
DRAFT STATUTORY INSTRUMENTS

2001 No.

The Uncertificated Securities Regulations 2001

PART 4

DEMATERIALISED INSTRUCTIONS ETC.

Properly authenticated dematerialised instructions, etc.

35.—(1) This regulation has effect for the purpose of determining the rights and obligations of persons to whom properly authenticated dematerialised instructions are attributable and of persons to whom properly authenticated dematerialised instructions are addressed, when such instructions relate to an uncertificated unit of a security, or relate to a right, benefit or privilege attaching to or arising from such a unit, or relate to the details of a holder of such a unit.

(2) Where a properly authenticated dematerialised instruction is expressed to have been sent on behalf of a person by a sponsoring system-participant or the Operator—

- (a) the person on whose behalf the instruction is expressed to have been sent shall not be able to deny to the addressee—
 - (i) that the properly authenticated dematerialised instruction was sent with his authority;
or
 - (ii) that the information contained in the properly authenticated dematerialised instruction is correct; and
- (b) the sponsoring system-participant or the Operator (as the case may be) shall not be able to deny to the addressee—
 - (i) that he has authority to send the properly authenticated dematerialised instruction; or
 - (ii) that he has sent the properly authenticated dematerialised instruction.

(3) Where a properly authenticated dematerialised instruction is expressed to have been sent by a person, and the properly authenticated dematerialised instruction is not expressed to have been sent on behalf of another person, the person shall not be able to deny to the addressee—

- (a) that the information contained in the properly authenticated dematerialised instruction is correct; or
- (b) that he has sent the properly authenticated dematerialised instruction.

(4) An addressee who receives (whether directly, or by means of the facilities of a sponsoring system-participant acting on his behalf) a properly authenticated dematerialised instruction may, subject to paragraph (5), accept that at the time at which the properly authenticated dematerialised instruction was sent or at any time thereafter—

- (a) the information contained in the instruction was correct;
- (b) the system-participant or the Operator (as the case may be) identified in the instruction as having sent the instruction sent the instruction; and
- (c) the instruction, where relevant, was sent with the authority of the person on whose behalf it is expressed to have been sent.

(5) Subject to paragraph (6), an addressee may not accept any of the matters specified in paragraph (4) if at the time he received the properly authenticated dematerialised instruction or at any time thereafter—

- (a) he was a person other than a participating issuer or a sponsoring system-participant receiving properly authenticated dematerialised instructions on behalf of a participating issuer, and he had actual notice—
 - (i) that any information contained in it was incorrect;
 - (ii) that the system-participant or the Operator (as the case may be) expressed to have sent the instruction did not send the instruction; or
 - (iii) where relevant, that the person on whose behalf it was expressed to have been sent had not given to the Operator or the sponsoring system-participant (as the case may be), identified in the properly authenticated dematerialised instruction as having sent it, his authority to send the properly authenticated dematerialised instruction on his behalf; or
- (b) he was a participating issuer, or a sponsoring system-participant receiving properly authenticated dematerialised instructions on behalf of a participating issuer, and—
 - (i) he had actual notice from the Operator of any of the matters specified in subparagraph (a)(i) to (iii); or
 - (ii) if the instruction was an Operator-instruction requiring the registration of a transfer of title, he had actual notice of any of the circumstances specified in regulation 28(3); or
- (c) he was an Operator and the instruction related to a transfer of units of a security which was in excess of any limit imposed by virtue of paragraph 15 of Schedule 1; or
- (d) he was an Operator and he had actual notice of any of the circumstances specified in regulation 27(2) in a case where the instruction was—
 - (i) a system-member instruction requesting him to settle a transfer in accordance with his rules; or
 - (ii) an issuer-instruction given in the circumstances specified in regulation 33(2)(b) requesting him to register a transfer of title.

(6) Notwithstanding that an addressee has received, in respect of a properly authenticated dematerialised instruction, actual notice of the kind referred to in paragraph (5), the addressee may accept the matters specified in paragraph (4) if at the time that he received the actual notice it was not practicable for him to halt the processing of the instruction.

(7) Subject to paragraph (8), this regulation has effect without prejudice to the liability of any person for causing or permitting a dematerialised instruction—

- (a) to be sent without authority; or
- (b) to contain information which is incorrect; or
- (c) to be expressed to have been sent by a person who did not send it.

(8) Subject to paragraph (9), a person who is permitted by this regulation to accept any matter shall not be liable in damages or otherwise to any person by reason of his having relied on the matter that he was permitted to accept.

- (9) The provisions of paragraph (8) do not affect—
 - (a) any liability of the Operator to pay compensation under regulation 36; or
 - (b) any liability of a participating issuer under regulation 46 arising by reason of a default in complying with, or contravention of, regulation 28(6).
- (10) For the purposes of this regulation—

- (a) a properly authenticated dematerialised instruction is expressed to have been sent by a person or on behalf of a person if it is attributable to that person; and
- (b) an addressee is the person to whom a properly authenticated dematerialised instruction indicates it is addressed in accordance with the rules and specifications referred to in paragraph 5(5) of Schedule 1.

(11) Nothing in this regulation shall be taken, in respect of any authority, to modify or derogate from the protections to a donee or third person given by or under any enactment or to prohibit a donee or third person so protected from accepting any of the matters specified in paragraph (4).

(12) Paragraphs (2) to (4), (5)(a), (6) to (9) and (11) of this regulation shall apply in relation to a written notification given under regulation 25(3) or 32(2)(c) as if—

- (a) each reference to a properly authenticated dematerialised instruction were to such a notification which has been authenticated by the Operator in accordance with rules made and practices instituted by the Operator in order to comply with paragraph 25(g) of Schedule 1;
- (b) each reference to information contained in the properly authenticated dematerialised instruction being correct (or incorrect) included, in the case of written notification given under subparagraph (c) of regulation 32(2), a reference to any statement of the sort referred to in that subparagraph being true (or untrue, as the case may be);
- (c) each reference to an addressee were a reference to the Operator; and
- (d) the reference in paragraph (6) to the processing of the instruction were to acting on the written notification.

Liability for forged dematerialised instructions, induced amendments to Operator registers of securities, and induced Operator-instructions

36.—(1) For the purpose of this regulation—

- (a) a dematerialised instruction is a forged dematerialised instruction if—
 - (i) it was not sent from the computers of a system-participant or the computers comprising an Operator-system; or
 - (ii) it was not sent from the computers of the system-participant or the computers comprising an Operator-system (as the case may be) from which it is expressed to have been sent;
- (b) an act is a causative act if, not being a dematerialised instruction and not being an act which causes a dematerialised instruction to be sent from the computer of a system-participant, it unlawfully causes the Operator—
 - (i) to make, delete or amend an entry on an Operator register of securities; or
 - (ii) to send an Operator-instruction to a participating issuer;
- (c) an entry on, deletion from, or amendment to an Operator register of securities is an induced amendment if it is an entry on, deletion from, or amendment to an Operator register of securities which results from a causative act or a forged dematerialised instruction; and
- (d) an Operator-instruction is an induced Operator-instruction if it is an Operator-instruction to a participating issuer which results from a causative act or a forged dematerialised instruction.

(2) If, as a result of a forged dematerialised instruction (not being one which results in an induced amendment to an Operator register of securities or an induced Operator-instruction), an induced amendment to an Operator register of securities, or an induced Operator-instruction, any one or more of the following events occurs—

- (a) the name of any person remains on, is entered on, or is removed or omitted from, a register of securities;
- (b) the number of units of a security in relation to which the name of any person is entered on a register of securities is increased, reduced, or remains unaltered;
- (c) the description of any units of a security in relation to which the name of any person is entered on a register of securities is changed or remains unaltered,

and that person suffers loss as a result, he may apply to the court for an order that the Operator compensate him for his loss.

(3) It is immaterial for the purposes of subparagraphs (a) to (c) of paragraph (2) whether the event is permanent or temporary.

(4) The court shall not make an order under paragraph (2)—

- (a) if the Operator identifies a person as being responsible (whether alone or with others) for the forged dematerialised instruction (not being one which results in an induced amendment to an Operator register of securities or an induced Operator-instruction) or the causative act or forged dematerialised instruction resulting in the induced amendment to the Operator register of securities or the induced Operator-instruction (as the case may be) notwithstanding that it is impossible (for whatever reason) for the applicant to obtain satisfactory compensation from that person; or
- (b) if the Operator shows that a participating issuer would be liable under regulation 46 to compensate the applicant for the loss in respect of which the application is made, by reason of the participating issuer's default in complying with, or contravention of, regulation 28(6).

(5) Subject to paragraphs (6) and (7), the court may award to an applicant compensation for—

- (a) each forged dematerialised instruction (not being one which results in an induced amendment to an Operator register of securities or an induced Operator-instruction);
- (b) each induced amendment to an Operator register of securities; and
- (c) each induced Operator-instruction,

resulting in an event mentioned in subparagraph (a), (b) or (c) of paragraph (2).

(6) The court shall not under paragraph (5) award to an applicant—

- (a) more than £50,000 for each such forged dematerialised instruction, induced amendment to an Operator register of securities, or induced Operator-instruction;
- (b) compensation for both an induced amendment to an Operator register of securities and an induced Operator-instruction if that induced amendment and that induced Operator-instruction resulted from the same causative act or the same forged dematerialised instruction.

(7) In respect of liability arising under this regulation the court shall—

- (a) in awarding compensation only order the Operator to pay such amount of compensation as it appears to it to be just and equitable in all the circumstances having regard to the loss sustained by the applicant as a result of the forged dematerialised instruction, induced amendment to the Operator register of securities, or induced Operator-instruction;
- (b) in ascertaining the loss, apply the same rules concerning the duty of a person to mitigate his loss as apply to damages recoverable under the common law of England and Wales, Northern Ireland, or Scotland, (as the case may be); and
- (c) where it finds that the loss was to any extent caused or contributed to by any act or omission of the applicant, reduce the amount of the award by such proportion as it thinks just and equitable having regard to that finding.

(8) An application to the court for an order under paragraph (2) shall not prejudice any right of the Operator to recover from a third party any sum that he may be ordered to pay.

(9) An event mentioned in subparagraph (a), (b) or (c) of paragraph (2) shall not give rise to any liability on the Operator other than such as is expressly provided for in this regulation, except such as may arise from fraud or other wilful default, or negligence, on the part of the Operator.

(10) Subject to paragraph (9), this regulation does not affect—

- (a) any right which any person may have other than under this regulation (not being a right against the Operator); or
- (b) any liability which any person other than the Operator may incur other than under this regulation.

(11) Where an application is made under paragraph (2), and the Operator receives from the applicant a request for information or documents relating to—

- (a) a forged dematerialised instruction;
- (b) an induced amendment to an Operator register of securities; or
- (c) an induced Operator-instruction,

in respect of which the application is made, the Operator shall, in so far as he is able, and in so far as the request is reasonable, within one month give the applicant the information and documents.

(12) The applicant shall, in so far as he is able, within one month give the Operator such information or documents as the Operator reasonably requests in connection with an application under paragraph (2) with respect to—

- (a) steps taken by the applicant to prevent the giving of any forged dematerialised instruction (whether of the kind referred to in paragraph (2) or of any other kind); and
- (b) steps taken by the applicant to mitigate the loss suffered by him,

provided that the applicant need not give information or documents pursuant to this paragraph until the Operator has complied with any request made by virtue of paragraph (11).

(13) Neither the Operator nor the applicant shall be required to disclose any information by virtue of, respectively, paragraph (11) or (12) which would be privileged in the course of civil proceedings, or, in Scotland, which they would be entitled to refuse to disclose—

- (a) on grounds of confidentiality as between client and professional legal adviser in proceedings in the Court of Session; or
- (b) on grounds of confidentiality of communications made in connection with, or in contemplation of, such proceedings and for the purposes of those proceedings.

(14) The jurisdiction conferred by this regulation shall be exercisable, in the case of a participating security constituted under the law of England and Wales, or Northern Ireland, by the High Court; and in the case of a participating security constituted under the law of Scotland by the Court of Session.