Finally, a Consideration of Reliance in a s.90A FSMA Claim

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Introduction

As we have previously written in our series on claims made under s.90A and Sch. 10A of the Financial Services and Markets Act 2000 ("FSMA"), significant elements of establishing liability under those provisions remain largely untested before the courts. One such element is the question of what is "reasonable reliance" in the context of a s.90A/Sch. 10A claim, and how a claimant (or group of claimants) might go about proving reliance. More particularly, can claimants satisfy the reliance element of paragraphs 3 and 5 of Sch. 10A of FSMA (detailed below) even though they have not read the relevant published information?

Prior to the recent judgment of Mr Justice Leech in *Allianz Funds Multi-Strategy Trust (on behalf of AllianzGI Best Styles Global Equity Fund) and Others v Barclays PLC*[1] ("*Allianz v Barclays*"), only one judgment had substantively addressed the reliance requirement for a s.90A claim: *ACL Netherlands BV v Lynch*[2] (known as the "*Autonomy*" judgment).

In *Allianz v Barclays*, the court has dealt in some detail with the issue of reliance by investors who have not directly read the published information impugned in the claim but who instead relied on the market price of a security when taking investment decisions. The decision provides welcome clarity on the issue of reliance and will be well received by listed companies. However, the judgment will not make for pleasant reading for passive/retail investors, who will have little to no protection under s.90A. Given the significance of the decision and the potential to limit the scope of the section 90A regime, it seems inevitable that the claimants will appeal so this is unlikely to be the last word on the matter.

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1 [2024] EWHC 2710 (Ch)

2 [2022] EWHC 1178 (Ch)

Background

Paragraph 3 of Sch.10A of FSMA provides that a relevant issuer of securities will be liable to pay compensation to a person who acquires, continues to hold or disposes of those securities in reliance on published information, and suffers loss in respect of the securities as a result of any untrue or misleading statement (including any omissions) in the published information. Further, the person alleging loss must have continued to hold, or disposed of, relevant securities in reliance on the published information in question in circumstances where it was reasonable for that person to rely on the published information.

The claims in *Allianz v Barclays* relate to allegedly false and misleading statements by Barclays in its 2011, 2012, 2013 and 2014 annual reports, its 2011, 2012, 2013 and 2014 interim results announcements, and in a prospectus it published in connection with a rights issue which took place in September 2013. Further and alternatively, the claimants allege dishonest omissions from each of these sources of published information and the prospectus by Barclays, and dishonest delay in Barclays publishing particular information (contrary to paragraph 5 of Sch.10A of FSMA).

The claimant group comprised 460 institutional investors, falling into three categories:

- **Category A**: Claimants who had read and relied on the relevant published information directly, "in that they read and considered" the relevant information.

- **Category B**: Claimants who relied on the relevant published information indirectly through other sources which acted as a conduit for the substantive contents of the published information. Examples of these other sources included reviewing transcripts of investor relations calls where the contents of the relevant published information were the subject of discussion and questions, reviewing reports of brokers or financial analysts which themselves relied on published information, and reviewing news reports or analysis from news or investment information outlets which themselves relief on or referred to the published information.

- **Category C**: Claimants who suffered loss as a consequence of movements in the Barclays share price, on the basis of "price/market reliance". These Claimants were largely investors in index or tracker funds.

Barclays sought strike out and reverse summary judgment in respect of 241 claims brought by Category C claimants, on the basis that those claimants had no reasonable cause of action or alternatively no real prospect of success under s.90A/Sch.10A FSMA because they did not allege, and could not prove, that they had relied on published

information. Barclays separately sought strike out or alternatively reverse summary judgment in respect of the claimants' claims for dishonest delay.

The Position Regarding Reliance

The Category C claimants' position on reliance was based on the theory of an efficient market; that in an efficient market, the price of a particular security reflects and is effectively determined to have taken account of all relevant public information. They argued that by relying on the market price of Barclays' securities, they relied, indirectly, on the published information which would influence the price of that security in the market. This was essentially an argument along the lines of the "fraud on the market" analysis that is typically deployed by claimants in US securities litigation.

By contrast, Barclays argued that the common law test for reliance, established in the context of the tort of deceit, should apply to claims under s.90A/Sch.10A. Applying that test, claimants must show that they read the published information containing the misleading statement or omission in order to demonstrate reliance.

In determining whether the Category C claimants had met the reliance requirement of Sch.10A, Leech J considered the only previous substantive decision on the subject – Autonomy. In that case (which was unusually fact-specific, and a case in which reliance was not a significant issue), the court had stated that "*the requirement for reliance cannot be satisfied in respect of a piece of published information which the acquirer did not consider at all*".[3] Mr Justice Leech also considered the legislative background to s.90A/Sch.10A in some detail.

Ultimately, Leech J agreed with Barclays and concluded that the common law test for reliance in the tort of deceit would apply. That required each Category C claimant to prove that: (i) they had read or heard the representations made in the published information; (ii) they understood the representations in the sense which they now allege was false or misleading; and (iii) that the representations caused them to act in a way which caused their loss. The Category C claimants could not show this, nor could they rely on the presumption of inducement because they had not read the published information. Accordingly, the 241 Category C claims were struck out, removing a total of approximately £330 million from the total value of the claim.

[3] [2022] EWHC 1178 (Ch) at [505]

Dishonest Delay

Paragraph 5 of Sch.10A FSMA provides that an issuer of securities will be liable to pay compensation to a person who acquires, continues to hold or disposes of those securities and suffers loss in respect of the securities as a result of a delay by the issuer in publishing relevant information. For liability to arise, a person discharging managerial responsibilities within the issuer must have acted dishonestly in delaying the publication of the information.

Notably, there is no reliance requirement in the dishonest delay provision in paragraph 5 of Sch.10A FSMA, reducing the burden on claimants when compared to the requirements of paragraph 3 of Sch.10A.

In seeking to have the claims for dishonest delay struck out, Barclays argued that for paragraph 5 of Sch.10A FSMA to apply, relevant information must have been late but published eventually. The claimants argued that a "continuing delay" of relevant information being published encompassed any information that ought to have been published earlier by Barclays (even if it was not ultimately published). Barclays argued that a claim for a "continuing delay" in the form put by the claimants would essentially be a claim for an omission of published information under paragraph 3 of Sch.10A FSMA. Allowing the claimants to claim for dishonest delay in relation to information which had never been published would in effect render claims relating to omissions under paragraph 3 of Sch.10A FSMA redundant. In effect, there would be substantial overlap between claims under paragraphs 3 and 5, which cannot have been Parliament's intention. Leech J ultimately agreed with Barclays, finding that claims for dishonest delay where there was no publication or announcement had no real prospect of succeeding under paragraph 5 of Sch.10A FSMA at trial.

Where Are We Now?

The judgment in *Allianz v Barclays* brings welcome clarity to the question of reliance and suggests, for now at least, the US style fraud on the market type theories will not be available to UK claimants. That will inevitably mean it is harder to get these claims off the ground (at least for certain classes of claimants).

In particular, the decision has effectively narrowed the potential scope of claims under s.90A/Sch.10A FSMA for "passive" investors who do not actively take part in reviewing materials published by the issuers in whose securities they invest. For those investors, protection for losses suffered as a result of misleading or false information published by issuers covered by FSMA will be limited to claims under s.90 relating to formal listing

particulars and prospectuses, as there is no reliance requirement under that provision. However, Leech J left open the possibility that a claimant could satisfy the reliance test by pointing to indirect reliance – the Category B claims – for example if a fund manager or broker relied on and referred to the relevant published information in discussions with claimants.

Whilst the decision on dishonest delay makes sense as a matter of logic, one perhaps unintended consequence of the judgment is that issuers may have an incentive to delay indefinitely publishing particular information to the market which they might otherwise have published (i.e. because investors must show reliance in respect of omissions under paragraph 3 of Sch.10A but there is no such requirement for delayed publication under paragraph 5 of Sch.10A).

Whether or not that is a tangible concern remains to be seen given the obligations under the Disclosure, Guidance and Transparency Rules regarding timely publication of relevant information. Questions of breach of directors' duties might also arise, which directors would no doubt wish to avoid.

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