempt to solicit work. This approach was followed up in early January 2009, with a suggestion that the fund manager may be interested in working with MGM.
3. In February 2009, Burns arranged a meeting between the fund manager and MGM to explore the possibility of the fund manager providing investment services to MGM. Throughout February 2009, these discussions continued whilst, at the same time, Burns continued to attempt to solicit work from the fund manager. Those approaches were firmly rejected in late February 2009.
4. In June 2009, MGM appointed the fund manager to provide investment services.
5. Throughout this period, MGM were aware of Burns' historical connection with the fund manager, but were not made aware of her ongoing attempts to solicit work.

In 2010, the following occurred:

1. In February 2010, Burns was informed of her appointment to the board of the other mutual society, Teachers.

2. From June 2010, Burns arranged for the fund manager to attempt to secure an appointment to Teachers. Those discussions progressed positively.
3. In November 2010, Burns issued what was effectively an invoice to the fund manager in respect of her work in introducing both MGM and Teachers (based on an ad valorem rate), albeit she did not have any formal engagement with them.

The Issue

The FCA made various allegations against Burns in support of issuing a fine and prohibition order against her on the basis that she lacked integrity and was not fit and proper.

By the time the matter reached the Court of Appeal, the key issue was the nature of the duties Burns owed the mutual societies in avoiding conflict of interest, and whether or not her conduct contravened these duties.

Burns argued that, because she had never received any benefit from the fund manager, she was not in any conflict of interest. It was argued on her behalf that disclosure of a conflict is only necessary when the relevant transaction is binding (or at least a 'racing certainty' as it is put in one authority).

The Court of Appeal found she was conflicted and endorsed the following principles:

1. Soliciting a benefit, while making reference to a fiduciary position and using it as part of the persuasion, is not necessarily improper. What would make it improper would be that the solicitation creates a situation where the director has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.
2. If solicitation would create a situation where the director has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company, the only way to save such solicitation from being improper is to make prior disclosure to the company and obtain the company's prior consent.
3. As soon as a situation arises where the director has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company, disclosure should be made. There is no need for the conflicting opportunity to be final and binding, or indeed a 'racing certainty'.

In the circumstances, the Court found that Burns was "*actively soliciting a remunerative relationship with the Fund Manager, for her own personal benefit, at the very same time as she owed an undivided duty of loyalty*" to the mutual societies to dispassionately consider any future business between the fund manager and the mutual societies.

Burns was subsequently fined and banned.

The Impact

The law in relation to conflicts of interest, as applied by the Court of Appeal, is fairly unremarkable.

That said, there will no doubt be some nervous shuffling in seats amongst our readership. In a small jurisdiction, where the highly integrated nature of our finance industry is one of the selling points, conflicts are a fact of life.

Senior and in-demand industry figures regularly and quite properly leverage their connections for the benefit of themselves and the companies they work for or are appointed to. The decision in Burns does highlight some important points:

1. Not every situation where you rely on your connections and appointments to get you in the door will give rise to a conflict.
2. Conflicts are not inherently bad, but undisclosed and unmanaged conflicts are.
3. Conflicts, and the need to disclose, can arise earlier than what you might think. It is the possibility that you may have divided loyalties in a particular transaction, rather than the actual taking advantage of it, that gives rise to the conflict.

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