

**APPOINTED REPRESENTATIVES AFTER
*KVB CONSULTANTS V JOHN HOPKINS
MCKENZIE [2024] EWCA CIV 765***

4 December 2024

Steph David

BASICS

- Section 19 of FSMA 2000: the general prohibition unless
 - Authorised person
 - Exempt person
 - Breach = criminal offence (FSMA 2000, sections 20 and 23)
- Part 4A of the FSMA 2000 deals with permission to carry on regulated activities
 - s 55E(5) the FCA can incorporate into the description of the RA such limitations as it considers appropriate, which includes limitations “as to circumstances in which the activity may, or may not, be carried on”; a narrower or wider description of the RA to that in the application
- Retail vs other types of client – set out in the COBS (see COBS 3 of the FCA Handbook)

FSMA 2000, S 39

- “[O]utsourcing the regulation of appointed representatives to authorised persons” (as per Males LJ in *KVB* para 24 quoting Richards LJ in *Anderson v Sense Networks Ltd* [2019] EWCA Civ 1395 [2019] Bus LR 1)
- HM Treasury (2021 CfE) proportionate regulatory approach to encourage greater competition and innovation
 - 2023 FCA figures: c. 35,000 active ARs – growth areas – consumer finance and pensions and retirement income
- Investor protection purpose: *Ovcharenko v Investuk Ltd* [2017] EWHC 2114 (QB) “a safeguard for clients”; “a long stop liability target” HHJ Waksman (para 33)

WORDING OF THE PROVISION

39 Exemption of appointed representatives

(1) If a person (other than an authorised person)—

(a) is a party to a contract with an authorised person ("his principal") which—

(i) permits or requires him to carry on **business of a prescribed description**, and

(ii) complies with **such requirements as may be prescribed**, and

(b) is someone for whose activities in carrying on the **whole or part of that business** his principal has accepted responsibility in writing,

he is exempt from the general prohibition in relation to any regulated activity comprised in the carrying on of that business for which his principal has accepted responsibility. [...]

(2) In this Act "appointed representative" means—(a) a person who is exempt as a result of subsection (1), or ...

(3) The principal of an appointed representative is responsible, to the same extent **as if** he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility.'

KVB: WAS THE LIMITATION IN THE ARA PERMITTED BY FMSA 2000, S 39?

- ARA prohibited Jacob Hopkins McKenzie from giving advice to or arranging deals for retail clients
- Is it a permissible limitation as to **what** activity may be carried out or an impermissible attempt to prescribe **how** the permitted activity is carried on (distinction from Richards LJ in the *Anderson* case)?
- Majority (Males LJ and Sir Geoffrey Vos (MR))
- Minority (Lewison LJ)

MAJORITY OPINION

- Key meaning of “business of a prescribed description” and “the whole or part of that business” in the context of the statutory purpose
- Type of business AR permitted to conduct is distinct from the question of for whom the business is undertaken (para 88)
- Assessment of client categorisation analogous to assessment of suitability of investment (para 89) – where does the risk lie?
- “kind of avoidance of responsibility of clever drafting” (para 90)
- A professional investor would have a higher degree of protection (para 91)
- Thus – ARA term that JHM should deal only with professional clients operated as a contractual term between JHM and KCL and did not affect the scope of the permission given for s 39 FSMA purposes
- BUT – KCL giving permission to JHM for something which it was not itself authorized by the FCA to do? (*nemo dat maxim*)

MINORITY OPINION (LEWISON LJ)

- Considered wording of s 55E
- Person NOT an authorised person except to the extent his carrying out of regulated activities is authorised by the FCA (para 100) (therefore s 39 cannot apply)
- Retail clients falls on the “what” rather than “how” side of the line (para 102); s 102 – *part* of the business of a generic description
- COBS – concerned with *how* question
- But noted need for further argument

WHAT NEXT?

- Permission to appeal to Supreme Court granted Oct 2024
- “Any regulated activities which are carried on by the representative in accordance with such an arrangement are the responsibility of the principal, who must therefore have permission for all the regulated activities they carry on.” (Explanatory Notes to the FSMA 2000) [see also Jackson & Powell on Professional Liability, para 14-018]
- Implications of the Consumer Duty and how that ties to the investor protection purpose (commentary to the effect it has been overstated?)
- Intervenors? FCA (ensuring the principal has effective regulatory oversight); FOS (definition of an eligible complainant); Treasury (ultimate responsibility and orders under FSMA 2000, s 39(4)?)

QUESTIONS?

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