[2018] UKUT 0234 (TCC)

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Applicants: Patrick McLarry (1) **Roy Grimwood (2)**	**Reference: FS/2017/017**
Respondent: The Pensions Regulator	

DECISION NOTICE

JUDGE TIMOTHY HERRINGTON

1. The Applicants had referred to this Tribunal decisions by the Determinations Panel of the Regulator contained in a Determination Notice issued on 8 December 2017 to prohibit the Applicants from acting as trustees of trust schemes pursuant to s 3 Pensions Act 1995.

2. Section 3 of the Pensions Act 1995 gives the Regulator power by order to prohibit a person from being a trustee, among other things, of trust schemes in general if it is satisfied that the person concerned is not a fit and proper person to be a trustee of the schemes to which the order relates.

3. The Applicants challenged this finding of a lack of fitness and properness through their references, and in particular the Regulator's pleaded case that both of the Applicants had acted dishonestly and with a lack of integrity.

4. At a case management hearing held on 10 April 2018, among a number of other things, the Tribunal gave a ruling that in the substantive hearing of the references the Tribunal would determine the question as to whether the Regulator had made out its case that the Applicants were not fit and proper by applying the usual standard of proof to be applied in civil proceedings, namely whether it was more likely than not that the behaviour concerned had occurred. In giving that ruling, the Tribunal indicated that its reasons for that ruling would be contained in its decision issued following the substantive hearing of the references.

5. In the event, the Applicants have now withdrawn their references, but because the issue is of more general importance, the Tribunal now sets out its reasons for the ruling described at [4] above.

6. The Applicants had pleaded in their Reply to the Regulator's Statement of Case that the question as to whether they were fit and proper should be determined by the application of the criminal standard of proof, namely that the allegations concerned were proved beyond reasonable doubt.

7. It is well-established in this Tribunal in references relating to decisions by the Financial Authority to prohibit persons from working in the financial services industry on the grounds that they are not fit and proper that the civil standard of proof should be applied.

8. Submissions to the contrary were made to the Tribunal in the case of *Carrimjee v FCA* [2015] UKUT 79. Accordingly, the Tribunal reviewed the relevant authorities. It said this at [29] to [31] of the Decision:

> "29. There is now a long line of effect that the standard of proof is on the normal civil standard of the balance of probabilities, following the dicta of Lady Hale in the judgment of the Supreme Court in *Re S-B (Children) Care Proceedings: standard of proof [2010]* 1 AC 678, and in particular her statement, in paragraph 11, approving the statement of Lord Hoffmann in *Re B* [2009] 1 AC 11, paragraph 13 that except in relation to a category of cases identified by Lord Hoffmann in that case which the law classed as civil but for which the criminal standard was appropriate "the time has come to say, once and for all that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not."
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> 30. Consequently, this Tribunal has taken the view that in determining both disciplinary references and those involving assessments of fitness and propriety (such as where the Authority as in this case seeks withdrawal of approvals or prohibition) that the normal civil standard is to be applied. This is on the basis that such cases do not fall within that category of cases identified by Lord Hoffmann in *Re B* as being in effect "quasi-criminal" and, although classed as civil cases, the application of the criminal standard of proof is appropriate because of the "serious consequences of the proceedings": see Lord Hoffmann in *Re B* at paragraph 5.
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> 31. Mr George, who made submissions on this issue, invited us to conclude that in the light of the remarks of this Tribunal in the recent case of *Hannam v Financial Conduct Authority* [2014] UKUT 0233 (TCC) this approach should no longer be regarded as correct. He contends that in references which involve the potential withdrawal of approvals or imposition of a prohibition order the criminal standard of proof, namely that allegations need to be proved beyond reasonable doubt, should be applied."

9. The remarks in *Hannam* that counsel for Mr Carrimjee was referring to were remarks to the effect that sanctions relating to market abuse, the subject matter of the reference in that case, and which the Tribunal held engaged the civil standard of proof may be different to "sanctions" that can be imposed in order to prohibit a person from working in the financial services industry on the grounds of fitness and properness.

10. The Tribunal rejected emphatically any suggestion that the criminal standard of proof should apply to questions determining fitness and properness in relation to financial services industry professionals. It said this at [47]:

> "In our view the aside in Paragraph 191 of *Hannam* that Mr George relies on does not lead anywhere near to a contrary conclusion. The Tribunal in *Hannam* had no argument on the point and, to be fair to Mr George, he did no more than invite us to consider the position in the light of that aside. We have done so, and in the familiar phrase, the time has come to say once and for all that the civil standard of proof applies in relation to all disciplinary and non-disciplinary references made to this Tribunal pursuant to FSMA…."

11. In my view there is no reason to take a different approach in relation to cases heard in this Tribunal relating to decisions of the Regulator in respect of pensions cases. In particular, the power to prohibit set out in s 3 Pensions Act 1995 is drafted in very similar terms to that contained in s 56 Financial Services and Markets Act 2000, the relevant provision which gives the Financial Conduct Authority power to prohibit a person who it is satisfied is not fit and proper to work in the financial services industry. Furthermore, this Tribunal has already decided that in relation to a reference of a decision by the Pensions Regulator to impose a financial penalty the matter should be determined by reference to the ordinary civil standard of proof on the balance of probability: see *All Metal Services v the Pensions Regulator* [2017] UKUT 0323 (TCC) at [34].

12. I therefore conclude that in references of decisions made by the Pensions Regulator pursuant to s 3 Pensions Act 1995 the burden is on the Regulator to prove its case by reference to the ordinary standard on the balance of probability, namely whether the alleged conduct more probably occurred than not.

UPPER TRIBUNAL JUDGE
TIMOTHY HERRINGTON

Decision issued: 16 July 2018