[2015] UKUT 0181 (TCC)
Reference number: FS/2014/0011

FINANCIAL SERVICES – application for the Tribunal to extend time for a reference made out of time – decision notice issued pursuant to settlement agreement entered into between applicant and the FSA – application of principles in Data Select - whether good reasons for delay in making the reference – weight to be afforded to settlement agreement – merits of applicant's case on reference

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
FINANCIAL SERVICES

MOHAMMED SUBA MIAH **Applicant**

- and -

THE FINANCIAL CONDUCT AUTHORITY **Respondent**

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 30 March 2015

The Applicant, Mr Miah, in person

Simon Pritchard, instructed by the Financial Conduct Authority, for the Respondent

DECISION

1. The Applicant, Mohammed Suba Miah ("Mr Miah"), has applied to the Tribunal for an extension of time for the making of a reference in respect of a decision of the Authority (at that time the Financial Services Authority or "FSA") which was notified to Mr Miah by decision notice dated 4 February 2008.

2. At the material time, section 133(1) of the Financial Services and Markets Act 2000 ("FSMA") provided that:

> "A reference to the Tribunal under this Act must be made before the end of—
>
> (a) the period of 28 days beginning with the date on which the decision notice or supervisory notice in question is given; or
>
> (b) such other period as may be specified in rules made under section 132.

3. The statutory time limit accordingly expired on 3 March 2008. However, under the Financial Services and Markets Tribunal Rules 2001 (SI 2001/2476) ("FSMT Rules") made under s 132 FSMA, the then Tribunal, of which this Tribunal is the successor, had power under regulation 10 to extend any time limit for making a reference under FSMA or those FSMT Rules.

4. The functions of the Financial Services and Markets Tribunal were transferred to this Tribunal with effect from 6 April 2010, and that Tribunal was abolished from that date. For the purpose of Mr Miah's reference, which was filed with the Tribunal on 28 October 2014, therefore, it is the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the UT Rules") that apply. Under paragraph 2(2) of Schedule 3 to the UT Rules, a reference notice must be received no later than 28 days after notice was given of the decision in respect of which the reference is made, the same time limit that applied under the former s 133(1) FSMA. However, under Rule 5(3)(a) of the UT Rules, the Tribunal has a discretionary power to extend the time for complying with any rule. It is that power that Mr Miah invites the Tribunal to exercise.

Background

5. The following summary is taken largely from Mr Pritchard's skeleton argument for the Authority with certain additional observations of my own. Although Mr Miah took issue with a few points of detail, and I have taken those points into account, he did not challenge the broad description of the background provided by Mr Pritchard.

Mr Miah's involvement with Square Mile Securities Limited

6. Between December 2005 and May 2006, Mr Miah was an approved person at Square Mile Securities Limited ("Square Mile"), an agency stockbroking firm.

7. Mr Miah's role included recommending customers purchasing higher risk securities issued by smaller capitalised companies that had been, or were to be, admitted to trading on the Alternative Investment Market ("AIM") or PLUS market. At the relevant time, Mr Miah was approved to perform the "Investment Adviser" controlled function (CF21).

8. As set out in the Final Notice issued to Mr Miah, the Authority considered that (and Mr Miah agreed to settle on the basis that) during the relevant period, Mr Miah's conduct fell short of the Authority's prescribed regulatory standards for approved persons. In particular, Mr Miah agreed that he breached the Authority's Statements of Principle and Code of Conduct for Approved Persons ("APER") in that:

> (a) He failed to act with integrity by intentionally and dishonestly writing Square Mile trade tickets to record the purchase of securities by Square Mile customers when the customer had not given their explicit agreement or consent to the transaction (in breach of Statement of Principle 1);
>
> (b) He failed to act with due skill, care and diligence in carrying out his controlled function when making recommendations to Square Mile's customers to purchase higher risk securities issued by smaller capitalised companies (in breach of Statement of Principle 2). In particular, Mr Miah:
>
> > (i) did not provide customers with adequate risk warnings and failed at all times to take reasonable steps to ensure that customers understood the particular and higher risks of the securities he recommended to them and/or otherwise made statements to customers that obscured and/or diminished those risks;
> >
> > (ii) made factually inaccurate and potentially misleading statements to customers about the higher risk securities he recommended and the issuing companies;
> >
> > (iii) made recommendations to customers to purchase higher risk securities without having obtained sufficient information about, or having sufficient regard to, the personal and financial circumstances and needs of customers to ensure the suitability of his recommendations; and
> >
> > (iv) employed unacceptable methods and practices that resulted in high and undue pressure on customers to purchase the securities that he recommended.

9. The Final Notice records that the Authority had identified 11 unauthorised transactions which together had established liabilities for the customers of approximately £114,000, on which Mr Miah would have received commission if the customers had paid. The Final Notice puts the amount of commission which Mr Miah had created the opportunity to earn on the unauthorised trades at about £8,425, and notes that "he would have had to share [this] with a colleague".

The Authority's Investigation

10. On 12 October 2006, the Authority commenced an investigation into Mr Miah's conduct.

11. On 8 January 2008, the Authority sent Mr Miah a letter, which was headed "Discounts for early settlement – 'stage 1' letter" explaining that "although [the Authority] have not concluded our investigation, [the Authority] consider that we now have a sufficient understanding of this matter to make a reasonable assessment of the appropriate penalty. Our current understanding of the misconduct by you is set out in the attached without prejudice draft warning notice … [W]e consider that the misconduct by you warrants a financial penalty. Our assessment of the appropriate penalty is £30,000. This is without taking into account any available discount." Attached to the letter was a draft Warning Notice. Mr Miah was advised that Stage 1 would end on 4 February 2008, and that if settlement was reached by then a discount of 30% of the penalty figure would be available.

12. On 1 February 2008, Mr Miah signed a Settlement Agreement with the Authority. Pursuant to the Settlement Agreement, Mr Miah agreed:

> (a) "to the imposition on him of a prohibition order prohibiting him from performing any function in relation to any regulated activity carried on by any authorised person, exempt person, or exempt professional person as set out in the Final Notice … [and] to pay a financial penalty of £21,000 to be paid in two instalments…"
>
> (b) "to the issue of a warning notice ('the Warning Notice') by the FSA in the same terms attached to this Agreement and marked as Annex A and that Mr Miah will not dispute with the FSA the facts and matters set out in the Warning Notice."
>
> (c) "to waive and not to exercise his rights, whether under section 387 of the Act [the Financial Services and Markets Act 2000 ("FSMA")] or otherwise, to make representations to the Regulatory Decisions Committee ("RDC") in respect of the Warning Notice."
>
> (d) "… to the issue of a decision notice ('the Decision Notice') in the same terms as the Warning Notice … and that Mr Miah will not dispute with the FSA the facts and matters set out in the Decision Notice."
>
> (e) "to waive and not to exercise his rights under section 57 and/or section 67 of the Act or otherwise, to refer the matter to the Financial Services and Markets Tribunal ("the Tribunal") once the Decision Notice has been issued."
>
> (f) "to waive and not exercise his rights under section 394 of the Act to access the material relied upon by the FSA in deciding to issue the Warning Notice and/or the Decision Notice and any secondary material which might undermine these decisions."
>
> (g) "to the issue of a final notice ('the Final Notice') by the FSA in the same terms as the Decision Notice … before the expiry of the period

specified under section 133(1) of the Act (which may not be less than 28 days)".

(h) "that he will not, after or at the time of the publication of the Final Notice, seek to contradict or make a public statement inconsistent with the Final Notice."

13. On 4 February 2008, the Authority issued Mr Miah with a Warning Notice and a Decision Notice.

14. On 7 February 2008, the Authority issued Mr Miah with a Final Notice.

15. On 8 February 2008, the Authority wrote to Mr Miah to inform him that its "investigation into your misconduct was concluded by way of Final Notice dated 7 February 2008." That letter explained that "section 56(7) of the Financial Services and Markets Act 2000 provides that: 'The Authority may, on the application of the individual named in a prohibition order, vary or revoke it.'"

16. Prior to settling with Mr Miah, the Authority issued a Final Notice in relation to Square Mile imposing a fine of £250,000 (reduced from £1.5 million as a result of an early settlement and to take into account Square Mile's financial circumstances). That Final Notice was published on or about 14 January 2008. By that Final Notice, the Authority explained that the Square Mile had failed to:

(a) conduct its business with integrity (in breach of Principle 1 of the Authority's Principles for Businesses);

(b) pay due regard to the interests of its customers and treat them fairly (in breach of Principle 6);

(c) pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading (in breach of Principle 7);

(d) take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment (in breach of Principle 9); and

(e) take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems (in breach of Principle 3).

17. On 8 July 2008, the Authority issued a Final Notice to Baljit Somal, another investment adviser at Square Mile. By that Final Notice the Authority prohibited Mr Somal from performing any function in relation to any regulated activity and imposed on him a penalty of £16,000 (reduced following early settlement). That Final Notice records that Mr Somal received a basic salary of £15,000 per year, enhanced by commission which, on the unauthorised trades, the Authority put at £4,425.

Subsequent matters

18. On 19 March 2010, Mr Miah's legal representatives wrote to the Authority seeking clarification regarding the prohibition order.

19. On 25 March 2010, the Authority gave such clarification: "The terms of the Final Notice make clear that the prohibition covers Mr Miah from performing any function in relation to any regulated activity carried out by any authorised person, exempt person or exempt professional."

20. On 25 July 2012, Mr Miah was convicted at Cardiff Crown Court of one count of conspiracy to commit fraud, two counts of fraud by false representations, one count of forgery and one count of carrying on unauthorised investment business. Mr Miah was sentenced to 4 years and 9 months imprisonment (reduced on appeal by 3 months) and disqualified from acting as a company director for six years. He was released from custody on 17 October 2014.

21. Mr Miah is yet to pay to the Authority the penalty imposed on him pursuant to the Final Notice. By section 390(9) FSMA, the Authority is entitled to recover the sum as a debt and, accordingly, the Authority has sought, through its agents, to recover the sum. To that end:

> (a) on 17 January 2014, the Applicant was served with a statutory demand; and
>
> (b) on 17 September 2014, the Authority commenced bankruptcy proceedings.

22. On 28 October 2014, the Applicant filed the application with the Tribunal. The effect of the application was that the bankruptcy proceedings were adjourned. Following the issue of this decision in draft to the parties, Mr Miah sent the Tribunal a copy of an order made in Newport (Gwent) County Court on 24 April 2015 dismissing the petition.

23. Although Mr Miah argued that the outcome of those proceedings was relevant to the question whether he should be permitted to make his reference out of time, for the reasons explained in this decision that is not the case. Neither the existence nor the outcome of bankruptcy proceedings has any relevance to the question whether to permit Mr Miah's reference to be made out of time.

The law

The decision-making process

24. The penalty on Mr Miah was imposed, and the prohibition order was made, in accordance with the terms of FSMA, as it applied at the relevant time. Section 66 gave the Authority power to take disciplinary action against individuals, including the levying of a financial penalty. Section 67 provided that both a warning notice and a decision notice had to be given, and that if the Authority decided to take action

against a person under s 66, that person could refer the matter to the Tribunal, subject to the applicable time limits.

25. Similar provisions applied in respect of prohibition orders, the statutory authority for which was found in s 56. Once again, this time by s 57, both a warning notice and decision notice had to be given to the individual concerned, and the matter could be referred to the Tribunal, subject again to the applicable time limits.

26. By s 395 FSMA, the Authority had to determine the procedure that it followed in relation to the giving of warning and decision notices. Sub-section (2) provided that the procedure was to be designed to secure, among other things, that the decision giving rise to the obligation to give any such notice was taken by a person not directly involved in establishing the evidence on which that decision was based. Sub-section (11) provided that in any particular case the Authority's failure to follow its procedure would not affect the validity of the notice given in that case.

27. At the material time, DEPP 4 and 5 of the Decisions Procedure and Penalties (DEPP) Manual provided guidance in respect of the relevant procedure:

> (a) DEPP 4.1G: "All statutory notice decisions under executive procedures will be taken either by a senior staff committee or by an individual [Authority] staff member."
>
> (b) DEPP 4.1.2G: "In either case, the decision will be taken by [the Authority] staff who have not been directly involved in establishing the evidence on which the decision is based, except in accordance with section 395(3) of the Act."
>
> (c) DEPP 5.1.1G:
>
> "(1) A person subject to enforcement action may agree to a financial penalty or other outcome rather than contest formal action by [the Authority].
>
> (2) The fact that he does so will not usually obviate the need for a statutory notice recording [the Authority's] decision to take that action. Where, however, the person subject to the enforcement action agrees not to contest the content of a proposed statutory notice, the decision to give that notice will be taken by senior Authority staff.
>
> (3) The decision will be taken jointly by two members of [the Authority's] executive of at least director of division level (the "settlement decision makers").
>
> (4) One of the directors taking the decision will usually be, but need not be, the director of Enforcement. (In exceptional cases, the director of Enforcement may have been directly involved in establishing the evidence on which the decision is based and would

not therefore be able to participate (see section 395(2) of the Act).)"

…

28. DEPP 6.7 contains guidance in respect of discounts for early settlement. The level of discount depends on the stage in the process at which the Authority and the person concerned enter into a settlement agreement. For present purposes I need only refer to Stages 1 and 2:

> (a) Stage 1 is the period from the commencement of an investigation until the Authority has a sufficient understanding of the nature and gravity of the breach to make a reasonable assessment of the appropriate penalty, and has communicated that assessment to the person concerned and allowed a reasonable opportunity to reach agreement as to the amount of the penalty. The maximum settlement discount if settlement is reached at Stage 1 is 30%.
>
> (b) Stage 2 starts at the end of Stage 1. It factors in time for the making of written representations, and lasts until the expiry of the period for the making of those representations. The maximum settlement discount at Stage 2 is 20%.

Power to extend time

29. There was no dispute as to the principles to be applied in determining Mr Miah's application. The exercise of a discretionary power under the UT Rules requires the Tribunal to give effect to the overriding objective of dealing with cases fairly and justly (Rule 2, UT Rules). That, in general terms, requires the Tribunal to consider all the circumstances and to carry out a balancing exercise, weighing the respective prejudice to the parties in granting or refusing the application.

30. In the particular context of extensions of time, I accept that the relevant principles to be applied are those derived from *Data Select Ltd v Revenue and Customs Commissioners* [2012] UKUT 187 (TCC), a decision of this Tribunal (Morgan J). In that case, Morgan J said (at [34]):

> "Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions."

31. Having considered certain other authorities, Morgan J addressed the particular issue of the importance of finality of litigation in relevant cases. He said (at [37]):

> "Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application

> concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. Nonetheless, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision."

32. Although, following the introduction of a change to Rule 3.9 of the Civil Procedure Rules (CPR 3.9), there has been some difference of view in the Tribunal as to the principles that now fall to be applied in this respect (see in particular *Revenue and Customs Commissioners v McCarthy & Stone (Developments) Ltd* [2014] UKUT 196 (TCC), *Leeds City Council v Revenue and Customs Commissioners* [2014] UKUT 0350 (TCC) and *Revenue and Customs Commissioners v BPP Holdings Ltd and others* [2014] UKUT 0496 (TCC)), I am satisfied that it is the approach adopted in *Data Select* that is applicable in this Tribunal. In the financial services context, that was the view taken by this Tribunal (Judge Herrington) in *Javier Martin-Artajo v The Financial Conduct Authority* [2014] UKUT 0340 (TCC) in considering an application to extend time for the making of a reference to the Tribunal under s 393(11) FSMA. I respectfully agree with the approach adopted by the Tribunal in that case.

Mr Miah's application

33. Mr Miah has made it clear that he does not seek to excuse his past conduct and that he has at all times fully accepted his responsibilities. He considers, however, that the Authority has not applied its powers fairly when he contrasts his own position with that of Square Mile and Mr Somal. He has regard in this connection in particular to the financial penalties imposed on Square Mile and Mr Somal, to his criminal convictions in 2012 and to the proceedings against him under the Proceeds of Crime Act 2002 ("POCA").

The imbalance in the penalties imposed

34. In support of his argument that the penalty imposed on him was excessive, when compared with others, Mr Miah has referred to the penalties imposed on Square Mile and Mr Somal. In the case of Square Mile, as I have described, a penalty of £250,000 was imposed, but this had been substantially reduced from £1.5 million having regard to early settlement at Stage 1 and therefore with a discount of 30%, and Square Mile's financial circumstances. Mr Somal's penalty was £16,000, reduced from £20,000. In the case of Mr Somal, proceedings were settled at Stage 2, that is following further representations, such that the maximum discount allowed was 20%. Mr Miah's penalty was £21,000, which was reduced from £30,000 by 30% on the basis that settlement was reached at Stage 1. In the case of each of Mr Miah and Mr Somal, the respective Final Notices record that the Authority recognised that the financial penalty was likely to have a significant effect on them as individuals, and

that the Authority had taken into account the financial resources and other circumstances of each of them.

35. Mr Miah also referred to settlements that had apparently been reached with seven other individuals, but where details of the settlements had not been published. Mr Miah also asserted, but without any evidence, that certain individuals connected with Square Mile had since February 2008 been given regulatory approval, which he said also amounted to others being given preferential treatment when compared to him.

36. Mr Miah's main complaint was that there had been no reconciliation to explain what he regarded as an imbalance in the treatment afforded to him by the Authority, and the treatment afforded, in absolute terms, both to Square Mile and to Mr Somal. In the case of Mr Somal, he complained that he should have been afforded the same treatment, arguing that their remuneration had been the same and that commission payments had been shared equally. The investigation had been based on the same materials.

37. A comparison of the Final Notices issued to Mr Miah and Mr Somal indicates that both were senior dealers responsible for making recommendations to customers regarding higher risk small cap securities issued by new or emerging smaller capitalised companies that Square Mile was offering for sale. Both were approved by the Authority to perform the CF21 Investment Adviser controlled function (as it then was). Both were found to have breached Statements of Principle 1 and 2. However, whereas Mr Miah was found to have conducted himself dishonestly in 11 transactions, Mr Somal was found to have done the same in four. In addition, the Final Notices reveal a difference in what the Authority perceived to be the remuneration of Mr Miah, on the one hand, and Mr Somal on the other. The Notices recognised that commission on the unauthorised trades had been shared, but record that Mr Miah's annual basic salary was £29,000 and that of Mr Somal £15,000.

38. Although Mr Miah submitted that the Authority had relied upon assumed sales of £1 million per month, in respect of which the commission would have been in the order of £120,000 per month, and argued that this had not been the case, I have been unable to ascertain how these figures are arrived at. They do not appear in the Final Notice issued to Mr Miah. The commission on the unauthorised trades (which would have been shared) is recorded as £8,425; that, recognising that it was shared commission, along with the salary of £29,000, is the sum stated as the amount of benefit gained or lost in accordance with DEPP 6.5.2G in determining in Mr Miah's case the appropriate level of penalty.

39. I find, therefore, that there is no evidential basis for Mr Miah's allegation of disparity of treatment as between himself and Square Mile and Mr Somal in the level of the financial penalties that were imposed.

POCA proceedings

40. Mr Miah referred to the POCA proceedings against him in a number of contexts. He sought to argue in particular that as a result of those proceedings the Authority had obtained a material benefit for a period, from 2006, which included the activities at Square Mile.

41. I do not consider that such an assertion is well-founded. Although Mr Miah sought to argue that the period addressed in those proceedings included the relevant period for the purpose of these proceedings, that is not the case. The relevant period in respect of which the Authority took action against Mr Miah was identified in the Final Notice as December 2005 to May 2006. The statement under s 16(3) POCA covers the period between 24 June 2006 and 21 September 2012.

42. In any event, the notion that such subsequent, and entirely separate, proceedings can give rise to a retrospective reconsideration of Mr Miah's financial circumstances when he himself, as I shall come on to describe, had entered into the Settlement Agreement after the Authority had rejected his claims of financial hardship, is fanciful.

Criminal proceedings

43. As I have described, Mr Miah was convicted on a number of counts of fraud, one of forgery and one of carrying on unauthorised investment business. Those convictions did not relate to the activities at Square Mile in respect of which Mr Miah had received a financial penalty and a prohibition order as recorded in the Final Notice. The fraud and unauthorised investment business convictions related principally to a film making project: A Town Called Arthur Limited, through a company, Global Microchip Limited, and a fraud on two individual investors. The forgery conviction related to a forged cheque paid to a finance company in respect of a hire purchase contract on a car.

44. Mr Miah has failed to persuade me that those convictions had anything to do with his activities at Square Mile. Although the fact of his having been prohibited by the Authority, and having been made liable to a penalty of £21,000, were noted in the proceedings, there is nothing in the transcript provided by Mr Miah to support his assertion that the count of carrying on unauthorised investment business included the taking into consideration of activities whilst he was at Square Mile. Indeed, the relevant factor was that Mr Miah had been barred, yet purported to be authorised.

45. There is in my view, therefore, no basis for the submission by Mr Miah that, unlike himself, others implicated in the activities of Square Mile, and Square Mile itself, had not been prosecuted in relation to those activities, and that such disparity of treatment as compared to his case was unfair. I reject Mr Miah's submission that any part of his conviction was founded upon his activities at Square Mile.

The DEPP procedure

46. Mr Miah submitted that the Authority had acted contrary to its own procedure in considering whether to impose a financial penalty, and in calculating the appropriate level of such a penalty. Although he referred to DEPP 6.2, which states that the Authority will consider all the circumstances of the case when determining whether or not to take action for a financial penalty and sets out a non-exhaustive list of the factors that may be relevant for that purpose, Mr Miah has not suggested any basis on which the Authority could be held to have failed to observe that procedure. It is evident from the Final Notice that the Authority considered relevant factors in reaching its determinations.

47. Mr Miah has also referred to DEPP 6.5 to 6.5D. However, as Mr Pritchard pointed out, that appears to be a reference to the current provisions of DEPP which were not in force at the material time. The Final Notice does make specific reference to relevant provisions of DEPP 6.5 as then in force. There is, accordingly, nothing in Mr Miah's criticism of the Authority's procedures in this respect.

48. Nor is there any merit in Mr Miah's assertion that the Authority failed to take account of the effect of the penalty and the prohibition as causing Mr Miah serious financial hardship. Before entering into the Settlement Agreement, Mr Miah was invited by the Authority, by letter dated 29 January 2008, to assist the Authority in its consideration of Mr Miah's financial resources, to complete a declaration of financial circumstances. I understand that Mr Miah did make representations to the Authority in that respect, but that those representations were not accepted. Mr Miah's financial circumstances, as put forward by him at the relevant time, were therefore taken into account, as is made clear in the Final Notice. Despite the rejection of his representations, Mr Miah entered into the Settlement Agreement.

Prohibition order

49. As regards the prohibition order, Mr Miah says that since the regulatory action he has taken steps to remedy his misconduct. He says that he has retrained and redressed those affected by his past failings and that he is committed to continuing to do this. He submits that he has addressed the level of risk to consumers or confidence in the financial system which resulted from his time at Square Mile. He does not envisage taking up employment for the purpose of performing a regulated activity but submits that his qualifications and skills are likely to require engagement with authorised or exempted persons in the ordinary course of those activities in a supervised and transparent role.

50. In my judgment, a reference in respect of the prohibition order on these grounds is misconceived. Mr Miah is not arguing that the prohibition order should not have been made. He is arguing that, having regard to circumstances that now exist, the prohibition order should be varied or revoked. Those are exactly the circumstances in which Mr Miah may make an application under s 56(7) FSMA. Following such an application, if the Authority were to refuse to vary or revoke the order, Mr Miah would have the usual right to make a reference in respect of that decision. That, and not a late reference of the original decision, is the appropriate way to proceed.

Reasons for the delay in making a reference

51. The delay in this case, which is more than 6 years from the end of the statutory period for making a reference, is substantial. Mr Miah puts forward the following reasons for that delay:

(1) He had been unaware of his possible grounds for the making of a reference until comments were made by HH Judge Bidder QC in the criminal proceedings on 25 July 2012 as to the disproportionate treatment that had been suffered by Mr Miah.

(2) He was in prison between July 2012 and October 2014, and had no internet access, nor any access to any materials other than those related to the POCA proceedings. In addition, Mr Miah told me that from the time of his arrest (June 2009) until he was sentenced his bail conditions did not permit him to have any access to electronic material, nor could he communicate by email.

(3) The reference had been made within 14 days of "the last reference made in the course of ongoing county court proceedings".

(4) There has been no response from the Authority to certain correspondence sent between 2008 and 2010.

52. I agree with Mr Pritchard that none of these submissions by Mr Miah is capable of providing a reason, still less a good reason, for the delay in making a reference.

53. As to the alleged comments by Judge Bidder, despite having been given an opportunity following the hearing to produce the relevant transcript and to identify those parts on which he was relying, nothing produced by Mr Miah supports his assertion that Judge Bidder said anything to suggest that Mr Miah had been treated disproportionately in the matters covered by the Final Notice. The only reference to the relative amounts of the penalties was when there was some confusion as to whether it had been Square Mile, and not Mr Miah, who had been fined. When told that Mr Miah had been fined £21,000 and Square Mile £250,000, Judge Bidder simply remarks: "… when I saw the [£]21,000 reference, I thought it was rather a small fine for the company." That does not support Mr Miah's assertion in any way. Although in his final written submissions Mr Miah attempted to persuade me that there was an alternative interpretation of Judge Bidder's comments that was more favourable to his case, I disagree. I find that such interpretation is not only not plausible, it is not one that Mr Miah can reasonably have entertained.

54. Indeed, I agree with Mr Pritchard when he submitted that the sentencing remarks of Judge Bidder indicate that, far from criticising the disciplinary action taken by the Authority, that disciplinary action was relied upon by Judge Bidder:

> "… none of you were authorised by the Financial Services Authority. You were all, I am quite sure, well aware of that. Indeed you, Miah, had previously been employed by a company called Square Mile Securities, and in that company you and others had conducted identical high pressure sales of investments, many of which proved to be complete failures. That company was investigated by the FSA; the company and you were fined, and you were prohibited from

> performing any function in relation to regulated investment activity. You ignored that ban, and seamlessly continued the same behaviour, but this time hiding under a false name, and in that context you told lie after lie to investors."

55. Mr Miah appears to have been subject to constraints on his activities, at least from the time of his arrest in June 2009 until his release from prison in October 2014. However, there was a considerable time between the date of the decision notice in his case (4 February 2008) and his arrest during which he was subject to no such restraints. The Final Notice in relation to Square Mile had been issued prior to Mr Miah entering into the Settlement Agreement; that in relation to Mr Somal was issued on 8 July 2008, a year before Mr Miah says he became subject to constraints.

56. Furthermore, even given the constraints he was under, I agree with Mr Pritchard that those cannot provide a proper reason for failing to make a reference. As Mr Pritchard rightly submitted, it is commonplace for prisoners serving time in custody, and even more so when subject to bail conditions, to initiate and participate in court proceedings. Whilst consideration will be given to the nature and effect of such constraints, they cannot absolve a person from taking any action to initiate or pursue proceedings subject to time limits. There is no evidence of Mr Miah having taken any steps at all to make a reference to this Tribunal until October 2014. By contrast, as well as Mr Miah's participation in the POCA proceedings, there is evidence, first, of his having instructed solicitors to write to the Authority on 19 March 2010 to clarify the terms of the prohibition order, and secondly of his having instructed counsel in connection with his appeal to the Court of Appeal against his sentence.

57. The fact that there were, until 24 April 2015, bankruptcy proceedings in the county court does not represent a reason for Mr Miah not having made a reference in due time. Those proceedings were aimed at enforcing the debt which, under s 390 FSMA, becomes due and payable if unpaid at the end of the period specified in the Final Notice. Those proceedings are irrelevant to the question whether Mr Miah had good reason for the delay. Equally irrelevant is the correspondence which Mr Miah says he has been having with the Authority as to settlement of the outstanding amount. None of that correspondence, apart from a reply from the Authority, dated 25 March 2010, to the letter of 19 March 2010 from Mr Miah's solicitors, was evidenced to the Tribunal, but it could not in any event provide a reason for delay in making a reference.

The Settlement Agreement

58. Even if Mr Miah had had a good reason for the delay in submitting his reference, he would have faced a formidable hurdle in the form of the Settlement Agreement which he entered into with the Authority on 1 February 2008. That agreement enabled the Authority's investigation to be concluded, and in exchange for Mr Miah agreeing at Stage 1 to the imposition of the financial penalty and the prohibition order, to the issue of the warning notice, the decision notice and the final notice and not to make representations to the RDC or a reference to the tribunal, entitled him to a discount from what would otherwise have been the penalty sought to be imposed by the Authority.

59. The Settlement Agreement has no particular status within the FSMA. There is nothing in the FSMA to preclude the making of a reference in respect of a decision of the Authority which has been reached on an agreed basis, or the making of an application to extend time for the making of a reference. But the fact of such an agreement is a material circumstance in considering the fairness and justice of extending time. Fairness and justice works both ways; there is a balancing exercise to be undertaken in assessing the balance of fairness and justice to each party. Where one party has altered its position as a result of a Settlement Agreement, there is a strong prejudice to that party in permitting the other party effectively to resile from that agreement. That must be weighed in the balance against any prejudice to an applicant.

60. Mr Pritchard referred me to the decision of this Tribunal in *Townrow v The Financial Services Authority* [2013] WL 617154 as authority for the proposition that, having regard to the Settlement Agreement, even if the Tribunal decided to extend time for Mr Miah's reference, the reference would be liable to be struck out because it is abusive.

61. In *Townrow* itself, the Tribunal concluded, at [25], that the reference was without merit and had no reasonable prospect of success. It left to one side the arguments on abuse. On the other hand, the Tribunal in *Townrow* referred with approval to *Sharma v The Financial Services Authority* (FS/2010/0008), where a reference was made by Mr Sharma in respect of a prohibition order based on lack of fitness and propriety to conduct financial services business arising out of certain criminal convictions for financial services related activities. The Tribunal found that Mr Sharma's reference had no reasonable prospect of success. It went on to say, at [49], that Mr Sharma's reference also amounted to a collateral challenge to the criminal convictions and, as such, should be struck out as an abuse of process as part of the Tribunal's wider strike out jurisdiction.

62. The application before me is not a strike out application. It is nonetheless clear that, in considering whether it is in the interests of fairness and justice to extend time for Mr Miah's reference, I may take into account the extent to which, having regard in particular to the Settlement Agreement, Mr Miah's reference may be considered an abuse of process.

63. Mr Miah has sought to undermine the Settlement Agreement by reference to a number of arguments. It has not been easy to unravel the many strands of submission made by Mr Miah on the law from his rather impenetrable skeleton argument, but I hope that the following summary will deal with all the material issues he wished to raise. I am grateful to the Authority for having compiled a bundle of the many authorities cited by Mr Miah in his skeleton argument. I have considered those authorities although I should record that Mr Miah did not take me to any of them in any detail in the course of his oral submissions.

64. Mr Miah has argued that the agreement is uncertain and imprecise. He says that it lacks the requisite intention to create legal relations. His argument is that its terms are "unsubstantiated, vague, indeterminate & imprecise … expressed without

subsequent instrumental effect incapable of reconciliation against formal, factual & binding analysis by the higher courts taking into account a holistic analysis by those courts."

65. There are two points here. The first is that the agreement cannot be argued to be uncertain or imprecise. It is abundantly clear what it means on its terms. Nor can there be any argument that it was not intended to create legal relations between the Authority and Mr Miah. It was self-evidently intended to be binding on each of them.

66. The second appears to seek to rely on what Mr Miah regards as an analysis by Judge Bidder in the Crown Court of the unfairness of Mr Miah's financial penalty and on the POCA proceedings. As to the supposed analysis by Judge Bidder it was, as I have found, nothing of the sort. Nor can the POCA proceedings have any bearing on the matter, for the reasons I have given earlier, at [40]. Although Mr Miah's financial position in 2008 was relevant to the determination of the level of the financial penalty imposed on him, it is noteworthy that Mr Miah entered into the Settlement Agreement after his claims of financial hardship had been considered, and rejected, by the Authority. In any event, all the matters raised by Mr Miah in this context post-date the Settlement Agreement and can have no bearing on its terms or its effect.

67. Pursuing the theme of unequal treatment to which I have referred, Mr Miah has argued that the agreement should be construed so as to include an implied condition or warranty that Mr Miah would be afforded equal treatment with Square Mile and Mr Somal. He argued, as a consequence, that the Authority has breached such an implied term and that the Tribunal may treat the agreement as repudiated.

68. Mr Miah referred to a number of authorities in support of his arguments. In *Arcos Limited v E A Ronaasen and Son* [1933] AC 470, the House of Lords decided that a buyer of goods under a contract which provided a particular specification of goods was not bound to accept goods which did not answer that description. In the well-known case of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, the Court of Appeal explored the law relating to repudiation of a contract for breach, holding that a contract may only be treated as at an end if the breach goes so much to the root of the contract that it makes further commercial performance of the contract impossible, or substantially deprives a party of the whole benefit that party was intended to obtain.

69. Neither of those authorities can assist Mr Miah. Leaving aside my view that Mr Miah has failed to demonstrate any case that there was an inequality of treatment, he has not shown that there was any implied warranty or condition as to equality of treatment. It is quite clear that the Settlement Agreement was based on the mutual understanding of the parties as to Mr Miah's position, both as regards the conduct in respect of which the Authority had decided to impose sanctions and Mr Miah's own financial circumstances. Mr Miah had not been so concerned as to his own circumstances as to have decided not to enter into the Settlement Agreement. Nor does he appear at the time to have had any particular interest in the position of Square Mile or Mr Somal; he did not raise the matter of Square Mile's settlement with the

Authority before entering into the Settlement Agreement, and did not take any steps to question the position when Mr Somal's Final Notice was published.

70. For the same reasons, Mr Miah's submission that the contract was frustrated has no substance. The contract was performed in accordance with its terms. The same applies to Mr Miah's argument that there was some form of collateral contract that equal treatment be afforded to the various participants. Indeed, the agreement contains a provision under which Mr Miah and the Authority agreed that it constituted the entire agreement between the parties.

71. Mr Miah has also argued that the terms of the Settlement Agreement were unfair, and that the agreement was an unconscionable bargain. In support of this argument, Mr Miah relies on the fact that he was an unrepresented party, and that the Authority and he had unequal bargaining power. In this connection, amongst other authorities, Mr Miah has referred to *Alec Lobb (Garages) Ltd and others v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173 where it was held that, notwithstanding that the parties had unequal bargaining power, the conduct of the defendants in relation to the transaction had not been unconscionable, coercive or oppressive and therefore the plaintiff's claim in equity was invalid. In this case, even if it were accepted that there was an inequality of bargaining power, Mr Miah has provided no evidence of any such conduct on the part of the Authority.

72. In any event, I do not accept that it can be taken for granted that the parties had unequal bargaining power. Even though Mr Miah was unrepresented, he had available to him the right to make further representations to the Authority, including representations to the RDC and to make a reference to the Tribunal. Although in taking those steps the discount available to him in respect of the financial penalty on a later settlement would be reduced, he was not in the position of being prejudiced by not entering into the agreement when he did. There is nothing to suggest that Mr Miah entered into the Settlement Agreement other than willingly and mindfully. His failure to complain of any of its terms, or any part of the performance of the agreement, until now bears that out.

73. Further authorities cited by Mr Miah fail to assist his arguments. Thus, in arguing that the Settlement Agreement was an unconscionable bargain, Mr Miah referred to *Strydom v Vendside Ltd* [2009] EWHC 2130, in which Blair J, having discussed the first instance judgment of Peter Millett QC (as he then was) in *Alec Lobb*, summarised the position at [36] in the following way:

> "In summary, therefore, before the court will consider setting a contract aside as an unconscionable bargain, one party has to have been disadvantaged in some relevant way as regards the other party, that other party must have exploited that disadvantage in some morally culpable manner, and the resulting transaction must be overreaching and oppressive. No single one of these factors is sufficient-all three elements must be proved, otherwise the enforceability of contracts is undermined …"

In my judgment Mr Miah has singularly failed to demonstrate that any one of those factors is present in this case.

74. There is no relevance in this case of the business efficacy test, in relation to which Mr Miah referred to what Bowen LJ had said in *The Moorcock* (1889) 14 PD 64, at p 68, concerning the foundation for a finding that there was an implied warranty or covenant being the presumed intention of the parties so as to enable the transaction to be given such business efficacy as must have been intended by the parties. There is no room for an argument that the Authority and Mr Miah intended the Settlement Agreement to have any different effect or efficacy than it actually had. Nor would the officious bystander, from whom Mr Miah also sought assistance by reference to *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, have concluded that any such term should be implied into the Settlement Agreement.

75. Mr Miah also argued, in written submissions, that the term of the Settlement Agreement which provided that he would not make a reference to the Tribunal would be prohibited under the Unfair Contract Terms Act 1977. Although I received no submissions on this, I have been unable to ascertain on what basis that Act could be said to apply to the terms contained in the Settlement Agreement, including the agreement not to make a reference. In any event, it is not the agreement not to make a reference that is material in these circumstances, but the fact of the settlement of the regulatory process by means of the Settlement Agreement.

76. Although Mr Miah has taken a scattergun approach to the making of submissions on numerous principles of contract law and a series of authorities, the end result is that none of the bullets have come close to their target. The element missing in all instances is a circumstance that would provide a relevant context for the application of the principle relied upon. The same applies to the multiple references made by Mr Miah to statutes of no conceivable relevance or application to this case, including the Criminal Justice Acts 1972 and 1988, the Senior Courts Act 1981, the Supreme Court Act 1981, the Limitation Act 1980 and the Criminal Procedure (Attendance of Witnesses) Act 1965, as well as Article 1 of the First Protocol to the European Convention on Human Rights.

77. It follows that Mr Miah has failed to undermine the significance and effect of the Settlement Agreement. It is accordingly a relevant circumstance that falls to be considered in determining whether this Tribunal should exercise its discretion to extend time for Mr Miah's reference in this case.

Conclusion

78. Taking account of all the circumstances of this case, I have reached the clear conclusion that no extension of time should be granted for the making by Mr Miah of a reference in respect of the decision notice dated 4 February 2008. In reaching that conclusion I have had regard in particular to the following findings, and the reasons I have set out more fully above, and which I summarise here:

(a) There was no good reason, indeed no reason at all, for the substantial and significant delay in making the reference. I do not accept that Mr Miah had the epiphany that he claims to have had in relation to the alleged inequality of treatment as between himself and Square Mile and Mr Somal. I find that Judge Bidder's comments in the Crown Court proceedings did not give any indication that he considered there to have been any such inequality. I find too that none of the constraints to which Mr Miah was subject during his period on bail or in prison provides a good reason for his failure to make a reference.

(b) Mr Miah entered into the Settlement Agreement willingly and advisedly. There is nothing in Mr Miah's arguments to cast doubt on the efficacy of that agreement. The agreement has been performed, and the Authority has relied on the agreement. In the circumstances of this case, it would be unfair and unjust to the Authority for a matter concluded in that way now to be re-opened. A reference in such circumstances would, in my view, also amount to an abuse of process.

(c) I do not consider that the substantive grounds on which Mr Miah seeks to make a reference would have any reasonable prospect of success, either as regards his arguments in relation to the alleged (and, in my view, unfounded) disparity in treatment, nor the attempt to have the prohibition order reviewed by reference to changes in circumstances.

79. It is clear, as I have described above, that there is, in matters concerning references from a decision of the Authority, an interest in the finality of litigation, just as there is on an appeal from a judicial decision. The remarks of Morgan J in *Data Select*, at [37] are apposite to the circumstances of this case. Both parties, and in the context of this application in particular the Authority, were entitled to assume that matters had been finally settled. There is no basis at all for disturbing that position in the circumstances of this case.

80. For these reasons, I conclude that it would not be in the interests of fairness and justice to extend time for Mr Miah's reference.

Decision

81. Mr Miah's application is refused.

ROGER BERNER
UPPER TRIBUNAL JUDGE

RELEASE DATE: 02 MAY 2015