



[2017] UKUT 0275 TCC

Reference number: FS/2016/018
FS/2016/019

FINANCIAL SERVICES - Decision Notice - application under Rule 5(3) Tribunal Procedure (Upper Tribunal) Rules 2008 for direction to disclose documents and information relating to decision to investigate and bring proceedings against Applicants to determine whether abuse of process - application refused

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

JOHN CHIESA
COLETTE CHIESA

Applicants

- and -

THE FINANCIAL CONDUCT AUTHORITY

Respondent

Tribunal: Judge Greg Sinfield

Sitting in public at Royal Courts of Justice, Strand, London, WC2A 2LL on 17
March 2017

Jason Mansell, counsel, instructed by Griffin Law, for the second Applicant

Rhys Meggy, counsel, instructed by Griffin Law, for the first Applicant

Selva Ramasamy, counsel, instructed by the Financial Conduct Authority, for
the Respondent

DECISION

Introduction

1. This decision concerns an application for disclosure of materials within the possession of the Respondent ('the FCA' or 'the Authority') evidencing the internal decision-making of the Enforcement Division ('Enforcement') of the FCA in commencing and then pursuing regulatory investigations, and, thereafter, regulatory proceedings against the Applicants, Mr and Mrs Chiesa.

2. On 26 October 2016, the FCA issued Decision Notices to the Applicants. In the Decision Notices, the FCA prohibited the Applicants from performing any function in relation to any regulated activities carried on by an authorised person, exempt person or exempt professional firm and withdrew approval to perform controlled functions. In addition, the FCA imposed a financial penalty of £50,000 on Mrs Chiesa for failing to deal with the FCA in the open and cooperative way in making misleading statements during a compelled interview. On 23 November 2016, Mr and Mrs Chiesa referred the FCA's decisions to the Upper Tribunal ('the Tribunal').

3. In March 2017, Mr and Mrs Chiesa applied to the Tribunal for a direction under rule 5(3)(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('UT Rules') that the FCA disclose materials within its possession that show the internal decision-making of Enforcement in commencing and then pursuing regulatory investigations that led to the issue of the Decision Notices. Mr and Mrs Chiesa submitted that such disclosure was necessary in order for the Tribunal to deal with the case fairly and justly. The FCA did not contend that the Tribunal did not have power under rule 5(3)(d) to make an order for disclosure such as that requested but submitted that the Tribunal should not do so.

4. Mr and Mrs Chiesa also applied for a direction under paragraph 3(3) of Schedule 3 to the UT Rules that the register of references should not include particulars of Mr and Mrs Chiesa's references. They also sought a direction, under rule 14 of the UT Rules, that the FCA should not publish the Decision Notices. Before the hearing, Mr and Mrs Chiesa accepted that the application under rule 14 was inextricably linked to the application for early disclosure. Mr and Mrs Chiesa also indicated that they were content for the outline details of their references to be included on the register in the usual way.

5. For the reasons set out below, I have decided to refuse the application for disclosure.

Background

6. Mr and Mrs Chiesa were partners in an authorised partnership which traded principally as Westwood Independent Financial Planners ('Westwood'). Westwood provided personal investment advice. Both Mr and Mrs Chiesa were approved at Westwood to perform the CF 4 (Partner) controlled function on 1 December 2001. Mrs Chiesa performed the CF 21 (Investment adviser) controlled function at Westwood during the period from 11 December 2001 to 1 October 2003. Mr Chiesa was additionally approved to perform the CF 10 (Compliance oversight), CF 11 (Money laundering reporting) and CF 30 (Customer) controlled functions and had responsibility for insurance mediation. In practice, Mr Chiesa had the lead advisory and customer facing role and took the lead in generating new business, while Mrs Chiesa occupied an operational management role, working as the office manager dealing with bank accounts, staff pay and logistics.

7. In April 2008, the FCA commenced an investigation into Westwood's sales of geared traded endowment policies ('GTEPs'). This resulted in the FCA issuing a Decision Notice to Westwood on 31 May 2011 imposing a financial penalty of £100,000 for the firm's failure to ensure its clients received suitable advice in relation to the GTEPs that it sold. Westwood referred that Decision Notice to the Tribunal on 23 June 2011. On 22 November 2013, the Tribunal upheld the FCA's decision to impose a financial penalty on Westwood of £100,000 for mis-selling GTEPs.

8. As partners with unlimited liability in Westwood, Mr and Mrs Chiesa were liable for Westwood's debts. In October 2011, Mr and Mrs Chiesa entered sequestration (due to an unpaid statutory demand made by an adviser working with Westwood). At the time of the sequestration, Mr and Mrs Chiesa had significant liabilities due to the need to pay compensation in respect of numerous complaints relating to advice given by Westwood. Westwood and, therefore, Mr and Mrs Chiesa had liabilities of more than £5 million, mainly from customers' claims against Westwood. The FCA alleges that, in the build-up to sequestration, Mr and Mrs Chiesa took a variety of steps to protect their assets and money from tax and creditors' claims. In November 2011, Mr Charles Moore was appointed as trustee in sequestration. As part of the sequestration process, Mr and Mrs Chiesa were required to make full disclosure to Mr Moore to enable him to realise their assets for the benefit of the creditors of Westwood. Mr and Mrs Chiesa remained approved persons, albeit inactive, while the estate of Westwood was wound up.

9. The FCA alleges that Mr Chiesa misled Mr Moore by deliberately making misleading disclosures and/or failing to disclose the true position as to their income, expenditure and assets. The FCA further alleges that Mrs Chiesa deliberately acquiesced with and assisted Mr Chiesa in such conduct. The FCA asserts that Mr and Mrs Chiesa gave Mr Moore the impression that they had limited income, expenditure and assets while telling a different story to banks from whom they were seeking a loan. The FCA claims that, in a compelled interview in February 2015, Mrs Chiesa attempted to mislead the FCA by making statements designed to give the impression that she lacked capability and understanding in relation to Mr and Mrs Chiesa's relevant business arrangements, when she in fact understood and had an important role in those arrangements. The FCA also contend that Mrs Chiesa attempted to mislead the FCA in relation to her ownership of valuable jewellery.

Application for disclosure

10. Mr and Mrs Chiesa now seek a direction from the Tribunal that the FCA disclose all relevant records which impact upon the FCA's internal decision-making relating to the following events (to include but not limited to notes of internal meetings, telephone attendance notes, internal email communications, internal reports and position papers):

- (1) The decision to institute regulatory investigations concerning Mr and Mrs Chiesa's interaction with the Trustee in Sequestration (early-mid 2013);
- (2) The decision not to refer the Authority's concerns to other agencies specifically tasked with investigating the allegations which form the subject matter of the proceedings in apparent conflict with memoranda of understanding reached with law enforcement (early-mid 2013);

- (3) The decision to conduct the investigation in private and without notice, not serving the Memoranda of Appointment of Investigators dated 30 July 2013 until 12 December 2013 (July 2013-January 2014);
- (4) The decision to task persons involved in the 'Westwood' investigation to conduct the investigation into Mr and Mrs Chiesa (early-mid 2013-2014);
- (5) The decisions to first request and the refuse receipt of Mr and Mrs Chiesa's 'Forms C' withdrawing their regulatory approval (2013-present);
- (6) The decision to contact the Trustee in sequestration, Mr Moore, (seemingly in 2012/13) and any other records which may suggest pressure being applied to obtain his cooperation to the investigation (2013-present);
- (7) The decisions to refuse Mr and Mrs Chiesa's offers of undertakings not to carry out any regulated activity (2013-the present);
- (8) The decision (then abandoned) to hold a compelled interview on the same day as the scoping meeting (December 2013-January 2014);
- (9) Decisions relating to the complaints made by Mr Sampson concerning the FCA's conduct (January 2014-March 2014);
- (10) Decisions made refusing the Applicants' representatives requests to extend the deadlines for responding to Information Requirements, non-compliance with which would engage APER 4, and for repeatedly seeking to allege failure to comply with the said information requirements (March to October 2014);
- (11) Decisions concerning the Authority's failure to commence proceedings under section 177 FSMA notwithstanding the correspondence issued to the Applicants (March 2014 to date);
- (12) The decision to commence writing the Preliminary Investigation Reports, and the FCA's view at *that* time as to what proceedings should be brought including, prior to interview, whether APER 4 allegations were in contemplation (September 2014 onwards);
- (13) The decision to seek to interview both Mr Chiesa and Mrs Chiesa pursuant to the FCA's powers to compel (August 2014-February 2015), notwithstanding earlier indications that it would not seek to do so;
- (14) The decision to refuse to provide Mrs Chiesa with any pre-interview disclosure prior to her compelled interview on 18 February 2015 (August 2014-February 2015);
- (15) The decision to commence disciplinarily proceedings against Mrs Chiesa for alleged breach of APER 4 (February 2014-present);
- (16) The decision to seek a financial penalty of £150,000 in relation to the alleged APER4 breach by Mrs Chiesa and the failure to raise the unique nature of the penalty sought before the RDC on the issue of a Warning Notice;
- (17) The decision to refuse to allow independent counsel or a fresh and independent investigation team to participate in any inspections of the Trustee's files (2015-present);

(18) The decisions taken not to preserve the form of the Trustees' files and generally not to give effect to the proposals set out in the Applicants' letters of 5 August 2016 and 12 August 2016 (August 2016).

11. Mr and Mrs Chiesa ask that the FCA be required, through FCA personnel wholly unconnected to the current investigation and/or the Westwood litigation, to:

- (1) identify and deliver up to Mr and Mrs Chiesa the requested material; or
- (2) identify and deliver up the requested material to the Tribunal for it to determine whether it meets the test for disclosure and should be disclosed; or
- (3) identify and list the requested material and then determine on a document by document basis whether the material meets the test for disclosure (save that to the extent the material examined would, but for the application of public interest immunity and/or legal professional privilege otherwise meet the test for disclosure to place any such material before the Tribunal for it to determine whether it should be provided).

Grounds for disclosure

12. Mr and Mrs Chiesa contended that there are reasonable grounds to believe that the investigations underlying these proceedings may have been instituted and pursued in bad faith. They allege that the investigations and proceedings were merely a means to an end, namely creating a pretext for bringing misconduct proceedings that would enable the FCA to impose a financial penalty. Mr and Mrs Chiesa submitted that the financial penalty imposed on Mrs Chiesa "may have been intended" as a substitute for the fine previously imposed on Westwood which the FCA was unable to recover due to Westwood's insolvency.

Evidence

13. In support of their contention that the FCA acted in bad faith, Mr and Mrs Chiesa relied on the witness statements of Mr Mark Edmonds, a solicitor acting for Mr and Mrs Chiesa in these proceedings, and Mr Alasdair Sampson, a solicitor who was instructed to represent Westwood in relation to the earlier proceedings. Counsel for Mr and Mrs Chiesa accepted that the evidence of the witnesses, which describes correspondence between the parties and the conduct of the investigators, provides only circumstantial evidence in support of the allegations and there was no direct evidence to show that the FCA had conducted the investigations and pursued the proceedings with an improper motive. They contended that such circumstantial evidence could be enough to support an inference that the FCA had acted in bad faith and that would be sufficient to support Mr and Mrs Chiesa's application. Neither witness gave oral evidence or was subject to cross examination. My assessment of their evidence is based on the witness statements and the exhibits to which I was referred.

14. In summary, Mr Edmonds states that it was only after the Tribunal had confirmed the financial penalty imposed on Westwood and the FCA had become one of its unsecured creditors that Enforcement decided to investigate Mr and Mrs Chiesa's interaction with the Trustee, Mr Moore, who had been appointed to oversee Westwood's sequestration and the personal bankruptcy of Mr and Mrs Chiesa. Mr Edmonds states that the only authority to investigate whether Mr and Mrs Chiesa had misled the Trustee was the FCA and that Mr Moore had never made any complaint that he had been misled. Mr Edmonds states that the FCA had a vested interest in establishing that Mr

and Mrs Chiesa had misled the Trustee and the FCA sought to identify any possible basis to allege that Mr and Mrs Chiesa had done so.

15. Mr Edmonds also states that “it appears that the FCA may have misused their investigative powers under section 56 FSMA as part of a strategy to ultimately extract from Mr and Mrs Chiesa payment of the outstanding [Westwood] fine.” That is the high watermark of Mr Edmonds’ evidence and it is no more than his interpretation of the facts.

16. Mr Edmonds refers to the interview of Mrs Chiesa on 18 February 2015. He criticises the FCA for telling Mrs Chiesa, at the outset of the interview, that she should say if things about which she was asked were more within her husband’s knowledge than her own or if they were things that she did not know about and then asking her open questions and not challenging her answers. Mr Edmonds states:

“It can only be inferred that the decision not to put any allegations of falsity to Mrs Chiesa during the interview was a conscious one, having the benefit of depriving her of an opportunity to correct the allegation.

In the circumstance there is a strong inference that this was an interview engineered in advance to bring about circumstances in which Mrs Chiesa would give a disbelieved account such that a breach of APER 4 could then be alleged.”

17. Effectively, this is an allegation that the FCA tricked Mrs Chiesa into giving misleading answers at her interview by telling her that she could say if she did not know the answer to a question and then asking her open questions. I do not consider that it can reasonably be inferred from such conduct, which seems to me to be perfectly fair and proper, that the FCA sought to trap Mrs Chiesa. Nor do I accept that failing to challenge Mrs Chiesa’s answers when the FCA did not believe them was somehow tricking her into giving wrong answers. Her answers at the interview were either true or untrue and whether the FCA disbelieved them is irrelevant. Further, Mrs Chiesa had an opportunity to establish the veracity of any answers disbelieved by the FCA at the hearing before the RDC and will have again, if necessary, at the hearing of the reference before the Tribunal.

18. Mr Edmonds also makes various criticisms of the conduct of the investigation and the decision to bring proceedings which, in essence, are that the FCA’s actions were aggressive, contrary to its usual practice and unprincipled. A similar complaint was made by Westwood at the hearing of its reference. For reasons which I discuss below at [32] and [33], such criticisms are not matters for this Tribunal except in so far as they cast doubt on the FCA’s case in a reference.

19. Mr Sampson’s evidence makes clear the mutual animosity aroused by the earlier investigation and proceedings in relation to Westwood. He refers to the proceedings having been “very hard fought with strong feelings seemingly raised on the part of those investigating on behalf of the Authority.” He then states that he challenged the actions of a number of the FCA’s officers including two in-house solicitors and that he made a complaint about one of them to the Solicitors Regulation Authority. Mr Sampson states that, given his dealings with the FCA and challenges to the integrity of some of its officers, he was immediately suspicious when the FCA announced that it was starting a new investigation. He suspected that the FCA was seeking to find a way to impose a financial penalty on Mr and/or Mrs Chiesa in place of the £100,000 that the FCA could

not recover from Westwood. It is clear from his witness statement that Mr Sampson's suspicions were never allayed. Mr Sampson accuses the FCA of being highly aggressive towards Mr Moore, the trustee, and threatening him with personal liability for costs if he appealed the Tribunal's decision in Westwood. However, Mr Sampson acknowledges that he cannot produce any email or letter to support his allegation and no evidence was produced of any complaint by Mr Moore.

20. Mr Sampson also says that an email from one of the FCA's officers, Mr Sillett, which stated that the FCA is investigating "... whether Mr and Mrs Chiesa have acted without integrity..." demonstrated very clearly by those words that officers in the FCA had already made up their mind that Mr and Mrs Chiesa had acted without integrity. I cannot accept that the sentence quoted shows that Mr Sillett or any officer had already formed a view about Mr and Mrs Chiesa's conduct: that would be to ignore the word "whether" entirely.

21. In conclusion, Mr Sampson's evidence appears to me to be based on suspicion and supposition coloured by the antagonism created by the investigation and proceedings relating to Westwood.

Submissions

22. Counsel for Mr and Mrs Chiesa accepted that the application was being made at an early stage but submitted that no meaningful disclosure exercise had been conducted for the purposes of preparing the list of documents served with the FCA's Statements of Case pursuant to paragraph 4(3)(b) of Schedule 3 to the UT Rules. They contended that the safeguards ordinarily present within the reference procedure were missing in this case and that placed Mr and Mrs Chiesa's representatives at an unfair disadvantage in pleading the Applicants' case meaningfully with the appropriate evidence considered and in keeping with their professional obligations.

23. The FCA's investigation of Mr and Mrs Chiesa overlapped with the jurisdiction of the Accountant in Bankruptcy and, while there is nothing that says that the FCA cannot investigate matters where there is an overlap, it is unclear why the investigation was started and moved from being a prohibition investigation under section 56 FSMA to a disciplinary allegation under section 66 FSMA. Mr and Mrs Chiesa's concern is that the section 56 investigation was a facade and that it was no more than a mechanism to create an environment to make Mrs Chiesa subject to disciplinary jurisdiction under section 66.

24. Counsel for Mr and Mrs Chiesa contended that the FCA investigation was not concerned with the actual performance of regulated activities. It should be seen in the context of Westwood being in sequestration. The FCA was a creditor and had a vested interest. Counsel said that there is no other example of action under APER 4 based on comments in an interview in which the interviewee did no more than deny points put by the FCA. Counsel also remarked on the fact that the amount of the financial penalty suggested by Enforcement to the RDC (although the RDC did not adopt it) was £150,000 which, when discounted for early payment, would have been £105,000 and thus very close to the £100,000 imposed on Westwood but never paid.

25. Counsel submitted that the intention of Enforcement in commencing the investigation could also be seen from the 'volte face' in relation to the 'Form Cs'. Counsel pointed out (and it was not disputed) that the FCA initially asked both Mr and

Mrs Chiesa to complete and submit a Form C giving notice that they had ceased to perform controlled functions only to refuse to accept the forms at a later date. The submission was that the FCA cannot have refused to accept the Form Cs for consumer protection reasons as Westwood was no longer trading. The Tribunal was invited to infer that the only reason for not accepting the forms was to keep Mr and Mrs Chiesa on the disciplinary hook.

26. Counsel also submitted that, in order for the Tribunal to deal with the case fairly and justly, it was necessary that those whose conduct raises the concern play no role in the disclosure process. To date disclosure had been undertaken by the very same persons whose conduct raised the concern. Counsel acknowledged that paragraph 4(3)(b) of Schedule 3 to the UT Rules, which states that the FCA must provide any further material which might undermine the referred decision, provides safeguards to Mr and Mrs Chiesa but submitted that, given the concerns raised, they may have been deprived of those procedural safeguards because the persons suspected of bad faith were in charge of the disclosure and were conflicted and inherently indisposed against allowing consideration or disclosure of all relevant and disclosable material for fear that it may expose their bad faith. Further, the mere spectre of bad faith might affect the FCA's view of whether to disclose material which might undermine its case.

27. Counsel submitted that the Tribunal should be concerned and that Mr and Mrs Chiesa should be allowed to explore this issue. It should be dealt with as soon as possible. The requests for information were proportionate. The material should be delivered to Mr and Mrs Chiesa's solicitors or, if the FCA object to that course, to the Tribunal. If there are matters of legal privilege and public interest immunity then the material should go before the Tribunal to determine.

28. The FCA contended that the purpose of the proceedings before the Tribunal is to decide whether there had been misconduct by Mr and Mrs Chiesa which should be determined by reference to their words and actions in the build-up to sequestration, taking account of their true income, expenditure and assets, what they told Mr Moore about those matters and what Mrs Chiesa told the FCA when interviewed. The Tribunal is not the appropriate forum for dealing with complaints of misconduct by the FCA and there is a separate complaints procedure for such matters. Mr and Mrs Chiesa have not submitted any complaint about the FCA's conduct and the application for disclosure on grounds of alleged misconduct is simply an attempt to deflect focus away from the true purpose of these proceedings.

29. The FCA submitted that it had complied with its disclosure obligations and would continue to do so on receipt of Mr and Mrs Chiesa's replies to the statements of case through secondary disclosure, subject to relevance. Counsel for the FCA submitted that the concession by counsel for Mr and Mrs Chiesa that there is "a current absence of direct evidence to support Mr and Mrs Chiesa's concerns" demonstrated that the application for disclosure review was little more than a fishing expedition.

Discussion

30. Counsel for Mr and Mrs Chiesa relied on dicta from the Court of Appeal's judgment in *R v Mullen* [1999] EWCA Crim 278, [2000] QB 520 as showing the effect on proceedings where abuse is established. Mr Mullen had been brought from Zimbabwe to England, where he was wanted by the police, by a Zimbabwean immigration officer following deportation proceedings. Mr Mullen was charged and convicted of

conspiring to cause explosions and sentenced to 30 years in prison. Later, it was established that the security services of the United Kingdom and Zimbabwe had colluded in order to procure Mr Mullen's deportation in circumstances where he was denied access to a lawyer, contrary to Zimbabwean law and internationally recognised human rights. On appeal, Mr Mullen did not challenge the fairness of the trial that led to his conviction but contended that the conviction was unsafe as a result of the abuse of process that had led to his unlawful deportation from Zimbabwe. The Court of Appeal allowed the appeal on the ground that Mr Mullen's prosecution was unlawful and the conviction resulted from a trial that should never have taken place.

31. Counsel for Mr and Mrs Chiesa referred me to the strongly worded passages from pages 529 to 30 and 534 of the report. I do not consider, however, that those passages are of any assistance in deciding this application because it is clear that the Court of Appeal in *Mullen* was considering a very different situation. In *Mullen*, it was established and accepted by all parties that an abuse of process had taken place. Further, the abuse was such that, without it, no trial could have occurred. In this case, I am not satisfied that Mr and Mrs Chiesa have shown that there was any abuse. Accordingly, I do not need to decide whether *Mullen* and the authorities cited in the judgment apply to financial services cases before the Tribunal. If I were required to do so, I would say that there is a distinction between the abuse in *Mullen* that led to a trial that could never have taken place without it and which meant that the resulting conviction was unsafe within the terms of section 2(1)(a) of the Criminal Appeal Act 1995 and this case.

32. In this case, the alleged abuse, if proved, relates to the motives of those who instigated the investigation and proceedings rather than the lawfulness of the proceedings that led to Mr and Mrs Chiesa's reference to the Tribunal. It seems to me that the allegations of abuse relate to matters of conduct and I consider that the proper approach to such matters is that adopted by Judge Berner in *Ford & Ors v FCA* [2016] UKUT 41 (TCC). In that case, the applicants sought specific disclosure relating to alleged misconduct by the FCA but, unlike in this case, they had also brought separate misfeasance proceedings against the FCA. At [38] – [40], Judge Berner said:

“38. Any application for specific disclosure must be tested by reference to relevance and proportionality. Relevance must be considered in the context of the matters which are within the jurisdiction of the Tribunal to determine. That jurisdiction is a statutory one, contained in s 133 of the Financial Services and Markets Act 2000 (“FSMA”). By s 133(4), the evidence which the Tribunal may consider is any evidence relating to the subject matter of the reference.

39. A reference is not an appeal from any decision of the Authority or the RDC. The Tribunal has a first instance jurisdiction, and considers the subject matter of the reference afresh by way of complete rehearing. It is concerned with the decisions that have been taken by the Authority with respect to the conduct of the applicants, and, in the light of its own findings in relation to the subject matter of the reference, what action in relation to the financial penalty it considers is appropriate to be taken by the Authority, and in relation to prohibition, whether the reference should be dismissed or remitted to the Authority to reconsider and reach a decision in accordance with the findings of the Tribunal (s 133(5), (6)).

40. The subject matter of the references in this case is the conduct of the applicants. It is that conduct which must be considered by the Tribunal. Mr Ford was unable to persuade me that his disclosure requests going to the

decision-making processes of the Authority had relevance in these proceedings to the conduct of the applicants.”

33. The Tribunal (Judge Herrington) adopted a similar approach in *Arif Hussein v FCA* [2016] UKUT 0549 (TCC) at [106] – [109]. In my opinion, the Tribunal does not have jurisdiction to deal with complaints about the FCA’s conduct of investigations or proceedings. The issue for this Tribunal, at the substantive hearing of the references, is whether Mr and Mrs Chiesa lack fitness and propriety and, if so, what (if any) is the appropriate action for the FCA to take. The criticisms of the FCA’s conduct made by Mr Edmonds and Mr Sampson do not address those issues and, even if those criticisms are valid, they would not be grounds for allowing the references and instructing the FCA to withdraw the Decision Notices although they might form the basis of a complaint to the Complaints Commissioner.

34. Counsel for Mr and Mrs Chiesa also relied on *Kotonou v National Westminster Bank Plc* [2015] EWA Civ 1106 when submitting that there were real concerns that there had been an abuse of power by the FCA and that led to unfairness or brought the reference proceedings into disrepute. That case, however, also concerned a very different situation to the present one. In *Kotonou*, the court was considering whether Mr Kotonou’s claim was an abuse of process on the ground that it was based on facts that were inconsistent with facts found in earlier proceedings. Gloster LJ said at [45]:

“...what is required in the present case is ‘an intense focus on the facts of this case’, to determine whether in broad terms Mr Kotonou’s new proceedings can be characterised as falling under one or other, or both, of the broad rubrics of unfairness or the bringing of the administration of justice into disrepute.”

35. *Kotonou* was, therefore, a very different case where the alleged abuse related to the facts that formed the basis of the claim. That is not the subject of the allegation in this case which relates to the conduct of the FCA. For reasons given in *Ford & Ors* and above, I do not consider that the conduct of the FCA is relevant to the issues that must be determined by the Tribunal on the reference by Mr and Mrs Chiesa.

36. Counsel for Mr and Mrs Chiesa submitted that the Tribunal, like any court, has a duty to enquire whether there has been an abuse and this can only be satisfied by ordering disclosure. Counsel contended that, if the Tribunal considered that Mr and Mrs Chiesa had got over the threshold, there was a duty to enquire and the Tribunal could only be satisfied that there was no abuse of process by ordering the disclosure requested. In my opinion, Mr and Mrs Chiesa have not ‘got over the threshold’. Having read the witness statements of Mr Edmonds and Mr Sampson and considered the exhibits to which I was referred, I am not satisfied that the evidence shows that the FCA instituted the investigations and pursued the disciplinary proceedings against Mr and Mrs Chiesa in bad faith nor do I consider that I can infer that the FCA acted from an improper motive. I consider that the evidence presented does not show, on the balance of probabilities, that it is more likely than not that the investigation and proceedings were motivated by bad faith nor that there are any grounds for inferring such bad faith.

37. In the absence of direct evidence, it seems to me that counsel for Mr and Mrs Chiesa are compelled to contend that it is necessary for disclosure to be provided so that any allegations of bad faith and abuse of process can be properly pleaded by them and to enable the Tribunal to deal with the case fairly and justly. I do not accept that submission. It amounts to the proposition that merely asserting that there has been bad

faith justifies ordering disclosure. In my view, that cannot be correct. There is nothing in the case law authorities cited to me that indicates that it would be appropriate to order disclosure of documents or other materials solely on the basis of a party's allegation of bad faith and abuse of process where evidence to support such an allegation or allow an inference of such conduct to be drawn is lacking. The person making the application bears the burden of proving, to the normal civil standard, that there was bad faith or some other abuse of process. In my view, Mr and Mrs Chiesa have failed to discharge that burden. I do not accept that the evidence presented to me shows or supports an inference that these proceedings were instituted and pursued in bad faith or are an abuse of process. Accordingly, even if I were persuaded that the issue of the FCA's conduct were relevant, I would not order the FCA to make the disclosure requested by Mr and Mrs Chiesa in their application.

Decision

38. For the reasons given above, I refuse Mr and Mrs Chiesa's application for disclosure.

39. The application for disclosure having been dealt with, Mr and Mrs Chiesa are now required to submit their replies to the FCA's statements of case and I direct that they should do so within 21 days.

Judge Greg Sinfield

Release date: 13 July 2017