SQUIRE PATTON BOGGS

What Is the Relevance to my Fund of Sections 90 and 90A of the UK's Financial Services and Markets Act 2000 (FSMA)?

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The short answer is that s.90 and s.90A enable equity holders in UK-listed companies to sue for losses caused when companies publish untrue or misleading/incomplete market statements.

Given the opportunities these types of action present, third-party litigation funders are increasingly inviting equity holders based in various jurisdictions (in particular investment funds and pension funds) to sign up to English High Court claims. This enables the funders to build up large claimant groups and to aggregate each fund's individual losses into a single, potentially eye-watering claim amount.

A number of such claims have already been brought in England, typically in the wake of regulatory and/or criminal investigations of listed companies and financial institutions, and the resulting fines and public settlements with regulators in the UK and the US. For example:

- **RSA** – Claims brought (and settled in 2022) following RSA having overstated profits and failing to disclose a decline in reserves.
- **G4S** – Claims being pursued following a 2014 settlement with the UK's Ministry of Justice over an alleged billing fraud, and a 2020 deferred prosecution agreement with the SFO.
- **Barclays Bank** – Claims being pursued following Barclays' regulatory settlements and fines arising from its handling of its dark pools trading platform.
- **Standard Chartered Bank** – Claims being pursued based on alleged sanctions non-compliance between 2007 and 2019 and regulatory fines from US and UK authorities.

When Might I Be Entitled to Join/Bring Such a Claim?

Section 90 (Schedule 10)

(1) You are a shareholder who has acquired securities/shares in respect of which there exists a prospectus or listing particulars.

(2) You have suffered loss because the relevant prospectuses or listing particulars (i) stated things that were untrue or misleading; and/or (ii) were missing essential information.

Section 90A (Schedule 10A)

(1) You are a shareholder who has acquired, continued to hold or disposed of securities in reliance on market published information,

(2) You have suffered a loss because the relevant published information (i) stated things that were untrue or misleading; and/or (ii) were missing essential information, including as a result of a dishonest delay by the company in publishing such information.

What Challenges Might Typically Arise?

As already noted, often these claims require funders to build large groups of often quite diverse claimants from various jurisdictions. Unavoidably each claimant fund will have its own priorities and legal structures, as well as appetite for litigation. Therefore, key challenges for a funder and its law firm of choice will be maintaining coherent, well-informed, and responsive client groups, that (i) early in the process are able to engage in key decisions and approve court filings, and (ii) later in the proceedings can assist with the gathering of key evidence in support. Consequently, in some cases, claimant funds have engaged dedicated service providers or a trusted law firm to help monitor the litigation's progress and to assist with efficiently dealing with queries and requests for instructions during the proceedings.

When considering s.90A claims (often termed a fraud style of action), there is a relatively high burden to meet. Unlike for a s.90 claim, it is necessary to prove that a person discharging managerial responsibilities (PDMR), for example a director of the issuer, (i) knew a statement was untrue or misleading; or (ii) was reckless as to whether it was untrue or misleading; or (iii) knew an omission to be a dishonest concealment of a material fact.

Further, and again different from s.90 claims, s.90A claimants must prove reliance, i.e. that they acquired, continued to hold or disposed of securities in reliance on relevant published information.

In comparison, an s.90 claim (often described as applying a standard more akin to negligence) might be seen as the more straightforward to pursue, particularly because there is no requirement to establish reliance. However, an s.90 action is not always going to be available depending on the nature of the complaint. An s.90 claim also will fail if it can be shown that the claimant fund knew that the relevant statement was inaccurate/incomplete.

In addition, there remain other defences to s.90 claims, e.g. that the issuer reasonably (i) believed that a statement was true and not misleading; (ii) believed that an omission was properly made; (iii) relied upon an expert or official source to verify the accuracy of its statements/omissions; and/or (iv) issued a relevant correction (or took steps to do so) prior to any acquisition of securities.

Finally, and whether an s.90 or s.90A claim, there is no strict liability. Thus, it remains necessary for claimant funds to establish causation as well as loss to recover.

What Might I Be Entitled to Recover?

With the relevant legal principles still to be subjected to detailed scrutiny by the English courts, there remains significant uncertainty around the calculation of damages.

"Left in Hand"

This methodology may be available where the fraud measure of damage is found to apply in s.90A claims. In such case, the left in hand methodology seeks to put the claimant fund in a position as if it had never purchased the securities. In other words, the difference in value between (i) the price at which the claimant fund purchased the securities; and (ii) the price that was ultimately left in the claimant fund's hands, either following a sale, or based on the current market price.

A key benefit is that such a claim could seek damages for the full drop in value of the security in the relevant period, regardless of cause (i.e. even if some of the price drop were for unrelated market reasons). That said, the claimant fund would still have to address the alternative scenario, i.e. what it would have done instead. If that alternative might also have been impacted by market forces, then that may, in turn, reduce the value of loss available to be recovered.

"Inflation Per Share"

In the absence of the fraud measure, an alternative methodology is to compensate the claimant fund on the assumption it still purchased the securities but did so at their true market price. In other words, the difference in value (or inflation) as between (i) the price at which the claimant fund purchased the securities; and (ii) their true value on the date they were acquired – namely the price the securities would have been absent the impact of any untrue or misleading statements or omissions.

Which Is Best?

In principle, the fraud measure may appear the most attractive, but, as already noted, this may not always be available. It may also be the case that in large claimant groups, there will be different interests and strategic tensions, including as to the calculation of quantum of losses. Moreover, whether each claimant fund, had it been aware of the truth, would not have purchased the securities at all versus simply being willing to pay less for them, are key questions of fact that may necessarily require proof through evidence.

The Future

While still a relatively nascent area in terms of settled interpretations of key principles, and whether due to the efforts of litigation funders or otherwise, there seems little doubt that at least in the short to medium term the trend for s.90 and a.90A actions is likely to continue. Moreover, looking ahead, it appears that developments around environmental, social and governance and/or climate change goals and related regulation may very well present further opportunities for s.90 and s.90A claims. With such issues an increasing focus for governments and regulators, it is likely that litigation funders and specialist class action firms will not be far behind in seeking to identify opportunities to pursue listed corporates and financial institutions that are pulled up and/or fined by the regulators.

Where We Can Help

Our team has experience of running and monitoring large s.90/90A claims involving numerous claimant funds and would be delighted to provide initial or even ongoing support and advice in the event you are approached to participate in such a claim (or may already be involved with one). In such event, we are also ideally placed to assist with advice on the terms of any litigation funding agreement (LFA) that you may be asked to sign with a litigation funder, as well as engagement terms with the law firm recommended by such a funder to pursue the litigation, and this is whether the claim is being proposed in terms of a representative action, a multiclaimant claim, or will be pursued under a group litigation order (GLO) or some other form of collective action. In any such event, please feel free to drop us a line to have an initial discussion around your options.

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