Neutral Citation Number: [2023] EWHC 1130 (Ch)

Case No: BL-2023-000196 & 2020-000644

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17 May 2023

Before: Master McQuail

Between:
In Claim No. BL-2023-000196:

THE FINANCIAL CONDUCT AUTHORITY	**Applicant**
- and -	
(1) SAMUEL ANTHONY EXALL **(trading as Synergy Group)** **(2) SYNERGY LAND GROUP LIMITED**	**Respondents**

In Claim No. BL-2020-000644:

THE FINANCIAL CONDUCT AUTHORITY	**Applicant**
- and -	
(1) 24HR TRADING ACADEMY LIMITED **(2) MOHAMMAD FUAATH HAJA MAIDEEN MARICAR**	**Respondents**

- -

Mr William Day instructed by **The Financial Conduct Authority** for the **Applicant**
No appearance for the **Respondents**
Hearing date: 18 April 2023

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Approved Judgment

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MASTER McQUAIL

This judgment will be handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10 am on 17 May 2023

Master McQuail:

Background

1. This is my judgment following the hearing on 18 April 2023 of two applications (**the Applications**) brought by the Financial Conduct Authority (**the FCA**) for directions under section 382(3) of the Financial Services and Markets Act 2000 (**FSMA**) as to the distribution of amounts recovered by enforcement action against persons concerned in unauthorised investment activity.

2. The Applications are unrelated but raise similar issues and they were heard together for efficiency. I am grateful to Mr Day for his helpful skeleton argument and his clear presentation of the Applications.

3. The first Application dated 6 October 2022 is brought in proceedings commenced in 2011 by the FCA's predecessor the Financial Services Authority (**the FSA**) against Samuel Exall and Synergy Land Group Limited, a company of which Mr Exall was sole director and shareholder (**Synergy**). Synergy arose out of an unauthorised "landbanking" collective investment scheme. The proceedings were settled by way of a consent order made by Master Teverson on 29 February 2012, by which Mr Exall undertook to sell the underlying land and pay the proceeds to the FSA Collection Account and, pursuant to the terms of which, the FSA was given liberty to apply for directions for distribution under section 382(3) of FSMA.

4. The auction of the Land did not take place until April 2019. The net proceeds of £27,397.34 were paid to the FCA in May 2019. The FCA proposes to distribute the entirety of this sum among the identified investors on a per capita basis.

5. The second Application dated 23 January 2023 is brought in proceedings commenced in 2020 against 24HR Trading Academy Limited and its sole director and shareholder Mr Mohammad Maricar (**Maricar**). Maricar arose out of an unauthorised business which advised and made arrangements in respect of regulated "forex" investments. 24HRTA provided a "signals service" by which it made forex recommendations to investors and provided links on its website to two forex brokers from which it received commission if the investor signed up to either broker via those links. The FCA obtained summary judgment and a restitution order from Judge Jonathan Richards (as he then was) on 22 April 2021 for Mr Maricar to pay the principal sum of £530,695.03 plus interest to the FCA pursuant to section 382 of FSMA. Mr Maricar was made bankrupt. A dividend of £106,650.58 was paid to the FCA by the Official Receiver.

6. The range of losses of the 1,387 identified investors who received advice or participated in the investment arrangements ranges from in excess of £50,000 to 10p. The FCA's proposal is to distribute the sum available among the 411 persons who have lost more than £500 on a pro rata basis.

Service

7. The Applications are brought in the underlying proceedings and the respondents are the defendants to those proceedings. That is notwithstanding that no relief is sought against those parties and (save in Mr Maricar's case) that they are not potential beneficiaries of the proposed distribution.

8. The FCA requests that service of the Applications on the respondents is dispensed with under CPR 6.28. The FCA says that the respondent have no interest in the Applications and are not effective respondents.

9. The FCA contends that under CPR 6.28 I need only be satisfied that there are "good reasons" to dispense with service as opposed to the "exceptional circumstances" required by CPR 6.16 to dispense with service of a claim form. The learned editors of Civil Procedure 2023 suggest that the former is correct. In the case of *General Dynamics United Kingdom Ltd v State of Libya* [2021] UKSC 22 observations of Lord Lloyd-Jones at [78] and Lord Stephens at [236-237] support that approach. The fact that CPR 6.28 contains no reference to "exceptional circumstances" certainly indicate that the bar is lower in the case of 6.28 than 6.16, which does contain those words.

10. I am satisfied from the evidence adduced by the FCA that it has not been possible to locate Mr Exall or Mr Maricar. I am satisfied also that the company defendants have been dissolved and could not be served without restoration.

11. I am satisfied that the defendants are not effective respondents to the applications and taken together with the difficulty in serving them conclude that there are good reasons, which I am also satisfied is the correct test, to dispense with service on them.

FSMA - Restitution and distribution orders

12. Section 382 relevantly provides:

> "(1) The court may, on the application of the appropriate regulator … 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
>
> (b) that one or more persons have suffered loss or been otherwise adversely affected as a result of the contravention.
>
> (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;
>
> (b) in a case within paragraph (b) of that subsection, to the extent of the loss or other adverse effect;
>
> (c) in a case within both of those paragraphs, to the profits appearing to the court to have accrued and to the extent of the loss or other adverse effect.
>
> (3) Any amount paid to the regulator concerned in pursuance of an order under subsection (2) must be paid by it to such qualifying person or distributed by it among such qualifying persons as the court may direct."

13. The relevant definitions for the purposes of this provision are as follows:

> (i) the "regulator concerned" or "appropriate regulator" is in this case the FCA, (section 382(12)-(14)); and
>
> (ii) a "qualifying person" for distribution purposes is (section 382(8)):
>
> "…a person appearing to the court to be someone (a) to whom the profits mentioned in subsection (1)(a) are attributable; or (b) who has suffered the loss or adverse effect mentioned in subsection (1)(b)."

14. The three reported cases on the principles governing directions for distribution orders under section 382(3) to which Mr Day drew my attention are the decision of Mr David Halpern QC (as he then was) in *Financial Conduct Authority v Anderson* [2014] EWHC 363 (Ch); the decision of Mr John Kimbell QC (as he then was) in *Financial Conduct Authority v Paradigm Consultancy SA* [2019] EWHC 3648 (Ch); and Mr Justice Mellor's decision in *Financial Conduct Authority v Golding* [2021] EWHC 372 (Ch).

15. The following principles were accepted by Mr Halpern and Mr Kimbell as applicable to the exercise of the court's jurisdiction under section 382(3) and relevant to the Applications before me:

> (i) the court should have regard to the purpose of the order for disgorging profits or compensating for loss which is to compensate those affected by the contraventions consistent with the FCA's regulatory objective of the protection of consumers: *Anderson* at [9] and *Paradigm* at [30(a)];
> (ii) where there is a shortfall between the losses suffered by "qualifying persons" and the FCA's recovery and where the underlying facts have not been fully established or agreed the court has to do its best and that will generally be on a rough-and-ready basis: *Anderson* at [4-5] and *Paradigm* at [30(b)-(c)]
> (iii) any method of distribution should be as simple as possible consistent with being fair and having regard to the expense of the available options: *Anderson* at [13] and *Paradigm* at [30(f)];
> (iv) the Court should be satisfied that (a) the FCA has taken reasonable steps to identify all the persons who are potentially within the definition of qualifying person; (b) to identify their losses and (c) the proposal is reasonably fair having regard to the sum available for distribution and the FCA's limited resources: *Paradigm* at [32].

16. I note also Mellor J's observation in *Golding* at [31] that applications under the section will depend on their own facts.

FCA's Resources

17. Mr Day submitted that a particular concern for the FCA is that distribution orders do not contain directions for investors to prove losses to the FCA analogous to creditors proving in an insolvency. The FCA does not have the resources to adjudicate upon individual claims for compensation; realistically, it is only able to proceed on the basis of the information gathered in the enforcement action that led to the restitutionary payment. I accept that that is a proper concern and that, following the principles from the cases to which I have referred, a direction for distribution may properly not contain any direction for individuals to prove losses.

Synergy

18. The detailed background to the Synergy investigation, the proceedings that led to Master Teverson's Order and the sale of the underlying land is set out in the first witness statement of Andrew Slavin, an employee of the FCA, dated 6 October 2022.

Jurisdiction

19. There is a preliminary jurisdictional issue about whether any directions for distribution can be given in Synergy under section 382(3) of FSMA. This is because the sum received by the FCA from the sale of the Land was not paid under section 382(2) but rather pursuant to Mr Exall's undertaking given in the consent order made by Master Teverson to which I have referred.

20. A similar jurisdictional issue arose in *Paradigm* (also a landbanking case) where the sum received had been paid to the FCA by liquidators of the landbanking company rather than by way of order under section 382(2).

21. Mr Kimbell concluded that it was not right to construe section 382(3) as limited to cases where the court had made an order under section 382(2) and that as a matter of statutory construction, section 382(3) is engaged whenever FCA has "properly receive[d] money arising out of a claim under section 383(2) [sic]" (at [42]).

22. In Synergy, the sums were paid under a consent order compromising a claim. The order gave liberty to apply for directions to make payment of sums received pursuant to section 382(3) which must mean that the parties understood that those sums would be paid or arise out of a claim under section 382(1) for an order under section 382(2).

23. I adopt the construction of Mr Kimbell in *Paradigm* and conclude that this Court has jurisdiction to make directions under 382(3) in Synergy.

Proposed qualifying persons

24. Mr Slavin's evidence explains that he identified the Synergy investors through a forensic investigation that he began after the proceeds of sale of the Land were received in May 2019 by reviewing Synergy's bank accounts.

25. Mr Slavin identified 60 investors by this means and cross-checked his information against Land Registry and Insolvency Service information.

26. On 9 October 2020 the FCA issued a press release publicising the Synergy investigation. This caused one further investor to make themselves known to the FCA.

27. On 10 December 2020, the FCA wrote to all those 61 investors proposing a per capita distribution and explaining that it would include in its proposals for distribution all those who responded to its letter.

28. The 32 investors (or their personal representatives) who have responded to that letter are now listed in Appendix 1 to the draft Synergy Order.

29. Given the incomplete nature of the records in Synergy, the FCA proposes that a final opportunity is given to investors to come forward by publishing a further press release on the FCA's website with a bar date 2 months from the making of the Order on the Synergy Application. Those listed in Appendix 1 and any other investor coming forward will be asked for bank details by the bar date if they are to participate in the distribution which will be made by way of bank transfer. That payment methodology means that there should be no undistributed balance.

Proposed per capita distribution

30. The FCA proposes a per capita distribution in this case for the reasons explained in Mr Slavin's first witness statement. In particular:

(i) The recoveries represent less than 2% of the losses claimed by the 32 investors identified to date. There has been no determination of losses, because settlement terms were reached in 2012. A rough-and-ready type of distribution is therefore appropriate;

(ii) The FCA has real concerns about any distribution on a pro rata basis because it has no way of verifying the investors' losses. In several cases the amount an investor has claimed to have lost is a significant multiple of the amount that Mr Slavin has identified from Synergy's records;
(iii) The FCA has no means of verifying the claims. Synergy's records are incomplete and investors hold incomplete records. Any adjudication process would be costly and very likely inconclusive.
(iv) It is not certain that investors realised they could address the question of quantum when responding to the FCA rather than assume the sums identified by the FCA were determinative of their losses and that might lead to unfairness.

31. The per capita distribution proposal was mentioned in letters from the FCA to investors dated 10 December 2020, 17 March 2021 and 1 September 2022. Only one investor has objected, a Mr Beall. As it happens, he would do better than a per capita distribution if it proceeded pro rata by reference to his claimed losses but worse than a per capita distribution if it proceeded pro rata basis by reference the losses shown by Synergy's records. This example, Mr Slavin says and I agree, demonstrates the difficulties of adopting a pro rata approach. The per capita approach eliminates the need to further investigate and adjudicate on investor losses.

32. Mr Slavin's second witness statement dated 11 April 2023 confirmed that the 32 identified investors were notified of the application, the date of the hearing and that they might attend. No investors attended.

Conclusions - Synergy

33. I am satisfied that the FCA's actions to date, together with the proposed direction to publicise the investigation and distribution after the hearing, satisfies the duty on the FCA to take reasonable steps to identify potentially qualifying persons within the meaning of section 382(8) of FSMA for distribution of the Synergy recovery.

34. I am satisfied also that the FCA has taken what steps it reasonably can to identify investor losses and that, in light of the difficulties in identifying those losses and the relatively small sum available for distribution, directing a per capita distribution is appropriately and sufficiently fair on the facts in Synergy.

35. Subject only to requiring that there is an express provision in the final form of the Order that each of the 32 identified investors will receive a communication from the FCA following the making of the Order making clear that that person will only participate in the distribution if bank details are provided by the bar date, I therefore approve the FCA's proposed directions for distribution in Synergy embodied in the draft before the Court.

Maricar

36. The detailed background to Maricar, the proceedings that led to Judge Jonathan Richards' order, Mr Maricar's bankruptcy and the dividend from the Official Receiver is set out in the third witness statement of Ian Poole, an employee of the FCA, dated 23 January 2023.

Jurisdiction

37. Jurisdiction is straightforward. The FCA obtained a section 382(2) order and its dividend from Mr Maricar's bankruptcy was paid pursuant to that order, being the only debt owed by Mr Maricar's estate to the FCA.

Proposed qualifying persons

38. There are two (overlapping) categories of qualifying persons in Maricar: (a) those who subscribed for signal services and (b) those who made losses in trading activities because of the signal services and/or the arrangements with the forex brokers.

39. Mr Poole's evidence describes how he has gone about identifying persons in these categories.

40. The FCA obtained 24HRTA's bank statements as well as information from PayPal and information from the forex brokers. A review of the bank statements and PayPal records enabled payments paid for signals to be identified. Most payees were also identified by the information provided by the forex brokers which included profit and loss details for individual investors. The forex brokers' data also identified further customers. The forensic analysis of that information identified 1,387 customers, who are listed in an appendix exhibited to Mr Poole's statement. The FCA proposes to limit the distribution class to persons identified by this exercise.

41. There are certain customers of 24HRTA who would not be included in the proposed distribution:

(i) customers who paid 24HRTA in cash, unless they used 24HRTA's links to sign up with the forex brokers. Identities of investors paying in cash are not recorded in 24HRTA's banking records, so it would not be possible to verify the claims of any customers who fall into this category (were any to come forward);

(ii) those who traded other than through the identified forex brokers and/or signed up with those brokers by a route other than the links provided by 24HRTA. Mr Poole's fourth witness statement of 11 April 2023 explains that a further investor in this category recently came forward, but the person in question failed to provided any further information when asked.

The justification for the exclusion of those who paid cash is the evidential uncertainty. The justification for the exclusion of those who traded other than through use of the 24HRTA links is the fact that the enforcement action was targeted at arrangements made through use of the links which generated commission and thus profit for Mr Maricar, which would not apply to investors who never used the links.

42. Mr Maricar himself opened an account with one of the brokers using the 24HRTA link. The information provided to the FCA by that broker shows that he made a £507.90 loss on that account. However, the FCA seeks a direction that Mr Maricar be excluded from distribution since he was the person who contravened FSMA and was the subject of the restitution order. It would subvert the policy behind the section to allow the person against whom enforcement action was taken to benefit from it, even in part. Fairness dictates that the FCA's recoveries from Mr Maricar's bankruptcy estate are distributed to those who suffered losses as a result of his unauthorised activity. I accept that analysis and agree that Mr Maricar should be expressly excluded from benefit.

43. In contrast to Synergy, the FCA does not propose any directions to give other potential investors a further opportunity to come forward after this hearing because:

(i) the totality of the information in Maricar is more comprehensive because of the availability of the third party information. The FCA therefore has greater confidence that it has identified the vast majority of investors.

(ii) the FCA issued a press release drawing attention to this Application on 24 February 2023. Mr Poole's fourth witness statement explains that five potential qualifying persons identified themselves after the Application was made, but none have produced the additional information that he sought from them and it is therefore not proposed they be added to the class of qualifying persons. The FCA has no reason to consider that a further press release would identify any further investors.

44. As in Synergy the identified investors will be asked to provide bank details by the bar date if they are participate in the distribution, in order that the recovery is distributed in full.

Proposed pro rata distribution with cut off at £500 losses

45. The quality of the records available to the FCA in Maricar means that the FCA is confident that a pro rata distribution can fairly be implemented based on the losses it has identified from its enforcement action.

46. A different issue arises in Maricar, which is the range of investor losses, the number of investors and the level of recovery compared to the totality of the losses. 1,387 investors have been identified. The range of losses is between £52,781 and 10p. The total loss is £1.3m. The fund to be distributed is £106,650.58.

47. Nearly a third of the total losses are attributable to 18 customers. 411 customers suffered losses of over £500, together comprising 85% of total losses. 764 customers suffered losses of over £250, together comprising 94% of total losses.

48. The FCA points out that recoveries are low compared to the overall losses identified, such that a rough-and-ready type of distribution is appropriate. In particular, the FCA considers that it would be appropriate to apply a minimum threshold for participation in the distribution. I agree that it cannot be proportionate to distribute a share of the recoveries to someone with identified losses of only 10p and that a line must be drawn somewhere, taking account of the FCA's resources to be expended on effecting the distribution. The FCA's alternative proposals are for there to be a threshold at £500, alternatively £250. If the line is drawn immediately above £500, the investor with the lowest loss would receive c.£45 and 411 payments would need to be processed. If the line were drawn immediately above £250 the investor with the lowest loss would receive c.£21, and the FCA would need to process an additional 353 payments.

49. Investors were informed of the proposal for distribution in a letter from the FCA of 26 January 2023 but none have taken specific issue with the threshold element of the envisaged directions. Mr Poole's fourth witness statement explains that the investors have been informed of the date of the hearing. None chose to attend.

Conclusions

50. I am satisfied that the FCA's actions to date satisfy the duty on the FCA to take reasonable steps to identify potentially qualifying persons for distribution of the Maricar recovery within the meaning of section 382(8) of FSMA.

51. I am satisfied also that the FCA has taken what steps it can to identify investor losses but that, in light of the range of those losses, directing a pro rata distribution with a minimum threshold of loss "in excess of £500" is proportionate, when considering the burden on the FCA's resources, and therefore sufficiently fair on the facts in Maricar.

52. Again, subject only to requiring that there is an express provision in the final form of Order that each of the potentially qualifying investors will receive a communication from the FCA following the making of the Order making clear that that person will only participate in the distribution if bank details are provided by the bar date, I approve the FCA's proposed directions for distribution in Maricar as embodied in the draft Order before the Court.

Post Script

53. Between the date of the hearing and the date of handing down this judgment a Mr Anscombe, a person who had invested in Synergy, made himself known to the FCA. Mr Anscombe has been confirmed as an investor by reference to Synergy's bank statements and he will be added as the 33rd name in Appendix 1 to the Synergy Order