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ASSET LAND
INVESTMENT PLC V
FINANCIAL CONDUCT
AUTHORITY [2016]
UKSC 17



The Financial Conduct Authority (“**FCA**”) brought proceedings against Asset Land Investment plc along with its principal owner and director, Mr. Banner-Eve (the “**Appellants**”). The Appellants had been found to be operating an unauthorised real estate collective investment scheme (“**CIS**”). Operating a CIS is a regulated activity under the Financial Services and Markets Act 2000 (“**FSMA**”) and therefore a CIS operator is required to be authorised, and failure to do so is a criminal offence. The Appellants in this case, should have been authorised as AIFMs, as operators of the scheme.

CIS

S235 of FSMA describes a CIS as an **arrangement** with respect to **property** whereby individuals taking part in the arrangements can receive profits or income arising from the acquisition/holding/management/disposal of the property. To fall within this section, the participants (in the scheme) cannot have day-to-day **control** over the **management** of the property and the property must in fact be managed as a whole, by or on behalf of, the operator of the scheme.

Under s19 of FSMA, it is a criminal offence to carry out a regulated activity, such as operating a CIS, without authorisation from the FCA.

Facts

- The Appellants had purchased land for the purpose of redevelopment.
- The Appellants divided the plots and sold them to individual investors under the pretense that the Appellants would obtain planning permission of the sites and arrange for the sale to a developer. The investors would, in return, realise huge profits.
- Once the investors had paid for their individual plots, they received contractual documentation which contradictorily stated that the Appellants would not apply for planning permission.

Decision

At first instance, the high court held in favour of the FCA stating that in the circumstances this amounted to operating a collective investment scheme. The Court of Appeal upheld this decision and the Supreme Court unanimously dismissed the appeal by the Appellants. This decision is important as it reflects the purposive and literal stance the courts will take when interpreting s235 of FSMA.

Reasoning

The crux of the decision was centered on clarifying what “property”, “arrangements” and “control” meant in relation to this case, under s235 of FSMA.

- (1) The court held that the oral representations made by the Appellants to the investors constituted the “arrangements”, even though the contractual documents stated otherwise.
- (2) The court held that the “property” was the site as a whole, and not the individual plots, because the sale of the property as a whole would then lead to the profits being dispersed to the investors.
- (3) Therefore, despite the investors being the legal owners of their individual plots of land, the scheme was arranged in such a way that investors could not have “control” over the property as a whole, given the verbal intention of the Appellants was that they would apply for planning permission and arrange for the sale of the plots.

This lack of overall control meant that the scheme fell within s235 in establishing a CIS. The FCA’s guidance on this illustrates the same point (PERG 11.2) which states that; “*if the*

substance is that each investor is getting rights under a scheme that provides for someone else to manage the property, the arrangements would be regarded as a CIS.”

Take away points

Firms must be very cautious when structuring their arrangements. As this case shows, the FCA will be looking into the substance of the arrangements i.e. not just what the legal documents purport to state, and subsequently the courts will in effect lift the veil on the documentation if in practice the situation is materially different. Furthermore, if firms are managing and promoting real estate funds structured as a CIS in the UK, they must ensure that they are authorised by the FCA.

If you need advice relating to real estate funds, the activities which are regulated by the FCA, and what impact that could have on your firm, Cleveland & Co, your external in-house counsel, are here to help.

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