

Case No: HC06C04145

Neutral Citation Number: [2009] EWHC 285 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 5 February 2009

BEFORE:

MR JUSTICE FLOYD

IN THE MATTER OF THE FINANCIAL SERVICES AND MARKETS ACT 2000

BETWEEN:

FINANCIAL SERVICES AUTHORITY

- and -

BAYSHORE NOMINEES LIMITED & OTHERS

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MR JAMES PURCHAS instructed by the Financial Services Authority appeared on behalf of the **CLAIMANT**

MISS SOPHIE MALINCKRODT appeared on behalf of the **FIRST & SECOND DEFENDANTS**

THE THIRD TO FIFTH DEFENDANTS did not appear and were not represented

Judgment

MR JUSTICE FLOYD:

1. This is an action brought by the Financial Services Authority against five defendants, Bayshore Nominees Limited, a Mr Manji, a Mr Bhowan, a person or persons carrying on business as Enterprise Analytics Incorporated and a person or persons carrying on business as Gatemore Securities.

2. The Financial Services Authority has become alerted to a scheme operated by the defendants which involves selling shares. The shares promoted were in a number of companies, including Sim4Travel and other traded companies. The shares in question were offered to individuals, some of whom invested. I have heard from two of those investors, a Mr Hudson and a Mr Stubbs, one of whom was

approached by a person claiming to represent Enterprise Analytics and another who was claiming to represent Gatemore.

3. The activities in question are those which are sometimes referred to as “boiler room” activities. The purpose is to cause investors to buy shares which are of little intrinsic value and for them to be maintained at the price at which they are offered by limited trading in the shares.

4. The general principle of the scheme, as outlined in the evidence which I have heard, is that Bayshore, the first defendant, would acquire blocks of shares in the promoted companies. Mr Manji, the second defendant, owned ultimately but indirectly all the shares in Bayshore. Mr Bhowan, the third defendant, managed its day to day operations under Mr Manji's supervision. Cold calls were then made to investors in the United Kingdom from persons pretending to or claiming to represent brokers. These are the boiler rooms to which that term refers. The brokers would encourage investors to purchase shares in the companies. Bayshore would then send confirmation notes to any investors who purchased shares and the confirmation notes would require payment for the shares to be made to Bayshore's bank account in the UK. Bayshore also provided other services, including issuing instructions to the relevant share registrars to transfer shares from its holding to the investors. After some very considerable period of time Bayshore would send out share certificates to the investors. Bayshore would then make onward transfer arrangements for the money received from the investors.

5. The trial of this action has lasted very much less than one day because the FSA has reached agreement (subject to the court's approval) with the first, second and third defendants. Two consent orders are before me disposing of the action (again, as I say, subject to my approval) in respect of them. The fourth and fifth defendants, who are sued in the manner approved in [Bloomsbury Publishing Group and Another v News Group Newspapers Limited \[2003\] EWHC 1205 \[2003\] 1 WLR 1633](#), have not appeared or taken any part in the litigation. The action therefore proceeds against them in their absence.

6. I have seen in the witness box to confirm their written evidence three witnesses and I have given permission for the remainder of the evidence to be relied on by way of hearsay notice. The evidence establishes that a number of individuals gave their names when soliciting investments, either purportedly representing Enterprise Analytics Incorporated or Gatemore. They are Michael King, Matthew Anderson, Tristan Kingsley, John Henderson, Steven Hamilton, Michael Tyler, Max Churchill, Anthony McPhie on behalf of Enterprise Analytics and a Mr McCann and a Peter Griffin or Peter Griffiths on behalf of Gatemore Securities. It seems to me to be appropriate that the order should recite that it appears to the court that those persons were carrying on business as Enterprise Analytics or Gatemore Securities as appropriate.

7. The FSA's case against Bayshore following the compromise is that Bayshore was (a) arranging investment deals contrary to [article 25](#) of the [Financial Services and Markets Act 2000 \(Regulated Activities\) Order 2001](#) (“RAO”) and [section 19 of the Financial Services and Markets Act 2000](#); (b) safeguarding and administering assets belonging to another contrary to [Article 40 RAO](#) and [section 19 FSMA](#). Against Mr Manji and Mr Bhowan, the FSA's case is that they are knowingly concerned in contraventions by Bayshore of [Article 40](#). In addition they say that Mr Manji was knowingly concerned in Bayshore's breaches of [Article 25](#). Against Gatemore and Enterprise Analytics, the FSA's case is that they were advising on the buying of investments contrary to [Article 53](#) of the [RAO](#) and [section 19 FSMA](#) and communicating invitations or inducements to engage in investment activity contrary to [section 21 FSMA](#).

8. In the course of his opening Mr Purchas, on behalf of the FSA, has taken me through the statutory provisions under the Act and the statutory instruments. He has carefully indicated to me where the evidence supports the FSA's allegations and taken me through the various potential exceptions which might avail the defendants. In the end I was entirely satisfied that the evidence established the charges that the FSA made under each of the heads to which I was taken. One matter and one matter only caused me some transient concern. One of the prohibited activities on which the FSA is advising on investments. The relevant Article of the [RAO](#) provides:

"Advising a person is a specified kind of activity if the advice is (a) given to the person in his capacity as an investor or potential investor or in his capacity as agent for an investor or a potential investor; and (b) advice on the merits of his doing any of the following, whether as principal or agent, (i) buying/selling a particular investment."

9. Specified activities are only prohibited if they are carried out for this purpose in the United Kingdom. Although the FSA does not have direct knowledge of this one way or the other, the evidence does appear to suggest that at least some of the moving forces behind the fourth and fifth defendants are based abroad, and communicate their advice by telephone to this country. The question therefore arises whether the activity of advising by telephone from abroad falls within the prohibition. To put it another way: where does the activity take place? Is it where the adviser is located or is it where the investor is located? Or both?

10. It seems to me, first of all, that it would be somewhat odd if the prohibition in [RAO](#) 53 could be avoided by the adviser locating himself outside the jurisdiction. The purpose of the restriction is to prevent investors receiving advice from unauthorised persons and that purpose would be defeated if the section did not extend to advisers giving advice to investors in the United Kingdom from abroad.

11. Secondly, my attention has been drawn to the fact that there is excluded from [RAO](#) 53 the giving of advice by an overseas person as a result of a legitimate approach. It seems to me that that exclusion at least contemplates the possibility of an overseas person being within the ambit of the section, although it is fair to say that the definition of overseas person will include an overseas person who happened to be located in the United Kingdom.

12. The third consideration, which in my view is decisive, is that when one looks at [RAO](#) 53, one sees that the core of the prohibition is in relation to the receipt of the advice. The act of advising cannot possibly be completed until the investor has received it. Therefore, it seems to me that either the activity of advising is being carried on both at the location of the adviser and the investor or that it is being carried on exclusively at the location of the investor. In either case (and it is not necessary for me to decide which it is) the activity is within the prohibition.

13. In those circumstances it seems to me that the objection that I had first considered does not arise. The evidence very clearly establishes that those responsible for the fourth and fifth defendants were giving advice and were inviting investors to invest in the shares in question. I have no doubt that the case which the FSA makes against the fourth and fifth defendant is properly made out.

14. In those circumstances it seems to me that it is appropriate for me to grant the court's approval to the two consent orders, subject to one point of drafting in each case which I have raised and which it seems to me should not give rise to any difficulty. I will hear counsel as to the precise form of relief against the fourth and fifth defendants.