FORUM CHAMBERS

In This Update:

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3 KEY DEVELOPMENTS

July 2022: This month's edition we have articles from Clyde Darrell, Michael Phillis and Ruhi Sethi-Smith. This edition will cover the new class of digital assets, new research for Norwich Pharmacal and Bankers trust orders and more…

No Private Right of Action ("PROA") For New 'Consumer Duty' – A Missed Opportunity?

Introduction

On 27 July 2022, the FCA set out its final rules and guidance for a new Consumer Duty that aims to set higher and clearer expectations for the standard of care firms should give to consumers (https://www.fca.org.uk/publication/policy/ps22-9.pdf). As stated at paragraph 1.3 of the Policy Statement:[1]

> *"Setting higher standards and putting consumers' needs first is central to [the FCA's] strategy – and the cornerstone of this Duty."*

Given the widespread recognition by both the FCA and many stakeholders that the introduction of this Consumer Duty represents a "paradigm shift" in the FCA's expectations of how firms treat consumers, the question of whether a Private Right of Action ("PROA") was required to give the new Consumer Duty "teeth" to compel compliance has been an important topic of discussion throughout the consultation process.

PROA under Section 138D FSMA

Under section 138D of FSMA 2000, where a person suffers loss as a result of a breach of a Rule made by the FCA or PRA, under certain circumstances, that person may have a right of action for damages for those losses against the offending firm. However, this right is somewhat curtailed by the fact a person's right under section 138D does not apply in relation to breaches of the FCA's Principles for Businesses ("PRIN").

Analysis of a PROA for breach of the Consumer Duty

The Consumer Duty is unusual in that it's a package comprising of a consumer principle (which will be added as Principle 12 alongside the existing 11 Principles at PRIN 2.1.1), cross-cutting rules and outcome rules. One could therefore be forgiven in assuming that, at the very least, breach of the cross-cutting or outcome rules would give rise to a PROA under section 138D.

However, notwithstanding this outlook, after consultation, the FCA have confirmed that a PROA will not attach to *"…any aspect of the Duty at this time".*[2]

[1] PS22/9, para 1.3

[2] PS22/9, para 11.1

Given the polarising nature of this issue, this decision by the FCA is unsurprising, and is likely to leave many consumers and consumer organisations disappointed. There are two noteworthy points which arise from the FCA's decision.

Firstly, as noted above, there is an asymmetry argument to be made in respect of the inconsistent nature of allowing a PROA for breach of FCA Rules generally except the Rules that apply exclusively to the Consumer Duty.

Secondly, extending PROA to the Principles is not a new issue and has long been a contentious topic. Outside the context of the Consumer Duty, it was most recently considered by the FCA in its July 2018 Discussion Paper on a duty of care and potential alternative approaches[3] and its April 2019 Feedback Statement on a duty of care and potential alternative approaches: summary of responses and next steps[4], both of which discussed the effect of extending a PROA for breaches of the FCA's Principles. Since both of these documents were published, the FCA has used its intended implementation of the New Consumer Duty to reconsider the idea.[5]

The arguments for introducing a PROA for the Consumer Duty are well known. The principal argument of those in favour has always been that the threat of potential legal action would incentivise firms to change their culture and improve their standards of conduct, leading to improved consumer outcomes.[6] Given the cornerstone of the Consumer Duty is to raise standards, one could imagine that the introduction of a PROA for breach of the Consumer Duty would be the most effective tool to improve and maintain standards amongst firms. Other arguments in favour noted by the FCA include that awards made by the Financial Ombudsman Service ("FOS") have a compensation limit, that FOS decisions are not easily enforced and that consumers should have as many avenues of redress open to them as possible.[7]

The arguments against are equally well known. They include the suggestions that a PROA for breach of a Consumer Duty would bring duplication of existing obligations, legal complexity and confusion caused by adding an overarching duty on top of an existing framework of detailed rules and guidance. Proponents have also argued that a PROA would increase the risk of flood legal claims adding pressure on the courts and lead to increased costs for firms, that litigation would not always be in the consumers best interest due to the increasing costs and delay litigation brings and that the redress options currently available to consumers, such as FOS, offer a better, more affordable

[3] DP18/5
[4] FS19/2
[5] CP21/13

[6] See FS19/2, PS22/9, and Law Commission (2014) *Fiduciary Duties of Investment Intermediaries* at pg 212
[7] FS19/2, para 30

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consumer friendly way of seeking redress.[8]

Whichever side of the argument one falls, it is clear that there are strong views on both sides which, it can be argued, has probably led a, historically conservative, FCA to conclude that such an introduction at this time would constitute too much change for the industry. Indeed, having considered the arguments during the Consultation process, the FCA landed on the position that:

> *"…allowing industry time to embed the Duty without the prospect of private action being brought would help to realise the consumer benefits we want to see from the Duty. However, we proposed keeping the possibility of a PROA under review."*[9]

Conclusion

Given how polarising and potentially far reaching the decision to introduce a PROA for breach of the Consumer Duty could be, the FCA's decision to adopt this 'wait and see' approach is unsurprising. The FCA have confirmed that any decision to attach a PROA to the Consumer Duty would be subject to further consultation.[10]

Given the direction of the financial service retail market and the inherent risks consumers now face which have been brought about by new innovative products and services such as crypto assets, one does wonder whether the refusal to introduce a PROA for breaches of the Consumer Duty represents a missed opportunity.

Clyde Darrell (2014 Call)

Clyde specialises in banking and finance and commercial litigation. For more information about Clyde Darrell see his profile here:

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Law Commission proposes new property class of Digital Assets

On 28 July 2022, the Law Commission of England and Wales released its proposals to reform the law around digital assets, including cryptocurrencies and NFTs, as part of the current Government's aim of making England and Wales a peak jurisdiction for digital asset activities.
The most eye-catching of its proposals is that the law be reformed to recognise a distinct category of personal property

[8] See Sarah O'Neill "*The pros and cons of a private right of action for consumers in light of evidence from other sectors and countries*" (2020), page 9, for a comprehensive summary of the arguments.
[9] PS22/9, para 11.1
[10] PS22/9, page 66

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known as "data objects", as opposed to personal property as things in possession and choses in action. These are distinguished from things like digital images by the necessary characteristic that they be "rivalrous" i.e. that their use excludes the use of them by others, and from the copyright in that image by the requirement that a data object exist independently of the legal system.

The primary driver behind this proposal appears to be that by recognising data objects as a kind of personal property, actions may exist *in rem* and enforced against anyone, not just the party to an original contract.

One can immediately see that if this approach is not adopted by all jurisdictions, certain blockchain activities may at least in theory become effectively impossible to perform, where a crypto-token with disputed ownership status may pass rapidly through machines in many jurisdictions, and any cause of action whose result would be an attempted alteration of the blockchain as represented on machines in particular jurisdictions to change the record of ownership of a token would be, to put it lightly, a disaster.

It remains to be seen how the Law Commission's paper changes upon consultation. It may be that it is proposed that digital asset laws and judgments be enforced only at exchange-level, which would bring England and Wales into a higher level of regulation and central control than has typically been favoured by the users and promoters of cryptocurrencies.

MICHAEL PHILLIS (Call 2010 Australia, 2017 England and Wales)

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New Global Reach for Norwich Pharmacal and Bankers Trust Orders

From 1 October 2022, new wording will be inserted to paragraph 3.1 (25) of Practice Direction 6B of the CPR 1998 to cover claims or application for disclosure to obtain information regarding (1) the true identity of a defendant or a potential defendant; and/or (2) what has become of the property belonging to the applicant.

Practice Direction 6B covers the circumstances in which the English courts will permit service outside of the jurisdiction. The effect of the insertion at paragraph 3.1 (25) will mean that most Norwich Pharmacal (NP) and Bankers Trust (BT) situations will be covered and the wording is designed to simplify the process for obtaining for permission to serve NP and BT orders outside of the

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jurisdiction in claims which are intended to be brought in England and Wales.

The amendment appears to be a response to recent decisions regarding service of NP and BT orders outside of the jurisdiction in relation to crypto disputes see ***Ion Science v Persons Unknown*** **(unreported) 21 December 2020 (Commercial Court)** and ***AB Bank Ltd v Abu Dhabi Commercial Bank PJSC*** **[2016] EWHC 2082 (Comm)**. These decisions have been inconsistent in that courts have permitted service of BT orders outside the jurisdiction but refusing permission in relation to NP orders.

Sir Geoffrey Vos hopes that this development will make it easier to litigate civil fraud claims in the English courts by making the distinction between NP and BT orders much less significant for the purposes of granting service out of the jurisdiction.

Permission to serve an NP or BT order out of the jurisdiction will still be required but this development marks an extremely important advance in maintaining London's favourable position as a launch pad for international fraud claims and asset recovery. The ramifications of this change will be felt all over the world and in particular in off-shore centres which have historically been considered a 'safe' place to hide assets.

RUHI SETHI-SMITH (call 2012)

Ruhi is a member of Forum Chambers' financial services, commercial litigation and Insolvency teams.

Ruhi has extensive experience of asset recovery involving applications for Norwich Pharmacal and Bankers Trust orders

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