Neutral Citation Number: [2022] EWCA Civ 397

Case No. CA-2021-000956 (formerly A3/2021/0304)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Kelyn Bacon QC (sitting as a Deputy High Court Judge)
[2020] EWHC 1097 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 25 March 2022

Before :

LORD JUSTICE LEWISON
LORD JUSTICE NEWEY
and
LORD JUSTICE SNOWDEN

- -

Between :

THE FINANCIAL CONDUCT AUTHORITY	**Claimant/ Respondent**
- and –	
KAREN FERREIRA	**Defendant/ Appellant**

- -

Jon Colclough (instructed by **Johnsons Solicitors**) for the **Appellant**
James Purchas and Daniel Khoo (instructed by **The FCA**) for the **Respondent**

Hearing date : 20 January 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII and the National Archives. The date and time for hand-down is deemed to be 10 a.m. on Friday 25 March 2022.

Lord Justice Snowden :

1. This is an appeal by Karen Ferreira ("Ms. Ferreira") against a decision of Kelyn Bacon QC (as she then was), sitting as a Deputy High Court Judge: [2020] EWHC 1097 (Ch) (the "Judge" and "the Judgment"). It raises a short but important point of construction on the meaning of section 382 of the Financial Services and Markets Act 2000 ("section 382" and "FSMA") in relation to the power of the court to order compensation to be paid by persons who have been knowingly concerned in the contravention of a relevant requirement under FSMA.

2. The Judgment followed a seven-day trial of a claim brought by the Financial Conduct Authority (the "FCA") against a number of defendants arising out of the promotion of shares in a company called Our Price Records Limited ("the Company"). The defendants included Ms. Ferreira and a Mr. Skinner, who were the two directors of the Company at the relevant time.

3. A total of about £3.6 million had been raised by the Company from over 250 retail investors in 2014 and 2015, but the Company never traded in any material way and went into administration with a substantial deficiency. Of the monies raised from investors, about £650,000 was paid to Mr. Skinner and about £21,000 for the benefit of Ms. Ferreira.

4. In the Judgment, among other things, the Judge ordered Ms. Ferreira to pay about £2.7 million to the FCA for the benefit of investors. That liability was imposed pursuant to section 382 which provides that the court may make such an order if satisfied that a person has contravened a relevant requirement under FSMA, "or been knowingly concerned in the contravention" of such a requirement.

5. In the case of Ms. Ferreira, liability was imposed on the basis that she had been knowingly concerned in the contravention by the Company of the requirements of section 21 FSMA ("section 21"). Section 21 is entitled "Restrictions on financial promotion". So far as relevant, section 21(1) (as in force at the relevant time) provides that a person must not, in the course of business, communicate an invitation or inducement to engage in investment activity. However, by section 21(2), that prohibition does not apply if the person making the communication is an authorised person, or if the content of the communication is approved by an authorised person. Contravention of section 21(1) is a criminal offence punishable by imprisonment or a fine or both: see section 25 FSMA ("section 25").

6. There was no dispute at trial that the Company had contravened section 21(1). Ms. Ferreira's defence to the claim under section 382 that she had been knowingly concerned in that contravention was that she did not know that section 21(1) had been contravened. Her evidence was that she had trusted Mr. Skinner to organise the share offering in a way that complied with the relevant legal requirements. She said that she believed that the Company's communications with potential investors had been approved by a firm of chartered accountants called Leigh Carr, and that she had no reason to suspect that the relevant requirements had not been complied with. In fact, although Leigh Carr had issued approval letters purporting to approve the Company's communications to investors, it was not authorised to do so for the purposes of section 21(2), but had been tricked into doing so by Mr. Skinner.

7. Having heard oral evidence, the Judge accepted Ms. Ferreira's account of her involvement in events and of her own knowledge. The Judge found (at paragraph 144 of the Judgment) that Ms. Ferreira did not have actual knowledge or imputed knowledge on the basis of wilful blindness that the Company's investment communications had not been validly approved under section 21(2).

8. However, the Judge concluded that, as a matter of law, this was irrelevant to the issue of whether Ms. Ferreira had been "knowingly concerned" in the contravention of section 21(1). The Judge held that provided that a defendant knew that a relevant communication was being made, it was not necessary for the making of an order under section 382 that the defendant should also know that it was not approved by an authorised person.

9. On appeal, Ms. Ferreira contends that the Judge's interpretation of section 382 was wrong, and that to have been "knowingly concerned" in a contravention of section 21(1), a defendant must have had knowledge (whether actual or imputed on the basis of wilful blindness) that the relevant communication was not approved.

The relevant legislation

10. Section 382 provides, so far as is material, as follows.

> "(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."

11. Section 21, as in force at the relevant time, provided, so far as is material,

> "(1) A person ('A') must not, in the course of business, communicate an invitation or inducement to engage in investment activity.
>
> (2) But subsection (1) does not apply if –
>
> (a) A is an authorised person; or
>
> (b) the content of the communication is approved for the purposes of this section by an authorised person.
>
> (3) In the case of a communication originating outside the United Kingdom, subsection (1) applies only if the communication is capable of having an effect in the United Kingdom.

> …
>
> (5) The Treasury may by order specify circumstances (which may include compliance with financial promotion rules) in which subsection (1) does not apply…"

12. Pursuant to section 21(5), the Treasury has made several orders setting out further factual circumstances in which section 21(1) should not apply. The principal such order is The Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (SI 2005/1529) (the "FPO").

13. The circumstances in which section 21(1) is disapplied under the FPO are many and various. They include matters relating to the location and nature of the recipient of the communication, the nature and content of the communication, and the maker of the communication. By way of example only, Article 48 of the FPO disapplies section 21(1) in relation to communications with certified high net worth individuals. Many of the disapplications are drafted in lengthy and complex terms.

The Judgment

14. In paragraph 113 of the Judgment, the Judge first referred to some statements by Millett LJ in SIB v Scandex Capital Management [1998] 1 W.L.R. 712 ("Scandex"). In Scandex, the Court of Appeal considered a claim brought by the Securities and Investment Board (a predecessor to the FCA) against a director of Scandex, a company incorporated in Denmark. Scandex had contravened section 3 of the Financial Services Act 1986 (the "FSA 1986"), which provided that,

> "[n]o person shall carry on, or purport to carry on, investment business in the United Kingdom unless he is an authorised person under Chapter III or an exempted person under Chapter IV of this Part of this Act".

15. The SIB sought a compensation order against the director pursuant to section 6(2) FSA 1986, for having been "knowingly concerned in the contravention" by Scandex of section 3 FSA 1986. The director's defence was that he honestly believed that Scandex was at the material time authorised to carry on investment business in Denmark and so exempt from the requirement to obtain similar authorisation in the United Kingdom.

16. Millett LJ stated, at page 717D-E,

> "It is to be observed that it is not sufficient for a person to be subjected to liability under section 6(2) that he was knowingly concerned in the carrying on of the business; he must appear to have been knowingly concerned in the contravention. The contravention consists of (i) the carrying on of an investment business (ii) in the United Kingdom (iii) by a person who is not an authorised person under Chapter III of the Act of 1986. Before the second defendant can be made liable under section 6(2), therefore, he must appear to have possessed the requisite knowledge of all three ingredients of the contravention. It is not disputed that the second defendant was knowingly concerned in

> the carrying on by Scandex of an investment business in the United Kingdom. The sole question is whether he has an arguable case for claiming that he did not know that it was not an authorised person."

17. In the instant case, the Judge applied Millett LJ's first point that it was not enough for the defendant to be knowingly concerned in the carrying on of business, but that they had to be knowingly concerned *in the contravention*. The Judge held that the concept of being "knowingly concerned in a contravention" for the purposes of section 382 required satisfaction of two discrete elements, namely (i) that the person must have been actually involved in the contravention, and (ii) that the person must have had knowledge of the facts on which the contravention depends.

18. The formulation of the second limb of the Judge's test reflected the endorsement by Millett LJ in Scandex at page 720E-H of a dictum of Neville J in Burton v Bevan [1908] 2 Ch 240, 246-247. In that case, the question had been whether the defendant had "knowingly contravened" a particular statutory provision. Neville J had said,

> "I think that 'knowingly' means with knowledge of the facts upon which the contravention depends. I think it is immaterial whether the director had knowledge of the law or not. I think he is bound to know what the law is, and the only question is, did he know the facts which made the act complained of a contravention of the statute?"

19. It was not disputed before us that these initial steps in the Judge's reasoning were correct.

20. It was also not disputed before the Judge, and was common ground before us, that Ms. Ferreira had been sufficiently involved as a director in the making of the relevant communications by the Company to satisfy the first limb of the test which the Judge set out.

21. The key issue before us was therefore whether the Judge applied the second limb of her test correctly. In paragraph 116 of her Judgment, the Judge recorded how the FCA put its case in this respect,

> "116. The essence of the FCA's primary case is that the constitutive elements of a section 21 contravention are the elements set out in section 21(1) – namely that (i) there was a communication of an invitation or inducement to engage in investment activity, and (ii) the communication was made in the course of business. Section 21(2) does not set out an element of the contravention, Mr Purchas submitted, but rather merely sets out a situation in which the prohibition in section 21(1) does not apply at all. If (as in this case) it is clear that the prohibition does apply, because none of the relevant exemptions are satisfied, then the "knowledge" in question can only concern the knowledge of the elements set out in section 21(1)."

22. In the next paragraph, the Judge also noted the practical effect of the FCA's submission,

> "117. That submission is of somewhat deceptive simplicity, for this is not, in my view, a straightforward issue. The effect of the FCA's submission is that in almost every case where a person is "concerned" in a breach of section 21 FSMA they are likely to have the requisite degree of knowledge, since all that is required is knowledge that a communication has been made which invites or induces investment activity or claims management activity, and knowledge that this is in the course of business. Only in a rather limited set of circumstances might a good case be made of lack of knowledge, such as a situation where the communication has been made by a rogue employee, entirely unbeknown to the company's directors."

23. The Judge then went on to consider the reasoning and outcome in Scandex. She acknowledged that Millett LJ's reasoning set out in paragraph 16 above was to the effect that a defendant had to know that the person who was carrying on the investment business was not authorised before liability could attach. However, the Judge then accepted the submission of the FCA that this was a result of the drafting of section 3 FSA 1986 which was in issue in Scandex, and that the different wording of section 21 FSMA required the opposite result in the instant case. The Judge explained her reasons as follows,

> "120. … the discussion of knowledge in Scandex follows inevitably from the way in which section 3 of the 1986 Act was drafted … Under … section 3 of the 1986 Act … the prohibition was and is defined as being engaged *unless* the relevant person is an authorised person. An essential ingredient of the prohibition on carrying on an investment business is therefore that the person carrying on the business is not authorised.
>
> 121. By contrast, section 21(1) FSMA sets out an absolute prohibition on communicating an invitation or inducement to engage in investment or claims management activity, which does not in itself carve out the situation in which that communication is authorised. Instead, separate provisions disapply section 21(1) FSMA if certain conditions are satisfied – which include (under section 21(2)) the fact that the communication is made by an authorised person or has been approved by an authorised person. The FCA should not, Mr Purchas submitted, have to prove knowledge in relation to the requirements of a disapplication provision that is not applicable on the facts of a particular case.
>
> 122. I consider that Mr Purchas was right to place emphasis on the structure of the prohibition in section 21 FSMA. The prohibition could have been drafted in similar terms to section 19 FSMA, so as to provide for a prohibition on communicating an invitation or inducement to engage in investment activity, unless the communication is made by or its contents have been approved by an authorised person. Indeed section 57 of the 1986 Act, which was the predecessor to section 21 FSMA, did identify

> the prohibition in essentially that way. Section 21, however, was drafted in conspicuously different terms, as Mr Purchas described."

24. The Judge then considered a number of supporting submissions by the FCA as to the impact of the various disapplications of section 21(1) in the FPO and the policy considerations underlying section 382. The Judge stated,

> "123. It is also notable that section 21(2) is not the only situation in which the prohibition in section 21(1) is disapplied; in addition, as described above, various exemptions are specified in the FPO, including the exemptions for certified high net worth individuals and sophisticated investors. If as a matter of construction the elements of the contravention incorporated the fact that no exemption or disapplication provision applied in a particular case, the result would be that proof of knowing concern under section 382 would require an enquiry into the defendant's knowledge or belief of the facts relating to every exemption that might potentially, but on the facts did not, apply to the case in question. That would substantially undermine the effectiveness of section 382.
>
> 124. Mr Purchas also referred to the policy reasons that, in his submission, supported the FCA's construction of the concept of "knowing concern". As Browne-Wilkinson VC explained in SIB v Pantell (No.2) at page 264D–E, one of the purposes of introducing powers to make a restitution order against someone who was "knowingly concerned" in unlawful investment activity was to prevent directors from hiding behind the corporate veil of the infringing company. In particular:
>
> > "If as is often the case, the company is not worth powder and shot, it is obviously just to enable the court, as part of the statutory remedy of quasi-rescission, to order the individual who is running that company in an unlawful manner to recoup those who have paid money to the company under an unlawful transaction."
>
> 125. As Mr Purchas pointed out, if a company has contravened section 21 FSMA it is no defence for it to assert that it believed (reasonably or otherwise) that the relevant communications to investors were authorised. It would, therefore, be illogical if a director who is the controlling mind of the company could avoid a finding of knowing concern in the contravention by reference to such a belief, particularly in light of the rationale for orders against those "knowingly concerned" as described above."

25. The Judge then concluded,

> "126. "Knowledge" of a contravention of section 21 therefore requires knowledge of the facts giving rise to the contravention as set out in section 21(1). It is not necessary to go further and establish that the defendant knew that the primary contravener was not authorised, or that the relevant communication was not approved by an authorised person; nor is it necessary to establish any knowledge or belief as to the applicability of any other exemptions, such as the exemptions for high net worth individuals or sophisticated investors.
>
> 127. I therefore reject Mr. Skinner and Ms. Ferreira's defences to the section 21 claims. Whether or not they believed the contents of the various investment communications to have been approved by Leigh Carr is irrelevant to the establishment of knowing concern under section 382. All that is required is that they knew the facts set out in section 21(1); and in that regard it is undisputed that both Mr. Skinner and Ms. Ferreira did indeed know that [the Company] was, in the course of business, communicating invitations and/or inducements to engage in investment activity."

Analysis

26. Before considering the Judge's reasons, I should make two preliminary observations as to the practical effect of her decision.

27. First, in paragraph 117 of her Judgment, the Judge acknowledged that if the FCA was correct in its argument, in almost every case where a person is "concerned" in a breach of section 21 they would be likely to have the requisite degree of knowledge, since all that would be required would be knowledge that a communication was being made that invited or induced investment activity or claims management activity, and knowledge that this was in the course of business. The acceptance that, on the FCA's case, the word "knowingly" in section 382 would serve little or no purpose, is not a promising starting point for an argument on statutory interpretation.

28. In that respect, although the Judge gave an example in paragraph 117 of her Judgment of a case involving a rogue employee which she thought might give some meaning to the concept of being "knowingly" concerned, I do not think that was, in fact, a good example. In the case postulated by the Judge, it is difficult to see how the directors of the company could be said to have been "concerned" in the contravention of the prohibition at all, because, *ex hypothesi*, the rogue employee would have been acting on his own initiative and without the involvement of the directors. The case against the directors would therefore fail at the first hurdle and questions of their knowledge would not arise.

29. Secondly, although the argument tended to focus on the position of directors, Mr. Purchas accepted that the interpretation advanced by the FCA would have the result that the FCA could cast the net of section 382 far wider. So, for example, any employee or agent involved in the sending of an invitation to potential investors to invest in a company would be potentially at risk of an order being made under section 382 if it turned out that the communication was not validly approved for the purposes of section

21(2) or covered by a disapplication in the FPO, irrespective of whether the employee or mailing agent had any means of discovering whether that was in fact so. Although Mr. Purchas suggested that the employee or agent would be protected from injustice by the fact that the court would have a discretion whether to make an order under section 382 in such a case, that might be thought to be cold comfort to someone exposed to such proceedings.

30. I turn then to the wording of section 21 and the application of the principle adopted by the Judge based upon Burton v Bevan and Scandex, that a defendant can only be liable under section 382 if they "know the facts which made the act complained of a contravention of the statute".

31. In my judgment, and for the reasons that follow, the Judge was wrong to accept the FCA's argument that the only constitutive elements of a section 21 contravention are the elements set out in section 21(1). I consider that knowledge of the facts which make the act complained of a contravention of the statute must include knowledge of the factual circumstance that prevents a potentially relevant disapplication from operating.

32. The point can be illustrated by a simple example. Suppose a statute were to prohibit any communication inviting or encouraging the making of an investment, but also provided that such prohibition is not to apply at weekends. It would not be sufficient to establish liability under section 382 if a defendant director knew that an advertisement inviting an investment had been placed in a newspaper by his company. Those facts alone would not indicate whether a contravention of the prohibition had occurred. The missing fact which the director would also have to know is that the advertisement was not in a newspaper published at a weekend.

33. As Lewison LJ observed during the hearing, the point can also be tested by asking how an indictment charging the primary offence of breach of the relevant prohibition would be framed. In the case of my simple example above, it would not be a good indictment simply to charge the company with placing an advertisement inviting an investment in the company. That would charge an act which might, or might not, be an offence. The indictment would also have to specify that the advertisement was placed in a newspaper published on a weekday and not one published at the weekend.

34. So, specifically in relation to section 21, it would not, in my judgment, be sufficient for an indictment simply to allege that a company communicated an invitation or inducement to engage in investment activity in the course of business. The correct form of indictment would, as Mr. Colclough pointed out during the hearing, look something like paragraph 2(a) of the Claim Form issued by the FCA in the instant case. That paragraph stated,

> "It is the FCA's case … that [the Company] by way of business, communicated, alternatively caused to be communicated, invitations or inducements to engage in investment activity *without being either an authorised person or an exempt person and without the communications having been approved by an authorised person,* in contravention of section 21 FSMA."
>
> (my emphasis)

35. In this respect it is also instructive to have regard to the provisions of section 25(2)(a) which provide that it is a defence for a person charged with the offence of contravening section 21(1) to show that he believed on reasonable grounds that the content of the relevant communication was prepared, or approved for the purposes of section 21, by an authorised person. If the FCA were correct that the absence of preparation or approval by an authorised person referred to in section 21(2) are not component elements of the offence, it is difficult to understand why the legislature should have seen fit to give a defendant a defence on the basis that he reasonably believed that such preparation or approval by an authorised person had taken place.

36. This line of reasoning was clearly what led Millett LJ to conclude in Scandex that under section 3 FSA 1986 the defendant director would not be liable if he did not know that his company was not an authorised person. As I have indicated above, although the Judge appreciated this point, she thought that Scandex could be distinguished on the basis of the difference in drafting of section 3 FSA 1986 and section 21 FSMA. With respect, I do not agree. Although there is clearly a difference in the drafting of section 3 FSA 1986 and section 21 FSMA, in my judgment, the difference is purely one of style and not substance.

37. Section 3 FSA 1986 set out in one section a prohibition which applied unless the relevant person was an authorised person, whereas section 21 is divided into two sub-sections. The first sub-section sets out a prohibition which is then expressed not to apply in the circumstances set out in the second sub-section. That there is no substantive difference between these two drafting styles can be illustrated by reference to the simple example given above.

38. Assume a statute in the following terms,

> "No person shall make or cause to be made any communication inviting or encouraging the making of an investment, unless the communication is made at the weekend."

Assume, alternatively, that the statute reads,

> "(1) No person shall make or cause to be made any communication inviting or encouraging the making of an investment.
>
> (2) Subsection (1) shall not apply to communications made at the weekend."

For my part, I cannot discern any substantive difference whatever between the two formulations. In either case there would be a contravention of the prohibition if, but only if, the communication took place during the week rather than at the weekend.

39. It is also instructive to look, as did the Judge, at the terms of section 57 FSA 1986 which was the predecessor to section 21 FSMA. However, in order to get the full picture it is also necessary to look at the terms of section 58 FSA 1986. Sections 57 and 58 FSA 1986 were in the following terms,

> "57(1) Subject to section 58 below, no person other than an authorised person shall issue or cause to be issued an investment advertisement in the United Kingdom unless its contents have been approved by an authorised person….
>
> 58(1) Section 57 above does not apply to—
>
> (a) any advertisement issued or caused to be issued by, and relating only to investments issued by [the government, local authorities etc]…;
>
> (b) any advertisement issued or caused to be issued by a person who is exempt under [certain sections of the Act] if the advertisement relates to a matter in respect of which he is exempt…;
>
> (c) any advertisement which is issued or caused to be issued by a national of a member State other than the United Kingdom in the course of investment business lawfully carried on by him in such a State and which conforms with any rules made under section 48(2)(e) above;
>
> (d) any advertisement which [consists of or any part of listing particulars etc] …
>
> …
>
> (3) Section 57 above does not apply to an advertisement issued in such circumstances as may be specified in an order made by the Secretary of State for the purpose of exempting from that section -
>
> (a) advertisements appearing to him to have a private character, whether by reasons of a connection between the person issuing them and those to whom they are issued or otherwise;
>
> (b) advertisements appearing to him to deal with investment only incidentally;
>
> (c) advertisements issued to persons appearing to him to be sufficiently expert to understand any risks involved; or
>
> (d) such other classes of advertisement as he thinks fit."

40. It is apparent that sections 57 and 58 FSA 1986 adopted a combination of both the drafting style used in section 3 FSA 1986 and the style now to be found in section 21 FSMA. As such, I do not think that the Judge was right to accept the FCA's submission that the style of drafting connoted an intention of the part of the legislature to achieve a fundamentally different result in section 21 FSMA, as opposed to its predecessor, or

section 3 FSA 1986 as considered in Scandex. In passing I would also note that we were not taken to any legislative history or academic commentary recognising any such significance in the change of drafting.

41. Nor am I persuaded by the two additional supporting reasons given by the Judge for reaching her conclusion.

42. The first reason was that the "effectiveness" of section 382 would be undermined if proof of being knowingly concerned required an enquiry into the defendant's knowledge or belief of the facts relating to every disapplication or exemption under the FPO that might potentially, but on the facts did not, apply to the case in question.

43. I have already made a preliminary observation about the potential width of the net which section 382 would cast if the FCA's contention were correct. The FCA's argument about the "effectiveness" of section 382 is in essence the same point. Section 382 would obviously be more "effective" from the FCA's point of view as claimant, if defendants were liable irrespective of whether they knew that, for example, an investment communication had not been approved. But that begs the question, and for the reasons that I have given, I do not think that this is what the legislature intended when it included the reference to a person being "knowingly" concerned in a contravention.

44. Nor do I consider that such an outcome would in practice lead to a need for inquiries which are as onerous or impractical as the FCA suggests. In practice, the FCA will have necessarily formed a view as to why the alleged primary contravention of FSMA took place, and the issue of the state of the defendant's knowledge and belief will only arise in relation to a limited number of potentially relevant disapplications under the FPO. Moreover, it is only if the defendant can offer a credible explanation of why they believed the facts relevant to those disapplications were different to the true position that there will be any live issue. Investigation of the defendant's explanation of his state of knowledge in such a case is something that would fall squarely within the remit of a regulator, and determination of disputed questions of knowledge is something that courts do routinely.

45. The Judge's second reason was that one of the purposes of introducing powers to make a restitution order against someone who was "knowingly concerned" in unlawful investment activity was to prevent directors from "hiding behind the corporate veil" of an insolvent infringing company. In this respect, the Judge also accepted the FCA's submission that since a primary infringer is liable without regard for the state of its knowledge, it would be illogical for a director's liability to depend upon their state of knowledge.

46. I do not accept these arguments. As to the second point, far from it being illogical, it is quite clear from section 382 that the legislature did intend there to be a difference in the test for liability of a primary infringer and a secondary party. That is evident from the addition of the word "knowingly" in relation to a secondary party but not the primary infringer. If it had been intended that the same test would apply to both, section 382 could simply have excluded the word "knowingly" and have stated,

> "(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 concerned in the contravention of such a requirement."

47. As to the first point, the Judge interpreted section 382 in a way that imputed to the legislature an intention to impose personal liability on directors (or others) simply on the basis that they knew of the actions that the company was taking in the course of its business. That would be a far-reaching step indeed. Business is normally conducted, and investment opportunities are routinely offered, by companies with limited liability. The interpretation adopted by the Judge would result in limited liability being disregarded irrespective of whether the company was in fact rendered insolvent by the contravention of FSMA, and in a much wider set of circumstances than those in which the courts have conventionally thought it appropriate to pierce the corporate veil. Such grounds conventionally require some finding that the directors or corporators have established the company as a sham or façade for the purposes of some fraud. The corporate veil has never been disregarded simply because the directors were aware of the actions that their company was taking in the course of its business. In my judgment, the intention to introduce such a radical departure from the principles of limited liability in the financial services field should not be attributed to the legislature in the absence of some very clear indication – of which there is none.

Conclusion

48. For these reasons I respectfully disagree with the interpretation of section 382 reached by the Judge. I would allow the appeal.

Lord Justice Newey:

49. I agree.

Lord Justice Lewison:

50. I also agree.