



Reference numbers: FS/2017/012&13

FINANCIAL SERVICES– procedure- applicants contending they have third party rights in relation to a Supervisory Notice-whether Tribunal has jurisdiction in relation to the subject matter of the references-no-references struck out-Rule 8 (2) (a) Tribunal Procedure (Upper Tribunal) Rules 2008

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

**UK INNOVATIVE TI LIMITED
and
IAIN CLIFFORD STAMP**

Applicants

- and -

THE FINANCIAL CONDUCT AUTHORITY

**The
Authority**

TRIBUNAL: Judge Timothy Herrington

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 12 April 2018

Mr Iain Stamp, Director, UK Innovative TI Limited, for the Applicants

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

DECISION

Background

5 1. The following findings are made from the documentation provided to me by the Financial Conduct Authority (the “Authority”) in support its application to strike out these references, as well as other documentation provided by the Applicants in response to that application and some other matters that I was told about at the hearing.

10 2. By a First Supervisory Notice dated 27 June 2017 (the “FSN”) the Authority imposed certain requirements on Stargate Capital Management Ltd (“SCM”) and Stargate Corporate Finance Limited (“SCF”) (together “Stargate”) pursuant to the powers given to the Authority by s 55L of the Financial Services and Markets Act 2000 (“FSMA”) to impose requirements on an authorised person acting on its own
15 initiative. By a Second Supervisory Notice dated 15 November 2017 (the “SSN”) the Authority informed Stargate that it had decided not to rescind certain of the requirements.

20 3. Among other things, the FSN required SCM to cease to be the investment manager of a fund called FX Perpetual. According to the FSN, FX Perpetual traded currency pairs on an intra-daily basis and was developed by the first Applicant in this reference, UK Innovative TI Limited, (“UKITI”). The FSN referred to the fact that UKITI was not authorised under Part 4A of FSMA. The FSN stated that UKITI manages the algorithm, develops the code and provides trade signals to SCM in relation to FX Perpetual. The Authority expressed doubts in the FSN as to whether
25 SCM was genuinely performing the investment management role in respect of FX Perpetual and stated that the circumstances indicated that UKITI may be acting as the investment manager, as well as the developer and provider of FX Perpetual. There was also a reference in the FSN to “UKITI’s director”. Mr Iain Stamp (“Mr Stamp”) is the sole director of UKITI so that the reference to “UKITI’s director” could only be
30 a reference to Mr Stamp.

4. Although not specifically stated in the FSN, it is common ground that if UKITI was performing the role as investment manager, then it would be committing a criminal offence by conducting a regulated activity in breach of the general prohibition contained in s 19 FSMA.

35 5. On Friday 7 July 2017 the Authority published the FSN on its website in its entirety. As the restrictions on Stargate’s business imposed by the FSN took immediate effect s 391 (5) FSMA gave the Authority the power to publish such information about the matter to which the notice related as it considers appropriate. The FSN specifically named UKITI and made various references to UKITI in the text
40 of the notice, including the matters referred to at [3] above.

6. On Monday, 10 July 2017, the Authority replaced the full version of the FSN on its website with one which had been redacted so as to black out UKITI’s name

wherever it appeared in the notice. The notice also redacted another firm's name which is not relevant to this matter.

7. On 13 July 2017 Citywire, an online publication which I was told is widely read within the independent financial adviser community, published an article which reported upon the FSN and its consequences for Stargate. The article also referred to FX Perpetual and the role of UKITI in relation to that fund as well as the suggestion that UKITI was acting as the investment manager of the fund, rather than SCM. The article also referred to UKITI being an "unauthorised company". The article also referred to Mr Stamp, as being "behind UKITI". Reference was made to Mr Stamp's previous association with a firm which was censured by the Authority in 2010.

8. On 31 July 2017 Stargate referred the FSN to the Tribunal pursuant to the right given by s 55 Z3 FSMA in that respect to an authorised firm who is aggrieved by the exercise by the Authority of its own-initiative powers to impose requirements. Section 55Y (5) (c) FSMA also gives the recipient of a First Supervisory Notice the right to make representations on the notice to the Authority whether or not it has referred the matter to the Tribunal and Stargate decided to exercise that right in parallel with its reference to the Tribunal.

9. On 7 August 2017 UKITI and Mr Stamp purported to refer the FSN to the Tribunal. The grounds for each of the references were stated to be that in the FSN "unfounded allegations were made against UKITI and that a copy of the FSN was published naming UKITI specifically along with "UKITI's director". The reference notice expanded these grounds as follows:

"Publication of UKITI's name and the reference to "UKITI's director" "with the unfounded allegations (which are strenuously denied) is prejudicial to UKITI and has caused damage to UKITI's business and earnings potential and ruined its working relationship with SCM and other counterparties. The FCA alleges that UKITI was providing investment management services. There is much evidence (including the FCA's own guidelines) that supports the fact that UKITI was not providing investment management services. In fact, SCM was providing investment management services and outsourcing certain non-regulated activities to UKITI."

10. The reference notices then referred to the publication of the unredacted and redacted FSNs, stating that it was the unredacted version "which caused the damage" and referred to the publication of the Citywire article which the reference notices stated, "constitutes libel". The reference notices finished by stating that the Authority should have decided not to name UKITI in the FSN.

11. On 21 August 2017 the Tribunal wrote to the Applicants and the Authority seeking clarification of the basis on which the Applicants wished to participate in the proceedings relating to Stargate's reference. The Tribunal referred to s 393 FSMA and observed that that provision did not appear to confer third party rights in respect of Supervisory Notices.

12. I digress at this stage to set out the relevant provisions of s 393 and some observations on its purpose.

13. Section 393 is designed to give third parties certain rights in relation to Warning and Decision Notices given to another person in respect of whom the Authority is taking regulatory action. Warning and Decision notices are statutory notices which are generally given when the Authority is proposing to take disciplinary action against firms and individuals, such as to impose a financial penalty or to withdraw an individual's status as an approved person.

14. Warning and Decision notices are to be contrasted with Supervisory Notices. A Supervisory Notice may be issued pursuant to the powers contained in s 55Y FSMA following a decision by the Authority to exercise its power to vary or remove a firm's permission to carry on regulated activities or impose requirements as to the manner in which such business may be carried on because, for example, it has serious concerns as to how the firm's business is being conducted and that as a result the interests of consumers may be at risk of being prejudiced. Section 55Y permits the Authority to impose a requirement which has immediate effect if it reasonably considers that it is necessary to do so. The powers contained in s 55 Y are therefore of a protective rather than a disciplinary nature.

15. Where a Warning Notice has been given, s393(1) provides:

20 "If any of the reasons contained in a warning notice to which this section applies relates to a matter which-

(a) identifies a person ("the third party") other than the person to whom the notice is given, and

25 (b) in the opinion of the regulator giving the notice, is prejudicial to the third party,

a copy of the notice must be given to the third party."

16. Section 393 (3) provides that the person who is given a copy of the notice must be given a reasonable period to make representations to the regulator giving the notice.

30 17. Section 393(4) gives third party rights in relation to a Decision Notice. It provides as follows:

"If any of the reasons contained in a decision notice to which this section applies relates to a matter which –

35 (a) identifies a person ("the third party") other than the person to whom the decision notice is given, and

(b) in the opinion of the regulator giving the notice, is prejudicial to the third party,

A copy of the notice must be given to the third party."

18. As the predecessor to this Tribunal, the Financial Services and Markets Tribunal, stated at [38] of its decision in *Sir Philip Watts v FSA* (2005), because the warning and decision notice procedure created by FSMA is capable of prejudicing parties other than the direct recipients of the notices, the purpose of s 393 is to provide certain rights of third parties as defined in the section.

19. The Tribunal observed that there were parallels in common law procedures, arising for example in the case of investigations under the Companies Acts. The Tribunal referred to *In Re Pergamon Press Ltd* [1971] 1 Ch 388 where it was held that Department of Trade and Industry inspectors are under a duty to act fairly, and to give anyone whom they propose to condemn or criticise in their report a fair opportunity to answer what is alleged against them. As a result of this judgment, which concerned criticisms made of the conduct of Mr Robert Maxwell in his running of Pergamon, the practice of what has become known as the process of “Maxwellisation” has arisen. An example of this process is where a public authority, such as the Authority, is investigating a bank failure and proposes in its report to make statements which could be construed as criticising the conduct of those involved in the running of the bank. In those circumstances, the Authority will seek representations from those in respect of whom those statements are to be made, to give them the opportunity of making representations before the report is finalised. The Tribunal in *Watts* stated that s 393 FSMA was “plainly intended to deal with the same kind of situation” as that which arose in the *Pergamon Press*.

20. Returning to the narrative of events in this case, the Authority responded by stating that it agreed with the Tribunal’s observation that s 393 did not appear to apply to Supervisory Notices. Mr Stamp responded that he and UKITI wish to participate in the proceedings because of the allegations made against them without making any observation as to the applicability of s 393.

21. Accordingly, on 6 September 2017 the Tribunal raised the possibility of Mr Stamp and UKITI being permitted to make submissions and give evidence to the Tribunal in respect of the statements that had been made about them in the FSN. Rule 5 (3) (d) of The Tribunal Procedure (Upper Tribunal) Rules 2008 (the “Rules”) gives the Tribunal power to make a direction permitting a person who is not a party to relevant proceedings (in this case Stargate’s reference) giving evidence or making submissions in those proceedings.

22. In the meantime, Stargate was planning to make written representations on the FSN to the Authority. It had previously made representations through its solicitors shortly after the issue of the FSN which, among other things, including representations as to why UKITI was not acting as an investment manager in relation to FX Perpetual.

23. On 14 September 2007 UKITI and Mr Stamp were also invited by the Authority to make representations on the FSN. The Authority stated that those representations should be limited to the nature of the relationship between UKITI and SCM and “in particular whether UKITI may be acting as an investment manager and/or providing

investment advice, as well as being the developer and provider, of FX Perpetual with SCM simply being paid a modest fee to provide regulatory legitimacy.”

24. I was told by Mr Watts at the hearing that the decision to invite a person other than the recipient of the notice to make representations on a Supervisory Notice was
5 exceptional and it was not the normal practice of the Authority to make such a decision. Mr Watts told me that the decision to permit third party representations in this case was a result of the Tribunal having indicated that it might permit UKITI and Mr Stamp to make submissions and give evidence during the Tribunal proceedings and the Authority wished to ensure there was symmetry between the two sets of
10 proceedings.

25. On 18 September 2017 the Authority wrote to the Tribunal informing it that the Regulatory Transactions Committee, the Authority’s decision-maker in relation to the FSN and the SSN, had invited Mr Stamp and UKITI to make representations as regards the FSN. Accordingly, the Tribunal agreed that further steps as regards
15 Stargate’s reference would be stayed pending the outcome of those representations and those made by Stargate itself.

26. On 20 October 2017 UKITI made written representations to the Regulatory Transactions Committee. Those representations provided a further explanation as to why in its view UKITI was not carrying on a regulated activity.

20 27. On 15 November 2017, having considered both the representations made by Stargate and UKITI, the Authority issued the SSN. The SSN removed a number of the restrictions imposed by the FSN but continued a number of other restrictions.

28. The SSN referred in some detail to the representations made by Stargate, but made no reference to representations made by UKITI. However, there was some
25 change from what was said in the SSN as regards UKITI and Mr Stamp. In particular, UKITI was now anonymised and referred to throughout as “Firm Y”. There was no longer any specific suggestion that UKITI had been acting as an investment manager, but at paragraph 55 of the SSN, it is stated that the Authority “is...concerned that the way in which the fund was operated and managed gives rise to concerns as to whether
30 activities are being conducted which are in breach of the general prohibition.” I was told by Mr Watts at the hearing that the Authority is not investigating whether UKITI has been acting in breach of the general prohibition contained in s 19 FSMA.

29. On 24 November 2017 McFaddens LLP, who were then acting for UKITI and Mr Stamp, wrote to the Tribunal stating that their clients were minded to withdraw
35 their applications conditionally upon it being conceded by the Authority that their clients may make submissions and give evidence to the Tribunal in respect of the statements that had been made about them in the FSN.

30. On 9 December 2017 Stargate referred the SSN to the Tribunal.

31. Having considered representations from the Authority, on 11 December 2017 I
40 made directions permitting UKITI and Mr Stamp to provide evidence and submissions to the Tribunal on the hearing of Stargate’s reference, limited to the

issues regarding the relationship between UKITI and Stargate. The parties were asked to agree directions for the future conduct of the reference. The directions made on 11 December 2017 concluded with a statement that I envisaged that in the light of McFadden LLP's letter of 24 November 2017 that the necessary steps would be taken to withdraw UKITI's and Mr Stamp's references, failing which the Authority may apply for those references to be struck out.

32. No directions were ever prepared because on 16 March 2018 Stargate agreed a settlement with the Authority and withdrew its references, which the Tribunal consented to on the same day.

33. By that time, no application had been made to withdraw UKITI's and Mr Stamp's references. Mr Stamp, who by now was representing himself and UKITI, made no such application and on 20 March 2018 the Authority made an application to strike out the references on the grounds that the Tribunal had no jurisdiction in respect of them, there being no right for a person other than the recipient of the notice to make a reference in relation to a Supervisory Notice.

34. As Mr Stamp indicated that he wished to resist the application on behalf of himself and UKITI, the Authority's application was listed for a hearing.

The Authority's application

35. The Authority's application can be summarised as follows:

(1) Section 55Y (5) FSMA, which applies where the Authority has decided, as it did in the case of Stargate in the FSN, to impose an immediate requirement in relation to how the firm may conduct its business, requires the Authority to inform the authorised person to whom the notice relates, in this case, Stargate, of its right to refer the matter to the Tribunal. There is no reference to any requirement to give any other person notice of a right to refer the notice to the Tribunal and there is no other section of FSMA which gives a person other than the authorised person in receipt of such a notice the right to make a reference to the Tribunal.

(2) Section 393 FSMA makes provision for a third party to refer a Warning or Decision Notice to the Tribunal. Section 392 FSMA sets out the categories of notice to which s 393 applies and all the categories listed refer only to Warning Notices and Decision Notices. The categories listed make no provision for notices given under s 55Y. Therefore, the only person permitted to make a reference to the Tribunal in relation to the FSN and the SSN is Stargate, as the person to whom the relevant notices were issued.

(3) UKITI and Mr Stamp purported to refer the FSN to the Tribunal, but there is no legal basis for them to do so.

(4) Rule 8 (2) (a) of the Rules provides that:

"The Upper Tribunal must strike out the whole or a part of the proceedings if the Upper Tribunal-

(a) does not have jurisdiction in relation to the proceedings or that part of them;

...”

5 (5) The language of the Rule makes it clear that the Tribunal has no discretion in such circumstances. In this matter the want of jurisdiction applies to the entirety of UKITI’s and Mr Stamp’s references. Whether by its own motion, or on the application of the Authority, the Tribunal must strike out the whole of these references pursuant to Rule 8(2)(a).

10 (6) The previous directions made by the Tribunal pursuant to Rule 5 (3) (c) permitting UKITI and Mr Stamp to give evidence and make submissions in relation to the Stargate references fell away when those references were withdrawn and therefore have no continuing effect.

15 36. Mr Stamp had no substantive response to the Authority’s submissions on the applicability of s 393 FSMA to Supervisory Notices and identified no other provision in this matter which gave third party rights in respect of Supervisory Notices. He does, however, raise the question as to why it is possible for him and his business to be, as he alleges, “defamed and destroyed” by the initial publication of the FSN with the allegations which were made against him and UKITI and in which UKITI was named, and he was identified as UKITI’s director, and which were further publicised in the Citywire article.

Discussion

25 37. There is no doubt that the Authority is absolutely right as regards the matters on which it relies in its application and which Mr Watts succinctly outlined in his submissions to the Tribunal.

30 38. The Tribunal is a creature of statute and only has such jurisdiction as has been conferred on it by legislation, in this case FSMA. The Authority has satisfied me that there is no provision within FSMA which makes provision for a reference to be made by a third party on the basis that he has been identified in a Supervisory Notice and that there are matters within the Supervisory Notice which are prejudicial to him. Clearly, UKITI and Mr Stamp would have had that right had the notice concerned been a Warning Notice or a Decision Notice issued in the context of disciplinary proceedings against Stargate but there is no basis on which I can construe s 393 as also applying to Supervisory Notices and nothing within the statutory framework for the issue of Supervisory Notices which gives any such right.

40 39. As far as any common law right that Mr Stamp and UKITI might have which arises out of the principle established in the *Pergamon Press* case referred to at [19] above is concerned, again since this Tribunal only has jurisdiction over such matters as are given to it by statute, and it has been given no jurisdiction in this regard, any remedy in relation to any alleged breach of those rights must be pursued through the courts and not this Tribunal.

40. Since the Tribunal has no jurisdiction to hear a reference by a purported third party in respect of a Supervisory Notice issued to another person, since, as Mr Watts submitted, Rule 8 (2) (a) of the Rules is drafted in mandatory terms I must strike out UKITI's and Mr Stamp's references. Their potential right to provide evidence and make submissions in relation to Stargate's references obviously ended with the withdrawal of those references and as a result the directions I made previously in respect of Stargate's reference of the FSN cannot assist Mr Stamp or UKITI in their attempt to keep their own proceedings alive.

41. However, I can see why Mr Stamp finds it difficult to see why he feels he has no remedy in this situation. It is also a matter of wider interest as to how the rights of persons who allege that they have been prejudiced by statements made in Supervisory Notices may be addressed so I will say a little more about those matters, which I explained to Mr Stamp at the hearing.

42. I am satisfied that Parliament's decision not to give statutory third party rights in relation to Supervisory Notices is not an oversight and must have been deliberate. A Supervisory Notice is of a different character to a Warning Notice or a Decision Notice. The latter are given, as I have said, in relation to disciplinary proceedings where typically the Authority is proposing to impose sanctions. The issue of a Supervisory Notice by the Authority in circumstances where it has concerns as to the manner in which an authorised firm's business is being conducted is not a sanction but is one of the tools available to the Authority in order to protect the interests of consumers. Parliament has given the Authority power to issue such notices with immediate effect, even without the firm itself, let alone any other person who is identified in the notice, being given the right to make representations before it is issued. The right to make representations and make a reference to this Tribunal follows in that situation after the making of the FSN and there is power in the Rules for the Tribunal to suspend the effect of the notice, if it is satisfied that the interests of consumers and others intended to be protected by the notice would not be prejudiced.

43. It is therefore envisaged that a balance needs to be struck between the interests of the authorised firm or any other person named in the notice on the one hand and the interests of consumers on the other hand. The Authority also from time to time needs to issue alerts warning the public of firms which it believes are carrying on regulated activity without the necessary authorisation without first seeking representations from the firm concerned. If the Authority needs to act urgently to protect consumers, it must be able to do so without the need to seek representations in every case.

44. However, as I have said, it is a question of balance. Mr Stamp clearly believes that the balance has not been properly struck in this case. He says that there was no need for the Authority to have named UKITI and identified him as UKITI's director when it first published the FSN, which he says appears to have been recognised by the Authority in that it removed the FSN from its website quickly and replaced it with a redacted version. However, since Citywire had already seen the unredacted notice, the damage had already been done, he says, and he contends that the damage is substantial. I also note that there is no ongoing investigation against Mr Stamp and UKITI in relation to any breach of the general prohibition and that the power in s 391

(5) to publish “such information about the matter to which the notice relates as [the Authority] thinks appropriate” does not mean that it must publish the entire notice as opposed to a redacted version or extracts from it.

5 45. As will be apparent from this discussion, there will often be very good reasons why a person who is not the subject of a Supervisory Notice should not have to be alerted to the fact that a first Supervisory Notice is going to be issued which is critical of that person’s conduct without him being given the right to make representations.

10 46. However, the position may be different in relation to the position regarding the issue of a second Supervisory Notice, bearing in mind the possible application of the common law rights not to be criticised publicly without being given the chance to make representations which arise from the principle established in the *Pergamon Press* case. Clearly if there is no actual identification in the Notice, and the relevant person is suitably anonymised then the need for that person to be given the right to make representations is much weaker than a case where the Authority proposes to
15 identify that person in its published notices or has already done so.

20 47. It must also be borne in mind that this Tribunal will be prepared to use its case management powers in an appropriate case to give a person, who is not the subject of a Supervisory Notice but in respect of whom prejudicial statements are made in the notice and who may assist the Tribunal in providing the necessary evidence to establish what is the true position regarding the allegations made in the Supervisory Notice, the right to submit evidence and make submissions. That power was exercised in this case because I felt that it would be invidious and not in the interests of justice if this Tribunal were to make findings that a person who was not a party to the proceedings had acted in breach of the general prohibition without that person having
25 had the opportunity of giving evidence and making submissions on the issue. It was because of that decision that the Authority in this case decided, exceptionally, to give UKITI and Mr Stamp the right to make representations before the SSN was issued and it was clearly right to do so on the facts of this case.

30 48. However, that opportunity is no longer open to Mr Stamp and UKITI in this case because of the withdrawal of the Stargate references. I informed Mr Stamp that if he felt the Authority had caused damage to his business he had the right to take proceedings against the Authority in the High Court, although the Authority would have statutory immunity in relation to those proceedings unless it could be shown that it had acted in bad faith: see paragraph 25 of Schedule 1ZA FSMA. Alternatively, Mr
35 Stamp and UKITI may make a complaint to the Authority pursuant to The Complaints Scheme established pursuant to Part 6 of the Financial Services Act 2012 if they feel that publication of their details should not have taken place in the manner which they did in this case. There is power for the Authority to make an ex-gratia payment of compensation in respect of a complaint that is found to be justified.

40 **Conclusion**

49. I direct that these references be struck out.

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JUDGE TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE

RELEASE DATE: 25 April 2018