Neutral Citation: **[2022] UKUT 00269 (TCC)**

UT (Tax & Chancery) Case Number: UT-2022-000065

Upper Tribunal
(Tax and Chancery Chamber)

Decided on the papers

PROCEDURE – Decision Notice issued by the Financial Conduct Authority – hearing to decide whether to suspend effect of the Decision Notice – privacy application for publication of the Tribunal decision to be delayed – separate application for recusal of judge, including recusal from deciding the privacy application – recusal application refused

Before

DEPUTY UPPER TRIBUNAL JUDGE ANNE REDSTON

Between

MONEYBRAIN LIMITED
(RECUSAL APPLICATION)

Applicant

and

THE FINANCIAL CONDUCT AUTHORITY

Respondent

This is the Tribunal's decision on a recusal application made on 30 September 2022 by Jason Mansell of Counsel, instructed by Withers LLP, on behalf of the Applicant.

DECISION

INTRODUCTION

1. On 22 September 2022, I issued a judgment ("the Judgment") refusing an application made by Moneybrain Ltd ("Moneybrain"). On the day the Judgment was issued to the parties, Moneybrain made a further application ("the Privacy Application") that publication of the Judgment be delayed.

2. Before the Privacy Application was decided, Moneybrain made a further application that I recuse myself from deciding the Privacy Application and from future involvement in Moneybrain's case ("the Recusal Application").

3. This decision concerns the Recusal Application. For the reasons set out below, it is refused. A separate decision on the Privacy Application will be issued in due course.

ORAL HEARING?

4. Moneybrain applied for the Recusal Application to be decided at an oral hearing. In deciding whether or not to direct an oral hearing, I considered and applied the overriding objective at Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Tribunal Rules"), which provides:

> "(1) The overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
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> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Upper Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Upper Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction."

5. Dealing with a case "fairly and justly" engages not only the parties, but also other Tribunal users. In *Chartwell Estate Agents Ltd v Fergies Properties* [2014] EWCA Civ 506 Davis LJ (with whom Sullivan LJ and Laws LJ agreed) said at [28] that the purpose of the Jackson reforms was:

> "to change a litigation culture…with a view to protecting the wider interests of justice including the interests of other court users: who themselves stand to be affected in the progress of their own cases by satellite litigation, delays and adjournments occurring in other cases by reason of non-compliance."

6. I decided that it was not in the interests of justice to hold an oral hearing of the Recusal Application, for the following reasons:

(1) Holding an oral hearing requires not only more time, cost and effort from the parties, but also uses more time and resources of Tribunal staff and the judiciary. As Davis LJ said in *Chartwell*, other tribunal users are adversely affected when applications made in satellite litigation are decided at an oral hearing rather than on the papers.

(2) An oral hearing would delay the determination of the Recusal Application because it would be necessary to issue further directions, including for dates to avoid.

(3) The issues can be properly considered on the basis of the Recusal Application. Moneybrain provided a detailed submission, drafted by Counsel, so I was fully aware of its grounds. Having considered those submissions, it was clear that some were based on mistakes of fact, some on mistakes of law, and the balance were not arguable. It was therefore not proportionate to direct an oral hearing.

THE FACTS

7. On 30 May 2022, the Financial Conduct Authority ("the Authority") gave a Decision Notice ("the Decision Notice") to Moneybrain refusing its application to be registered as a cryptoasset exchange provider and a custodian wallet provider pursuant to Regulation 57 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ("the MLRs").

8. Moneybrain had created a type of cryptocurrency known as BiPS Tokens ("BiPS" or "Tokens"). The Authority issued the Decision Notice because it decided Moneybrain had deliberately and recklessly published on its websites misleading marketing and promotional material relating to the Tokens and was therefore not a person who "has acted and may be expected to act with probity" and so not a "fit and proper person" within the meaning of Regulation 58A of the MLRs.

9. Following the issuance of the Decision Notice, Moneybrain "offshored" its operations to Moneybrain Global Limited ("MGL"), a Jersey company under the same control as Moneybrain.

10. By a notice dated 24 June 2022, Moneybrain made a reference to the Tribunal by way of an appeal against the Decision Notice ("the Reference"). In the Reference, Moneybrain also applied for a direction that the effect of the Decision Notice be suspended pending the determination of the appeal ("the Suspension Application"), pursuant to Rule 5(5) of the Rules.

11. A hearing of the Suspension Application took place before me on 23 August 2022, by video. Moneybrain made no application for that hearing to be in private. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. The hearing was therefore held in public.

12. In the summary of the facts set out in the Recusal Application, Mr Mansell says that:

> "the Tribunal's determination was based on documents supplied by the Authority for the purpose of the hearing and the written and oral representations of the parties, together with the limited evidence of Mr Birkett (a director of the Appellant) on limited issues on oath"

13. This statement is incorrect. Although the Bundle was put together by the Authority, it included over three hundred pages provided by Moneybrain.

14. On 13 September 2022, the Judgment refusing the Suspension Application was provided in draft to the parties on a confidential basis to allow them the opportunity to notify the Tribunal of any clerical mistakes or errors arising from an accidental slip or omission. The parties were directed to respond by 16 September 2022.

15. On behalf of Moneybrain, Mr Farr (Moneybrain's adviser, who had attended the hearing) responded the same day, applying in the following terms for an extension of time:

> "(a) The Authority made a secondary disclosure yesterday of 20 further documents, which the Applicant has not yet received which have a potential to material errors or omissions; and
>
> (b) The Applicant Director suffered a family bereavement last night, to which he is responsible for making the funeral arrangements."

16. The Tribunal clerk replied to Mr Farr at my direction as follows:

> "The application from the Applicant dated 13 September 2022 for an extension of time has been passed to Judge Redston. She reminds the Applicant that only clerical mistakes or errors arising from an accidental slip or accidental omission in the draft decision on the Suspension Application can be submitted for consideration; this does not include making fresh submissions relating to new documents which were not before the Tribunal at the time of the hearing.
>
> In view of the family bereavement, Judge Redston has agreed to a short extension until 21 September for the parties to provide any suggestions for corrections. This extension applies to both parties."

17. The further disclosure of documents by the Authority to Moneybrain took place on 16 September 2022. Under the heading "the Facts" the Recusal Application states that these documents are "relevant to the overall issue and relevant to the issues the Tribunal had been required to determine at the hearing on 23 August 2022". The statement that these documents were "relevant" to the issues decided at the Suspension Hearing is not a fact but a submission.

18. The Recusal Application also states that on 20 September 2022, Moneybrain instructed Withers LLP ("Withers"). I have accepted that to be a fact.

19. On 21 September 2022 at 13.40, the Authority provided the Tribunal with a list of four minor typographical errors in the Judgment. Although neither the Tribunal clerk nor I realised it at the time, the Authority's list was not copied to Moneybrain.

20. On 21 September 2022 at 15.10, Withers informed the Tribunal that the firm had been newly instructed, and made the following application ("the Extension Application"):

> "Whilst our client has a number of observations on the draft judgment, we also wish to make detailed representations as to the timing of publication of the interlocutory decision as well.
>
> In addition, the position has been further complicated by disclosure by the Authority last Friday 16 September (after the draft judgment was handed down for comment) of material which has the potential at least to impact upon the decision made following the hearing.
>
> We are currently considering carefully the appropriate response to each of these issues and at the same time urgently familiarising ourselves with the underlying facts and matters.
>
> In the circumstances we respectfully request a further adjournment until close of business this Friday 23 September to write more substantively in respect of all the issues now identified."

21. In the evening of 21 September 2022, I drafted an interlocutory decision which refused the Extension Application and which included the following points:

(1) The Judgment set out the outcome of the hearing in which both parties participated. The text of the Judgment was circulated in draft only to allow typographical and similar mistakes to be identified.

(2) The Suspension Application had been decided by the Judgment, and it was too late for the parties to make additional submissions on new evidence which was not before the Tribunal at the hearing of that Application. Any such new evidence and submissions could be put forward at the substantive hearing of the Reference.

(3) As Moneybrain had not identified any clerical errors/omissions in the Judgment by the deadline (which had already been extended following Moneybrain's earlier application), the Judgment had been released for publication after incorporating the amendments put forward by the Authority.

22. On Thursday 22 September 2022, the following events took place:

(1) In emails timed at 8.54 and 8.55 I directed the Tribunal clerk to issue the interlocutory judgment refusing the Extension Application, and to issue and publish the Judgment.

(2) The interlocutory judgment was released to the parties at 10.54.

(3) The Judgment was released to the parties at 12.05 after the Tribunal clerk had applied for and received a Neutral Citation Number ("NCN").

(4) At 12.13, Withers sent the Tribunal another email attaching a document headed "Observations as to errors and omissions relating to the draft decision" ("the Observations"). The Observations included requests for:

(a) a change to paragraph [70] of the Judgment. This reflected Moneybrain's incorrect understanding of that paragraph, see further §35ff below;

(b) a change to paragraph [75] of the Judgment, on the basis that this passage was the view of the Tribunal, when it instead records the submissions of the Authority, see §41ff;

(c) multiple insertions to the effect that Moneybrain may provide further evidence at the hearing of the Reference, when the evidential position had already been set out at [22]-[23] of the Judgment; and

(d) the insertion of sentences into the text of the Judgment and other changes to the wording.

(5) At 15.13 Withers filed the Privacy Application. I spoke to the Tribunal clerk by phone, confirmed with her that the Judgment had not yet been issued, and directed that she delay its issuance pending my consideration of the Privacy Application.

(6) At 15.34 the clerk provided me with an email which had been sent to the Tribunal by Withers at 17.10 the previous day, so after the Tribunal's normal working hours. By the time the Tribunal clerk saw this email, she had already received my judgment refusing the Extension Application. The email read as follows:

> "I have called your switchboard number to check whether this short time extension has been received but I was not able to speak to anybody.
>
> In the absence of a substantive response to our short time extension to date, please note we are working on the assumption that there is no fundamental objection to that short time extension request until close of business, this Friday 23 September.

> If there is a fundamental objection to that short time extension request, please could you let us know by return."

23. I considered the Privacy Application over the weekend and on Monday 26 September 2022, directed that if the Authority wished to respond to the Privacy Application it was to do so as soon as possible, and by no later than 4pm on 30 September 2022.

24. Later the same day, Withers sent a further email asking that the Observations be considered for inclusion in the Judgment. The text of that email contained the following passages:

> "Had we known the Judge was minded to refuse the application for an extension we would have endeavoured to submit our representations before she directed the judgment should be finalised.
>
> In not letting us know as requested by return, and in the Judge not being seemingly aware of our communication (as it is not referred to in her decision refusing the application despite a detailed chronology otherwise being set out), our client has been unfairly prejudiced if the interlocutory judgment is not now corrected as we have suggested."

25. On 27 September 2022, I directed that the Tribunal clerk write to Withers as follows:

> "The list of 'Observations' provided by Withers after the final decision of the Tribunal on the Suspension Application ('the Judgment') has been considered by Judge Redston. None of the suggested amendments come within Rule 42 of the Tribunal Procedure (Upper Tribunal) Rules 2008, and the Judgment will not be amended."

26. On 30 September 2022:

(1) At 12.25, Withers filed and served the Recusal Application.

(2) At 15.49, the Authority filed and served its Response to the Privacy Application.

(3) At 16.14, Withers filed further submissions in relation to the Privacy Application ("the Further Submissions"), together with an unsigned witness statement from Mr Lee Birkett, Moneybrain's owner and sole director; a signed witness statement was filed and served at 16.36.

27. This decision deals only with the Recusal Application. As noted at the beginning of this decision, a separate decision on the Privacy Application will be issued in due course.

THE RECUSAL APPLICATION

28. The Recusal Application begins by explaining its purpose:

> "It is an application that the Learned Judge should recuse herself from making any further judgments, orders or directions in respect of the above reference on the grounds of "apparent bias" and that all subsequent proceedings, orders and/or directions, including but not limited to, the issue of publication should be determined before a differently constituted Tribunal."

THE LEGAL PRINCIPLES

29. The test for the recusal of a judge is well-established. It was helpfully summarised by Upper Tribunal Judge Wikeley in *Kirkham v Information Commissioner (recusal and costs)* [2018] UKUT 65 (AAC) as follows:

> "14. The law governing apparent bias is well known. The test is "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased": see Lord Hope of Craighead in *Porter v Magill* [2002] 2 AC 357 at [103]. The

"fair-minded and informed observer", according to Lord Steyn in *Lawal v Northern Spirit* [2003] UKHL 35, "is neither complacent nor unduly sensitive or suspicious" (at [14]). See also *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2; [2006] 1 WLR 781 (also reported as *R(DLA) 5/06*), where Lord Hope added that the "fair-minded and informed observer" must be taken to be to be able distinguish between what is relevant and what is irrelevant and decide what weight should be given to facts that are relevant.

15. Thus, as Underhill LJ recently observed in *Shaw v Kovac* [2017] EWCA Civ 1028 at [86], "An impartial observer will generally have no difficulty in accepting that a professional judge will decide the case before him or her on its own merits and will be unaffected by how they may have decided different issues involving the same party or parties". Moreover, as Burnett LJ (as he then was) added in the same case at [88], "The party who seeks to bounce a judge from a case may be fair-minded and informed but may very well lack objectivity."

16. The rule against bias was considered in more detail by the Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd* [1999] EWCA Civ 3004; [2000] QB 451, where it was stressed that the "mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection". So, for example, where a member of a tribunal makes it clear (e.g. through comments or body language) that he or she is unimpressed by evidence that is being given, that may be a rational reaction to the evidence even though it may be discourteous or even intemperate. In such circumstances, it does not show that the tribunal member had a closed mind or was biased, with the result that the tribunal's decision is not vitiated (*Ross v Micro Focus Ltd* UKEAT/304/09).

17. As already noted, the "fair-minded and informed observer" will recognise that judges are assumed to be trustworthy and to understand that they should approach every case with an open mind. As Mr Commissioner Bano (as he then was) pointed out in *CIS/1599/2007* at paragraph 12:

> "In *R (on the application of Holmes) v General Medical Council* [2002] 2 All ER 524 the Court of Appeal held, applying the *Porter* test, that the fact that a Lord Justice of Appeal had refused leave to appeal was not a ground for requiring the lord justice to recuse himself from hearing the full appeal, and in *AMEC Capital Projects Limited v Whitefriars City Estates Limited* [2005] 1 All ER 723 the Court of Appeal held that the same principles apply even where an adjudicator has already decided an issue on the merits against one of the parties."

18. Referring to the passage in *Locabail*, and cited above, Dyson LJ held as follows in *AMEC Capital Projects Limited v Whitefriars City Estates Limited* (at paragraph 21):

> "…As was said in *Locabail*, the mere fact that the tribunal had previously commented adversely on a party or found his evidence unreliable would not found a sustainable objection. On the other hand, if the tribunal had made an extremely hostile remark about a party, the position might well be different. Thus, in *Ealing London Borough Council v Jan* [2002] EWCA Civ 329, this court decided that the judge should not hear the retrial of proceedings where he had twice said of the respondent in preliminary proceedings that he could not trust him 'further than he could throw him'."

19. Thus in *Otkritie International Investment Management Limited v Urumov* [2014] EWCA Civ 1315 ["*Otkritie*"] the Court of Appeal held that the fact a trial judge had made adverse findings against a party did not preclude him or her sitting in subsequent proceedings. As Davis LJ further noted in *Shaw v Kovac* (at [19]), "It is striking that in that case the trial judge was held by the Court of Appeal to have been positively wrong to recuse himself on the application of the defendant in circumstances where, in the same complex commercial proceedings, the judge previously had made findings of actual fraud on the part of the defendant."

20. Whilst each case necessarily turns on its own facts, these authorities demonstrate clearly that judges must be robust and are not expected to jump to recuse themselves. The rationale was explained clearly by Chadwick LJ in *Triodos Bank N.V. v Dobbs* [2005] EWCA Civ 468, in which the defendant had invited Chadwick LJ to recuse himself as a result of his conduct in relation to a permission to appeal application in related proceedings. Chadwick LJ observed as follows:

> "7. It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If the judges were to recuse themselves whenever a litigant – whether it be a represented litigant or a litigant in person – criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a judge felt obliged to recuse himself simply because he had been criticised – whether that criticism was justified or not. That would apply, not only to the individual judge, but to all judges in this court; if the criticism is indeed that there is no judge of this court who can give Mr Dobbs a fair hearing because he is criticising the system generally, Mr Dobbs' appeal could never be heard.""

30. In *Otkritie* Longmore LJ also observed at [13]:

> "The general rule is that [the judge] should not recuse himself, unless he either considers that he genuinely cannot give one or other party a fair hearing or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so … there must be substantial evidence of actual or imputed bias before the general rule can be overcome. All of the cases, moreover, emphasise that the issue of recusal is extremely fact-sensitive."

31. The Recusal Application also cited *Amjad v Steadman-Byrne* [2007] EWCA 625 ("*Amjad*"), in which the Court of Appeal said that the test for apparent bias would be met if the judge had demonstrated "the premature formation of a concluded view in the claimant's favour, even before the defendant had given evidence". The facts of *Amjad* were that, having heard the claimants' evidence but not that of the defendants, the judge had called both Counsel into his chambers and said he could not see how the defendants could win. The Court of Appeal found that the judge had shown apparent bias, and endorsed the following passage Lady Smith's judgment in *Project v Hutt* (2006) UKEAT S/0065/05/RN:

> "There are, of course, occasions when a judge or tribunal can quite properly explore difficulties that have become apparent from the evidence in a case, prior to the point at which all evidence has been led and submissions made, whether with a view to encouraging parties to consider settlement or narrowing the issues between them, or otherwise. There must, though, be few occasions when that can properly be done at a point prior to the leading of any evidence in the case since, at that stage, there is, by definition, no evidence before the court or tribunal on which it can comment. Moreover, if minded to make such a comment, it is plain that the risk of giving an impression of prejudgment will arise if it is not made clear to the parties that any views expressed are but provisional, that the tribunal's mind is not yet made up and that it remains open to persuasion."

THE JUDGMENT

32. The Recusal Application relies in part on four passages from the Judgment, which in Mr Mansell's submission show I had made "findings that the Appellant lacked probity" and had "demonstrate[d] the premature formation of a concluded view" to that effect. I reject those submissions for the reasons explained below.

The purpose of the hearing and the structure of the Judgment

33. The purpose of the hearing was set out at [15]-[16] of the Judgment:

> "15. In deciding the Suspension Application I must therefore first decide whether there is "a case to answer" – in other words, I must be satisfied that there is evidence to support the Authority's conclusions, or as Judge Herrington put it in *Gidiplus,* that the Decision Notice made findings capable of demonstrating that Moneybrain failed to meet the conditions for registration as a cryptoasset business.
>
> 16. If I find there is a case to answer, the next stage is to consider whether allowing the Suspension Application would prejudice the interests of persons intended to be protected by the Decision Notice. I have taken it that the persons the Authority intended to protect are Moneybrain's existing or potential customers, see *PDHL Limited v FCA* [2016] UKUT 0129 (TCC) at [26].

34. The Judgment first set out the law and made limited findings of fact (none of which is criticised in the Recusal Application), and was then structured as follows:

(1) Whether there was "a case to answer", which was divided into:

(a) Moneybrain's first submission that there was "no case to answer" because the Authority's Decision Notice was based on two matters which were outside its legal powers to consider, namely:

(i) the Authority's opinion about Moneybrain's promotional material, a matter which fell within the remit of the Advertising Standards Authority ("ASA"); and

(ii) "preventing consumer harm", which was beyond its legal remit in the context of the MLRs. Mr Birkett, on behalf of Moneybrain, relied on page 52 of the Authority's Report and Accounts, which read "we have no consumer protection powers and very limited regulated remit over most types of crypto activities".

(b) Moneybrain's second submission, that there was no case to answer because its websites did not include misleading material

(2) Having considered those submissions, I found there was a case to answer. I went on to consider whether I could be satisfied that allowing the Suspension Application would not prejudice "the interests of any persons (whether consumers, investors or otherwise) intended to be protected by that notice", as I was required to do by Rule 5(5) of the Rules (see §45). I concluded that I could not be satisfied.

(3) Finally, I considered whether, given that conclusion, a balancing exercise was necessary. I accepted Mr Temple's submission on behalf of the Authority that it was not.

Paragraph [70] of the Judgment

35. The first passage relied on by Mr Mansell is at [70] of the Judgment, which formed part of my consideration of Moneybrain's first submission. I found as follows:

(1) Regulation 58A(1) of the MLRs provides that the Authority "must refuse" to register an applicant who does not meet the requirement in Regulation 58A(2), namely that it is "a fit and proper person" to carry on the business of a cryptoasset exchange provider and/or custodian wallet provider. Thus, the Authority was obliged to refuse registration when an applicant is not "fit and proper", and plainly had the power to make a decision to that effect.

(2) In deciding whether a person is "fit and proper", Regulation 58A(4) requires the Authority to consider certain specified matters, one of which is whether the applicant "has acted and may be expected to act with probity".

(3) When assessing probity all potentially relevant matters must be considered, see *Frensham v FCA* [2021] UKUT 0222 (TCC).

36. The passage relied on by Mr Mansell then follows. It reads:

> "If, having considered all potentially relevant matters, the Authority decides a person lacks probity, it is obliged to refuse registration. That obligation is not displaced by references made in the Report and Accounts; by the separate regulatory requirements placed on the ASA, or by a decision of the Authority's Financial Promotions Team to close their file having considered matters within the remit of that Team."

37. I concluded this first issue at [71] by saying:

> "I thus reject Mr Birkett's submission that there is "no case to answer" because the Authority was not acting within its powers when it decided Moneybrain was not "fit and proper" on the basis of material on its websites."

Mr Mansell's submission about paragraph [70]

38. Mr Mansell submitted that paragraph [70] shows I have "a settled view" that:

> "The probity allegation will not be displaced by references made in the Report and Accounts; by the separate regulatory requirement placed on the ASA, or by a decision of the Authority's Financial Promotions Team to close their file having considered matters within the remit of that Team."

39. He expanded this by saying:

> "…contrary to the finding made [in [70] of the Judgment], the finding that the Appellant lacks probity will be displaced if the Authority is unable to show that the marketing documents and other prominent statements were misleading in nature and even then, the Authority will have to show that such a finding reasonably leads to a lack of probity finding. Examination of the matters highlighted at Paragraph 70 at the substantive hearing may in fact displace the allegation that the material was misleading, and/or such an

> examination may not lead to a conclusion that the Appellant lacks probity. In making a definitive finding that such evidence does not displace and by inference cannot displace the probity assessment the Tribunal is displaying a prematurely settled mind which could lead to the suspicion of bias see *Steadman-Byrne v Amjad* [2007] EWCA Civ 625.

40. Those submissions are incorrect, for the following reasons:

(1) Paragraph [70] is not about whether or not Moneybrain can displace the Authority's decision that it lacks probity by providing evidence to that effect. Whether there is a case to answer on probity is the second issue considered in the Judgment. The first issue (of which paragraph [70] forms part) is only about whether the Authority has the legal power to refuse to register a person if it decides the person lacks probity.

(2) Paragraph [70] plainly does not include "a finding that the Appellant lacks probity". It makes no reference to the Appellant at all; it is concerned only with the scope of the Authority's powers.

(3) Paragraph [70] also does not make "a definitive finding" that a person cannot displace a decision made by the Authority by putting forward evidence to that effect. The paragraph says nothing about evidence.

(4) Mr Mansell's submissions that the probity finding could later be displaced by references made in the Authority's Report and Accounts and/or by the regulations which govern the ASA are misplaced. Those documents contain no material which could possibly provide "evidence" to show that Moneybrain did not lack probity; they were instead adduced by Moneybrain to support its submission about the Authority's limited regulatory powers. In the context of evidence about Moneybrain's probity, the view of the Authority's Financial Promotions Team (see [55]-[56] of the Judgment) is also irrelevant.

(5) There is thus no basis for Mr Mansell's submission that paragraph [70] shows I had "a prematurely settled mind" that Moneybrain lacks probity.

Paragraph [75]

41. Paragraphs [73]-[76] of the Judgment form part of the second issue. In considering that issue, I first set out the Authority's submissions, followed by those of Mr Birkett, and then my view.

42. Paragraph [75] is one of the paragraphs which summarise the Authority's submissions. Mr Mansell submitted that:

> "…[in] paragraph 75(1) of the judgment…the Tribunal unequivocally agrees with the Authority's assessment that Moneybrain lacked probity because its conduct in omitting risk details was deliberate."

43. Mr Mansell added that it is clear from paragraph [75] that the Tribunal has come to "a settled view" that "the actions of the Appellant in omitting risk details was deliberate".

44. These submissions are plainly incorrect, because paragraph [75] sets out the Authority's view, not my view; that followed at paragraphs [78] to [80].

Paragraph [88]

45. As set out above, when considering a Suspension Application, the Tribunal first considers whether there is "a case to answer", and if so, whether "allowing the Suspension Application would prejudice the interests of persons intended to be protected by the Decision Notice", in this case Moneybrain's existing or potential customers. That stage is required by Rule 5(5) of the Rules, which provides:

> "In a financial services case, the Upper Tribunal may direct that the effect of the decision in respect of which the reference has been made is to be suspended pending the determination of the reference, if it is satisfied that to do so would not prejudice –
>
> (a) the interests of any persons (whether consumers, investors or otherwise) intended to be protected by that notice;…"

46. Having decided at [80] that there was a case to answer, I then went on to consider whether allowing the Suspension Application would prejudice the interests of Moneybrain's existing or potential customers. It is clear from *Sussex Independent Financial Advisers Limited v FCA* [2019] UKUT 228 (TCC) ("*Sussex*") and earlier authorities that the burden in showing that the interests of consumers will not be prejudiced rests on the applicant, here Moneybrain.

47. It was the Authority's view that allowing the Suspension Application would prejudice the interests of consumers, because of the risk that they would be misled by the website material. On behalf of Moneybrain; Mr Birkett disagreed. Having considered both parties' submissions, I held at [85] that:

> "…I am not satisfied that the interests of consumers would be protected were the Suspension Application to be granted. In other words, Mr Birkett has not satisfied me that allowing Moneybrain to resume operations would not prejudice the interests of its customers and potential customers."

48. Because Rule 5(5) begins "the Upper Tribunal *may* direct", the Tribunal in *Sussex* said that "it is a matter of judicial discretion as to whether or not a suspension should be granted" and that this discretion was to be exercised by way of a balancing exercise, taking into account all relevant factors. Mr Temple submitted that there was no place for such a balancing exercise in a case such as this, and I agreed. I said at [87]:

> "As I am not satisfied that allowing Moneybrain to resume operations would not prejudice the interests of consumers, there is no need to carry out a balancing exercise."

49. I then said at [88], in a passage which was therefore plainly *obiter:*

> "It is also clear from the foregoing that I have not identified any factor in Moneybrain's favour which would come anywhere close to outweighing the risk of harm to consumers from the material on Moneybrain's websites (much of which continues to be present on MGL's website)."

Mr Mansell's submissions on paragraph [88]

50. Mr Mansell submits that paragraph [88] shows I had a "settled view" that "Moneybrain's website creates a risk of consumer harm which has not been mitigated by the Appellant", and that this "finding" is "particularly telling" because:

> "The risk of harm can only be founded on a finding that the various marketing documents and other prominent statements issued by the Appellant are misleading, otherwise there is no such risk. The finding is relevant to the issue of apparent bias, since it indicates the Tribunal has a settled view that the marketing documents and other prominent statements publications are misleading."

51. Mr Mansell similarly submits that the paragraph shows I had reached a "pre-determined", "settled" and "definitive" view that the marketing documents and other statements were misleading.

52. Those submissions misunderstand the task which the Tribunal is required by Rule 5(5) to perform, namely to decide whether the interests of consumers would be protected. I decided

that issue in favour of the Authority, and went on to say that as a result the Authority would therefore inevitably be successful were there to be a balancing exercise. It is plainly incorrect for Mr Mansell to submit that paragraph [88] demonstrates "apparent bias".

Other submissions relating to the Judgment

53. Mr Mansell also submits that by the Judgment the Tribunal has "not made clear to the parties that any views expressed are but provisional, that the tribunal's mind is not yet made up and that it remains open to persuasion". This citation from *Project v Hutt* misses the point that in deciding a suspension application the Tribunal has a particular statutory task to perform: it is required to make findings in order to decide whether the requirements of Rule 5(5) are satisfied, and those findings are not "provisional" in the context of a suspension application.

54. The submission also ignores the clear and explicit statements at [22] of the Judgment:

> "I next set out some limited findings of fact from the evidence summarised above. I have tried to be careful only to make findings which are directly relevant to the Suspension Application, and not to make definitive findings on disputed matters which will be explored in more detail on the hearing of the Reference. I have also proceeded on the basis that what Mr Birkett said about certain aspects of Moneybrain's business is correct. That is without prejudice to the position that may be established after full consideration of all the evidence following the hearing of the Reference."

55. Thus, it will be for the parties to put their case afresh at the hearing of the Reference, and that Tribunal panel will not be bound by the findings in the Judgment.

SUBMISSIONS RELATING TO PERIOD AFTER THE HEARING

56. Mr Mansell also submitted that what happened after the hearing provides further evidence of "apparent bias". I have taken each of his points in turn.

The refusal of the Extension Application

57. He submitted that the my refusal of the Extension Application indicates "apparent bias" because that refusal decision was issued:

> "after the expiry of the deadline [for compliance with the direction] and thereby denied the Appellant an opportunity to submit its representations within the time allocated"

58. This submission is entirely without foundation, for the following reasons:

(1) On 13 September 2022 he Tribunal issued a direction requiring typographical corrections be provided by 16 September 2022.

(2) Moneybrain applied for an extension the same day, which I allowed; I directed a new compliance date of 21 September 2022.

(3) Moneybrain did not comply with that direction. Instead, at 15.10 on the final day for compliance it made the Extension Application, which I refused.

(4) That there was no good reason for Moneybrain's failure to comply with the time limit can be seen from Withers' later email of 26 September 2022, which said (see §24):

> "had we known the Judge was minded to refuse the application for an extension we would have endeavoured to submit our representations before she directed the judgment should be finalised".

(5) The need for compliance with directions and orders applies in the Tribunals as in the Courts, see *BPP Holdings v HMRC* [2016] EWCA Civ 121 and *Denton v White* [2014] EWCA Civ 906.

(6) Mr Mansell also refers to Withers' follow-up email asking for confirmation that the extension would be allowed. This was sent at 17.10 on the last day for compliance. Rule 12(1) of the Tribunal Rules provides that "An act required by these Rules, a practice direction or a direction to be done on or by a particular day must be done by 5pm on that day". Withers' request for confirmation was therefore sent after the time set by the Rules, and as a practical matter, after the Tribunal office had closed for the night.

(7) There was no reasonable basis on which Moneybrain could have assumed that it would be allowed a further extension, given that:

(a) an extension had already been provided;

(b) the reason for the original direction was simply to allow the parties to provide typographical errors; and

(c) the limited nature of that exercise had already been emphasised in the email send to Moneybrain on 13 September 2022.

(8) It was entirely reasonable and in the interests of justice for me to finalise the Judgment overnight after taking into account the four minor typographical errors identified by the Authority.

59. The decision to refuse the Extension Application is plainly not evidence of apparent bias.

Contrast with the time allowed to the Authority

60. Mr Mansell submits that my refusal to grant the Extension Application is in "marked contrast" to the four days given to the Authority to provide submissions on the Privacy Application, and that his too was evidence of "apparent bias".

61. The reasons the Extension Application was refused are set out in the previous section of this decision. The granting of four days to the Authority to comment on the Privacy Application was no more than is reasonably required for a party to provide submissions on a new application made by the other party. This is not "apparent bias" but normal case management carried out in the interests of justice.

The further disclosure

62. As set out earlier in this decision, I was told by Mr Farr on 13 September 2022, after the Judgment had been issued in draft, that the Authority was to disclose further documents. I was informed by Withers on 21 September 2022 that these had been provided on 16 September 2022.

63. Mr Mansell submits that the Extension Application should have been allowed so as to allow Moneybrain time to make submissions on those new documents, and that failing to give Moneybrain that opportunity is also evidence of "apparent bias".

64. When I responded to the original extension application made by Mr Farr on 13 September 2022, I also explained that the Judgment had been circulated to allow for the corrections under the slip rule, and "this does not include making fresh submissions relating to new documents which were not before the Tribunal at the time of the hearing".

65. In the decision refusing the Extension Application, I said that it was too late for the parties to make additional submissions on new evidence which was not before the Tribunal at the hearing, but added that any such new evidence and submissions can be put forward at the substantive hearing of the Reference.

66. Both those responses were plainly correct and not evidence of "apparent bias".

Publication

67. Mr Mansell submits that I acted with "apparent bias" in relation to publication of the Judgment for the following reasons (in italics):

(1) *Moneybrain had not been invited to make submissions on whether or not the Judgment should be published*. The normal position is that judgments issued following a public hearing are published, and it is not the Tribunal's practice to invite submissions on publication.

(2) *On 22 September 2022, the judge gave a direction to the clerk for the Judgment to be published, even though Moneybrain had indicated that it wanted to make submissions on publication*. Directing that the Judgement be published was a normal case management decision, taking into account the following facts:

(a) The email from Withers timed at 15.10 on 21 September 2022 did not state they would be making a privacy application, but made the more limited statement that "whilst our client has a number of observations on the draft judgment, we also wish to make detailed representations as to the timing of publication of the interlocutory decision as well".

(b) Moneybrain had had plenty of time to make submissions on publication; the hearing took place on 23 August, a month previously, and the Judgment was circulated in draft on 13 September 2022.

(c) There was no good reason for the delay, see Withers email of 26 September 2022 already referred to at §58(4).

(3) *The Tribunal's direction on the morning of 22 September 2022 that the judgment be published was given "despite the Tribunal knowing" that "publication could cause disproportionate damage to the Appellant's regulated business and other companies with which the Appellant's directors are connected"*. This is wrong as a matter of fact and law because:

(a) On the morning of 22 September 2022, when I directed publication, there was neither evidence nor submissions before the Tribunal relating to damage being caused to Moneybrain or to Mr Birkett's other businesses if the Judgment was published.

(b) The Privacy Application was received later that day, and said only that publication "may even pose an existential threat" to Moneybrain.

(c) It was not until 30 September 2022, when Withers filed the Further Submissions on the Privacy Application together with Mr Birkett's witness statement, that there was any evidence before me on this matter.

(d) Plainly, there is no "apparent bias" in not considering a matter on which no evidence or submissions had been provided.

68. Mr Mansell also submits that my consideration of the Privacy Application is itself a sign that "due process was not followed initially". The party which failed to follow due process was Moneybrain, in not making the Privacy Application in good time.

69. The Privacy Application was received by the Tribunal before the Judgment was sent for publication, and I decided it was in the interests of justice to consider it. That is not an indication of apparent bias.

The Observations

70. Mr Mansell submits that the Tribunal's refusal to amend the Judgment to take into account the Observations is an indicator that Tribunal has come to a "predetermined view" that Moneybrain acted without probity, because otherwise the Tribunal would have amended those paragraphs. This is incorrect for the following reasons:

(1) As set out earlier in this decision, the Judgment contains no finding that Moneybrain acted without probity.

(2) The Observations were not included because they were outside the scope of Rule 42. That Rule cannot enable a court to have "second or additional thoughts", see *Bristol-Myers Squibb Co v Baker Norton Pharmaceutical* [2001] EWCA Civ 414 at [25] *per* Aldous LJ. The Rule is instead limited "clerical mistakes and accidental slips or omissions".

(3) Some of the Observations are in addition factually incorrect, see §22(4).

The Authority's corrections

71. As noted at §18, the Authority's short list of typographical errors was not copied to Moneybrain, although neither the Tribunal clerk nor I realised this at the time. It is unclear whether this oversight is also being relied upon as evidence of "apparent bias", but if so, it is plainly without foundation.

OVERALL CONCLUSION, PUBLICATION AND THE REFERENCE

72. For the reasons set out above, the Recusal Application is dismissed.

73. It is in the interests of justice for publication of this decision to be linked to the outcome of the Privacy Application.

(1) If the Privacy Application is allowed, this decision will not be published until the earlier of:

(a) the withdrawal of the Reference;

(b) the publication of the Tribunal's decision on the Reference; and

(c) the final outcome of any successful appeal by the Authority against the Privacy decision.

(2) If the Privacy Application is refused, this decision will not be published until the earlier of:

(a) the withdrawal of the Reference;

(b) the publication of the Tribunal's decision on the Reference; and

(c) the final outcome of any unsuccessful appeal by the Authority against the Privacy decision.

74. The Tribunal had already decided, some two weeks before the receipt of the Recusal Application, that the Reference would be heard by a different panel. For the avoidance of any possible doubt that decision was not made because I had recused myself from that hearing.

ANNE REDSTON
UPPER TRIBUNAL JUDGE
Release date: 07 October 2022