UT Neutral citation number: **[2023] UKUT 00259 (TCC)**

UT (Tax & Chancery) Case Numbers:
UT-2023-000053; UT-2023-000054

Upper Tribunal
(Tax and Chancery Chamber)

Decided on the papers

UNLESS ORDER – Applicant denying key part of the Authority's Statement of Case – refusal to provide reasons for denial – Application by Authority for directions, including unless order – Application granted.

Judgment given on: 24 October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE ANNE REDSTON

Between

TONI FOX-BRYANT
DAVID BRIAN PRICE

Applicants

and

THE FINANCIAL CONDUCT AUTHORITY

Respondent

Representation:

For the Applicants: Mr Gareth Fatchett of FS Legal Solicitors LLP, instructed by the Applicants

For the Respondent: Zsuzsa Elek, solicitor in the Legal Division of the Financial Conduct Authority

DECISION

1. This is an interlocutory decision about an Unless Order. In *Breen v HMRC* [2023] UKUT 252 (TCC), the Upper Tribunal recommended that reasoned decisions about Unless Orders be published, so that "other judges and the public can understand the decision-making process involved". Those comments related to the Tax Chamber of the First-tier Tribunal, but there is no reason why they should not apply equally to the Upper Tribunal. I have therefore directed that this interlocutory decision be published.

INTRODUCTION

2. Ms Fox-Bryant and Mr Price ("the Applicants") were the owners and directors of CFP Management Ltd ("CFP"), a small financial services advisory firm. CFP had entered into arrangements with another company to provide advice relating to the transfer of pensions from defined benefit schemes to defined contribution schemes.

3. The Financial Conduct Authority ("the Authority") carried out a review of a sample of 21 of CFP's client files for the period from 21 April 2015 and 31 October 2017 ("the File Review"). CFP subsequently entered liquidation.

4. On 3 May 2023, the Authority issued Decision Notices to both Applicants under the Financial Services and Markets Act 2000 ("FSMA"). By the Decision Notices, the Authority withdrew the Applicants' approvals to perform senior management functions and imposed financial penalties; Ms Fox-Bryant's Decision Notice also included a prohibition order under s 56 of FSMA. The Applicants referred the Decision Notices to the Tribunal ("the References").

5. On 11 October 2023, the Authority applied for directions in relation to the Reference ("the Application for Directions"). This was supported by a bundle of 247 pages ("the Bundle"), which included:

(1) the Decision Notices;

(2) the Authority's Statement of Case, including at Annex 1 a summary of the File Reviews ("Annex 1"). Ms Fox-Bryant is named as the Adviser in 12 of the 21 cases reviewed;

(3) the Applicants' Reply to the Statement of Case ("the Reply"); and

(4) relevant correspondence between the parties.

6. Of the draft directions, only the first was in dispute. This was an "Unless" Order, which read:

> "Unless the Applicants by 4pm on 27 October 2023 provide the Authority with proper particulars of their response to Annex 1 to the Authority's Statement of Case, including all matters therein that the Applicants dispute and the reasons that they dispute such matters, then:
>
> (a) paragraphs 33, 34 and 39 of the Applicants' Reply shall be struck out; and
>
> (b) the Applicants will be taken to have admitted paragraphs 66 to 90, 94, 107 to 109, and 123 of the Authority's Statement of Case."

7. The Authority asked that the Application for Directions be determined at a hearing. Having considered that Application and the Bundle, I decided that it was in the interests of justice to decide it on the papers. That is because the parties' positions are clear from the correspondence, and because an oral hearing would require further time and costs, both for the parties and for the Tribunal; it also risks delaying the listing and hearing of the appeals.

8. I first consider and decide the Application for Directions; my Directions to the parties are set out at the end of this judgment.

PARAGRAPH 34

9. Paragraph 34 of the Reply reads:

> "The Applicants have not had access to the files (they are with the CFP liquidator) and are unable to provide any sensible commentary until the files are disclosed."

10. The Authority's position is that it has disclosed the client files relevant to the File Review three times: on 9 November 2022, 20 January 2023 and 15 September 2023. Mr Fatchett's email to the Authority dated 27 September 2023 explicitly recognises that the Applicants have the client files. Paragraph 34 is therefore incorrect and it is struck out.

PARAGRAPH 36

11. Paragraph 36 reads:

> "For reasons set out prior, the Applicants have not reviewed the files referred to in the 16th December 2020 letter, nor have they had access to the files since April 2021."

12. Consistently with my decision in relation to paragraph 34, the final part of the above sentence, reading "nor have they had access to the files since April 2021" is also struck out.

PARAGRAPHS 33 AND 39

13. The Authority's case is based in large part on the outcome of the File Reviews, which found that (a) a significant proportion of the advice provided by the Applicants was unsuitable, and (b) the suitability of some advice could not be assessed due to material information gaps. The Applicants explicitly accept in the Reply that "the cornerstone of the Authority's case are the file and systems failings (which are materially based on the 16 December 2020 file reviews)".

14. Paragraph 33 of the Reply is a response to paragraphs 66 to 90 of the Statement of Case. Those paragraphs set out, by way of examples, three cases taken from Annex 1. Paragraph 33 reads: "the Applicants deny the files are unsuitable".

15. Paragraph 39 then reads:

> "The Applicants will ask to review the December 2020 files and to show that they are within the bounds of being acceptable. Where failings are found, they are not sufficiently seriously [sic] to warrant the serious financial penalties being sought."

16. By the Application for Directions, the Authority asked that the Applicants be required to provide "proper particulars" of the reasons why they deny that the files are unsuitable, and why any failings are "not sufficiently serious" to warrant the financial penalties.

17. In deciding that issue, I considered the correspondence between the parties and the relevant law. The correspondence is summarised below, followed by my reasons for agreeing with the Authority.

The correspondence

18. On 12 September 2023, the Authority asked the Applicants to file and serve an amended Reply, so as to provide their reasons why they deny that files considered in the File Review are unsuitable and/or contained material information gaps.

19. On 27 September 2023, Mr Fatchett of FS Legal Solicitors replied on behalf of the Applicants; his email said that Applicants were not responding to the Authority's request because they had:

> "no resources to do so. This would require expert evidence to counter [the Authority's] own analysis".

20. The Authority replied on 5 October 2023, saying:

> "It is not clear to us that your clients are unable to afford expert assistance, but in any event, we do not understand why your clients – who were both pension transfer specialists – cannot explain why they disagree with the conclusions of the file reviews. Moreover, they both have first-hand knowledge about the contents of the client files. Consequently, they are very well placed to explain why they 'deny that the files are unsuitable'.
>
> Absent a proper explanation from your clients as to why they disagree with the file review outcomes, neither the Authority nor the Court will be able to manage this case appropriately. The scope of necessary evidence, and the length of trial, will depend upon what matters are actually in dispute.".

21. On 9 October 2023, FS Legal responded, stating that the Applicants were "not going to amend the Reply", and that the "fundamental issue" was that the Authority had earlier informed the Applicants that they did not need to respond to the File Reviews, and that whether the files were unsuitable was "for the Upper Tribunal to determine". The Authority then made the Application for Directions.

Reasons for allowing the Application in relation to paragraphs 33 and 39

22. I agree with the Authority that the Applicants must either provide proper particulars of the reasons why they deny the Authority's conclusions based on the File Reviews, or paragraphs 33 and 39 must be struck out. That is for the reasons set out below.

Party has to know the case it has to meet

23. It is well-established that the purpose of pleadings is so that the other party knows the case it has to meet: see *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* (1994) 72 BLR 26, where Saville LJ said at 33-34:

> "The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it."

24. That passage was affirmed by the House of Lords in *Three Rivers District Council v Bank of England* [2001] UKHL 16; [2001] 2 All ER 513 *per* Lord Hope at [49]. Lord Hope also endorsed the following *dicta* from Lord Woolf MR's judgment in *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775, 792J-793A: he said that pleadings were "required to mark out the parameters of the case that is being advanced by each party" and "in particular" were "critical to identify the issues and the extent of the dispute between the parties". Those authorities have been frequently cited and reaffirmed by subsequent courts and tribunals.

25. The Applicants have provided no reasons as to why they deny that (a) the advice given to clients was unsuitable, or (b) the suitability of some advice could not be assessed due to material information gaps. I agree that unless the Applicants provide further particulars, the Authority cannot know the case it has to meet, and this is a basic requirement of pleadings in the Upper Tribunal, just as it is in the courts.

The Upper Tribunal's role

26. The Applicants' position is that the question of the suitability or otherwise of the advice given was "for the Upper Tribunal to determine". However, before the Upper Tribunal can determine that issue, it requires pleadings which are sufficiently particularised for the position of the parties at the substantive hearing to be understood and evaluated. The Upper Tribunal also has to case manage the Application in advance of that substantive hearing: this includes deciding resource allocation, and the length and timing required by the appeal. The Applicants must therefore provide particularised pleadings in advance of the hearing.

The Rules

27. Schedule 3, paragraph 5(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 sets out the requirements for a reply to a statement of case: This provides (emphasis added):

> "The reply must—
>
> (a) state the grounds on which the applicant relies in the reference;
>
> (b) identify all matters contained in the respondent's statement of case (which are disputed by the applicant;
>
> (c) state the applicant's reasons for disputing them."

28. The Applicants have therefore failed to comply with Schedule 3, paragraph 5(2)(c) of the Upper Tribunal Rules, because the Reply contains a bare denial of what the Applicants have accepted is the "cornerstone" of the Authority's case.

The burden of proof

29. In a case such as this, the burden of proof rests on the Authority. However, that does not mean that an Applicant can simply deny the case the Authority has advanced. As Judge Berner said *in Badaloo v the Financial Conduct Authority* [2017] UKUT 158 (TCC) at [50]

> "the legal burden of proof in a reference of this nature is… on the Authority. But …that does not absolve an applicant from putting forward their own case in response to the case made by the Authority. Once such a case has been made, supported by evidence, the evidential burden may shift, and it is therefore essential in those circumstances for a tenable contrary case to be raised by the applicant."

Lack of resources/expert evidence?

30. The Applicants say that expert evidence would be required to "counter" the analysis in the File Reviews, and they do not have the resources to instruct an expert. For the reasons already set out in this decision, neither would provide a justification for their failure to particularise their pleadings. There are also the following additional reasons:

(1) As the Authority notes, the Applicants were both pension transfer specialists, and can reasonably be expected to be able to give their own views, on the basis of their knowledge, training and experience, as to why they disagree with the conclusions of the File Reviews, without needing to instruct an expert.

(2) The Authority also says that both Applicants had "first-hand knowledge about the contents of the client files", and that does not appear to be in dispute: I note that Ms Fox-Bryant was the adviser in 12 of the 21 cases considered by the File Review.

(3) The evidence previously provided to the Authority and the Upper Tribunal shows that they have financial resources; these have been considered in the separate Costs Application decision.

The email from the Authority

31. As recorded above, one of the reasons given by the Applicants for not providing any particulars of its denials was that the Authority had earlier informed CFP that it did not need to respond to the File Reviews; Mr Fatchett said this was the "fundamental issue" in the appeal.

32. The background to his submission is that on 16 December 2020, the Authority provided CFP with a letter summarising the result of the File Review. On 17 December 2020, Mr Fatchett informed the Authority that the Applicants were "looking to appoint an insolvency practitioner" in relation to CFP. Mr Derek Murdoch of the Authority responded the same day, saying:

> "In terms of responding to our specific feedback and file review findings, in circumstances where the firm does not have the funds to consider and as appropriate respond to our feedback and request for review work, we would not expect the firm to do so.
>
> However, the impact of a lack of response from the firm would need to be considered by my Enforcement colleague along with any alternative means for them to gather the information they may require. For example, it may be possible for information to be requested directly from individuals."

33. The Applicants can of course refer to and rely on the email from Mr Murdoch to explain why CFP did not respond to the results of the File Review, and Ms Elek accepted in the Application for Directions that the Authority "does not seek to restrict the Applicants' ability to argue that the 'fundamental issue' is the Authority's own conduct following the File Review".

34. However, Mr Murdoch's email does not allow the Applicants to bypass both the obligations imposed by the Rules and the well-established requirement that pleadings set out each party's case "to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it".

PARAGRAPHS OF THE STATEMENT OF CASE,

35. The Authority has also applied for the Upper Tribunal to direct that, if proper particulars are not provided, "the Applicants will be taken to have admitted paragraphs 66 to 90, 94, 107 to 109, and 123 of the Authority's Statement of Case". I move on to considering those paragraphs.

Paragraphs 66-90

36. As noted above, paragraphs 66 to 90 sets out three examples taken from Annex 1. The Applicants' Reply to those paragraphs of the Statement of Case consists of paragraph 34, which I have struck out, and paragraph 33, which is the subject of the Unless Order.

37. I therefore agree with the Authority that unless the Applicants comply with the Unless Order, they will be taken to have admitted paragraphs 66-90.

Paragraphs 94, 107-109 and 123

38. I next considered whether, if the Applicants do not comply with the Unless Order, it should follow that they have also admitted the points contained within paragraphs 94, 107-109 and 123 of the Statement of Case ("the remaining paragraphs").

39. Paragraph 94 is headed "information collection failings" and sets out the "material information gaps" which on the Authority's case based on the File Review, prevented an assessment of suitability.

40. Paragraphs 107-109 summarise and exemplify the Authority's finding that unsuitable advice was given to clients. Paragraph 123 states that insufficient information was provided to

17 out of the 21 clients who formed part of the File Review, including by way of Suitability Reports.

41. I agree with the Respondent that these paragraphs are directly related to the File Review, and that if the Applicants do not comply with the Unless Order, they should also be taken to have admitted the points contained within each of the remaining paragraphs.

42. Although not referred to in the Application for Directions, the position is the same for paragraph 124 of the Statement of Case. It reads "Further, Suitability Reports contained the text quoted at paragraph 70 above, and paragraph 71 is repeated". It thus simply repeats two paragraphs which have already been considered as part of paragraphs 66-90.

TIMING FOR COMPLIANCE

43. The draft directions proposed that the Applicants should have three weeks to comply with the Unless Order. I accept that a highly relevant factor is that the Applicants have had the relevant files since 9 November 2022, so for almost a year.

44. However, Annex 1 runs to 45 closely typed pages of detailed findings. In my judgment, it is reasonable and proportionate to allow the Applicants until 31 December 2023 to comply with the Order. The dates for compliance with the other Directions have been amended in consequence.

DIRECTIONS

For the reasons set out above, it is directed that:

1. The Reply is to be amended so as to remove paragraph 34, and the phrase "nor have they had access to the files since April 2021" from paragraph 36.

2. Unless the Applicants by **5pm on 31 December 2023** file and serve an amended Reply to the Statement of Case, which contains proper particulars of their response to Annex 1, including all matters therein that they dispute and the reasons that they dispute such matters, then:

   (a) paragraphs 33 and 39 of the Reply shall be struck out; and

   (b) the Applicants will be taken to have admitted paragraphs 66 to 90, 94, 107 to 109, and 123-124 of the Statement of Case.

3. In complying with the Unless Order, the Applicants are to provide both a marked up copy of the Reply showing the paragraphs struck out or otherwise amended, and a clean copy with revised numbering.

4. **By 5pm on 19 February 2024**, the parties shall exchange witness statements and serve the same on the Upper Tribunal at 5pm.

5. **By 5pm 19 March 2024**, the parties are to provide the Upper Tribunal with dates to avoid for a six day hearing (to include a reading day for the Upper Tribunal), beginning with 1 May 2024 and ending on 31 December 2024.

ANNE REDSTON
UPPER TRIBUNAL JUDGE

RELEASE DATE: 25 October 202