REASONS FOR DIRECTIONS – application for a costs order in respect of the previous hearing – allowed in part – application for a direction that certain questions be determined at a preliminary hearing – allowed in part – application for directions requiring the Respondent to provide further information and to file further documents and for associated directions - dismissed – Financial Services and Markets Act 2000 Sch 13 para 13 - Financial Services and Markets Tribunal Rules 2001 SI 2001 No. 2476 Rules 10(1)(f) and (g); 13(1); and 21

THE FINANCIAL SERVICES AND MARKETS TRIBUNAL

PAUL DAVIDSON

Applicant

- and -

THE FINANCIAL SERVICES AUTHORITY

Respondent

Tribunal: DR A N BRICE (Chairman)

Sitting in London on 30 July 2004

Bitu Bhalla of Counsel, instructed by Messrs Saunders & Co, Solicitors for the Appellant

Tom Beazley QC with Javen Herberg of Counsel, instructed by the Respondent, for the Respondent

REASONS FOR DIRECTIONS

Background

1. On 15 July 2004 the Tribunal gave notice that there would be a pre-hearing review on 30 July 2004. On 26 July 2004 the Applicant applied for a number of directions, namely:

(1) a direction under Rule 21 for a costs order in respect of the previous hearing (the costs application);

(2) a direction under Rule 13(1) that certain questions be determined at a preliminary hearing (the preliminary hearing application); and

(3) directions under Rule 10(1)(f) and (g) requiring the Respondent to provide further information and to file further documents and for other associated directions (the disclosure application).

2. On 3 August 2004 the Tribunal released Directions including directions:

(1) that the Applicant's application for a costs order be allowed to the extent that the Tribunal orders the Respondent to pay to the Applicant one-half of the costs thrown away by the Applicant in connection with the previous hearing; the costs shall be assessed on the standard basis by a costs official under Rule 21(3)(b)(i); as to the other half of the costs the Tribunal expressed the hope that the Lord Chancellor would consider favourably the application already made by the Applicant to the Lord Chancellor for an *ex gratia* payment;

(2) that the Applicant's application for an issue to be heard at a preliminary hearing be allowed to the extent that the following issue shall be determined as a separate issue during the hearing of the reference:

> "Whether the reference before the Tribunal involves the determination of a "criminal charge" against the Applicant within the meaning of Article 6 of the Convention at Schedule 1 to the Human Rights Act 1998 and, if so, what consequences follow"; and

(3) that the Applicant's application for directions under Rule 10(1)(f) and (g) requiring the Respondent to provide further information and to file further documents and for associated directions be dismissed.

3. In respect of each of these directions it was indicated that full reasons would follow. This document sets out the reasons for each of these three directions.

The facts

4. The facts relevant to all three applications are as follows.

5. The Applicant referred to the Tribunal a decision of the Respondent to impose a penalty of £750,000 for market abuse. Rule 4(3)(e) of the Financial Services and Markets Tribunal Rules 2001 SI 2001 No. 2476 (the Rules) provides that the reference notice shall state, among other things, the issues concerning the Respondent's notice that an applicant wishes the Tribunal to consider. The Applicant's reference notice mentioned three such issues, namely:

> "(1) The circumstances in which the spread bets were placed on the share price of Cyprotex including the related hedging arrangements.
>
> (2) Mr Davidson's involvement in the placing of the spread bets and whether that involvement constituted market abuse.
>
> (3) The level of penalty that the FSA has decided to impose."

6. The hearing of the Applicant's reference commenced on 14 June 2004 before a Tribunal chaired by the President with one other member selected from the panel of chairmen and two other members selected from the lay panel. The Applicant appeared in person. On 16 June 2004 the Respondent became aware of a conversation which had taken place on the evening of 15 June 2004 between the chairman of the Respondent's Regulatory Decisions Committee and the member of the Tribunal selected from the panel of chairmen hearing the reference of the Applicant. On 17 June 2004 the Respondent informed the Tribunal that it believed such a conversation had taken place. The hearing of the reference was then adjourned and it was suggested that the Applicant might wish to take legal advice which he did.

7. On 18 June 2004 the chairman of the Respondent's Regulatory Decisions Committee tendered his resignation with immediate effect and the Respondent issued a statement that it regarded his actions (in connection with the conversation) as inappropriate. On 24 June 2004 the member of the Tribunal selected from the panel of chairmen hearing the reference of the Applicant recused himself from the reference.

8. The Tribunal reconvened on 28 June. The Respondent had applied for the three remaining members of the Tribunal to recuse themselves The Applicant had applied for directions that the Respondent provide further information or, alternatively, that the Tribunal should recuse itself. On 28 June the remaining three members of the Tribunal recused themselves on the basis that the fair minded and informed observer would not be able to exclude the real possibility of unconscious bias. Thereafter a newly constituted Tribunal was selected.

9. With those facts in mind I turn to consider the three applications of the Applicant.

(1) - The costs application.

10. The application was for a direction under Rule 21 for a costs order in respect of the previous hearing. Specifically, the Applicant sought an order for costs, payable forthwith, against the Respondent, in respect of the costs incurred by the Applicant and thrown away as a result of the recusal of the Tribunal on 28 June 2004.

The legislation relating to costs

11 Section 132 of the Financial Services and Markets Act 2000 (the 2000 Act) provides for the establishment of the Tribunal and section 132(4) provides that Schedule 13 is to have effect as respects the Tribunal and its proceedings. Paragraph 13 of Schedule 13 contains provisions about costs and paragraph 13(1) provides:

> **"If the Tribunal considers that a party to any proceedings on a reference has acted vexatiously, frivolously or unreasonably it may order that party to pay to another party to the proceedings the whole or part of the costs or expenses incurred by the other party in connection with the proceedings."**

12. The relevant parts of Rule 21 of the Rules provide:

> **"21(1) In this Rule, "costs order" means an order under paragraph 13 of Schedule 13 (power of Tribunal to order payment of costs) that a party pay the whole or part of the costs or expenses incurred by another party, and "the paying party" and "the receiving party" mean, respectively, the parties against whom and in whose favour the Tribunal makes, or (as the case may be) considers making a costs order. …**
>
> **(3) Where the Tribunal makes a costs order it may order—**
> **(b) that the costs shall be assessed … on such basis as it shall specify-**
> **(i) in England and Wales, by a costs official; .. ."**

The issues

13. The issues for determination in connection with this application were whether the Respondent had behaved "unreasonably" within the meaning of paragraph 13 of Schedule 13 and whether a costs order should be made now or deferred until the end of the re-hearing.

The arguments

14. For the Applicant Mr Bhalla argued that the Applicant now had to fund a re-hearing of his reference through no fault of his own. He had difficulty funding his representation because his assets were the subject of freezing orders and he should not be at a disadvantage. He was the victim of an unfortunate series of events which had originated with the actions of the chairman of the Respondent's Regulatory Decisions Committee who was employed by the Respondent. If the conversation had not taken place the Applicant would not be in the position he was now in. The Respondent had admitted that the conduct of the chairman of the Regulatory Decisions Committee was "inappropriate". That was the same as saying that it was unreasonable within the meaning of paragraph 13 of Schedule 13. The chairman of the Regulatory Decisions Committee was an employee of the Respondent and so his unreasonable conduct was that of the Respondent. Mr Bhalla went on to argue that there was no adequate reason for deferring a decision on this application. He mentioned that the Applicant has sent a letter to the Lord Chancellor asking for an *ex gratia* payment and had received an acknowledgment but not a substantive reply. He estimated that the amount of the costs thrown away, including the four days of the hearing (14, 15, 16 and 17 June) when the Applicant was a litigant in person, and the legal advice leading up and including the events of 28 June 2004, amounted to approximately £35,000.

15. For the Respondent Mr Beazley argued that there was no evidence about the extent of the resources of the Applicant. In any event he argued that the application for costs was premature and should be considered later at the end of the reference when a decision could be taken by the full newly constituted Tribunal. Further, no decision should be made until it were known whether the Lord Chancellor would make an *ex gratia* payment. Mr Beazley went on to argue that the reason why the previous Tribunal had recused itself was not principally because of the actions of the then Chairman of the Regulatory Decisions Committee but because of the actions of the member of the Tribunal selected from the panel of chairmen. Further, the Respondent had not acted unreasonably but, even if it had, an order for the full amount of the costs should not be made against the Respondent. Finally, no schedule of costs had been provided and any order should be limited to the costs thrown away and should not extend, for example, to costs incurred before the commencement of the previous hearing.

Reasons for direction

16. In approaching this application I bore in mind that the events which led to the recusal of the previous Tribunal were in no way the fault of the Applicant. However, the Applicant was put into the position, through no fault of his own, of needing to seek legal advice immediately prior to the recusal and of having to re-start his reference before the newly constituted Tribunal. It seemed to me that fairness indicated that he should not be out of pocket as well as inconvenienced by these events. However, the Tribunal only has power to make a costs order if a party has acted unreasonably. On the facts mentioned in paragraphs 5 to 8 above it seems clear to me that the chairman of the Respondent's Regulatory Decisions Committee did act unreasonably. His actions were described by the Respondent as inappropriate and they led to his resignation with immediate effect. They were, therefore, unreasonable. At the time the chairman of the Respondent's Regulatory Decisions Committee was an employee of the Respondent and his actions were, therefore, those of the Respondent. However, I would like to emphasise that in all other respects the Respondent behaved correctly, especially in drawing the conversation to the attention of the Tribunal.

17. Having concluded that the Respondent, through the chairman of its Regulatory Decisions Committee acted unreasonably, I have gone on to consider whether to order the Respondent to pay the whole or part of the costs. Here I agree with Mr Beazley that the reason why the previous Tribunal recused itself was partly because of the actions of the member of the Tribunal selected from the panel of chairmen. Fairness, therefore, indicates that the Respondent should not be ordered to pay more than one half of the costs. In respect of the other half the Tribunal has no power to order the payment of costs by a person who is not a party to the proceedings but expresses the hope that the Lord Chancellor will consider favourably the application of the Applicant for an *ex gratia* payment.

18. In the ordinary course I would have preferred this application to be considered at the end of the re-hearing of the reference when the decision could be taken by the full newly constituted Tribunal. However, this is a discrete matter which can be disposed of now. Further, if the direction is to assist the Applicant to fund his representation for the re-hearing then the direction has to be given now rather than later.

19. I agree with Mr Beazley that the costs order should be limited to the costs thrown away. I express no view about the amount of the costs; that will be verified by the costs official unless, of course, the amount can be agreed.

20. For these reasons I directed that the Applicant's application for a costs order be allowed to the extent that the Tribunal orders the Respondent to pay to the Applicant one-half of the costs thrown away by the Applicant in connection with the previous hearing; the costs shall be assessed on the standard basis by a costs official under Rule 21(3)(b)(i); as to the other half of the costs the Tribunal expressed the hope that the Lord Chancellor would consider favourably the application already made by the Applicant to the Lord Chancellor for an *ex gratia* payment.

(2) - The preliminary hearing application

21. The application was for a direction under Rule 13(1) that certain questions be determined at a preliminary hearing. More specifically, the application was for directions that the following questions be determined at a preliminary hearing:

> (1) Whether the trial of any reference to the Tribunal arising out of the provisions of sections 118 and 123 of the 2000 Act (market abuse) in respect of a person who has not surrendered himself voluntarily to the jurisdiction of the Respondent by virtue of being authorised to provide financial or market services, should be conducted as the determination of a criminal charge and whether accordingly all the safeguards and rights applicable to a defendant in criminal proceedings undertaken in the United Kingdom be accorded to the person concerned, including but not exclusively whether any final determination be decided on the criminal burden of proof.
>
> (2) Whether, in any event, the trial of this reference (subject to the caveat that it is intended to advance an argument before or at the hearing of the reference that the proceedings themselves, and those of the Regulatory Decision Committee are and were an abuse of process) should be conducted as the determination of a criminal charge and whether accordingly all the safeguards and rights applicable to a defendant in criminal proceedings undertaken in the United Kingdom should be accorded to the Applicant, including, but nor exclusively, that any final determination be decided on the criminal burden of proof.
>
> (3) Whether the proceedings before the Regulatory Decisions Committee arising out of the provisions of sections 118 and 123 of the 2000 Act (market abuse) in respect of a person who has not surrendered himself voluntarily to the jurisdiction of the Respondent by virtue of being authorised to provide financial or market services are also obliged to afford the above protections to the person concerned.
>
> (4) Whether the proceedings before the Regulatory Decisions Committee in respect of the Applicant arising out of the provisions of sections 118 and 123 of the 2000 Act (market abuse) were also obliged to afford the above protections to the Applicant.

The relevant legislation

22. Section 118 of the 2000 Act defines market abuse and section 123 provides that if the Respondent is satisfied that a person is or has engaged in market abuse it may impose on him a penalty of such amount as it considers appropriate. Section 127(4) provides that, if the Respondent decides to take action against a person under section 123, that person may refer the matter to the Tribunal. Sections 132 and 133 of the 2000 Act contain provisions about the jurisdiction of the Tribunal. Section 132(2) provides that the Tribunal is to have the functions conferred on it under the Act.

23. Rule 13(1) of the Rules provides:

> **"13(1) The Tribunal may direct that any question of fact or law which appears to be in issue in relation to the reference be determined at a preliminary hearing."**

The arguments

24. For the Applicant Mr Bhalla argued that the provisions of the 2000 Act concerning market abuse covered not only professional persons but also members of the public; the Applicant was not a professional in the market. That was why the system was designed to separate the investigation of market abuse from the decision making. That, together with the ability to impose a penalty, made the proceedings akin to criminal proceedings. It followed, in his view, that the standard of proof was beyond all reasonable doubt. The reason why the Applicant wanted these questions determined before the re-hearing was because, if the conclusion was that the imposition of a penalty for market abuse was in the nature of a criminal charge, that would affect the burden of proof and the standard of proof and would also make a difference to the way in which the arguments were presented to the Tribunal. It would also affect the requirement for disclosure.

25. For the Respondent Mr Beazley argued that the Tribunal should not direct the separate hearing of the preliminary issues requested by the Applicant. Question (1) was too widely drawn and questions (3) and (4) were outside the jurisdiction of the Tribunal as set out in sections 132 and 133 of the 2000 Act. Those questions referred to the Regulatory Decisions Committee which was part of the Respondent's internal procedures. The Tribunal did not have jurisdiction to consider a complaint about the conduct of the Respondent; that would have to be pursued by way of judicial review. Further, the Tribunal could only consider the subject matter of the reference and the reference notice indicated only three issues which were referred to the Tribunal; the conduct of the Regulatory Decisions Committee in 2001-2002 had no relevance to any of those three issues. The only question relevant to this reference was question (2) but that should be re-phrased so as to reflect that a hearing before the Tribunal was not a trial. He cited *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* judgment of the Competition Appeal Tribunal of 15 January 2002 paras 91 to 106.

26. Mr Beazley accepted that it was arguable that the imposition of a penalty for market abuse was in the nature of a criminal charge for the purposes of Article 6 of the Convention in the Schedule to the Human Rights Act 1998 but argued that it was not. In any event, he argued that the outcome of that issue would not affect the re-hearing of the reference. First, he accepted that the burden of proof was on the Respondent. Next he accepted that it was for the Tribunal to determine, after

argument, the standard of proof and what other protections for the Applicant followed if there were a determination that there were a criminal charge. Thirdly, however, he argued that the Applicant already had all the protections to which he would be entitled even if a penalty for market abuse were to be a criminal charge. Nothing, therefore, needed to be decided in advance of the re-hearing and he suggested that the issue be heard as part of, and at the same time as, the re-hearing of the reference and not at a separate preliminary hearing.

Reasons for direction

27. In considering this application I was concerned to ensure that the Applicant will have the opportunity to argue any relevant issue and that all relevant protections are available for the Applicant. However, I agree with Mr Beazley that question (1) is too wide and it is not necessary for the Tribunal to reach a view about "any reference" but only about the Applicant's reference. Questions (3) and (4) concern the proceedings before the Regulatory Decisions Committee of the Respondent and not the proceedings of the Tribunal and, in my view, will not add to the protections afforded to the Applicant. The proceedings of the Regulatory Decisions Committee are not judicial proceedings but are part of the Respondent's internal decision-making process. The Committee is not mentioned in the 2000 Act which places the duty of decision making on the Respondent. The decision is that of the Respondent and it is that decision which may be referred to the Tribunal. The Tribunal is independent and impartial and is a complete first instance Tribunal which is not bound by the evidence and arguments put before the Committee but which will reach its own decision on the evidence and argument put to it. It is the Tribunal which affords all relevant protections to the Applicant.

28. Turning to question (2) **t**he framework of the 2000 Act distinguishes clearly between matters which are criminal offences and matters which are not. For example, section 23 provides that a person who contravenes the general prohibition is guilty of an offence and there are also other examples. Where the Act provides for a matter to be an offence it is not within the jurisdiction of the Tribunal but follows the normal criminal procedures of summary conviction or conviction on indictment in the criminal courts. However, if a penalty for market abuse is imposed under section 123 then section 127(4) provides that the matter may be referred to the Tribunal which is not a criminal court but governed by its own statutory Rules. Thus the statutory framework indicates that a penalty for market abuse is not a criminal offence under the 2000 Act.

29. However, Article 6 of the Convention in the Schedule to the Human Rights Act 1998 contains provisions about the requirements of a fair trial for the determination of civil rights and obligations on the one hand and criminal charges on the other. The meaning of criminal charge in Article 6 is not the same as the meaning of criminal offence under national law and it is possible for a matter not to be a criminal offence under national law but to be a criminal charge under Article 6. It is this issue which may affect the Applicant and which should be argued before the Tribunal.

30. The application was for a direction that issues be heard at a preliminary hearing before the re-hearing of the reference. In deciding whether to make such a direction it was relevant to consider what additional protections a finding (that a

penalty for market abuse was a criminal charge) would make available to the Applicant. The Respondent accepts the burden of proof. There are differences between the parties as to the correct standard of proof but these do not need to be argued in advance of the re-hearing. The other protection identified by the Applicant was the criminal standard of disclosure and that is a matter for argument. However, the Rules contain provisions about disclosure in proceedings before the Tribunal. Rule 5(3) provides that the Respondent's statement of case should be accompanied by a list of the documents on which the Respondent relied in support of the referred action and any further material which in the opinion of the Respondent might undermine the decision to take that action. Rule 7 provides that, after the filing of the applicant's reply, if there is any further material which might be reasonably expected to assist the applicant's case as disclosed by the reply and not mentioned in the list provided under Rule 5(3), then the Respondent shall file a list of such further material. These provisions mirror closely the provisions of sections 3(1)(a) and 7(1)(a) of the Criminal Procedure and Investigations Act 1996. Thus it appears that the disclosure already provided to the Applicant under the Rules meets the criminal standard of disclosure. That means that it is not necessary to decide before the re-hearing whether a penalty for market abuse is a criminal charge for the purposes of Article 6 of the Convention in the Schedule to the Human Rights Act 1998.

31. For these reasons, I directed that the Applicant's application for issues to be heard at a preliminary hearing be allowed to the extent that the following issue shall be determined as a separate issue during the hearing of the reference:

> "Whether the reference before the Tribunal involves the determination of a "criminal charge" against the Applicant within the meaning of Article 6 of the Convention at Schedule 1 to the Human Rights Act 1998 and, if so, what consequences follow".

(3) - The disclosure application

32. The application was for directions under Rule 10(1)(f) and (g) requiring the Respondent to provide further information and to file further documents and for other associated directions. More specifically, there was an application for a direction under Rule 10(1)(g) that, within fourteen days, the Respondent should file (other than documents already disclosed under the Rules and other than documents which might attract legal professional privilege):

> (1) all internal notes, memoranda, correspondence and e-mails relating to the investigation and enforcement (including before the Regulatory Decisions Committee) of:
>
> (a) the case relating to the Applicant;
>
> (b) cases and investigations arising out of and/or connected with the case relating to the Applicant;
>
> (2) all such internal notes, memoranda, correspondence and emails relating to proceedings before the Tribunal;
>
> (3) all communications (by whatever means) with and between witnesses relied upon by the Respondent;
>
> (4) all communications with and between witnesses or prospective witnesses not relied upon by the Respondent;

(5) all internal notes, memoranda and draft statements relating to witnesses relied upon by the Respondent; and

(6) all internal notes, memoranda and draft statements relating to witnesses not relied upon by the Respondent.

33. There was also an application under Rule 10(1)(f) for a direction requiring the Respondent to provide further information within fourteen days, namely, the information and documents mentioned in a letter dated 21 June 2004 written by the Applicant's solicitors to the Respondent. That letter asked forty-one questions arising out of the events which led to the recusal of the previous Tribunal. The application stated that the provision of the information was to enable the Applicant to properly advance an argument for abuse of process in respect of proceedings before the Tribunal and before the Regulatory Decisions Committee.

The relevant legislation

34. Section 394 of the 2000 Act provides that if the Authority gives a person a notice to which the section applies it must also allow him access to the material on which it relied in taking the decision and secondary material which, in the opinion of the Authority might undermine that decision.

35. Rule 5 provides that the Respondent's statement of case shall be accompanied by a list of documents on which the Respondent relied in support of the referred action and the further material which, in the opinion of the Respondent, might undermine the decision to take that action. Rule 7 provides that following the filing of the applicant's reply, if there is any further material which might reasonably be expected to assist the applicant's case as disclosed by the applicant's reply and which is not mentioned in the list in accordance with Rule 5, the Respondent shall file a list of such further material. Rule 10(1)(f) and (g) provide:

> **"10(1) Directions given by the Tribunal may – …**
>
> **(f) permit or require any party to provide further information or supplementary statements …**
>
> **(g) require any party to file any document-**
>
> **(i) that is in the custody or under the control of that party;**
>
> **(ii) that the Tribunal considers is or may be relevant to the determenation of the reference; and**
>
> **(iii) that has neither been exempted from disclosure by direction given pursuant to Rule 8(4) nor been made available pursuant to Rule 8(7),**
>
> **and may also require that any such document directed for filing as above shall be copied to the other party or else made available to that other party for inspection and copying; … ."**

The arguments

36. For the Applicant Mr Bhalla argued that the information requested could be relevant to the Applicant's arguments about market abuse and the amount of the penalty; one of the Applicant's arguments was that a penalty of a greater amount was imposed on him than on other financial institutions and he wished to find out if there were any bias within the Regulatory Decisions Committee against the Applicant. In criminal matters there was a presumption of full disclosure and an accused should have the ability to obtain full disclosure of all facts relating to the issue to be

determined. There was also a possible issue of abuse of process and he argued that the Tribunal had an inherent jurisdiction to consider such an issue. The Applicant might say that the conduct of the Respondent, acting through its Regulatory Decisions Committee, in imposing a penalty on the Applicant, and a larger penalty than on other institutions was an indication of bias against the Applicant and/or an unfair decision. Before deciding whether to apply to amend his reference notice to make this an issue in the reference the Applicant required the information mentioned. The Tribunal had the jurisdiction to entertain an application for abuse of process and would be entitled to decide an issue of abuse of process if, for example, the Respondent had fabricated proceedings.

37. Dealing first with the application under Rule 10(1)(g) for the Respondent Mr Beazley argued that the Respondent had already, in accordance with the requirements of Rules 5(3) and 7, provided the Applicant with copies of all the documents upon which the Respondent relied in support of the referred action and with the further material which, in the opinion of the Respondent, might undermine the decision to take action and any further documents which might reasonably be expected to assist the Applicant's case. The material already provided included transcripts of the interviews with the witnesses who would attend the re-hearing to be questioned and also interviews with witnesses who were not being called to give oral evidence. The provisions of Rule 5 and Rule 7 mirrored closely the provisions of sections 3(1)(a) and 7(1)(a) of the Criminal Procedure and Investigations Act 1996. Many of the documents mentioned in the Applicant's request were not relevant to the issues for determination in the reference within the meaning of Rule 10(1)(g)(ii) and so the Tribunal had no power to order such disclosure.

38. Turning to the application under Rule 10(1)(f) Mr Beazley argued that the information requested had no relevance to the issues in the reference which concerned whether the Applicant had engaged in market abuse and the amount of the penalty. The jurisdiction of the Tribunal was not to review the actions of the Regulatory Decisions Committee of the Respondent but to reach its own views *de novo* on the evidence and arguments presented to it. Because the Tribunal had such a wide jurisdiction the way in which the Respondent reached a referred decision was not relevant. As the previously constituted Tribunal had recused itself the recusal was no longer a continuing issue before the newly constituted Tribunal. Also, the question whether or not the Respondent was satisfied that other persons had engaged in market abuse was not relevant to the determination of the Applicant's reference.

39. Turning to the suggestion that the Applicant might wish to make abuse of process (by the previous Tribunal and/or the Regulatory Decisions Committee) an issue in the reference Mr Beazley stated that the Respondent would oppose such an application. There was nothing in the 2000 Act or the Rules which provided that the Tribunal could consider such an issue but, in any event, an order for disclosure should not be made before it was an issue in the reference.

Reasons for direction

40. I begin with the application under Rule 10(1)(g) and, in considering this application, I bore in mind that, before directing the Respondent to file any other documents, I had to consider whether they were relevant to the determination of the reference. The issues in the reference are set out in paragraph 5 of these Reasons for

Directions above. In my view, the very wide nature of the documents requested must have included very many which were not relevant to the determination of those three issues.

41. Mr Bhalla said that he wanted to find out if there were any bias in the Regulatory Decisions Committee because, if there were, he might want to add another issue, namely the abuse of process in the Regulatory Decisions Committee and/or the previous Tribunal However, abuse of process is not at present an issue in the reference. Further, as mentioned above, the proceedings of the Regulatory Decisions Committee are not judicial proceedings but are part of the Respondent's internal decision-making process. The final decision is that of the Respondent and that may be referred to the Tribunal. The Tribunal is independent and impartial and is a complete first instance Tribunal which is not bound by the evidence and arguments put before the Committee but which will reach its own decision on the evidence and argument put to it. The Tribunal will make up its own mind on the issues in the reference and will in no sense be bound by any action of the Regulatory Decisions Committee. The Applicant is fully protected by the proceedings before the Tribunal. The Tribunal is a statutory Tribunal and so has no inherent jurisdiction. It may only consider those decisions of the Respondent which are identified in the 2000 Act as being referable to the Tribunal.

42. Turning to the application under Rule 10(1)(f), although that sub-Rule does not specifically say that the information requested must be relevant to the determination of the reference, it seems to me that in exercising its discretion under Rule 10 the Tribunal should bear in mind the relevance of the further information requested. In my view the circumstances surrounding the recusal of the previous Tribunal cannot have any relevance to the issues for determination in the re-hearing of the Applicant's reference before the newly constituted Tribunal.

43. The Applicant also applied for some associated directions which depended upon the granting of the other disclosure applications. As the disclosure applications were not granted the application for the associated directions also fails.

44. For these reasons I directed that the Applicant's application for directions under Rule 10(1)(f) and (g) requiring the Respondent to provide further information

and to file further documents and for associated directions be dismissed.

DR A N BRICE

CHAIRMAN

FIN/2003/0016
09.08.04