[2020] UKUT 0243 (TCC)

Appeal number: FS/2019/0015

FINANCIAL SERVICES – costs - whether all or any part of costs claimed by successful applicant should be awarded – whether the referred decision was unreasonable- whether the Authority conducted the proceedings unreasonably - Tribunal Procedure Upper Tribunal) Rules 2008 rule 10 (3) (d) and (e)

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

FINANCIAL SOLUTIONS (EURO) LIMITED	**Applicant**
- and -	
THE FINANCIAL CONDUCT AUTHORITY	**The Authority**

TRIBUNAL: Judge Timothy Herrington

The Tribunal determined the application without a hearing with the consent of the parties having considered the written submissions of the parties

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DECISION

Introduction

1. On 23 May 2019 the Financial Conduct Authority ("the Authority") gave a decision notice (the "Decision Notice") to the Applicant ("FSE") pursuant to which the Authority decided to cancel FSE's Part 4A permission pursuant to s 55J of the Financial Services and Markets Act 2000 ("FSMA"). By a reference notice dated 20 June 2019, FSE referred the matter to the Tribunal.

2. In summary, in the Decision Notice the Authority decided that FSE has failed to satisfy the Authority that it is ready, willing and organised to comply with the requirements and standards of the regulatory system and has failed to satisfy the Authority that its business is being managed in such a way as to ensure that its affairs will be conducted in a sound and prudent manner or that FSE is a fit and proper person having regard to all the circumstances. The basis for that decision was that FSE had failed to comply with the Authority's rules that required it to pay fees and levies to the Authority. As a consequence, the Authority considered that FSE was failing to satisfy the suitability Threshold Condition (in paragraph 2E of Schedule 6 FSMA). In addition, the Authority considered that by failing to satisfy the Authority that FSE had effected compliant professional indemnity insurance ("PII"), FSE had failed to make appropriate provision in respect of its liabilities and was therefore in breach of Principle 4 of the Authority's Principles for Businesses, in that it did not maintain adequate resources, and did not meet the appropriate resources Threshold Condition (in paragraph 2D of Schedule 6 FSMA).

3. Prior to the Authority instituting the regulatory proceedings against FSE which led to the Decision Notice, FSE and its sole director, Mr Markou, had been under investigation by the Authority for alleged breach of the Authority's regulatory requirements. In particular, in a Supervision Letter issued on 9 June 2017 the Authority contended that (i) Mr Markou's competence and capability fell below the standards expected and therefore the Authority had serious concerns over Mr Markou's suitability to be a director and approved person of a financial services intermediary and (ii) FSE had inadequate financial crime systems and controls and there was a significant level of suspicion that FSE was being used to commit financial crime on a repeated basis. As a result of those findings, the Authority invited FSE and Mr Markou to consider applying on a voluntary basis to cancel its Part IV permission and his approved person status. When FSE and Mr Markou declined to do so the Authority opened its investigations which had not been concluded by the time of the regulatory proceedings which led to the Decision Notice.

4. In support of its reference FSE contended that it had not failed to satisfy the suitability Threshold Condition and the appropriate resources Threshold Condition. In particular, FSE contended that its failure to obtain PII was a direct result of the Authority carrying out investigations into FSE and its director, such that no insurance provider would grant a PII policy to FSE while these investigations were ongoing and

as a consequence of not having PII, FSE had taken the appropriate decision not to trade, and therefore could not afford to pay the Authority its fees and levies.

5. FSE also contended that the Authority failed to give proper consideration to its power to remit and reduce fees and in any event, it was irrational not to remit or reduce the fees in circumstances where FSE was not trading by reason of the Authority's own regulatory action. FSE further contended that applying the Authority's rules in respect of the failure to pay fees and the failure to have PII was irrational where FSE could not comply with these obligations because of the Authority's actions and that this had the effect or withdrawing FSE's Part 4A permission "by the back door".

6. FSE's reference was a "non-disciplinary reference" with the result that the Tribunal's powers were limited as set out in s 133 (4) to (6A) of FSMA.

The Tribunal's decision on the reference

7. In a decision ("the Decision") dated 22 April 2020 ([2020] UKUT 0139 (TCC)) the Tribunal determined FSE's reference.[1] The reader is referred to the Decision for the detailed findings.

8. At [21] the Tribunal summarised the scope of its powers under s 133 FSMA by reference to the relevant case law. In particular, it observed that if it was not satisfied, in the light of its findings, that the Authority's decision was within the range of reasonable decisions, the correct course was to remit the matter back to the Authority under s133(6)(b). It also observed that it would be entitled to conclude that the Authority's decision was outside the range of reasonable decisions if it were to make findings of fact that were clearly at variance with findings made by the Authority and which formed the basis of the Authority's decision.

9. At [22] the Tribunal observed that if the Authority fails to take into account a relevant factor or takes into account irrelevant factors in making its decision, then its decision will be flawed with the result that the decision will not be within the range of reasonable decisions open to the Authority.

10. At [83] the Tribunal summarised its principal findings of fact that were relevant to its assessment as to whether the Authority's decision to cancel FSE's Part 4A permission was reasonably open to it as follows:

> (1) FSE was unable to obtain PII after 9 May 2017 as a direct consequence of the conclusions in the Supervision Letter, and in particular the request by the Authority that FSE should cancel its permission.

[1] Terms defined in the Decision and used in this decision bear the same meanings given in the Decision.

(2) The Authority did not pursue the issue of a Supervisory Notice in order to restrict FSE's regulated activities notwithstanding the concerns expressed in the Supervision Letter.

(3) There was a significant delay in making a decision as to whether to refer FSE and Mr Markou to Enforcement after the Supervision Letter and little progress was made in progressing those investigations once the investigations were opened.

(4) FSE had not paid any of the fees which became due and payable after 9 May 2017 because it had insufficient resources to do so, notwithstanding its receipt of income of some £13,000 after it ceased trading. Mr Markou remained willing to ensure that FSE paid the outstanding fees as and when it was able to resume trading. FSE's policy was to pay its regulatory fees out of current trading income and provisions were not made in earlier accounting periods in respect of fees becoming due in the next accounting period.

(5) The Threshold Conditions case was presented to the RDC on the basis of it being a simple routine case of a firm failing to meet the Threshold Conditions because of its refusal to pay fees and not having PII for good reason.

(6) The Warning Notice suggested that had the Authority itself given an instruction to FSE not to trade then enforcement action for non-payment of the fees and the failure to obtain PII would not have been taken.

(7) The RDC recognised Mr Markou's arguments concerning the reasons why PII was not obtained and the fees not paid and that it was necessary to consider whether other angles should be explored.

(8) The RDC considered whether the discretion in FEES 2.3.1R should be exercised so as to remit the fees but declined to exercise the discretion itself. It did not refer the matter back to Enforcement or any other division of the Authority for policy guidance.

11. At [84] the Tribunal identified that the key factual matters that called for determination on the reference were (i) whether FSE was able to obtain PII and (ii) whether it was able to pay the fees and levies. At [85] the Tribunal accepted that it would be reasonably open to the Authority to cancel FSE's Part 4A permission had the Authority been able to make out its case on those factual matters. The Tribunal observed that had that been the case the matter could have been properly regarded by the Authority as a routine case which would justify the cancellation of FSE's Part 4A permission.

12. At [86] the Tribunal found that the case was not routine because the Tribunal had not accepted the factual premise on which the Authority's case rested. The Tribunal said that in those circumstances, there was a range of other factors that the Authority must take into account in considering whether in the light of the fact that FSE had not been able to secure PII and had not had the resources to pay the fees and levies the firm was failing to satisfy the Threshold Conditions.

13. At [91] the Tribunal found as a matter of fact that after 9 May 2017 FSE was managing its business in such a way as to ensure that its affairs were being conducted

in a sound and prudent manner. It also found that had the Authority used its supervisory powers to put FSE's cessation of business for the time being on a formal footing until circumstances changed by varying FSE's Part 4A permission by, for example, making it a condition that it did not resume trading until it obtained PII and paid its outstanding fees, then the Authority would not have pursued the cancellation of the firm's Part 4A permission and then could have pursued the enforcement investigations which, if the outcome was favourable to FSE, would have enabled it to resume trading because it would then be likely that it would be in a position to pay the fees and obtain PII. The Tribunal agreed with the RDC's observation that without the investigation being pursued and the firm not being in a position to trade it was indeed caught in a "vicious circle".

14. The Tribunal set out at [93] the factors that the Authority had failed to take into account as follows:

(1) The fact that the failure to obtain PII was as a consequence of the findings of the Supervision Letter which could only be remedied once it was clear whether or not FSE and Mr Markou were to be referred to enforcement and, if so, the outcome of those investigations was known. The RDC were wrong to say in the Decision Notice that in the circumstances of this case, the fact that there were ongoing investigations was an irrelevant factor.

(2) Whether in the circumstances, the Authority should have considered exercising its power to remit the fees, or at least forbear from taking action to enforce them pending the outcome of the investigation. The Tribunal found that Mr Markou had put forward cogent reasons why the fees could not be paid, and, in those circumstances, it was the duty of the Authority to consider whether in the circumstances it was appropriate to pursue payment for the time being. The Tribunal found that the RDC did consider the issue to a degree, but it did not take steps to ascertain a full picture as to the policy of the Authority as regards the exercise of the discretion in the rule.

(3) Whether as an alternative to pursuing the cancellation route, the Authority should have considered whether to exercise its powers to issue a Supervisory Notice pending the outcome of the enforcement investigations. The Tribunal found that the Authority must have come to the view that, notwithstanding its request that the firm cancel its permission following the Supervision Visit, the concerns were not so great that they justified the Authority pursuing a cancellation on its own initiative based on the findings after the visit and after the firm had declined the invitation to cancel. The Authority did not consider pursuing the alternative route of varying the firm's Part 4A permission, a route which the RDC Chairman had himself identified at the oral representations meeting.

(4) Whether it should, as an alternative to pursuing the cancellation route, conclude its investigation into FSE and Mr Markou either by discontinuing the investigation or instituting regulatory proceedings.

15. Accordingly, the Tribunal allowed the reference and remitted the matter to the Authority. The Tribunal directed the Authority to reconsider its decision, taking into

account the Tribunal's findings of fact, as summarised at [83], its further findings at [86] to [91] and the matters set out at [93].

The costs application

16. On 21 May 2020 FSE made an application for costs. The legal basis for the application was wrongly stated in the application but it was clear that it was made on the basis that the Authority had acted unreasonably in bringing, defending or conducting the proceedings, as provided for in Rule 10 (3) (d) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Rules").

17. FSE attached a detailed statement of costs in which they claimed total sum of £47,910. Included in that amount was a sum of £18,712.50 in respect of a success fee payable to FSE's solicitors. FSE now accepts that the Tribunal has no power to make a costs award in respect of a success fee.

18. The Authority provided written submissions opposing the application on 17 June 2020. FSE replied to those submissions in writing on 30 June 2020. With the consent of the parties, I have determined the application having considered those submissions without a hearing.

19. It emerged from the parties' written submissions sent after the application, that in fact FSE also contended that the Authority's decision, as set out in the Decision Notice, was unreasonable and accordingly that as well as having jurisdiction to make an order for costs pursuant to Rule 10 (3) (d) of the Rules, the Tribunal also had jurisdiction to make an order pursuant to Rule 10 (3) (e) of the Rules. I have therefore considered the application on the basis that it is made under both of these provisions.

Relevant Law

20. Section 29 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA"), so far as relevant, provides that:

> "(1) The costs of and incidental to –
>
> (a)….
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules."

21. This provision makes it clear that whether or not costs are to be awarded in any particular case and, if so, of what amount, is a matter of discretion for the Tribunal. Like all judicial discretions, it must be exercised having taken account of all relevant circumstances and ignoring all irrelevant factors.

22. Section 29 (3) TCEA makes it clear that the power to award costs is also subject to Tribunal Procedure Rules. The relevant rules in this case are Rules 10(3)(d) and 10(3)(e) of The Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Rules") which provide so far as relevant as follows:

> "(3) …. the Upper Tribunal may not make an order in respect of costs or expenses except—
>
> …
>
> (d) if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings;
>
> (e) if, in a financial services case … the Upper Tribunal considers that the decision in respect of which the reference was made was unreasonable."

23. As the Tribunal observed in *Alistair Rae Burns v FCA* [2019] UKUT 0019 (TCC) ("*Alistair Burns*") at [15], these two provisions focus on different acts: Rule 10 (3)(d) focuses on conduct during the Tribunal proceedings and Rule 10(3)(e), which only applies to financial services cases (a category into which FSE's reference fell) focuses on the nature of the decision that is the subject of the reference (in this case, the Decision Notice).

24. Therefore, I cannot consider whether to exercise my discretion to award costs in FSE's favour unless I find either or both of the following to be the case:

(1) the Authority has "acted unreasonably" in bringing, defending or conducting the proceedings on FSE's reference;

(2) the RDC's decision as recorded in the Decision Notice was "unreasonable".

25. It was common ground that the principles to be applied when considering an application under Rule 10 (3)(d) of the Rules were those set out at [22] of *Alistair Burns* by reference to [47] of the decision of the Upper Tribunal in *HMRC v Jackson Grundy* [2017] UKUT 0180 (TCC), a case dealing with a rule of the First-tier Tribunal (Tax Chamber) which is in identical terms. Those principles are:

(1) The rule is a threshold condition. It is only if the tribunal concludes that a party has acted unreasonably in the relevant respect that the question of the exercise of a discretion to award costs can arise. A determination of the question whether a party has, or has not, acted unreasonably is, accordingly, not the exercise of a discretion, but a matter of value judgment;

(2) The phrase "bringing, defending or conducting the proceedings" is an inclusive phrase designed to capture cases in which an appellant has unreasonably brought an appeal which he should know could not succeed, a respondent has unreasonably resisted an obviously meritorious appeal, or either party has acted unreasonably in the course of proceedings, for example by persistently failing to comply with the rules and directions to the prejudice of the other side;

(3) HMRC would be acting unreasonably in defending an appeal if they ought to have known that their view of the case had no reasonable prospect of success but not otherwise; it cannot be that any wrong assertion by a party to an appeal is automatically unreasonable;

(4) The restriction in s 29 Tribunals, Courts and Enforcement Act 2007 to the recovery of costs "of and incidental to" the proceedings means that there is no power to make an order in respect of anything else and, particularly, in respect of any investigation or decision made which preceded the institution of the proceedings or the preparation of those proceedings before the tribunal and;

(5) Nevertheless, although it is not possible for a party to rely upon the unreasonable behaviour of the other party prior to the commencement of the appeal, nor can costs incurred before that period be ordered, behaviour of a party prior to the commencement of proceedings might well inform actions taken during proceedings.

26. The Authority submits that these principles demonstrate that the Tribunal may only award the Applicant its costs pursuant to Rule 10 (3)(d) of the Rules if it considers that either:

(1) the Authority has acted unreasonably in the course of the proceedings under the reference, for example, by persistently failing to comply with the rules and directions to the prejudice of the other side; or

(2) The Authority ought to have known that its view of the case had no reasonable prospect of success.

27. I accept the first limb of the Authority's submissions on this point. However, I do not accept the gloss that the Authority has sought to place on the test formulated in *Jackson Grundy* in the second limb of its submissions. As the Applicant submitted, that the Authority should have known that its case had no reasonable prospects of success is an example of unreasonable conduct in defending proceedings, not the only possible way that such unreasonable conduct can be demonstrated. As the Applicant observed, the Authority would be acting unreasonably in circumstances where it failed to properly take account of a material issue, as in *Alistair Burns*, where the Authority failed to properly consider the question of limitation after the commencement of proceedings.

28. In *Jackson Grundy*, the Tribunal elaborated on how the question of whether a decision could reasonably be defended could be assessed. It said at [85] that this could be done by considering whether

> "…it should have been apparent to [the Respondent], considering the matter dispassionately, and by reference to the information available to them when the notice of appeal was served on them, that the review decision was so flawed that it could not properly be defended."

29. It seems to me, as the Applicant submitted, that this formulation is correct and should be applied when the Tribunal has to consider the question as to whether it was

reasonable of a party to have taken a decision on receipt of the other party's case to defend the proceedings. I also consider that another example of where a party could be held to have acted unreasonably is where it fails to produce evidence to support its case.

30. At [18] and [19] of *Alistair Burns* the Tribunal referred to two points of importance to be considered in the context of an application made under Rule 10 (3)(e) of the Rules by reference to the decision of the Financial Services and Markets Tribunal, this Tribunal's predecessor, in *Baldwin v FSA* (5 April 2006). The applicable rule at that time was in broadly identical terms to Rule 10(3)(e). The points concerned can be summarised as follows:

(1) Judging whether something is reasonable or unreasonable is wholly distinct from judging whether it is right or wrong: a decision may be wrong without being in the slightest degree unreasonable.

(2) The Tribunal needs to take account of the fact that proceedings before the RDC are administrative rather than judicial. The Tribunal is required to focus on the decision itself. The right approach is to ask whether the Authority's decision was unreasonable, given the facts and circumstances which were known or ought to have been known to the Authority at the time when the decision was made. The Tribunal needs to remind itself that the process leading to the Authority's decision is not a full judicial hearing of the kind conducted by the Tribunal but is conducted informally and speedily so that the Authority is not expected or compelled to follow procedures or express its conclusions, as required of a court.

31. As the Authority observed in its submissions, the language of unreasonableness in the cost rules overlaps of the test for whether, on determining a reference, the Tribunal should remit the matter to the Authority, as articulated in the Tribunal's case law and referred to at [21] and [22] above. In this case, the Tribunal concluded that the decision set out in the Decision Notice was not within the range of reasonable decisions open to the Authority and accordingly remitted the decision to the Authority for reconsideration.

32. The question therefore arises as to whether, when the Tribunal has found that the Authority's decision could not have been reasonably arrived at, in essence follows that the decision is an unreasonable decision for the purposes of the costs rules.

33. The Authority submits that there is no connection between the unreasonableness test in the rules on costs, and the test for whether a decision was "unreasonable" and therefore to be remitted under s 133(6)(b) FSMA. The Authority submits:

(1) The language of unreasonableness has always been present in the provisions on costs, but it does not appear in the test for remittance in s 133(6)(b).

(2) Whilst the language of unreasonableness is used in the case law that the Tribunal applies when deciding whether or not to remit a decision under s 133(6)(b), that is whether the Authority's decision was one that was reasonably

open to it all was within the range of reasonable decisions, that test requires something less than *Wednesbury*[2] reasonableness, and will not always entail any criticism of the Authority, in particular where a decision is remitted on the basis of new evidence that has been adduced before the Tribunal by the Applicant.

(3) The costs rules in financial services cases (both in the Financial Services and Markets Tribunal and this Tribunal) pre-date the jurisdiction to remit (and therefore, the need to articulate a test for when the Tribunal ought to do so).

(4) It is important to distinguish what is meant by an "unreasonable" decision in the context of the test for remittance pursuant to s133(6)(b) from "unreasonably… defending" proceedings" as that term is used in Rule 10 (3)(d) and then "unreasonable" decision in Rule 10 (3)(e). It cannot be the case that in every case that the Tribunal remits the decision to the Authority, it is also to be regarded as having acted unreasonably within the meaning of the rules on costs; that would introduce a rule that costs follow the event, by the back door.

(5) The tests under Rule 10 (3)(d) and (e) differ from each other only in relation to timing. Under Rule 10 (3)(d) the Tribunal is entitled to consider whether the Authority ought to have dropped its defence of the decision in the event that, in the course of proceedings on the reference, new evidence comes to light which it ought to recognise meant its defence would no longer have any reasonable prospect of success. By contrast, the test under Rule 10 (3)(e) focuses solely on whether the decision was reasonable when it was made.

(6) Accordingly, the Authority's original decision cannot have been unreasonable if the Tribunal remits solely on the basis of new evidence or arguments, which the Authority could not reasonably have been aware of at the time of the decision. In such cases the Authority cannot be criticised for failing to consider a relevant matter, because it could not reasonably have known of it.

(7) It is not necessary that the Authority's original decision was unreasonable in the *Wednesbury* sense. The Tribunal must make its own judgment as to whether the Authority's original decision was reasonable.

34. In the light of those submissions, the Authority summarised the test to be applied in considering whether a decision was unreasonable for the purposes of Rule 10 (3)(e) was whether the Decision was not simply wrong, but so obviously wrong that the Authority is to be criticised for seeking to defend it on the reference at all.

35. Again, in my view the Authority has sought to place a gloss on the ordinary meaning of the Rule which is not justified. The question as to whether a particular decision was a was not "reasonable" requires a multifactorial assessment to be undertaken by the Tribunal taking account of all the relevant circumstances. The

[2] That is the test applied when considering whether a public authority had acted outside its statutory powers. As formulated in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 the test is whether the decision concerned was so unreasonable no reasonable authority could ever have come to it which, as the Court of Appeal observed, is different from a test as to whether a court would consider the decision to be reasonable.

question of whether or not a particular matter or decision was "reasonable" is not primarily a question of law. The Tribunal has an unfettered power, to be exercised judicially, as to whether it considers a decision to have been "reasonable".

36. The Tribunal rejected in *Baldwin* the proposition that the question of "reasonableness" should be assessed by reference to the *Wednesbury* principles. The formulation suggested by the Authority in my view comes very close to a "Wednesbury" test and is too narrow. Likewise, it would be too simplistic to proceed on the basis that where the Tribunal has decided to remit the matter to the Authority for further jurisdiction, that in itself leads to the inevitable conclusion that the decision concerned was "unreasonable". As the Authority correctly submitted, the test for the purposes of the costs rules has not been changed following the enactment of s 133 (6)(a) FSMA and the formulation of the test by the Tribunal in its case law as to the circumstances in which a matter should be remitted to the Authority for further consideration.

37. It seems to me that there is a degree of overlap between Rule 10 (3)(d) and Rule 10 (3)(e). Therefore, for example, if the Authority seeks to defend on a reference a decision which it ought to have known was seriously flawed, there would be jurisdiction to consider an award of costs under either rule. On the other hand, at the time the decision was made it may well have been reasonable but in the light of a change of circumstances or new evidence that the Applicant seeks to adduce, it may be the case that the Authority should have considered whether it should continue to defend the proceedings and, if it failed to do so, there may be a case for a costs order under Rule 10 (3)(d). Obviously, if the Tribunal finds that both the decision itself was unreasonable and the conduct of the Authority during the proceedings was also unreasonable, the case for the Tribunal to award costs is strengthened.

Discussion

38. It is clear from the discussion of the relevant law set out above that in this decision I need to decide first whether there is jurisdiction to make a costs order in favour of FSE. That will be the case if I find either or both of the following contentions by FSE to be made out:

> (1) The RDC's decision as recorded in the Decision Notice was "unreasonable";
>
> (2) The Authority has "acted unreasonably" in bringing, defending or conducting the proceedings on FSE's reference.

39. As far as (1) is concerned, FSE invites the Tribunal to find that the Authority's decision to cancel FSE's Part 4A permission was unreasonable on the basis of the matters found at [84] to [93] of the Decision, and particularly that the Authority failed to take the matters set out at [93] into account when making the decision to cancel the permission. FSE submits that all of these were matters known and available to the Authority when it made the decision, and none were founded on new evidence presented to the Tribunal for the first time.

40. The Authority contends that this is a case in which the Tribunal has made a different finding of fact on a matter which formed the basis of the Decision, namely the question as to whether FSE could at the relevant time have obtained PII. The Authority submits that as a result of the finding made to the contrary by the RDC, it did not need to examine any of the questions which would have arisen if it had found there to be a causal link between the investigation and FSEs lack of PII. The Authority therefore submits that the question for the Tribunal is whether it was unreasonable for the Authority to decide to cancel FSE's Part 4A permission (rather than considering whether it would be more appropriate to vary the same or make performance of regulated activities conditional on obtaining PII and paying fees) on the basis that FSE did not meet the clear requirement that a whole PII, and the Authority was not satisfied that this was the result of the Authority's investigation.

41. The Authority submits that the RDC's factual findings were not "unreasonable" in the sense that it was not obvious they could not be defended on a reference to the Tribunal. In particular:

(1) FSE had succeeded in renewing its PII after received a Private Warning in 2012;

(2) FSE's evidence in support of its contention that it could not renew its PII because of the Authority's investigation was limited to an email from its broker dated 7 July 2017 and a further letter dated 21 March 2019. Mr Markou had said before the RDC that he had made informal enquiries and had been told that he would only be able to obtain PII at a very high premium (not that he could not obtain PII at all);

(3) FSE have sufficient sums on reserve to cover the outstanding fees.

42. Furthermore, the Authority submits that in light of the RDC's conclusion that FSE could have done more to obtain PII, and its lack of PII had therefore not been caused by the Authority's investigation, it was not unreasonable for the RDC to proceed to find that FSE had failed to comply with the requirement to hold PII. Consequently the Authority submits that there was no need, or room, for any consideration of the questions of how the Authority's regulatory requirements are to be applied where a firm was its lack of PII has, in effect, been caused by the Authority itself, as that issue did not arise on the RDC's findings on the key question of fact.

43. As far as (2) is concerned, FSE contends that the Authority acted unreasonably in defending the reference without serving any of its own evidence. It submits that the Authority made substantial assertions against FSE's case and assertions as to material matters of fact without substantiating the same with any of its own evidence. FSE submits that the failure to bring any evidence before the Tribunal demonstrates that the Authority failed to properly analyse its own case and the reference generally, failed to assess the merits of the reference, failed to act appropriately within the confines of generally acceptable litigation practice, and required FSE to prove its case at a substantive hearing instead of withdrawing its decision.

44. The Authority contends that its decision not to serve any witness evidence was not a breach of any of the Rules and did not cause FSE any prejudice. Indeed, the Authority observes, it had an adverse effect on the Authority's case and is not the kind of conduct capable of falling within Rule 10(3)(d) of the Rules.

45. If I accept all or some of FSE's contentions, I must then consider whether, as a matter of judicial discretion, I should make a costs order in favour of FSE and, if so, whether such order should extend to the whole or a specified part of the costs claimed by FSE. If I determine that a costs order is appropriate, I will then consider whether I can undertake a summary assessment of the costs concerned myself or whether to direct that the application be made the subject of a detailed assessment.

46. I shall therefore proceed to deal with each of these issues in turn.

Issue 1: Whether the RDC's decision was unreasonable

47. The Authority's submissions are based essentially on the point that the Tribunal made a different finding of fact on the question of whether it was possible for FSE to obtain PII. The Authority submits that the RDC's finding, although found by the Tribunal to be wrong, was not unreasonable bearing in mind the evidence before the RDC, the representations made to it and the fact that the RDC's position as an administrative decision-maker meant that its proceedings were less formal than those of the Tribunal. In those circumstances the Authority contends that the other matters that the Tribunal found it failed to take into account at [93] of the Decision do not have any bearing on the question of the reasonableness of the RDC's decision.

48. I reject those submissions. I accept that had this been one of those many routine cases of failure to obtain PII and pay fees where there were none of the background circumstances of an ongoing investigation and prior request for cancellation which were present in this case, so that it was reasonable to assume that there was no good reason for the failure to obtain PII and pay the outstanding fees, then it would have been reasonable for the Authority take the view it did about the firm's alleged difficulty in obtaining PII and paying its fees. If that decision was then referred to the Tribunal and the Tribunal made a different finding of fact having heard the evidence and the cross examination of the witnesses, there would be no basis on which it could be said that as a result of that finding the Authority's decision was unreasonable. That would be the case notwithstanding that the Tribunal would have referred the decision back to the Authority for reconsideration in the light of the different finding of fact. That would be an example of a decision which could not have been reasonably arrived at because of the Tribunal's finding of fact, but it was not an unreasonable decision which justified the making of a costs order.

49. However, in this case, as the Tribunal found in the Decision, the Authority erroneously dealt with this case is if it were a routine case. In my view by making a separate referral to Enforcement based solely on the failure to pay fees and obtain PII without taking into account the other surrounding circumstances, namely the background of an ongoing investigation, a request for cancellation and the decision not to impose a Supervisory Notice, both Enforcement and then the RDC in its

decision acted unreasonably. In particular, at [93] of the Decision the Tribunal found that the RDC was wrong to say in the Decision Notice that the fact of the ongoing investigation was an irrelevant matter.

50. The background referred to above in this case should have led the Authority to consider more thoroughly the question as to whether the impact of the ongoing investigation and the request for cancellation had prevented the firm from obtaining PII and paying its fees before following the routine cancellation route. The Authority relied entirely on the alleged failure of FSE to make sufficient efforts to obtain PII. The Authority should have realised that the request to cancel and the ongoing investigation is of a different order to the prior issue of a private warning some years ago and should have led it to investigate the feasibility of a firm in FSE's position obtaining PII, a failure which continued with its lack of evidence on the issue during the Tribunal proceedings. Hand-in-hand with that failure went the failure of the Authority to consider whether to exercise its power to remit the outstanding fees.

51. Alternatively, the Authority should have considered whether the prior investigation should be closed and FSE notified accordingly, which would have created different circumstances in which FSE could have attempted to obtain PII and then pay its fees.

52. The RDC appeared to have recognised the position in its observations during the oral representations meeting that without the investigation being pursued and the firm not being in a position to trade it was caught in a "vicious circle" but it did not go on to consider how that vicious circle might have been broken.

53. I therefore conclude on this issue that I do have jurisdiction to make a costs order in favour of FSE on the basis that the RDC's decision was unreasonable.

Issue 2: Whether the Authority has acted unreasonably in bringing, defending or conducting the proceedings

54. My conclusions on the reasonableness of the RDC's decision lead me to conclude that the Authority also acted unreasonably in seeking to defend that decision in the Tribunal. That is on the basis that when the reference notice was served, which contended that the failure to obtain PII and FSE's ability to pay its fees was a direct result of the Authority's investigations, the Authority should have realised that its decision was so flawed that it could not properly be defended unless at that stage it had carried out a proper investigation as to the feasibility of FSE being able to obtain PII in the circumstances in which it found itself. If those investigations indicated that notwithstanding FSE's efforts, PII would likely to have been available at a reasonable cost then of course it would have been reasonable for the Authority to proceed to defend the reference and file a Statement of Case accordingly. I therefore do not accept that in this case the Authority's decision not to investigate that question and adduce evidence on it was not the kind of conduct capable of falling within 10 (3) (d) of the Rules.

55. I therefore conclude on this issue that I do have jurisdiction to make a costs order in favour of FSE pursuant to Rule 10(3) (d).

56. **Issue 3: Whether and to what extent a costs order should be made**

57. In my view, the matters that I have identified that have led me to conclude that both the Authority's decision and its decision to defend the proceedings on the basis of that decision were unreasonable went to the heart of the matters to be determined on the reference. In those circumstances, there is no reason why I should not exercise my discretion to make an order the Authority to pay all of FSE's costs of and incidental to the proceedings in the Tribunal, subject to an assessment of the reasonableness of the amount claimed.

Issue 4: The amount of the costs award

58. In view of the amount claimed and the fact that the proceedings only lasted one day, in my view it is appropriate that I should undertake a summary assessment of the costs claimed.

59. There were three matters where the Authority disputed the amounts claimed. These were:

(1) The £7,485 claimed in respect of VAT which the Authority contended should be deducted unless FSE was not registered for VAT.

(2) The success fee and the VAT attributable to such fees.

(3) The amount claimed in respect of Mr Markou's time on the basis that those were not costs which FSE is bound to pay its legal representatives.

60. FSE is not registered for VAT, and accordingly it may claim an appropriate amount in respect of VAT on the fees it has to pay its legal representatives. It is accepted that the success fee is not recoverable from the Authority therefore the amount of the success fee and the attributable VAT must be disallowed.

61. As far as the claim for Mr Markou's time is concerned, as well as being director of FSE and its sole witness in the Tribunal proceedings, he is also an employee of the law firm engaged by FSE and his time costs are sought in the same fashion that the costs incurred by any litigant engaging the services of a firm would pay for a fee earner's time.

62. I question the appropriateness of a firm of solicitors allocating as a fee earner in respect of Tribunal proceedings a person who is also the principal witness in the proceedings. In my view that creates scope for significant conflicts of interest and the ability to draw the line between those costs that are properly characterised as fees charged by the legal firm and costs which are not properly characterised because they relate to the time spent by Mr Markou in his capacity as the person giving instructions to the legal firm and its Counsel on the matter. I therefore disallow the costs claimed in respect of Mr Markou.

63. There has been no objection to the quantum of the other fees claimed, and in my view the amounts claimed, including Counsel's fees, are reasonable.

64. I therefore direct that the Authority pay to FSE £20,360 in respect of the costs it has incurred in relation to the proceedings arising out of its reference.

JUDGE TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE
RELEASE DATE: 5 August 2020