Neutral Citation Number: [2010] EWCA Civ 123

Case No: C1/2009/2024

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
MR JUSTICE COLLINS
[2009] EWHC 2242 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2010

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
LORD JUSTICE STANLEY BURNTON
and
LORD JUSTICE JACKSON

Between :

THE FINANCIAL SERVICES AUTHORITY (1) **ELISABETH CONNELL (2)** **PATRICIA SENRA (3)**	**Appellants**
- and -	
AMRO INTERNATIONAL SA (1) **CREON MANAGEMENT SA (2)**	**Respondents**
- and -	
GOODMAN JONES LLP	**Interested Party**

Dinah Rose QC and **Andrew George** (instructed by **The Financial Services Authority**) for the **Appellants**
Charles Flint QC (instructed by **Mishcon de Reya**) for the **Respondents**
The **Interested Party** did not appear and was not represented.

Hearing date: 2 February 2010

Approved Judgment

LORD JUSTICE STANLEY BURNTON :

Introduction

1. This is an appeal by the Financial Services Authority against the order dated 28 August 2009 made by Collins J in judicial review proceedings brought by the Claimants, Amro International SA ("Amro") and Creon Management SA ("Creon"). The FSA had appointed the Second and the Third Appellants as investigators under section 169 of the Financial Services and Markets Act 2000 ("FSMA"): I shall refer to them as "the Investigators". They had issued a notice dated 4 August 2009 under sections 171 and/or 172 of FSMA to compel the production of certain documents from Goodman Jones LLP ("Goodman Jones"), who are accountants who acted for Amro and Creon and associated companies and individuals. That notice was subsequently amended by notice dated 11 August 2009.

2. The judge quashed the decision of the FSA to appoint the Investigators, and quashed the notices dated 4 and 11 August 2009 on Amro's undertaking to instruct Goodman Jones to produce to the FSA certain classes of documents, far narrower in extent than those sought by the Investigators.

3. The FSA contends that the judge erred in law in quashing its appointment of the Investigators and the notices of 4 and 11 August 2009. The Respondents submit that he was entitled to make, and rightly made, the order referred to above.

4. The appeal raises questions of general importance concerning the exercise by the FSA and its investigators of the powers conferred by FSMA in aid of foreign regulators.

The facts

5. The foreign regulator in this case is the Securities and Exchange Commission of the United States of America. Both the UK and the US regulators are parties to Memoranda of Understanding relating to international cooperation. The first, dated 25 September 1991, was entered into between the SEC and the Securities and Investment Board, the predecessor of the FSA. Part 3 of that MOU set out requirements for requests for information made under it by the SEC to the SIB and vice versa. In May 2002 both the UK and the US regulators entered into a multilateral MOU "concerning consultation and cooperation and the exchange of information" under the aegis of IOSCO, the International Organisation of Securities Commissions.

6. In June 2002, the SEC began an investigation into Rhino Advisors Inc. ("Rhino") relating to trading in stocks. As a result of its investigation, in April 2006 the SEC instituted proceedings in the United States District Court for the Southern District of New York against, among others, Andreas Badian. In its complaint, the SEC alleged that in 2001 Mr Badian and others had engaged in fraudulent and manipulative trading in the shares of Sedona Corporation, a US company. Amro had loaned Sedona $2.5 million; Sedona had agreed to repay $3 million some 4 months later. The loan agreement permitted Amro to convert Sedona's debenture stock to ordinary shares at specified conversion dates. Obviously, the lower the market price of Sedona's shares at the conversion dates the more shares Amro could acquire. Mr Badian and others acted for Rhino, an unregistered investment adviser firm, one of whose clients was Amro. The complaint alleges that Mr Badian, with the assistance of the other

defendants in those proceedings, engaged in concealed manipulation of Sedona's share price by a scheme of extensive short selling of the shares, in fraud of Sedona, in breach of the agreement between Sedona and Amro, and in violation of Federal securities laws.

7. In May 2003, Robert Charron, a New York lawyer, on behalf of Rhino made and served on the SEC a response to questions that Rhino had been required to answer under the Securities and Exchange Act 1934. In his response, he identified Creon, like Amro a client of Rhino, as a company that had engaged in conjunction with Amro in concealed dealing in Sedona shares during the relevant period. He said that Amro and Creon had a large number of companies, referred to as special purpose vehicles, or SPVs, that they used for their financing transactions. The statement listed those SPVs, and stated that three of them had purchased shares in Sedona stock, but not during the period of the alleged fraudulent trading.

8. By July 2009, discovery in the New York proceedings was apparently drawing to a close. When extending time for completion of non-expert discovery to 15 August 2009, the judge stated:

> I grant this consent motion .... It is extremely unlikely that I will grant any further extensions; this case focuses on events that occurred in 1999 to 2002.

9. On 9 July 2009, the SEC requested a further extension for non-expert discovery to 31 August 2009; the other parties did not object to this, and on 24 July 2009 US Magistrate Judge Eaton granted the request.

10. On the same day (a Friday), the SEC sent to the FSA by email a request for assistance pursuant to the 1991 and the IOSCU MOUs. The heading to the letter of request was the NY action against Badian and others. The SEC sought the FSA's assistance:

> in obtaining the production of documents from Goodman Jones Chartered Accountants ("Goodman Jones"), a London-based accounting firm that we have ascertained through discovery has (or had) records in its possession relating to entities and/or transactions relevant to the SEC's civil court action.

The SEC stated that Badian and others, acting for Rhino, had used short selling to manipulate Sedona's stock price downward to favour the financial interest of Rhino's clients, Amro, Creon and related SPVs identified in Exhibit A to the letter. That list was the list of SPVs that had been provided by Mr Charron. The letter stated:

> The documents sought from Goodman Jones will show the identity of the owners of Amro, Creon, and the SPVs and the roles of those entities in the alleged fraud to manipulate Sedona's stock price.

11. The letter of request stated that the SEC had been ordered to complete discovery by 30 August 2009, and that it did not believe that an additional extension of time was possible. It requested the FSA's expedited assistance in obtaining the following documents from Goodman Jones:

> 1. All documents that relate to ... Rhino, Amro, Creon ... and/or their Special Purpose Vehicles, identified in Exhibit A to this letter, for the earlier of the date of Amro's incorporation or January 1, 2000 through the present, including, but not limited to:
>
> a. All documents that reflect the legal and/or beneficial owners, and the persons who funded and/or directed their activities;
>
> b. All memorandum or correspondence related to Rhino, Amro, Creon and/or their Special Purpose Vehicles; and
>
> c. Bank, brokerage and/or depository accounts records of ... Amro and/or Creon and/or their Special Purpose Vehicles (including, but not limited to opening account documents, monthly account statements, cancelled check, deposit slips, and/or wire transfers) in which any of them or persons affiliated with them had signatory or trading authority, and/or in which any of them had a legal or beneficial interest.

The SEC requested the FSA to compel production of these documents in the event that Goodman Jones refused to produce them.

12. On the following Monday 27 July 2009, Anila Bedi and Beth Connell of the FSA telephoned Isabela Reis and Jim McHale of the SEC to discuss the request. The written record of the telephone call states:

> In particular, the FSA wanted to discuss the scope of the request and the relevance of information requested. In particular, the FSA could not understand the relevance of the information requested about Creon and a number of SPVs, as they were not referenced in the SEC's publicly available complaint. The FSA wanted to discuss the following areas of concern with the SEC:
>
> 1. How are Goodman Jones related – who are their clients?
>
> 2. Who are Creon and what is their involvement as they are not mentioned in the SEC complaint?
>
> 3. How are the SPVs related?
>
> 4. Why is the timeframe so wide considering conduct in question was prior to 2003?

13. The FSA explained that the request for assistance did not clearly show why the information requested was relevant. The record of the telephone call continues:

> The SEC explained that the fraudulent action by Andreas Badian as contained in the SEC's request was not an isolated incident and that Andreas Badian and other members of the Badian family had been involved in repeated fraudulent and

> manipulative practices. The SEC explained that Creon was an organisation that had been identified during discovery which has the same status as Amro and appeared to be involved in the same manipulative transactions. The SEC believe that both Amro and Creon are ultimately owned by members of the Badian family and that Andreas Badian personally profited from the manipulative trading in question.

14. Ms Bedi explained that there were two problems. The first was logistical: whether the information could be produced in the short period of time requested by the SEC. The second concerned process under FSMA: the FSA "needs to be able to prove request is reasonable and necessary in the circumstances". Ms Bedi asked whether it was possible to limit the scope of the request in order to obtain correspondence related only to transactions. She explained that it was "not clear what the links were or the relevance/necessity of information sought". The SEC responded that they:

> ... do not view the request as unreasonable. Explained that Badian had done the same thing with other transactions and under US law, "pattern and practice" can be used as evidence to show a guilty mind. The interest in Creon and the SPVs is to show a course of behaviour and highlight that Badian had acted in a fraudulent way on a number of occasions and may himself have personally benefited from the manipulative trading in question.

The SEC said that they would send a letter to the FSA setting out the relevance of Creon in the lawsuit, the relationship and relevance of the SPVs and of the documents referred to in requests b and c.

15. On the same day, 27 July 2009, the FSA sent a letter to Goodman Jones requesting on a voluntary basis the provision of the information and documents sought by the SEC, as set out in the SEC request, i.e. in paragraphs a, b and c. The letter enclosed the list of SPVs.

16. Goodman Jones replied by e-mail on 28 July 2009. Quite rightly, they said that they were subject to obligations of confidentiality towards their clients and could not provide information to third parties on a voluntary basis. They stated that it would be helpful if the FSA could use its statutory powers to compel production, and added:

> For your information, we hold some records within the items a, b and c of your aforementioned letter and these records could be made available within your timescale.

17. In an email dated 28 July 2009 the SEC responded to the questions raised by the FSA. They stated:

> 1. Creon and Amro were both managed by Badian's company and engaged in what appears to be the same fraudulent conduct. They both used the same source of funds for their business.

2. The Special Purpose Vehicles operated to conceal the action of Amro and Creon.

3. The correspondence sought in Item "b" concerning Amro, Creon and the SPVs should show who was directing their activities, the source of their funding, the nature of their operations, and the distribution of profits from illegal conduct. The bank records sought in Item "c" should document the flow of funds into and out of accounts in the names of Rhino, Amro, Creon, and the SPVs. They should also help establish the extent to which Defendant Badian profited from the fraudulent activities of these entities in which he participated. The documents that the Commission seeks from Goodman Jones go to the heart of the allegations in the Complaint. Those documents will help establish the following:

1. Who owns and financed Amro's activities?

2. Who owns and financed Creon's activities?

3. How did Amro and Creon initially fund the transactions that gave rise to the allegations in the complaint?

4. How Amro and Creon initially funded similar transactions?

5. How Amro and Creon earned money from such transactions?

6. To which banks or other depository institutions did Amro and Creon send the earnings or profits from those transactions?

7. Whether any of those earnings are traceable to the funds expended for the benefit of Defendant Badian?

Our goal is to show a "pattern of practice" or a "course of conduct" on the part of Defendant Badian. Such a showing finds support in the law of evidence applicable to this case. Our U.S. Federal Rule of Evidence 404(b) permits a proponent to show "other crimes, wrongs, or acts [to show] proof of motive, opportunity, [or] intent" to engage in the conduct of which a civil Complaint alleges. Correspondence developed in this litigation reveals that Goodman Jones was intimately involved in maintaining the books and records of Rhino, Amro, Creon and the SPVs. Those documents too will help prove the allegations in the Commission's Complaint.

18. Having received this information, the FSA prepared a document assessing the referral made by the SEC. It set out what the FSA was seeking to achieve, namely:

What do you seek to achieve with Enforcement Tools?

- Assist the SEC to further its proceedings against the Defendants, who are suspected of short selling stock in

order to manipulate the price downwards, contrary to the provisions of the Securities Act 1933 and the Securities and Exchange Act 1934.

- Fulfil the FSA's obligation to take such steps as it considers appropriate to co-operate with other persons who have functions similar to our own, as required by section 354 of FSMA.

- Fulfil the FSA's commitment to cooperate, provide assistance and exchange information pursuant to the IOSCO Multilateral MoU dated May 2002 and the bilateral MoU between the SEC and the FSA dated 25 September 1991.

It set out the SEC's allegations as follows:

> Notwithstanding this prohibition the Commission alleges that Badian, a senior employee at Rhino, engaged in a scheme of extensive short selling of Sedona's shares on behalf of Amro and Creon, in violation of this agreement and US federal securities laws. This conduct operated as a fraud on Sedona and the market for Sedona's shares. The SEC's complaint further alleges that Jacob Spinner, Mottes Drillman and Jeffrey "Danny" Graham assisted Badian in carrying out this scheme. They executed manipulative trades through accounts they controlled at Defendant Pond Equities and other Broker, Refco Securities ("Refco"). They engaged in matching trades with respect to transactions at two brokerage firms, Westminster and Refco, and they double-reported transactions to create the false impression of sales volume. Badian illegally directed Spinner, Drillman and Graham to sell short massive amounts of Sedona stock with "unbridled levels of aggression," to "clobber" Sedona's stock price until it "collapsed." These three individuals concealed the identity of Amro and Creon from the market, which enabled them to create the false appearance that individual investors were selling large amounts of Sedona's stock. During March 2001, Badian directed trading in Sedona that comprised approximately 40% of all trading stock. During that period, Sedona's share price dropped from an average of $1.43 a share before 1 March 2009 to an average of $0.75 per share by 23 March 2001.
>
> The Commission also alleges that the firm Pond Equities and its senior management violated the supervision and recordkeeping requirements of federal securities laws in connection with its trading in Sedona's shares. Moreover, Pond and its directors failed to adopt adequate supervisory and compliance policies and procedures or systems to detect or prevent the manipulative trading in which Spinner and Drillman engaged.

> Correspondence obtained during this litigation reveals that Goodman Jones was involved in maintaining the books and records of Rhino, Amro, Creon and the relevant SPVs.

The document set out the relevance of the information sought by repeating the contents of the SEC email of 28 July 2009. Under the heading "Factors in favour of and against Enforcement action", it referred to section 169(1)(b) of FSMA, set out below, and considered the factors mentioned in section 169(4):

> *Whether corresponding assistance would be given*
>
> 20. The SEC is a signatory to a bilateral MoU with the FSA dated 25 September 1991 and to the ISOCO MoU of May 2002. Under the terms of these MoUs, the SEC has rendered, and continues to render, corresponding assistance to the FSA.
>
> *Whether there is a UK parallel to the law or requirement breached.*
>
> 21. The SEC's investigations concerns potential violations of the general antifraud provision of the Securities Act of 1933 and the Securities and Exchange Act of 1934. The equivalent offences under UK law are contained in section 397 of FSMA
>
> *The seriousness of the case and its importance to persons in the UK*
>
> 22. The SEC regards the matters giving rise to its investigation as serious. The conduct under question is limited to the US and does not involve UK entities. It is not known whether persons in the UK are affected.
>
> *Whether it is in the public interest*
>
> 23. There is a strong public interest in continuing to foster relationships of mutual assistance with overseas regulators. The exchange of information is of clear advantage to the parties involved and contributes to the maintenance of comity as recognised in international jurisprudence.
>
> Turning to other factors to be consider by FSA:
>
> 24. The proposed investigators will consist of Beth Connell and Patricia Senra from the Legal Group.
>
> 25. The amount of information being requested is substantial considering the short deadline for production. However, the SEC has explained that the information is necessary to show repeated conduct on behalf of Mr Badian and prove to the court that Mr Badian has shown a repeated course of conduct. In addition, Goodman Jones has indicated that production by the required deadline is feasibile.

19. On 3 August 2009, Sean Martin, the Head of Department of the Legal Group of the FSA confirmed by his signature that he accepted the case for enforcement within the scope set out in the Assessment. On the same day, he signed a Memorandum of Appointment of Investigators appointing Ms Connell and Ms Senra as Investigators under section 169(1)(b) of FSMA. The Memorandum set out the reasons for their appointment:

> "REASONS
>
> Investigators have been appointed in order to assist the SEC with its ongoing civil action in the matter of *SEC v Andreas Badian, Jacob Spinner, Mottes Drillman, Jeffrey Graham, Pond Securities Corp, Ezra Birnbaum and Shaye Hirsch, Civ. Action No. 06CV 2621 (Southern District of New York)*. This action involves fraudulent and manipulative trading in the common stock of Sedona Corporation contrary to the general antifraud provisions contained in section 17(a) of the Securities Act of 1933 and section 10(b) of the Securities Exchange Act 1934.

20. On 4 August 2009, the Investigators issued a notice to Goodman Jones under section 171(2) and 172(2)(b) of FSMA to produce the documents and information described as set out in the SEC letter of request and set out under paragraph 11 above.

21. Goodman Jones raised two issues. The first related to the words "persons affiliated with them" in paragraph c of the description of documents sought: Goodman Jones suggested that the meaning of this phrase was unclear, as indeed it was. Secondly, they asked to be permitted to inform their clients of the notice that had been served on them.

22. By letter dated 11 August 2009 the FSA informed Goodman Jones first that the description of documents in paragraph c had been amended by deleting the words "or persons affiliated with them" and substituting by name Mr Badian, his brother Thomas and their father, and, secondly, that they could inform their clients of the notice.

23. On 12 August 2009, the defendants to the New York action applied to the New York Court for an order requiring the SEC to withdraw the Request to the FSA and/or to be precluded from using any of the material which it received from the FSA on various grounds relating to, amongst other things, the SEC's alleged conduct in the American Action, alleged breaches of American procedural law and alleged non-compliance with the applicable rules (the Hague Convention) by which evidence should be obtained from abroad. On 13 August 2009 that application was dismissed. The defendants then applied for a reconsideration of that decision. On 17 August 2009, that application was also dismissed.

24. This claim for judicial review, together with a request that it be determined as a matter of urgency, was issued on 17 August 2009. It was heard as a matter of urgency by Collins J who granted permission to apply for judicial review and made the orders summarised at paragraph 1 above, on the Claimants' (the Respondents to this appeal)

undertaking to instruct Goodman Jones to produce to the FSA all documents in their possession relating to:

> (1) The alleged *"fraudulent and manipulative trading in the common stock of Sedona Corporation"* during March 2001 pleaded in a complaint dated 3 April 2006 ("the US Complaint"); or
>
> (2) The allegation in the US Complaint that the said trading in Sedona stock was *"to favour the financial interest of... Amro International SA"*; or
>
> (3) The allegation that the alleged "*scheme of extensive short selling of Sedona Shares*" was engaged in by Andreas Badian.

25. Collins J granted permission to appeal. Possibly because of the litigation in this country, the documents sought by the SEC are not required with the same urgency as before. The decision on this appeal is therefore of practical significance.

The legislative framework

26. FSMA imposes a statutory duty on the FSA to take appropriate steps to co-operate with overseas regulators, such as the SEC, which have similar functions to the FSA. Section 354(1) of FSMA provides:

> The Authority must take such steps as it considers appropriate to co-operate with other persons (whether in the United Kingdom or elsewhere) who have functions—
>
> (a) similar to those of the Authority; or
>
> (b) in relation to the prevention or detection of financial crime.

27. The powers that the FSA may exercise when it decides to cooperate with a foreign regulator include those conferred by section 169:

> 169. (1) At the request of an overseas regulator, the Authority may—
>
> (a) exercise the power conferred by section 165; or
>
> (b) appoint one or more competent persons to investigate any matter.
>
> (2) An investigator has the same powers as an investigator appointed under section 168(3) (as a result of subsection (1) of that section).
>
> (4) In deciding whether or not to exercise its investigative power, the Authority may take into account in particular –

> (a) whether in the country or territory of the overseas regulator concerned, corresponding assistance would be given to a United Kingdom regulatory authority;
>
> (b) whether the case concerns the breach of a law, or other requirement, which has no close parallel in the United Kingdom or involves the assertion of a jurisdiction not recognised by the United Kingdom;
>
> (c) the seriousness of the case and its importance to persons in the United Kingdom;
>
> (d) whether it is otherwise appropriate in the public interest to give the assistance sought.

28. The FSA's powers under section 165 are restricted to authorised persons, principally persons authorised by the FSA to carry out activities in relation to investments that are regulated under the Act: see sections 22 and 31. Goodman Jones were not authorised under the Act, and the section 165 powers could not therefore be exercised in relation to them. It follows that if the FSA was to obtain the documents sought by the SEC, it had to appoint an investigator or investigators under section 169(1)(b). That is what it did.

29. As has been seen, section 169(2) provides that such an investigator has the powers of an investigator appointed under section 168(3). Section 170 imposes a duty on the FSA, save in specified circumstances, to give written notice of an investigator's appointment to the person who is the subject of the investigation. Section 172 is as follows:

> 172 *Additional power of persons appointed as a result of section 168(1) or (4)*
>
> (1) An investigator has the powers conferred by section 171.
>
> (2) An investigator may also require a person who is neither the subject of the investigation ("the person under investigation") nor a person connected with the person under investigation—
>
> (a) to attend before the investigator at a specified time and place and answer questions; or
>
> (b) otherwise to provide such information as the investigator may require for the purposes of the investigation.
>
> (3) A requirement may only be imposed under subsection (2) if the investigator is satisfied that the requirement is necessary or expedient for the purposes of the investigation.
>
> (4) "Investigator" means a person appointed as a result of subsection (1) or (4) of section 168.
>
> (5) "Specified" means specified in a notice in writing."

By virtue of section 169(1)(b), the Investigators were within the definition in section 172(4), and they therefore had the powers conferred by that section. Section 172(1) confers the powers conferred on other investigators by section 171:

> 171 *Powers of persons appointed under section 167*
>
> (1) An investigator may require the person who is the subject of the investigation ("the person under investigation") or any person connected with the person under investigation—
>
> (a) to attend before the investigator at a specified time and place and answer questions; or
>
> (b) otherwise to provide such information as the investigator may require.
>
> (2) An investigator may also require any person to produce at a specified time and place any specified documents or documents of a specified description.
>
> (3) A requirement under subsection (1) or (2) may be imposed only so far as the investigator concerned reasonably considers the question, provision of information or production of the document to be relevant to the purposes of the investigation.

30. This circuitous drafting gives rise to unnecessary cross-referencing, but leads to the undisputed conclusion that the Investigators have the powers conferred by section 171(1) and (2) provided they "reasonably [considers] the question, provision of information or production of the document to be relevant to the purposes of the investigation".

The judgment of Collins J

31. The judge seems to have applied to the Investigators' notice to Goodman Jones the requirement that the production of the documents sought was necessary or expedient for the purposes of their investigation. In paragraph 15 he said:

> It is to be noted that subsection (2) of section 171 specifically refers to production of documents which must be specified documents or of a specified description, whereas 172 deals with the provision of information. I suppose it may well be said that production of a document may also be the provision of information, the information being the information contained in the document, but I would have thought that, when one is dealing with production of documents, the natural reading of the provisions of the Act mean one goes to section 171(2) rather than to section 172(2). However, since documents such as are in involved in this case are confidential documents, it seems to me that it is implicit, even if one does not specifically go to section 172(3), that it would not be appropriate to require their production unless indeed that was necessary or expedient

> for the purposes of the investigation. The word proportionate has been used and it is, as I understand it, accepted that the test that the FSA gives itself is one of proportionality when it is concerned with documents that are otherwise confidential, and it seems to me that that is a proper approach to be adopted when one looks at the provisions of the Act overall. Thus, I do not think that it is right to adopt a technical approach to these provisions of the Act. It seems to me that the approach which I understand to be that adopted by the FSA is indeed a correct one.

32. The judge was critical of the delay of the SEC in seeking the documents and information it sought from Goodman Jones. He considered that the ambit of the information to which the FSA, and through it the SEC, were entitled was confined to the allegations pleaded in the SEC's complaint in the New York litigation, and what would have been permissible discovery (i.e., disclosure of documents) in such proceedings if they had been before our courts:

> 42. I come back then to the powers. It seems to me that where, as here, the request for assistance is based, as it was, and indeed the appointment of inspectors makes this clear, on the need to assist in the claim, then the nature of that claim becomes of fundamental importance. It is all very well for the SEC to say that they should be allowed to produce the evidence of other misconduct and to say that they are now alleging that Creon was involved and Amro was involved because Badian was himself, or through his family, effectively the owner of, or heavily involved in, the claimant companies. Those are not allegations which are contained in the claim and, as it seems to me, in those circumstances it is wrong for the FSA to agree to go beyond what is actually covered by the claim. It is particularly the case where, as here, the claim is made for such a wide variety of documentations.
>
> 43. Mr Hunter [counsel for Amro] submits that they have not been specified within the meaning of the legislation. Certainly "specified" can include a wide identification of documents but here there is indeed a scope for wondering precisely how far this went and, indeed, Goodman Jones themselves raised queries as to the extent to which they were bound to give discovery. But, more importantly, these, as I say, are sought in order to try to identify unlawful activities by, among others, Amro and Creon, who are thus being dragged in, without any right to defend themselves. It seems to me in those circumstances that the FSA could not have done other than decided that it was not necessary or indeed proportionate for the wide scope of discovery that was sought to be agreed to.

33. He concluded his judgment as follows:

45. So far as questioning the SEC is concerned, it would, I am satisfied, place an intolerable administrative burden on the FSA if they were required to satisfy themselves in all cases as to the correctness of what they were being asked to investigate or the basis upon which the investigation was asked for. They are entitled generally to rely upon the information given to them by the foreign regulator and, in cases other than those such as this which rely on support from an individual court case, normally they will be told, I imagine, why it is that the information is sought, or rather that the investigation is sought, because the allegations are whatever they are and the regulator in question is pursuing the relevant enquiries. As I say, as a general proposition, it seems to me that such an investigation will be an endeavour to find evidence, that is what an investigation is all about, based upon allegations which may in the end turn out to be without foundation but which are taken seriously and properly taken seriously by the foreign regulator.

46. The circumstances here were such as did mean that the FSA thought it right to make some enquiries and that was because the request made did not seem to be consistent with the case which they were being asked to support. Those enquiries made were properly made and it seems to me the FSA adopted entirely the right approach. When, however, they received that information, for the reasons that I have given I do not think that they were justified in giving the assistance that was sought, but I do not think equally that it was necessary for them to make yet further enquiries in order to see precisely upon what the allegations were based. They were faced with what was requested, they knew that it was a request made very much at the last minute (that was obvious from the timing) and they knew the extent of the request and of the documents that they were being asked for. But, as I say, I do not think that there was any specific duty to make further enquiries. It may be that, if they still thought in terms of accepting the request or possibly accepting the request, they should have followed it further, but that was only if they sought to justify agreeing to the request.

47. In those circumstances, I am satisfied that the claim to that extent succeeds, and I say to that extent because I recognise, indeed it is clear, that some discovery will indeed be proper and, provided that that discovery was limited to the Sedona transaction or relevant to the Sedona transaction, then there could be no objection to it.

The issues on this appeal

34. The principal issues on this appeal are the following:

(1) When considering whether to exercise the powers conferred by section 169(1) of FSMA, is the FSA under a duty to investigate or to verify the information provided by the overseas regulator?

(2) On the basis that the SEC's request does not comply with the requirements of the MOUs, was it open to the FSA to accede to it?

(3) When investigators are appointed under section 169, is the FSA subject to the requirement in section 170(2)?

(4) Were the investigators confined by the terms of their appointment to seek documents relevant to the issues pleaded in the New York proceedings? In the circumstances of the present case, was the matter that the FSA was entitled to appoint the Investigators to investigate limited to the facts pleaded in the New York proceedings? And if so, were the documents the production of which the Investigators were entitled to require from Goodman Jones similarly limited to those evidencing those facts?

(5) When deciding whether to make a requirement under section 171(1), is it sufficient for an investigator reasonably to consider that the question, provision of information or production of documents is relevant to the purposes of his investigation, or must he be satisfied that the requirement is necessary or expedient for those purposes?

(6) Was the requirement made by the Investigators for the production of "specified documents or documents of a specified description" within the meaning of section 171(2), or was their requirement too wide or too vague to fall within the statutory power?

The parties' submissions on this appeal

35. For the FSA, Ms Rose QC submitted that the above issues fall to be decided as follows:

(1) The FSA is under no such obligation.

(2) Yes.

(3) No.

(4) No.

(5) The test to be applied is that of relevancy.

(6) The documents sought by the letter of 11 August 2009 are of a specified description and therefore within the statutory power.

36. Ms Rose further submitted that the judge had erred in that he had in effect imposed on the FSA a duty to verify the information provided by the SEC and the SEC's need for the documents it sought; that he had wrongly considered that the Investigators had to be satisfied that their requirement that the documents be produced was "necessary or expedient for the purposes of the investigation"; that he had wrongly limited the scope

of any lawful requirement to documents relating to the facts pleaded in the New York proceedings. If the judge had correctly applied the provisions of FSMA, he would not have quashed the appointment of the Investigators or their requirement contained in the letter of 11 August 2009.

37. For the Respondents, Mr Flint QC contended that, apart from his application of the "necessary or expedient" test, the judge had correctly applied the provisions of the Act. Furthermore, the FSA had wrongly acceded to the SEC's request when the latter had failed to comply with either of the MOUs. Lastly, the Investigators' requirement was too vague and wide to satisfy the statutory requirement that it be for documents of a specified description. It followed that the appeal should be dismissed.

Discussion

(1) The lawfulness of the appointment of the Investigators

38. Financial enterprises and financial transactions are increasingly international, as the banking crisis has only too clearly demonstrated. It is therefore of the greatest importance that national financial regulators cooperate, particularly where there are suspicions or allegations of financial fraud or other misconduct. The desirability of such cooperation is reflected by FSMA, not only by section 169. Section 2(3)(e) requires the FSA, when discharging its general functions, to have regard to the international character of financial services and markets. Section 354 requires it to "take such steps as it considers appropriate to co-operate with other persons (whether in the United Kingdom or elsewhere) who have functions (a) similar to those of the [FSA] or (b) in relation to the prevention or detection of financial crime".

39. It would be surprising if the Act did not permit the FSA to accord full faith and credit (to borrow the phrase of the Constitution of the United States and applied to a judgment of a court of the State of New York by Lord Denning MR in *Colt Industries v Sarlie (No. 2)* [1966] 1 WLR 1287) to a foreign regulator, particularly one as important as and of the reputation of the SEC. I can see no good reason why Parliament should have required the FSA to second-guess a foreign regulator as to its own laws and procedures, or as to the genuineness or validity of its requirement for information or documents. Significantly, none of the matters listed in section 169(4) that the FSA may take into account when deciding whether to exercise its investigative power at the request of a foreign regulator points in the direction of requiring the FSA to form a judgment as to the necessity or desirability, from the point of view of the foreign regulator, of its obtaining the information or documents it seeks. This is not to say that the FSA was bound to comply with the SEC's request. The FSA must, and did, consider the request when deciding whether to exercise its discretion under section 169 by the exercise of its investigative powers. The FSA in fact asked the pertinent questions, set out at paragraph 12 above, and received sensible answers. It is clear that the FSA decided to exercise its investigative power having considered the matters listed in section 169(4), as shown by the FSA assessment referred to at paragraph 18 above.

40. The judge was critical of the SEC, for its delay in seeking the documents and for the breadth of the documents it sought. In my judgment, it was not incumbent on the FSA to examine the SEC's request critically, and it was all the more wrong for the court to do so. That it was inappropriate for the court in this country to do so is highlighted by

the fact that the New York court denied Mr Badian's application for an order precluding the SEC from obtaining and using in the New York proceedings the documents requested from the FSA. I think it right to assume that if the SEC's request were extravagant under New York law, in the sense that it extended to documents of no possible relevance or admissibility in those proceedings, that would have been asserted by Mr Badian's lawyers and would have resulted in the grant of some relief on his application. It is not for the courts of this country to determine whether the SEC's request will result in documents being obtained that will be useful for it in the New York proceedings.

41. In paragraph 45 of his judgment the judge accepted, rightly in my view, that the FSA is not "required to satisfy itself of the correctness of what they are being asked to investigate or the basis upon which the investigation was asked for". However, he did not apply this conclusion to the SEC's request, and in that he erred.

42. I see no error of law or principle in the FSA's decision to appoint the Investigators. It follows that I would allow the appeal against his order quashing their appointment.

(2) Was it open to the FSA to accede to the SEC's request if it did not comply with the requirements of the MOUs?

43. The requirements set out in the MOUs are not to be found in FSMA. In my judgment, the requirements to be satisfied by the FSA and its investigators when deciding whether to act in support of an overseas regulator are those contained in the statute, and not elsewhere. It follows that it is immaterial whether the SEC's request complied with either of the MOUs.

(3) Was the FSA required to comply with the requirement in section 170(2)?

44. Section 169(2) confers on an investigator appointed under section 169(1)(b) the same powers as an investigator appointed under section 168(3) (as a result of subsection (1) of that section), but does not impose any duty on the FSA to comply with any of the requirements of section 170. Section 170 applies to investigators appointed under section 168(3) or (5), but not to those appointed under section 169, as these Investigators were. Moreover, the provisions of section 170, and in particular of subsection (2), would seem to be inapt in relation to a section 169 investigation.

45. It follows that the lack of a notice under section 170(2) is immaterial.

(4) The scope of the Investigators' appointment

46. The Investigators were appointed not to obtain documents admissible in the New York proceedings, or relevant to issues already pleaded in those proceedings, but "to assist the SEC with its ongoing civil action ..." The SEC stated that the documents it sought would be helpful to it in that action, and gave sensible reasons for that statement, including explaining why similar fact evidence would be helpful. In my judgment, that was sufficient for the FSA, and it should have been sufficient for the judge.

47. As I have already indicated, I do not think it is for the courts of this country to assess whether the SEC's assertions as to the relevance of the documents it sought are well-

founded as a matter of New York law. Nor is it for our courts to consider whether the scope of the New York action or the facts pleaded in it may or may not be enlarged following disclosure of the documents now sought.

48. The judge approached this case as if the FSA had sought disclosure of documents in domestic litigation: hence his comment in paragraph 42 of his judgment that "it is wrong for the FSA to agree to go beyond what is actually covered by the claim"; hence his statement in paragraph 47 that "some discovery will indeed be proper", and hence the formulation of the undertakings that were required of the Respondents. With respect to the judge, who produced a comprehensive judgment in circumstances of apparent urgency, this was a fundamentally incorrect approach. The FSA was exercising an investigatory power, not a power of discovery, and it was not limited to requiring documents relating to the allegations then pleaded in the New York proceedings.

(5) The test to be applied by the Investigators when considering whether to exercise the power conferred by section 171

49. The judge held, in paragraph 15 of his judgment, that the power of the Investigators to require production of confidential documents could be exercised only if it was necessary or expedient for the purposes of their investigation. He also referred to a test of proportionality, although we were told that he had wrongly formed the impression that the FSA accepted that it should apply that test when deciding whether to seek production of confidential documents.

50. In my judgment, the judge erred in applying the "necessary or expedient" test. That is the test to be applied under section 172, by an investigator when considering whether to exercise the power conferred by section 172(2), which may be exercised in relation to a person who is not the person under investigation and who is not connected with him. That power includes power to interrogate (section 172(2)(a)). The power conferred by section 171(2), while also exercisable in relation to an unconnected person, is limited to requiring the production of documents. It is not surprising that Parliament required an investigator to apply a more rigorous test to a requirement that a person who is not the person under investigation or connected with him (as defined in section 171(4)) subject himself to questioning than that applicable to a requirement that he produce documents. The judge wrongly transferred the test in section 172 to the powers conferred by section 171. This is inconsistent with the express provisions of FSMA.

51. The consideration that the documents sought by the Investigators are confidential cannot justify departing from the words of the statute. In any event, documents sought by the FSA, relating as they usually will to financial transactions and arrangements, will normally be confidential. It is clear from other provisions of FSMA, in particular from sections 348 to 353, that Parliament appreciated this. Moreover, investigators and the FSA will be under a duty to use such documents and the information in them only in the exercise of their public functions: see those sections of FSMA and regulation 3 of the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations SI 2001 no. 2188.

52. It follows that the appropriate test to be applied by investigators when considering whether to exercise their powers under section 171 is whether the questions to be

answered or the provision of the information sought under subsection (1) or the production of documents sought under subsection (2), is relevant to the purposes of the investigation. This is a relatively low hurdle. Subject to the question of proportionality, the court cannot impugn the investigator's decision unless it is satisfied that the investigator unreasonably concluded, in a subsection (2) case, that the production of documents was relevant.

53. In fact, the Respondents did not contend before the judge that in order to issue a notice under section 171(2) the Investigators needed to do more than reasonably to consider that the production of the documents sought was relevant to their investigation: paragraph 7.3 of their skeleton argument. Mr Flint did not so contend before us. I suspect that the judge was misled by the terms of the Investigators' letters of 4 August and 11 August 2009, which required production of the documents sought pursuant to both sections 171(2) and 172(2)(b) of the Act, and by the Investigators' letter of 12 August 2009, which stated that they were satisfied that the exercise of their powers was necessary and proportionate. It seems to me that they applied a more stringent test than was required by section 171. It follows that the requirement for the production of documents was justified under section 171(3). It is therefore unnecessary to consider whether the test in section 172(3) was also satisfied.

54. Proportionality is relevant because Article 8 is or may be engaged. But the rights under Article 8.1 are qualified by Article 8.2. It is not suggested that Article 8.2 is inapplicable, the only issue being one of proportionality. Where documents are sought that are relevant to allegations or suspicions of financial malpractice or crime, as in the present case, the requirement of proportionality will be easily satisfied. I have no doubt that it was in the present case.

(6) Was the Investigators' requirement for specified documents or documents of a specified description?

55. I do not think it can be said that the letters of 4 and 11 August sought specified documents. It is quite clear that the SEC, and the Investigators, were unable to specify the documents they wanted to be produced. But did they seek documents of a specified description?

56. In support of his submission that the requirement made by the Investigators was too wide and vague, Mr Flint relied on the decision of this Court in *Tajik Aluminium Plant v Hydro Aluminium AS* [2005] EWCA Civ 1218 [2006] 1 WLR 767. That case concerned a witness summons issued under CPR r 34.2 which was alleged to be too vague and broad. In a judgment with which the other members of the Court of Appeal agreed, Moore-Bick LJ said:

> 27 In order to answer the question raised in this case I think it is necessary to return to first principles with such assistance as may be gained from the earlier authorities. A witness summons, unlike an order for disclosure, requires the person to whom it is addressed to attend court on a specified occasion and to produce to the court the documents to which it refers. It is a requirement reinforced with a penal sanction. Justice demands, therefore, that the person to whom it is addressed should be told clearly when and where he must attend and what he must bring

with him. Anything less is unfair to the witness; it also makes supervision and enforcement by the court extremely difficult, as Miss Reffin was forced to admit. For these reasons I consider that the view put forward in *Phipson* , to which I referred earlier, is to be preferred. Ideally each document should be individually identified, but I do not think it is necessary to go that far in every case. In *In re Asbestos Insurance Coverage Cases* [1985] 1 WLR 331 the court was concerned with an application under section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 under which the High Court is empowered to make orders for the production of documents for use as evidence in proceedings abroad pursuant to a request from a foreign court. Subsection (4) of section 2 expressly provides that an order made under that section shall not require the person to whom it is addressed to state what documents are or have been in his possession, custody or power or to produce any documents other than particular documents specified in the order and subsection (5) provides for the payment of conduct money, expenses and loss of time. This strongly suggests that the draftsman was seeking to equate an order to produce documents made under section 2 with the writ of *subpoena duces tecum* and to draw a distinction between such an order and what at that time would have been an order for discovery. However, despite the express requirement that an order under this section must specify particular documents, Lord Fraser of Tullybelton, with whom the other members of their Lordships' House agreed, considered that "a compendious description of several documents" would suffice provided that the exact document in each case was clearly indicated. By way of example he drew a distinction between an order for the production of "monthly bank statements for the year 1984 relating to [your] current account" with a named bank, which he thought would satisfy the requirements of the Act, and "all [your] bank statements for 1984", which he thought would not: see pp 337-338.

28 Rule 34.2 does not contain any provision comparable to section 2(4) of the Evidence (Proceedings in Other Jurisdictions) Act 1975, but Lord Fraser's observations are none the less helpful because they provide an example of the ways in which, without describing them individually, it may be possible to identify the documents to be produced with sufficient certainty to leave no real doubt in the mind of the person to whom the summons is addressed about what he is required to do. In my view that is the test that should be applied when considering whether documents have been sufficiently identified in a witness summons. Whether it has been met is likely to depend, at least in part, on the particular circumstances of the case. It is unlikely to be met if the documents are described simply by reference to a particular transaction or

> event which is itself described in broad terms, although in cases where the transaction is self-contained and sufficiently well-defined that might be satisfactory. In general, I think that doubts about the adequacy of the description should be resolved in favour of the witness.
>
> 29 In the present case the documents are described in the schedule to each of the witness summonses in broad terms of the kind that would be appropriate to an application for disclosure but which fail to identify the documents with sufficient certainty to enable the witness to know what is required of him. I am satisfied, therefore, that the judge was right to set aside the witness summonses on this ground and that it is unnecessary to consider the other matters on which the witnesses relied in support of their applications. ...

57. The context of that case was very different from the present. A witness summons is issued in proceedings in which the issues have been defined by the pleadings, in order to obtain documents that may be admitted in evidence. The power conferred by section 171, although associated with litigation in the instant case, will normally be exercised when the FSA is not in a position to plead specific allegations. The power is an adjunct to an investigation, for which in the case of an investigation under section 167 requires no more than that the FSA or the Secretary of State considers that there is good reason for it. Suspicion of malpractice may be sufficient. In the case of an appointment under section 168, it is sufficient if it appears to the FSA that there are circumstances suggesting that offences or market abuse have taken place. Investigations would be unnecessarily and inappropriately hindered if investigators were restricted to obtaining specified documents, which is no doubt why Parliament conferred power to obtain specified classes of documents. Lord Fraser's example of a requirement for "all [your] bank statements for 1984", while not a requirement for specified documents, is an example of a requirement for documents of a specified description. What is important is that the person on whom the requirement is made can identify the documents he has to produce, since failure to produce them may lead to the imposition of a penalty under section 177.

58. In the present case, in my judgment the Investigators' requirement was for specified classes of documents. Significantly, Goodman Jones's immediate response to the Investigators' letter of 27 July was, as mentioned above, to state that they held some records within the classes set out in the letter which could be made available within the short time sought by the FSA. Apart from the lack of clarity of the reference to persons affiliated with Amro, Creon and their SPVs, which was deleted from the requirement by the letter of 11 August, Goodman Jones did not suggest and have not suggested that they were or are unable to identify the documents to which the Investigators' requirement relates.

59. It follows that the requirement contained in the letter of 11 August 2009 was a lawful requirement under section 171.

Conclusion

60. For the reasons set out above, the judge was wrong to quash the appointment of the Investigators and was wrong to quash the requirement made by them under section 171. I would allow the appeal of the FSA.

Lord Justice Jackson:

61. I agree.

Lord Justice May:

62. I also agree.