IN THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

FINANCIAL SERVICES

[2016]UKUT 0265 (TCC)

Case No: FS/2015/0006,

CHRISTIAN BITTAR **The Applicant**

-and-

THE FINANCIAL CONDUCT AUTHORITY **The Authority**

Case No: FS/2015/0007

JOERG VOGT **The Applicant**

-and-

THE FINANCIAL CONDUCT AUTHORITY **The Authority**

Case No: FS/2015/0009

PHILIPPE MORYOUSSEF **The Applicant**

-and-

THE FINANCIAL CONDUCT AUTHORITY **The Authority**

-and-

DEUTSCHE BANK AG

Interested party
(All three references)

DIRECTIONS

Sitting in public at the Royal Courts of Justice, Strand, London WC2A 2LL on 25 May 2016

Having heard Edward Brown, Counsel, for the Authority, James Waddington QC, for the Serious Fraud Office ("SFO"), Natasha Wong, Counsel, for Mr Moryoussef, James Macdonald, Counsel, for the Interested Party, Andrew Hunter QC, for Mr Bittar and Sara George for Mr Vogt

IT IS DIRECTED, in relation to Mr Bittar's reference, that:

1. The Authority shall, no later than 5 pm on 31 July 2016, send or deliver its statement of case and list of documents in compliance with paragraph 4 of Schedule 3 to the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules").

2. Each of the Applicant and the Interested Party shall no later than 5 pm on 30 September 2016, send or deliver its reply and list of documents in compliance with paragraph 5 of Schedule 3 to the Rules.

3. Each of the parties shall, no later than 5 pm on the date which is one month after the date by which both of the relevant parties have complied with Direction 2 above, provide to each of the other parties a list of any further disclosure requests it wishes to make and shall provide in respect of each further request an explanation of the basis of the request.

4. A case management hearing shall be listed for the earliest convenient date after 3 January 2017 to deal with any further disclosure requests of the parties and any other matters required, including the question of expert evidence. The parties shall provide their dates to avoid during January 2017 for this case management hearing to the Tribunal within 14 days of the date of release of these directions.

5. Liberty to apply.

REASONS FOR DIRECTIONS

1. As will be apparent from the directions that I have made, I have made the following decisions following the case management hearing on 25 May 2016:

> (1) That there should be no further stay to Mr Bittar's reference at this stage and the parties should proceed to take steps to bring that reference to a hearing through a staged case management process; and
>
> (2) That there should be no direction to consolidate either Mr Moryoussef's or Mr Vogt's references with that of Mr Bittar at this stage and the current stay on Mr Moryoussef's reference until after the Supreme Court's judgment in *Macris* should be maintained for the time being.

2. The Authority had applied on 6 November 2015 for a stay of proceedings on Mr Bittar's reference to last until after the Supreme Court's judgment in *Macris* had been released. On 18 November 2015, following representations made by Mr Bittar on the Authority's application, the Authority wrote to the Tribunal stating that it in its view it was not sensible to advance Mr Bittar's reference pending resolution of the criminal proceedings in respect of a charge of conspiracy to defraud which have been brought by the SFO against, among others, Mr Bittar and Mr Moryoussef. Those criminal proceedings overlap in terms of subject matter with these references. In particular, I am told that it will be alleged by the prosecution in the trial, among other things, that Mr Bittar and Mr Moryoussef conspired to manipulate EURIBOR and that the trial has been listed to commence in September 2017. The Authority has also applied for the references of Mr Bittar and Mr Moryoussef to be consolidated. The Authority contends that consolidation is in the interests of justice and will further the overriding objective because the factual overlap is considerable and there are common issues of

principle. Consequently, they contend, efficiency and cost effective use of public resources is firmly in favour of a single hearing.

3. The Authority contends that the Supreme Court's hearing in *Macris* is imminent and therefore it would be prudent to consider whether the bulk of the resourcing expenditure necessary in relation to Mr Bittar's reference should await final determination of the jurisdiction issue. The Supreme Court hearing in *Macris* will take place in October 2016. The Authority contends that it is reasonable to assume that a judgment could be expected some 3 months later.

4. The Authority's position on the stay was supported by Mr Moryoussef, Deutsche Bank and the SFO.

5. As far as Mr Morroussef is concerned, he wishes to concentrate for the time being on defending himself in the criminal proceedings. Accordingly, he does not wish to pursue his reference at all until *Macris* has been decided by the Supreme Court. He has limited resources and wishes to devote them to defending himself in the criminal proceedings in priority to pursuing his reference. He would therefore be most concerned at the prospect of having to prepare for both sets of proceedings simultaneously and that will put a strain on him in defending himself in the criminal proceedings. He also shares the SFO's concerns about there being a risk to the fairness of his trial were his reference to be heard before the criminal proceedings had been concluded. He is, however, prepared to agree to a lifting of the stay to the extent of permitting the preliminary issue on the question of whether he had been identified in the Deutsche Bank Final Notice ("the Notice") to be determined following the release of the Supreme Court's judgment in *Macris*.

6. The SFO have concerns that there would be a real risk of serious prejudice to the fairness of the trial of Mr Bittar, Mr Moryoussef and the others who have been charged were the regulatory proceedings to be heard before the criminal trial had been concluded. Mr Waddington put forward three specific concerns. First, there is a risk of prejudice through publicity which might flow from a finding that Mr Bittar acted dishonestly being made before the criminal trial took place. Secondly, there is the undesirable possibility of there being a finding by the Tribunal in his favour and a verdict against him in the criminal case, or vice versa which may look inconsistent and the risk of inconsistent decisions is reduced by the more serious case, which incorporates a more comprehensive amount of evidence, requires a higher standard of proof in a finding of dishonesty, being heard first. Finally, Mr Bittar may seek to identify inconsistencies between the evidence and fact-finding exercise in the regulatory proceedings and the way the prosecution case is put in the criminal proceedings and the criminal trial judge, in deciding whether or not the introduction of some part of parallel proceedings is permissible, may have to consider various competing interests. It is not sufficient for Mr Bittar to say that he is happy for the regulatory proceedings to go first; the Crown is also entitled to a fair trial. Mr Waddington made it clear that the SFO would resist any attempt to introduce the evidence given or findings made by the Tribunal into the criminal proceedings.

7. Mr Bittar strongly opposes any further stay at this stage. His starting point is that, as a matter of principle, regulatory proceedings such as his reference perform an important public function and should not be stayed simply because there are parallel criminal proceedings. He has a statutory right to put his case before the specialised Tribunal that Parliament has decided should hear such matters and, bearing in mind the considerable delays that have occurred to date, the reference having been made in May 2015 and the identification issue having been decided in his favour in November

2015. At that stage he anticipated directions being made for the further conduct of his reference, bearing in mind the Tribunal's directions in June 2015 to the effect that even if the Authority obtained permission to appeal to the Supreme Court in *Macris* that would not be justification for a stay.

8. It was also relevant that Mr Bittar's proceedings before the RDC in respect of the separate Warning Notice that he had been given had been stayed at the behest of the SFO, until the conclusion of the criminal proceedings. Although he was originally content with a stay pending further developments, since the Notice was issued in April 2015 Mr Bittar has strongly opposed a stay of the RDC proceedings. Mr Hunter submitted that a stay of regulatory proceedings in a case where there are parallel criminal proceedings should only be granted where the Tribunal is satisfied that there is a real and serious risk of injustice in either or both proceedings if a stay were to be refused and that this risk cannot be addressed by case management safeguards. Mr Bittar has made it clear that he sees no prejudice to him arising out of regulatory proceedings and criminal proceedings moving forward in parallel. As far as he is concerned, the charging decision makes it all the more important that he is afforded his statutory right to challenge the Notice in circumstances where it was published, with considerable publicity, but without warning to him and without him having been afforded his statutory right to challenge the prejudicial allegations against him in it. Mr Hunter submits that its very existence is seriously harmful to Mr Bittar in the context of a defence to the criminal charge because it presents a wholly one-sided story to the public and the longer the Notice goes unanswered the worse the prejudice becomes. As far as he is concerned, it is very much a case of justice denied if the hearing of his reference is delayed into 2019, which is likely to be the effect if the proceedings were stayed pending the resolution of the criminal proceedings. In Mr Hunter's submission, none of the points made by the SFO to support its claim that there is a real risk of serious prejudice if the regulatory proceedings were not stayed could not readily be addressed by appropriate use of the Tribunal's case management powers or by the judge in the criminal proceedings.

9. Mr Vogt supports Mr Bittar's position. Mr Vogt has in fact no current standing in these proceedings because the Tribunal has decided that he was not identified in the Notice. He is seeking permission to appeal against that decision and his application in that regard has been stayed pending the Supreme Court's judgment in *Macris*. It is only if the reasoning in that judgment indicates that the identification issue should be decided in his favour that his reference could be revived. In those circumstances I have not taken into account at this stage the fact that were Mr Vogt to have a live reference it may be prudent to consolidate it with those of Mr Bittar and Mr Moryoussef.

10. As Mr Hunter observed in his submissions, there has been a considerable delay between the last case management conference and this one which has been occasioned because of the change of circumstances arising following the decision to charge Mr Bittar and Mr Moryouusef. In that context, when I gave my directions to convene the case management hearing held on 25 May I envisaged that it could be held in February this year. One of the reasons why that was not possible was that the SFO did not, as it was directed, provide details of the matter to the other subjects of the conspiracy charge who are not parties to these proceedings in order that they may consider whether they wish to make representations on the question of the stay until prompted some time later.

11. In making my decision on these applications I have of course been guided by the overriding objective and the need to balance the competing interests of the parties. That has not been easy in these somewhat unusual circumstances. It is unusual for the subject of criminal proceedings not to wish to stay parallel civil proceedings and the position taken by Mr Moryoussef reflects what normally occurs, that is the subject does not wish to deal with two sets of proceedings in parallel, particularly if he has limited resources. Those are constraints which clearly do not apply to Mr Bittar and in my view he sets out compellingly and cogently his reasons why he wishes to pursue his reference notwithstanding the parallel criminal proceedings. I must give strong weight to his desire to pursue his statutory rights as expeditiously as possible and therefore to the requirement in Rule 2 (1) (e) of the Rules that in applying the overriding objective the Tribunal must avoid delay, so far as compatible with proper consideration of the issues. Equally, I must give strong weight, as I have done so far in these proceedings, to Mr Moryoussef's desire to preserve his resources. His reasons as to why he wishes to give the criminal proceedings priority are also cogent and compelling.

12. In considering the question of delay, I have also had regard to the Authority's position and the fact that in asking it to prepare its statement of case before the identification issue is finally determined may result in wasted work on its part and have sought to balance this against the factors which way heavily in favour of Mr Bittar's position.

13. I have also taken account of the fact that the burden is on the party who is in favour of the stay to demonstrate that it is in the interests of justice to grant it.

13. As far as the SFO is concerned, it became clear during the course of the hearing on 25 May that it was no longer seeking a complete stay on proceedings until after the criminal proceedings had been determined, in contrast to the position it took before the RDC. Mr Waddington agreed that the SFO's concerns would be fully addressed so long as the hearing of Mr Bittar's reference did not take place before the criminal proceedings had concluded. The SFO therefore has no concerns if matters are otherwise progressed in relation to the reference.

14. Because of the staged case management approach that I am taking, it is unnecessary for me to make a definitive determination at this stage that Mr Bittar's reference will be heard after the criminal proceedings have concluded. On the basis of the timetable that I have set for the first stages of the proceedings it may well be the case that the hearing window for the reference would be between July and November 2017. Mr Waddington urged me to proceed on the basis that the September 2017 trial date was a fixture and was unlikely to be moved. Both Mr Hunter and Miss Wong were more sceptical; they point to delays caused in the earlier LIBOR trials because of issues of disclosure and submitted that it was realistic to suppose that similar delays could occur here with the result that the trial could be put back, even by a number of months.

15. In my view it would be prudent in the circumstances not to assume that the trial will necessarily commence in September 2017. If for example, it was put back until 2018 then, assuming that appropriate case management safeguards could be put in place and Mr Bittar's reference was able to be listed for a hearing in July 2017, I would not rule out hearing his reference before the criminal proceedings were heard. That is on the assumption that either Mr Moryoussef's reference had not been consolidated or he had failed on the identification issue. If that is not the case I will clearly have to take Mr Moryoussef's position into account.

16. I was taken to a number of authorities by both Mr Hunter and Mr Waddington as to the principles to be applied in deciding whether or not to stay regulatory proceedings until parallel criminal proceedings have been concluded. There was no difference in substance between the parties on the relevant principles to be applied and there is no need for me to analyse them here. I observe that in all the cases that were cited was not a single case where the issue of potential serious risk of injustice if the civil proceedings were not stayed was not capable of being addressed through the exercise of case management powers in the civil proceedings or, in the case of the criminal proceedings, by the Judge during the course of the trial. There is a strong presumption against a stay and it is a power which has to be exercised with great care and only where there is a real risk of serious prejudice which may lead to injustice. In this case, in my view only the first of the three concerns raised by the SFO could give rise to a serious risk of prejudice to a fair trial. The risk of inconsistent decisions has been discounted in the courts: see Steyn LJ at paragraph 43 of his judgment in *R v Panel on Takeovers and Mergers, ex parte Fayed and others* [1992] BCC 524. It does not seem to me that the fact that the trial judge may have to rule on the issue of admissibility of the findings of the regulatory proceedings in itself could amount to a serious risk of prejudice. It is open to this Tribunal to give case management directions restricting the use of material in these proceedings or not publicise its decision until the criminal proceedings are concluded: see *Bankas Snoras v Antonov and another* [2013] EWCA 131 (Comm) at paragraphs 45 and 46 give examples of the kind of safeguards that can be put in place.

17. I do however accept that the authorities show that there will be a real risk of prejudice to the right to a fair trial where the civil proceedings were heard shortly before the criminal proceedings: see *D. P. R. Futures Ltd* [1989 1 WLR 778, Millet J at page 790 D-E. This appears to be on the basis that any publicity relating to the civil proceedings would be fresh in the minds of the jury or any witnesses at the time the criminal proceedings were held. This is not considered to be an issue where there is a significant gap between the conclusion of the civil proceedings and the commencement of the criminal trial. In this case, the matter must therefore be kept under review but it may be necessary depending on the circumstances to defer the hearing of the reference until after the criminal proceedings have concluded.

18. I turn now to the question of consolidation. In my view it would only be sensible to make a decision on that if I also decided to lift the stay on Mr Moryoussef's reference. Mr Moryousef has satisfied me that it is at the present time in the interests of justice to continue the stay for the reasons that he gives. His wish to give priority to the criminal proceedings should be respected as should his desire not to use resources on his reference until the identification issue has been finally determined in *Macris.* However, assuming the Court of Appeal's decision is upheld, then in my view it would be appropriate to progress Mr Moryoussef's reference at that point, at least to the extent of determining the preliminary issue of identification. I did not take Miss Wong to disagree with that. The question of consolidation can be revisited at that point and where the issues at stake in Mr Bittar's reference will have become apparent. As Mr Hunter correctly observed, whilst there is some overlap between the subject matter of the two references, a significant part of what Mr Bittar complains about does not involve his dealings with Mr Moryoussef. The position regarding Mr Vogt's reference will also become apparent at that stage.

19. I now turn to the question of whether to stay Mr Bittar's reference until the Supreme Court's judgment in *Macris.* As I have mentioned, in my decision refusing a stay last year, when the Authority sought a stay on the basis of its application to the

Supreme Court for permission to appeal, I decided that matters should not change if permission to appeal were granted. There was no appeal against that decision and in my view circumstances have not changed to the extent that I should revisit that decision. Mr Brown urged me to take into account the reality of the position which was that matters had moved on to the extent that the Supreme Court hearing was imminent and therefore it was appropriate to await its decision. I do not accept that submission. The delay in moving matters forward which has resulted in that position is not to be laid at the door of Mr Bittar. Indeed, part of the reasons may be laid at the door of the Authority and the SFO. Had the RDC not stayed its own proceedings it may well have made its decision by now on the disciplinary proceedings taken against Mr Bittar which may have made this reference unnecessary. It follows from the discussion above as to when it is appropriate to stay regulatory proceedings because of pending criminal proceedings that it is difficult to see why the RDC decided that it could not conclude its own proceedings well before the criminal proceedings would commence. Publicity is not an issue because RDC proceedings are in private. I also mentioned the fact that there was a delay in arranging this case management hearing, part of which is down to communication failures on the part of the SFO.

20. Neither would I regard the Supreme Court's decision as being imminent. A further stay of probably no less than seven months before a decision is likely is in my view significant in the light of the delays to date and the strong presumption that Mr Bittar is entitled to pursue his statutory rights as expeditiously as possible. Therefore, although, depending on the outcome in the Supreme Court, requiring the Authority to prepare a statement of case and take further steps in the proceedings before that time may result in resource being wasted in my view this possibility is outweighed by the other factors mentioned above. It is for these reasons I have decided it is in the interests of justice not to impose a stay on Mr Bittar.

21. With regard to the directions themselves, I accept that the Authority may require longer than is usual for preparing its statement of case, bearing in mind the complexity of the matter and its novelty in the sense that there has not yet been a substantive hearing of a third party reference in this Tribunal. I have given Mr Bittar an equivalent amount of time to prepare his reply, although Mr Hunter indicated that he may not need it. Consequently, I have made provision that will allow the directions to be progressed if Mr Bittar puts in his reply earlier.

22. We did not explore at the case management hearing what part Deutsche Bank intends to play in the proceedings. The Rules do not appear to cater specifically for pleadings from a third party so I have at this stage proposed that they should be treated the same as the Applicant and submit a reply of their own. If Deutsche Bank feel that something more or less should be provided they have liberty to apply for amended or different directions.

TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE

RELEASE DATE: 09 June 2016