Neutral citation: **[2024] UKUT 00295 (TCC)**

UT (Tax & Chancery) Case Number: UT/2023/000050

Upper Tribunal
(Tax and Chancery Chamber)

Rolls Building, London

FINANCIAL SERVICES — preliminary hearing – application to amend scope of reference and the Authority's statement of case

Heard on: 26 January 2024
Subsequent written submissions on dates up to 25 March 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE MARK BALDWIN

Between

DARREN ANTONY REYNOLDS

Appellant

and

THE FINANCIAL CONDUCT AUTHORITY

The Authority

Representation:

For the Appellant (on the Disgorgement and Limitation Grounds only): Henry Reid, of counsel, instructed by Keystone Law

The Appellant in person on all other grounds/issues

For the Authority: Ms Eleanor Campbell, of counsel, instructed by the Financial Conduct Authority

DECISION

Introduction

1. This is my decision on the application (the "Application") by the Authority dated 6 December 2023, by which the Authority seeks:

(1) a direction that the scope of Mr Reynolds' reference is confined to the matters set out in his amended reference dated 23 June 2023 as expanded by permission of the Tribunal by paragraph 54(2) of its judgment dated 20 September 2023 (the "Scope Application");

(2) permission to amend its own Statement of Case on the "Limitation Ground" of the reference (the "Amendment Application"); and

(3) directions for the proceedings to the hearing of the reference (the "Directions Application").

2. Mr Reynolds is represented on a pro bono basis in respect of two grounds of his reference (the Limitation and Disgorgement Grounds (see below)) under the Financial Services Lawyers Association (FSLA) RDC Pro Bono Scheme. On all other grounds/matters arising out of his reference, he represents himself.

3. The Application was the subject of an in-person hearing (lasting most of a day) on 26 January 2024 and the Scope Application was subsequently the subject of extensive written submissions, mainly designed to make sure that Mr Reynolds was clear about was being considered and had an opportunity to present his arguments in the best light. Although Mr Reid and Mr Watts (of Keystone Law) are representing Mr Reynolds pro bono in relation to the Limitation and Disgorgement Grounds only, they very kindly allowed an element of "mission creep" and assisted Mr Reynolds with these submissions. I would like to take this opportunity to record my gratitude to them for doing so.

Background

4. On 10 August 2022 the Authority issued a Warning Notice to Mr Reynolds alleging misconduct in the period between 12 March 2015 and 5 February 2018 (the "Relevant Period"). At that time Mr Reynolds was an approved person at Active Wealth (UK) Limited ("Active Wealth"), a small financial advice firm. Active Wealth was authorised by the Authority with permission to conduct regulated activities, including advising on pension transfers. It was alleged that Mr Reynolds breached Statement of Principle 1 (Integrity) of the Authority's Statements of Principle for Approved Persons. He is said to have done this by acting dishonestly and recklessly when performing his controlled functions in relation to advising on investments in relation to the pension transfer business of Active Wealth and by acting dishonestly in his interactions with the Authority.

5. The aspect of Mr Reynolds's conduct which has generated significant interest is his advice in relation to members of the British Steel Pension Scheme ("BSPS"). The relevant background is well known, In summary, as at 30 June 2017 BSPS had approximately 125,000 members and £15 billion of assets. In March 2017 however, BSPS was closed to future accruals, meaning no new members could join it, and existing members could no

longer build up their benefits. In the Autumn of 2017, existing members were required to choose between certain options offered by BSPS. The decision was not straightforward, and it was particularly important that any advice they received was balanced and fair. During the Relevant Period Active Wealth advised 153 customers who were members of BSPS to transfer their British Steel pension to an alternative pension arrangement, usually a SIPP.

6. On 26 January 2023 the RDC heard submissions in relation to the matters alleged in the Warning Notice.

7. On 2 May 2023 the FCA issued a Decision Notice (the "Decision Notice"), by which the Authority concluded that Mr Reynolds lacked honesty and integrity and is therefore not a fit and proper person to perform functions in relation to any regulated activity. Considering those findings, the Authority decided to:

> (1) make an order prohibiting Mr Reynolds from performing any function in relation to any regulated activities carried on by any authorised or exempt persons or exempt professional firm pursuant to section 56 of the Financial Services and Markets Act 2000 (the "Act") ("the Prohibition"); and
>
> (2) impose on Mr Reynolds a penalty of £2,212,316 pursuant to section 66 of the Act (the "Penalty").

8. The Authority concluded in the Decision Notice that during the Relevant Period Mr Reynolds advised the vast majority of Active Wealth's customers to invest in investments for which Active Wealth received prohibited commission. Mr Reynolds arranged for commission to be paid to him - and other employees of Active Wealth - via two separate companies, in an attempt to conceal those payments from, amongst others, the Authority.

9. The Authority further concluded that, in order to procure that Active Wealth customers invested in investments for which he received commission, and in order to maximise the amount of prohibited commission which he received, Mr Reynolds dishonestly:

> (1) advised Active Wealth customers to invest in an investment portfolio created by Greyfriars Asset Management LLP ("Greyfriars") referred to as "P6", consisting of mini-bonds, knowing that it was not suitable for those customers;
>
> (2) falsified P6 Application Forms in order to create the false impression to Greyfriars that P6 was suitable for Active Wealth's customers when it was not;
>
> (3) advised and persuaded customers to transfer out of the British Steel Pension Scheme when he knew it was not in their best interests;
>
> (4) wrote suitability reports to create the false impression that he had provided suitable advice; and
>
> (5) failed to disclose adequately or at all the existence of exit fees to customers and misled some of those customers about the existence of the exit fees.

10. The Authority also concluded that Mr Reynolds dishonestly misled the Authority and the Insolvency Service during the Relevant Period and thereafter, including during their

respective investigations, in order to conceal the prohibited commission payments from them. After the end of the Relevant Period, it is said that Mr Reynolds recklessly allowed the destruction of his Active Wealth email account, which contained evidence relevant to the Authority's investigation.

11. Mr Reynolds has referred the Decision Notice to this Tribunal. The (somewhat involved) history of the reference is (broadly) as follows:

(1) On 30 May 2023 Keystone Law, on behalf of Mr Reynolds, submitted a reference to the Tribunal (the "Original Reference"). The Original Reference referred only the Penalty to the Tribunal and raised two grounds for doing so (the "Limitation Ground" and the "Disgorgement Ground").

(2) On 31 May 2023 an exchange took place between the Tribunal and Keystone Law by which the Tribunal sought to check that Mr Reynolds was not seeking to contest the Prohibition or the underlying facts on which the Authority's decision was based. Mr Watts confirmed that he was not.

(3) On 9 June 2023 however, Mr Reynolds wrote to the Tribunal seeking an "extension of time in which to submit grounds of appeal and make applications in respect of privacy etc" (the "Privacy Application"). Mr Reynolds said he sought three things by that application: (1) orders in relation to privacy matters; (2) a reduction in the quantum of the penalty for the reasons set out in that email (referred to by the parties as the "Property Transfers Ground" and the "Financial Hardship Ground"); and (3) a removal of the finding that he had lacked honesty and integrity in his dealings with clients.

(4) Directions for the amendment of the reference were subsequently given by the Tribunal, with the Authority's agreement.

(5) Mr Reynolds submitted an amended reference on 23 June 2023 (the "Amended Reference"). By the Amended Reference Mr Reynolds added the Property Transfers Ground and the Financial Hardship Ground to the reference. He also added certain new factual allegations in relation to the Limitation Ground. Notwithstanding the terms of his application of 9 June 2023, however, the Amended Reference did not seek to challenge the Prohibition or the findings of dishonesty and recklessness in the Decision Notice.

(6) The Authority conducted a further document review in advance of service of its Statement of Case, and disclosed a further 49 documents to Mr Reynolds, with its Statement of Case, on 21 July 2023.

(7) In his written submissions for the hearing of the Privacy Application, served on the Authority on 1 September 2023, Mr Reynolds suggested that he did not accept the breadth of the prohibition, which he described as a "carpet ban" which was causing him a "large issue for potential work".

(8) At the hearing (the "Privacy Hearing") of the Privacy Application, on questioning by the Tribunal, Mr Reynolds expressly confirmed that he did not wish to challenge the findings of dishonesty and lack of integrity in the Decision Notice,

but that he wished to submit that the Prohibition was too broad in light of the Authority's findings. Such a submission entailed a reference of the Prohibition to the Tribunal. The Authority did not object to Mr Reynolds being permitted to amend the Reference to refer the Prohibition on this basis. Accordingly, my judgment in relation to the Privacy Application recorded that Mr Reynolds was permitted to refer the "the question of the application of the Prohibition to what one might describe as "marginal" activities… but that is all."

(9) On 18 September 2023 Mr Reynolds served his Reply: the Limitation and Disgorgement Grounds were addressed in a document prepared by Mr Reynolds' pro bono counsel ("Reply Part 1"). In a separate document ("Reply Part 2") Mr Reynolds set out his further submissions. Much of Reply Part 2 was concerned with matters relating to the Privacy Application, which the Tribunal had dismissed. Other aspects of that document however, appeared to seek to introduce issues which went beyond the scope of the Amended Reference, and beyond the scope of the amendment to the reference permitted by the Tribunal at the Privacy Hearing. This is why the Authority included the Scope Application in its the Application.

(10) The decision in the Privacy Application (the "Privacy Decision") was released on 21 September 2023.

(11) On 21 September 2023 Mr Reynolds emailed the Clerk to the Tribunal complaining that "The judge states [in the Privacy Decision] that I am not questioning the "honesty and integrity" when my email of the 9th June sent to yourself and the FCA clearly states that as one of the requests for an extension."

The Scope Application

12. Mr Reynolds resists the Authority's Scope Application and asks to be allowed to amend the Amended Reference to include the extent of the claims made by the Authority of acting without honesty and integrity. He describes this as being "the heart of what I have always contested as will be shown in my evidence and at the hearing".

13. Rule 5 of the Rules provides that the Tribunal may permit or require a party to amend any document. Rule 2 provides that the overriding objective of the Rules is to enable the Upper Tribunal to deal with cases fairly and justly. This includes dealing with cases in a way which is proportionate to their importance as well as avoiding unnecessary formality and avoiding delay "so far as compatible with the proper consideration of the issues". There is no dispute between the parties as to the applicable law in this area, which can be briefly summarised, as follows:

14. As Mr Reynolds is not entitled to amend his statement of case, or the scope of the reference, as of right: it is for him to show, amongst other things, that the proposed amendment has a real prospect of success *Bittar v Financial Conduct Authority* [2017] UKUT 83 (TCC) at [54]-[55].

15. Where an applicant refers a decision to issue a penalty, the Tribunal may confirm that the Authority issued a penalty in the right amount or, if it considers, in light of its findings, that the penalty was the wrong amount, it may direct the Authority to issue a

penalty in a different amount – or no penalty at all; Financial Services and Markets Act 200 ("FSMA") section 133(5)(a). Where the applicant refers a decision to issue a prohibition, the Tribunal's powers are more circumscribed: if it makes different findings of fact from those in the decision notice, and it not is satisfied that, in light of its findings, the decision was within the range of reasonable decisions of the Authority, it must refer the decision back to the Authority, for the Authority to reconsider; FSMA section 133(6)(b).

16. Mr Reynolds' proposed amendment to the Amended Reference can only be said to have a real prospect of success if he has any real prospect of successfully challenging the decision to issue the Prohibition, or the amount of the Penalty. Thus, in *Sharma v Financial Services Authority* (Reference Number FS/2010/0008), a case concerning an application by the Authority to strike out a reference relating to a prohibition order, Judge Sir Stephen Oliver QC said, at [43]:

> "I turn now to the merits of the FSA's application. The FSA must satisfy me that there is no real prospect of Mr Sharma's case succeeding. "Succeeding" means that Mr Sharma must have a real prospect of securing from the Tribunal a determination as to the appropriate action which is more favourable to him than that contained in the Decision Notice."

17. In *Hussein v Financial Conduct Authority* [2016] UKUT 549 (TCC), which also concerned a prohibition order, Judge Herrington considered the application of the passage from *Sharma* cited above, on an application by the Authority to strike out two passages in Mr Hussein's reply. He observed, at [104]:

> "Whilst the power to strike out part of a case must be exercised with care, where, as in this case, the basis for the application is that the provisions sought to be struck out are irrelevant and unnecessary, it seems to me that the statement in *Sharma* referred to at [101] above is on point and I should consider whether the allegations which are sought to be struck out have any real prospect of assisting the Tribunal in determining what is the appropriate course for it to take in the light of the case pleaded in the Statement of Case and those paragraphs in the Reply which directly answer that case. If the findings made in respect of the matters pleaded in those paragraphs would make no difference to the Tribunal's decision on the merits of the case it would be contrary to the overriding objective, and in particular to the requirement to avoid unnecessary complexity and costs, to allow points to be argued which are not relevant to the central issues that the Tribunal has to resolve in order to determine the reference. Those are considerations that have to be balanced against the need for Mr Hussein to be able to participate fully in the proceedings and present his case fairly."

18. *Larksway Investments Limited v FCA* [2017] UKUT 422 also concerned a non-disciplinary reference. When considering an application by the Authority to strike out the reference, Judge Herrington referred to the applicable principles as set out in *Hussein* and continued, at [52]:

> "… the test I must apply to this issue is whether on the basis of the material before me Larksway has any real prospect of securing from the Tribunal a

> determination as to the appropriate action which is more favourable to it than that contained in the Decision Notice. In the context of a reference relating to a decision to cancel a firm's Part 4A permission, as in this case, which is a non-disciplinary reference, that means that Larksway must persuade me that there is a real prospect of the Tribunal deciding that the Authority's decision to cancel Larksway's Part 4A permission was not one that in all the circumstances is within the range of reasonable decisions open to the Authority. In other words, I would have to decide that it is arguable that the Authority's decision to cancel is irrational or that there is been [sic] some other flaw in the Authority's decision-making process, or there are other facts and circumstances which would merit the Authority reconsidering its decision."

19. The Tribunal should, therefore, only permit Mr Reynolds to expand the Amended Reference, if it is satisfied that there would be a real prospect of the Tribunal deciding (1) that the full Prohibition was not within the range of reasonable decisions open to the Authority, or (2) that is appropriate to reduce the amount of the Penalty. To apply any other test would be contrary to the overriding objective, as it would risk significant time and costs being wasted hearing issues the determination of which would not have any real prospect of changing the result of the Amended Reference.

The Authority's Submissions

20. For the Authority, Ms Campbell submits that Mr Reynolds has, however, had two opportunities to refer the findings of dishonesty to the Tribunal: once when the Original Reference was issued, and again when it was amended. He did not do so on either occasion. Moreover, at the hearing of the Privacy Application the Tribunal gave him an opportunity to explain whether he wished to refer the findings of dishonesty to the Tribunal. Mr Reynolds expressly disavowed any such intention. Her position, therefore, is that Mr Reynolds has not referred these findings to the Tribunal. He should not be permitted to do so at this stage as (1) he has still failed to articulate any proper basis for doing so; and (2) such a case would have no real prospect of success.

21. As far as the Prohibition is concerned, the Authority submits that Mr Reynolds has no prospect of securing a determination which is more favourable than that in the Decision Notice because, even if he succeeds in persuading the Tribunal to set aside all the findings of dishonesty which he sought to challenge in his submissions before the RDC, it will remain the case that he has not even sought to deny that he made false statements in P6 application forms. Secondly, even if Mr Reynolds succeeded in persuading the Tribunal that his receipt of commission was not dishonest and was merely the result of his negligent failure to understand the applicable rule or, perhaps, his negligent reliance on statements or conduct of third parties, it would remain the case that he had received prohibited commission in excess of £1 million and wrongfully failed to disclose this to his clients. Finally, even if Mr Reynolds were to persuade the Tribunal that his bad pension transfer advice, and/or his failure to disclose exit fees, was merely negligent (and not part of a dishonest attempt to maximise his commission from those investments), it would remain the case that such negligence had a severe impact on hundreds of consumers. Even if the Amended Reference were to be expanded, Mr Reynolds would have no real prospect of

persuading the Tribunal that a full prohibition was not within the reasonable range of decisions by the Authority.

22. As far as the penalty is concerned, even if Mr Reynolds succeeds in his aim, the level of the penalty will remain just in all the circumstances of the case. Mr Reynolds therefore cannot show that if he is permitted to expand the scope of the Amended Reference as he seeks to do, he has a real (as opposed to fanciful) prospect of achieving any reduction in the amount of the Penalty.

23. Finally, Ms Campbell says that Mr Reynolds' failure to refer the Authority's decision in its entirety at the outset, has resulted in significant wasted time and costs. Expanding the Amended Reference as Mr Reynolds now proposes will require the existing statements of case to be re-written, significant amounts of further disclosure on both sides, and a new set of directions to trial. The Authority anticipates that the new issues raised will require evidence from numerous witnesses, including evidence from the victims of Mr Reynolds' misconduct, together with expert evidence in relation to (at least) the nature of the investments in P6 and the appropriateness of transfers out of BSPS. The Authority anticipates that a final hearing of such an expanded Amended Reference would take at least three weeks.

Mr Reynolds' Submissions

24. Mr Reynolds explains the Original Reference not referring to his challenge to the Authority's finding that he acted without integrity in breach of Statement of Principle 1 as being down to "a misinterpretation of what needed to be confirmed to the Upper Tribunal by Mr Watts of Keystone Law on my behalf". Mr Watts does not explain why the Amended Reference refers only to the "Property Transfers Ground" and the "Financial Hardship Ground" as additional grounds and does not seek a removal of the finding that he lacked honesty and integrity.

25. He explains his apparent concession at the Privacy Hearing as being down to a misunderstanding. He accepts that "as the sole director of Active Wealth it was my decision as to the business model. Therefore, as this has now been advised by the Authority that the advice given to me as to the model's validity was wrong, I must accept responsibility and accept some form of prohibition from working in any management capacity within the giving of financial advice." He draws a distinction between this level of fault and the allegation that he acted without honesty or integrity. Although he appeared to concede on this point in the Privacy Hearing, he says that, as soon as he received the Privacy Decision, he contacted the clerk to the Tribunal to challenge the statement in the Privacy Decision that he accepted the Authority's finding of lack of integrity. He submits that the history of his engagement with the Original and Amended Reference "prove an intent, and knowledge and understanding of intent by both the Authority and UTTC, to challenge key elements of the Draft Decision Notice regarding Honesty and Integrity".

26. Mr Reynolds submits that, if he is permitted to argue his amended case, it would have a realistic prospect of success. His submissions relate to the degree of his culpability (including the extent to which he was negligent or not at fault as opposed to being dishonest) and the presence (or absence) of mitigating or aggravating factors.

27. He does not dispute the legal position, so far as his being allowed to amend his reference is concerned, but says that, as he has always sought to clarify the grounds of his reference from shortly after the time limit expired and consistently since then, there is no real prejudice to the Authority.

28. As far as the P6 applications are concerned, Mr Reynolds says that he did challenge the basis on which the Authority's case was put in the RDC. He criticises the Decision Notice as it was based on a very limited selection of cases and P6 forms were completed following guidance from Greyfriars and Active Wealth's compliance consultant. The Authority has clarified that Mr Reynolds' challenge in relation to the P6 application forms containing false statements was not based on sampling issues, but the points about Mr Reynolds completing those forms on advice would seem to remain.

29. As far as the commission is concerned, Mr Reynolds accepts the commission was not allowed but says that he did not structure how it was received to conceal this and he submits that others were paid in the same way, and he believed that the Authority knew that Greyfriars was paying commissions and did not object to it. From their argument on the Limitation Ground, it appears (he submits) that the Authority was well aware that Greyfriars was paying commission. As far as concealment is concerned, Mr Reynolds says that it was made clear to the RDC that he did not conceal the commission payments from the Authority. His exchanges with the Authority and the Insolvency Service can be clarified by evidence he will give. If his evidence is accepted, he believes that the Tribunal will accept that his culpability was greatly less than has been alleged.

30. Mr Reynolds says that, in looking at his culpability and fitness, it is not enough just to look at the amount of the commission received. It is essential to look at his state of mind. As a general matter, he says that he "believed that the advice process was robust". If he is allowed to present files, then the Tribunal will be able to decide whether his advice was negligent rather than dishonest.

31. On the Penalty, and leaving aside the challenges already in the Amended Reference, Mr Reynolds says that the level of Penalty assumes that his case was "as bad as it could be" and a proper consideration of all the evidence would not be likely to endorse such a conclusion.

32. Finally, Mr Reynolds submits that how the FCA wishes to prove its case is a matter for it. Permitting his amendments will involve a revision of the Authority's statement of case but he has always made efforts to explain the breadth of the grounds which he wished to argue. There are currently no directions at as to trial (so it is incorrect to argue that 'new' directions will be required). Certainly, some live evidence will be required from witnesses, because of the unsatisfactory nature of some of the purely documentary evidence relied on by the Authority. Again, there could be reasonable discussions as to this. It would be a matter for the Authority as to whether it requires expert evidence to be adduced, although the Authority has not so far considered it necessary to adduce any such evidence and has been confident in its own ability to assess the relevant evidence. On timing, three weeks may be an overestimate, but this depends on the approach taken by the Authority.

Discussion

33. The allegations made against Mr Reynolds relate to dishonesty or recklessness, amounting to a breach of Statement of Principle 1 (Integrity). They are, therefore, very serious allegations. Given the seriousness of the allegations against Mr Reynolds, it would not be fair or just of me to deprive him of an opportunity to challenge the Decision Notice unless I am satisfied that the proposed challenge does not have a reasonable (as opposed to fanciful) chance of success. As Judge Herrington observed in *Hussein* (see above), the power to strike out part of a case must be exercised with care, and the same must be true of not allowing a party to raise an issue (for example, by amending their reference). If, however, there would be no reasonable prospect of Mr Reynolds' case succeeding, then there would be no merit in prolonging proceedings; indeed, as Judge Berner pointed out in *Badaloo v Financial Conduct Authority*, [2017] UKUT 158 (TCC), it would not be proportionate or fair and just to do so.

34. Mr Reynolds says that he has always made efforts to explain the breadth of the grounds which he wished to argue. Whilst he may have tried to do so, he has not been as thorough or careful as one would expect where this (very important) challenge to the core finding of lack of integrity is concerned. For example, he allowed the Amended Reference to be submitted without any reference to a challenge to the Authority's finding of lack of honesty/integrity, despite his having initially sought to do exactly that. In the Privacy Hearing Ms Campbell made it clear that the Authority would consent to Mr Reynolds referring the prohibition "solely for the purpose of submitting that in view of the findings made in the decision notice the prohibition is too broad" and contrasted that with a full on challenge to the prohibition "which says you were wrong to find that I was dishonest, you were wrong to find I was reckless, I don't lack integrity" to which the Authority would object. Mr Reynolds said that "Miss Campbell summed it [what he was looking for] up very well there." I agree with Mr Reynolds that Ms Campbell's summary of the position is crystal clear, and I have struggled to see how he could be in any real doubt about what he was agreeing to. That said, I accept that, as soon as he received the Privacy Decision, he drew the Tribunal's attention to his position.

35. Putting matters very broadly, my understanding of Mr Reynolds' position is that he did challenge all aspects (including the P6 application forms) of the Authority's case and (both in relation to the (allegedly) unchallenged matters and then more generally) he says that his actions were based on advice and/or a belief that he was acting in line with accepted practices, which he believed were known to the Authority and to which it did not take exception. If he can sustain those arguments, which he says he can do, then it seems to me that he would have a reasonable chance of succeeding in an argument that he had not been dishonest or reckless in breach of Statement of Principle 1.

36. Mr Reynolds may have been negligent, but I am not aware of Mr Reynolds having made a formal admission that his behaviour amounted to a breach of Statement of Principle 2; for example, paragraph 21 of his latest submission begins "Even if I was negligent …". On that basis, I do not consider that I should proceed on the basis that negligence in breach of Statement of Principle 2 is either admitted or a conclusion the Tribunal would inevitably reach in relation to Mr Reynolds' behaviour.

37. In any event, if Mr Reynolds' behaviour were to amount to a breach of Statement of Principle 2 rather than Statement of Principle 1, we would need to consider whether the issue of negligence in breach of Statement of Principle 2 in the alternative is a matter before the Tribunal. *Bluecrest Capital Management (UK) LLP v FCA*, [2023] UKUT 00140 (TCC), dealt at some length with the question whether a new allegation (of a breach of a different Principle) not before the RDC could be part of the matter before the Tribunal and the Upper Tribunal concluded (at [197]) that:

> "The consistent line of case law requires that allegations of regulatory breach be at the very least canvassed before the RDC and potentially must be (a) at least referred to if not relied on in the decision notice (Jabre) and (b) fall within the scope of the allegations made in the warning notice for them to form part of the "matter referred". We agree with the Applicant that the failure to present the Principle 7 and/or COBS case at any point prior to the current application goes beyond a failure to attach legal "labels" to the Authority's case. It involves a new and different allegation."

38. I understand (from extensive discussion of *Bluecrest* in another case in which I am involved) that the Authority has appealed the decision in *Bluecrest*, and the appeal is due to be heard by the Court of Appeal over three days in July. If *Bluecrest* is correct, it will inevitably raise the question whether a breach of Statement of Principle 2 (as opposed to an articulated allegation of a breach of Statement of Principle 1 only) can be seen as automatically to be included in the matter referred as an alternative or lesser allegation.

39. If Mr Reynolds can establish that he has not breached Statement of Principle 1 and if (following *Bluecrest*) a breach of Statement of Principle 2 is not before the Tribunal (or, if it is, he can show that his level of culpability, given his reasonable reliance (if such it was) on others, was low), Mr Reynolds' chances of establishing that a full prohibition was not within the reasonable range of decisions by the Authority would be reasonable (as opposed to fanciful). Whether he actually would be successful or not is an entirely different matter, which would be for another day. But, having crossed that baseline, it would not be just or reasonable to refuse him permission to further amend his Amended Reference.

40. I appreciate that expanding the scope of the Amended Reference may further delay the substantive hearing and will inevitably incur costs. I am also conscious that Mr Reynolds has not always been as rigorous as one might expect in relation to a point he says is so important for him. But I consider that, just as in the tax jurisdiction of the tribunals there is a "venerable principle" that the task of the tribunals is to determine the right amount of tax due, not to decide who has the better argument (see, for example, *Shinelock Limited v HMRC*, [2023] UKUT 00107 (TCC)), there is here a public interest in getting to the "right" regulatory outcome. This includes (as has been observed in a number of cases) in particular ensuring, so far as possible, that persons who are not fit and proper persons to perform functions in relation to a regulated activity are precluded from doing so, but it must equally include seeking to ensure that people accused of serious wrongdoing that would justify such action being taken against them have a proportionate opportunity to defend themselves. It would not be fair or just to do otherwise. I do not consider that allowing Mr Reynolds (even at this stage) to refer the allegations of lack of integrity and the Prohibition and Penalty in that light would be disproportionate as long as

the points he seeks to make in his expanded reference have a reasonable prospect of getting him a different (and improved) outcome.

41. My difficulty with allowing Mr Reynolds to further amend the Amended Reference is that I am not sure exactly what it is that Mr Reynolds wants to say. As Ms Campbell rightly observed, any extension of the reference to include a challenge to the Authority's findings of lack of integrity would need to be properly particularised. **In other words, Mr Reynolds would need to set out, in relation to the Authority's allegations, why he says that an allegation is wrong and/or why it does not support a conclusion that he lacks integrity.**

42. I am not prepared to allow Reply Part 2 to stand as an amendment to the Amended Reference, nor am I prepared (given the cost and timing implications of doing so) to allow Mr Reynolds to extend the scope of the Amended Reference without there being clarity as to the scope of any such extension. I had hoped that the hearing in January would achieve that, but I have clearly failed in delivering on that objective. However, given the seriousness of the allegations against Mr Reynolds, and accepting that I may be guilty of a charge of prolonging proceedings to no good effect, I will give Mr Reynolds permission to apply to further amend the Amended Reference to refer the Authority's finding that he lacks integrity in breach of Statement of Principle 1 and the Prohibition and Penalty in that light. If he wishes to do so, he must serve and file an application to that effect no later than Friday 17 May.

43. For Mr Reynolds' benefit, I stress that any such application must set out succinctly, but comprehensively and very clearly, so that there can be absolutely no doubt at all about his position, precisely why he says that the Authority are wrong to conclude in the Decision Notice that he lacks integrity. He should also indicate what evidence he would lead to support his factual allegations. If he does this, the Authority and the Tribunal will be able to clearly understand the reasons for the extended reference and be able to decide whether his chances of success are reasonable (rather than fanciful).

44. If Mr Reynolds makes such an application, the Authority may (no later than 28 days after Mr Reynolds files and serves his application) file and serve a response to that application, in whatever terms they consider appropriate.

45. Once this process is concluded, I will decide whether (and to what extent) Mr Reynolds may extend the scope of the Amended Reference and determine the Authority's Scope Application. **For Mr Reynolds' benefit, I stress that this is absolutely his last chance to seek to extend the terms of the reference and so he should make sure that his application and proposed amended scope of reference meet the criteria (including the need for clarity and precision) set out above.**

The Amendment Application

46. Turning now to the Amendment Application, the Authority's Statement of Case in its original form dealt with the Limitation Ground as set out in the Amended Reference. It noted that even as at 17 August 2016 - the date on which the Authority accepts time started to run in relation to certain acts of misconduct - the only misconduct which could

reasonably have been inferred from the information the Authority had at that time, was Mr Reynolds' misconduct in giving unsuitable investment advice in relation to P6, and making false statements on P6 application forms.

47. On limitation Reply Part 1 concluded as follows:

> "It is DR's case that the above material means that the only sensible conclusion to draw is that the FCA did have information from which the relevant misconduct (at a minimum to include the recommendation by Active Wealth of unsuitable investments (in the form of P6), and the payment / acceptance of prohibited commission payments) could have been reasonably inferred, prior to 17 August 2016…"

48. The Authority says that, having reviewed Reply Part 1, it considers it appropriate to put Mr Reynolds on notice of the matters in relation to which it says that, even on his limitation case as pleaded, time did not start to run before 17 August 2016.

49. Proposed new paragraph 12A of the Authority's draft Amended Statement of Case pleads that, even if the Authority had information from which it could have been inferred that Mr Reynolds was receiving commission before 10 August 2016, time did not start to run at that date, because it did not know of the particular misconduct of Mr Reynolds in dishonestly concealing commission payments by procuring their payment through two sham companies.

50. At proposed, new paragraph 21B of the Authority's draft Amended Statement of Case, it is submitted that, even if the Authority is to be treated as having known that Mr Reynolds was giving wrong advice and/or receiving commission, before 10 August 2016, time did not start to run in relation to subsequent, similar acts of misconduct until after that date.

51. In the Authority's submission, it is important that Mr Reynolds understands that, on the Authority's case, even if he establishes that prior to 10 August 2016 the Authority had information from it could reasonably have inferred that Mr Reynolds had given bad advice in relation to P6, and/or received prohibited commission, as a matter of law this would not (in the Authority's view) be a complete, or even partial, defence to the Penalty.

52. Ms Campbell submits that the proposed amendments ought not to be controversial: they raise no new or contested issues of fact, and Mr Reynolds will have ample time to consider them before the substantive hearing. She says that it is clearly appropriate that the Authority be permitted to run these arguments at the substantive hearing.

53. There is no suggestion that the proposed amendments are outside the subject-matter of the reference – the *Bluecrest* point discussed above. So, I turn to the criteria for exercising the Tribunal's case management discretion in relation to proposed amendments.

54. I agree with Mr Reid that this is not the time to consider the legal issues relating to the Limitation Ground, and so I will assume for these purposes that they have a reasonable prospect of achieving the aim the Authority is advancing them for. Mr Reid does not appear to dispute this.

55. This is the first case management hearing in these proceedings. The amendments are not late amendments (in the sense of amendments being proposed shortly before/during trial), and it is clearly not too late for them to be able to be fairly determined at the substantive hearing, which is some time away.

56. The reason why the amendments were not advanced sooner is (Ms Campbell says) simply that it was not until service of Reply Part 1, that Mr Reynolds set out his case on limitation in any detail. It was only once it was clear what facts and matters Mr Reynolds relied on in support of the Limitation Ground, that the Authority considered it appropriate for it to further particularise its case on limitation in the way it proposes to do by the amendments.

57. New paragraphs 12A and 12B seem perfectly clear to me.

58. The Authority has now filed and served a witness statement certifying and explaining its disclosure exercise in relation to the existing Amended Reference and confirming that its disclosure is complete in relation to all matters pleaded (including the proposed new paragraphs 21A, 21B, and new Annex 2 to its draft Amended Statement of Case). The Authority agrees that Mr Reynolds should be allowed to amend Reply Part 1 to deal with these amendments. Given that the hearing is now unlikely to take place before the Autumn at the earliest, I agree that the introduction of paragraphs 21A and 21B will have little (if any) impact on the timetable for the proceedings, or the resources of the parties.

Other Directions

59. Until the scope of the reference has been clarified once and for all, there is no point in my making directions for the proceedings to the substantive hearing of the reference. Ms Campbell and Mr Reid have jointly suggested some directions, for which I am grateful, and I have given some thought to directions too. As soon as I have dealt with the scope issues, I will circulate draft directions.

Disposition

60. In conclusion, for the reasons set out above:

(1) Consideration of the Authority's Scope Application and the Directions Application are adjourned.

(2) The Authority's Amendment Application is allowed.

(3) Mr Reynolds is permitted to amend his Reply Part 1 in response to the amendments contained in the Authority's Amendment Application referred to in (2) above.

(4) I give permission for Mr Reynolds to apply for permission to further amend the Amended Reference to refer the determination of the Authority in its Decision Notice that he lacked integrity in breach of Statement of Principle 1 and the Prohibition and Penalty in that light. The terms of that permission are set out at [42]-[45] above.

DEPUTY UPPER TRIBUNAL JUDGE MARK BALDWIN

RELEASE DATE: 19 April 2024