

Legal issues arising in enforcement in the UK markets in an era of judgment led financial supervision.

**The 2018 Financial supervision
workshop – legal and market
perspectives on
enforcement actions**

DISTINCTION BETWEEN ENFORCEMENT AND SUPERVISION

- “ Effective supervision increases ..likelihood that...excessive risk-taking within financial institutions...or threats to potential financial stability will be brought to light...[and can] reduce likelihood that market [actors] will violate substantive rules ...[e]ffective enforcement...ensures that sanctions imposed on those found to have violated substantive rules serve to advance regulatory objectives ...” OUP “ PRINCIPLES OF FINANCIAL REGULATION” (2016) – Armour et al

Origins of Judgement-Based Supervision

- Contrasted with formulaic, mechanistic and “box-ticking” approaches to supervision
- UK Financial Services Authority’s approach to supervision developed and in use until 2008 was often described as “Risk-based” and “principles-based”. Some called it “light touch”

Components of the Bank of England's (acting through the PRA) approach to banking supervision

- Judgements will be central - but about what?
- Prospective/Forward looking – current risks and plausible risks
- Focussed – on issues and firms that pose greatest risk to stability of the financial system

Obstacles to Judgement-led Supervision

- **People :**
 - wisdom, prescience beyond their years..?
 - technical skills and “market savviness” or “market instincts” ?
- **Vision and Imagination :**
 - Emergent risks
 - Plausible risks
- **Data challenges:**
- **Contestability of Judgments:**

The UK Courts and the new supervisory regime

(1) Case law on structural reform – ring-fencing of UK retail banking *In re Barclays Bank plc and another; In re HSBC Bank plc; In re Lloyds Bank plc and another; In re Santander UK plc and another* [2017] EWHC 1482 (Ch) and *Barclays Bank plc* [2018] EWHC 472 (Ch)

(2) Lloyds ECNs *BNY Mellon Corporate Trustee Services Ltd v LBG Capital No 1 plc and another* [2016] UKSC 29

FCA and PRA – the UK regulators’ operation of this new approach post crisis

- Tougher and far more visible approach to be expected from both regulators but especially so from the FCA
- CEO of FCA : “Credible deterrence is here to stay” and committed to greater use of formal enforcement powers and these can be used at an earlier stage in a supervisory intervention context – eg forcing changes to a business’ remuneration arrangements
- ***DISTINCT Post Crisis Shift***
- FCA now sends a tough message in its discussion of its approach to Enforcement
- <http://www.fca.org.uk/firms/being-regulated/enforcement>
- Credible Deterrence is now its central concern

Enforcement regime in the UK Courts

- **Tariq Carrimjee v FSA [2016] UKUT 447**

“there is a difference between the notions of punishment and deterrence. If the fact of a prohibition order is publicised....then the fact that it becomes known by other financial services professionals that behaviour of the kind identified in the relevant notice may result in a prohibition order then inevitably the fact of that prohibition is likely in practice to act as a deterrent to others and will therefore serve the legitimate purpose of sending a message to both financial services professionals and the public at large as to the possible consequences of such behaviour. This will serve to strengthen public confidence in the regulatory system and in our view statements in the relevant notice that draw attention to the deterrent effect of the order and the message that it sends are perfectly legitimate.”

Enforcement regime in the UK Courts

- **Macris v Financial Conduct Authority[2017]
UKSC 19**
- When a specific management function is referred to as being in part responsible for his employer's breaches and transgressions is the individual undertaking that function entitled to due process and chance to contest the regulator's findings?
- *“This may look like a small point but.....it has significant implications for the conduct of the authority's investigatory and disciplinary functions...”*