Neutral Citation Number: [2021] EWHC 648 (Ch)

Case No: BL-2020-000644

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL

25 March 2021

Before :

JUDGE JONATHAN RICHARDS
Sitting as a Deputy Judge of the High Court

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Between :

THE FINANCIAL CONDUCT AUTHORITY **(a company limited by guarantee)**	**Claimant/ Applicant**
- and –	
(1) 24HR TRADING ACADEMY LIMITED **(2) MOHAMMAD FUAATH HAJA MAIDEEN MARICAR**	**Defendants/ Respondents**

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Philip Hinks and William Day (instructed by **The Financial Conduct Authority**) for the **Claimant/Applicant**
Jonathan Lennon (instructed by **Rahman Ravelli Solicitors**) for the **Defendants/Respondents**

Hearing date: 11 March 2021
Draft judgment circulated:18 March 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Judge Jonathan Richards:

1. In this summary judgment application, the Financial Conduct Authority (the "FCA") seeks relief against 24HR Trading Academy Limited (the "Company") and against Mr Maricar pursuant to s380 and s382 of the Financial Services and Markets Act 2000 ("FSMA").

2. The FCA's claims arise from two activities that the Defendants engaged in. First, either the Company, or Mr Maricar have, since 2017, sent "Signals" over social media. The proper characterisation of these Signals is disputed, so I will describe them neutrally as containing details of transactions in contracts for differences, spread betting contracts, and options (to which I will refer using the umbrella term of "CFDs") relating to foreign exchange ("FX"), that Mr Maricar considered to be advantageous. Second, again described neutrally, the Defendants put clients in touch with two FX brokers: AvaTrade EU Ltd ("AvaTrade") and Vantage Global Prime Pty Ltd ("Vantage FX").

3. The FCA assert that these activities involved the Defendants carrying on, by way of business, the regulated activities of (i) advising on investments within article 53 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the "RAO") and (ii) arranging deals in investments within article 25 of the RAO, in breach of the general prohibition set out in s19 of FSMA. They also assert that both Defendants have communicated invitations or inducements to engage in investment activity in breach of s21 of FSMA.

4. The FCA therefore seeks:

    i) declarations accordingly;

    ii) an order under s382 of FSMA for restitution of £530,695 plus interest consisting of some of the profit which has accrued to the Defendants as a result of the alleged contraventions of FSMA; and

    iii) final injunctive relief under s380 of FSMA prohibiting the Defendants from repeating their contraventions of FSMA.

The Regulatory Landscape

<u>The General Prohibition</u>

5. Section 19 of FSMA sets out a general prohibition (the "General Prohibition") on persons carrying out, or purporting to carry out, specified "regulated activities" in the United Kingdom without being an "authorised person" or an "exempt person". It is common ground that neither the Company nor Mr Maricar is an authorised person or exempt.

6. Section 22 sets out the scope of regulated activities as follows:

> *"An activity is a regulated activity for the purposes of this Act if it is an activity of a specified kind which is carried on by way of business and (a) relates to an investment of a specified kind; or (b) in the case*

of an activity of a kind which is also specified for the purposes of this paragraph, is carried on in relation to property of any kind."

7. The activities that are "specified" for these purposes are set out in RAO. Article 25 of the RAO specifies the activity of "making arrangements" as follows:

"(1) Making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment which is … (b) a relevant investment … is a specified kind of activity.

(2) Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within paragraph (1)(a), (b), (c) or (d) (whether as principal or agent) is also a specified kind of activity."

8. By Article 26 of the RAO the following arrangements are excluded from the scope of Article 25(1), though not from Article 25(2):

"arrangements which do not or would not bring about the transaction to which the arrangements relate"

9. Article 53 of the RAO also provides for "advising" to be a specified kind of activity as follows:

"Advising a person is a specified kind of activity if the advice is:

(a) given to the person in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor; and

(b) advice on the merits of his doing any of the following (whether as principal or agent):

(i) buying, selling, subscribing for, exchanging, redeeming, holding or underwriting a particular investment which is a security, structured deposit or a relevant investment…".

10. The regulated activities of both "advising" and "making arrangements" apply to specified "investments" only. No argument has been raised to the effect that the CFDs referred to in the Signals were anything other than specified "investments".

Restrictions on financial promotion

11. As well as the General Prohibition, FSMA also contains specific restrictions on financial promotion. Section 21(1) provides as follows:

"A person … must not, in the course of business, communicate an invitation or inducement to … engage in investment activity."

12. Section 21(2) contains an exception to the prohibition applicable to authorised persons and situations where the content of the communication is approved by an authorised person which is not applicable in the circumstances of this case.

13. Section 21(8) defines "engaging in investment activity" to include:

> *"…entering or offering to enter into an agreement the making or performance of which by either party constitutes a controlled activity"*

14. The concept of controlled activities is defined in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (the "FPO"). One such controlled activity is, by Article 4 and paragraph 3 of Schedule 1 of the FPO:

> *"Buying or selling … contractually based investments."*

A "contractually based investment" for these purposes includes the CFDs referenced in the Signals (see paragraphs 21 and 23 of Schedule 1 to the FPO).

The Court's powers if there is a breach of regulatory requirements

15. Section 380 permits this court to grant an injunction restraining a person from breaching regulatory requirements with s380(1) providing:

> *"1) If, on the application of the appropriate regulator or the Secretary of State, the court is satisfied—*
>
> *(a) that there is a reasonable likelihood that any person will contravene a relevant requirement, or*
>
> *(b) that any person has contravened a relevant requirement and that there is a reasonable likelihood that the contravention will continue or be repeated,*
>
> *the court may make an order restraining (or in Scotland an interdict prohibiting) the contravention."*

16. A "relevant requirement" for these purposes includes any requirement imposed by or under FSMA. (s380(6)(a)(i) and s283(9)(a)(i)). Accordingly, it is common ground that the requirements imposed by s19 and s21 of FSMA are both "relevant requirements".

17. Section 382(1) of FSMA deals with, among others, restitution orders, providing as follows:

> *"(1) The court may, on the application of the appropriate regulator or the Secretary of State, make an order under subsection (2) if it is satisfied that a person has contravened a relevant requirement, or been knowingly concerned in the contravention of such a requirement, and—*
>
> *(a) that profits have accrued to him as a result of the contravention; or*
>
> *…*

> *(2) The court may order the person concerned to pay to the regulator concerned such sum as appears to the court to be just having regard –*
>
> > *(a) in a case within paragraph (a) of subsection (1), to the profits appearing to the court to have accrued;"*

The principles to be applied on an application for summary judgment

18. It was common ground that this court has, by CPR 24.2, the power to give summary judgment against the Defendants and so to grant the FCA all or any of the remedies that they seek. That power can be exercised if the court considers that the Defendants have no real prospect of defending the FCA's claim, or any issue raised in that claim.

19. I have applied the following principles when deciding whether to give summary judgment:

    i) The question is whether the Defendants have a "realistic", as opposed to "fanciful" prospect of success. That requires the defence to carry some degree of conviction. It needs to be more than merely arguable.

    ii) I should not conduct a "mini-trial". Accordingly, I should be wary of deciding genuinely debatable questions of fact. That does not mean, though, that I should accept everything that the Defendants say at face value as it is possible that there is no real substance in factual assertions they make, particularly if they are contradicted by contemporaneous documents.

    iii) When reaching my conclusion, I should take into account not only the evidence placed before me on the application for summary judgment, but also evidence that could reasonably be expected to be available at trial.

    iv) Accordingly, I should hesitate about granting summary judgment now, even if there is no obvious current conflict of fact, where there are reasonable grounds for believing that a fuller investigation into facts would add to or alter the evidence available to the trial judge and so affect the outcome of the case.

    v) On the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction. If I am satisfied that I have before me all the evidence necessary for a proper determination of that question, and the parties have had an adequate opportunity to address it in argument, I should "grasp the nettle" and decide it.

Assumed Primary Facts

20. I have not sought to make findings on disputed matters of fact since I am not conducting a "mini-trial". Therefore, I will determine this application on the basis of the assumed primary facts set out below. These consist of (i) specific admissions that are made in the Defence or (ii) statements of fact advanced in witness evidence served on behalf of Mr Maricar and the Company or (iii) other statements of fact that are apparently uncontroversial given the way that the

parties have put their respective cases (such as, for example, the content of statements made in the Company's promotional literature or the contents of Signals). I describe these as "assumed facts" since I have not independently sought to test their accuracy.

The Company and its business

21. The Company was incorporated on 2 December 2016. Since 12 July 2017, Mr Maricar has been its sole director. Since 1 December 2017 (at the latest), he has been its sole shareholder. Mr Maricar accepts that, since 12 July 2017, he has been the "moving light behind the company".

22. The Company entered into contracts with its customers for the provision of Signals, together with other services. The way in which these services were offered evolved as follows:

    i) Between August 2017 and February 2018, clients could choose to receive a "trading signals service". During this time, in return for payment the customers would obtain access to Signals and would also be sent educational material on FX trading created by third parties, including market commentary, news articles and internet links to educational tutorials on You Tube.

    ii) After February 2018, clients were no longer able to receive the "trading signals service" alone. Rather, in return for payment, clients could either:

        a) enrol on a 12-month online course on FX trading under which they would obtain educational material produced by the Company including market commentary, news articles and monthly educational webinars; or

        b) enrol on a face-to-face course, under which they could attend the Company's premises once a week for four weeks to obtain instruction on FX trading and obtain other educational material such as market commentary, news articles and monthly educational webinars.

    A client enrolling on either the 12-month online course or the four-week face-to-face course would obtain access to the Signals.

23. In order to effect the kind of FX transactions that were dealt with in the Company's educational materials and referred to in the Signals, a person would need to have access to an FX trading platform. The Company referred its clients to AvaTrade and VantageFX via links on its website. The Company's clients were not contractually obliged to have accounts with either AvaTrade or VantageFX, but the Company offered inducements to use that platforms as follows:

    i) Between February 2018 and October 2019 the Company offered a two-week free trial of its services (including access to the Signals) and discounted fees thereafter to customers who opened an account with AvaTrade by using the relevant link on the Company's website and entering the relevant partner code.

ii) Between September 2018 and October 2019 the Company offered a three-week free trial of its services (including access to the Signals) and discounted fees thereafter to customers who opened an account with VantageFX by using the relevant link on the Company's website and entering a partner code.

24. Mr Maricar personally entered into a written agreement with VantageFX under which he would receive commission by reference to the number of customers that he introduced who opened accounts with VantageFX. Between 13 September 2017 and 12 September 2019, VantageFX paid £95,093 into Mr Maricar's personal bank account by way of commission.

25. There was no written agreement, whether between the Company or Mr Maricar and AvaTrade for commission to be paid. However, in practice, between 13 September 2017 and 12 September 2019, AvaTrade paid £435,602 into Mr Maricar's personal bank account by way of commission for the introduction of clients who opened accounts. Unlike the commission that VantageFX paid, AvaTrade's commission contained an element referable to the volume of trades that the client introduced placed on their VantageFX account.

The Signals and the context in which they were issued

26. Between October 2018 and April 2019, Signals were sent to clients via the WhatsApp messaging service. After that, they may have been sent via social media platform called Telegram.

27. I was shown a sample of some of the Signals sent over WhatsApp. It was agreed that this sample was representative of the text of Signals generally sent, although obviously their detail varied considerably: some referred to "buy" transactions, some to "sell" transactions and different pairs of currency appeared in different Signals. The Signals used shorthand that would be familiar to those with some knowledge of FX transactions. Clients who were sent Signals had access to a document entitled "24HR Trading Academy – How to Read Signals & Execute Trades on MT4" (the "Signals Manual"). That Manual explained how Signals could be interpreted. It also explained the electronic instructions that needed to be given to an FX trading platform in order to generate CFDs that would give effect to the transactions referenced in the Signals.

28. For example, on 3 December 2019, a Signal was sent that reads as follows:

> *"USCAD POTENTIAL BUY 1.3160 or entry now optional Sl 1.3130 Tp1 1.3190 Tp2 1.3230".*

29. This can be explained as follows:

i) "USCAD" refers to the currency pair of the US Dollar ("USD") and the Canadian Dollar ("CAD").

ii) The reference to "potential buy" suggests that it was considered that the US Dollar might appreciate against the Canadian Dollar.

iii) The reference to "1.3160 or entry now" indicates that there was opportunity to benefit from the anticipated appreciation of the US Dollar by taking a long position in US Dollars via a CFD either at the then current market exchange rate ("entry now") or when the US Dollar: Canadian Dollar exchange rate was 1.3160.

iv) The reference to "Tp1" and to "Tp2" were to occasions on which profits could be taken. This point was explained in detail in the Signals Manual: broadly to give effect to this Signal, a client could enter into two transactions: one which provided for a "take profit" ("Tp1") if the exchange rate rose to 1.3190 and the other providing for a "take profit" ("Tp2") when the rate rose to 1.3230.

v) The reference to "optional Sl" was to a "stop loss", a means of limiting losses if, contrary to the expectation set out in the Signal, the US Dollar depreciated in value against the Canadian Dollar. If such a "stop loss" was applied to a transaction, it would automatically be closed if the exchange rate fell to 1.3130. That would still realise a loss, but would protect against further losses should the rate fall still further.

The issues to be decided

30. The skeleton argument that Mr Hinks and Mr Day submitted on behalf of the FCA contained a list of issues to be determined which I reproduce in the Appendix to this judgment (albeit with definitions altered to conform to those that I use). Since Mr Lennon did not disagree with that formulation of those issues I will structure the remainder of this judgment by reference to those issues noting that those issues fall to be determined in the context of a claim for summary judgment in which the relevant question is whether the Defendants have a real prospect of defending the claims made.

Issue 1 - Whether the Signals constituted "advice" on "investments"

Applicable principles and authorities

31. This issue is relevant to the question of whether there was any breach of the general prohibition as a consequence of "advice" being given (for the purposes of Article 53 of the RAO. Article 53 is reproduced above. It requires an examination of the following issues:

i) Whether the Signals constituted "advice". That issue is disputed and is addressed in this section.

ii) Whether any "advice" was given to a person in the capacity as an investor or potential investor. There was no dispute on this issue.

iii) Whether any "advice" is as to the merits of buying or selling a particular investment which is a security, structured deposit or a relevant investment. There was no dispute on this issue. Although currency is not itself an investment, the Signals were written in the language of CFDs and FX

options (both of which are "relevant investments"). There was no suggestion that they related to anything other than particular investments.

32. Therefore, Issue 1 reduces to the question of whether the Signals constituted "advice". I was referred, among others, to the authorities of *Rubenstein v HSBC* [2011] EWHC 2304 (QB)[1], *Thornbridge Limited v Barclays Bank Plc* [2015] EWHC 3430 (QB), *Re Market Wizard Systems (UK) Limited* [1998] 2 BCLC 282 (ChD) and *FCA v Avacade Ltd (in liquidation)* [2020] Bus LR 1897. From those authorities I have drawn the following propositions:

    i) Advice involves the provision of information, but the provision of information on its own is not sufficient to constitute advice. For there to be "advice" as to the merits of buying or selling a particular investment, the information must either be accompanied by a comment or value judgment on the relevance of that information to a client's investment decision or must itself be the product of a process of selection that will tend to influence the investment decision of the recipient (*Rubenstein* at [81]).

    ii) The question of whether "advice" is given is logically separate and distinct from the question of whether the giver of the advice assumes a duty of care in tort for the accuracy of that advice (*Avacade* at [350]).

    iii) Whether "advice" is given is to be determined objectively (*Thornbridge* at [38]). It follows that, if a particular communication does constitute "advice" determined objectively, the agreement of the parties cannot make it something different (*Market Wizard Systems Limited* at [36]).

    iv) A recommendation as to a course of action is capable of being "advice" (*Thornbridge* at [38]). Where advice of this character is given it does not matter whether the recipient is free to follow or disregard it. It will retain its character of advice even if the recipient can be expected to obtain further advice before proceeding with it (*Market Wizard Systems Limited* at [34]).

33. I will say a little more about these conclusions in the light of some of the submissions that Mr Lennon made on behalf of the Defendants.

34. First, I accept Mr Lennon's point that when determining whether, viewed objectively, the Signals constituted "advice", those Signals have to be understood in context including the educational offering that the Company was giving to its clients. Context is frequently important in determining meaning. But I do not accept the Defendants' argument that this means that the question of whether there was advice can only be resolved at trial after an exhaustive analysis of all aspects of that wider context. Rather, I consider that this issue can be resolved summarily. If the Defendants demonstrate elements of context that give rise to a triable issue of whether "advice" was given then of course I should not determine Issue 1 summarily. However, if the elements of context on which they rely are not such as to satisfy me that they have any realistic prospect of defending the

1 This judgment went on appeal to the Court of Appeal, but the judge's conclusions at first instance on the scope of the concept of advice were not reversed.

FCA's claim that the Signals were "advice", I am entitled to determine the issue in the FCA's favour summarily.

35. Second, I accept Mr Lennon's point that it is relevant to consider the extent to which Mr Maricar, or the Company, made statements disavowing any intention to give "advice". That is not at odds with the proposition that the matter must be determined objectively: if a person making a statement says that it is not to be taken as "advice", that is at least relevant to the question of whether, viewed objectively, it is advice. However, because the matter is objective, the subjective intention of the person making the statement is not determinative. A person can give something that, viewed objectively, is "advice" without intending to do so.

Discussion of Issue 1

36. As I have noted, the Signals have to be understood in context. Part of the relevant context is what the Company said to its customers about the Signals. On its webpage as at 3 February 2019 the Company wrote:

> *"The free 2 week trial is ideal for those who are looking to test out the potentials of the Forex industry and see if it is the ideal path to pursue seriously. It allows you to be able to have a go at executing real time trades risking very little money whilst I assist you on which markets to invest your money in, the hard work is done for you! You just need to execute the trades on your phone/pc. By following my analysis and alerts you can aim to make a healthy return in your first two weeks after which you can decide whether or not to continue…*
>
> *My success ratio is around atleast [sic] 70-80% weekly with some weeks even being 90%+. The minimum amount of pips you will be able to catch weekly is 200[2] with most weeks being double that on a regular basis so if you are someone who is good at following instructions you will have no trouble making a bit of side income!"*

37. As I have already noted, as well as issuing Signals, the Company made the Signals Manual available. Accordingly, putting everything together:

    i) the Company issued frequent Signals that contained all the details that a recipient would need to buy specific CFDs;

    ii) the Company boasted of Mr Maricar's success ratio and the pips he could generate, thereby indicating that the transactions referenced in the Signals would produce good levels of profit;

    iii) the Company provided information, in the Signals Manual, on how to turn the Signals into CFDs;

[2] FX exchange rates are typically published to 4 decimal places. A "pip" refers to a change in the fourth decimal place in the direction recommended. So, if the USD:Sterling exchange rate is quoted at 1.4531, a change to 1.4537 would generate 6 "pips". Those pips would be favourable for a person who had a long position; unfavourable to someone with a short position.

iv) the Company emphasised the lack of "hard work" that would be needed to use the Signals to produce a profit. A recipient just needed to "execute the trades" and be "good at following instructions".

38. The Company and Mr Maricar were also active in reminding customers when Signals were issued which, if followed, would have led to profits. At the end of a trading day, Mr Maricar would send messages over the WhatsApp platform updating on the performance of the Signals: which hit their "take profits" point and which did not. When a particular Signal hit any of its "take profits" points, the event would be celebrated by use of a "bullseye" emoji or similar. He would invite his customers to tell them how much money they made.

39. In addition, he would send weekly updates comparing on that week's performance against the benchmark of 200 pips per week. Mr Maricar would also send self-congratulatory messages over WhatsApp to his customers when particular Signals did particularly well, or when Signals over a week did particularly well. So, for example, on 22 January 2019 he sent a message to the WhatsApp group:

> *"Just to put it into perspective I promise you all 200 pips a week minimum and Ive hit that within a day … of trading."*

40. These factors in my judgment paints a clear picture that, interpreted objectively, the Signals were "advice". A reasonable recipient of them would conclude that they constituted a recommendation to effect the specific transactions in CFDs referenced in the Signals.

41. The Defendants argue that they have a realistic prospect of establishing that the Signals do not contain "advice" by reference to their surrounding context. They submit that the matter should permit to a full trial at which that context can be properly explored. They point to the following aspects of the surrounding context:

i) The Company was engaged in the provision of education to its customers. Properly understood, the Signals were a tool to educate those customers on how the markets worked and the kind of transactions and strategies a successful market participant such as Mr Maricar would employ.

ii) Mr Maricar warned his customers not to rely on the Signals alone, but to deploy their own skill and judgment. Some of his customers have submitted witness statements in these proceedings confirming that they treated the Signals as educational material. The context indicates that the Signals were not intended to be copied unthinkingly.

42. The Defendants' submissions on the issue at paragraph 41.i) involved the proposition that the Signals were nothing more than information as to transactions that Mr Maricar had effected, without any accompanying value judgment as to the advisability or otherwise of those transactions. I consider there is no realistic prospect of establishing this at trial. The Signals did not, even arguably, simply record transactions undertaken. Read objectively, they clearly carried with them the suggestion that they described transactions which, if copied, could be expected to produce a profit. That is clear from the promotional statements on the

Company's website, the fact that the Signals Manual showed customers how to turn the Signals into transactions, from the promise that the Company would deliver its customers at least 200 pips per week and the daily and weekly round ups as to how the Signals performed. I acknowledge that, in his witness evidence, Mr Maricar said that the statements on the website to which I have referred in paragraph 36 above were written in haste. But written in haste or not, those statements were entirely consistent with the Company's other communications.

43. The Defendants point to the fact that the Company provided educational services as well as Signals including webinars and face to face courses for which it charged. This being an application for summary judgment against the Defendants, I will assume in their favour that a large number of recipients of Signals also accessed the Company's educational offering. However, even in that case, I do not consider that the Defendants have a realistic prospect of establishing that the educational context displaces what I consider to be the clear meaning of the Signals. The Signals remained advice to enter into particular FX options and CFDs even if those Signals were received by people who also received supplies of educational content from the Company.

44. The Defendants' second point is related. Essentially, it is argued that, once regard is had to the context, including the educational context, a hypothetical reasonable recipient of a Signal would have understood that it was not intended to be emulated. Instead, a recipient would be expected to bring to bear their own skills and experience, including skills derived from the Company's educational material, in deciding whether to implement a transaction referred to in any particular Signal, or a variant thereof.

45. There was indeed evidence of Mr Maricar striking a cautionary note about placing undue reliance on Signals. On 1 March 2019, after what was evidently a week in which the Signals' performance had been variable, Mr Maricar wrote to the WhatsApp group:

> *"[The week] would've defo tested a lot of your money risk management and reminded you what game you are end of the playing in [sic], especially those who started [off] on the past few flawless weeks I have had, it created a somewhat unrealistic expectation in a lot of your heads that this game is so easy (even though I have been making it look like that for the past few months results wise) but that's where your test of mental discipline really kicks in and also your education. Signals end of the day are an 'assistance' to your trading skills and should be used as such. Always make efforts to learn every day whether that maybe by youtube videos, babypips course online or even by doing the course that I offer."*

46. However, I do not consider that even in the light of this, or other similar communications that the Defendants rely on, there is any realistic prospect of displacing the conclusion that the Defendants were offering "advice". In a sense, all "advice" that falls short of a command requires a recipient to apply independent judgment before following it. Even if recipients of Signals realised that it would be necessary to apply independent judgment as to whether the transaction was advisable, the Signal remained "advice" in the sense of being a

recommendation from the Company to effect that transaction (see paragraph 32.iv) above).

47. In a similar vein, I was shown a "disclaimer" that was sent to the WhatsApp group. That disclaimer said that any information provided to customers was as "general market information for educational and entertainment purposes and did not constitute investment advice". Customers were told to engage in "extensive independent market research" before making trading decisions. Liability for loss which might arise as a result of reliance on information provided by the Company was excluded. This disclaimer does not alter the conclusions I have come to. First, it is not arguable that the Signals were "general market information" rather than advice. If they were, the Company would not have boasted of successes and kept, and published, running totals of how many pips customers following the Signals would have earned. It is not open to the parties to agree that communications that are, objectively, "advice" have a different character (see 32.iii) above). I express no view on whether this disclaimer did operate to restrict or exclude the Company's liability to its customers associated with the Signals. However, even if it did, that would not prevent the Signals from constituting "advice".

48. I do not, therefore, consider that any of the contra-indications that the Defendants have put forward stand any realistic chance of displacing the conclusion that the Signals were "advice" on particular investments for the purposes of Article 53 of the RAO.

Issue 2 – Whether Mr Maricar engaged in the activity of transmitting Signals as well as the Company

49. The FCA argue that both Mr Maricar and the Company transmitted the Signals so that both of them could be treated as having provided investment advice in contravention of the General Prohibition. They rely on the fact that Mr Maricar "transmitted the Signals".

50. I will not determine this issue summarily. I agree with the Defendants that they have a realistic prospect of establishing that only the Company should suffer consequences for providing unauthorised investment advice. It may well be the case that Mr Maricar "transmitted the Signals", but the Company clearly needed some human intervention in order for Signals to be sent. I consider that Mr Maricar would have a realistic prospect of arguing successfully that individual agents or employees of a company should not automatically suffer personal sanctions whenever they perform activities on behalf of a company. It may be, as the FCA argues, that Mr Maricar's habit of receiving commission into his own personal bank account means that the corporate veil can be pierced in this case. But I consider that this issue is appropriately explored at trial.

Issue 3 – Whether Mr Maricar was "knowingly concerned" in the contravention

of the General Prohibition

51. This issue is relevant to the question as to orders that can be made against Mr Maricar personally under s382(2) of FSMA[3]. In *Securities and Investments Board v Pantell S.A. and others (No 2)* [1993] Ch 257, Sir Nicholas Browne-Wilkinson V.C said, in the context of predecessor legislation set out in the Financial Services Act 1986:

> *"The most obvious example of a person 'knowingly concerned' in a contravention will be a person who is the moving light behind a company which is carrying on investment business in an unlawful manner."*

52. Mr Maricar has admitted that, at material times, he was the moving light behind the Company and I therefore determine this issue summarily in the FCA's favour.

Issue 4(i) – arranging deals in investments for the purposes of Article 25 of the RAO

Principles and authorities

53. I derive the following conclusions on Article 25 and Article 26 of the RAO from the authorities that I was shown including *In Re The Inertia Partnership LLP* [2007] EWHC 502 (Ch) and *Avacade.*

    i) Article 25(1) and Article 25(2) are two separate limbs and the exclusion in Article 26 applies only in the context of Article 25(1).

    ii) Both Article 25(1) and Article 25(2) are concerned with "arrangements", a wide term which embraces matters which do not give rise to legally enforceable rights.

    iii) There is a distinction between the use of the term "arrangements" in Articles 25(1) and (2) and the term "transaction" in Article 26. Accordingly, a person can "make arrangements" for the purposes of Article 25 even if that person's actions do not involve or facilitate the execution of each step necessary for entering and completing the transaction.

    iv) Article 25(1) is concerned with arrangements for another person to acquire a particular investment. It is thus more specific than Article 25(2) in that it is directed at arrangements which are likely to have the effect of causing a transaction in a particular investment to be concluded by that other person. However, there is no requirement, in Article 25(1) for the other person to be party to the arrangements.

    v) The exclusion in Article 26 (which applies only for the purposes of Article 25(1)) is asking a factual question of causation, namely whether the

[3] If Mr Maricar was "knowingly concerned" in contraventions of requirement, that would also entitle a court to exercise powers under s380(2) and (3). However, at the hearing it was clarified that the FCA is seeking an injunction only under s380(1) against Mr Maricar personally to which the concept of being "knowingly concerned" is not relevant.

"arrangements" operated to "bring about" an ultimate "transaction". If they did not, then Article 25(1) does not apply.

vi) Article 25(2) is broader than Article 26(2). It is concerned with the making of arrangements "with a view to" a person acquiring "investments" generally and not necessarily particular investments. This describes "a more inchoate form of activity which is not necessarily causative of the transaction in the sense that it brings it about but which nonetheless helps it to happen" ([227] of *Avacade*).

vii) For Article 25(2) to apply, the person who is envisaged to acquire the investments must be a party to the "arrangements".

54. I did not understand the parties to disagree with any of these propositions, except for that set out at paragraph 53.vi). The Defendants relied on *Adams v Options SIPP UK LLP* [2020] EWHC 1229 for the proposition that, in order for an arrangement to be entered into "with a view to" a person acquiring investments, there needs to be some causative link between the arrangement and an acquisition. However, in respectful agreement with the court in *Avacade*, I consider that the statements of HHJ Dight on which the Defendants relied (see [124] of *Adams v Options SIPP*) were *obiter* since the court had, in that case, already found that there was no pleaded case based on Article 25(2) and so it did not need to express a view on the meaning of the phrase "with a view to" which was relevant only to Article 25(2). I also respectfully agree with the analysis of the court at [227(iii)] of *Avacade*.

Article 25(1)

55. The FCA applies the following reasoning when arguing that both Defendants have engaged in the activity set out in Article 25(1):

i) Both Defendants have made "arrangements" consisting of a combination of transmitting the Signals and referring clients to AvaTrade and VantageFX.

ii) Those arrangements were "for" the customers referred to enter into transactions in particular investments, being the CFDs that would be recommended in the Signals.

iii) The arrangements satisfy the causation condition set out Article 26 since they would cause customers to enter into those transactions.

56. In my judgment the Defendants have a realistic prospect of establishing that, on a fuller examination of the facts, the "causation requirement" of Article 26 is not met with the result that Article 25(1) is disapplied. Accordingly, I will not determine summarily that either Defendant was engaging in activities to which Article 25(1) applied.

57. I have reached that conclusion because the "arrangement" on which the FCA relies for the purposes of Article 25(1) only put a customer in the position of receiving Signals and having the capability (an account with AvaTrade or Vantage FX) which would enable CFDs to be entered into. If the customer then

entered into a CFD, I consider the question of causation would be at large depending on the extent to which the customer applied independent thought or judgment before entering into that transaction. If the evidence demonstrated that customers tended to exercise independent judgment then a court at trial might well conclude that, even though the customer had received "advice" in the form of a Signal, the true cause of the transaction effected was the customer's own judgment. At the other extreme, if the evidence demonstrated that customers tended simply to copy Signals without exercising any independent judgment, the causation condition might well be satisfied. I accept Mr Lennon's submissions that matters of disputed fact such as this should not be determined summarily.

Article 25(2)

58. The FCA put their case on Article 25(2) somewhat differently from under Article 25(1). In essence they argue:

    i) The Defendants made an arrangement with their customers and AvaTrade/VantageFX under which customers who used the Company's sponsored links to open accounts with AvaTrade and VantageFX benefited from a free trial of the Company's services and reduced fees thereafter.

    ii) Those arrangements were made "with a view to" customers acquiring CFDs generally, since those were the kind of transactions that formed the subject matter of the Signals.

59. In his written skeleton argument, Mr Lennon made some submissions as to the scope of the term "arrangements". I did not, however, understand him to be arguing that the tripartite relationship between the Company, its customers and AvaTrade/VantageFX which I have described in paragraph 58.i) above was incapable of constituting an "arrangement". It plainly is an arrangement having regard to the wide meaning of that term. Moreover, those of the Company's customers who chose to use the sponsored links provided in order to open accounts at AvaTrade or VantageFX were party to the arrangement since they both performed actions in accordance with the arrangement and enjoyed benefits under it in the form of a free trial and possibly reduced fees for the Company's services thereafter.

60. Therefore, the true question is whether the arrangements were made "with a view to" customers acquiring CFDs. The Defendants argue that they were not, pointing to the possibility that a client of the Company might use the Company's sponsored links to open an account with VantageFX, but then lose interest in FX trading and effect no transactions for a period. If after two years, the customer then effected a transaction, it would be wrong in principle for that to be linked to the earlier "arrangement" as it is "too remote". There ought, the Defendants argue, to be a full examination of the evidence at trial in order to determine the extent to which this sort of fact pattern was present.

61. I reject this submission. As I have explained in my articulation of applicable principles at paragraph 53 and 54 above, Article 25(2) is not concerned with a causative relationship between an "arrangement" and a particular transaction. Rather, it is enough that the arrangement be "with a view" to a party to that

arrangement acquiring investments. Therefore, provided that the arrangement was made "with a view to" the customer acquiring CFDs or FX options, it would not matter whether the customer made any actual acquisitions. Accordingly, I see no need for the wider factual inquiry for which the Defendants argue.

62. Nevertheless, the Defendants are correct to observe that the "arrangements" must be made with a view to the Company's customers acquiring investments. It would not be sufficient if they were merely made with a view to those customers opening accounts at AvaTrade or Vantage FX. I invited submissions from the parties as to whether the phrase "with a view to" invites an examination of the subjective purposes for which the Company (or Mr Maricar) made the arrangements, or of the objective characteristics of those arrangements.

63. Both parties argued that the issue should be approached objectively, though Mr Lennon argued that the subjective attributes of investors were relevant as well. However, I do not think that it matters whether the test is objective or subjective.

64. If it is objective then in my judgment the position is quite clear. Customers were referred to AvaTrade and Vantage FX. On opening an account and depositing money, they would receive a free trial of the Company's services and discounted fees thereafter. The Company's services included the provision of Signals which were highly specific together with instruction as to how electronic instructions could be given over the very platforms at which they had just opened accounts to generate CFDs corresponding to those Signals. Viewed objectively such an arrangement was "with a view to" the investors entering into CFDs and I see no realistic prospect of the Defendants successfully arguing otherwise.

65. If the matter is subjective, it is dealt with in Mr Maricar's witness evidence. He said, in paragraphs 7(d) and 21 of his witness statement:

> *"I referred prospective clients to open trading accounts with AVA Trade EU Ltd (and/or its affiliates) and Vantage Global Prime Pty Ltd. The educational services that were provided were designed for people who were interested in becoming adept in the forex market, this required clients to have access to a trading platform.*
>
> *…*
>
> *"It is correct 24HR referred prospective clients to open trading accounts with AvaTrade and Vantage, as set out in paragraphs 7(e) & (d) above. The purpose for doing so was to enable client access to a trading platform to practice the FX principles taught within the educational material"*

66. Mr Maricar accepts, therefore, that his subjective purpose was to enable customers to effect actual investments and was not limited to merely enabling them to open an account.

67. In his written skeleton argument, though not in his oral submissions, Mr Lennon referred to Articles 27 and 33 of the RAO both of which operate as exceptions to Article 25(2). I do not consider it reasonably arguable that either of these Articles applies. Article 27 would be applicable only if it could be said that the Company

was "merely… providing the means by which one party to a transaction (or potential transaction) is able to communicate with other such parties. That is not, even arguably, an accurate description of what the Company was doing. Article 33 of the RAO could apply only if the Company's introduction of its customers to AvaTrade and Vantage FX was made "with a view to the provision of independent advice or the independent exercise of discretion in relation to [investments]". However, the Company has adduced no evidence to the effect that AvaTrade or Vantage were to provide advice or exercise discretion. The clear picture that emerges from both the pleadings and the witness statements is that AvaTrade and VantageFX would simply execute transactions that customers placed over their platforms.

68. Finally, in his written skeleton argument, though not in his oral submissions, Mr Lennon argued that Article 25(2) could not apply if, in effecting referrals, the Company was acting as the agent of AvaTrade or VantageFX. However, I was shown no evidence, or pleading, to the effect that the Company was acting as the agent of AvaTrade or VantageFX and, accordingly, I see no realistic prospect of such an argument succeeding.

69. The Defendants point to other cases concerning Article 25 of the RAO that have proceeded to trial, rather than being determined summarily. But that does not demonstrate that this case is suitable for trial on the Article 25(2) issue. For the reasons I have given, I do not consider that a trial of this issue is appropriate. I conclude summarily that the Company engaged in activities falling within Article 25(2). I deal with the extent of Mr Maricar's involvement in my discussion of Issue 5 below.

Issue 4(ii) – Financial Promotions

70. I have quoted relevant extracts from s21 of FSMA is set out at 11 to 14 above. At the hearing, the parties explained that there is limited case law on this provision. In *Avacade*, the court considered s21, but there seemed to have been relatively little dispute as to its interpretation with the court noting, at [359] that it was common ground that:

> *"something active is needed, involving persuasion or incitement" before s21 is engaged."*

71. Nevertheless, the court in *Avacade* did express some conclusions on the scope of s21. At [360] and [361], the court considered and endorsed paragraphs of the FCA's "perimeter guidance" and thereby concluded that the question of whether a person communicates "an invitation or inducement…to engage in investment activity" involves the application of an objective test. Accordingly, it concluded that the question is whether a reasonable observer, taking account of all the circumstances at the time the communication was made would:

    i) consider that the communicator intended the communication to persuade or incite the recipient to engage in investment activity, or that was its purpose; and

ii) regard the communication as seeking to persuade or incite the recipient to engage in investment activity.

72. The FCA argues that the Company's activity of offering its customers a free trial of its services for a period, together with reduced fees thereafter if they used the Company's links and referral codes for AvaTrade and VantageFX, met both limbs of the test. The Company's activity, the FCA argues, was an active promotion which was both designed and intended to persuade customers to open accounts with those brokers for the purposes of making FX or commodity trades by using CFDs.

73. The Defendants made no separate submissions on Issue 4(ii). Mr Lennon's written skeleton argument did not address s21 at all and, in his oral submissions, he explained that this was because the Defendants consider that the FCA's claims of breach of s21 would stand or fall together with their claims as to Article 25 of the RAO. In those circumstances, I will apply the approach adopted in *Avacade*. Since (i) I accept the FCA's submission set out at paragraph 72; (ii) the Company advanced no analysis contradicting that submission and indeed (iii) the Company appears to accept that, having lost on the Article 25(2) issue it must also lose on s21 of FSMA, I will determine summarily that the Company acted in breach of s21. I will address the extent of Mr Maricar's involvement in my analysis of Issue 5.

Issue 5 – Mr Maricar's involvement in breaches of Article 25(2) and Section 21 of FSMA

74. I determine this issue in the same way as Issues 2 and 3 and for similar reasons. I will not determine summarily that Mr Maricar himself contravened Article 25(2) of the RAO or s21 of FSMA. I will, however, conclude summarily that Mr Maricar was "knowingly concerned" in both categories of contravention for the purposes of s382(2).

Issues 6 to 9 – Remedies

75. As regards Issue 6, I will make declarations as to (i) the Company's contraventions of the General Prohibition and s21 that I have found and (ii) Mr Maricar's knowing involvement in those contraventions.

76. As regards Issue 7, the commission that AvaTrade and Vantage paid (totallng £530,695) was a direct result of contraventions of Article 25(2) and s21 of FSMA. That commission was paid as consideration for the very act of referral to AvaTrade and Vantage that was at the heart of the contraventions. Neither Defendant has sought to argue that the requisite link between the contraventions and the commissions was not present. The commission represented "profit" that Mr Maricar, a person knowingly concerned in those contraventions, received as the commission was paid into his personal bank account. I will, therefore, make a restitution order under s382(2) of FSMA against Mr Maricar personally. I will not make a restitution order under s382(2) against the Company, as the FCA have not established a profit made by the Company (as distinct from Mr Maricar) as a result of the contravention.

77. As regards Issue 8, in principle it appears to me to be just for an order under s382(2) to include an interest component. The obvious purpose of s382(2) is to deprive persons of "profits" arising out of contraventions of regulatory requirements. In my judgment that includes both the sums received themselves and further sums that can be obtained from investing them. In the absence of any submissions from the Defendants to the effect that either (i) no award in respect of interest should be made or (ii) a lower interest rate should be used, I will adopt the FCA's suggestion that an interest rate of 2% above Bank of England base rate should be used.

78. Issue 9 is somewhat more complicated. In relation to my powers under s380(1):

    i) As regards s380(1)(b), I am satisfied that the Company has breached a relevant requirement. I am satisfied that there is a reasonable likelihood that the contravention by the Company of the General Prohibition pertaining to investment advice will continue or be repeated. In his witness statement, Mr Thorp of the FCA produced social media extracts that suggested that the Company was still sending signals in September 2020 despite clearly being on notice of the FCA's view that this involved a breach of the General Prohibition relating to investment advice. While, in his submissions, Mr Lennon suggested that no further signals were sent after September 2019, there was no statement to that effect in Mr Maricar's witness evidence.

    ii) I was not, however, shown any evidence that the Company is continuing to refer customers to AvaTrade or VantageFX, or any other broker. Therefore, I am not satisfied that there is a reasonable likelihood that the Company will continue to engage in activities falling within Article 25 of the RAO, or that it will continue to breach s21 of FSMA.

    iii) For the purposes of s380(1)(b), I am not at this stage satisfied that Mr Maricar himself has contravened a relevant requirement, as distinct from being "knowingly concerned" in such contraventions. Nor am I at this stage satisfied, for the purposes of s380(1)(a) that there is a reasonable likelihood that Mr Maricar personally will contravene a relevant requirement since I am only prepared to find on a summary basis that to date contraventions have been effected by a company which he controls, rather than by Mr Maricar himself.

79. I will, therefore, make an injunction against the Company under s380(2) restraining it from continuing to transmit trading signals or otherwise provide advice on the merits of buying, holding or subscribing for CFDs, spread betting contracts and/or options. I will not make an injunction restraining future breaches of Article 25 of the RAO or s21.

80. The FCA invites me to issue a similar injunction against Mr Maricar personally. I am not, however, satisfied that I should do so on a summary basis. To my mind it is reasonably arguable that I do not have power under s380(2) to issue an injunction against Mr Maricar. I acknowledge the FCA's argument that, once the requirements of s380(1) are met, the court has a power to make an "order restraining … the contravention" and that this not expressly stated to be limited to an order against the person or persons whose conduct is relevant for the

purposes of s380(1)(a) and (b). Therefore, say the FCA, if I am satisfied that there is a reasonable likelihood that the Company will continue to contravene relevant requirements, I am entitled to make an order restraining future contravention by Mr Maricar. But I consider that there is a counter-argument, namely that "the contravention" referred to in the tailpiece of s380(1) has to be the likely future contravention effected by the very persons mentioned in s380(1)(a) or (b). The existence of that counter-argument leads me to the conclusion that I will not exercise my power to make an order against Mr Maricar summarily pursuant to s380(2).

81. The FCA argues that, even if I do not have power under s380(2) to issue an injunction against Mr Maricar, I nevertheless have the power under s37 of the Senior Courts Act 1981. I accept that submission. However, that is not the basis on which the FCA argued for an injunction against Mr Maricar and I am concerned that I heard no argument as to what considerations I should take into account when considering the exercise of my general power to issue an injunction in circumstances where I am not satisfied that the conditions necessary for the specific powers in s380 to be exercised. While it is appropriate to "grasp the nettle" in summary judgment applications, on this issue, I do not consider I have all the submissions I need to do so. I will make no injunction against Mr Maricar personally.

82. I hope that, in the light of this judgment, the parties can agree a form of order. If they cannot, I will hear further submissions from them.

APPENDIX – ISSUES TO BE DETERMINED

The Signals

1. Did the Signals constitute advice on investments for the purpose of article 53 of the RAO in contravention of the general prohibition?

2. Did Mr Maricar engage in the business of transmitting the Signals in addition to the Company?

3. If not, was he knowingly concerned in the Company's contravention of the general prohibition?

The trading accounts

4. Did the activities of the Defendants (or either of them) in encouraging, inducing or inviting consumers to open trading accounts with brokers AvaTrade and Vantage FX:

    i) Constitute arranging deals in investments for the purpose of article 25 of the RAO in contravention of the general prohibition?

    ii) Contravene the restriction on financial promotion contained in section 21 of FSMA?

5. If the answer to issue 4 is 'yes' for the Company but 'no' for Mr Maricar, was Mr Maricar knowingly concerned in the Company's contravention of either (i) the general prohibition or (ii) the restriction on financial promotion?

Relief

6. Is the FCA entitled to declarations that the Defendants have contravened section 19 and/or section 21 of FSMA; alternatively, that Mr Maricar has been knowingly concerned in the Company's contraventions of sections 19 and/or 21?

7. Is the FCA entitled to a restitution order under section 382 of FSMA having regard to commission payments which have accrued to the Defendants as a result of their contraventions of sections 19 and/or 21?

8. What if any interest is the FCA entitled to pursuant to section 35A of the Senior Courts Act 1981?

9. Is the FCA entitled to a final injunction restraining the Defendants from (i) transmitting trading signals or providing other advice on the merits of buying, selling, holding or subscribing for CFDs, spread betting contracts and/or options; and/or (ii) encouraging, inducing or otherwise inviting other persons to open or operate trading accounts with AvaTrade, Vantage FX or any other trading platform?