



Reference number: FS/2016/013

FINANCIAL SERVICES – procedure – application to make reference out of time – whether Tribunal satisfied that in all the circumstances application should be granted –no–Rule 2 and Schedule 3 Paragraph 2(2) Tribunal Procedure (Upper Tribunal) Rules 2008

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

ROBERT ANGUS HILL

Applicant

- and -

THE PENSIONS REGULATOR

The Regulator

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

Application decided on the basis of written submissions

DECISION

Introduction

5 1. This decision relates to an application by the applicant ("Mr Hill") to make a
reference to this Tribunal out of time in respect of the determination notice issued by
The Pensions Regulator (the "Regulator") to Mr Hill on 28 October 2011 ("the
Determination Notice"). In the Determination Notice the Regulator decided to make
10 from being a trustee of the Hugh Mackay Retirement Benefits Scheme (the
"Scheme") and from occupational pension schemes established under trust in general
("the Prohibition Order").

The Facts

15 2. The Determination Notice related to the Regulator's application to its
Determinations Panel for an order under s 3(1) of the Pensions Act 1995 prohibiting
Mr Hill and other original trustees of the Scheme each from being a trustee of the
Scheme and from occupational pension schemes established under a trust in general.
The Determinations Panel decided that it was appropriate to make a prohibition order
20 issued following oral hearing before the Determinations Panel on 14 October 2011, at
which Mr Hill had been represented by both leading and junior counsel.

25 3. The Regulator had sought a prohibition order against Mr Hill and the other
trustees on the basis they were not fit and proper persons to be a trustees of either the
Scheme or any occupational pension schemes established under trust ("trust
schemes").

4. The Determinations Panel decided that Mr Hill and the other trustees were not
fit and proper persons to be trustees of trust schemes because they were not competent
and capable and therefore determined that they be prohibited from acting as trustees
of trust schemes in general.

30 5. The Determinations Panel found that the trustees committed serious breaches of
the Occupational Pension Schemes (Investment) Regulations 2005 and that these
failures left the Scheme with an asset portfolio heavily concentrated in property and
highly leveraged which was inherently risky.

35 6. The Determinations Panel also found that the trustees did not recognise and
manage conflicts of interest, inappropriately profited from their position as trustees
and in a number of ways allowed their personal interests and obligations as trustees to
conflict. The Determinations Panel found that there was no evidence before them that
the trustees appreciated the seriousness of the conflict or took appropriate steps to
manage it.

40 7. By reason of these matters, the Determinations Panel was of the opinion that
the trustees did not have the adequate competence and capability to act as trustees as

they found that they had been responsible for serious and persistent breaches of pension legislation and associated regulations and breaches of trust law.

8. The Determination Notice was sent to the trustees on 28 October 2011.

9. By virtue of paragraph 2(2) of Schedule 3 to the Tribunal Procedure (Upper Tribunal Rules 2008) (the “Rules”) a reference of a decision of the Regulator to this Tribunal must be received no later than the 28 days after the notice of the decision in question is given. Accordingly, the time for referring the Determination Notice in this case expired on 25 November 2011.

10. Although no reference was made within the prescribed time limit, it is clear that there was some correspondence between the trustees’ solicitors and the Regulator following the issue of the Determination Notice. For example, on 27 January 2012, the trustees’ solicitors wrote to the Regulator in which they set out a number of statements in the Determination Notice that they said were inaccurate and asked that the Determination Notice be amended to correct these inaccuracies before it was published. Mr Hill himself also wrote to the Regulator on 29 January 2012 complaining about a number of inaccuracies and the fairness of the process before the Determinations Panel. The Regulator responded to the trustees’ solicitors on 30 January 2012 stating that most of the points highlighted were matters that ought to have been raised by way of a reference of the Determination Panel’s decision to the Tribunal.

11. The Regulator wrote to Mr Hill in response to his letter on 6 February 2012 informing him that if he was dissatisfied with the Determination Notice he had the right to refer it to the Upper Tribunal. The Determination Notice was published on 8 February 2012.

12. It is therefore clear from this correspondence that Mr Hill and the other trustees had determined not to make a reference to the Tribunal at this stage.

13. On 12 September 2016 Mr Hill referred the Determination Notice to the Tribunal, over 4 years and 9 months out of time. As it appears from his reference notice and his subsequent correspondence with the Tribunal, the reasons for the lateness of the reference given by Mr Hill are as follows.

14. Mr Hill was under investigation for a period of 4 ½ years from December 2009 to September 2014 by various regulatory and official bodies. These investigations culminated when the new trustee of the Scheme appointed by the Regulator issued civil proceedings against the trustees claiming from them an amount in excess of £20 million.

15. As a result of the above with all the stress, anxiety and family upset that it caused, Mr Hill only now finds himself in a position both physically and mentally to look back at the events objectively.

16. At the time of the oral hearing before the Determinations Panel, the trustees and their advisers were facing the civil proceedings mentioned above and therefore not in

a position to be cross-examined before the Determinations Panel because of this action.

17. After the issue of the Determination Notice, the trustees were told by their lawyers that to appeal would cost time and money (they had not been advised that making the reference would in itself cost nothing) and after nearly two years of fighting the Regulator the trustees only had limited resources which would be needed to fight the upcoming civil action.

18. Mr Hill also says that it was not explained to the trustees that being banned as a trustee “condemns you as being not a “fit and proper person” or that this statement is published on the Regulator’s website forever, along with the criteria for fit and proper persons”.

19. Mr Hill says that he recently set up a new company, but being banned as a trustee meant that the Bank would not accept him as a director, he was not allowed to own more than 20% of the issued share capital, and his integrity was called into question. This point was amplified in Mr Hill’s later representations to the Tribunal. He said that the original allegations against him, namely that he had been accused of fraud and criminality but which were not eventually established, meant that he has been regarded, at best, with deep suspicion, and at worst, as someone not be trusted, by many people he had previously dealt with. This had severely impacted on his standing in the business community in the North East. As a result, he had been unable to borrow money from lenders, which is vital in his business, as when they Google his name up comes all the old accusations made in the press which he has tried and failed to get removed.

20. Mr Hill also says that there are many other things, including health issues which have plagued him since then, the latest of which is not being able to be a director of any new company. That was for him the “final straw” and it is anger at the many injustices he has suffered over the years that has prompted him to bring this case now. He expresses his belief that there should be no time limit on justice and therefore should be allowed to make a late reference.

30 **The law and factors to be considered**

21. The approach to be taken by this Tribunal in considering an application for an extension of time of this type, which may be granted pursuant to the power to extend time contained in Rule 5(3)(a) of the Rules, was set out by this Tribunal in *Martin-Artajo v Financial Conduct Authority* [2014] UKUT 0340 (TCC) at [31] to [51] of the Decision. I need not set out the relevant passages in full again but the approach to be taken, which does not appear to be in dispute, can be summarised as follows:

(1) In exercising its power to extend time the starting point is the overriding objective of the Rules which requires the Tribunal to consider whether in all the circumstances it is fair and just to extend time: see [32] to [35] of the Decision;

(2) As set out by Morgan J, sitting in the Upper Tribunal, in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) there are five questions which as a general rule a Tribunal is to ask itself when considering whether to extend time, namely:

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- (a) What is the purpose of the time limit?
 - (b) How long was the delay?
 - (c) Is there a good explanation for the delay?
 - (d) What will be the consequences for the parties of an extension of time? and
 - (e) What will be the consequences for the parties of a refusal to extend time?

10 (3) The time limit concerned must be given great respect and there must be strong factors in favour of departing from it. Time limits should be respected unless there are good reasons not to and time limits are there for a reason: generally speaking, the parties are entitled to finality (see [40] of the Decision).

15 22. In the past, the Tribunal has also taken into account the merits of the reference in deciding whether or not to extend time. However, as the Tribunal recently held in *Koksal v The Financial Conduct Authority* [2015] UKUT 603 (TCC), taking account of the recent judgment of the Supreme Court in *Global Torch Ltd v Apex Global Management Ltd (No 2)* [2014] UKSC 64, the merits of the case should only be a factor to be weighed in the balance where the case is either obviously hopeless (in which case there is no point extending time) or so overwhelmingly strong that there is no realistic prospect of there being a defence to it.

20 23. Since *Data Select* was decided, CPR rule 3.9 has changed and provides that on an application for relief from any sanction imposed for a failure to comply with any rule the court must consider the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, practice directions and orders. Furthermore, as the Regulator submits, the Court of Appeal has recently confirmed that the Tribunal Rules are to be complied with in like manner to the CPR and that the stricter approach taken by the courts to compliance with procedural rules heralded in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 and clarified in *Denton v TH White Ltd* [2014] 1 WLR 3926 applies equally in the Tribunals: see *BPP Holdings Limited v HMRC* [2016] EWCA Civ 121 at [37] to [38].

30 24. In the light of *BPP*, as the Regulator submits, I should accord “significant weight” as part of my consideration of the overriding objective to the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, practice directions and orders.

35 25. In practice, bearing in mind the facts of this case, I am able to make my decision primarily by reference to the factors in *Data Select*.

Discussion

40 26. I now turn to consider whether I should extend time in the light of the facts found and the principles I have identified above. I do so by carrying out a balancing exercise in respect of those factors that tend to favour the grant of an extension and those which do not, giving appropriate weight to the various factors in the light of the facts found and coming to a conclusion as to whether as a result of that balancing

exercise it is fair and just to grant an extension. I start by considering the five questions identified in *Data Select*.

The purpose of the time limit

27. The Regulator has correctly identified that the time limit serves an important public interest in the finality of litigation. As this Tribunal observed in *Martin-Artajo* at [54], in principle the time limit should be enforced and it should be regarded as a precise limit and not a vague target. Generally, the time limit should not be departed from unless there is a good reason to do so. This is a strong factor against extending time. In answer to one of Mr Hill's points, there is a time limit to justice in the sense that Parliament has recognised that there cannot be an unfettered right to bring an action at any time after the relevant events because the principle of finality of litigation is an important one and the interests of the other party have to be considered.

The length of the delay

28. The delay in this case is very lengthy (over 4 years and 9 months). It is therefore not insignificant. This is also a strong factor against extending time.

The explanation for the delay

29. Mr Hill's reasons for the delay are summarised at [14] to [20] above. In my view none of the reasons given are good reasons for the delay in making the reference.

30. Even though Mr Hill was facing civil proceedings at the time, arising out of the circumstances that led to the making of the Prohibition Order, if he had the difficulties he mentioned of fighting on two fronts at once, he could have made his reference (which does not in itself involve a significant use of resource in completing the necessary reference form) and then applied to the Tribunal for a stay on proceedings pending the resolution of the civil proceedings. It may well have been the case that the Tribunal would have been sympathetic to arguments on that point but Mr Hill did not give himself the opportunity of making those arguments by simply not making a reference at all. Mr Hill says that the civil proceedings were subsequently settled but he gives no detail as to when that occurred.

31. Whilst it can be understood that all the circumstances taken together might result in stress, anxiety and upset, again he could have made the reference and sought to have the proceedings stayed whilst those circumstances continued to exist. The Tribunal could then make a full assessment of the situation and decide whether it was in the interests of justice to proceed with steps to bring the reference to a hearing at that stage. It is, however, unlikely that the circumstances that Mr Hill describes could have lasted for the entire period between the expiry of the time limit and the date when he finally made his reference. Indeed, on his own admission, investigations against him were completed by September 2014 and another two years passed before he made his reference.

32. Mr Hill says that he was not told that there was no fee for filing a reference. However, he does not say whether he checked the position himself, on the assumption that he was not going to use lawyers to represent him. This would have been discovered by a simple enquiry to the Tribunal. Obviously, as the Regulator submits, making a reference to the Tribunal would involve a significant commitment of time, and cost if he were to instruct lawyers, but it was always open to Mr Hill to make a reference and deal with the matter himself. Again, the Tribunal may have been sympathetic were he to find himself in a position of fighting on two fronts at once.

33. As regards Mr Hill's contention that he did not understand that the effect of a prohibition order is that you have been found not to be a "fit and proper person", this is readily apparent from the guidance available on the Regulator's website. Up to the point of the Determination Notice and for a short period thereafter, Mr Hill appears to have been advised by lawyers who presumably would have given him advice as to the effect of a prohibition order.

34. In my view the evidence shows that the main reason that has compelled Mr Hill to make his reference at this late stage is the difficulties that he has now experienced in trying to set up a new company. This cannot be regarded as a good reason arising as it does so long after the events in question. In my view these are consequences that could reasonably have been foreseen at the time the prohibition order was made, and could have been addressed by making a reference at that stage.

35. Therefore, in this case the explanation for the delay does not amount to a factor in favour of extending time.

The consequences for the parties of an extension of time

36. Should an extension of time be granted, then Mr Hill will have the opportunity of challenging the Regulator's decision in the Tribunal. I accept the Regulator's submission that an extension of time would cause a degree of prejudice to the Regulator. It will have to assign a new case team to the matter and divert scarce resources from other, important, regulatory casework. As this Tribunal has said in other cases, finality in litigation is normally to be given strong weight. In this case therefore, the factor tends to be a factor against extending time.

The consequences for the parties of a refusal to extend time

37. As far as the Regulator is concerned, a refusal to extend time would mean that it would not have to devote any of the resources to dealing with the reference to the Tribunal. This does not necessarily mean that the Regulator will not have to put a team together to consider the circumstances that led to the Prohibition Order afresh in the light of any change in circumstances since that time. It is open to Mr Hill to make an application pursuant to s 3(3) of the Pensions Act 1995 for the Prohibition Order to be revoked. This would appear to me to be the more appropriate route for Mr Hill to follow rather than seek to make a reference of the original decision so long out of time. An application to revoke the Prohibition Order will give him the opportunity of convincing the Regulator that he has learned lessons from his mistakes in the past and that due to a change in circumstances it is appropriate to revoke the Prohibition Order. Were the Regulator to take a different view on that application, Mr Hill would then

have the opportunity of referring the refusal to revoke the order to the Tribunal pursuant to a fresh reference. Therefore, in this case the factor does not tend to support an extension of time.

The merits of the application

5 38. Mr Hill made a considerable number of arguments as to the merits of his
reference. Some of them relate to a change of circumstance following the settlement
of the civil proceedings against the trustees. As I have indicated, these arguments are
better deployed in the context of an application to revoke the Prohibition Order. In the
10 circumstances, notwithstanding the Regulator's contention that the reference is
without merit because Mr Hill agreed to the Prohibition Order, I regard the merits of
the reference as a neutral factor in this case.

Conclusion

15 39. Applying the overriding objective in the light of all of the factors considered
above, I am of the view that the balancing exercise comes out clearly against granting
an extension of time.

40. My reasons for this conclusion are as follows:

(1) The delay in making the reference is a long one and there is no good reason
for it.

20 (2) There will be some resource implications for the Regulator if the reference
were admitted but not to the extent that it would be seriously prejudiced, on the
assumption that Mr Hill follows the alternative approach of seeking a revocation
of the Prohibition Order. In this particular case, the prejudice to Mr Hill of not
pursuing his reference is not substantial because of his ability to make an
25 application to the Regulator for a revocation of the Prohibition Order and the
right to refer any refusal of that application by the Regulator to the Tribunal.
This factor, combined with the strong factors against granting time set out at (1)
above, weighs heavily against granting an extension of time.

41. I therefore conclude that it is in the interests of justice that time for the making
of the reference is not extended and the reference cannot therefore be admitted.

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**TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE**

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RELEASE DATE: 7 November 2016