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The FCA's commitment to "test and use" its powers pays off in FCA v BlueCrest Capital

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In testing times – The FCA's commitment to "test and use" its powers pays off in FCA v BlueCrest Capital

The recent decision by the Court of Appeal in *FCA v BlueCrest Capital Management [2024] EWCA Civ 1125* reverses the Upper Tribunal's decision in BlueCrest Capital Management (UK) LLP v FCA [2023] UKUT 00140 (TCC) (which we analysed in a previous article). The Court of Appeal found for the FCA, determining that the FCA was permitted to (a) amend its Statement of Case after the Decision Notice had been issued and (b) impose a redress scheme on a single firm pursuant to section 55L FSMA without reference to the four conditions (loss, causation, breach of regulatory duty, and actionability) set down in section 404 FSMA. What does this decision mean for financial service firms, particularly considering the FCA's Consumer Duty and evolving approach to enforcement? And, is this the end of this particular story?

Background

This case concerns one of the world's largest hedge funds, BlueCrest Capital Management (UK) LLP ("**BCM**"), who were accused by the FCA of failing to manage conflicts of interest pursuant to Principle 8 of the FCA's Principles for Businesses (conflicts of interest). On this basis, in November 2021, the FCA issued a Decision Notice imposing a financial penalty of £40.8 million and requiring BCM to provide redress to its investors (estimated at US$700 million). In imposing the redress requirement, the FCA relied on section 55L FSMA, which provides the FCA with powers to impose requirements on firms on its own initiative ("**OIREQ powers**"). The FCA asserted that its OIREQ powers gave it a broad general basis to impose a consumer redress scheme on a single firm simply where it considered this *"desirable"* to further any of its statutory operational objectives, here its consumer protection objective.

BCM referred the decision to the Upper Tribunal which was asked, among other issues, to consider the necessary statutory conditions to be satisfied before a redress requirement could be imposed under section 55L FSMA, and whether those were met here. Before the Upper Tribunal, the FCA also sought to amend their case to include Principle 7 of the FCA's Principles for Businesses (communications with clients) breaches, namely allegations that BCM had provided misleading information to investors and made personnel decisions that benefited senior managers personally.

The Upper Tribunal found that the FCA's powers to impose consumer redress schemes under section 55L FSMA had to be construed with, and are restricted by, its powers to impose consumer redress schemes under section 404 FSMA, the conditions of which had not been met. The Upper Tribunal refused the FCA's amended case, as such the case before the Upper Tribunal was only on the basis of the Principle 8 breaches.

The FCA appealed the Tribunal's decision to the Court of Appeal, which was heard before Lord Justice Popplewell, Lord Justice Nugee, and Lady Justice Falk in the Court of Appeal in July 2024.

The Court of Appeal's decision

On 2 October 2024, the Court of Appeal delivered its judgment, allowing the FCA's appeal and dismissing BCM's cross-appeal.

Imposition of a single-firm redress requirement

The Court of Appeal concluded that the FCA has the power to impose a single-firm redress scheme using its OIREQ powers under section 55L FSMA. The Court rejected the Tribunal's interpretation that the exercise of this power is subject to additional statutory preconditions under section 404 FSMA, namely establishing loss, breach of regulatory duty, causation, and civil actionability. The Court emphasised that the conditions for exercising this power are limited to those expressly stated in section 55L.

Lord Justice Popplewell, delivering the leading judgment, held that a redress scheme could be imposed on a firm under section 55L "*provided it is a rational decision which the FCA considers to advance the objective of securing an appropriate degree of consumer protection*". That is a surprisingly broad test, permitting the FCA a significant degree of discretion. Indeed, as Popplewell LJ also held, the effect of this decision is that, in contrast to its powers under section 404 FSMA, the FCA is entitled under section 55L to*"to impose redress for loss of a kind which is not recoverable in the courts"*.

The question now to be determined by the Tribunal is, therefore, whether the proposed redress scheme does indeed achieve an *"appropriate degree of protection"* for consumers as laid out in section 1C(1) of FSMA.

Jurisdiction of the Upper Tribunal

The Court of Appeal held that the Upper Tribunal had erred in its interpretation of its jurisdiction in concluding that it did not have authority to permit amendments to the FCA's statement of case. The Court clarified that the scope of *"the matter"* referred to the Tribunal includes any issues with "a real and significant connection with the subject matter of the process, in the sense of its procedural or substantive content, which has culminated in the decision notice or supervisory notice", but were not limited to the matters set out in the final notice.

Implications for Financial Services firms

The FCA said in its statement on 2 October 2024 that the Court of Appeal's decision *"has important wider implications both for the FCA's ability to secure redress for consumers and its ability to conduct litigation*

before the Upper Tribunal effectively". The decision is undoubtedly a welcome boost for the regulator as it seeks to *"deploy the right tool to deal with the right issue quickly"*, as per Steve Smart in his June 2024 speech, and *"to test and use our* [the FCA's] *powers to the limit"* as per Nikhil Rathi on 14 March 2024.

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The Court's decision for the FCA significantly bolsters the FCA's ability to impose redress schemes on firms. In line with the FCA's commitment to use all the statutory powers available to it, including its supervisory intervention powers as an alternative to or concurrent with enforcement proceedings, we expect to see the FCA using its wide-ranging section 55L and section 404 FSMA powers to impose redress schemes again before long.

More generally, we expect the FCA to continue to prioritise consumer redress. We saw this most recently in the FCA's H2O Final Notice, where the FCA prioritised consumer redress over a fine. This follows Therese Chambers' statement in February 2024, in the context of the FCA's agreement with Link Fund Solution to compensate investors, that the FCA would *"prioritise compensation to consumers over fines where that is the right thing to do"*. Firms are reminded of the importance of prioritising consumers' interests and ensuring compliance with the Consumer Duty – and, if things do go wrong, proactively engaging with the regulator on ways to compensate affected consumers. In this context, we note that the FCA also has significant powers under sections 382 and 384 FSMA that could be used to order firms to pay restitution for breaches of the Consumer Duty.

The decision also provides welcome clarity for the FCA on the scope of the Upper Tribunal's jurisdiction, affirming that it can consider issues closely connected to the subject matter of the FCA's decision notices. Practically this means that firms and individuals referring cases to the Tribunal need to be aware that the regulator's whole case could be back on the table, not just the matters set out in the FCA's decision notice. This does seem to create its own uncertainty and potentially increase the risks of pursuing matters through the appeals process. As the FCA seeks to crystallise outcomes in cases quicker, we might see them using this increased uncertainty to persuade firms and individuals to agree to the imposition of requirements or an outcome, rather than risk appeal.

What happens now?

The question remains whether BCM will seek to appeal the Court of Appeal's decision to the Supreme Court. Given the significance of this decision for BCM, and for regulated firms more generally, we speculate that they just might and we will watch with interest for an application for permission to appeal. The story continues…