Securities Litigation in England and Wales: An Overview of ss. 90 and 90A FSMA Claims

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Introduction

Unlike other jurisdictions, such as the United States, securities litigation in England has been relatively uncommon despite a legal framework being in place for decades (and even longer for prospectus liability). The tide appears now to have turned as the courts have witnessed a steady increase in the number of cases in recent years. A number of factors have contributed to this development including: (i) the rise of third-party litigation funding in the United Kingdom, which has identified group actions against public companies as a potential area for investment; (ii) the prominence and increased use of Group Litigation Orders, which provide a straightforward opt-in procedure for claimants to join a class action; and (iii) the availability of 'After the Event' ("ATE") insurance, which provides cover for claimants' liability to pay for the defendant's costs if the claim is unsuccessful; and (iv) a rise in the incidence of shareholder activism in relation to UK public companies. These factors have arguably incentivised investors who have suffered loss as a result of misleading information or omissions (or those funding them). It is clear that along with classic "stock drop" circumstances—e.g. a corporate scandal—there will be an uptick in securities claims associated with the increasing public focus on ESG matters.

This article is the first in a series we will be publishing examining the background, trends and key legal issues in securities litigation in England. We will also identify practical steps public companies can take to minimise the risk of successful claims while identifying some particular areas of risk. In doing so, we draw upon experience from more developed jurisdictions, particularly the United States, but also identify certain trends in claims currently before the English courts.

To start with, this article discusses the background and elements of the relevant provisions of the Financial Services and Markets Act 2000 ("FSMA"), which provides the statutory cause of action for shareholders of public companies who have suffered loss caused by untrue or misleading statements in listing particulars or prospectuses, as

well as other published information in relation to relevant securities. We also discuss the impact of some relevant cases.

Background and Overview of ss.90 and 90A FSMA

Statutory liability for untrue statements in prospectuses has been available (if seldom utilised) under English law since the Directors Liability Act 1890. By contrast, English law did not specifically provide any statutory relief for misstatements in other published information until s. 90A FSMA was enacted in 2006. Although the issue of directors' responsibility for disclosures (and indeed, that of other persons) came under the microscope as a result of the DTI Inspectors' investigation and subsequent Report into the affairs surrounding the flotation of Mirror Group Newspapers PLC, the more immediate catalyst for legislative change was the EU Transparency Obligations Directive in 2004, which required Member States (including the UK at the time) to align national rules with the stricter disclosure standards outlined in that Directive and to enact appropriate liability rules under national law.

Under the Directive, a greater emphasis was placed on the importance of securities issuers providing accurate information to investors through regular flows of information. Increased investor protection was viewed as one means by which barriers to the admission of securities to regulated markets could be reduced. Section 90A FSMA (the operative provisions of which have now been superseded by the contents of Schedule 10A FSMA) provided part of the national law relief in the UK (as required by the Directive).

Consequently, FSMA now covers both forms of statutory cause of action, with s. 90 claims concerning misleading or untrue statements in listing particulars and prospectuses and s. 90A and Schedule 10A applying to misleading or untrue statements in other published information. For convenience, we refer to s. 90A as shorthand for claims brought under Schedule 10A.

Sections 90 and 90A complement the existing claims available to shareholders, for example, through the common law actions for deceit or negligent misstatement. They are, however, distinct and substantially different because of the various limitations and challenges associated with common law claims. The well-known Lloyds/HBOS decision is a good example of failure to establish a common law duty of care owed by directors (of the bank) to individual shareholders with respect to market statements (an element which is not required under s. 90A). Similarly, Hildyard J in the Autonomy litigation (see below) identified the difficulties with these forms of common law claims when compared to the s.90A regime—the tort of deceit is not appropriate for a claim

concerning misleading information in financial accounts, as financial accounts do not typically induce someone to acquire securities.

Therefore, in addition to the macro reasons for increased FSMA claims identified earlier, claimant lawyers have had a successful education on the pitfalls and challenges associated with common law claims following the *Lloyds/HBOS and Autonomy* decisions and so are more willing to proceed under the FSMA provisions.

Elements of A s.90 and 90A FSMA Claim

As we have seen, ss. 90 and 90A are directed at two different aspects of the same mischief, namely untrue or misleading information. Whilst similar, each has distinct elements and different defences, which we summarise below.

S.90 FSMA

Under the terms of s. 90, any person responsible for listing particulars, supplementary listing particulars, prospectuses or supplementary prospectuses is liable to pay compensation to a person who has:

- acquired relevant securities, and
- suffered loss in respect of the securities as a result of:
  - any untrue or misleading statement therein, or
  - any omission of information required to be included but not included.

Schedule 10 then sets out a series of defences that can be raised to avoid liability by a responsible person (such person being the issuer, its directors who are responsible for the contents of the document, and any others who authorise its contents or accept responsibility in the document).[1] In summary terms, these are:

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[1] Naturally, this is a wider group of persons than under s. 90A (considered below) which is limited to the issuer. It is also broader than the "person discharging managerial responsibilities" as required for s. 90A claims. Instead, s. 90 could apply to any person who authorises the contents of the document and is named in the document, or is recorded in the document as accepting responsibility for the document. In theory, this could extend to third-party advisors, but that is unlikely if they have simply provided advice rather than accepted responsibility for the document. It does, however, cover those who authorise themselves to be named in the document as future directors of the company.

- the person held a reasonable belief that the statement in question was true and not misleading, or
- the omission of information was proper, and one or more of the following are satisfied:
  - the belief continued until the time of the acquisition of the securities;
  - the securities were acquired before it was reasonably practicable to bring a correction to the attention of persons likely to acquire them;
  - all reasonable steps were taken to draw a correction to the attention of those who acquired the securities before they were acquired; or
  - the belief continued until after the commencement of dealings in the securities following admission and they were acquired after such a lapse of time that the person ought in the circumstances to be reasonably excused.

A number of uncertainties remain given the relative absence of judicial consideration of this provision and the associated defences.[2] However, it seems clear that the claimant(s) need not have relied on the information in order for a claim to be established. This is because the focus of the provision is on loss suffered rather than the circumstances surrounding the acquisition of the securities by the claimant. That focus is explained by the fact that it can be reasonably assumed that a purchaser of securities would have read and relied upon the listing particulars, prospectus, etc. which were issued in support of the sale of the relevant securities. The lack of a need to show reliance for s.90 is an important distinction when compared to s. 90A claims and those in the tort of deceit or for misrepresentation.

S.90A FSMA

By contrast, liability under s. 90A is limited to the issuer. In summary, an issuer of securities is liable to pay compensation to a person who:

- acquires, continues to hold, or disposes of securities in reasonable reliance on published information, and
- Suffers loss in respect of the securities as a result of;

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[2] For example, it remains to be seen exactly how the reasonable belief element could be satisfied and the degree of granularity required to evidence reasonable belief.

- Any untrue or misleading statement in that published information, or
- The omission from that published information of any matter required to be included in it.

However, in order for the issuer to be found liable, a person discharging managerial responsibilities within the issuer (normally a director of the issuer) ("PDMR") must have known that the statement was untrue or misleading or was reckless as to whether it was true or misleading. Similarly, in respect of omissions, a PDMR must have known the omission to be a dishonest concealment of a material fact. FSMA also provides for liability when there has been dishonest delay in publishing information (as has been alleged, for example, in the recent Wirecard scandal).

In considering the elements, it is clear that s 90A claims involve significant evidential hurdles given that the statutory provisions require proof of reliance by the shareholder and that a PDMR had the requisite level of knowledge. These would typically entail a factual investigation (and, depending upon the circumstances, potentially a very significant one that could be costly). On the one hand then, establishing an s.90A FSMA claim is theoretically more difficult (and certainly more expensive) than an s.90 claim, although this must be balanced by the fact that it could be founded on a wider range of publications when compared to an s.90 FSMA claim (which is limited only to listing particulars and prospectuses).

Limitation Period

For completeness, the limitation period for statutory claims like s.90 and s.90A FSMA is six years from the date of accrual of the cause of action. For s.90 FSMA claims, the cause of action is likely to accrue at the point when the securities were acquired pursuant to the prospectus. For s. 90A FSMA claims, the cause of action may accrue when the untrue, misleading or omissive publication was made, or when its falsity could have become known in the case of concealment.

Notable Judgments on s.90 and s.90A FSMA Claims

Although there have been relatively few decided cases under the FSMA provisions, recent years have seen a substantive (and lengthy) decision on s.90A (the Autonomy litigation) and significant interim judgments on ss 90 and 90A matters. Below, we discuss a few high-profile examples, but a later article in this series will explore some of the unresolved legal issues in more detail including by reference to more detailed examination of these cases.

S.90 FSMA Cases

The most prominent example of prospectus litigation in the UK to date has been the RBS (*Rights Issue Litigation*), which was a group litigation that was brought by roughly 9,000 investors. The group litigation spawned a number of judgments at the interlocutory stage on things such as privilege and whether ATE insurance and litigation funding is required to be disclosed, before it was eventually settled on the eve of the trial. Nonetheless, the course of the litigation showed it was possible to pursue high-value and complex group litigation on a securities law claim to trial under the UK legal framework.

The case arose out of a £12 billion rights issue on the basis of a prospectus dated 30 April 2008 relating to the issue of shares by the Royal Bank of Scotland ("RBS"). A few months later, in October 2008, at the height of the financial crisis that hit the US and UK banking sector, RBS failed and required emergency public support from the UK government. At the time, the RBS share price collapsed, and many of the Claimants suffered near total loss of the value of their investment in the rights issue shares. By various actions (including s.90 FSMA), the Claimants sought recovery against certain of the key RBS directors responsible for the prospectus. The Claimants contended that these directors had misrepresented the financial health of the bank in the prospectus by omitting critical information such as the fact that RBS was relying on nearly $12 billion of cheap loans from the US Federal Reserve at the time.

S.90A FSMA Cases

Autonomy

ACL Netherlands BV v Lynch [2022] EWHC 1178 (Ch) ("***Autonomy***") is the first substantive judgment of the English courts following trial on matters concerning s. 90A.

Facts: The case concerned the purchase of the entire share capital in Autonomy (at the time a public company) for $11.1 billion by Hewlett Packard ("HP"). The Claimants (including HP and Bidco—a special purpose vehicle set up by HP to purchase Autonomy) alleged that the Defendants (who were, at the relevant time, directors of Autonomy) had breached their duties in respect of dishonestly and deliberately misrepresenting the financial performance of Autonomy during a specific period (so as to inflate the purchase price).

It is worth noting the rather unusual way that s.90A FSMA featured in the claim. A s.90A FSMA claim can only be brought against the issuer of securities. However, the issuer in this case was Autonomy, which was owned by the Claimants and therefore would be of no benefit as a target. To recover against the Defendants, the following steps were taken: (i) the Claimants notified Autonomy of the claims; (ii) controlled by

HP, Autonomy admitted liability (and quantum) under s.90A FSMA to Bidco; (iii) Autonomy then sued the Defendants, i.e. its former directors, for the loss under ordinary breach of duty principles (relying on the liability of the Issuer) and under s 90A FSMA because Schedule 10A FSMA permits an issuer to claim losses back from PDMRs. The Court accepted that this "dog-leg structure" was conceptually possible but required the Claimant to prove its case against the Issuer, and the Defendants took no overall objection.

Decision: The specific allegations raised by the Claimants related to six distinct areas within the Company's business and accounting. Notably, the Court undertook an extensive analysis of the conditions around establishing liability in an s.90A claim and ultimately found for the Claimants in large part. In doing so, the Court provided guidance on the application of s.90A (and Schedule 10A) FSMA in a very detailed way. For example, the Court considered the meaning of reasonable reliance, what constitutes published information, when a PDMR may be said to have known or was reckless about untrue or misleading statements as well as the appropriate measure of loss. Understandably, given the unorthodox nature of the dog-leg structure of the claim, there are many issues more relevant to shareholder class actions which remain largely unanalysed.

The G4S Litigation and the Tesco Litigation

Two other proceedings worthy of mention are the G4S Litigation and the Tesco Litigation, both of which have been the subject of judgments on interim applications.

Facts: In the case of *Various Claimants v G4S Limited* [2022] EWHC 1081 (Ch), the Defendant, G4S, was the issuer of securities. The Claimants were institutional investors who alleged that the Defendant had breached s.90A FSMA. In a summary judgment application, the Defendant sought to strike out the Claimants' allegations on the grounds that certain named individuals were not PDMRs (hence failing to satisfy a prerequisite for liability). The Defendant also contended that the Claimants had not properly pleaded a realistic case that the contested PDMRs were de facto directors of the Defendant, and the case had no real prospects of succeeding at trial.

Decision: The Court ultimately found that where an issuer had directors (whether de jure, de facto or arguably shadow), the directors were PDMRs. Accordingly, the Court rejected the Claimants' argument that PDMR status extended to non-directors who are senior executives responsible for managerial decisions affecting the future developments and business prospects of the issuer or its business units. Nevertheless, the summary judgment application failed because the Court considered that the Claimants had a real prospect of showing at trial that various disputed PDMRs were de facto directors. The Court noted in particular that existing case law showed a potential

for elasticity in the application of de facto directorship, and it would be desirable to test this based on the facts found at trial.

Facts: In the *Tesco Litigation*, the Claimants had purchased securities issued by Tesco, the Defendant, and held them in dematerialised form through a computer-based share transfer system. These securities were held through layers of intermediaries, and so the Claimants only had an entitlement to the securities by way of sub-trust.

The Claimants brought a claim against the Defendant under s.90A FSMA and alleged that the Defendant had made misleading statements which caused them to suffer loss. Para 8(3) of Schedule 10A FSMA extends the right to bring a s.90A FSMA claim to persons who had acquired or disposed of "any interest in securities". The Defendant applied to strike out the case contending that because the Claimants held their share interest through intermediaries, they did not have "interest in the securities", and they also had not technically "acquired" or "disposed" of any securities as these transactions occurred at the intermediary level (above).

Decision: The Court rejected the Defendant's arguments in SL Claimants v Tesco [2019] EWHC 2858 (Ch). It held that while the Claimant did not have any direct proprietary interest in the underlying securities, the "right to a right" which they had (under the sub-trust) was enough to be an equitable property right that fell within the expression of "any interest in the securities" in para 8(3) of Schedule 10A FSMA. Moreover, the Court affirmed that the "acquisition" or "disposal" of the securities included transactions through a chain of intermediaries which caused ultimate beneficial owners, such as the Claimants, to be vested or cease to be vested with securities.

Where to from Here?

From a review of publicly available filings in the English courts, it is clear that shareholder activism is a continuing trend. ESG and climate issues are becoming ever more prominent and we expect that the increased disclosures surrounding ESG matters, notably the Financial Conduct Authority's recent reform of disclosure rules, may be something actively considered by investors and their advisors.

Other articles in the series will include:

- discussion of the trends in underlying sources of liability such as climate issues, sanctions risks, anti-corruption statements, and supply chain issues;

- deeper examination of the key legal issues and identification of some of the more important areas of uncertainty;
- comparisons from other jurisdictions with more developed securities litigation; and
- some practical tips which can be employed to seek to minimise FSMA claims.

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Please do not hesitate to contact us with any questions.

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