Reference No: FIN/2006/0015

PENALTY – Authorised Person – Partnership – Decision Notice imposing penalty issued after termination of Partnership – whether regulatory authority has power to impose penalty on dissolved partnership – whether partners are personally liable – who rank as partners in dissolved partnership – FSMA 2000 32(1), 40(1(c) and 206(1)

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
FINANCIAL SERVICES

FOX HAYES **Applicants**

- and -

FINANCIAL SERVICES AUTHORITY **Authority**

Tribunal: SIR STEPHEN OLIVER QC
MICHAEL HANSON
TERRY CARTER FCA

Sitting in public in London on 29-30 March 2010

Robin Knowles QC, acting *pro bono,* and Lucy Frazer for Mr C P Frazer
S N Hedley for Ms C Grundell and Mr SN Hedley
Ian McCombie, solicitor, for Mr R G Jones

Malcolm Jones in person

Richard Coleman, counsel, for the Authority

DECISION

1. This decision deals with the first question remitted to the Tribunal by the Court of Appeal as a consequence of its judgment in *FSA* v *Fox Hayes* [2009] EWCA Civ 76. The Court of Appeal, having found that Fox Hayes had breached the FSA's Conduct of Business Rules in respect of certain financial promotions approved by Fox Hayes, at a time when it was a partnership, declared the appropriate penalty to be £954,770. (The Authority had determined the penalty as £150,000.) The main question for us at this hearing was which of the partners were, as a matter of law, liable for the £954,770 penalty. During the period to which the penalty related there had been a sequence of partnerships, each composed of different partners.

The Background

2. The partnership of solicitors based in Leeds and known as Fox Hayes was, at all material times, authorised to conduct regulated activities under Part IV of Financial Services and Markets Act 2000 ("FSMA"). Over the period February 2003 to June 2004 ("the period of breach") the Fox Hayes partnership approved twenty sets of financial promotions of unauthorised overseas "entities". The circumstances of the promotions are not material to the present issues. They can be found in the 2008 decisions of the Financial Services Markets Tribunal (FIN 2006/0015) and of the Court of Appeal (*FSA* v *Fox Hayes, supra*).

3. At the start of the period of breach the Fox Hayes partnership comprised nine partners of which one was a salaried partner. The business was carried on under a partnership agreement. During the period of breach the then existing partnership was dissolved on the retirement of one partner and replaced, with effect from 1 August 2003, by another partnership that subsisted throughout the rest of that period.

4. By a notice dated 28 April 2004, the FSA notified Fox Hayes that it had appointed persons to carry out an investigation under section 168(5) of FSMA because it appeared that from January 2003 Fox Hayes might have failed to comply with the FSA's Rules and Principles in connection with the approval of financial promotions for unauthorised overseas persons.

5. By a letter of 27 September 2005, while investigation was continuing, Fox Hayes informed the FSA that it would be converting to a limited liability partnership as of 1 October 2005. Fox Hayes stated that an application to cancel its Part IV permission would be made in due course. This application was refused by the FSA.

6. On 30 September 2005, Fox Hayes transferred its business to Fox Hayes LLP ("the LLP") with effect from that day. Fox Hayes, the transferor partnership, agreed that as of that date it would discontinue carrying on the business of providing legal services under the name of Fox Hayes. (All further references in this decision to "Fox Hayes" are to are to Fox Hayes partnership as distinct from the LLP.)

7. The FSA explained in ensuing correspondence that it had to refuse the application to cancel its authorisation of Fox Hayes on account of the continuing investigation. (The FSA is empowered by section 44(3) to refuse to cancel an authorisation.) It can only impose financial penalties or other sanctions on authorised firms. Consequently its policy is to refuse to cancel an authorised firm's authorisation pursuant to an investigation and until any resulting disciplinary proceedings are complete.

8. By a Decision Notice dated 29 September 2006, the FSA imposed a penalty of £150,000 on Fox Hayes for various breaches of the Conduct of Business (COB) Rules. Specifically these were COB 3.8.4R(1) and COB 3.12.6R(2). The penalty was imposed pursuant to section 206 of FSMA. The Decision Notice noted that Fox Hayes had "since the events in issue in this Notice … transferred its business to Fox Hayes LLP and that the new firm does not undertake the approval of financial promotions". The Decision Notice was addressed to "Fox Hayes, 118 North Street, Leeds". None of the Fox Hayes partnerships, prior to incorporation as an LLP, had had that address as the registered address for FSA authorisation purposes.

9. Fox Hayes referred the matter to the Tribunal under section 208(4) of FSMA. The reference was incorrectly submitted in the name of the LLP. The FSA and Fox Hayes agreed that this had been a mistake and that Fox Hayes, and not the LLP, was the referring party. The Tribunal reduced the penalty from £150,000 to £146,000 and remitted the matter to the FSA with a direction that the penalty be so reduced.

10. The FSA appealed to the Court of Appeal. Disagreeing with the Tribunal in certain respects, the Court of Appeal found that Fox Hayes had breached the COB Rules in respect of each of the financial promotions that it had approved. It made declarations including, so far as material, that the appropriate penalty was £954,770, subject to the determination by the Tribunal of certain questions remitted back to it.

11. During the hearing in the Court of Appeal, the partners provided evidence to varying degrees as to their means. The FSA submitted that the evidence did not establish lack of means. The question of the ability of the partners to pay the penalty also raised prior questions of which partners would be responsible for paying the penalty. Mr CP Frazer and Mr Malcolm Jones disputed the FSA's contention that it was the partners of the firm at the time of contraventions for which the penalty would be imposed. The Court of Appeal therefore remitted the following questions to the Tribunal:

(a) Which partners will, as a matter of law, be liable to pay the financial penalty imposed;

(b) whether the penalty specified by the Court of Appeal should be diminished by reason of the financial circumstances of the relevant partners who would be liable to pay it; and

(c) what the penalty should be?

The Issues

12. Issue (a) breaks down into three issues as follows:

(i) Does the Decision Notice relate to Fox Hayes or to LLP? The FSA contends it is Fox Hayes. Mr RG Jones, Mr Malcolm Jones and (as an alternative) Mr CP Frazer contend that it is LLP. If the partners are right, that is the end of the question.

(ii) Assuming the partners are wrong, what are the relevant point(s) in time for the purposes of identifying the liable partners? The FSA contends the partners at the time of the contravention are the relevant partners. Mr Frazer and Mr M Jones contend that the relevant partners are the partners at the time of the Decision Notice (which, in view of the dissolution of Fox Hayes, Mr Jones says should be taken to be the partners at the date of the transfer of the business).

(iii) Once the relevant time(s) are identified, it is necessary to identify who the partners were at those times. There is no dispute that at least Mr Manning, Mr Philip Drazen, Mr I Coupland and Mr S Coupland were. The issues concerns the so-called fixed share equity partners (Mr Malcolm Jones, Mr RG Jones and Mr Frazer), and whether or not they were partners in law. It appears to be common ground among all interested parties (except Mr M Jones) that the salaried partners were not partners at the times when the contraventions occurred. (Mr SN Hedley for himself and Ms C Grundell, addressed us on behalf of those salaried partners.)

13. The FSA's position on these issues can be briefly summarised as follows. The Decision Notice relates to Fox Hayes, the partnership. It is the partners at the time of the contraventions who are liable to pay the penalty and they are personally liable. On this basis the liable partners are Mr Robert Manning, Mr Drazen, Mr I Coupland, Mr S Coupland, Mr Malcolm Jones, Mr RG Jones and Mr Frazer. Special considerations should, the FSA submitted, be applied to the position of Mr Brill who retired at an early stage of the period of breach.

14. We will need to determine whether the penalty falls to the discharged only out of the assets of the relevant partnership or whether the partners are separately liable to meet the penalty out of their personal assets without such limitation. The reason is that there is no money left in Fox Hayes and, as will appear from the next two paragraphs, its full equity partners are all in various states of insolvency.

Parties, evidence and submissions before the Tribunal

15. Mr I Coupland and Mr Philip Drazen (both profit-sharing equity partners) have entered into IVAs. Mr S Coupland, another such partner, has been declared bankrupt. Mr I Coupland has written to the Tribunal saying that any penalty awarded by the Tribunal against these three former partners would be subject to their respective insolvency processes; consequently they do not intend to participate further in the matter. Although they have not formally admitted that they would be liable in respect of the penalty assessed by the Tribunal, they have not suggested that they are not and

Mr I Coupland and Mr Drazen have acknowledged in their respective IVAs that they are likely to be liable to the FSA in the full amount.

16. Mr Manning, the senior partner throughout the period of breach, has entered into an IVA. He has put in no submissions and no evidence. Mr R G Jones was represented by Mr Ian McCombie, a solicitor. He produced written submissions and a written statement. His primary case is that none of the partners during the period covered by the breaches is liable to pay the penalty assessed by the Tribunal because the partnership had been dissolved by the time the FSA issued its Decision Notice on 29 September 2006. He says that it is the LLP and not the Fox Hayes partnership or any of the partners, that would be liable to meet the penalty assessed by the Tribunal.

17. Mr Malcolm Jones, representing himself, produced written submissions to similar effect and a witness statement. He also advances an alternative contention, if the Tribunal rejects his primary case, that the LLP and not the partners are liable to pay the penalty. He says that the partners as at the date of the Decision Notice are liable. He further says that since the partnership had in fact dissolved upon the transfer of the business a year prior to the Decision Notice, the partners immediately prior to the incorporation of the LLP should be deemed to be the partners at the time of the Decision Notice. He therefore contends that, in addition to the partners identified by the FSA, Mr S Hedley and Ms C Grundell are potentially liable but not Mr Frazer.

18. Mr Frazer, represented by Robin Knowles QC, acting *pro bono*, has provided a witness statement and an affidavit. He argues that the partners as at the date of the Decision Notice are liable, which would exclude him; alternatively, he contends, the LLP is liable.

19. Mr Hedley and Ms Grundell have produced witness statements denying liability as alleged by Mr Jones (and by Mr Frazer on the grounds that, as partners in the LLP, they were liable because they were partners at the date of the Decision Notice.)

20. The LLP is in administration. The administrators have put in brief submissions. In these they consider that the partners, not the LLP, are liable to pay the penalty. They say there is little or no prospect of a dividend for unsecured creditors. We should note that Mr Hedley and Ms Grundell were partners in the LLP from the time of its creation.

21. The FSA produced a witness statement from Josie Durham, one of the team appointed to conduct the investigation.

22. The first issue we deal with is whether the penalty imposed by the Decision Notice is imposed on the LLP, as contended for by Mr RG Jones and Mr M Jones and, as an alternative submission by Mr Frazer. If we decide that the penalty was imposed on Fox Hayes and not on the LLP, then the question arises as to which of the succession of partnerships is liable. Is it, as the FSA contend, the partnership or partnerships in existence during the period of breach? Is it, as some of the individuals

contend, the “partners” at the date of the Decision Notice being the partners immediately prior to the incorporation of the LLP? If we decide that that liability falls on the partners at the time when the “contraventions” took place, the questions then arise as to who were the partners at that time and whether the liability to discharge falls on those partners personally or whether liability is limited to the realisable value of partnership assets.

Statutory provisions relevant to the issues

23. Section 206 of FSMA enables the FSA to impose a civil penalty. Section 206 is in Part X1V of FSMA which is stated to cover “Disciplinary Measures”. Section 206 reads as follows:

> (1) “If the Authority considers that an authorised person has contravened the requirement imposed on him by or under this Act …., it may impose on him a penalty, in respect of the contravention, of such amount as it considers appropriate
>
> (2) The Authority may not in respect of any contravention require a person to pay a penalty under this section and withdraw his authorisation under section 33.
>
> (3) A penalty under this section is payable to the Authority.”

Section 207 requires the FSA to give the relevant authorised person a warning notice if it proposes to impose a penalty: (this had been given in June 2006). Section 208(1) provides that if the Authority decides to impose a penalty under section 206 it must “without delay give the authorised person concerned a Decision notice”.

24. The Authorised Person on whom the FSA has sought to impose the penalty is “Fox Hayes”. Section 31 provides that the person who has a Part IV permission to carry on one or more regulated activities is “authorised for the purposes of this Act” and that “authorised person” means “a person who is authorised for the purposes of the Act”.

25. Authorisation of “partnerships and unincorporated associations” is covered by section 32 which reads in its entirety as follows:

> “(1) If a firm is authorised –
>
> (a) it is authorised to carry on the regulated activities concerned in the name of the firm; and
>
> (b) its authorisation is not affected by any change in its membership.
>
> (2) If an authorised firm is dissolved, its authorisation continues to have effect in relation to any individual or firm which succeeds to the business of the dissolved firm.
>
> (3) For the purposes of this section, an individual or firm is to be regarded as succeeding to the business of a dissolved firm only if succession is to the whole or substantially of the whole of the business of the former firm.

> (4) "Firm" means –
>
> (a) A partnership; or
>
> (b) An unincorporated association of persons.
>
> (5) "Partnership" does not include a partnership which is constituted under the law of any place outside the United Kingdom and is a body corporate"

Section 40(1)(c) provides that a partnership may apply to the Authority for permission to carry on regulated activities.

26. Section 33 of FSMA provides for withdrawal of authorisation by the FSA and states that –

> "(1) This section applies if –
>
> (a) an authorised person's Part IV permission is cancelled; and
>
> (b) as a result, there is no regulated activity for which he has permission.
>
> (2) The Authority must give a direction withdrawing that person's status as an authorised person"

27. Section 44 provides for variation (which includes cancellation) at the request of the authorised person. Subsection (2) states that the FSA "may, on the application of an authorised person with Part IV permission, cancel that permission".

On which entity or entities did the penalty fall?

28. The case for the FSA (in more detail) is that the penalty was imposed "on" Fox Hayes. This follows from the fact that the Decision Notice was issued to Fox Hayes. The FSA recognise that at the time of issue (29 September 2006) Fox Hayes had become dissolved as a partnership under the general law by reason of the transfer to the LLP. The Decision Notice followed the notice of appointment of investigators and memorandum of that appointment dated 28 April 2004. Those were matters that had been notified to Fox Hayes and related to the concern of the FSA with Fox Hayes's suspected failure to comply with the COB rules. They had been issued at a time when Fox Hayes was still approving the financial promotions. Fox Hayes' authorisation had not, say the FSA, been discharged on dissolution. Authorisation continues until such time as it is cancelled by the FSA and cancellation requires the FSA's permission under section 44(2). It had not been cancelled; the result was that Fox Hayes remained an authorised person and would do so until the current proceedings had been concluded.

29. RG Jones and Malcolm Jones contended that the penalty could not in law be imposed on the Fox Hayes partnership nor could the Decision Notice properly be served on the Fox Hayes partnership. Fox Hayes had been dissolved by the time of the Decision Notice. It had ceased to be an authorised person and consequently it

could not be made the subject matter of a penalty notice. The only possible candidate for a penalty was the LLP which had taken on the assets and assumed the liabilities of the Fox Hayes partnership.

30. Mr Frazer, represented by Robin Knowles QC, argued that the partnership incurring the liability imposed by the Decision Notice was the partnership in existence at the time of the Decision Notice. He, Mr Frazer, was not a partner in that partnership. This followed from section 32(2), the effect of which was that only the successor firm whose authorisation "continues" may be penalised because only this firm is authorised. It was not therefore possible to impose a penalty on a previously authorised partnership. Our attention was drawn in this connection to provisions in FSMA that specifically apply to preserve the FSA's powers after authorisation has ceased. The FSA is given the power to make an administration order in relation to an insolvent partnership which "is or has been an authorised person" (section 359 of FSMA) and it can participate in insolvency proceedings of a partnership which "is or has been an authorised person" (section 362 of FSMA). It was pointed out that there is no similar wording in relation to the sending of a Decision Notice or the imposition of a fine.

31. For Mr Frazer it was stressed that the practicalities of serving the Decision Notice in the context of a changing partnership scenario favoured a construction whereby the imposition of a penalty was to be limited to the currently authorised firm. That firm, it was said, would control the factors those in ENF11 and ENF13 that which determine the imposition of the penalty and its amount. Those factors, found in ENF11 and ENF13 are to be taken into account by the FSA. The first factor is the conduct following the breach including how quickly, effectively and completely the firm or approved person has brought the breach to the attention of the FSA. Another is the degree of cooperation that the approved person has shown during the investigation and any remedial steps that the approved person has taken since the breach. The third factor is the size and financial resources of the approved person, those being assessed that at the time the fine is being imposed.

32. It was finally pointed out for Mr Frazer that the scheme of the FSMA is to give the FSA the ability to control the firm which is doing the regulated activities and hence needs to be appropriately regulated. Where a firm dishonestly dissolves itself to evade liability (which is not suggested in this case), the cessation of operations will have effectively brought to an end any inappropriate conduct. The Act does not allow the FSA both to withdraw authorisation and to require a person to pay a penalty (section 206 of FSMA).

33. We think that section 206(1), properly construed, enables the Authority to impose the penalty "on" the Fox Hayes partnership notwithstanding the fact that when the decision to impose it is taken, Fox Hayes has been dissolved and has ceased to carry on any business. The condition for imposition of the penalty is that the authorised person has contravened a relevant requirement. This is no longer in dispute. The penalty is directed at the contravention and the person responsible for the contravention. The FSA is therefore enabled to impose the penalty on the authorised person as the person who contravened the requirement.

34. Fox Hayes was, we recognise, dissolved under the general law when the transfer to the LLP took place. That did not, in our view, result in the particular Fox Hayes partnership ceasing to be an authorised person for the purposes of section 206(1). Authorisation and the regulatory consequences of authorisation stick with a firm until the FSA releases it from the regulatory scheme by granting permission under section 44(2). That will remain the position for so long as the present proceedings continue.

35. Section 32(2) is consistent with section 44(2). It does not, as we read it, absolve a partnership or an incorporated body from responsibility for regulatory contraventions committed by it prior to any change in membership or dissolution. Its effect is to extend the authorisation to the successor individual or firm while leaving the predecessor within the regulatory regime.

36. For those reasons we do not accept the argument presented for Mr Frazer, nor the principle behind the arguments addressed for Mr RG Jones and Mr Malcolm Jones.

37. It was argued separately for Mr R G Jones by Mr Ian McCombie that the effect of regulation 6(2)(b) of the LLP Regulations was to pass the Fox Hayes authorisation to the LLP. On that basis, it was said, section 32 applied with the result that the LLP, as successor to the authorisation, could be penalised under section 206(1). The FSA with knowledge of the transfer of business to the LLP must be taken to have decided to impose the penalty on and to proceed against the LLP.

38. We do not accept that argument. Section 32(2) as we read it, has no application here. There is no reference in regulation 6 of the LLP Regulations to section 32. The absence of such reference makes it clear that section 32, and particularly sub-section (2), has not been extended to LLPs. We mention in this connection section 1(2) of the Limited Liability Partnerships Act 2000 which states that an LLP "is a body corporate (with legal personality separate from that of its members) which is formed by being incorporated under this Act". The LLP, as such a body corporate, will be outside the scope of section 32(2) which applies to "firms" defined as partnerships or unincorporated associations of persons.

39. Finally on this topic we refer to arguments advanced by Mr Malcolm Jones. He says, first, that the Decision Notice cannot affect the former partners because it was not served on them individually. They should have had the opportunity to take part in the proceedings. We do not accept this. We are satisfied that the FSA served the Decision Notice on Fox Hayes in accordance with the rules for the service of documents on partnerships contained in regulation 2(2)(c) i.e. the last known address, and regulation 3(1)(c), i.e. on Mr Ian Coupland as partner. Both regulations are contained in the Financial Services Markets Act 2000 (Service of Notices) Regulations SI 2001/1420.

40. Then Mr Malcolm Jones says that no attempt had been made to involve individual partners. It was, he said, the responsibility of those conducting the case on

behalf of Fox Hayes partnership to ensure that the relevant partners were appropriately consulted. The LLP conducted the proceedings on behalf of the Fox Hayes partners. We do not accept that this flaws the proceedings. The LLP conducted the proceedings on behalf of the Fox Hayes partners. Mr Ian Coupland, one of the Fox Hayes partners, had the conduct of the case. Messrs Manning and Malcolm Jones, both of whom gave evidence at the earlier proceedings before the Tribunal, were very closely involved. Mr R G Jones says that he left the matter to be conducted by Messrs Malcolm Jones and Ian Coupland. But as already mentioned, the investigation of the proceedings clearly related to Fox Hayes' conduct in approving the financial promotions. There is no good reason why those partners who knew about the investigation and proceedings did not ensure that all of the partners covered by the contraventions should have been appropriately informed. This was a matter for the partners and not the statutory responsibility of the FSA.

41. The remaining point taken from Mr Malcolm Jones was based on section 208(1) of FSMA which requires the Decision Notice to be given, following the FSA's decision to impose the penalty, "without delay". He pointed out that the FSA had become aware of the breaches some two to three years before the Decision Notice was issued. That may be so, but section 208, (which deals with actual decisions of the FSA) follows section 207 which is concerned with the position where the FSA has reached the stage of "proposing" to impose a penalty. This gives the authorised person the opportunity to respond before the actual decision is taken. The warning notice was given on 31 May 2006. On some date after that the Regulatory Decisions Committee met and made the FSA's "decision" and the Decision Notice was issued on 29 September. We do not see that there was any delay in the relevant sense. Nor was any evidence presented by Mr Malcolm Jones to substantiate his allegation of delay.

42. For those reasons we have concluded that the Decision Notice covers Fox Hayes and not the LLP.

What are the relevant point(s) in time for the purposes of identifying the liable partners?

43. The legislation does not expressly address the question of which partners are liable to pay a financial penalty imposed under section 206 of FSMA. However, the Court of Appeal has offered the answer: the partners at the time of the contraventions are liable. See paragraph 47 of the judgment:

> "But the transfer of assets and liabilities into the limited liability partnership does not, of course, alter the legal position which is that, at the time of the contraventions Fox Hayes was a partnership without limited liability and it is, therefore, the partners at the time of the contraventions who have the legal liability to pay any penalty which is ultimately imposed. For this reason it seems to me to be right to have regard to the relevant partners (and their individual assets) rather than the firm of Fox Hayes …. It was for this reason that, at the end of the hearing, we asked for evidence about the financial resources of the relevant partners."

The FSA acknowledges that in paragraph 54 of this judgment the Court of Appeal appears to have left open the possibility of the partners advancing a contrary argument before the Tribunal. Nonetheless the FSA submits that the Court of Appeal's view, while not binding, is correct. The case for Messrs Frazer, RG Jones and Malcolm Jones is that, insofar as there is any liability on the partners, it is in the partners at the time of the decision notice that are liable. By then, Mr Frazer had retired and there were no others because Fox Hayes had been dissolved.

44. We have already noted that a partnership may be the entity authorised to carry out regulated activities. The present penalty was, as we have noted, imposed by the FSA on Fox Hayes pursuant to section 206(1) in respect of the contraventions as the authorised person that had contravened the relevant requirements. In our view partnerships authorised under Part IV come within the scope of section 206(1) in the following ways. First, "Authorised person" is defined "a person who is authorised for the purposes of this Act": see section 31(2) and 412(1) of FSMA. Then section 5 of the Interpretation Act 1978 provides that in any Act, unless the contrary intentions appears, words and expressions listed in Schedule 1 of the Act are to be construed in accordance with that schedule. "Person" is to be construed as including "a body of persons corporate or unincorporated". It follows therefore that "authorised person" in FSMA is to be read as including an authorised partnership, and it follows from that that the authorised partnerships on which the penalty may be imposed under section 206(1) in the partnership (or partnerships) existing when the contraventions took place.

45. For those reasons and in the light of our conclusions in paragraphs 33 and 34 above we think that the penalty is imposed on the Fox Hayes partnerships that existed during the period of breach. We turn now to examine the associated question of where the liability actually falls and against whom it may be levied.

46. The case for the FSA is that although FSMA does not address which partners are liable to pay a penalty imposed on the partnership, there is a presumption that the general rules of law apply. The penalty has been imposed in respect of Fox Hayes's contraventions of requirements placed on the firm by FSMA, i.e. the COB Rules. The penalty will be recoverable as "a debt" by virtue of section 390(9) of FSMA. The FSA rely on the general principle of partnership law that every partner of the firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner, but not for debts and obligations incurred before or after he is a partner: see section 9 of the Partnership Act 1890. The general principle, say the FSA, points on that basis to the conclusion that the partners at the time of the contravention are jointly liable to pay the debt represented by the penalty, as with any other debt.

47. Mr Knowles for Mr Frazer (in an argument that applies to all the Fox Hayes partners) contended that a penalty under section 206(1) can only be imposed "on" the authorised person and the only authorised person here is the firm. Fox Hayes, the firm, is given a statutory personality and only the firm's assets can be used to satisfy

the penalty. The partners individually were not authorised nor was the penalty imposed on any of them. Because liability has been imposed on the firm, there is no jurisdiction to levy the penalty against the assets of the individual partners. That limitation of liability, it was pointed out, is expressed in the case of criminal liability under FSMA (section 403) and it must apply, *a fortiori*, to a civil liability. Reliance was placed on the judgment of the Court of Appeal (Criminal Division) in the analogous case of *Stevenson* v *Bick* [2008] EWCA Crim 273. (We refer to this case and its implications later.)

48. We need to point out at this stage that FSMA contains different regimes for regulatory penalties and for criminal offences. The present section 206 penalty is a "disciplinary measure" imposed under Part IV which is in the regulatory and disciplinary part of FSMA. The penalty is civil in character. Criminal proceedings taken under Part XXVII, e.g. sections 400-403, distinguish between offences committed by the partnership and those for which the individual partners may be found guilty. In the latter case the consent or connivance of the partner is a necessary condition for conviction. When the partnership or firm is convicted the fine is levied against the partnership assets. The individual partner will not bear the fine out of his personal assets therefore, as the Court of Appeal observed in the comparable context of *Stevenson (*a "criminal proceedings" case*)* supra:

> "If fines could be levied against the assets of individual partners, this would largely negate the legislative scheme under which they cannot be made defendants unless complicit".

But *Stevenson* has no application here when the penalty is civil in nature.

49. Because this is a civil (regulatory) penalty imposed on the Fox Hayes partnership it is a partnership liability and the Partnership Act rules apply without any limitation. Under these the partners are jointly and severally liable for the partnership debts and, by section 10, liable for any penalty involved. There is nothing in FSMA that expressly or by implication displaces the normal liability of the partners for a penalty of this nature. We recognise that section 32 makes the Fox Hayes partnership an authorised partnership for regulatory purposes; but it did not, as contended for Mr Frazer, make Fox Hayes a statutory person for whose debts and penalties its constituent members have no individual liability. Indeed FSMA itself acknowledges the continuing liability of the individual partners in section 390(9) which reads as follows:

> "If all or any of the amount of a penalty payable under a final notice is outstanding at the end of the period stated under sub section (5)(b), the Authority may recover the outstanding amount as debt due to it".

50. To summarise so far, we have concluded that the penalty was imposed on the partnerships in existence during the period of breach. We have also concluded that liability to the penalty is not confined to the assets of the partnership (as would have been the case had the FSA sought to impose a criminal fine); it extends to the assets

and resources of the individual partners. We now turn to the remaining question of who the partners were during the period of breach.

Who were the "liable" partners during the period of breach?

51. Three partnership agreements cover the period of breach. The first agreement is dated 28 August 2002 (taking effect from 1 August 2002). The second is dated 18 November 2003: this is said to have taken effect from 1 August 2003. The third is dated 27 January 2004: this covered the engagement of a Mr Richardson as a fourth salaried partner. For reasons that we will give as regards salaried partners (i.e. that they are to be disregarded in determining who is liable for the penalty) we are not concerned with the third agreement.

52. The parties to the first partnership deed of 28 August 2002 were Mr Colin Frazer, Mr Robert Manning, Mr R Jones, Mr S Coupland, Mr I Coupland, Mr P Drazen, Mr I Brill, Mr M Jones, Ms C Grundell and Mr M Morse.

53. Ms Grundell and Mr Morse were described as salaried partners and as such they were employees, Employment is inconsistent with partnership. This is because a partner cannot be employed by his own firm. We refer to section 2(3)(b) of the Partnership Act 1890 and Lindley and Banks on Partnerships (18th edition) at paragraph 3-04. Nor did Ms Grundell and Mr Morse share in profits. They were indemnified by the partners in respect of liabilities of the partnership. Those features satisfy us that Ms Grundell and Mr Morse were not partners under the Deed of 28 April 2002 and so cannot be made liable for the penalty.

54. Messrs Manning, S Coupland, I Coupland, Drazen and Brill were "profit sharing equity partners" in defined shares. Mr Frazer was entitled to 8% of a proportion of the profits. Messrs R Jones and M Jones were "fixed share equity" partners. Both of them were entitled (under the Deed of 28 April 2002) to a share of fees billed by them or by their secretaries, any trainee or other unqualified member of staff primarily responsible to them; in addition Mr M Jones was entitled to £76,000 and Mr R Jones to £70,000, in each case of the first £505,000 of profits.

55. It was argued for Mr Frazer that he was not a partner during the period covered by the 28 August 2002 Deed or during any part of the period of breach. It was said that his 8% was of the same nature as the salary of a salaried partner: it entitled him to a maximum of only £4,000 more than one of the salaried partners. He was not a member of the executive committee (consisting of Messrs Manning, I Coupland, S Coupland and Mr Drazen) and he took no part in the management of the Fox Hayes practice.

56. We accept that Mr Frazer was not involved in the management of Fox Hayes and we accept that he played no part in the promotions giving rise to the breaches of the COB Rules. There has been no challenge to his claim that he was opposed to the firm doing the promotions work. Nonetheless we think that his limited entitlement to share in profits has made him a person who is bound by the acts of the firm and has

made him jointly and severally liable (under sections 9 and 10 of the Partnership Act) for its debts and liabilities.

57. For Mr R Jones it was stressed that he had not carried out the promotional work. The firm had been managed, throughout the period of breach, by the four members of the executive committee and Mr Malcolm Jones. Mr R Jones should not, therefore, be liable in any way for the penalty which had been directed at those whose conduct caused the breaches of the COB Rules. Mr Malcolm Jones argued that liability should rest with the profit-sharing equity partners and not with the fixed share partners.

58. Neither Mr R Jones nor Mr M Jones has, we note, suggested that they were not partners in the ordinary sense of that word and for Partnership Act purposes. It seems to us that they clearly were partners throughout the period of the first agreement, i.e. until the Agreement of 18 November 2003 took effect.

59. There is no dispute that Mr Brill was a partner until his departure from the firm on 31 July 2003. Three out of the twenty financial promotions had been approved by the firm by the time he left. Consistent with their approach generally, the FSA argue that Mr Brill can only be liable for contraventions committed while he was with the firm. If any penalty were to be imposed on Mr Brill then the starting figure of £954,770 indicated by the Court of Appeal would have to be apportioned between the periods before and after his departure. Indeed the FSA has invited the Tribunal not to include Mr Brill as a liable partner. We do not see how we can do this without affecting the positions of the other partners. We think that the correct approach is to apportion three twentieths of the figure suggested by the Court of Appeal to the period before his departure and seventeen twentieths of that figure to the period after his departure (subject to any further reduction made when we come to consider the second and third questions remitted to us by the Court of Appeal).

60. For the remaining part of the period of breach (ie the period covered by the Deed of 18 November 2003) the first relevant change was that Mr Frazer’s share became £35,000, such sum to abate if the firm’s profits fell short of £505,000. He was required to commit half his time to the practice. The position of Mr R Jones and Mr Malcolm Jones remained the same. All three of them, to a greater or lesser degree, participated in the profits of the practice. All three were, in our view, partners who were liable for the penalty in respect of the breach.

61. Ms Grundell, Mr M Morse and Mr S N Hedley were salaried partners under the Deed of 18 November 2003. They were all employed by the partnership. They were required to make no contributions to capital or expenses and losses of the practice; nor did they share in profits or goodwill. We think that they were not, during the period when the contraventions took place, partners in Fox Hayes as a matter of law; they will not therefore be liable for any part of the penalty.

62. At certain stages in the course of the hearing we wondered whether we should take account of Article 6.2 of the European Convention on Human Rights. For example, had the partners been prosecuted under section 403 of the FSMA they would have been in a position to argue that, where relevant, they had neither consented nor connived to any of the breaches of the COB Rules. Each partner would have been entitled to a full statement of the charge against him. We were referred however to the decision of the Court of Appeal in *Fleurose* v *The Securities and Futures Authority*, [2001] EWCA Civ 2015. The question in issue in that appeal was whether the hearing before the disciplinary tribunal had constituted the determination of a "criminal charge". The Court of Appeal concluded that disciplinary proceedings against a professional man or woman, although not specifically classified as criminal, might still bring into play some of the requirements of a fair trial spelt out in Article 6.2. Nonetheless the disciplinary proceedings instituted by the SFA against Mr Fleurose were not properly to be regarded as involving a criminal charge or offence for purposes of article 6.2. The penalty in issue here is likewise disciplinary in character. We mention this only because some of the partners who may have to pay up in discharge of the penalty are partners who were neither members of the executive committee of Fox Hayes nor involved in the promotions giving rise to the breaches. Had Article 6.2 been applicable, the Tribunal's approach to the penalty proceedings and to the liabilities of the individual partners might have been different.

Costs of Ms Grundell and Mr Hedley

63. We mention finally for claims for costs in respect of attending the present hearing made by Ms C Grundell and Mr S Hedley. We will deal with these in a separate Direction.

SIR STEPHEN OLIVER QC
JUDGE OF THE UPPER TRIBUNAL
RELEASE DATE: