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Unauthorised business is sometimes no business

From [Tax & Technical](#) Nov 18 2011 BY: [Stephen Gilchrist](#) , Chairman and Head of Regulatory Law , Saunders Law

In June 2011, the Financial Services Authority (FSA) secured a summary judgment against Stephen Watkins, who traded as Consolidated Land UK, for conducting a collective investment scheme (CIS) while unauthorised.

The operation of a collective investment scheme is a regulated activity under the Financial Services and Markets Act 2000 (FSMA). It requires authorisation by the FSA.

The judgment held that Mr Watkins sold land illegally to UK consumers and ordered him to make an interim repayment of £920,000, via the FSA, to his victims. Mr Watkins has also been banned for life from selling plots of land.

The above exemplifies the efforts being taken by the FSA to close down operations involving the sale of products which are not otherwise 'specified investments' (which broadly speaking include financial products), but which are being sold in a way which contravenes FSMA.

While entrepreneurs are constantly looking at new products and new markets, the role of the FSA is often forgotten or a blind eye is turned.

FSMA prohibits any person from carrying on a regulated activity in the United Kingdom, or purport to do so, unless he is an authorised person or an exempt person.

The prohibition is referred to in this Act as the 'general prohibition'. It is also a crime which can be punished by up to two years imprisonment. These activities include offering investment advice, deposit taking, managing investments and establishing a collective investment scheme. Generally speaking, specified investments are those pertaining to financial products

Collective investment schemes

Regulated activities include the management, advising upon, and promotion of those specified investments and specifically the establishment, operation or winding up of a CIS.

Land is not a specified investment and so the sale of land is not in itself a regulated activity, but Mr Watkins fell foul of the FSA because of the suggested operation of a CIS.

In essence, a CIS arises when the persons who are to participate do not have day-to-day control over the management of the property, and either the contributions of the participants and the profits or income out of which payments are to be made to them are pooled; or the property is managed as a whole by or on behalf of the operator of the scheme.

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Essentially the FSA claimed Mr Watkins's customers were told by his sales staff that he would seek planning permission for them and also help them to re-sell the land at a profit.

The FSA claimed the promise of his business to apply for planning permission, and manage a subsequent re-sale of the land, brought the mechanics of his operation within the definition of a CIS – no day-to-day to control by the participants of the scheme and management of the investment by Mr Watkins's business.

Under FSMA, an agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party. The other party is thus entitled to recover both any money or other property paid or transferred by him under the agreement; and compensation for any loss sustained by him as a result of having parted with it.

The FSA can take action against the operator of a CIS to close him down, freeze his assets and seek recovery of all monies paid in. Bankruptcy proceedings may follow and all other methods of enforcing civil judgments are also available.

With the civil and criminal sanctions available, the moral is to ensure that whatever product is being sold to the retail market, it is not sold via any mechanism which could be construed as a CIS and thus attract the attention of one of the UK's fiercest regulators.

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