Neutral Citation: **[2025] UKUT 00197 (TCC)**

Case Number: UT/2023/00014 - 17

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, London

FINANCIAL SERVICES – procedure – application for a witness summons

Heard on: 11 March 2025
Judgment date: 24 June 2025

Before

JUDGE JONATHAN CANNAN

Between

(1) BANQUE HAVILLAND SA

(2) EDMUND LLOYD ROWLAND

(3) VLADIMIR BOLELYY

Applicants

and

THE FINANCIAL CONDUCT AUTHORITY

Respondent

and

DAVID JOHN ROWLAND

Third Party Rights Applicant

Representation:

For the First Applicant: Alex Bailin KC and Jason Mansell of counsel instructed by Kingsley Napley LLP
For the Second Applicant: Simon Pritchard of counsel instructed by Peters & Peters LLP
For the Third Applicant: Rhys Meggy of counsel, instructed by Hickman & Rose
For the Third Party Rights Applicant: Bryan Shacklady of Forsters LLP

For the Respondent: James Purchas and Catherine Vaughan-Neil of counsel instructed by the Financial Conduct Authority

For Mr David Weller: Ben Strong KC instructed by Greenberg Traurig LLP

DECISION

INTRODUCTION

1. The Financial Conduct Authority ("the Authority") has applied for the Tribunal to issue a witness summons to Mr David Weller so that he is required to attend the hearing of these references to give evidence on behalf of the Authority. The references are listed for hearing between 15 September 2025 and 3 October 2025.

2. Mr Weller has been the subject of a previous application in which the Authority invited the Tribunal to issue a witness summons of its own initiative. Judge Herrington declined to do so for reasons set out in a decision released on 8 May 2024 with neutral citation [2024] UKUT 00115 (TCC). That decision was released following a case management hearing which considered various aspects of the references ("CMH 1"). I gratefully adopt Judge Herrington's summary of the issues and the procedural history of the references at [1] – [28] of CMH 1.

3. In brief, the Authority's case against the Applicants is that they were all concerned to some extent in the production and dissemination of a presentation which the Authority alleges proposed a manipulative trading strategy aimed at creating a false or misleading impression of the market in Qatari bonds ("the Presentation"). The Presentation was prepared in the Autumn of 2017. The Authority alleges that ideas in the Presentation were disseminated and subsequently published in two media articles.

4. The primary case of the First Applicant ("the Bank") is that none of the persons alleged to be involved were acting in the course of the Bank's business. As such, their actions and knowledge cannot be attributed to the Bank. In the alternative, the business described in the Presentation was not carried out with respect to regulated activities or ancillary activities in relation to designated investment business and therefore no obligations under the Authority's Principles for Businesses could arise. Further, the Presentation was not disseminated as alleged by the Authority.

5. The Second Applicant held a branch senior manager function at the Bank. He denies any involvement with drafting or disseminating the Presentation.

6. The Third Applicant says that he was the Second Applicant's assistant and had been undertaking some research for the Second Applicant. He had been acting on instructions and under the guidance of Mr Weller who was the person who prepared the Presentation. He believed that the Presentation was connected to the Rowland family business and was wholly unconnected to the Bank. He did not disseminate the Presentation save for passing it on to the Second Applicant.

7. Mr Weller also held a branch senior manager function at the Bank. He was the subject of a Decision Notice dated 17 January 2023 in relation to his alleged involvement in creating the Presentation, knowing that there was a material risk that it would be disseminated in order to market the Bank's services to potential investors in the Middle East who might have reason to put economic pressure on Qatar. The Decision Notice set out the Authority's decision to prohibit him from performing any function in relation to any regulated activity and to impose a fine of £54,000. Mr Weller decided not to refer his Decision Notice to the Tribunal. He accepts that he was involved in creating the Presentation but as a matter of fact disputes the Authority's allegations as to the circumstances in which it was created. He says that it was never intended as a serious document.

8. Judge Herrington described the position of Mr Weller and the parties in relation to Mr Weller's evidence at the time of CMH 1 at [94] – [97]:

> 94. In this case, as Mr Weller had indicated in advance of the case management hearing that he would object to being summonsed as a witness under Rule 16, I directed that in the interests of

dealing with the matter efficiently he be invited to make submissions on the Authority's application before any decision was made to summons him. It is clearly envisaged by the wording of Rule 16 (4) that a potential witness may be given the opportunity of objecting to the issue of the summons before it has in fact been issued, rather than being required to object after the event. Accordingly, Mr Strong KC made submissions on behalf of Mr Weller at the case management hearing as to why the Authority's application should be refused.

95. The Authority contends that Mr Weller should be required by the Tribunal to give evidence as a neutral witness under Rule 16 of the Rules. The Authority says that the unusual circumstances of this case are such that it is appropriate for both the Authority and the Applicants to be permitted to cross-examine Mr Weller. The Authority contends that it is clear that Mr Weller's evidence is likely to be of substantial assistance to the Tribunal, having regard to his role in the creation of the Presentation and his status as a senior employee at the Bank's London Branch. However, it says that it would not be appropriate for the Authority to call Mr Weller as its own witness, in circumstances where (i) the Authority has found that Mr Weller's conduct in relation to the Presentation lacked integrity; (ii) there is an absence of regulatory finality as between the Authority and Mr Weller (with the Authority being precluded from issuing a Final Notice to him pending the determination of these references); and (iii) the Authority does not accept important aspects of Mr Weller's characterisation of relevant events, including his own conduct in relation to the Presentation.

96. The Authority therefore says that the Tribunal should give directions to the parties to facilitate Mr Weller giving evidence as a neutral witness.

97. None of the Applicants wish to call Mr Weller as a witness. However, they have made it clear that if he were to be called as a witness by the Authority or by the Tribunal on its own initiative then they would wish to cross-examine him. They oppose the Authority's invitation that Mr Weller be treated as a neutral witness on the basis that it is open to the Authority to call him as their own witness even in circumstances where some of his evidence undermines the Authority's case.

9. The Authority's position in CMH 1 was recorded at [117] and [118] as follows:

117. Mr Purchas explained the rationale for the application as follows:

(1) The circumstances of the present case are unusual. The Authority has issued four Decision Notices in respect of materially the same factual circumstances but only three of those decisions have been referred to the Tribunal. Further, because Mr David Rowland has made a third-party reference in relation to Mr Weller's Decision Notice, the Tribunal has held that the Authority is precluded from issuing a Final Notice to Mr Weller.

(2) The net sum of these unusual circumstances is that Mr Weller, despite not being a party to these proceedings, maintains a real interest in their outcome, notwithstanding his decision not to contest the allegations against him any further, including because Mr Edmund Rowland and Mr Bolelyy seek to place all the blame for the improper nature of the Presentation on Mr Weller. Put another way, the consequence of the Applicants' references and that of Mr David Rowland in particular is that Mr Weller has indirectly been brought back into the fold in regulatory proceedings which he has sought to avoid. If the Tribunal was to make findings different to those reached by the Authority in Mr Weller's Decision Notice, by reason of Mr David Rowland's third party reference, the Authority might be required to issue a Further Decision Notice to Mr Weller.

(3) Mr Weller's evidence is likely to be of substantial assistance to the Tribunal, in circumstances where (i) Mr Weller was one of a very small number of individuals who attended both the meetings held on 13 September [2017] and has had and is likely therefore to have relevant evidence to give as to the Presentation's origins and the purposes for which it was created; (ii) Mr Weller contributed materially to the contents of the Presentation; and (iii) Mr Weller was at all material times a senior employee of the Bank and authorised as an

SMF21 (such that he has had and is likely to have relevant evidence to give as to the wider context surrounding the Presentation).

(4) Mr Rowland and Mr Bolelyy seek to portray Mr Weller as solely responsible for the improper nature of the Presentation, Mr Edmund Rowland going so far as to allege that in December 2017 Mr Weller threatened to "blame anyone he could" for the Presentation unless he was paid £200,000.

118. Mr Purchas submitted that it would be inappropriate for the Authority to call Mr Weller as its own witness because:

(1) The Authority has found that Mr Weller's conduct in relation to the Presentation lacked integrity. That has obvious implications for the appropriateness of the Authority calling Mr Weller to give evidence as its own witness, particularly in circumstances where Mr Weller's recklessness is a live issue between the Authority and the Bank.

(2) The absence of regulatory finality as between Mr Weller and the Authority means that Mr Weller has a direct personal interest in the outcome of these proceedings, which interest may well be at odds with the Authority's regulatory objectives and the RDC's conclusions in the Decision Notices. It would not be appropriate, in the Authority's view, for it to embark upon a process of producing a witness statement with Mr Weller in relation to the very events in respect of which the Authority alleges that his conduct lacked integrity, particularly where the regulatory action which the Authority proposes to take against Mr Weller cannot take effect pending the determination of these references.

(3) The Authority does not accept important aspects of Mr Weller's characterisation of relevant events, including his own conduct in relation to the Presentation. It would not be entitled to cross-examine him on those matters which would undermine the Tribunal's ability to determine these references on the basis of the best available evidence. Although the Tribunal could hear the Authority's submissions as to why Mr Weller's evidence in respect of such matters should not be accepted, it would not have the benefit of Mr Weller's response to those submissions, because the Authority will not be permitted to cross-examine him and he will not have the opportunity to respond to the allegations made against him. That would place the Tribunal in an unsatisfactory position and would be inconsistent with the overriding objective. Furthermore, it would cause some unfairness to Mr Weller himself, who will be deprived of the opportunity to respond to the Authority's case in respect of the areas where the Authority does not entirely accept his characterisation of events.

10. It is important to note that at [119], Judge Herrington concluded that Mr Weller's evidence would be highly relevant to the references:

119. I make no criticism of the Authority for having aired this proposal before the Tribunal. It is, as the Authority says, an unusual situation. I have no doubt that, for the reasons given by Mr Purchas, as summarised at [118(3)] above, Mr Weller's evidence is highly relevant to the matters that the Tribunal has to determine.

11. It appears that the reference to [118(3)] was intended as a reference to [117(3)]. Judge Herrington went on to conclude that it would not be appropriate for the Tribunal to call Mr Weller as its own witness. He gave five reasons for reaching this conclusion. First, he considered that there were "formidable practical difficulties" and the Tribunal would be forced to enter the arena in obtaining Mr Weller's evidence in chief. That is not relevant for present purposes. The Judge's other reasons are relevant:

123. However, this is not a case where the Tribunal is truly acting on its own initiative, as envisaged by the Rules. In reality, as Mr Strong submitted, this is an application by the Authority for the Tribunal to summons a witness who the Authority believes can assist its case in some respects, but who it also believes will give evidence that might undermine the Authority's case. If I were to grant the application, then in effect the Authority would be able to circumvent the "non-impeachment principle".

124. In those circumstances, as Mr Strong submitted, where the Authority believes that Mr Weller has relevant evidence to give on the issues that are before the Tribunal, then it should seek to call him as its witness.

125. Secondly, it is not clear that on the basis of the Authority's explanation as to why it cannot call Mr Weller that he is to be regarded by them as not being a witness of truth, at least in relation to the matters on which they wish him to give evidence. There is no allegation of dishonesty against Mr Weller on the part of the Authority; it seems to me that the dispute between the Authority and Mr Weller is as to how his behaviour and the events concerned are to be characterised.

126. Thirdly, as the authorities cited above indicate, there is no bar, in civil or criminal litigation, to a party submitting that part of what its own witness says should not be accepted in the light of evidence from another witness, even if the party concerned cannot cross-examine its own witness. There will be plenty of evidence, including evidence given by the Applicants and the relevant documentation which will give the Authority ample opportunity to make submissions on that basis.

127. Fourthly, it is not clear that the Authority regards it as essential that it has evidence from Mr Weller in order to make out its case against any of the Applicants. As regards the dispute about the meetings held on 13 September 2017, the Authority has the evidence of Mr Unwin, who also attended the meeting and whom the Authority interviewed. For its case on attribution, the Authority relies on the actions of Mr Edmund Rowland as well as the actions of Mr Weller.

128. Fifthly, I accept that Mr Weller has strong reasons for not wishing to participate in the proceedings. He made the decision not to contest the findings in his Decision Notice. I was told that this was because he wished to draw a line under a painful and protracted episode for the sake of his health and his family. If he had referred his Decision Notice, his reference would have been heard with the present references and he could not have been called by the Authority or the Tribunal as a witness. In my view it would be highly undesirable to require the subject of regulatory proceedings to submit themselves for cross-examination in the Tribunal in relation to his own regulatory proceedings. As the Authority has noted, in the absence of a Final Notice, the regulatory proceedings against Mr Weller have not yet been concluded and it is possible that the Authority may have to consider the issue of a Further Decision Notice in the light of any findings made in respect of Mr David Rowland's third-party reference. Those circumstances are a strong indication that it would not be fair for Mr Weller to be compelled to give evidence against his wishes to draw a line under the proceedings.

12. When the Judge referred at [123] to the "non-impeachment principle" he was referring to a principle described by Leggatt LJ in *R v Smith (Jordan)* [2019] EWCA Crim 1151 at [28]:

28. The relevant principles can, we think, be summarised as follows:

(1) Subject to the overall control of the court, the prosecution has a discretion as to what witnesses to call at a trial, but that discretion must be exercised in accordance with the interests of justice and the general duty of the prosecution to put all evidence which it considers relevant and capable of belief before the jury.

(2) It is open to the prosecution - and indeed the interests of justice may require it - to call a witness to give evidence only part of which the prosecution considers to be worthy of belief.

(3) In such circumstances the prosecution is in principle entitled to adduce other evidence to contradict that part of the witness's evidence which the prosecution considers to be inaccurate or false, and to invite the jury to reject that part of the witness's evidence.

(4) That may be done without applying to treat the witness as hostile. However, unless the witness is declared hostile, evidence adduced to contradict the witness may not include a previous inconsistent statement of that witness, nor is the prosecution, as the party calling the witness, entitled to cross-examine the witness.

13. These principles were in the context of a criminal prosecution before a jury and were cited by Judge Herrington at [105]. At [106] he concluded that there was no reason the same principles should not apply to the regulatory proceedings in these references. There is no specific challenge to that conclusion, although it appears to me that the principles may operate differently in the context of regulatory proceedings before a specialist Tribunal. I address this further below.

14. Following Judge Herrington's decision in CMH 1 not to summons Mr Weller, the Authority wrote to Mr Weller's solicitors asking whether he would be willing to give evidence voluntarily. Mr Weller declined to do so. The Authority accepted that Mr Weller had "understandable concerns" as to the possibility that further adverse findings might be made against him. The Authority therefore offered reassurance that if having heard his evidence the Tribunal did make findings against him which were more adverse than those contained in its Decision Notice, then it would not seek to increase his financial penalty ("the Reassurance"). The Authority noted however that in those circumstances it may need to issue a Further Decision Notice reflecting the findings of the Tribunal. The Authority stated that if Mr Weller chose to refer any Further Decision Notice to the Tribunal, the Authority would not seek to increase the financial penalty. The Authority did recognise that if Mr Weller did refer a Further Decision Notice then the Tribunal itself could decide to increase the penalty. Despite the Reassurance, Mr Weller remained unwilling to give evidence voluntarily.

GENERAL PRINCIPLES

15. Rule 5(3)(d) of The Tribunal Procedure (Upper Tribunal) Rules 2008 provides the Tribunal with the following case management power:

> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Upper Tribunal may …
>
> (d) permit or require a party or another person to provide documents, information, evidence or submissions to the Upper Tribunal or a party;

16. The jurisdiction to issue a witness summons appears in Rule 16:

> **Summoning or citation of witnesses and orders to answer questions or produce documents**
>
> 16(1) On the application of a party or on its own initiative, the Upper Tribunal may —
>
> (a) by summons (or, in Scotland, citation) require any person to attend as a witness at a hearing at the time and place specified in the summons or citation …
>
> (2) A summons or citation under paragraph (1)(a) must—
>
> (a) give the person required to attend 14 days' notice of the hearing or such shorter period as the Upper Tribunal may direct; and
>
> (b) where the person is not a party, make provision for the person's necessary expenses of attendance to be paid, and state who is to pay them.
>
> (3) No person may be compelled to give any evidence or produce any document that the person could not be compelled to give or produce on a trial of an action in a court of law in the part of the United Kingdom where the proceedings are due to be determined.
>
> (4) A person who receives a summons, citation or order may apply to the Upper Tribunal for it to be varied or set aside if they did not have an opportunity to object to it before it was made or issued.

17. Mr Weller correctly submitted that just because a person can give relevant evidence does not mean that the Tribunal must hear from that witness. Rule 15 provides that the Tribunal can limit the evidence it hears as a matter of case management.

18. There was no dispute between the parties as to the principles I should apply in determining whether to issue a witness summons to Mr Weller. I can summarise the principles as follows:

(1) There is a burden on the party seeking a witness summons to justify the need for it (see *Morris v Hatch* [2017] EWHC 1448 (Ch)).

(2) A witness summons will be justified only if there is a real likelihood that the witness will give evidence that will materially assist the Tribunal in its determination of an issue or issues in the proceedings (see *Ford and Owen v FCA* [2017] UKUT 147 (TCC) at [12]).

(3) The grounds on which a potential witness can oppose the issue of a witness summons include where it would be unfair and oppressive for the Tribunal to issue a witness summons (see *Barclays Plc v FCA* [2024] UKUT 00214 (TCC) at [47] and [48]).

(4) There is a burden on the potential witness to establish that a witness summons would be unfair and oppressive (see *Barclays Plc v FCA* at [51]).

(5) What is unfair and oppressive is extremely fact-sensitive. It involves a balancing exercise taking into account all the circumstances including any unfairness to the potential witness, the materiality of the evidence and the consequences for the fairness of the proceedings if the potential witness is not required to give evidence (see *Barclays Plc v FCA* at [48]).

19. Mr Weller submitted that if a potential witness can show some basis for saying that it would be unfair and oppressive to require the witness to give evidence, essentially a prima facie case, then the Tribunal goes on to balance all relevant factors. I do not consider that is the correct approach. The question is whether in all the circumstances it would be unfair and oppressive to require the witness to give evidence. That is the approach I intend to take, although both approaches ought to give the same result.

THE PARTIES' POSITIONS

20. The Authority's application dated 5 September 2024 is made on the basis that it considers there is a real likelihood that Mr Weller will give evidence that will materially assist the Tribunal in determining the references. The Authority seeks a direction that Mr Weller should give evidence on the following matters:

(1) The origins of the Presentation and the circumstances in which it came to be prepared.

(2) Details of any meetings and exchanges in relation to the Presentation.

(3) Details of any meetings or exchanges with the Second Applicant following publication in the media of ideas related to the Presentation.

(4) The reasons for Mr Weller refusing to sign a "declaration of honour" to the Luxembourg Commission de Surveillance du Secteur Financier.

(5) The Second Applicant's allegation that Mr Weller demanded a payment of £200,000 and threatened to blame anyone he could for the Presentation if it was not paid.

21. These matters can be viewed as broadly encompassing the origins of the Presentation, the dissemination of the Presentation and what the Authority alleges was an attempt by the Second Applicant to cover up his responsibility for the Presentation.

22. The Second Applicant's allegation that Mr Weller demanded a payment of £200,000 is not directly relevant to the Authority's case on the references or to the Second Applicant's case on his reference. However, if true it would be relevant to the credibility of any evidence given by Mr Weller.

23. I summarise the position of Mr Weller and the Applicants on the Authority's application in the following paragraphs.

24. Mr Weller objects to the application. He accepts that he would be able to give evidence relevant to the issues and that in some respects it would support the Authority's case against the Applicants. However, he says that significant aspects of his evidence differ from the case being put forward by the Authority. Overall, Mr Weller contends that it would be unfair and oppressive for him to be required to give evidence taking into account the following factors:

(1) The evidence he could give is not important or essential to the Authority's case. There is other evidence on which the Authority can rely to establish its case. It would not be unfair to the Authority if it cannot call Mr Weller to give evidence.

(2) Judge Herrington found at [128] of CMH 1 that Mr Weller had "strong reasons" for not wishing to participate in the proceedings and that it would be "highly undesirable" if the subject of regulatory proceedings was required to submit himself to cross-examination in relation to those proceedings.

(3) Notwithstanding the Authority's Reassurance, Mr Weller would remain at risk of adverse findings in a Further Decision Notice following the hearing. It is inconsistent with the statutory scheme in the Financial Services and Markets Act 2000 ("FSMA") to require Mr Weller to give evidence before the content of his decision notice is determined. The protection afforded by the statutory scheme would be circumvented.

(4) The Third Applicant has made clear that in cross-examination he would mount a root and branch attack on Mr Weller's honesty. Mr Weller will not be in a position to challenge the evidence of any other party or to make submissions on the evidence.

(5) Mr Weller's mental health and family life has been severely affected by the prolonged regulatory proceedings against him. That impact will be unfairly exacerbated if he is now required to give evidence.

(6) The Authority ought to have made the present application at CMH 1 before Judge Herrington, as an alternative to its invitation to the Tribunal to summon Mr Weller of the Tribunal's own initiative. The Authority has offered no good explanation for its failure to do so.

(7) The fact that the Second Applicant has alleged that Mr Weller attempted to blackmail him is not a good reason for Mr Weller to be compelled to give evidence.

(8) None of the other parties say that it would be unfair if Mr Weller is not called to give evidence.

25. The Third Applicant expressly objects to the Authority's application. His objections may be summarised as follows:

(1) Mr Weller is not a witness of truth. The Authority has accepted that: in certain respects he lacks integrity; he has a motivation to give untrue, self-serving evidence; and

that he has already given an untrue account as to aspects of his own conduct in relation to the Presentation.

(2) The Authority's Reassurance does not remove the motivation for Mr Weller to give untrue or self-serving evidence.

(3) There are key tensions between the Authority's pleaded case as to Mr Weller's involvement in drafting the Presentation and his own account of that involvement. For example, it is Mr Weller's evidence that no-one took an alleged discussion about the Presentation seriously. He produced a "short, jokey document" and it did not occur to him that it would be used to market the Bank. The Authority does not accept that evidence and it is seeking to both commend and impugn Mr Weller's evidence at the same time.

(4) Similar tensions arise in relation to Mr Weller's actions following publication of the Presentation. For example, when the first article was published he considered that there was no truth in the article and no reason to think that the Presentation had been disseminated. It was only when the second article was published that he realised the Presentation had been disseminated. The Authority did not accept Mr Weller's evidence in relation to the first article and considers that it must have been obvious to him that the Presentation had been disseminated.

(5) In these circumstances, it cannot be said that there is a real likelihood that Mr Weller's evidence will materially assist the Tribunal. Mr Weller's evidence would add layers of complexity to the proceedings and there would be practical difficulties about how his evidence in chief would be given. It is also said that there may be a need for further disclosure in respect of Mr Weller's communications with the Authority.

(6) There is other evidence including the evidence of Mr Unwin and the documentary evidence which is likely to carry more weight in the Tribunal's determinations.

26. The Second Applicant expresses himself to be neutral in relation to the Authority's application, although he does make certain observations which I shall consider in the discussion below.

27. The Bank is also neutral as to whether a witness summons should be issued. However, it has made submissions as to the scope of the evidence Mr Weller should give if he does give evidence. In particular, the Bank does not consider that there should be any direction limiting the scope of Mr Weller's evidence, not least because the Authority's list of issues on which Mr Weller should give evidence does not include whether Mr Weller and the other individual Applicants were acting in the course of the Bank's business. The Bank considers that Mr Weller could provide highly relevant evidence as to the capacity in which the individuals were acting in creating the Presentation. The Bank is particularly concerned that the scope of its cross-examination of Mr Weller should not be limited by any witness summons.

DISCUSSION

28. I shall structure my consideration of the issues under the following broad headings:

(1) Whether there is a real likelihood that Mr Weller's evidence would materially assist the Tribunal.

(2) Fairness to the parties.

(3) Unfairness to Mr Weller.

(4) The overall balancing exercise.

Material assistance

29. It is not necessary to set out in detail the evidence in relation to the issues where the Authority says that Mr Weller's evidence is relevant. I have considered the parties' submissions and the pleaded cases and I am satisfied that there is a real likelihood that Mr Weller would give evidence that would materially assist the Tribunal in determining the references. That is consistent with the conclusion of Judge Herrington in CMH 1 at [119] that Mr Weller would be able to give highly relevant evidence.

30. In finding that there is such a real likelihood, I take into account that there is no witness statement from Mr Weller. It is not at this stage possible to say what Mr Weller's evidence would be at the hearing, but I shall assume his evidence would be in line with what I am told he has said in interview with the Authority.

31. I do not accept the Third Applicant's submission that the Authority's position in seeking to both commend and impugn Mr Weller's evidence, or that any practical difficulties in adducing Mr Weller's evidence, means that his evidence is unlikely to materially assist the Tribunal. In short, Mr Weller's involvement in preparing the Presentation means that he would be an important witness as to the origins of the Presentation and the circumstances in which it came to be prepared. It is also likely that his evidence would materially assist in relation to subsequent events, including dissemination of the Presentation, the alleged cover-up after publication in certain media of ideas in the Presentation and the capacity in which various individuals were acting. It may be that his evidence as to dissemination of the Presentation and the alleged cover up would be of more limited relevance, but I am satisfied that it would be relevant.

32. I cannot at this stage make any assessment as to the credibility of any person's account in relation to these matters and nothing I say in this decision should be taken as doing so. In the ordinary course, a Tribunal will wish to hear all relevant evidence on matters which are in dispute. It is only having heard all the oral and documentary evidence that the Tribunal will be able to make such an assessment. Some of the issues on which Mr Weller would give evidence involve oral exchanges between Mr Weller and the Second and Third Applicants where their evidence is diametrically opposed. What was said in alleged meetings is not necessarily reflected in any contemporaneous documents. There are issues where the Tribunal could not adopt the approach described in *Gestmin v Credit Suisse* [2013] EWHC 3560 (Comm), of placing more reliance on contemporaneous documents than on oral evidence.

33. In the absence of oral evidence from Mr Weller, the Authority intends to rely on what Mr Weller has previously said in interviews with the Authority. Such evidence will be hearsay and whilst it is prima facie admissible pursuant to section 174 FSMA, it is usually preferable to have direct evidence from the relevant witness. It appears that there may be a challenge to the admissibility of the interview evidence. I am not in a position to rule on the admissibility of that evidence. I have not heard full submissions from the parties and I have not been taken to the interview transcripts themselves. For present purposes I shall assume that the interview transcripts are admissible. In those circumstances, whilst Mr Weller's oral evidence may be described as important to the Authority's case, it cannot be described as essential. Indeed, it is not the Authority's position that Mr Weller's oral evidence is essential to its case. If I refuse the application for a witness summons then that would no doubt be relevant in considering any issue as to the admissibility of the transcripts.

34. I recognise that the Authority would be in a difficult position in relation to Mr Weller's evidence, in the sense that it could be inviting the Tribunal to accept some of his evidence but to reject other aspects of his evidence on the basis that it is untrue and/or self-serving. However,

I do not consider that the non-impeachment principle described in *R v Smith (Jordan)* means that the Authority should not be entitled to rely on Mr Weller's evidence.

35. There are various issues where the Authority does not accept what Mr Weller has previously said in interview. It does not seek to adduce his evidence in relation to those issues, but of course that does not mean that the other parties could not cross-examine Mr Weller. Subject to general case management, they would be entitled to cross-examine Mr Weller on all issues where he can give relevant evidence, including the Bank's case that Mr Weller and the other individuals involved were not acting in the course of the Bank's business. Cross-examination may also include matters going solely to credibility, such as the alleged demand for payment referred to by the Second Appellant.

36. Judge Herrington considered the non-impeachment principle in CMH 1, but at [125] he could not see that the Authority did not regard Mr Weller as being a witness of truth. At that stage it was being argued that the Authority was seeking to avoid the non-impeachment principle by inviting the Tribunal to call Mr Weller as a neutral witness who could be cross-examined by the Authority.

37. It does not seem to me that the non-impeachment principle described in *R v Smith (Jordan)* is engaged in the present circumstances. The Authority is not seeking to adduce any previous inconsistent statement of Mr Weller and it is not now seeking to cross-examine Mr Weller.

38. The principles described in *R v Smith (Jordan)* were based on an earlier Court of Appeal case of *R v Cairns* [2002] EWCA Crim 2828. In that case, the issues arose in the context of a challenge to the prosecution's decision to call a witness on certain matters who it was said the prosecution could not have regarded as a witness worthy of belief. That was because the prosecution did not accept the witness' evidence on certain other matters. The defendants had applied at trial to exclude that evidence on the basis that the prosecution had unreasonably or perversely exercised their discretion to call the witness. Alternatively, that the Judge should have exercised his discretion to exclude the witness' evidence pursuant to section 78 Police and Criminal Evidence Act 1984 on the basis that it would adversely affect the fairness of the proceedings. The Court of Appeal stated at [36]:

> 36. We know of no principle of law or justice which requires the prosecution to regard the whole of a witness's evidence to be reliable before he can be called as a prosecution witness. If it is open to the prosecutor to form the view that part of a witness's evidence is capable of belief, even though the prosecutor does not rely on another part of his evidence, then the prosecutor is entitled to exercise its discretion so as to call that witness. That must be so, since part of the witness's evidence could be of assistance to the jury in performing its task, and it would therefore be contrary to the interests of justice to deprive them of that assistance. The prosecution in such circumstances is not to be prevented from calling such a witness.

39. The Third Applicant argued that *R v Smith (Jordan)* and *R v Cairns* require that the evidence to be adduced by a prosecutor, and in this case by a regulator, must be worthy of belief on the topic on which it wishes the witness to give evidence. A prosecutor can adduce evidence on topic A even though it considers the witness' evidence on topic B would not be worthy of belief. A prosecutor cannot adduce evidence from a witness on topic A where it thinks he will give an untrue account on certain aspects of topic A.

40. The Court of Appeal in *R v Cairns* did not expressly consider such a submission, but it did say as follows:

> 39. So it is clear, in our view, that the prosecution may properly call a witness when they rely on one part of his evidence but not on another part. Whether they choose to call such a witness is a

matter for their discretion, to be exercised on the principles which we have already set out. But that does not amount to an attack on their own witness's credit.

40. In the present case the prosecution identified a rational explanation for not relying on part of Barry Cairns' evidence, namely his relationship with his wife and with his friend Hussain. That explanation did not cast doubt on his evidence about Chaudhary and Zaidi.

41. The principles were recently applied by the Court of Appeal in *R v Sikander* [2024] EWCA Crim 43 where Stuart-Smith LJ stated at [17]:

17. We are unable to detect any arguable merit in this proposed ground. The principles are well-known and are set out in *Cairns* [2002] EWCA Crim 2838: see in particular paragraphs 31 to 36. There is no principle of law that requires the prosecution to regard the whole of a witness's evidence to be reliable before they could be called as a prosecution witness. If it is believed that a witness can give no relevant evidence then clearly they should not be called. However, if the prosecutor takes the view that some of the witness's evidence is relevant and capable of belief, even though the prosecutor does not rely on other parts of their evidence, the prosecutor is entitled to exercise their discretion and to call the witness. If part of a witness's evidence is capable of being of assistance to the jury, the prosecution should not be prevented from calling the witness. Deciding whether any and if so what evidence of a given witness is reliable or unreliable is the primary function of the jury, as this jury was told and every jury is told.

42. Whilst it was possible to compartmentalise the evidence in *Cairns* and *Sikander*, there is no suggestion that it is necessary to be able to do so in all cases. It seems to me that in the present case the ultimate question is whether the evidence on which the Authority seeks to rely is likely to materially assist the Tribunal in its determination of the issues. I am satisfied that there is a real likelihood that it would materially assist despite the tensions identified by the Third Applicant.

43. In any event, I agree with the Authority that it is possible to compartmentalise Mr Weller's evidence. They seek to rely on his factual evidence as to what meetings took place and what was said at those meetings. They accept his evidence of those facts. What they do not accept is his subjective understanding of what he was being asked to do and whether it was a serious request.

44. I also take into account that these proceedings are being heard by a specialist tribunal and do not involve a jury trial. The Third Applicant submitted that the position was the same in civil proceedings and relied on what was said by Hildyard J in *ACL Netherlands v Lynch* [2022] EWHC 1178 (Ch):

682. In addition, as it seems to me, and as was submitted by the Defendants, the party which has sought to rely on the witness as a witness of truth, cannot invite the Court to believe the parts identified by that party as helpful to its case and yet disbelieve other parts which go the other way. The whole is the evidence of that party's witness, for good and ill. As Brooke LJ said in *McPhilemy v Times Newspapers Ltd (No 2)* [2000] 1 W.L.R. 1732, at 1740:

> "I know of no principle of the law of evidence by which a party may put in evidence a written statement of a witness knowing that his evidence conflicts to a substantial degree with the case he is seeking to place before the jury, on the basis that he will say straight away in the witness's absence that the jury should disbelieve as untrue a substantial part of that evidence."

45. That was said in a very different context. Both *ACL Netherlands* and *McPhilemy* involved a party seeking to rely on a statement made by a witness where that witness was not being called to give oral evidence and could not be cross-examined. That would not be the case here if Mr Weller does give oral evidence.

46. It may be, as the Third Applicant submitted, that the Tribunal would have to perform "mental acrobatics" in determining what part of Mr Weller's evidence it should accept and what part it should not accept. However, courts and tribunals are often required to deal with witnesses where one part of their evidence is credible and other parts are not credible.

47. That is consistent with Judge Herrington's finding at [126] that there was no bar to a party submitting that part of what its own witness says should not be accepted. He made that finding having considered the non-impeachment principle and various authorities, including *R v Smith (Jordan)*. The decision in Smith was based on the principles set out by the Court of Appeal in *R v Cairns*.

48. The Authority does not contend that Mr Weller has acted dishonestly. There is some doubt as to how the Authority views the evidence Mr Weller might be expected to give where it does not accept that evidence. It has described his evidence as self-serving which might imply that he is being deliberately untruthful, but it could also be because he has sub-consciously persuaded himself as to his understanding of what was said and done at the time the Presentation was created. Without knowing the precise evidence Mr Weller would give, these possibilities could only be explored at the hearing having heard the evidence with the benefit of cross-examination.

49. The Authority submits that it is unobjectionable for Mr Weller to give evidence as to what was said and done and by whom, and as to his subjective understanding of what was said and done. That is so, even if the Authority does not accept Mr Weller's evidence as to his subjective understanding. His evidence could be tested in cross-examination by the Applicants. It cannot be said at this stage that the Authority's position is unreasonable or perverse, which was the test applied in *R v Cairns*. I agree. Indeed, I have found as Judge Herrington also found that Mr Weller would have evidence to give which would be of material assistance to the Tribunal.

Fairness to the parties

50. There are a number of aspects to the question of what is fair to the parties.

51. In this context, Mr Weller and the Applicants have raised a question of why the Authority did not make this application at CMH 1. It is not clear to me why the Authority did not apply to summons Mr Weller as its witness in the alternative to inviting the Tribunal to call Mr Weller as its own witness. Directions had been given by Judge Jones on 16 October 2023 in relation to potential witnesses and required the parties to notify the Tribunal by 26 January 2024 what directions were being sought in relation to those witnesses. Judge Jones made provision for the proposed directions to be considered at a case management hearing in March 2024 which was the CMH 1 hearing before Judge Herrington. There was clearly an opportunity for the Authority to ask the Tribunal to issue a witness summons to Mr Weller, in the alternative to their preferred course at that stage of Mr Weller being called as a witness by the Tribunal.

52. The Authority does now have the benefit of the decision of Judge Herrington, but that does not explain why the application could not have been made in the alternative.

53. The Authority says that Mr Weller had initially agreed to appear as a witness for the Authority but following CMH 1 he had declined to do so. That appears to put the matter higher than is merited. Mr Weller had stated in December 2023 that he was deeply reluctant to be involved in the proceedings but that he would attend as the Authority's witness if the alternative was that he would be compelled to attend. His overriding desire was to play no part in the proceedings unless he absolutely had to. Mr Weller's skeleton argument for CMH 1 made clear that he was not prepared to give evidence and be cross-examined both by the Authority and the Applicants when there were outstanding regulatory proceedings.

54. The Authority has since given Mr Weller the Reassurance in a letter dated 31 May 2024 following CMH 1. However, there was no reason the Reassurance could not have been given prior to CMH 1 or indeed during the course of that hearing. The Authority might have required time to consider its position, which could no doubt have been accommodated.

55. The Authority says that it now has the benefit of decisions of the Upper Tribunal in *Barclays Plc* and of the Court of Appeal in *FCA v Seiler* [2024] EWCA Civ 852 which support its reasons for making the present application. In fact, neither of those cases establishes any new principles relevant to the application. *Barclays* considered objections to a witness summons but was applying established principles. In *Seiler*, the Court of Appeal held that the Authority was not an ordinary litigant in ordinary proceedings. The Authority and the Upper Tribunal have a joint purpose of seeking to ensure that integrity and confidence in financial markets is maintained (see Fraser LJ at [77]). The Court of Appeal was endorsing propositions that had been established in previous Upper Tribunal cases.

56. The position of the Applicants at CMH 1 was essentially that the Authority was seeking to avoid the non-impeachment principle and ought to have been calling Mr Weller as its own witness. Mr Weller's position was that he should not be called to give evidence. At [124] of CMH 1, Judge Herrington noted a submission on behalf of Mr Weller that if the Authority believed he had relevant evidence then it should seek to call him as its witness. I am satisfied that Mr Weller was not inviting the Authority to make the present application. The possibility of Mr Weller being called as the Authority's witness was raised by the Authority in its oral submissions in reply at CMH 1. The transcript of the hearing shows the following exchange:

> **Mr Purchas:** This is my fifth point, if you are not with the Authority that he should come as a neutral witness, we are not saying he should not attend at all. We are saying he should attend and if ultimately we have to call him then we need to have directions to provide for that.
>
> **Mr Strong:** Sorry to interrupt, but there has been no application for Mr Weller to be summonsed as the Authority's witness.
>
> **Mr Purchas:** Sorry, what I was … if he is not called by the tribunal as a neutral witness, that the Authority would want to call him as their witness; not to have him summonsed.
>
> **Judge Herrington:** So that would be a consensual matter, would it?
>
> **Mr Purchas:** I think if we get to the point where Mr Weller is no longer willing to be a witness called by the Authority, then we may be back again before you, but that it a different point.
>
> **Judge Herrington:** Yes. That would be an application.

57. It is not suggested by anyone that the present application amounts to an abuse of process by the Authority in circumstances where it could have made the application in CMH 1. Mr Weller did submit that the Authority must identify a change in circumstances to justify making the present application. I do not accept that is the case. It is a different application to that being made at CMH 1. What I do accept is that there has been no real change in circumstances that would explain the present application and I would have expected the application to have been made in the alternative in March 2024. Having said that, I do not consider that the Authority's failure to make the application at that time was in any sense tactical or deliberate. The position it took at the time was that the application was appropriate and Judge Herrington at [119] expressly made no criticism of the application. It seems more likely to me that the Authority failed to properly address the consequences of the Tribunal declining to call Mr Weller as a neutral witness.

58. These are circumstances I shall take into account when considering the overall balancing exercise. That includes Mr Weller's point that he had reasonably assumed immediately following CMH 1 that he would not be required to give evidence in these proceedings.

59. I can also take into account that the Authority's failure to make the present application in March 2024 has caused some inconvenience to the parties and the Tribunal, although not so as to endanger the hearing listed in September 2025. It has not been suggested that the failure has led to any specific prejudice, although it seems to me that it may well have caused the Applicants and Mr Weller to incur additional costs over and above what would have been required to deal with the application at CMH 1. No doubt the parties could be compensated for any additional costs they have incurred.

60. Overall, I accept that there would be a real risk of unfairness to the Authority if it is unable to call Mr Weller as a witness in support of its case. It would be deprived of evidence which is likely to be highly relevant to the issues on which it bears the burden of proof. I also take into account that whilst Mr Weller's evidence is important to the Authority's case, it does not consider that Mr Weller's evidence is essential.

61. Fairness to an applicant may require the Authority to call a witness who does not support its case theory, or at least draw the attention of the Tribunal to that witness. That is not this case. None of the Applicants considers that Mr Weller should be called as a witness. However I do not detect any unfairness to the Applicants if Mr Weller is required to give evidence.

Unfairness to Mr Weller

62. Mr Weller submitted that it would be unfair if he is required to give evidence when he is the subject of ongoing regulatory proceedings. He submitted that this is a powerful and potentially decisive factor weighing against the issue of a witness summons. Judge Herrington accepted as much at CMH 1 [128]. Indeed, prior to CMH 1 the Authority had said that this was one of the reasons why it had not adduced a witness statement from Mr Weller, together with the fact that it did not accept aspects of his evidence.

63. I agree that this is a significant factor, although its weight is reduced to some extent by the Reassurance. Despite the Reassurance, there could still be some unfairness to Mr Weller if he were required to give evidence to the Tribunal and a Further Decision Notice was subsequently issued to him. I cannot say that this is a remote possibility, even though Mr Weller for understandable reasons does not appear to have any appetite to challenge the Authority's case against him. The statutory scheme under FSMA envisages that the subject of regulatory proceedings will have seen the allegations in a Decision Notice before deciding whether to make a reference to the Tribunal, make submissions and potentially give evidence to the Tribunal.

64. As part of this submission, Mr Weller says that if he had referred his Decision Notice to the Tribunal, then as a party to the proceedings he could not have been compelled to appear as a witness.

65. The Authority challenges that proposition by reference to the Upper Tribunal Rules set out above. In particular, it relies on Rule 5(3)(d) which provides that the Upper Tribunal may require a party to provide evidence; Rule 16(1) which refers to a summons requiring "any person" to give evidence; and Rule 16(2)(b) which makes specific provision for circumstances where the person summoned is not a party, confirming that the reference to "any person" includes a party. The Authority says that I should infer from these provisions that a party can be compelled to give evidence.

66. Rule 16(3) also provides that no person may be compelled to give evidence where that person could not be compelled to give evidence in a court of law. The Authority contends that this cannot prevent a party being compelled to give evidence given the previous sub-paragraphs in Rule 16. It suggests that Rule 16(3) applies to situations such as a person being compelled to give evidence as to the content of privileged material. The Authority therefore submits that

Judge Herrington was wrong to say at [128] that a party could not be compelled to give evidence and I am not bound by his finding.

67. Mr Weller submits that these Rules, which provide that the Tribunal can direct a party to give evidence, apply in relation to procedural matters. For example where the Tribunal requires such evidence before permitting some procedural step to be pursued or to confirm that an appropriate search for documents has been undertaken. The Rules cannot be used to compel a party to give evidence on the substantive hearing of a reference. Mr Weller also submits that Judge Herrington has already held at [128] that the Authority could not have called him as a witness if he had referred his Decision Notice and that Judge Herrington's finding is binding between the parties.

68. I did not have full submissions on the question of whether, if Mr Weller had referred his Decision Notice, he could have been compelled to give evidence by the Authority. My provisional view is that he could not have been compelled. As to the question of whether I am bound by what Judge Herrington said at [128], the Authority invited me to depart from the finding of a Judge of equal standing. I do not consider that would be the right approach. These proceedings were between the same parties and if the Authority is bound by the finding then it would be as a matter of issue estoppel rather than precedent. I did not have submissions as to whether there would be any issue estoppel.

69. In any event, I do not consider that these points have much if any relevance for the purposes of this application. They do not assist on the question of whether there would be unfairness to Mr Weller if he is compelled to give evidence. The fact is that Mr Weller did not refer his Decision Notice and whether he could have been compelled to give evidence had he done so is academic. He is not a party to the present proceedings. I am however satisfied that the existence of ongoing regulatory proceedings against Mr Weller is a significant factor in the balancing exercise I must perform.

70. Mr Weller also submits that the unfairness arises because he would not be represented at the hearing. That means that he would not have the opportunity to be re-examined by his own counsel, he would not have the opportunity to challenge the evidence of other witnesses and he would not have the opportunity to make submissions to the Tribunal. Whether it would be practical or realistic to make provision for Mr Weller to have these protections was not canvassed at the hearing.

71. It is no answer to say that the absence of representation and the opportunity to participate in the hearing puts Mr Weller in no different position to most witnesses at trial. Most witnesses are not subject to ongoing regulatory proceedings in relation to the very matters on which the witness is being asked to give evidence.

72. I will also take into account that the risk of adverse findings of fact in the Tribunal arises whether Mr Weller gives evidence or not. The Second and Third Applicants both seek to blame Mr Weller for creating the Presentation. If the Tribunal were to make adverse findings against Mr Weller, then those findings could be included in a Further Decision Notice issued by the Authority to Mr Weller.

73. Mr Weller also relied on what he described as excessive delay in the Authority's investigation where he was repeatedly given incorrect information as to when a decision on his conduct would be made. The Authority says that it cannot be criticised for its conduct of the investigation. A complaint was raised by Mr Weller and dismissed following the Authority's complaints process.

74. I am not in a position to make any findings of fact in relation to these matters on the material before me. The most I can do is record the Authority's acknowledgment that it may

have been overly optimistic in what it told Mr Weller about timescales at various stages of the investigation. In the context of the balancing exercise, it does not seem to me that the Authority's conduct in this regard carries any weight. In contrast, the period of time since April 2018 when the investigation commenced and over which Mr Weller has had the regulatory proceedings hanging over him does carry some weight.

75. I am satisfied that Mr Weller's involvement in creating the Presentation and the subsequent regulatory proceedings has caused him considerable stress and anxiety. It has affected his employment prospects and his family life. No doubt giving evidence would be stressful for Mr Weller. However, there is no medical evidence as to the effect giving evidence might have on his health.

The overall balancing exercise

76. In conducting the overall balancing exercise and determining whether it would be unfair and oppressive for Mr Weller to give evidence I take into account all the factors described above. The following factors bear particular weight.

77. I am satisfied that there is a real likelihood that Mr Weller would give evidence that would materially assist the Tribunal. Indeed, I am satisfied that his evidence would be important evidence in support of the Authority's case.

78. I do not consider that it would be unfair to the Applicants if Mr Weller is required to give evidence. It might have been better if this application had been made in March 2024 in the alternative to the Authority's preferred approach of inviting the Tribunal to call Mr Weller as a witness. However, that has not led to any prejudice which could not be compensated for in costs.

79. There is potential unfairness to Mr Weller if he is required to give evidence when there are ongoing regulatory proceedings. This is a significant factor, even taking into account the Authority's Reassurance. I assume at this stage that Mr Weller would not be represented at the hearing and would have no opportunity to cross-examine other witnesses or make submissions to the Tribunal.

80. I also take into account the strong public interest that regulatory breaches should be fully investigated on the hearing of references. If the allegations are established then businesses and individuals should be the subject of appropriate sanctions. Equally, if the allegations are not established then businesses and individuals should be able to conduct their activities without sanction.

81. I have anxiously considered all the circumstances and all the parties' submissions, both written and oral. On balance, I do not consider that it would be unfair and oppressive if Mr Weller is required to give evidence on behalf of the Authority. I shall therefore issue a witness summons to Mr Weller.

82. I was invited to consider the scope of Mr Weller's evidence if I decided to issue a witness summons. The Authority has invited me to set out in the witness summons the issues on which Mr Weller should be asked to give evidence.

83. The Bank submits that a witness summons is not an appropriate mechanism by which to limit Mr Weller's evidence in chief. I was referred to *Z v Z (Legal Professional Privilege: Fraud Exception)* [2018] EWCA Civ 307 as authority for a proposition that there is no practice to give the recipient of a witness summons details of the issues on which the witness is to give evidence (see Sir James Munby at [29(iii)]). That case concerned particular circumstances where a solicitor was required to give evidence in connection with a freezing injunction and claimed legal professional privilege. He contended, amongst other things, that the failure to give him notice of the issues on which he was to give evidence had the effect of an ambush.

84. It does not seem to me that *Z v Z* has any bearing on the issues before me and it is not necessary for me to consider whether or not, as a matter of procedure, a witness summons to Mr Weller should set out the issues on which he will be required to give evidence. Clearly, as a matter of case management, I could make a direction as to the issues on which Mr Weller should give evidence in chief. As explained above, that would not limit the issues on which he might be cross-examined.

85. For present purposes, I shall simply say that I would expect Mr Weller to give evidence in chief on those issues which the Authority has identified as being issues where they wish to rely on his evidence. If there are other relevant issues on which Mr Weller wishes to give evidence in chief then subject to general case management I would not seek to prevent him from doing so. His evidence will in due course be subject to cross-examination as indicated above.

86. That is the only guidance I propose to give at this stage. The Authority and Mr Weller should seek to agree further directions for his evidence. All parties should seek to agree any other directions necessary for the final hearing. In particular with regard to amended lists of documents or challenges to the admissibility of documents relied on by any party. I leave open the possibility that Mr Weller might be afforded some opportunity to be represented at the hearing and have an opportunity to participate in the proceedings. The parties and Mr Weller should update the Tribunal in regard to directions within 21 days from the date of release of this decision.

CONCLUSION

87. For the reasons given above I will issue a witness summons to Mr Weller. I shall await the parties' update as to directions before doing so.

JUDGE JONATHAN CANNAN

Release date: 24 June 2025