KESSION CAPITAL LIMITED

-v-

KVB LIMITED AND OTHERS

DECISION OF THE SUPREME COURT

RESETTING THE SCALES: Section 39 FSMA & THE SCOPE OF AUTHORISATION

A. Introduction

1. In **Kession Capital v KVB and others** [2026] UKSC 11 the Supreme Court has clarified the proper construction and application of section 39 of the Financial Services and Markets Act ("FSMA"). It has also made important comments about the purpose of the regulatory regime so far as it concerns the activities of appointed representatives, and the responsibilities of their principals, under section 39. Simon Howarth KC and Lucile Taylor of Hailsham Chambers acted for the successful appellant.

2. In so doing, the Supreme Court allowed Kession's appeal against the decision of the Court of Appeal (which had affirmed the first instance decision of Mr Paul Stanley KC sitting as a deputy judge). Both courts below had held that Kession was responsible for the errors and omissions of its Appointed Representative ("the AR").

3. The decision is a helpful "reset" of the balance of obligations and duties between the AR and the principal.

B. Facts

4. The AR entered into an Appointed Representative Agreement ("the ARA") with Kession, for the purpose of advising clients about, and marketing, investments in property development schemes (which turned out to be Unregulated Collective Investment Schemes, although neither Kession nor the AR believed this to be the case at the time the ARA was entered into).

5. The Claimants invested c.£1.7M into the various schemes. All of the schemes failed, and the investments were all lost.

6. The Claimants sued Kession on the basis *inter alia* that Kession was responsible, by virtue of section 39 FSMA, for the acts and omissions of the AR. Kession disputed this contention on the basis *inter alia* that:

   a) The ARA expressly prohibited the AR from undertaking business with retail clients;

b) The Claimants all alleged that they were retail clients and should have been classified as such by the AR; so that

c) the AR's dealings with the Claimants fell outside the scope of the written permission granted to him and Kession was not, therefore, liable under section 39.

C. Structure of section 39

7. Section 39 operates in the following way:

a) If a principal, who is an authorised person for the purposes of FSMA (holding a Part 4A permission under the Act) gives written authority to an appointed representative to carry on "business of a prescribed description"[1] and accepts responsibility in writing for the whole or part of the activities of the AR in that regard[2], then the principal is responsible "as if he had expressly permitted it" for anything done by the AR.[3]

b) Thus, the principal is responsible even if it would have objected strenuously to the acts or omissions (e.g. if they had involved fraud or negligence).

c) Appointment under an ARA means that the AR does not breach the general prohibition (against carrying on financial services business without authorisation) contained in section 19 FSMA.

d) Business of a prescribed description refers to business prescribed by the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, which take one back (for the definitions) to the Regulated Activities Order. Those definitions are couched in generic terms.

8. Therefore, assuming the existence of an ARA, the question is what is meant by "the whole or part of" business of a prescribed description? In other words, what restrictions can be said to limit the AR's authority to "part of" business of a prescribed description?

D. Anderson v Sense Network Ltd [2019] EWCA Civ 1395, [2020] Bus LR 1 **("Anderson")**

9. The only previous appellate authority on section 39 was the decision of the Court of Appeal in **Anderson**. In that case, the principal had imposed a restriction within its ARA to the effect that the AR was not permitted to do investment business otherwise

[1] Section 39(1)(a)(i).
[2] Section 39(1)(b): emphasis added.
[3] Section 39(3).

than via a Company Agency, being an agreement which the principal had with the product provider.

10. The purpose of this restriction was to ensure that the principal could monitor the business being done by matching the commissions which should have been paid to the receipts shown on the AR's bank statements, to secure that all commission payments corresponded to client files. In this way it sought to have maximum visibility over the business being undertaken, and to maximise the effectiveness of its supervisory systems.

11. The AR avoided the intended purpose of the restriction by doing business through bank accounts which it had not declared to the principal and of which the principal was ignorant.

12. The Court of Appeal held that a restriction expressed in terms of Company Agency was effective to circumscribe the permission granted to the AR such that this business was not something for which the principal was liable. It was not within the "part of" the business of advising on investments which Sense had authorised, because it was not done through a Company Agency.

13. David Richards LJ (as he then was) held that there was a distinction between "what" business could be done, and "how" that business could be done. Restrictions as to "what" were effective to reduce the scope of authority, but restrictions as to "how" were not so effective. So, the Company Agency stipulation was effective but a stipulation that business was not authorised if it was done in breach of standards of delivery (whether statutory or at common law) was not effective.

14. He also said this, **Anderson** para 37:

> *"An authorised person cannot accept responsibility for a business for which it does not have authorisation from the FCA. While I accept that the words "the whole or part of" facilitate the involvement of more than one authorised person with the same AR, I do not see the basis for restricting the clear and unqualified words of section 39(1) to this situation. The purpose of section 39(1) is to confer exempt status on persons in a manner which will fulfil the underlying regulatory and protective purposes of the legislation. It may make perfect sense to limit an AR to a partial exemption, having regard to the breadth and depth of the expertise of that AR or indeed of the authorised person. If, as [Counsel for the Claimants] submits, the legislative intention is to make an authorised person responsible for all the activities of an AR that fall within the authorised person's own authorisation, it is inexplicable that section 39(1) is not drafted in clear terms to have that effect. For my part, I find it impossible to spell it out of section 39(1) as it is in fact drafted."*

15. In the present case no challenge was made to the judgment in **Anderson** or the reasons given for it: see Judgment at [38].

E. Kession's Own Part 4A permission

16. Kession did not possess a Part 4A permission allowing it to deal with retail clients. So, it sought to apply the same restriction to the permission it was giving to the AR. It argued in the present case that if it (Kession) did not have permission to deal with retail clients then it was an impossible proposition to suggest that it could permit or purport to permit the AR to do so.

17. The Court of Appeal in the present case (Lewison LJ dissenting) rejected this argument. The Supreme Court disagreed. The Supreme Court was unable to see how it could be suggested that a principal could appoint a representative to carry on business which the principal had no permission to carry out on its own behalf: see Judgment at [66].

F. Client Classification

18. FSMA adopts terms of art for the classification of clients. The default classification is a retail client.

19. Retail clients receive the strongest regulatory protection and therefore impose the greatest regulatory burden on the principal: Judgment at [50 to 52].

20. The other types of client are professional clients or eligible counterparties. Classifing a client as professional or an eligible counterparty involves very little by way of judgment or assessment. The Court of Appeal had treated assessment of classification of a client as akin to assessment of suitability of a product, and therefore an aspect of "how" business was to be done: but this was held by the Supreme Court to be incorrect [74, 75].

G. Reasoning of the Supreme Court: Further Points

21. First, the Supreme Court held that as a matter of ordinary language, it was intelligible to describe dealing with retail clients only as a "part of" the business of advising on investments and arranging deals in them (paragraphs [58, 73]). It followed that stipulating that retail clients could not be advised was also a means of delineating "part of" the business: Judgment at [58]. It also relied on the essential unfairness of making the principal liable for business which it had expressly prohibited [70].

22. Second, the Supreme Court held that this was supported by the differences drawn in the regulations between retail and non-retail clients, and by the fact that the FCA is entitled to impose restrictions on a Part 4A permission by reference to client classification: see section 55E FSMA and explanatory notes thereto.

23. These points are points of detail (albeit important detail) but the Supreme Court accepted Kession's arguments on a broader front as to the manner in which consumer protection was to be achieved. It endorsed and applied the approach of Lord Sumption JSC in **FCA v Asset LI Inc** [2016] UKSC 17 at [88] to the effect that "most regulatory legislation is a compromise between the protection of consumers and the avoidance of regulatory overkill." See paragraph [54].

24. Building on that foundation, the Supreme Court pointed to [61, 78]:
    a) The serious consequences for the principal of accepting responsibility for the AR; and
    b) The significance of exempt status conferred on the AR;
    c) The fact that the purpose of the regulatory scheme under FSMA is to seek to protect consumers:

> *"…on a prophylactic basis, seeking to prevent the occurrence of abuse, with proper person tests, staff qualifications and so on. It is important that remedies are available when things to wrong but to be effective a regime such as that under FSMA is focused on the prevention of abuse and must be construed with this in mind."*

25. The purpose of the section 39 regime, with a view to securing that "things go right", is as follows:
    a) The principal has a real and vested interest in supervising the AR [63];
    b) If the principal is able to limit the permission it grants to the AR to matters in which the principal has experience and expertise, the supervision will be more effective [64];
    c) This is supported by the provisions of SUP 12.4.2 R requiring the principal to establish, before appointing the AR, that the principal has adequate controls over what the AR may do and adequate resources to supervise.

H. Conclusions

26. First, the "what vs how" distinction, derived from **Anderson**, survives. This is plainly correct since an attempt to disclaim liability for breach of a contractual term aimed at doing business "non- negligently" makes no sense.

27. But, second, the Supreme Court has recognised the importance of a restriction on "what" may be done. The Supreme Court has decided that the importance of "what" lies in the ability/expertise of the principal to supervise, considered against the experience and expertise of the AR. This ought to eliminate arid arguments about whether a restriction is a "piece of clever drafting" or a substantive restriction.

28. It follows that the "Ovcharenko argument" (i.e that the whole purpose of section 39 is to set up the principal as a long stop liability target is wrong (see per HHJ Waksman QC in

Ovcharenko v InvestUK Ltd [2017] EWHC 2114 (QB)). Ovcharenko ought to be confined to the case in which the principal is in truth saying "I am not liable because your work was not of a proper standard". The notion that section 39 is a general safety net for claimants is not correct.

29. If the principal is truly able to say, "I am not liable because you were doing business outwith the permission, or doing business for which you required a particular qualification which you did not have, or you were doing business outside a plain English restriction", then it escapes liability.

30. The decision properly applies the insight per Lord Sumption in **Asset Land** that there must be a balance between consumer protection and regulatory overkill and provides a workable and readily understandable framework within which section 39 authorisations can operate.

31. Note, finally, that although this appeal arose out of an application for summary judgment, the Court noted that the issue had been fully argued and therefore "this Court rules as a final decision that Kession had no responsibility under section 39(3) for anything done or omitted by [the AR] in carrying on business with retail clients."

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