Neutral Citation: **[2025] UKUT 00087 (TCC)**

Case Number: UT-2023-000053/54

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
FINANCIAL SERVICES

FINANCIAL SERVICES – final decision on impact of taxation on, and appropriate rate of interest to be used in calculating, the amount to be disgorged in financial penalties under section 66 Financial Services and Markets Act 2000

Decided on written submissions on dates
between 21 January and 25 February 2025
Judgment date: 12 March] 2025

Before

JUDGE MARK BALDWIN
MR DUNCAN BLACK
MRS JO NEILL

Between

TONI FOX-BRYANT
DAVID BRIAN PRICE

Applicants

and

THE FINANCIAL CONDUCT AUTHORITY

The Authority

Representation:

For the Applicants: Mr Gareth Fatchett of FS Legal Solicitors LLP

For the Respondents: Mr Adam Temple of counsel, instructed by the Financial Conduct Authority

DECISION

INTRODUCTION

1. This is our second decision in relation to the references ("the References") made to this Tribunal by Ms Fox-Bryant and Mr Price of two Decision Notices ("the Decision Notices") dated 3 May 2023, by which the Authority decided to:

   (1) impose on Ms Fox-Bryant a financial penalty of £681,536 under section 66 of the Financial Services and Markets Act 2000 ("FSMA"), a prohibition order under section 56 FSMA and to withdraw Ms Fox-Bryant's approvals to perform senior management functions at CFP Management Limited ("CFP") under section 63 FSMA; and

   (2) impose on Mr Price a financial penalty of £632,594 under section 66 FSMA, a prohibition order under section 56 FSMA and to withdraw Mr Price's approvals to perform senior management functions at CFP under section 63 FSMA.

2. In a decision (the "November Decision" - Neutral Citation [2024] UKUT 00357 (TCC)) released on 13 November 2024 we dismissed the References as to the prohibition orders and withdrawals of approval. We noted that we agreed with the Authority that significant financial penalties should be imposed on both Applicants, but we decided that the size of those penalties needed to be reviewed in the light of our concern that the disgorgement element of the penalty should take account of the incidence of taxation and further consideration should be given to how interest should be charged on the benefits the Applicants derived from CFP, a company owned 50:50 by the two Applicants. At paragraph [239] of the November Decision we gave directions regarding submissions to be made by the parties on those issues.

3. At paragraphs [32]-[35] and [216]-[218] of the November Decision we summarised the principles applied by the Authority in determining financial penalties under section 66 FSMA. So far as relevant for us, one of the principles (referred to as "Disgorgement") is that a firm or individual should not benefit from any breach.

4. Paragraph 6.5B.1 of the Authority's Decision Procedure and Penalties manual ("DEPP") sets out the Authority's position on disgorgement:

> 'The FCA will seek to deprive an individual of the financial benefit derived directly from the breach (which may include the profit made or loss avoided) where it is practicable to quantify this. The FCA will ordinarily also charge interest on the benefit. Where the success of a firm's entire business model is dependent on breaching FCA rules or other requirements of the regulatory system and the individual's breach is at the core of the firm's regulated activities, the FCA will seek to deprive the individual of all the financial benefit he has derived from such activities."

5. So far as the charging of interest is concerned, DEPP 6.5B.1 says that the FCA will ordinarily charge interest when calculating disgorgement but does not set out a rate. In PS10/4, the FSA stated that it would:

> "determine the relevant interest rate, and the date from which it will apply, on a case by case basis. In deciding what interest rate to use, we may have regard to the interest rates applied by the Financial Ombudsman Service and the civil courts."

6. Following the release of the November Decision, the Applicants challenged our refusal to allow them to raise a third issue which they said was relevant to the penalty calculation. This issue was the extent of the economics derived by the Applicants from CFP's "traditional" advisory business and whether it was right for the Authority to regard all the benefits derived from CFP as amounts derived from the flawed business model which should be disgorged. The

Applicants described our refusal to allow this issue to be raised as an "exercise of discretion [which] has resulted in one very narrow element of the disposal of the matter being ultra vires". A dialogue on this issue with the Applicants' representative and (to a more limited extent) the Authority followed, the upshot of which was that just after the New Year we refused the Applicants permission to appeal to the Court of Appeal against our decision.

7. The Applicants did not seek permission to appeal against any aspect of the November Decision from the Court of Appeal.

8. Instead, on 21 January the Applicants' representative sent three emails to the Tribunal and the Authority enclosing 26 pdf files (discussed below) and commenting (in a fourth email sent to the Authority on 22 January):

> "…we are expecting you to re-calculate the disgorgement net of the tax paid. Our clients have had no benefit from the gross monies. I did that that was implicit in our production of the documents for you. In terms of interest, we would argue that you should charge at the bank base rate during the relevant period. The rate you are applying is a penal rate.
>
> 239(2) – requires the Authority to make representations on the two discrete issues (tax & interest rate) within 30 days. That is what we are expecting from you. We have provided you the information on tax paid, so you can review the figures. If you require anything else, please let us know."

FACTORS TO BE TAKEN INTO ACCOUNT IN CALCULATING THE PENALTY

Taxation

9. In our November Decision (at [228]) we held that, as the disgorgement calculation is looking to "deprive an individual of the financial benefit derived directly from the breach" and not to go further and punish them (which is the, perfectly legitimate, role of later steps in the calculation of financial penalties), the possibility that tax has eroded the value of a benefit should always be considered in the context of disgorgement.

10. In *FCA v Da Vinci Invest Ltd*, [2015] EWHC 2401 (Ch) at [219]-[223], Snowden J considered whether a person should be required to disgorge their gross profits from a wrongful activity (in that case share dealings that amounted to market abuse) and observed that he did not accept that "a person who has engaged in market abuse should be required to disgorge benefits that they have not received". On that basis, whilst he was not inclined to allow a reduction on account of general business overheads, he allowed a reduction on account of certain costs (payments under a 50/50 profit sharing arrangement with a third party) directly linked to the wrongful activity.

11. Although we did not have these passages from *Da Vinci* in mind when we prepared our November Decision, we consider that they provide further support for the conclusion we have just summarised. Just as Snowden J considered that the penalty should be reduced to reflect costs directly linked to the earning of the benefits in question, so we consider that, at least to the extent that it is permanent (clearly, if the payment of the penalty reverses the tax liability triggered by the receipt of the benefit, so that the tax can be reclaimed, no credit should be given for it) and capable of being calculated (or, at least, reasonably estimated), a liability to tax which erodes the value of a benefit should be taken into account in the calculation of the amount to be disgorged.

12. In our November Decision we made the (we hope, uncontroversial) observation that taxation can be a complicated, difficult and sometimes uncertain matter, and so there must be limits to how far tax can be taken into account. Here, for example, the Applicants seem to have taken money out of CFP by way of salaries, dividends and pension contributions (the latter paid directly into their personal pension schemes). Clearly, there is likely to be an

immediate income tax liability on the receipt of dividends and salaries. There will be no immediate income tax liability when the pensions contributions are made, but there will likely be when pension withdrawals are made. Accordingly, a thorough analysis would be required (including a consideration of the impact of the Applicants' personal circumstances on their tax liabilities) to determine the extent to which (if at all) tax eroded the value of the benefit derived by the Applicants from CFP. So, at [239](1), we directed that:

> 'If [the Applicants] wish the Authority to take tax into account in calculating the disgorgement amount, they must provide the Authority with full details (with supporting material) of how they have calculated the relevant amount of tax.'

13. The pdf files the Applicants sent to the Authority on 21 January included a lot of material (for example, copies of tax returns) relating to tax years outside the period we are concerned with (the "Relevant Period" - 21 April 2015 to 31 October 2017). Some tax calculations and one draft tax return (for Mr Price for the tax year 2015/16) relating to periods within the Relevant Period were supplied, but the Applicants did not provide any narrative explanation of how tax has impacted on the value of the benefits they received.

14. On 6 February the Authority sent in their submissions in relation to taxation and interest in the disgorgement calculation. So far as taxation was concerned, their principal comment was to highlight the failure of the Applicants to comply with our directions.

15. On 24 February the Applicants' representative emailed the Tribunal to say that:

> "My client (sic) have managed to log into their "My HMRC" accounts & downloaded the attached confirmations of tax paid for the tax years ending 2015, 2016, 2017 & 2018. See attached.
>
> I also attach copies of the tax calculations produced by my client's accountant for the tax years ending 2016, 2017 & 2018. The amounts of tax due agree with the amounts HMRC confirm as being paid."

16. On 25 February the Authority responded to this material and confirmed that it accepted that the tax shown in the documents sent on 24 February had been paid and that the tax shown by these documents to have been paid should – on a pro-rata basis to match the Relevant Period – be deducted from the capital amount of the disgorgement element of the penalty. The Authority calculated the tax deduction to be £43,665.20 for Ms Fox and £42,167.66 for Mr Price.

17. We pause here to observe that it is wholly unacceptable for the Applicants blatantly to disregard our directions in the way they did. They were told to calculate the amount of any reduction on account of tax they thought appropriate and provide "full details (with supporting material) of how they have calculated the relevant amount of tax". Instead, as Mr Temple (bluntly but fairly) observed, the Applicants "dumped a large number of pdf files and left all questions of assessment to the Authority."

18. In our November Decision we commented that an individual's tax liabilities can be heavily influenced by their personal circumstances. Only they, or their advisers, know what these are. So, if taxation is to be reflected in a disgorgement calculation, the first step must be for the subject or their advisers to provide a fully reasoned calculation of the effect of taxation which the Authority and (if necessary) the Tribunal can review. That is why we directed that the Applicants should "make the running" in this regard.

19. In the absence of any engagement from the Applicants on this point, we accept the Authority's calculations of the tax adjustments to be made in the disgorgement calculations.

We are grateful to the Authority for its fairness in stepping into the void left by the Applicants and calculating these tax adjustments.

20. Some of the benefits derived by the Applicants from CFP took the form of pension contributions made directly into their pension schemes. We were told that the amounts involved here were substantial. Clearly, no tax liabilities would have been incurred at the time those payments were made, nor will tax liabilities be incurred on investment returns generated within the pension schemes. However, tax liabilities will very likely be incurred on future withdrawals by the Applicants from their pension schemes.

21. In our November Decision (at [228]-[229]), we raised the possibility of a reasonable estimate of tax liabilities being taken into account. The task of trying to estimate future tax liabilities occasioned by withdrawals from a pension scheme strikes us as being a very difficult and uncertain process, which would require a number of assumptions to be made, for example as to the tax regime applicable to future withdrawals, how money would be drawn out of the pension scheme and the Applicants' personal circumstances at that time. All of these are *ex hypothesi* currently unknown and any assumptions we made could prove to be completely wrong.

22. Neither the Applicants nor the Authority developed any submissions on whether (and, if so, how) we should make some allowance for the impact of deferred tax on the value of the benefits derived from CFP in the form of pension contributions, and we do not consider that it would be appropriate for us to embark on that exercise off our own bat.

23. That said, one circumstance where it should be possible to calculate with sufficient certainty and precision the effect of tax on the value of the amount held within the Applicants' pension schemes which is to be disgorged would be if they were to withdraw that money from their pension schemes to pay the corresponding part of the penalty around the time it was calculated.

24. Provided that the full amount of tax reliefs or allowances available to the Applicants (for example, the ability (subject to a cap) to withdraw up to 25% of a pension "pot" free of tax, the annual nil rate band (to the extent it is available) and any losses or other amounts available to reduce the amount of tax payable on a withdrawal) were all treated as applied in reducing the tax payable on this withdrawal, then it seems to us that a reduction in the amount to be disgorged by reference to that tax liability would be appropriate. It would be important that the calculation of this tax liability took the full value of all available losses, reliefs etc into account (even if they might also be available against other unrelated amounts), to make sure that the reduction in the penalty was not effectively funding tax that the Applicants might otherwise be liable to pay at some point.

25. This approach would be consistent with the policy behind disgorgement, of making sure that the wrongdoer is not left with any benefit from their wrongdoing without penalising them. It would also make sure, in a case such as this, where it is said that the Applicants would suffer financial hardship if a penalty beyond the amount to be disgorged were imposed, that the Authority's imposition of a penalty does not trigger a tax liability which would almost inevitably go unpaid.

26. No doubt, as we are dealing with delinquent individuals who lack integrity, the Authority would wish to scrutinise any proposed tax reduction rigorously and might wish to control the flow of cash (taking control of the full amount withdrawn from the pension scheme and making any tax payment directly to HMRC on behalf of the Applicants), but this does not detract from the basic point that, if the tax liabilities referrable to amounts in the pension schemes cease to be deferred, will be crystallised in funding the payment of the penalty and can be calculated

with confidence and accuracy at the time the penalty is calculated, they should be reflected in the calculation of the amount to be disgorged.

Interest

27. We have seen that the Authority's policy is to charge interest when calculating the amount to be disgorged and the rate typically applied is 8% (which was the rate used here).

28. In *FCA v Da Vinci Invest Ltd*, [2015] EWHC 2401 (Ch), Snowden J commented on the charging of interest in the disgorgement element of the penalty calculation as follows (at [224]):

> "DEPP 6.5A.1 indicated that the FSA would ordinarily have charged interest upon any benefits payable at step 1. That would seem correct as a general proposition in order that a wrongdoer should be deprived of all benefits, including those derived from investment or use of money. I did not, however, receive any submissions as to an appropriate rate of interest that might be applied. Accordingly, and given that interest rates have generally been very low over the last few years, I do not propose to add any specific sum for interest. I shall, however, give some effect to this principle by rounding the final amount of the penalty to be imposed on DVI up rather than down."

29. In our November Decision we suggested (in the final sentence of [233]) that charging a rate of interest which is higher than prevailing commercial rates might go further than depriving the person of the benefit "derived directly from the breach" and risk taking into account amounts an individual could have derived indirectly by investing the benefit. However, in the light of Snowden J's comment (that benefits from wrongdoing include those derived from investing or using money) and the comment of Popplewell LJ in *FCA v Bluecrest Capital Management (UK) LLP*, [2024] EWCA Civ 1125, (that "It is plainly in the public interest for a firm to be required to disgorge <u>profit made as a result of wrongdoing</u> irrespective of loss to consumers" (our emphasis)), we acknowledge that we were wrong to be beguiled by the word "directly" into suggesting that the amount to be disgorged is limited to the amounts directly derived by subjects in the position of the Applicants together with interest at a deposit rate on those amounts.

30. We agree with Mr Temple's submission that the amount to be disgorged should reflect the secondary benefits derived by the wrongdoer from the way they invested or used the benefits they obtained directly because of their wrongdoing. This would include investment returns obtained or (the example we gave in our November Decision) money saved by paying off an expensive debt.

31. Where there are no investment or other measurable economic benefits derived by the subject or these do not fully reflect the value to the subject of having received benefits some time previously, interest should be charged on the amounts directly derived by the subject, in order (if nothing else) that what is disgorged is the present value of a benefit derived some time ago. "Disgorgement" is looking to deprive a wrongdoer of any benefit from their wrongdoing, not to compensate a person they have wronged or to penalise the wrongdoer, and so the rate of interest used in such a case should reflect prevailing deposit interest rates over the relevant period. This may mean, as it did in *Da Vinci Invest*, that in a time of ultra-low interest rates no interest should be charged.

32. Mr Temple submitted that, where monies have been invested, using a simple rate of interest cuts through the complexities of calculating the investment return from monies derived by the subjects from their wrongdoing. In such a case, he says, the Authority remains of the view that 8% is appropriate.

33. Unusually, we are not with Mr Temple on this point. The aim must, as Snowden J observed, be to require the subject to disgorge "all benefits, including those derived from

investment or use of money". This means that the starting point must be to identify (so far as possible) the full amount of the investment or other economic benefits derived by the subject and make sure that those amounts are disgorged in full.

34. If an interest rate were to be used, the rate chosen for that purpose would need to be a realistic proxy for the subject's investment return (high enough to force complete disgorgement of benefits but not so high as to risk producing a figure which performs a penal function). It seems to us that, by the time we have identified and validated an interest rate which meets these criteria, we would not be far short of calculating the subject's actual investment return. For that reason, and because forcing disgorgement of the full economic benefits but no more is conceptually the correct approach, we consider that the investment return derived by the Applicants from the monies paid into their pension schemes should be calculated and the full amount of that return should be included in the amount to be disgorged. On the assumption that there were already some funds in these pension schemes, some pro rating of overall returns may be required, but this does not strike us as a particularly difficult calculation.

35. If an investment loss is made or the return is lower than would have been obtained by depositing the money at interest, then (consistent with the point we made at [31]) interest should be charged at a deposit rate.

36. We agree with the Authority that, where a market interest rate is used, interest should be compounded.

DISPOSITION

37. So far as the prohibition orders under section 56 FSMA and the withdrawal of approvals to perform senior management functions at CFP under section 63 FSMA are concerned, the References have already been dismissed.

38. So far as the financial penalties under section 66 FSMA are concerned, we remit the calculation of those penalties to the Authority with a direction that the Authority should calculate the amount to be disgorged (step 1 in the calculation of the penalties) as follows:

(1) Where monies were paid into the Applicants' pension schemes, the amount to be disgorged is to be increased to reflect the higher of (a) the full amount of the investment returns derived from those monies and (b) interest on those monies using an interest rate equal to the Bank of England Base Rate from time to time compounded every six months.

(2) In the case of other monies derived from CFP, the amount to be disgorged is to be increased by reference to (a) any measurable economic benefits derived by using or investing all or part of those monies or (b) in the absence of any such benefits, or if such benefits do not fully reflect the value to the Applicant of having received benefits some time previously, by charging interest on those monies using an interest rate equal to the Bank of England Base Rate from time to time compounded every six months.

(3) The tax adjustments calculated by the Authority (£43,665.20 for Ms Fox and £42,167.66 for Mr Price) are to be deducted from the amount to be disgorged, including, if relevant, the amount on which interest is charged at 2(b) above.

(4) Save in the circumstances described in [23] above, in which case the approach described in [24]-[26] is to be followed, no further adjustments are to be made on account of tax.

39. The Applicants are to provide the Authority with full details of the investment returns earned in their pension schemes with fourteen days of the release of this decision and any other information requested by the Authority for the purposes of calculating the amount to be disgorged with fourteen days of request.

40. If the Authority and the Applicants cannot agree on the amount to be disgorged, there is liberty to apply to the Tribunal.

MARK BALDWIN
UPPER TRIBUNAL JUDGE

Release Date 12 March 2025