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UPPER TRIBUNAL CLARIFIES LIMITS ON FCA'S POWERS TO IMPOSE SINGLE FIRM REDRESS SCHEMES

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SUMMARY

On 21 June 2023, the Upper Tribunal handed down its judgment in *BlueCrest Capital Management (UK) LLP v The Financial Conduct Authority [2023] UKUT 00140 (TCC)*. The case considers both the Upper Tribunal's jurisdiction to permit amendments to a Statement of Case, as well as the FCA's power to impose a redress scheme on a single firm.

In relation to the second point, which is the focus of this blog, the Upper Tribunal firmly rejected the FCA's expansive interpretation of its power to impose redress schemes on single firms pursuant to section 55L FSMA, which provides the FCA with powers to impose requirements on firms on its own initiative ("**OIREQ powers**"). We explore this helpful clarification of the law and consider its wider implications for firms and consumers, particularly in a climate where consumer protection is at the forefront of the FCA's agenda and the FCA's new Consumer Duty comes into force on 31 July 2023.

THE FACTS

In a Supervisory Notice issued to British-American hedge fund, BlueCrest Capital Management (UK) LLP ("**BCM**"), in 2021, the FCA imposed a requirement on BCM, pursuant to its powers under section 55L FSMA, to pay redress to BCM's investor clients (estimated by the FCA to be in the region of US$700 million). The redress payment was structured to compensate investors for allegedly excessive investment management fees paid relative to allegedly substandard services they received, following failures by BCM to manage conflicts of interest.

In imposing the redress requirement, the FCA took the bold position that section 55L FSMA gave it a broad general power to impose a consumer redress scheme on a single firm simply where it considered this "desirable" to further any of its statutory operational objectives – in this case, its consumer protection objective.

The matter was appealed 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.

THE UPPER TRIBUNAL'S DECISION

In its judgment, the Upper Tribunal firmly rejected the FCA's interpretation of its OIREQ powers under section 55L FSMA. It highlighted that, if the FCA was correct, the implication of this would be that the FCA could impose substantial consumer redress schemes on single firms even where those firms had not breached any regulatory requirements *at all*. As the Upper Tribunal noted, that would have been a surprising outcome.

Instead, the 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. Consequently, the FCA can only impose a redress scheme on a single firm using its OIREQ powers where:

1. the firm has breached a regulatory duty;
2. persons to whom that duty was owed have suffered loss that was caused by the breach; and
3. the breach is *actionable* (i.e. a breach in respect of which a private right of action is available under section 138D FSMA).

In *BlueCrest*, the Upper Tribunal found that the final limb above had not been met. The FCA's case was only permitted to proceed based on Principle 8 of the FCA's Principles for Businesses (conflicts of interest), breach of which is not directly actionable under section 138D FSMA. The Upper Tribunal therefore barred the FCA from defending the reference, in respect of the Supervisory Notice that imposed the redress scheme.

IMPLICATIONS

Firms will no doubt take comfort from the fact that the Upper Tribunal has robustly refused the FCA an almost-unfettered power to impose consumer redress schemes on single firms pursuant to section 55L FSMA.

The decision in *BlueCrest* is all the more significant in circumstances where the FCA's new Consumer Duty comes into force, for the most part, on 31 July 2023. The FCA has made it clear in the consultations leading up to this that it will be looking to secure redress for consumers who have suffered harm through breaches of the Duty. It has been commonly accepted that, because the Duty is contained within the Principles section of the FCA Handbook, it will not be privately actionable and, consequently, it will not be open to the FCA to impose consumer redress schemes under section 404 FSMA for breaches of the Duty. Following the decision in *BlueCrest,* it is now clear that

the FCA will likewise be unable to use its section 55L FSMA OIREQ powers to impose redress schemes on single firms for breaches of the Duty.

That said, the FCA's powers to impose redress schemes remain wide-ranging and significant. While the Upper Tribunal was not willing to adopt the FCA's extreme interpretation of section 55L FSMA in *BlueCrest*, this section and section 404 FSMA remain powerful tools for the FCA. It should not be forgotten that the FCA, in addition, has significant powers to order firms to pay restitution under sections 382 and 384 FSMA (which could be used, for example, to impose redress schemes on firms for breaches of the Consumer Duty).

To date, the FCA's use of these wide-ranging powers has been relatively sparing. However, *BlueCrest* demonstrates the willingness of the FCA, for whom consumer protection is at the top of the agenda, to not only use these powers now, but to test them to their limits (albeit unsuccessfully, on this occasion). We therefore expect to see a continued increase in the FCA's imposition of redress schemes on firms, notwithstanding the outcome in *BlueCrest*.

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MEET THE TEAM

Ravi Nayer

London

ravi.nayer@bclplaw.com
+44 (0) 20 3400 4796

Rhys Corbett

London

rhys.corbett@bclplaw.com
+44 (0) 20 3400 3531
