[2017] UKUT 0423 (TCC)

Appeal number: FS/2016 /020

FINANCIAL SERVICES– prohibition order-procedure- Authority seeking prohibition order on grounds of Applicant's criminal conviction- whether proceedings should be stayed pending decision of Criminal Cases Review Commission whether to refer conviction to the Court of Appeal- whether proceedings should be struck out on the grounds that they have no reasonable prospect of succeeding- whether publication of Decision Notice should be prohibited on grounds of potential prejudice to criminal appeal proceedings if conviction referred to the Court of Appeal and retrial ordered- Rules 2, 5 (3) (j), 8 (3) (c) and 14 (1) Tribunal Procedure (Upper Tribunal) Rules 2008

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

TOM ALEXANDER WILLIAM HAYES **Applicant**

- and -

THE FINANCIAL CONDUCT AUTHORITY **The Authority**

TRIBUNAL: Judge Timothy Herrington

Sitting in private at The Royal Courts of Justice, Strand, London, WC2A 2LL on 25 September 2017

Sara George, Partner, Stephenson Harwood LLP, for the Applicant

Martin Watts, Counsel, instructed by the Financial Conduct Authority, for the Authority

DECISION

Introduction

1. This decision relates to three applications for procedural directions involving a reference made by the Applicant ("Mr Hayes") on 10 December 2016. The reference relates to a Decision Notice dated 28 October 2016 (the "Decision Notice") given by the Financial Conduct Authority (the "Authority") to Mr Hayes pursuant to which the Authority decided to make an order pursuant to s 56 of the Financial Services and Markets Act 2000 ("FSMA") prohibiting Mr Hayes from performing any function in relation to any regulated activity carried on by an authorised person, an exempt person or an exempt professional firm.

2. The Authority decided to make a prohibition order against Mr Hayes because of his conviction on eight counts of conspiracy to defraud in relation to the manipulation of Yen LIBOR. The Authority contends that this conviction demonstrates a clear and serious lack of honesty and integrity on the part of Mr Hayes such that he is not fit and proper to perform functions in relation to regulated activities.

3. The first of the three applications before the Tribunal (the "Privacy Application") is an application by Mr Hayes, originally made on 29 March 2017 and renewed on 19 September 2017, for an order prohibiting publication of the Decision Notice. Originally, Mr Hayes also applied for details of the reference to be removed from the Tribunal's register but that application is not being pursued.

4. The second application (the "Strike-Out Application") is an application by the Authority dated 3 April 2017 for a direction striking out the Applicant's reference in full on the basis that there is no real prospect of the Applicant's reference, or part of it, succeeding.

5. The third application (the "Stay Application") is an application by Mr Hayes, originally made on 29 March 2017 and renewed on 19 September 2017, for a stay of the Authority's prohibition proceedings pending the decision of the Criminal Cases Review Commission (the "CCRC") whether to refer his conviction to the Court of Appeal as unsafe and should it do so, the final determination of the appeal and any retrial which may be directed. Consequently, the Privacy Application seeks a direction that the Decision Notice should not be published pending a referral being made by the CCRC and a decision by the Court of Appeal regarding a retrial so as not to prejudice any subsequent trial.

Background to the reference

6. On 3 August 2015, Mr Hayes was convicted on indictment of 8 counts of conspiracy to defraud in relation to the manipulation of Yen LIBOR engaged in over a period of 4 years and was sentenced to a total of 14 years imprisonment. In December 2015, the Court of Appeal dismissed Mr Hayes's appeal against conviction but reduced his sentence to a total of 11 years' imprisonment.

7. On 28 October 2016, as a consequence of and in reliance solely on that conviction, the Authority gave Mr Hayes the Decision Notice. Paragraph 3 of the

Decision Notice states that it appears to the Authority that Mr Hayes is not a fit and proper person to perform any function in relation to any regulated activity because his convictions demonstrate a clear and serious lack of honesty and integrity such that he is not fit and proper to perform functions in relation to regulated activities. This paragraph also states that in reaching that decision, the Authority has had regard to all relevant circumstances, including the relevance and materiality of the offences, the fact that the offences are recent and the severity of the risk posed by Mr Hayes to consumers and financial institutions and confidence in the market generally. It is also stated that the Authority considers that it is appropriate to impose a prohibition order to achieve its consumer protection and integrity objectives.

8. Paragraphs 8 and 9 of the Decision Notice set out a summary of the terms of the indictments on which Mr Hayes was convicted as follows:

> "8. Counts 1-4 related to Mr Hayes' period of employment between August 2006 and December 2009 at UBS Japan, and involved Mr Hayes, between 8 August 2006 and 3 December 2009, whilst an employee of UBS Japan, conspiring, together with others, including other employees of UBS Japan and its associated entities, to defraud in that:
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> (1) knowing or believing that UBS, through the trading activity of Mr Hayes and others, was a party to trading referenced to yen LIBOR;
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> (2) they dishonestly agreed to procure or make submissions of rates by UBS, a Panel Bank, into the Yen LIBOR setting process which were false or misleading in that they:
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> (a) were intended to create an advantage to the trading of Mr Hayes and others; and
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> (b) deliberately disregarded the proper basis for the submission of those rates,
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> thereby intending to prejudice the economic interests of others.
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> 9. Counts 5-8 related to Mr Hayes' period of employment between December 2009 and December 2010 at Citigroup Japan, and involved Mr Hayes, between 1 December 2009 and 7 September 2010, whilst an employee of Citigroup Japan, conspiring together with others, including other employees of Citigroup Japan and its associated entities to defraud in that:
>
> (1) knowing or believing that Citigroup, through the trading activity of Mr Hayes and others, was a party to trading referenced to Yen LIBOR;
>
> (2) they dishonestly agreed to procure or make submissions of rates by Citigroup, a Panel Bank, into the Yen LIBOR setting process which were false or misleading in that they:
>
> (a) were intended to create an advantage to the trading of Mr Hayes and others; and
>
> (b) deliberately disregarded the proper basis for the submission of those rates,
>
> thereby intending to prejudice the economic interests of others."

The pleadings in respect of the reference

9. On 10 December 2016 Mr Hayes referred the Decision Notice to the Tribunal. The essence of his reasons for the referral was that the possibility of an adverse impact of a prohibition order on Mr Hayes's continuing attempts to overturn his conviction and the absence of any immediate threat he posed to the public due to his incarceration meant that it was sensible to wait for the conclusion of his appeal process against conviction. At that point, Mr Hayes's appeal against conviction had been dismissed but his representatives were preparing an application to the CCRC for his conviction to be referred to the Court of Appeal with the intention of submitting it to the CCRC before the end of 2016.

10. On 25 January 2017, the Authority served its Statement of Case. The case for prohibition was broadly the same as that set out in the Decision Notice, in particular the conviction for multiple offences involving dishonesty, fraud, financial crime and market manipulation, the seriousness of those matters and the severity of the risk posed by the Applicant to the Authority's objectives, to consumers and confidence in the financial system.

11. The Authority referred to the intention of Mr Hayes to refer the conviction to the CCRC, but considered that there was no obligation on Mr Hayes as to the timing of such a referral and no certainty as to the outcome. The Authority also stated that a prohibition order would not prejudice Mr Hayes's case were it to be remitted to the Court of Appeal by the CCRC.

12. On 27 February 2017, Mr Hayes served his Reply to the Statement of Case and an addendum to that Reply on 8 March 2017. Mr Hayes referred to the fact that he had now made his application to the CCRC and the essence of the Reply was that in the light of that application the Authority should follow the same approach as it did in relation to convictions where an appeal was pending, which is not to seek a prohibition order based on a conviction until the appeal process had been exhausted. Accordingly, Mr Hayes asked the Tribunal to stay enforcement action pending the outcome of Mr Hayes's application to the CCRC and in the meantime, prohibit publication of the Decision Notice on the basis that proceeding with both the imposition of a prohibition order and publication of the Decision Notice may prejudice a future retrial.

The Applications

The Strike-Out Application

13. This application relies on the powers of the Tribunal contained in Rule 8 (3) (c) of The Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Rules") which so far as relevant provides that the Tribunal may strike out the whole or a part of the proceedings if:

> "(c)… The Upper Tribunal considers there is no reasonable prospect of the… Applicant's case, or part of it, succeeding."

14. The Authority contends that taking into account the Tribunal's limited jurisdiction pursuant to s 133 (6) and (6A) of FSMA in respect of references of this kind, there are no findings as to issues of fact or law, or matters to be, or not to be, taken into account in making a prohibition order against Mr Hayes in respect of which the Tribunal could reasonably conclude that the Authority should be directed to reconsider its decision. The Authority contends that the prohibition order is within the range of reasonable decisions open to the Authority and accordingly there is no real prospect of Mr Hayes's case, or part of it, succeeding. Therefore, having regard to all the circumstances, and in accordance with the overriding objective, it is appropriate that the reference be struck out.

15. In support of these contentions, the Authority submits that the fact of the conviction and the conclusions regarding Mr Hayes's lack of fitness and propriety that flow from it are unchallengeable.

16. The principles to be applied in deciding whether to exercise the power to strike out proceedings in this Tribunal were considered recently in *Arif Hussein v* FCA [2016] UKUT 0549 at [99] to [102] of the Decision. In summary:

> (1) In deciding whether to make such a direction, regard must be had to the Tribunal's overriding objective in Rule 2 of the Rules which requires the Tribunal to deal with cases fairly and justly, which includes dealing with the case in ways which are proportionate to the importance of the case and the complexity of the issues;
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> (2) Consequently, the power to strike out must be exercised with care because no one should be deprived of access to justice summarily save for compelling reason. Therefore, the Authority must satisfy the Tribunal that the applicant has no real prospect of securing from the Tribunal a determination as to the appropriate action which is more favourable to him than that contained in the Decision Notice; and
>
> (3) The word "real" distinguishes "fanciful" prospects of success; proceedings should not be struck out save in clear and obvious cases where the legal basis of the claim is unarguable or almost incontestably bad

17. In this case, Mr Hayes accepts that if his conviction is found to be safe and upheld, the Authority may rely upon it to establish that Mr Hayes is not fit and proper and accordingly a prohibition order will follow. Ms George accepted that Mr Hayes had no basis to challenge the making of a prohibition order on its merits. I agree with this assessment and accordingly I accept the Authority's submissions that a challenge to the Decision Notice has no real prospect of succeeding. The convictions as they stand demonstrate a clear and serious lack of honesty and integrity and therefore on the basis of those convictions Mr Hayes is not fit and proper to perform functions in relation to regulated activities.

18. It is therefore clear to me that but for the application to stay the proceedings that the Authority's strike out application must succeed and Ms George did not seek to argue otherwise. Her position was that the strike out application was unnecessary and will ultimately never need to be determined. As stated above, if the conviction is found to be safe and upheld, inevitably a prohibition order would follow. However, if the conviction is found to be unsafe and not upheld, the basis upon which the Authority sought to prohibit Mr Hayes would no longer apply and the Authority would need to recommence proceedings on a different factual basis were it to seek to demonstrate that Mr Hayes is not fit and proper.

19. During the course of argument, Mr Watts confirmed that should a prohibition order be issued on the basis of Mr Hayes's conviction and the conviction was subsequently found to be unsafe and not upheld then the Authority would upon Mr Hayes's application revoke the prohibition order. Consequently, the Authority accepts the position that if the conviction was quashed then if it wished to prohibit Mr Hayes it would have to proceed by means of a new investigation and regulatory proceedings.

20. I therefore need say no more about the Strike-Out Application at this point.

The Stay Application

21. This application relies on the powers of the Tribunal contained in Rule 5 (3) (j) of the Rules which provides that the Upper Tribunal may stay any proceedings.

22. As is the case with all of the Tribunal's case management powers, in exercising the power the Tribunal must have regard to the overriding objective in Rule 2 which, as I have said, requires the Tribunal to deal with cases fairly and justly. As provided in Rule 2 (2) that includes seeking flexibility in the proceedings and avoiding delay, so far as compatible with proper consideration of the issues.

23. Mr Hayes contends that the Tribunal should grant a stay in circumstances where the sole basis for the prohibition order is a criminal conviction which in this case has now been accepted for investigation by the CCRC, the body charged by Parliament with the investigation and referral of potential miscarriages of justice, when a decision on a referral is imminent. Mr Hayes contends that the Authority's desire to expedite the prohibition is inappropriate when it seeks to do so solely so that a "message can be sent" when such a message may not ultimately be deserved and when, in his submission, it will be prejudicial to his interests should he face a retrial.

24. The Authority contends that the Tribunal should only grant a stay of these proceedings if it is satisfied that there would be a real risk of injustice to Mr Hayes in any future criminal proceedings and that there is no proper alternative basis for a stay.

25. The Authority submits that Mr Hayes's assertion of potential prejudice to any retrial should his conviction be quashed is fanciful and falls far short of demonstrating a real risk of injustice such as to provide a proper basis for a stay. The Authority does not accept that the proceedings should be stayed because of a perceived risk that jurors in any future criminal trial would be unable to try his case fairly if they became aware of the Decision Notice.

26. Whilst the Authority accepts that it will usually wait for the appeals process to be exhausted before seeking to impose a prohibition based on a criminal conviction, the application to the CCRC requesting that a reference be made to the Court of Appeal is not itself part of the appeal process and it is therefore appropriate for the Authority to take action based on the situation as it currently stands, which is that there is no appeal pending against the conviction on which it bases its case for a prohibition order.

The Privacy Application

27. Mr Hayes seeks a direction that the Decision Notice not be published pending the decision of the CCRC regarding a referral to the Court of Appeal and the ultimate disposal of any subsequent appeal and retrial. Mr Hayes contends that publication of the Decision Notice will inevitably cause substantial press coverage most of which will refer back to the evidence heard in the original trial which would otherwise be unlikely to be revisited given the passage of time. Mr Hayes submits that such publicity creates a real risk of prejudice to any retrial.

28. The Authority opposes the application on the following basis. First, the Decision Notice is based on the criminal conviction itself. The Decision Notice is not a consequence of a parallel regulatory action based on the same underlying facts as those yet to be determined by a jury. The Authority is not assessing or expressing conclusions on the evidence, it is merely accepting the verdict of the jury which found Mr Hayes guilty of serious offences of dishonesty. Secondly, the trial and appeal have already been publicly heard and have been surrounded by significant publicity. Any further appeals or re-trials in the future would not be impacted by the prohibition order because this would add nothing further to the question of Mr Hayes's culpability which is already the subject of court judgments. The Authority is not expressing a separate view on Mr Hayes's culpability through the prohibition order, it is expressing a view on the seriousness of the conviction and the relevance of the conviction to Mr Hayes's fitness and propriety.

The CCRC process

29. It is helpful to describe the CCRC process in some detail and to make findings of fact regarding the current position regarding Mr Hayes's application to the CCRC. The description of the process in general is taken from the CCRC's Annual Report and Accounts for the year 2016/2017, a copy of which was before the Tribunal.

30. The Criminal Appeal Act 1995 (the "1995 Act") established the CCRC to investigate independently alleged miscarriages of justice in England, Wales and Northern Ireland and where necessary to send cases back to the courts for a fresh appeal to be heard. The CCRC was established following a series of miscarriages of justice for convictions based on false confessions, police misconduct, non-disclosure and the reliability of expert testimony.

31. The CCRC is a post appeal organisation created to review cases where a person has been convicted of an offence, and has exhausted their normal rights of appeal, but

maintains that they have been wrongly convicted or incorrectly sentenced. The 1995 Act stipulates that the CCRC cannot refer a case for appeal if the applicant has their normal appeal rights remaining, unless there are exceptional circumstances.

32. Section 9(1) and (2) of the 1995 Act sets out the powers of the CCRC and the status of a referral as follows:

> "(1) Where a person has been convicted of an offence on indictment in England and Wales, the Commission—
>
> (a) may at any time refer the conviction to the Court of Appeal, and
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> (2) A reference under subsection (1) of a person's conviction shall be treated for all purposes as an appeal by the person under section 1 of the 1968 Act against the conviction."

33. Thus, although the making of an application to the CCRC for a case to be reviewed is not itself part of the appeal process as it normally takes place after all appeal rights have been exhausted, once a reference has been made, it is to be treated as if it were an appeal made by the convicted person.

34. In order to be able to refer a case to the appeal courts, the CCRC generally needs to be able to point to some potentially important new evidence or new legal argument that makes a case look sufficiently different to how it looked at trial or at an earlier appeal. The evidence or argument usually needs to be new in the sense that it was not available at the time of the conviction or appeal.

35. The CCRC must apply a threshold test which is set out in s 13 of the 1995 Act when it comes to decide whether to refer a case for appeal. In essence, the CCRC can only refer a case where it is satisfied that there is a "real possibility" that the conviction would be quashed if the referral were made. That is a similar test to the one that the Court of Appeal itself normally applies in deciding whether to give permission to appeal.

36. During 2016/17 the CCRC received 1,397 applications which is comparable to those received in recent years. Historically, more than 40% of the CCRC's applications have related to cases where the applicant has not exhausted his appeal rights and during 2016/2017 some 536 applications fell into that category of which only 99 were accepted for review because there were potential exceptional circumstances.

37. It is clear that the CCRC adopts a "screening process" so that clearly unmeritorious applications are disposed of at an early stage without a significant review taking place. In some cases, applications are ineligible because the cases are not within the CCRC's jurisdiction and in other applications simply do not present any issues that the CCRC seek and review are investigated, it being not unusual for the application to simply restate the points that have already been made, unsuccessfully, at trial and/or at appeal. If the CCRC is unable to see in the case any new issues, or potential new issues that it can work on, it will explain the position to

the applicant and close the case. Where the case is eligible for a review and the application makes the CCRC think that there are, or there may be, aspects of the case that require further scrutiny it will be allocated to a Case Review Manager for a review to be conducted. This applies to approximately one half of all applications received which relate to cases that are eligible. On that basis, it would appear that approximately one-third of the applications received by the CCRC in 2016/2017 would be subject to detailed review.

38. Once the Case Review Manager has conducted whatever investigations may be necessary and completed his review the matter is referred to a committee of Commissioners to decide whether the case should be referred to the relevant appeal court.

39. If it is decided not to refer a case, the applicant will be given an opportunity to make a response before making a final decision.

40. Only a small number of referrals are made each year. In 2016/2017 only 12 cases were referred. However, that reflected the lowest ever annual total and represented a significant decrease compared with recent years and with the long-term average of 33 referrals a year. The Chief Executive of the CCRC stated that the reasons for this sharp drop was not entirely clear and it may be that the number of referrals return to higher levels next year.

41. Another notable feature of 2016/2017 was the number and proportion of cases where applicants won their appeal following a CCRC referral. Historically, approximately 70% of referrals resulted in a successful appeal but that dropped to 53% in 2015/2016 and dropped further still in 2016/2017 to 46%. The CCRC does not have a "target success rate".

42. As far as Mr Hayes's application is concerned, regrettably there were some gaps in the evidence as to how far the CCRC has advanced with its investigation. It would have been helpful to have had at least a report from those advising Mr Hayes on this application as these advisers were not involved in the proceedings before the Tribunal.

43. I was provided with a copy of the application made by Mr Hayes to the CCRC on 30 January 2017. It is a very detailed document, setting out eight grounds on which a referral is sought, based on a detailed analysis of alleged flaws in the expert evidence, both medical and economic, which was relied upon by the prosecution and which influenced the outcome of the trial. The application was supplemented by an addendum dated 12 April 2017 which added a new ground based on fresh evidence concerning the expert who gave evidence at Mr Hayes's trial.

44. Ms George asserted in her skeleton argument that those advising Mr Hayes on the referral consider it likely that the matter will be referred to the Court of Appeal and that it is thought probable that in the event the conviction is quashed, it would be more likely than not that a retrial will be ordered.

45. There was no evidence to support the assertion as to the merits of the application and I make no findings either on that issue or the likelihood that it will result in a referral. However, as Mr Watts accepted, it is clearly a substantive application and is likely to be considered seriously. It would appear that it has passed the screening process referred to above and is therefore currently being investigated by a Case Manager.

46. There was no evidential basis for Ms George's assertion in her skeleton argument that the CCRC will determine whether a referral should be made to the Court of Appeal imminently. In response to questions from the Tribunal, it emerged that Ms George had been told that a response from the CCRC was expected in October 2017 which could either take the form of a decision on the application or a notification that further time was necessary before a decision could be made. From this response, I infer that if there was a decision on the application soon it is likely to be a decision that the material does not justify a referral rather than a decision that is positive from Mr Hayes's point of view. It seems more likely, if the CCRC believes that the application merits further scrutiny, that Mr Hayes will be told that further work needs to be carried out on it.

47. I can therefore make no findings as to when the CCRC is likely to make a final decision as to whether to make a referral. As Mr Watts observed, is not clear what further work needs to be done before a decision can be made, although he did accept that it was likely that the CCRC had received all the necessary material it required to make an assessment and that it was undergoing an investigation of the application. Mr Watts also observed that only a very small number of cases were in the event referred out of the large number of applications received and there appeared to be a bottleneck so that it would be fortuitous if there were an early decision on this application.

Other findings of fact relevant to the applications

48. Mr Hayes is currently serving his sentence in a category B prison. He participated in the hearing via video link and confirmed that he will not be seeking to be re-categorised to a lower grade, which might ultimately result in him being moved to an open prison, for at least one year as he does not wish to leave his current prison. He will therefore remain within the restrictions which apply to category B prisoners in terms of his ability to communicate with anyone outside his immediate family and approved legal advisers for the foreseeable future. Mr Hayes would not be eligible for early release until January 2021.

49. It is therefore clear that there is no prospect of Mr Hayes being in a position to engage in any regulated activities or perform any function for a regulated firm in the foreseeable future.

Discussion

50. I shall deal with the Stay Application and the Privacy Application in turn.

The Stay Application

51. There are two questions which I need to answer in order to determine this application as follows:

(1) Whether there would be a real risk of an injustice to Mr Hayes in that it would affect the fairness of any retrial that may be ordered by the Court of Appeal if his conviction were quashed following a referral by the CCRC were a stay not to be granted in respect of these proceedings; and

(2) If the answer to the first issue is in the negative, whether it is appropriate to direct a stay of these proceedings pending the decision of the CCRC to refer Mr Hayes's conviction to the Court of Appeal as unsafe and should it do so, the final determination of the appeal and any retrial which may be directed.

52. I accept Mr Watts's submissions that there is no case for a stay on the basis that there is any potential serious risk of injustice to any retrial that may be directed by the Court of Appeal following any successful referral of Mr Hayes's conviction.

53. It is relatively common for there to be parallel regulatory and criminal proceedings concerning the same subject matter. The authorities show that any potential serious risk of injustice if the regulatory proceedings are not stayed can normally be 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 the 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.

54. Mr Watts took me to two authorities which demonstrated how a trial judge in a criminal trial will seek to give directions to the jury to ignore any publicly available material which does not form part of the evidence before the jury in the trial.

55. In *Montgomery v Her Majesty's Advocate* [2003] 1 AC 641, Lord Hope of Craighead (at page 674B) noted:

> "The entire system of trial by jury is based upon the assumption that the jury will follow the instructions which they receive from the trial judge and that they will return a true verdict in accordance with the evidence."

56. In *R v Abu Hamza* [2007] QB 659, Lord Phillips CJ (at page 683B), proceeded on the basis that:

> "Juries follow the directions which the judge will give them to focus exclusively on the evidence and to ignore anything they may have heard or read out of court."

57. Further, as Mr Watts submits, there is no question of any finding made by the Authority (or the Tribunal) being admitted as evidence in a criminal trial: see *Hollington v F Hewthorn & Co Ltd* [1943] KB 587. The position may be different were the regulatory proceedings to take place shortly before the criminal proceedings. It has been accepted that there will be a real risk of prejudice to the right to a fair trial where civil proceedings are heard shortly before the criminal proceedings: see *D.P.R.*

Futures Ltd [1989] 1 WLR 778, Millet J at page 790 D-E. That appears to be on the basis that any publicity relating to the regulatory proceedings will 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. That is the position in this case; if there is a referral to the Court of Appeal there is likely to be a significant elapse of time before the appeal can be heard in the Court of Appeal and any further elapse of time before any retrial could be arranged.

58. I therefore see no basis for a stay of these proceedings on the grounds that there may be a serious risk of injustice to Mr Hayes in the event of a retrial.

59. I now turn to the question as to whether it is appropriate for there to be a stay of these proceedings pending the outcome of Mr Hayes's application to the CCRC.

60. In the circumstances, the considerations are different to those which apply where there are parallel regulatory and criminal proceedings. The situation here is that criminal proceedings have taken place which have resulted in a conviction. The Authority commonly takes regulatory proceedings against convicted criminals guilty of offences of dishonesty who have worked in the financial services industry with a view to them being prohibited from doing so in the future on the basis that their convictions demonstrate a lack of honesty and integrity. As discussed above, that is exactly what has happened in this case and there can be no criticism of the Authority having sought to do so in circumstances where Mr Hayes has not only been convicted but has also exhausted his appeal rights.

61. The Authority, quite rightly in my view, does not in practice commence regulatory proceedings with a view to prohibition on the basis of a criminal conviction until the appeal process has been exhausted, regardless of what view it might take on the merits of any application for permission to appeal which the convicted person may be pursuing. Thus, in this case, Mr Hayes's appeal against conviction was dismissed on 21 December 2015 and the Authority commenced regulatory proceedings some months later, with the issue of a Warning Notice on 22 July 2016.

62. Neither should the RDC be criticised, despite Mr Hayes's representations to the contrary, for having issued the Decision Notice when it did in October 2016 in circumstances where Mr Hayes intended to make an application to the CCRC but had not yet done so. The position regarding the commencement of any further process that might lead to the quashing of Mr Hayes's conviction must be regarded as completely uncertain in those circumstances.

63. Therefore, the question for me is whether the fact that not only has the application to the CCRC been made, but it is under active and serious investigation and a report as to its progress is, I am told, likely to be given during October 2017, should lead me to grant a stay.

64. Mr Watts submits that I find myself in no different position to the RDC and that I should not trespass on the RDC's proper decision to prohibit Mr Hayes on the basis of his conviction as it now stands.

65. Furthermore, Mr Watts submits, it is clear that a lot of work is still likely to be needed to be carried out in relation to the application to the CCRC, particularly in relation to further medical evidence in response to the medical evidence provided by Mr Hayes and the appointment of a prosecuting counsel. He submits that I should have regard to the fact that only a small number of applications result in a referral and there is no information which can indicate how soon a decision as to whether to refer or not can be made. In the circumstances, Mr Watts submits that there has not been any significant change to the position since the RDC made its decision.

66. Mr Watts's submissions have considerable force and logic. However, I have concluded that I should take a pragmatic approach and that having regard to the need to seek flexibility in the proceedings, as required by the overriding objective, I should grant a stay.

67. In coming to that decision, I have had regard to the need to avoid delay, so far as compatible with proper consideration of the issues. However, in my view the other factors in favour of granting a stay outweigh this factor for the following reasons.

68. First, as I have found at [46] above, the stay could be a very short one if the CCRC concludes at the end of October 2017 that the application should go no further. If at that stage the CCRC indicates that the application merits further work, then that is another factor in favour of a stay in that it demonstrates that the application does have some merit.

69. Secondly, in my view although the Authority is correct as a matter of strict law that the CCRC process is not part of the appeal process until a decision is taken to refer the matter to the Court of Appeal, I see no difference in substance between the position which currently pertains to this application, which is that it is being actively considered by the CCRC and has passed its screening process, and the position where an application for permission to appeal has been made to the Court of Appeal and a decision as to whether leave to appeal should be granted is still to be made. In effect, the commencement of a substantive investigation in relation to a serious application to the CCRC should be regarded as being equivalent to an outstanding application for permission to appeal. In the same way as it can never be predicted accurately how long the Court of Appeal may take to deal with an application for permission to appeal with the result that the Authority will suffer some delay in getting on with the regulatory proceedings, the same position applies with regard to this CCRC application, with the inevitable result that the final determination of the issue must be delayed.

70. Thirdly, I place no significant weight on the fact that should the process ultimately result in Mr Hayes's conviction being quashed he could apply for the prohibition order to be lifted and the Authority would without more grant that application. Whatever the Authority may say, such a process is unlikely to be as

simple as they say and there may be a significant delay in completing it. I accept Ms George's submission that no purpose is served by completing a process where there is a not insignificant prospect that it may need to be unwound if the factual circumstances on which the action is based change significantly.

71. Fourthly, Mr Hayes will for the foreseeable future remain as a Category B prisoner and the risk that he may engage in activities which would be covered by the prohibition order appears to me to be minimal. I accept that in normal circumstances there is a public interest in prohibition proceedings being concluded as soon as reasonably practicable because such orders are designed to protect the public from persons who are unsuitable working in the financial industry but that is not an immediate concern in this case.

72. Finally, I reject the suggestion that it is important that the prohibition order be made now so that it sends a clear message to the public and the industry that the Authority will take timely action to prohibit those convicted of serious offences of dishonesty from working in the industry. As will become apparent, I have decided to permit publication of particulars of the Decision Notice which in itself will be sufficient for the message that the Authority seeks to deliver to be made.

73. I therefore conclude that a stay of these proceedings is appropriate pending the completion of the referral process with the CCRC, on the terms of the directions which I set out below.

The Privacy Application

74. Rule 14 of the Rules so far as relevant provides:

> "(1) The Upper Tribunal may make an Order prohibiting the disclosure or publication of:
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> (a) specified documents or information relating to the proceedings; or
>
> (b)…
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> (2) The Upper Tribunal may give a direction prohibiting the disclosure of a document or information to a person if:
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> (a) the Upper Tribunal is satisfied that such disclosure will be likely to cause that person or some other person serious harm; and
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> (b) the Upper Tribunal is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction."

75. Mr Hayes seeks a direction under Rule 14 to prohibit publication of the Decision Notice pursuant to s 391 FSMA pending determination of the Reference.

76. In summary, s 391 (4) FSMA provides that the regulator giving a decision notice must publish such information about the matter to which the notice relates as it considers appropriate. Section 391 (6) FSMA, however, provides that the Authority may not publish information under s 391 if, in its opinion, publication of the

information would be, inter alia, unfair to the person with respect to whom the action is proposed to be taken.

77. It was common ground that the principles established in *Arch v Financial Conduct Authority (*2012) FS/2012/20 and *Angela Burns v Financial Conduct Authority* (2012) FS/2012/24 were applicable to the Privacy Application. These can be summarised as follows:

> (1) The open justice principle is to be applied such that the starting point is a presumption in favour of publication in accordance with the strong presumption in favour of open justice generally;
>
> (2) The onus is on the applicant to demonstrate a real need for privacy by showing unfairness;
>
> (3) In order to tip the scales heavily weighted in favour of publication the applicant must produce cogent evidence of how unfairness may arise and how it could suffer a disproportionate level of damage if publication were not prohibited; and
>
> (4) A ritualistic assertion of unfairness is unlikely to be sufficient. The embarrassment to an applicant that could result from publicity, and that it might draw the applicant's clients and others to ask questions which the applicant would rather not answer does not amount to unfairness.

78. The discretionary nature of the Tribunal's jurisdiction in relation to privacy applications is expressly recognised in *Arch* and *Burns.* The exercise of powers under the Rules is subject to Rule 2 of the Rules, which establishes the overriding objective of dealing with cases fairly and justly. As the Tribunal said in *Arch*, this imports a requirement that the discretion should be exercised judicially, that is taking into account all relevant factors, ignoring irrelevant factors and carrying out a balancing exercise between those factors that tend towards publication and those that would tend against. But in weighing those factors, the starting point is that the scales are heavily weighted on the side of publication. That is because the wording of s 391 indicates a statutory obligation to publish, in the absence of unfairness to the subject of the notice.

79. In this case, as described at [27] above, Mr Hayes contends that publication of the Decision Notice at this stage will cause substantial press coverage which will create a real risk of prejudice to any retrial.

80. In my view, notwithstanding the Authority's statutory duty to publish a decision notice pursuant to s 391 FSMA, there is a compelling reason not to publish when to do so would give rise to a real risk of serious prejudice in relation to potential criminal proceedings. If there is cogent evidence of such a risk then it would be unfair to publish the notice.

81. I have already found at [58] above, for the reasons given at [53] to [57] above, that there is no basis for a stay of these proceedings on the grounds that there may be

a serious risk of injustice to Mr Hayes in the event of a retrial and that any adverse publicity that may result from these proceedings can be addressed through appropriate directions from the Judge in any retrial. That is on the basis that publication will not take place at a point which is in close proximity to any retrial. As submitted by Mr Watts, that reasoning is equally applicable to the question as to whether it would be unfair to publish the Decision Notice. Furthermore, I accept the Authority's contentions as summarised at [28] above that publication of particulars relating to the Decision Notice would add nothing further to the question of Mr Hayes's culpability which is already the subject of court judgments.

82. However, I accept Mr Hayes's concerns about publication at this stage of certain provisions of the Decision Notice. It seems to me that the stated purpose of the Authority for publishing the Decision Notice at this stage, namely that it sends a message that the Authority will take action to prohibit persons who are convicted of serious offences from working in the financial services industry, can be served simply by publishing paragraphs 1 to 9 of the Decision Notice or any summary thereof together with Annex A to the notice. That only certain information relating to a Decision Notice rather than the full notice itself may be published is clearly envisaged by the wording of s 391 (4) FSMA. I will therefore make a direction to that effect.

Directions and further steps

83. In the light of my conclusions as set out above I make the following directions:

(1) Subject to further direction, all proceedings in respect of this reference, including the Authority's application to strike out these proceedings, shall be stayed pending the decision of the Criminal Cases Review Commission whether to refer the Applicant's conviction to the Court of Appeal as unsafe and should it do so, the final determination of the appeal and any retrial which may be directed.

(2) The Applicant shall keep the Authority and the Tribunal informed as to the progress of his application to the CCRC and any decision thereon.

(3) Subject to further direction, except with the consent of the Applicant, the Authority shall not publish the Decision Notice which is the subject of this reference, save that the Authority shall be at liberty to publish such particulars regarding the Decision Notice as are referred to at [82] above.

84. The directions envisage that the Tribunal and the Authority should be informed when the CCRC makes its decision. I envisage that if the decision is made not to refer the conviction to the Court of Appeal then the stay on the Strike-Out Application will thereupon be lifted. Although I have not made provision for the proceedings to be struck out automatically in that event in order to leave open the possibility that the Applicant may wish to make further representations on the issue, it will be apparent from what I have said in this decision that if the conviction is not referred it seems inevitable that the reference should thereupon be struck out. Therefore, should the Applicant notify the Tribunal that the conviction is not to be referred then he should indicate at that time whether he wishes to resist the Strike-Out Application and, if so, on what grounds.

85. Should the CCRC refer the conviction to the Court of Appeal and the conviction is quashed, then I envisage that the Authority would withdraw the Decision Notice but if for any reason it did not do so, it would be open to the Applicant to apply for a direction that the reference be allowed.

86. With regard to the publication of the particulars of the Decision Notice, I would expect that the Authority would include the usual legend to the effect that the decision is being challenged in the Tribunal. In the circumstances of this particular case, the Authority may wish to refer to the fact that the proceedings have been stayed according to the Tribunal's directions and include a link to this decision on the Tribunal's website.

87. Finally, I should record my thanks to Ms George who acted pro bono for Mr Hayes in respect of these applications which was of considerable assistance to the Tribunal.

TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE
RELEASE DATE: 24 October 2017