

Special Report:

Financial Services Law & Regulation

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Financial Services Law and Regulation

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Austria	LexisNexis Verlag ARD Orac GmbH & Co KG, Vienna
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Published by LexisNexis Butterworths

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A CIP Catalogue record for this book is available from the British Library.

ISBN 13: 978 14057 4917 6

Typeset by Letterpart Ltd, Reigate, Surrey

Printed and bound in Great Britain by Hobbs the Printers Ltd, Totton, Hampshire

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Financial Services Law and Regulation

Foreword

If ‘money makes the world go around’, as Liza Minnelli and Joel Grey so famously sang in the iconic film *Cabaret!*, then on 16 September 2008 the world very nearly stood still on its axis. The world ran out of money – or at least the sophisticated first world markets did. This happened notwithstanding those markets being replete with rules and regulations, with bodies galore to monitor and police the financial industry and with the serried ranks of lawyers and investigators to bring transgressors to courts and tribunals where judges ensure they are held to account.

Whilst the genesis of the crisis that engulfed the world and which has changed the financial and fiscal landscape for generations to come is out-with the reach of this book, there can be no doubt that it has provided the occasion and impetus for a deep review of the very essence of our approach to regulation in its broadest sense. Financial services and banking regulation, the policing of market abuse and mis-selling, how financial crime is managed within our criminal legal system and the often concurrent, but rarely coterminous, regime for the litigation and resolution of disputes between financial institutions – all must be scrutinised.

Lord Turner, Chairman of the FSA, speaking at the City Banquet at Mansion House, London on 22 September 2009 said this:

“We need radical change. Regulators must design radically changed regulations and supervisory approaches, but we also need to challenge our entire past philosophy of regulation.”

He is quite right: we do. That is not in question. What is, is whether there is the political and professional will to rethink our whole approach as Lord Turner envisages.

How can we continue to operate under the regime of scattergun regulation that this book so ably illuminates? Currently, one transaction can easily trigger four separate streams of investigation and litigation: criminal, civil, FSA enforcement and finally professional discipline. The penalties are equally widely spaced and come serially: punishment of an individual and her firm, suspension from practice, removal from a professional role, compensation, seizure of assets and so on and so on. All this may take years and become thoroughly unfair – unfair ultimately on us, the society that must pick up the pieces one way or another.

Our regulatory ‘crazy quilt’ is born of a disjointed and discordant system that has grown more piecemeal over the years. This book brings together in an intelligible and succinct way its diverse strands. Each strand is analyzed for its history and context, its substantive operation is explained, and its likely future development. Thus, this work should prove an invaluable point of reference for anyone caught up in litigation that is derived from the recent near meltdown of our city institutions – and beyond.

However, anyone reading this excellent synthesis of the different routes to legal remedy that await the transgressor, may pause to ask whether the time is not long overdue to allow the politicians and the policymakers to design a single regime that is purpose-built to deliver a single quick and economic investigation that posts a case to a specialist tribunal empowered to deal directly, or through delegation, with each aspect that the investigation triggers.

This would require the establishment of a single investigator and a single Financial Court, each with its own suite of powers. None would be new, but for the first time they would be vested in unified and singular regimes.

Such a Court could, for example, decide the guilt or innocence of someone accused and, if that person is guilty, fix the punishment. As part of that process the Court could determine whether that person – and his firm – are fit and proper persons to continue trading. The same Court could, either then or at a later hearing, resolve compensation issues as part of the adjudication. All this would happen before a Judge of the Financial Court, sitting with profession assessors, making maximum use of a developed form of the embryonic pleading and disclosure system in criminal proceedings so as to bring it closer to the approach in civil litigation.

I first made this suggestion in the mid-1990s. Perhaps its time has now come. Certainly the time has come to do *something* that would deserve Lord Turner's label 'radical'.

As life mimic's art, something must be done to banish to history the uncomfortably loud echo of Gordon Gekko's speech twenty years earlier in Oliver Stone's film *Wall Street*:

“... greed is good. Greed is right. Greed works. Greed clarifies, cuts through, and captures the essence of the evolutionary spirit ...and greed – you mark my words – will save ...the USA. Thank you very much.”

As it happened, greed nearly finished off the USA and the rest of us. Because of greed, in all probability, there will be another crisis and the challenge must be to create a regime of regulation that gives us the best possible chance of weathering the next storm better than we have the last.

I hope that this book may provide a very good starting point in that search.

Richard Lissack, QC
Outer Temple Chambers
London
November 2009

List of Contributors

Richard Lissack, QC, barrister, Outer Temple Chambers

Richard Lissack is Head of Strategic Development at Outer Temple Chambers and has been repeatedly recognised as a leading practitioner. He is listed in the *The Lawyer* Hot 100, has been a finalist for Barrister of the Year three times and is heavily listed in the 2010 legal directories. He was called to the bar in 1978 and became a Queen's Counsel at the age of 37 in 1994. He is also a QC at the Bar of the Eastern Caribbean, the Bar of Northern Ireland, an FLC at the Bar of New York and most recently became admitted with full rights of audience at the Dubai International Financial Centre Court. For the last 18 years he has sat as a Judge and more recently as an arbitrator. His practice is national and international and he has recently worked in New York and Abu Dhabi (both locations being instrumental in opening an annexe to his London Chambers), the British Virgin Islands, Italy, Switzerland, Luxembourg and Hong Kong. Much of his work focuses on banking and financial services law from the perspective of compliance, regulation and enforcement across jurisdictions. Richard's reputation and proven track record in cases of national and international significance and complexity precedes him.

Richard wrote the foreword to this Report.

Deborah A. Sabalot, solicitor and professional associate, Outer Temple Chambers

Deborah Sabalot is a qualified English solicitor and US lawyer with over 20 years experience in advising a wide range of financial sector clients on UK and international banking and financial services regulatory and compliance issues. She is the principal in her own law firm and is the consultant editor of the *Butterworth's Financial Services Law Handbook*. She has published many articles and contributed to a number of books including a chapter on international agreements and supranational bodies in financial services law in the second edition of *Blair, Walker and Purves: Financial Services Law*, published by Oxford University Press. She is a member of the Advisory Board of the Financial Services Lawyers Association and has also served as a member of the FSA's Working Party on Client Money and Assets and contributed to the working groups of the Financial Markets Law Committee and its predecessor, the Financial Law Panel.

Farhaz Khan, barrister, Outer Temple Chambers

Farhaz Khan specialises in financial services and pensions law. He has experience of advising on regulatory matters and the mis-selling of financial products. In 2008–2009 he was seconded to the General Counsel's Division of the FSA and worked on matters arising from the banking crisis. He is a member of the International Bar Association's Banking Law Committee and a founding member of the Financial Services Lawyers Association. He is an Editor of *Butterworth's Financial Regulation Service* and *Butterworth's Encyclopedia of Banking Law Update*.

Farhaz and Deborah wrote chapter one.

Michael Bowes, QC, barrister, Outer Temple Chambers

Michael Bowes' practice covers the areas of commercial crime and financial regulatory work (prosecution and defence), including acting for the FSA and the SFO. He has considerable experience in leading case teams, both in the criminal and regulatory fields. He was instructed by the FSA in its first prosecution for insider dealing (*R v McQuoid and Melbourne* [2009]) and both defendants were convicted. He is instructed by the FSA in a further insider dealing prosecution, *R v McFall, Rimmington & King*, which will be tried at Southwark Crown Court in April 2010. He is listed as a 'leader at the Bar' for Banking and Finance, Fraud (Crime) and Crime in Legal 500, Financial Services and Fraud (Crime) in Chambers UK and Fraud (Crime) in Legal Experts .

Oliver Assersohn, barrister, Outer Temple Chambers

Oliver Assersohn specialises in financial services regulation and litigation. He is currently acting as junior for one of the defendants in an ongoing criminal prosecution for insider trading having also acted as junior for the FSA in the first ever FSA-initiated prosecution for that offence (*R v McQuoid and Melbourne* [2009]). He is the only barrister to have been seconded to the Regulatory Decisions Committee of the FSA and has continued to be instructed by them in several ongoing matters. He is a member of the Financial Services Lawyers Association and sits on its Executive Committee.

Michael and Oliver wrote chapter two.

Nicholas Medcroft, barrister, Outer Temple Chambers

Nicholas Medcroft practices in regulatory law, with an emphasis on banking and financial services. He is recommended in the Legal 500 as a leading junior in banking and finance and in fraud. Since 2002 he has been on the Attorney General's Panel of Prosecuting Advocates acting for the government in major frauds, tax evasion and serious regulatory matters. He has particular experience of the obligations on financial institutions under Part VII POCA 2002 and the Money Laundering Regulations and was junior counsel for the bank in *Shah v HSBC Private Bank (UK) Ltd* [2009] at first instance and in the Court of Appeal.

Saul Margo, Outer Temple Chambers

Saul Margo graduated from Pembroke College, Cambridge with a First in Philosophy. He was called to the Bar in 2005 and became a member of Outer Temple Chambers in 2006. In addition to regulatory work he specialises in the fields of general commercial and pensions law. He undertook a secondment to the SFO in 2007 and was seconded to the Office of the Pensions Ombudsman for five months in 2008.

Nicholas and Saul wrote chapter three.

Michael Patchett-Joyce, barrister, Outer Temple Chambers

Michael Patchett-Joyce is a civil and commercial litigator with many years' experience in the higher courts and specialist tribunals. He has pre-eminent

experience in acting in complex, multi-million pound VAT repayment claims. He has appeared in appeals to the Court of Appeal, cases in the Queen's Bench and Chancery Divisions of the High Court (including specialist courts such as the Administrative Court and the Commercial Court), and cases before, and to be heard by, the First- and Upper- Tier Tribunals (Tax Chamber). He has also appeared in References on points of EC law to the European Court of Justice (ECJ).

Robert-Jan Temmink, barrister, Outer Temple Chambers

Robert practices in the fields of commercial and chancery litigation and international arbitration. The leading legal directories recommend him as a leading junior in commercial dispute resolution, and describe him as 'a multi-talented litigator, with a flair for international arbitrations', praising his 'facility with complex material: he gets to the point quickly, presenting information clearly and powerfully'. He was called to the bar of England & Wales in 1996 and has since been called to the bars of Northern Ireland, the State of New York (as a foreign legal consultant) and is registered to practice at the Dubai International Financial Centre Court. He was elected to a fellowship of the Chartered Institute of Arbitrators in 2007. He has been involved in a number of asset recovery claims, often acting for the Receiver, and has acted in many complex banking disputes, both in litigation and in arbitration, usually on behalf of the banks in a variety of jurisdictions around the world.

Michael and Robert wrote chapter four

Richard Hitchcock, barrister, Outer Temple Chambers

Richard Hitchcock specialises in commercial law, in particular, pensions and investment trusts and financial regulation. He has many years experience advising in these areas, appearing as an advocate in the higher courts and specialist tribunals and dealing with cases of high complexity and value. He has long appeared in the Law Directories as a leader in his field, described by peers and competitors variously as 'frighteningly bright', having 'a great legal brain', 'superb advocacy skills' and being 'actually very funny'. He enjoys both the conceptual and practical sides of legal practice and, whilst well practised at working on his own, values the collaborative benefit of teamwork. He sees increasing (and increasingly sophisticated) financial regulation as essential to the successful future of the financial services industry.

Kate Edwards, barrister, Outer Temple Chambers

Kate Edwards practices in commercial, pensions and VAT law. She has experience of working on multi-million pound negligence claims, including professional negligence group actions. In the regulatory field she acted as junior counsel in *Chargot & Ors v HSE* in the House of Lords and is acting as junior counsel for the appellant in *Westone Wholesale Limited v HMRC* [2008], on appeal from the First-Tier Tribunal (Tax).

Richard and Kate wrote chapter five.

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