



Neutral Citation Number: [2019] EWHC 1611 (Ch)

Case No: BL-2019-000466

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**BUSINESS LIST (CHANCERY DIVISION)**

Royal Courts of Justice  
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 21/06/2019

**Before:**

**MR JUSTICE MORGAN**

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**Between:**

**THE FINANCIAL CONDUCT AUTHORITY**  
**- and -**  
**NEVILLE REGISTRARS LIMITED**

**Applicant**

**Respondent**

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**On a written application without a hearing**  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

**MR JUSTICE MORGAN:**

1. These proceedings were brought by the Financial Conduct Authority (“the FCA”) against Neville Registrars Limited (“Neville”) pursuant to section 177 of the Financial Services and Markets Act 2000 (“FSMA”). Hereafter, all references in this judgment to sections of an Act of Parliament are to sections of FSMA.
2. The only matter now outstanding is the application by the FCA for an order that Neville pays the FCA’s costs of the proceedings.
3. So far as now relevant, the facts are as follows:
  - i) the FCA is an “investigating authority” for the purposes of section 168;
  - ii) pursuant to section 168, the FCA appointed a number of persons to conduct an investigation on its behalf;
  - iii) the persons so appointed included a Mr Craddock and a Mr Cawser;
  - iv) the investigation was not into the affairs of Neville;
  - v) on 18 April 2018, Mr Craddock acting as a duly appointed investigator required Neville pursuant to section 173(2)(b) and section 173(3) to provide to Mr Craddock specified information;
  - vi) on 18 October 2018, Mr Cawser acting as a duly appointed investigator required Neville pursuant to section 173 to provide to Mr Cawser specified information and, pursuant to section 173(4), to provide certain assistance;
  - vii) Mr Cawser’s requirement of 18 October 2018 was stated to replace all previous requirements including, therefore, Mr Craddock’s requirement of 18 April 2018.
4. On 5 March 2019, the FCA certified, or purported to certify, pursuant to section 177(1) and CPR 81.15 that Neville had failed to comply with a requirement imposed on it under Part XI of FSMA. The certificate made it clear that the body giving the certificate was the FCA. The certificate was signed on behalf of the FCA by a Mr Coulthard who is in the FCA’s Enforcement Legal Department. Mr Coulthard stated in the certificate that he believed that the facts stated in the certificate were true.
5. The certificate set out further details of the allegations made by the FCA. These details included statements that the requirements made on 18 April 2018 and 18 October 2018, as to the provision of information, were made by the FCA. The details also stated that section 177 permitted the FCA to certify that a person had failed to comply with an information requirement under Part XI of FSMA. It was further stated that the FCA believed that Neville had failed to comply with information requirements because of the matters stated in an affidavit (in fact it was an affirmation) of Mr Cawser.
6. Mr Cawser’s affirmation contained a detailed account of the dealings with Neville. He stated that he was making his affirmation on behalf of the FCA. According to Mr Cawser, the FCA had issued the information requests of 18 April 2018 and 18

October 2018. He also stated that the FCA could issue a certificate under section 177. At paragraph 54 of his affirmation, he stated that the FCA considered that Neville had failed to comply with the information requirements. At paragraph 55 of his affirmation, he stated that the FCA invited the court to take certain action in relation to Neville.

7. There is no statement in Mr Cawser's affirmation which amounts to a statement by him that he believed that Neville had failed to comply with Mr Cawser's information requirements. The furthest he went was to make a statement on behalf of the FCA that the FCA believed that that Neville had so failed.
8. The underlying differences in relation to Neville have been resolved and the FCA and Neville have agreed that apart from the issue as to costs, the court should make no order in these proceedings.
9. The FCA has asked the court to order Neville to pay the costs of the FCA in the sum of £1,840. Neville does not ask for its costs but submits that the court should make no order as to costs.
10. Neville's position in relation to costs is set out in two emails, on 26 April 2019 and 1 May 2019. The FCA replied to the first of these emails on 29 April 2019. The FCA did not reply to the second of these emails although it was invited by the court to do so.
11. The principal point made by Neville was that the certificate to be given under section 177 should have been given by Mr Cawser and not by the FCA. The FCA's response to this point was to rely on the fact that Mr Cawser made an affirmation in support of the certificate made by the FCA.
12. Section 177(1) provides:

“If a person other than the investigator (“the defaulter”) fails to comply with a requirement imposed on him under this Part the person imposing the requirement may certify that fact in writing to the court.”
13. The principal point raised by Neville relies on the phrase in section 177(1): “the person imposing the requirement”. Neville's argument is that the person imposing the requirement of 18 October 2018 was Mr Cawser and so the subsection required Mr Cawser to certify the fact that Neville had not complied with the requirement. The same point would arise in relation to the requirement of 18 April 2018 where the investigator was Mr Craddock. I need not consider separately the requirement of 18 April 2018 as the same point arises in relation to that requirement and, in any case, the requirement of 18 October 2018 stated that it replaced the earlier requirement.
14. Although the FCA has not put its case in these terms, it would seem that it proceeds on the basis that it was the FCA which imposed the requirement of 18 October 2018 and therefore it was open to the FCA to certify non-compliance for the purposes of section 177(1).

15. It can be seen that Neville's point raises a question as to the correct interpretation of an important section of FSMA. The point is one which requires proper consideration. I would have thought that the FCA would have been concerned to assist the court in construing this important section and would have made detailed submissions on the point. However, the FCA offered no assistance of any kind and the court has been left to conduct its own researches which have been time consuming.
16. In order to determine which of the rival arguments should prevail, it is necessary to consider other sections in Part XI of FSMA and some other general matters.
17. Section 165 provides for either the FCA or an officer, who is authorised in writing to do so, to require certain persons to provide information. Section 167 allows an investigating authority to appoint a competent person to conduct an investigation "on its behalf". In section 167, "investigating authority" is defined to include the Secretary of State, the FCA and others. Section 168, which was the section used in this case, allows an investigating authority to appoint a competent person to conduct an investigation "on its behalf". The definition of "investigating authority" in section 168 includes the Secretary of State, the FCA and others.
18. Section 169 allows the FCA to appoint an investigator at the request of an overseas authority. Section 169 includes a definition of "investigator" which was not included in sections 167 and 168. Further, section 169 does not state that the investigator is carrying out an investigation on behalf of the FCA nor, indeed, on behalf of the overseas authority
19. Section 170 contains general provisions as to investigations. The section refers to investigations on behalf of the investigating authority. The section also includes a person appointed under section 168 within the phrase "investigator". An investigator can be a member of the staff of the investigating authority. The investigating authority may control the investigation in certain respects.
20. Sections 171 to 173 provide for the powers of investigators appointed under sections 167 and 168. Sections 171 to 173 refer to a person appointed under section 167 or 168 as an "investigator". The relevant powers include powers to "require" certain persons to do certain things.
21. Section 176 provides for a justice of the peace to issue a warrant to enter and search premises. A warrant may be issued on an information laid by either a regulator or an investigator.
22. Based on this review of the statutory provisions, I consider that it would be possible to construe the phrase "the person imposing the requirement" where it appears in section 177(1) as meaning either Mr Cawser or the FCA. In the latter case, it can be said that the FCA imposed the requirement acting through Mr Cawser who was acting on its behalf. It might be said that section 177 did not refer to a certificate from the regulator or the investigating authority because section 169 provided for the appointment of an investigator where it might not be appropriate to say that a requirement of such an investigator was a requirement of a regulator or the investigating authority. Before coming to a final view on the meaning and effect of section 177(1), I have considered whether there is other material which might throw light on the intended meaning.

23. It is appropriate in the present context to consider the role of a certificate under section 177(1). Section 177(2) provides:

“If the court is satisfied that the defaulter failed without reasonable excuse to comply with the requirement, it may deal with the defaulter (and in the case of a body corporate, any director or other officer) as if he were in contempt; and “*officer*”, in relation to a limited liability partnership, means a member of the limited liability partnership.”

24. An application to the court made pursuant to section 177(2) is governed by CPR 81.15. Rule 81.15(4) provides that the certification needed for this rule should be in the form annexed to 81PD at Annex A and be accompanied by a detailed statement of the grounds of the certification and any evidence in support. By rule 81.15(5), the certification and the other documents must be served personally on the respondent to the application although the court can dispense with personal service under rule 81.15(6). By rule 81.15(7), the respondent must file an acknowledgement of service in the form in Annex B to 81PD and may file and serve evidence. There does not appear to be any need to issue another form of originating process to bring the matter before the court. It can be seen that the certificate under section 177(1) can lead to a formal court procedure which may have serious consequences for the respondent. The operation of CPR r. 81.15 was considered in *Simmonds v Pearce* [2018] 1 WLR 1849 but not in a way which assists with the point I am now addressing.
25. I have found one case involving an application to the court under section 177, namely, *Financial Services Authority v Westcott*, a decision of the Vice-Chancellor, Sir Andrew Morritt, on 9 October 2003. In that case, an investigator was appointed under section 168 and he required information pursuant to section 173. The judge said that the necessary certification was made under section 177(1) but he does not state precisely what form that took and there does not appear to have been any question raised as to the person who should provide the certificate under section 177(1). In that case, the Financial Services Authority took the further step of issuing a claim form seeking the committal of the respondent and the claim form was issued by the Authority rather than by the investigator. There was no discussion as to the need for a claim form or as to the identity of the person who should bring the matter before the court.
26. Although I have looked to see if the point now being considered is discussed in any text book, I have not been able to find such a discussion.
27. Having regard to the material and the considerations set out above, I hold that it was open to the FCA to certify for the purposes of section 177(1) that Neville had failed to comply with a requirement imposed on it. For this purpose, the FCA can say that it was “the person imposing the requirement” when the requirement was imposed by an investigator acting “on its behalf”.
28. It is not necessary in this case to decide whether it would also be open to an investigator appointed under section 168 to give the certificate referred to in section 177(1). It might be said that, given the formality involved and the consequences of a certificate, it is desirable for the FCA itself to give the certificate and bring the matter before the court. However, what I do decide is that the course adopted in this case was

open to the FCA. If, contrary to my conclusion, it had been necessary for the certificate to be given by Mr Cawser, I would have held that Mr Cawser did not at any time give such a certificate. He did not certify in the form required by 81PD and even in his affirmation he never expressed his own view of the matter but explained the view taken by the FCA.

29. Neville raised a number of further objections to the order for costs sought by the FCA, as follows:
  - i) it was said that it was unjust that Neville had been required to produce documents at its own expense and without its costs being met by the FCA;
  - ii) it was said that the information requirement was disproportionate although this assertion relied on the fact that Neville had been required to provide the information at its own expense;
  - iii) it was said that the sum claimed in relation to costs (£1,840) was excessive and that the FCA should not have incurred a fee of £1,275 for leading counsel to do unspecified “work on application”.
30. Neville’s real complaint appears to be that it had to provide the required information at its own expense. However, I agree with the FCA that the legislation which confers its powers to require information do not require it to pay the expenses of the person required to provide the information. I note that the power to require information conferred by section 173 does not expressly state that the requirement must be reasonable: compare the references to reasonableness in sections 165(4) and 171(3). However, Neville draws attention to section 3B(1)(b) which includes, as a regulatory principle, a requirement that a burden imposed on a person should be proportionate to the benefits expected to result from the imposition of the burden. In addition, I note what was said in *R (Amro International SA) v Financial Services Authority* [2010] Bus LR 1541 as to the constraints on the exercise of the various powers in Part XI of FSMA. In this regard I have considered everything which has been said in the material before the court but I am not satisfied that the burden placed on Neville was disproportionate to the benefits expected to result from the information requirements or (if this is relevant) was otherwise unreasonable.
31. As to the amount of the costs claimed, the costs are for the work done by leading counsel, for service of the application and the court fee. In that context, a cost of £1,275 for legal work on the application appears reasonable.
32. The result is that I will order Neville to pay the costs of the FCA summarily assessed in the sum of £1,840.