

Court of Appeal Decision in Financial Conduct Authority v BlueCrest Capital Management: Implications for Regulated Firms

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Introduction

On 2 October 2024, the Court of Appeal delivered a significant judgment in the case of *Financial Conduct Authority v BlueCrest Capital Management (UK) LLP* ([2024] EWCA Civ 1125). This decision addresses: (a) the scope of the Financial Conduct Authority's (FCA) powers under the Financial Services and Markets Act 2000 (FSMA) to impose redress requirements on an individual regulated firm; and (b) on the scope of the jurisdiction of the Upper Tribunal. The judgment has far-reaching implications for the regulatory landscape and the operational conduct of firms within the financial services sector.

Background

The case arose from two notices issued by the FCA to BlueCrest Capital Management (UK) LLP (BCMUK): a first supervisory notice (FSN) dated 30 September 2021, and a decision notice (DN) dated 4 November 2021. The FSN imposed a requirement for BCMUK to pay redress to Non-US Investors in the External Fund, estimated to exceed US\$ 700 million. The DN imposed a financial penalty of £40,806,700. Both notices were based on alleged breaches of Principle 8 of the FCA's Principles for Businesses, concerning the management of conflicts of interest.

BCMUK referred the notices to the Upper Tribunal, which ruled that the FCA's power to impose a redress requirement under s. 55L FSMA was circumscribed by the conditions set out in s. 404F(7) FSMA. The FCA appealed this decision, leading to the current judgment.

Key Issues and Findings

The Court of Appeal's judgment addressed two primary issues:

- The Scope of the FCA's Power to Impose Redress Requirements:** The Court of Appeal held that the FCA's power under s. 55L FSMA to impose redress requirements on an individual firm is not constrained by the four conditions of s. 404F(7) that have to be met before the FCA can impose an industry-wide consumer redress scheme. The court emphasised that s. 55L grants the FCA a broad discretion to impose requirements that it deems desirable to advance its operational objectives, including consumer protection. This power includes the ability to impose redress requirements based on past conduct without needing to establish the four conditions of loss, causation, duty, and actionability. But this does not give the FCA a *carte blanche*. It must still act rationally and within its powers. As the lead Court of Appeal judgement stated "I would readily accept that where none of the Four Conditions are fulfilled, it will rarely be the case that the FCA would be able to justify the imposition of a redress requirement as rational ..."
- The Jurisdiction of the Upper Tribunal:** The court also considered the scope of the Upper Tribunal's jurisdiction when a decision or notice is referred to it. The Court of Appeal, consistent with earlier cases, concluded that the "matter" referred to the Tribunal

encompasses any issues that have a real and significant connection with the subject matter of the process culminating in the decision notice or supervisory notice. This broad interpretation allows the Tribunal to consider new evidence and allegations that were not explicitly included in the original notices, provided they are connected to the underlying regulatory concerns.

Implications for Regulated Firms

The Court of Appeal's decision has several important implications for regulated firms:

- 1. Expanded FCA Powers:** The judgment confirms that the FCA has wide-ranging powers to impose redress requirements on individual firms without being limited by the stringent conditions of s. 404F(7). This means that firms must be prepared for the possibility of significant redress obligations being imposed based on the FCA's assessment of what is necessary to protect consumers, even if the traditional legal conditions for redress are not met.
- 2. Increased Regulatory Scrutiny:** Firms should expect more rigorous scrutiny of their conduct, particularly in relation to conflicts of interest and the management of client relationships. The FCA's ability to impose redress requirements retrospectively underscores the importance of maintaining robust compliance frameworks and ensuring that all regulatory obligations are met.
- 3. Broad Tribunal Jurisdiction:** The decision reaffirms the broad jurisdiction of the Upper Tribunal in regulatory disputes. Firms should be aware that the Tribunal can consider new evidence and allegations that were not part of the original FCA notices. This reinforces the need for comprehensive and proactive engagement with the FCA throughout the regulatory process, as new issues may arise during Tribunal proceedings.
- 4. Strategic Considerations:** Given the FCA's enhanced powers and the Tribunal's broad jurisdiction, firms must adopt a strategic approach to regulatory compliance and dispute resolution. This includes thorough documentation of compliance efforts, early identification and mitigation of potential conflicts of interest, and effective communication with the FCA to address any concerns before they escalate to formal notices.

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