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FCA PUBLISHES FINDINGS AGAINST LINK FUND SOLUTIONS - IN LATEST INSTALMENT OF WOODFORD SAGA //

Last month, the FCA issued a Final Notice against Link Fund Solutions, setting out its failings in managing the liquidity of the Woodford Equity Income Fund – some five years after the fund's collapse. The case serves as a timely reminder of the consequences of illiquidity and the role of authorised corporate directors. It also sheds light on the FCA's approach to schemes of arrangement.

Background

In June 2019, the Woodford Fund was suspended due to its deteriorating liquidity profile. This followed a period of underperformance by the fund, during which many investors sought to exit. The fund was then put into liquidation without reopening, meaning investors who remained in the fund were unable to redeem their investments.

Following the collapse, Link was investigated by the FCA for its role in running the fund as its 'authorised corporate director' (ACD). In April 2023, Link agreed to settle the FCA's case against it by implementing a scheme of arrangement, under which redress would be paid to investors in the Woodford fund (at the time of its suspension). Link entered into a conditional settlement agreement with the FCA reflecting this in April 2023.

The Scheme

On 9 February 2024 the High Court approved Link's scheme of arrangement and on 5 March 2024 it took effect. Under the scheme, Link agreed to pay all its available assets to the Woodford fund, together with a voluntary contribution of £60m from Link's parent company. The scheme established a £230m redress scheme for investors.

Final Notice

Following implementation of the scheme, in April 2024, the FCA issued its Final Notice against Link. The FCA found that Link failed to act with due care, skill, and diligence in carrying out its role as ACD and that it failed to pay due regard to the interests of customers and treat them fairly - resulting in breaches of Principles 2 and 6 of the FCA's Principles for Business. The FCA did not impose a financial

penalty on Link, on the basis this would have reduced the restitution available to the investors. Absent this factor the FCA said it would have imposed a penalty of £50m (which, in the event of settlement, could have been reduced to £35m).

The FCA's findings focused on four key areas:

(1) **The Woodford fund's liquidity profile was unreasonable and inappropriate in light of its short redemption policy (of four days).**
The FCA found that had Link adopted appropriate liquidity monitoring metrics, some of its own triggers would have been breached several months (and possibly even a year) before the fund was suspended.

(2) **The metrics used to measure liquidity were unreasonable and inappropriate.**
Link had assumed a participation rate of 100% - when applying some of its liquidity metrics. A 100% participation rate assumes that the entire volume of a security that was traded on a given day could be sold without affecting the price of that security. The FCA said this was "unrealistically optimistic and led to an unjustifiably positive assessment of liquidity". Normal market practice was to use a 20-30% participation rate. The issue of the 100% participation rate was flagged in a section 166 Skilled Person Report from October 2018. But despite the issue being raised, no changes were made.

(3) Link failed to properly supervise the investment manager, Woodford Investment Management Ltd (WIM).
The FCA found that from September 2018 onwards, Link repeatedly told WIM that there was a need to improve the overall liquidity profile of the fund. However, Link failed to ensure that necessary action was taken.

(4) **The fund held assets which remained illiquid even after listing, increasing the risks of liquidity issues arising.**

Another central issue for the FCA was Link's failure to monitor how early redemptions were being made. When investors asked for their investments to be redeemed, the most liquid assets were sold first, worsening the decline in liquidity. This resulted in unfair treatment and losses by investors who did not redeem before the fund was suspended. The FCA found that Link should have managed this situation better by, for example, requiring assets to be sold down equally across the liquidity profile (known as 'vertical slicing').

Final remarks

The case highlights the importance of giving sufficient weight to liquidity risk management in firm's governance oversight arrangements, including sufficient challenge and escalation, particularly in volatile markets. Liquidity management is an area of increased scrutiny by the FCA. In its 'Liquidity Management Multi-Firm Review' (published last year) the FCA set out findings from the review and good practice in this space.

The scheme of arrangement aspect is also noteworthy, as it is distinct from a number of other recent consumer redress schemes. This is due to the strong collaboration between Link and the FCA. The FCA supported the Link scheme and was involved with it from its inception. The scheme formed part of Link's conditional settlement with the FCA. This contrasts with the FCA's approach in other recent schemes, for example, in *Re ALL Scheme Limited [2021] EWHC 1401 (CH)* (the Amigo Case), where the FCA opposed the scheme (in its original form). The Link example shows the benefits of early engagement with all stakeholders, including the regulator, to put the firm on the path of least

resistance and achieve a successful outcome.

The Final Notice against Link, is not the end of the Woodford story - the FCA also recently published a separate warning notice against Neil Woodford (founding partner and manager of the Woodford fund) and the investment manager – WIM.

RECENT NEWS //

LIBOR-Rigging Conviction Upheld by Court of Appeal

The Court of Appeal has upheld Tom Hayes conviction for manipulating the LIBOR benchmark interest rate. Hayes was convicted in 2015 and sentenced to 14 years imprisonment (later reduced to 11 years). Hayes' current appeal was heard alongside that of Carlo Palombo, another trader who was convicted in 2019 for manipulation of EURIBOR. The cases were referred to the Court of Appeal by the Criminal Cases Review Commission (CCRC), following a US decision which overturned similar convictions of ex-Deutsche Bank traders, Matthew Connolly, and Gavin Black. Hayes' main arguments on appeal were: (1) that it was wrong in law that commercial considerations were prohibited in the LIBOR process; and (2) that the prosecution did not fulfil its obligation to prove the test for dishonesty. The Court of Appeal disagreed with both arguments and dismissed the appeals.

SFO Update: Ephgrave gives evidence to Justice Committee; Five-year strategy published; More disclosure troubles for the SFO; Ex-Petrofac executives and ex-Patisserie Valerie executives all plead not-guilty ahead of trials in 2026; Raid and arrests in new care home fraud investigation; Conviction for investment manager of Axiom Legal Financing Fund

SFO Director, Nick Ephgrave, gave evidence to the Justice Committee on 14 May, covering the direction of travel and priorities for the agency. Key takeaways from the session were:

(1) **Faster charging decisions** – Ephgrave wants to achieve a three-year target between opening an investigation and making a charging decision. He said there should be early and regular review of cases - the presumption will be that an investigation will be closed unless there is a reason for it to continue.

(2) **Paying whistleblowers** – Ephgrave reiterated his view that the UK should consider paying whistleblowers for providing evidence of wrongdoing, where this leads to a corporate settlement.

(3) **Disclosure** - Ephgrave said the agency has taken onboard recommendations from the reviews carried out by Brian Altman and David Calvert-Smith into historic disclosure failings by the agency. Ephgrave wasn't questioned on the agency's more recent disclosure problems relating to its disclosure software programme (addressed below). There was also discussion of the 'independent review of disclosure and fraud offences', currently being conducted by Jonathan Fisher KC. On this, Ephgrave said he was keen for there to be "better, superintended engagement between defence and prosecution teams on disclosure, so we can come together on things like search terms and what's in and out of scope." Ephgrave also said the definition of "relevant" in terms of what the SFO must disclose to defendants, should be narrowed. He suggested that it should mean "relevant to the case as charged" as opposed to "relevant to the investigation more generally."

(4) **More staff** – the SFO expects to have a vacancy rate of 15% by the end of 2024, which reflects an improvement from the 24% Ephgrave faced when he became director in September 2023. The majority of the recent recruits have filled investigator roles.

Last month the SFO published its five-year strategy. The paper touched on some of the same issues discussed by Ephgrave in his evidence to the Justice Committee and centres around four key objectives:

(1) Having a highly specialised, engaged, and skilled workforce.

(2) Harnessing the technology and tools of a changing world.

(3) Combating crime effectively through intelligence, enforcement, and prevention.

(4) Being a proactive, authoritative player in the global and domestic justice system.

In the detail behind these objectives, the SFO's strategy paper identifies some specific aims, including exploring incentivisation options for whistleblowers (a point that has now been raised by Ephgrave several times); pushing for a disclosure regime that is "fit for today's challenges"; and making more use of covert tactics and powers. The SFO's plans are expressed in board terms, and it remains to be seen how they will be implemented in practice.

The SFO's ongoing disclosure problems have hit the headlines again. On 22 April, the agency confirmed that it has commissioned a review of "relevant cases" where problems with its current and historic document review software may have caused the agency to overlook potentially exculpatory information. The agency opened the review after an internal memo in February 2024 flagged problems with its disclosure tool, during its investigation into London Mining. Only days after announcing this review, HM Crown Prosecution Service Inspectorate (HMCPSI), an organisation created to inspect the SFO and CPS, released a report saying the agency has made progress in improving its disclosure process. However, HMCPSI also said that staff within the SFO "are not confident" with the new system and there is a "clear need" for the agency to ensure that staff have the necessary skills.

Petrofac's former chief operating officer and another former executive were arraigned on 2 April on charges of offering and paying over $30m in bribes to earn contracts in the Middle East. Both individuals entered not-guilty pleas. Their trial has been set for 5 October 2026. In a separate arraignment hearing on 26 April, Patisserie Valerie's former chief financial officer and three others pleaded not guilty to fraud charges. The former executives of the bakery chain have been charged with conspiring to inflate the cash in Patisserie Holding's balance sheets and annual reports, including by providing false documentation to the company's auditors. Their trial is scheduled to start in March 2026.

The SFO has carried out the latest in a string of raids by the agency, also making three arrests. This most recent raid was in connection with the new care home fraud investigation involving property developer, the Carlauren Group. The Group collapsed into administration in November 2019. The SFO said the Group had offered investors 10% returns on investments into 23 properties across the UK, but that only nine were ever operational. This is the fifth new investigation launched by the SFO since director Nick Ephgrave took over as head of the agency.

On 3 May the SFO reported that it has secured the conviction of former investment manager, David Kennedy, for his part in a £100m investment fraud. Kennedy managed Axiom Legal Finance Fund and promised investors a secured return by offering loans to UK law firms that were pursuing no-win-no-fee cases. Kennedy was found to have used investor money to fund thousands of high-risk cases that were not independently vetted and often failed at court. He was also found to have diverted over £5.8m from Axiom and put the funds in offshore bank accounts and complex trusts to pay for items for his own benefit. The SFO opened an investigation into the collapse of Axiom Legal Financing Fund in July 2014.

FCA / PRA Update: FCA's proposal to publicise enforcement investigations under increasing scrutiny

with inquiry launched by the Financial Services Regulation Committee; New FCA Consultation on the Financial Crime Guide; FCA dismisses complaint about its handling of the British Steel Pension Scheme scandal

The consultation period for CP24/2 closed on 30 April, marking the end of one of the most contentious FCA policy proposals of recent years. The consultation, which was first announced in February, proposes to publicly announce the opening of and provide updates about enforcement investigations - which would include the name of the firm and a summary of the suspected breach. The consultation has prompted significant public debate, including comments from the Chancellor, who warned the FCA against its plan to "name and shame" companies under investigation. The FCA has published correspondence addressing concerns raised by the House of Lords Financial Services Regulation Committee regarding the proposals. Points of interest from those letters are:

- In its letter of 25 April, the FCA justifies its proposals by noting that in 2022 the House of Commons Public Accounts Committee directed the FCA to look into whether it would be an option to publish lists of those under investigation. This letter appends a non-exhaustive list of UK authorities that do make disclosures about the opening of an investigation (including Ofcom and the CMA) alongside information about international comparators.

- In its letter of 7 May, signed by Therese Chambers and Steve Smart, the FCA said that whilst the consultation proposed to move away from a presumption against disclosure, "there would be no presumption in favour of disclosure".

Then on 9 May, the FSRC announced that it has launched an inquiry into the FCA's proposals. The committee invites written submissions to its inquiry by 4 June. The FCA is clearly in a difficult position - facing scrutiny from Parliament and the public about its proposals. The FCA has said it remains "open minded on ideas as to how to address the issues identified" and will take several months to consider feedback and further engage with stakeholders.

On 25 April, the FCA published a new Consultation Paper (CP24/9) proposing changes to its Financial Crime Guide (FCG). The most notable updates are those to Chapter 7 on financial sanctions. The FCA proposes to update this section of the FCG to reflect the learnings from its recent review of firms sanctions systems and controls, including:

(1) Reporting requirements that the FCA has introduced for firms to report sanctions breaches, or if a firm is directly or indirectly subject to any sanctions.

(2) Governance arrangements to oversee sanctions systems and controls, including senior management accountability and oversight of outsourced functions.

(3) Providing more examples of the FCA's expectations and good and bad practice when using screening tools to identify potential sanctions issues.

(4) New guidance on the FCA's expectations of how firms identify, assess and report potential sanctions breaches.

Beyond financial sanctions, further updates to the FCG relate to proliferation financing, transaction monitoring and cryptoasset businesses. The deadline for commenting on the consultation is 27 June 2024.

The FCA has dismissed a year-old complaint that it failed to act and was not prepared enough to handle the British Steel Pension Scheme (BSPS) scandal. A complaint was filed on behalf of 354 members of the British Steel Pension Scheme in January 2023. An estimated 80,000 steelworkers lost an average of

£82,6000 (and in some cases up to £489,000) when they were given unsuitable advice to transfer their pension savings into high-risk investments. Part of the complaint against the FCA was that the regulator had been "consistently behind the curve" in responding to the impact on members of the BSPS and that the FCA failed to take steps to protect customers. In its main decision letter, the FCA explained how it considered the concerns raised and actions it took and having done so concluded that it took appropriate regulatory action based on the information available at the time. The FCA therefore did not uphold the complaints. The FCA did however agree to pay each of the 345 complainants £150 for the length of time it took to respond to the complaint.

FRC Update: PwC and EY fined over London Capital & Finance audit failings; Final Settlement Decision published to KPMG on Carillion

The Financial Reporting Council (FRC), the UK's accountancy regulator, has fined three audit firms including PwC and EY over failings on their audits of London Capital & Finance plc - an investment business that collapsed in 2019 owing over £237m to investors. The FRC has fined PwC £4.9m for failings on its 2016 financial year audit of London Capital and EY £4.4m over its work on the subsequent year's audit. The regulator said both audit firms admitted to 14 breaches of the FRC's audit rules, including failing to exercise "professional scepticism with particular regard for fraud". The FRC also issued a fine of £42,000 to a third firm, Oliver Clive & Co, and a £14,000 penalty to an employee in relation to their work on a 2015 audit of London Capital.

Following the previous announcement in October 2023 of the enforcement action taken in relation to KPMG's audits of Carillion plc, the FRC has now published the two full final settlement decision notices. Carillion collapsed into insolvency in 2018, shortly after KPMG had given an unqualified audit opinion on its financial statements. Following an investigation into KPMG's audits for the financial years 2013 - 2016, KPMG was fined £30m (which was later reduced to £21m to reflect the firms cooperation with the FRC's investigation). The sanctions imposed also include reprimands and an order to KPMG to reassess and report on its current measures to prevent similar breaches.

OFSI Update: Financial Sanctions FAQ published; Enforcement and Monetary Penalties Guidance Updated

OFSI has published Frequently Asked Questions (FAQs), a new form of additional guidance, designed to offer easily accessible responses to commonplace compliance questions. OFSI strongly recommends reviewing the FAQs in conjunction with its existing guidance and legislation, which take precedence over the FAQs. OFSI will release FAQs on an 'as-needed' basis, focusing on areas where new guidance would be beneficial to a substantial audience. OFSI may withdraw FAQs at its discretion.

On 2 May, OFSI published an updated Enforcement and Monetary Penalties Guidance. The updated version of the guidance will be applied by OFSI to cases moving forward. The guidance now better explains how OFSI will apply 'case factors', the factors OFSI uses to assess suspected breaches of financial sanctions. It further introduces two new distinct case factors, "Intent, knowledge, reasonable cause to suspect" and "cooperation", that were previously included more generally in the guidance.

ICO Update: New Fining Guidance

The ICO has published new Data Protection Fining Guidance setting out how it decides to issue penalties and calculate fines. The new guidance sets out the ICO's procedure for issuing and calculating fines under the UK GDPR and DPA 2018. By replacing and supplementing sections of the ICO's 2018 Regulatory Action Policy, the new guidance is intended to provide greater transparency to organisations and equip the regulator with a framework to deliver faster and more tailored enforcement action. Commissioner Edwards stated, "*this is meant to provide the agility that has been missing*". For more information on the new ICO Guidance see our fuller client briefing on The Lens.

Preliminary Report published into UK disclosure regime for criminal cases

On 24 April, a preliminary report was published providing information on the ongoing review of the UK's disclosure regime (for criminal cases) and fraud offences. Jonathan Fisher KC is chairing the review, which he is conducting in two phases - starting with a review of the disclosure rules. Suggestions in the preliminary report include imposing sanctions on prosecutors who miss deadlines and defendants who fail to engage, as well as potential bespoke solutions for the magistrates courts, where statutory requirements are often breached. Fisher KC concluded that "all my engagement has pointed to a need for better training and resources for disclosure issues across all parts of the criminal justice system…The importance of disclosure must be embedded as an inextricable part of the criminal trial process."

SRA: Draft guidance published on internal investigations; and Thematic review of SLAPPs

The SRA has published draft guidance on internal investigations for in-house and external lawyers. The document provides guidance on understanding and managing regulatory risks and issues associated with an investigation. The new guidance doesn't set out any new regulatory standards or requirements. It has been issued to address SRA concerns that: (1) poorly managed investigations may fail to identify underlying risks; and (2) internal investigations that are not carried out properly could give rise to a breach themselves. The guidance covers:

- The existing regulatory framework
- What an investigation is?
- The important of terms of reference
- The requirement for an investigator to be independent
- Tips for managing the process - including providing support for those involved, conducting interviews, managing evidence and the report
- When to notify the SRA

The guidance does not advise on how to make sure investigations comply with employment law. Or how to meet the requirements of other regulatory authorities or law enforcement bodies.

The SRA has published a thematic review of Strategic Lawsuits Against Public Participation (SLAPPs). The term SLAPP is used to describe a misuse of the legal system to prevent or discourage scrutiny of matters in the public interest or freedom of expression. SLAPPs have risen to prominence since Russia's invasion of Ukraine. Since then, the SRA has received around 60 reports that firms were involved in SLAPPs. In its review the SRA found that amongst firms visited there was good overall awareness on the issue of SLAPPs. Most firms visited were aware of a warning notice issued on the subject in 2022, with more than half saying they had changed working practices since its publication. Most firms visited were also found to be delivering a good standard of training on both SLAPPs and conduct in disputes to their fee earners. The SRA did identify some concerns around the lack of processes and controls regarding the use of third parties instructed by firms to work on their behalf.

Horizon Scanning

- The Court of Appeal is set to hear arguments this month on the application by World

Uyghur Congress (WUC) for judicial review of the decision not to open a POCA investigation into the import into the UK of cotton produced in the Xinjiang region of China. The High Court decision, refusing WUC's challenge, was delivered in January 2023.

- Guidance for companies on the new failure to prevent fraud offence will be issued by "early summer" – said junior Home Office minister Andrew Sharpe. The new offence was included in the Economic Crime and Corporate Transparency Act, which received royal assent in October 2023. The offence is expected to come into force six months after the Guidance is published.