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The FSA successfully appeals a decision which restricted its powers to meet requests for assistance from the SEC and other foreign regulators

The UK's Financial Services Authority (FSA) has successfully appealed a first instance decision which had placed certain limits on its ability to assist foreign regulators with information and document gathering. The case concerned a request by the US Securities and Exchange Commission (SEC) for assistance from the FSA in the UK.

*The FSA and others v Amro International SA and others*¹ was an appeal against an order made by Mr Justice Collins which had quashed an FSA request for documents and information. Collins J had done so on the basis that the FSA request was overly broad and as such, disproportionate and unnecessary. The Court of Appeal unanimously overruled Collins J and found that the FSA request was a proper one.

Background Facts

Rhino Advisors Inc. (**Rhino**), a New York corporation, acted as investment adviser to financing companies Amro International SA (**Amro**) and Creon Management SA (**Creon**). Amro and Creon were based respectively in Panama and the British Virgin Islands. Rhino employed an Andreas Badian until 2002.

In June 2002 the SEC commenced an investigation into Rhino relating to stock trading. Following this investigation, in April 2006 the SEC started proceedings in the United States District Court for the Southern District of New York against Andreas Badian and others (the **New York Proceedings**), alleging

unlawful short selling arrangements. Amro and Creon were not defendants to that action.

On 24 July 2009 the SEC requested assistance from the FSA in obtaining documents from Goodman Jones, a firm of accountants in London. Goodman Jones had acted for Amro and Creon and were thought to hold documents relevant to the SEC's claim. The SEC request included all documents in the possession of Goodman Jones from January 2000 to July 2009, relating to Rhino, Amro or Creon.

Initially, the FSA was not satisfied that all of the materials sought under the SEC request were within the scope of the New York Proceedings. The FSA therefore sought clarification of certain matters from the SEC which the SEC provided, following which the FSA made the request of Goodman Jones, asking for voluntary compliance with it. Reflecting Goodman Jones' client confidentiality obligations, the FSA then issued a notice under Part XI of the Financial Services and Markets Act 2000 requiring Goodman Jones to provide the FSA with the information and documents requested.

¹ [2010] EWCA Civ 123

Upon learning of the demand, Amro and Creon commenced judicial review proceedings in England against the FSA's decision on the basis that:

- (a) the FSA had acted unlawfully in agreeing to appoint inspectors to obtain the documents in question under their compulsory powers; and
- (b) the notice was in any event too wide and unspecific, such that the scope of the requirement was beyond the FSA's powers.

Decision at First Instance

The court at first instance² compared the FSA request against the SEC's pleaded complaint in the New York Proceedings, finding that that it was "wrong for the FSA to agree to go beyond what is actually covered by [that] claim".

Collins J noted that Amro and Creon were not parties to the New York Proceedings, nor was it asserted in that claim that they were involved in the alleged misconduct; indeed, Creon was not even mentioned. In these circumstances, the judge found that the FSA should have decided that "it was not necessary or indeed proportionate" to issue such a wide document request and therefore quashed the decision and requests of the FSA.

In reaching this decision, Collins J was also critical of the SEC for its delay in seeking the materials in question until "the very last moment".

Decision of the Court of Appeal

The Court of Appeal unanimously overruled Collins J and allowed the FSA's appeal. Giving the lead judgment of the Court, Stanley Burnton LJ dismissed Collin J's criticisms of SEC delay and the scope of the request, saying that it was "not incumbent on the FSA to examine the SEC's request critically, and it was all the more wrong for the court to do so".

The court held that the approach adopted in the lower court of comparing the scope of the SEC request with the allegations in the New York Proceedings was wrong, as the FSA was "exercising an investigatory power, not a power of discovery, and it was not limited to requiring documents relating to the allegations then pleaded in the New York proceedings".

The court also held that the test applied by Collins J, namely whether the request was "necessary or expedient for the purposes of the investigation", was the wrong one. Rather, the correct test for exercise of the power in question was whether the information or documents sought were "relevant to the purposes of the investigation". The court acknowledged that that test was a "relatively low hurdle" and found that it was satisfied in this case, as was the additional requirement of proportionality. The FSA request was therefore a proper one.

Comment

Given the international nature of the financial markets and the corresponding need for national regulators to be able to cooperate effectively with one another, it was unsurprising that the Court of Appeal reversed the lower court's decision which had reduced the ability of the FSA to assist other regulators around the world.

In light of this case, there is still some room for negotiating with the FSA the detail of such requests. Here, Goodman Jones suggested to the FSA that a phrase used in its request ("persons affiliated with them") was unclear. The FSA responded by deleting that phrase and adding reference to specific individuals. It therefore remains important to consider carefully whether there are ambiguities in the precise wording of any request received, particularly given that non-compliance with such a request can result in a fine or even imprisonment.

However, when it comes to wholesale challenge of an FSA request of this sort on the basis that it is not relevant or proportionate, there will probably be very few cases where such challenges are successful following this Court of Appeal decision.

² [2009] EWHC 2242 (Admin)

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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