Feature

KEY POINTS

- Transcripts of earnings calls are only published by recognised means where a Regulatory News Service (RNS) announcement concerns the transcripts themselves (as opposed to the mere fact of the call).
- Statements in published information are to be construed objectively but the parties' subjective understanding may (for reasons which are unclear) also be relevant.
- A "person discharging managerial responsibility" (PDMR) must have knowledge of both the statement giving rise to s 90A liability and its falsity.
- Reliance by the claimant's controlling mind is sufficient and the common law presumption of inducement applies by analogy under s 90A Financial Services and Markets Act 2000 (FSMA).
- PDMR status is limited to English law concepts of directorship, including the elastic concept of de facto directorship.

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UK Securities fraud litigation gains momentum: *Autonomy* and *G4S*

This article examines two recent decisions in securities fraud cases: (i) *ACL Netherlands v Lynch* [2022] EWHC 1178 (Ch) *(Autonomy)*; and (ii) *Allianz Global Investors GmbH v G4S Limited* [2022] EWHC 1081. The former considered such important questions as what published information is caught by s 90A of the Financial Services and Markets Act 2000 (FSMA), how statements in such information are to be construed, what constitutes the requisite guilty knowledge and how reliance is to be proved. In the latter case, the court held that so-called "person discharging managerial responsibility" (PDMR) status in these claims is limited to English law concepts of directorship but emphasised the potential elasticity of de facto directorship in particular.

In May 2022, the High Court handed down two decisions which could have a significant impact on securities fraud in England and Wales: Hildyard J published the full version of his much anticipated judgment following the lengthy trial in *ACL Netherlands v Lynch* [2022] EWHC 1178 (Ch) (*Autonomy*); and Miles J considered the meaning of a "person discharging managerial responsibility" (PDMR) for the purposes of s 90A and Sch 10A of the Financial Services and Markets Act 2000 (FSMA) in the context of a strike out application in *Allianz Global Investors GmbH v G4S Limited* [2022] EWHC 1081 (*G4S*).

This article addresses four aspects of the *Autonomy* decision which are relevant to claims under s 90A and Sch 10A of FSMA: (i) the scope of published information; (ii) the construction of statements; (iii) PDMR knowledge; and (iv) reliance, before turning to the ambit of PDMR status as set out in *G4S*.

BACKGROUND: S 90A AND SCH 10A

Section 90A and Sch 10A of FSMA contain a regime by which investors can claim statutory compensation for loss suffered in respect of untrue or misleading statements, material omissions and dishonest delays relating to certain categories of information published to capital markets by issuers of publicly traded securities in the UK.

Paragraph 2(1) of Sch 10A provides that the compensation regime applies to information published by the issuer "by recognised means" or "by means where the availability of the information has been announced by the issuer by recognised means". Paragraph 2(2) then defines "recognised means" as "a recognised information service" or "other means required or authorised to be used to communicate information to the market in question, or to the public, when a recognised information service is unavailable".

Under para 3(2) of Sch 10A, an issuer is liable in respect of an untrue or misleading statement only if a PDMR within the issuer knew the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading. Paragraphs 3(3) and 5(2) impose an equivalent PDMR knowledge requirement on claims in respect of material omissions and dishonest delay.

Paragraph 8(5) provides that for the purposes of Sch 10A the following are PDMRs: (a) any director of the issuer (or person occupying the position of a director, by whatever name called); (b) in the case of an issuer whose affairs are managed by its members, any members of the issuer; and (c) in the case of an issuer that has no persons within categories (a) or (b), any senior executive of the issuer having responsibilities in relation to the information in question or its publication.

Further, the effect of paras 3(1) and 3(4) of Sch 10A is that an issuer is only liable to pay compensation to a person who: (a) acquires, continues to hold or disposes of the securities in reasonable reliance on published information to which Sch 10A applies; and (b) suffers loss in respect of the securities as a result of any untrue or misleading statements in that published information or the omission from that published information of any matter required to be included in it.

Whilst s 90A has been a cause of action in its current form since 2010, remarkably few authorities have considered its working and construction leaving a large scope for debate as to these matters.

BACKGROUND: THE *AUTONOMY* LITIGATION

The *Autonomy* litigation concerned the fraudulent mis-selling of Autonomy Corporation plc (Autonomy) to Hewlett-Packard (HP).

HP and Autonomy as claimants alleged, among other things, that the defendants, Michael Lynch and Sushovan Hussain were liable to Autonomy for breach of their duties as former directors. The loss in respect of which the claimants claimed was Autonomy's own liability to the special purchase vehicle which HP used to acquire Autonomy (Bidco) arising under s 90A and Sch 10A of FSMA.

That liability was in turn said to arise from untrue or misleading statements and material omissions in and from information published to the market, on which HP and Bidco relied when acquiring Autonomy.

There are some potentially significant differences between the dispute arising in *Autonomy* and more typical securities litigation brought by shareholders or groups of shareholders:

(1) The *Autonomy* litigation did not involve establishing s 90A liability between the parties to the litigation, but rather, as between two of the claimants. This was described as a "dog-leg" form of liability in the judgment.

(2) The s 90A claim was in a sense fortuitous. HP was in the market for a corporate acquisition that would assist in changing the direction of its PC hardware business. Various target companies were considered, and Autonomy was selected. A claim under s 90A was available because Autonomy happened to be a London listed public company (and, indeed, *only* a claim under s 90A was available as regards the contents of published information, per para 7(1) of Sch 10A).

(3) The private, bipartite character, financial scale and business case for the transaction meant that the due diligence conducted was of a completely different character to pre-acquisition analysis which might be expected from a typical investor in equity markets. The principal goal was for HP to generate synergies between Autonomy's business and its own. HP carried out valuations of Autonomy and carried out extensive due diligence.

(4) Autonomy itself began life as an owner-managed software start-up and by the time of the acquisition remained very much a top-down company with (as the court found) Mr Lynch involved in many aspects of the business, to an unusual degree for a FTSE 100 listed company.

SCOPE OF PUBLISHED INFORMATION

The first issue in *Autonomy* which may be relevant to securities fraud litigation more generally is the scope of "by recognised means" under para 2 of Sch 10A. The court was asked to resolve a dispute as to whether transcripts of earnings calls (ie telephone conferences) were published by recognised means on the ground that the calls were announced (along with dial-in details) by recognised means (namely, on the Regulatory News Service (RNS)). Hildyard J held that they were not, because the announcements did not concern the transcripts themselves (*Autonomy* at [451]-[456]).

This decision, if it is to be followed in future cases, will require future parties to look carefully at the wording of RNS announcements to determine whether (as in *Autonomy*) it is merely the fact of and access details for a meeting or call which has been published by recognised means or whether the contents or some other record of the meeting falls within the scope of para 2 of Sch 10A.

CONSTRUCTION OF STATEMENTS

The court then went on to consider how the meaning of a statement in published information alleged to be false is to be determined. Applying principles from the law of misrepresentation, Hildyard J reasoned that the approach was objective and depended on what a reasonable person in the relevant context would take the statement to mean; though the court noted that for multilateral statements of the kind in published information, identifying that "context" might not be straightforward (*Autonomy* at [462]).

The court also appears to have held that where the statement was genuinely capable of more than one meaning it must not only be shown that the claimant understood it in the manner alleged to be false but also that the defendant intended the meaning which the claimant alleges was conveyed. The court's reasons for this conclusion do not emerge clearly from the legal analysis at [465]-[466]. It is not clear why the defendant's state of mind should be treated as a component of the construction analysis, as opposed to PDMR knowledge.

PDMR KNOWLEDGE

In respect of PDMR knowledge for liability arising from statements, Hildyard J held, by analogy with the common law authority of *Derry v Peek* (1889) 14 App Cas 337, that it is not sufficient that a person knows the facts which render a statement untrue: he or she will only be liable "if those facts were present to his mind at the moment when the statement is made, such that he appreciates that the statement is untrue" (*Autonomy* at [469]).

The court's reference to the "moment when the statement is made" may give rise to disputes in the context of market publications. It is difficult to see why a s 90A claim would fail if a statement was made innocently in an earlier draft but discovered to be false prior to publication, and then not corrected. In the authors' view, the court was not imposing any particular temporal requirement, but rather, emphasising that the statement and its falsity must both be known.

As regards omissions, Hildyard J held that:

> "the PDMR must have applied his mind to the omission at the time the information was published, and appreciated that a material fact was being concealed (i.e. that it was required to be included, but was being deliberately left out)" (*Autonomy* at [469]).

Further, the court held that it was necessary that the PDMR understood that the thing omitted was required to be disclosed (*Autonomy* at [1739]). It may prove significant in future cases that Hildyard J indicated that there could be less room for argument around whether something should have been disclosed in the narrative "front end" of an annual report, which is the director's "proper province", than in annual accounts purporting to have been prepared in accordance with accounting standards (*Autonomy* at [475]-[476]). However, any advisor can only advise on the facts they are given. Even the question of whether accounting disclosures should be made "cannot exclusively be determined by statements of accounting principle, or by a company's accountants and auditors" and is "ultimately a matter for the judgment of the directors" (*Autonomy* at [1746]).

RELIANCE

Various aspects of the reliance requirement in para 3 of Sch 10A were considered in *Autonomy*.

First, the court considered how reliance could be made out in circumstances where the relevant claimant was incorporated by HP shortly before the transaction completed,

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and well after the decision had actually been taken by HP to acquire Autonomy. Hildyard J resolved this point by relying on the Court of Appeal's decision in *Abu Dhabi Investments v H Clarkson* [2008] EWCA Civ 699. The judge concluded that "HP can be treated as the controlling mind of Bidco, and that HP's reliance is to be treated as Bidco's reliance" (*Autonomy* at [500]). Such reasoning is likely to be helpful for claimants in the professional investment management environment where investment decision making can be split between clients and external managers.

Second, the court determined the issue of whether it is sufficient for a claimant to have relied "in some generalised sense on a piece of published information (e.g. the annual report for a given year)" or whether conversely reliance had to be proved on the individual untrue or misleading statement itself. Hildyard J concluded that the latter was correct (*Autonomy* at [503]). However, this issue is controversial in a number of s 90A claims proceeding in the Financial List and is likely to remain controversial. The court's reasoning in *Autonomy* is very shortly stated and the point is a complex one, requiring detailed analysis of the different expressions used in different parts of para 3 of Sch 10A.

Third, Hildyard J concluded that the presumption of inducement "applies in the context of a FSMA claim no less than in other cases of deceit". The presumption is a common law concept which presumes that a claimant relied on a statement which was (objectively) material to his decision making. This is a helpful development for claimants in securities cases, albeit applicability of the common law presumption is disputed in other ongoing actions. It remains to be seen whether further first instance or appeal courts will take the same approach.

An important issue which received comparatively little attention was how reliance works for liability for omissions. It is unclear how it is conceptually possible to "rely" on an omission from published information in the same sense in which "reliance" has been developed in cases involving statements. This will have to be worked out in future decisions.

Further Hildyard J appears to have endorsed an approach to reliance on *statements* which required the claimant to have consciously understood the statement made in the sense intended ([482], [503]). This is a questionable conclusion, at least where the representations were both express and implied, and there was a case based on omissions. The court did not refer to *Crossley v Volkswagen* [2021] EWHC 3444 (QB) which reached the opposite conclusion on a strike out application in the case of implied representations. The court was not tasked with considering more indirect forms of reliance, and market-based reliance claims, which are advanced in other current s 90A cases.

PDMR STATUS: THE DECISION IN *G4S*

In *G4S*, the court held, following a strike out and summary judgment application, that PDMR status for the purposes of claims against companies managed by directors under s 90A and Sch 10A of FSMA is confined to the English law concepts of de jure, de facto and shadow directorship (*G4S* at [133]-[149]). In reaching that conclusion, Miles J rejected the claimants' submission that they had a real prospect of persuading the trial judge that PDMR status extends to persons who are senior executives responsible for managerial decisions affecting the future developments and business prospects of the issuer or its business units, being akin to the wider definition of "person discharging managerial responsibilities" deriving from the EU market abuse regime, and harking back to Art 1 of Commission Directive 2004/72/EC which expressly refers to other senior executives.

However, the court refused the application for summary judgment and/or strike out on the basis that the claimants had a real prospect of showing at trial that various disputed PDMRs with whom the application was concerned were de facto directors of the relevant issuer. In this regard, Miles J emphasised the flexibility of the English law concept of de facto directorship, noting that:

> "The cases show that whether a person is a de facto director is 'intensely fact-specific' and a question of 'fact and degree'." (*G4S* at [174])

The court is also required to consider what the relevant individuals actually did rather than merely considering the roles formally assigned to them in the corporate structure (*G4S* at [176]).

None of the existing cases on de facto directorship appear to have considered a corporate governance structure of the kind operated by many publicly listed issuers, namely a holding company sitting above subsidiaries which operate the day-to-day business (*G4S* at [179]).

The cases also show that there is some potential for "elasticity" in the application of the concept of de facto directorship in light of the purposes of the relevant statute; and it would be desirable to test the concept of what constitutes a de facto director for the purposes of s 90A and Sch 10A on the facts found at trial rather than in a factual vacuum (*G4S* at [180]).

CONCLUSION

The decisions in *Autonomy* and *G4S* follow the first substantive decision on limitation under s 90A which Miles J handed down in *Allianz Global Investors Gmbh v RSA Insurance Group Limited* [2021] EWHC 2950 (Ch) in a run of significant cases for securities fraud in this jurisdiction. However, many controversial issues (such as market/price reliance under s 90A) were not argued in *Autonomy* and a "classic" securities fraud claim involving equities investor claimants suing a publicly listed company under s 90A is still yet to come to trial in England and Wales. When one does a significant number of the conclusions in *Autonomy* and other aspects of s 90A are likely to be the subject of further debate and clarification. ■

Further Reading:

- Reliance: a comparison between the common law and s 90A FSMA (2021) 6 JIBFL 389.
- Claims under s 90A of FSMA for dishonest statements made to the market: an underutilised remedy? (2019) 3 JIBFL 154.
- LexisPSL: Financial Services: News: How to navigate the *Autonomy* judgment: guidance for corporate issuers defending s 90A, Sch 10A FSMA shareholder claims.