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Price/market reliance and s.90A/Sch.10A FSMA claims

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The recent decision of *Allianz Funds Multi-Strategy Trust and others v Barclays Plc* [2024] EWHC 2710 is potentially very significant for investors' claims under the UK's statutory liability regime for issuers' published information.

Its approach, if followed in future, may restrict the ability of certain types of investor, such as tracker funds, to make such claims in relation to market information (other than in listing particulars/prospectuses).

s.90A/Sch. 10A FSMA 2000 – some background.

Generally speaking, these contain provisions which put civil liability onto issuers for inaccurate statements in information published to the market on a periodic or ad hoc basis (as distinct from selling documents, such as prospectuses or listing particulars).

These were responsive to the 2004 Transparency Directive, and introduced statutory liability into an area where, previously, there was no particularly clear route to redress.

Accordingly, the standard was built around fraud (rather than negligence), and, amongst other requirements, the investor who has suffered loss due to such inaccuracies must show that, in dealing with the securities, it (reasonably) relied on the published information.

Sch. 10A (via s.90A) contains the substantive provisions (in particular, paragraph 3) in respect of such information published on or after 1 October 2010, whilst an earlier version of s.90A applies to information published before that date. The historic scheme under s.90A is broadly similar.

Separate provision, in s.90 FSMA, is made for inaccuracies in prospectuses/listing particulars. As well as being limited to those documents, s.90 is framed somewhat differently (for example, there is no reliance requirement).

"Reliance" and the position of "passive" investors

The case involved claims brought, under varying combinations of s.90 and Sch.10A, by a large number of investment funds against the defendant bank.

Of these claimants, 241, a significant proportion, brought claims under paragraph 3 of Sch.10A but did not suggest that they had read or considered any of the published information identified.

Instead, their case on reliance asserted a more indirect model rooted in the idea that bank was a listed issuer required to comply with information requirements. And, in an efficient market, its share price would "price in" the content of its published information.

That being the case, when, in their investment processes (including by way of algorithm or indexation), these claimants made decisions on the basis of the bank's listed status, or its share price, they, so the argument proceeded, could also be said to be relying on the published information.

This "price/market" reliance would have particular significance to "passive" investors whose investment processes are based on tracking an index (such as the FTSE 100) as opposed to "active" decisions.

The judge's position on "price/market" reliance

In that context, the bank applied for strike out and reverse summary judgment of these Sch.10A claims on the basis that the case on reliance did not meet its requirements.

The judge (Leech J) agreed and granted the bank's application. In short, following a detailed review of the legislation and its background, he concluded that Parliament's intention was for reliance in this context to mean the same as in the common law tort of deceit, and to act as a separate, limiting, requirement on claimants [107].

In his view, that test, as applied to express representations, required a claimant to prove they read/heard the representation, understood it in the sense which they allege was false, and that it had caused them to act in a way which caused them loss. Applied to the present context, that meant that a claimant would, as a threshold point, have to prove that it, or a third party who directed/influenced its investment decisions, had read or considered the relevant published information [109,129].

Whether it was a requirement that a claimant had to *also* apply its mind to the alleged inaccuracies themselves in the published information (as Hildyard J in Autonomy had thought to be the case) was a question left open by the judge [130], although he thought that this was not so in the case of omissions [111].

Does actionable "delay" require publication?

In addition, the 241 claimants also based Sch.10A claims on a separate provision therein (paragraph 5) which applies when an investor deals in securities but suffers loss due to a dishonest delay in the publication of information to the market (this was absent from the original iteration of s.90A, and does not require "reliance" by an investor).

The claims under paragraph 5 were also subject to the bank's strike-out/summary judgment application as the claimants' case invoked an *absence* of published material about certain alleged facts; as opposed to any *actual, but late,* publication of material. As to this, the judge agreed that delay in this context carried the latter, not the former, meaning; such that these claims should also be struck out. A - dishonestly - delayed publication of otherwise accurate material was the mischief paragraph 5 was aimed at. Conversely if a defendant issuer was under an obligation to announce facts to the market and simply did not do so, then this fell to be dealt with as an omission under paragraph 3 of Sch.10A. [138-139].

Potential implications of the decision

The issues ruled upon by the judge carry great significance for the future shape of securities claims founded on Sch.10A. In particular, the position on price/market reliance and paragraph 3 is an issue which is likely to affect numerous claimants in such cases (for example, evidence provided by the claimants' legal representative in the case estimated that, in 2020, around one third of the UK investment market comprised tracker funds whose investment processes could be described as "passive"). It may not, of course, be the last word; the judgment contains numerous references to the possibility of an appeal by the claimants. So developments in that space will be closely watched.

Click here for a copy of the judgment.