

# Court of Appeal considers consequences of unauthorised agents completing FCA related questionnaires

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*Personal Touch Financial Services Ltd (Appellant/Defendant) v Simplysure Ltd and one other (Respondents/Claimants), [2016] EWCA Civ 461s.*

## Background

This Court of Appeal decision was an Appeal from a judgment of the Mercantile Court of the Manchester District Registry. At first instance, the Claimants had succeeded in their breach of contract claim in which they argued successfully that the contract had been improperly terminated by the Defendant. This Appeal decision provides important guidance on the meaning and effect of section 19 of the Financial Services and Markets Act 2000 ("the Act"), and Article 25 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) ("the Order").

In this case an advisor employed by the Claimants had filled in a number of preliminary questionnaires pursuant to a "Compliance Agreement and Appointed Representative Agreement" dated 1 December 2006 (the "Contract"), with information provided by intended clients to enable advice to be given concerning a medical insurance policy. This case considered whether this activity was a "regulated activity" in accordance with the Act and the Order.

## Facts

Under the Contract, the First Claimant was appointed to act as the Defendant's representative to sell private medical insurance. The Defendant paid a monthly fee to the First Claimant for these services, and also paid commissions on policies the First Claimant sold.

The First Claimant provided a questionnaire to potential clients that required answers to enable advice to be given concerning a new personal medical insurance policy. The Defendant became aware that the First Claimant was not complying with the Act in the manner that was required under the Contract, as it believed that unauthorised staff were being instructed to fill in questionnaires, which it argued was a regulated activity under the Act. It was noted that one of the sections of the form expressly provided as follows "Private Medical Insurance (to be completed by PMI authorised advisors only)".

Clause 7 of the Contract made it a condition that the First Claimant must be aware of and comply with the rules of the relevant regulator.

As a result of the concerns, which had been raised by the Defendant about whether unauthorised persons were in fact carrying out regulated activities, the Defendant terminated the contract with the First Claimant. The Defendant relied upon section 19 of the Act, which provides inter alia that only authorised person, or an exempt person may carry on a regulated activity in the UK under the Act.

## First Instance Decision

The Judge found that the form filling by the advisor employed by the Claimant was a regulated activity, but that it was not a condition of the contract but an "intermediate term", and he did not find that its breach caused any loss that would make it a repudiatory term justifying termination by the Defendant. The Claim therefore succeeded in the Mercantile Court and the Defendant was ordered by the Judge to pay commissions.

## Court of Appeal Decision

The Appeal by the Defendant was allowed, and the first instance decision overturned.

The Judge had correctly identified that filling in the questionnaire was a regulated activity, but had erred in finding whether it was a condition that enabled the Defendant to terminate the Contract. Clause 7 of the Contract was a condition not an intermediate term.

# Comments

The Court of Appeal decision highlights the need for absolute clarity when deciding whether compliance with the Act is a term or condition of a written agreement. This is particularly important for parties when considering whether they can terminate a contract. Here the Court of Appeal found the fact that there was no evidence before the Judge that breaching Clause 7 would cause any loss was irrelevant. It was held that as Clause 7 of the Contract was a true condition of the Contract, "any breach was repudiatory irrespective of any damage that it caused or did not cause."

## Authors

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