High Court rejects "price/market reliance" for s.90A and Schedule 10A FSMA claims

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This decision is likely to place a significant limit on s.90A/Schedule 10A FSMA claims by "passive" investors who do not actively manage their investment portfolios

The High Court has granted reverse summary judgment for certain claims brought by institutional investors against Barclays plc (**Barclays**) under s.90A and Schedule 10A of the Financial Services and Markets Act 2000 (**FSMA**) for various alleged misrepresentations or omissions in published information: *Allianz Funds Multi-Strategy Trust v Barclays plc* [2024] EWHC 2710 (Ch).

The court considered for the first time whether “price/market reliance" satisfies the reliance requirement under s.90A/Schedule 10A FSMA. It ultimately dismissed claims brought by 241 claimants who had not read or considered the published information alleged to contain misstatements or omissions when deciding to buy, hold or sell Barclays' shares.

The court also held that liability for dishonest delay attaches to an issuer only where there has been a late publication; it does not apply where there has been a failure to publish the information at all. This would only give rise to a claim for an omission, for which reliance on the published information must be proved. Approximately 60% of the total quantum of the claims have now been struck out.

The decision is likely to significantly limit s.90A/Schedule 10A claims by "passive" shareholders who do not actively manage their investment portfolios. Since reliance can only be satisfied if investors have read the published material, such passive shareholders have no cause of action under s.90A/Schedule 10A FSMA. Additionally, if an issuer has *never* published the relevant information, this only gives rise to an action for an omission, not dishonest delay. The decision is likely to reduce the attractiveness of these claims for investors and those who fund these claims as claimants will need to prove they actually read or considered the relevant published information. It is therefore a welcome development from the perspective of listed issuers.

You can find our previous blog posts considering s.90A and Schedule 10A FSMA here.

We consider the decision in further detail below.

s.90A and Schedule 10A FSMA

S.90A and Schedule 10A FSMA impose civil liability on issuers of securities for untrue or misleading statements or omissions in all documents (except prospectuses or listing particulars, where the issuer has potential liability under s.90 FSMA) published to the market via a regulatory information service where a person discharging managerial responsibility (a **PDMR**) at the issuer knew that, or was reckless as to whether, the statement was untrue or misleading, or knew the omission to be a dishonest concealment of a material fact, or where there has been a dishonest delay in publishing relevant information. It is a requirement for a successful claim under s.90A/Schedule 10A that a shareholder must have acquired, continued to hold or disposed of securities in reasonable reliance on the published information to which the claim relates.

Background

The claim arose following settlements in 2016 between Barclays and: (i) the US Securities Exchange Commission; and (ii) the New York Attorney General; in respect of misrepresentations regarding its "dark pool" trading facilities.

The claims under s.90A/Schedule 10A FSMA allege that Barclays made false and misleading statements or omissions regarding its "dark pool" trading and its related investor safeguards. Additionally, the claimants allege that Barclays dishonestly delayed publishing the relevant information. The claimants seek damages for the diminution in value of Barclays shares, which they allegedly purchased and/or continued to hold in reliance on the bank's published information, resulting in financial loss. They argue that Barclays' failure to disclose accurate information about its trading practices and safeguards misled investors, causing them to suffer losses when the true nature of the "dark pool" trading facilities was revealed.

The claimants fell into the following three categories:

- Category A: Claimants who read and relied upon the relevant information directly;
- Category B: Claimants who read and relied on the relevant information indirectly through other sources, such as the reports of brokers or financial analysts; and
- Category C: Claimants who relied on the relevant information because their investment processes proceeded on the basis that: (a) Barclays was legally required to publish certain information; (b) Barclays' share price would reflect the contents of the published information; and (c) their investment decisions took account of Barclays' share price and its movements (referred to as "price/market reliance" or "fraud on the market" theory in other jurisdictions). This category includes index or tracker funds which invested in shares based on tracking of an index like the FTSE 100 and trading decisions made based on algorithms.

219 claimants fell within Categories A and B (alleging loss of £210 million) and the other 241 claimants fell within Category C (alleging loss of £330 million).

Barclays applied to strike out, or alternatively sought reverse summary judgment in respect of: (a) the Category C claims, arguing that reliance could not be established; and (b) the claims for dishonest delay.

Decision

The court held that the claims advanced in Category C had no real prospect of succeeding at trial and that there was no reasonable claim for dishonest delay. In reaching this conclusion, the court analysed the need to prove reliance on the published information and the interpretation of dishonest delay in publishing information, both of which are considered in more detail below.

Reliance requirement

Barclays argued that for a claim under paragraph 3 of Schedule 10A FSMA, claimants must prove they read or considered the published information containing the untrue or misleading statement or omission. The claimants contended that in an efficient market, an issuer's share price reflects its published information. Accordingly, investors indirectly rely on all published information because it is incorporated into the price. They argued that this issue was novel and unsuitable for summary determination.

Considering the legislative test at paragraph 3 of Schedule 10A FSMA, the court made the following findings:

- **Common law test of reliance applies.** The court held that the legislative intent was to incorporate the common law test of reliance from the tort of deceit into Schedule 10A of FSMA. This was applicable to both misleading statements and omissions. Unlike s.90 FSMA, s.90A FSMA expressly requires reliance. The court reasoned that, like the tort of deceit, proof of liability requires that a claimant prove both reliance and causation as "separate ingredients" of the claim. The court found it "obvious" that Parliament did not intend to "start afresh", but to adopt the reliance test from the tort of deceit, consistently applied by the courts for almost 150 years. The requirement to act “in reliance on published information” was intended to restrict recovery to those investors who could prove reliance on the published information, not just loss suffered as a consequence of a misleading statement or omission being made to the market (ie causation).
- **Support for interpretation of legislative intention.** The court commented that both the 2007 Davies Review (a government-commissioned report to examine and provide recommendations on the liability of issuers of securities for misstatements and omissions in their published information) and subsequent the treasury consultation, confirmed that the legislative intent was to incorporate the common law test of reliance from the tort of deceit.
- **Comparison with Australian law.** The claimants referenced the Federal Court of Australia's decision in *TPT Patrol Pty Ltd v Myer Holdings Ltd* [2019] FCA 1747, which accepted "market-based causation" as sufficient to found a claim for misleading and deceptive conduct. However, the Australian statute does not require claimants to act "in reliance on" a contravention like s.90A/Schedule 10A FSMA. The wording in the applicable Australian statutes requires a claimant to establish loss or damage “by” or “resulting from” a contravention (wording more akin to s.90 FSMA).
- **Express misrepresentations.** The court held that the test for reliance for an express misrepresentation requires a claimant to prove they read or heard the representation, understood it as false, and it caused them to act in a way which resulted in loss.
- **Secondary sources.** The court considered that this test was flexible enough to accommodate indirect reliance through "secondary sources", like brokers or advisors, but does not cover indirect reliance on published information via share price movements. Accordingly, to establish liability, an investor must prove that they either read, heard or had the alleged misstatement (or had the gist of

it communicated to them) when deciding whether to acquire, hold or dispose of the shares, so long as it was reasonable for them to do so.
- **Presumption of inducement.** If it is proved that a false statement is made which was material – in the sense that it was likely to induce entry into the contract – then there is an evidential presumption (of fact, not law) that the representee was so induced. The presumption is stronger if the representation was made fraudulently. However, the court held that the presumption of inducement does not arise unless the statement was read and understood (citing *Autonomy*).

Since the Category C investors did not read or understand the statements, the presumption of inducement did not apply. Funds with "passive" investment strategies based on index tracking (like the Category C claimants) could not meet the reliance test and therefore had no cause of action under s.90A/Schedule 10 FMSA.

The court left open the question of whether it is necessary for the claimants to prove that their decision-makers or advisers applied their mind to the alleged misleading or untrue statements, as suggested in the *Autonomy* decision. This is often referred to as the "awareness" requirement, which was considered in the context of implied representations in *Loreley Financing (Jersey) No 30 Limited v Credit Suisse Securities (Europe) Limited & Ors* [2023] EWHC 2759 (Comm), considered in this blog post. This will be a matter for trial.

The court was satisfied that the "awareness" requirement is not a requirement of the test applicable to omissions. It was only necessary that investors read or had communicated to them the publication from which the information had been omitted.

Dishonest Delay

Barclays also sought strike out or obtain summary judgment on claims that it delayed publishing relevant information, for which it was allegedly liable under paragraph 5(2) of Schedule 10A FSMA.

Barclays contended that to establish liability for dishonest delay there must have been eventual publication of the information. The claim had no real prospect of success because it relied solely on the absence of any publication about certain matters, rather than any subsequent, late publication of the information.

The claimants submitted that "delay" included not only "the action of deferring or postponing something", but also "procrastination" or "waiting". They contended that finding otherwise would allow an issuer to avoid liability by opting for "permanent silence" and never publishing the relevant information.

The court concluded that liability under paragraph 5(2) did not attach "unless and until" Barclays published information to which Schedule 10A applied. Barclays' liability under this paragraph was therefore contingent upon the actual, albeit delayed, publication of information. The court explained that the claimants' construction would lead to an "absurd result" and render paragraph 3 "almost redundant". The court saw no reason why Parliament would have intended "considerable overlap" between the causes of action in paragraphs 3 (for an omission) and 5 (for dishonest delay) in Schedule 10A, which would be the case if the latter was not dependent upon actual publication. If an issuer never publishes information that they are obliged to, then the only cause of action available is for an omission, provided the claimants can prove reliance and causation.

Summary disposals.

The court held there was no compelling reason to permit the Category C claims and the dishonest delay claims to go to trial as they had no real prospect of success. Additionally, there was a compelling reason *not* to permit these claims to go to trial: the significant reduction in the scope of and quantum of the claims promoted early settlement.