Neutral Citation: **[2024] UKUT 00115 (TCC)**

Case Numbers: UT-2023-000014-17

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing Venue: The Rolls Building, London EC4A 1NL

FINANCIAL SERVICES – procedure-whether substantive hearing of the references should be postponed-whether Authority should be required to disclose further documents - whether witness summons should be issued - whether representative of the Authority should be available to answer questions regarding the conduct of the Authority's investigation - whether parts of the Authority's case should be struck out- Rules 2, 5(3)(d) and (h),8(3)(c),(7),16 (1) and paras 4(3) and 6 Sch 3 Tribunal Procedure (Upper Tribunal) Rules 2008

Heard on: 26 and 27 March 2024
Judgment date: 8 May 2024

Before

JUDGE TIMOTHY HERRINGTON
(Sitting in Retirement)

Between

BANQUE HAVILLAND SA (1)
EDMUND LLOYD ROWLAND (2)
VLADIMIR BOLELYY (3)

Applicants

-and-

THE FINANCIAL CONDUCT AUTHORITY

The Authority

DAVID JOHN ROWLAND

Third Party Rights Applicant

and

THE FINANCIAL CONDUCT AUTHORITY

The Authority

Representation:

For the First Applicant: Alex Bailin KC and Jason Mansell, Counsel, instructed by Kingsley Napley

For the Second Applicant: Andrew George KC and Simon Pritchard, Counsel, instructed by Peters & Peters LLP

For the Third Applicant: Rhys Meggy, Counsel, instructed by Hickman & Rose

For the Third Party Rights Applicant: Fraser Campbell, Counsel, instructed by Forsters LLP

For the Authority: James Purchas and Rayan Fakhoury, Counsel, instructed by the Financial Conduct Authority

For the potential witness, David Weller: Ben Strong KC, instructed by Greenberg Traurig LLP

DECISION

Introduction

1. This decision relates to various applications for directions involving references made in respect of Decision Notices issued by the Authority in relation to what the Authority alleges is improper advice given by Banque Havilland S.A (the "Bank") in a presentation which it is alleged recommended manipulating trading strategies which could be a criminal offence, had it taken place in the UK.

2. Separate Decision Notices in relation to that matter have been given by the Authority to the Bank, Mr Edmund Rowland, Mr Vladimir Bolelyy and Mr David Weller. The Authority alleges that Mr Edmund Rowland, Mr Bolelyy and Mr Weller are personally culpable in relation to that matter as well as the Bank.

3. The Authority alleges that each of the Applicants has acted without integrity in relation to the presentation referred to above and seeks a substantial financial penalty from the Bank and financial penalties from each of Mr Edmund Rowland, Mr Bolelyy and Mr Weller as well as prohibition orders under s 56 of the Financial Services and Markets Act 2000 ("FSMA") against those three individuals.

4. Mr David Rowland has made a third party reference pursuant to s 393 (9) FSMA. Mr David Rowland has been identified in the separate Decision Notices referred to above. Mr David Rowland has made his reference on the basis that the Decision Notices contain statements that are prejudicial to him.

5. The Bank, Mr Edmund Rowland, and Mr Bolelyy (together the "Applicants") have referred their Decision Notices to the Tribunal and their references will be heard in due course. These references will be heard together with the third party reference of Mr David Rowland. Mr Weller has not referred his Decision Notice. On 6 March 2023 the Authority issued Mr Weller with a Final Notice setting out the regulatory action the Authority had decided to take as set out in Mr Weller's Decision Notice.

6. However, following the decision of this Tribunal released on 9 June 2023, [2023] UKUT 00136 (TCC), in which I concluded that the statutory scheme in FSMA does not envisage the issue of a Final Notice to the subject of a Decision Notice until any third party reference in respect of that Decision Notice has been determined by the Tribunal, whether or not the subject of the Decision Notice has referred the matter to the Tribunal, the Authority has withdrawn the Final Notice pending determination of these references.

7. The Authority filed a consolidated Statement of Case in relation to the references on 14 March 2023. Replies were filed by each of the Applicants and Mr David Rowland on 12 May 2023. On 16 October 2023 Judge Jones released directions for the future conduct of the proceedings. The Judge directed that the substantive hearing of the references would be listed on 10 June 2024 with a time estimate of up to 15 days. He also directed that there would be a case management hearing in March 2024. This was because there was a dispute as to whether the Tribunal had jurisdiction to consider certain of the allegations made in the Authority's Statement of Case in the light of this Tribunal's decision in *Bluecrest Capital Management v FCA* [2023] UKUT 00140 (TCC) ("*Bluecrest").* However, the effect of that decision is uncertain following the Tribunal granting permission to appeal to the Court of Appeal against its decision. That appeal is to be heard in July 2024.

8. Judge Jones's directions also envisaged there would be applications for disclosure and for potential witnesses to be summoned. It was therefore envisaged that the case management hearing would determine those applications, as well as determining the extent to which the substantive hearing of the references could proceed in the light of the jurisdiction dispute prior to the Court of Appeal delivering its judgment in *Bluecrest.*

9. The case management hearing took place on 26 and 27 March 2024 at which the following matters were considered:

(1) Whether the substantive hearing of the references should remain listed for 10 June 2024 or whether it should be postponed until a date after the Court of Appeal has handed down judgment following the Authority's appeal in *Bluecrest* ("the Postponement Application").

(2) Whether under Rule 6 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules"), the Tribunal should order the Authority to provide further disclosure of classes of documents defined as the Qatari Material and the CSSF Material as set out in the Bank's application for further disclosure and skeleton argument (dated 23 February 2024) and a more broadly defined class of Qatari Material set out in the application of Mr David Rowland dated 4 March 2024 ("the Disclosure Applications").

(3) Whether the Tribunal should issue a witness summons of its own motion in accordance with Rule 16 of the Rules requiring Mr Weller to give evidence as a "neutral" witness ("the Weller Witness Application").

(4) Whether the Tribunal should issue a witness summons or make an order/direction in accordance with Rule 16 or 6 of the Rules requiring either the Authority's lead investigator or Mr Dan Enraght-Moony to be tendered to the Applicants for cross-examination at the substantive hearing of the references ("the Authority Witness Application").

(5) Whether the allegation that Mr Edmund Rowland was knowingly concerned in a breach by the Bank of Principle 3 of the Authority's Principles for Businesses on the facts as alleged by the Authority should be struck out pursuant to Rule 8 of the Rules for the reasons set out in his strike out application dated 29 January 2024.

The pleadings in respect of the references

10. As set out in the Statement of Case, the Bank is a bank with its head office in Luxembourg and during the Relevant Period it had a branch in London ("the London Branch"), among other places. The ultimate controller of the Bank is Mr David Rowland. During the period which is relevant for the purposes of these references, 13 September 2017 to 13 November 2017 ("the Relevant Period"), the Bank exercised its right to carry on regulated activities in the UK as an "authorised person" in accordance with s 31 FSMA as an "incoming EEA firm".

11. Mr Edmund Rowland, the son of Mr David Rowland, was during the Relevant Period approved by the Authority to hold the EEA branch senior manager function ("SMF 21") at the Bank.

12. The Authority pleads that Mr Bolelyy was, until 9 November 2017, employed by the Bank as a senior investment analyst and frequently acted as Mr Edmund Rowland's assistant, reporting directly to him.

13. During the Relevant Period, Mr Weller was also employed in the London Branch during which time he was also approved by the Authority as an SMF 21. Mr Weller reported to Mr Edmund Rowland and to the Bank's Group Head of Asset Management.

14. The case pleaded by the Authority, as summarised at [10] to [14] of the Statement of Case is as follows:

(1) A Presentation prepared principally by Mr Bolelyy on the instructions and under the guidance of Mr Edmund Rowland, with significant input from Mr Weller ("the Presentation") proposed a manipulative trading strategy which aimed to create a false and/or misleading impression as to the market in and/or the price of Qatari bonds and/or related financial instruments ("the Strategy"), thereby to cause damage to Qatar and other market participants who would be affected by a depression in the price of Qatari bonds and the perception of an increased risk of default.

(2) The Presentation was disseminated to: (i) a representative of a UAE sovereign wealth fund known as Mubadala Investment Company ("Mubadala"); (ii) William Tricks, a "well-connected" individual engaged by the Bank to develop its business in the UAE and the Middle East region ("Mr Tricks"); and (iii) Mr David Rowland.

(3) The Bank (through Mr Edmund Rowland) saw the Presentation as a way of marketing itself and signalling that it would go to significant lengths, including countenancing involvement in improper market conduct, to advance what it perceived to be the interests of the UAE and/or other states or market participants in the Middle East aligned with the UAE, alternatively the Bank (through Mr Weller) was reckless in that regard.

(4) Throughout the Relevant Period, none of Mr Edmund Rowland, Mr Weller or Mr Bolelyy ("the Individuals") raised any concerns in relation to the Presentation with the Bank's compliance staff or senior management.

(5) The contents of the Presentation were subsequently referred to in press articles published on 12 October 2017 ("the Indian Article") and 9 November 2017 ("the Intercept Article"). Mr Edmund Rowland and Mr Weller nevertheless continued to fail to take any steps to bring what they knew about this matter to the attention of the Bank's Head Office or to put in train anything resembling compliance procedures. The Bank (through Mr Edmund Rowland) considered the publicity a "badge of honour" and an opportunity to be "capitalised" upon. Mr Edmund Rowland sought to portray the Presentation as having nothing to do with the Bank, trying to conceal his role in its creation and seeking to blame others for its creation.

(6) The conduct of the Applicants in the Relevant Period gave rise to the contraventions pleaded at [14] of the Statement of Case which are described at (7) to (14) below.

(7) Through the conduct, knowledge and state of mind of Mr Edmund Rowland and Mr Weller during the Relevant Period, the Bank failed to conduct its business with integrity in breach of Principle 1 by creating, circulating and disseminating the Presentation and by failing to put in train anything resembling compliance procedures at any stage, even following press reports relating to the content of the Presentation. The Bank deliberately (through Mr Edmund Rowland) or recklessly (through Mr Weller) designed a manipulative trading strategy intended to serve what it believed to be the

political interests of certain nation states and other market actors. In doing so, it put itself (an authorised firm) at risk of facilitating financial crime and/or market misconduct. Further, the Bank (through Mr Edmund Rowland) sought to try and cover up the misconduct in case there were to be an investigation by a regulatory body, including by seeking to portray the Presentation as having nothing to do with the Bank, trying to conceal Mr Edmund Rowland's role in its creation and seeking to blame others for its creation.

(8) Through the conduct, knowledge and state of mind of Mr Edmund Rowland and Mr Weller during the Relevant Period, the Bank breached Principle 3 and/or SYSC 6.1.1R because in preparing, circulating and disseminating the Presentation and in failing to put in train at any stage anything resembling compliance procedures, even following press reports relating to the content of the Presentation, and in seeking to cover up the misconduct from a potential regulatory investigation, the Bank failed to take reasonable care to organise and control its affairs responsibly and effectively and/or failed to implement adequate policies and procedures sufficient to ensure compliance of the firm including its managers, employees and appointed representatives with its obligations under the regulatory system and for countering the risk that the Bank might be used to further financial crime. Such policies and procedures as the Bank had to organise and control its affairs responsibly and to counter the risk that it might be used to further financial crime were deliberately not implemented in relation to the Presentation. Regardless of whether the preparation, circulation and dissemination of the Presentation were regulated activities, or ancillary activities in relation to designated investment business, they were carried on by the Bank in a prudential context, meaning that they had, or might reasonably be regarded as likely to have had, a negative effect on the integrity of the UK financial system and/or the Bank's ability to meet the fit and proper test. Likewise, regardless of whether the preparation, circulation and dissemination of the Presentation constituted bank business for the purposes of Principle 1, the Bank nevertheless deliberately exposed itself to the risk that it might be used to further financial crime in breach of SYSC 6.1.1R and/or Principle 3.

(9) Mr Edmund Rowland's conduct demonstrates a lack of integrity. The Presentation was created on Mr Edmund Rowland's instructions and under his guidance. He knew that the Presentation proposed a manipulative trading strategy which aimed to create a false and/or misleading impression as to the market in and/or the price of Qatari bonds and/or related financial instruments. He personally disseminated the Presentation to Mr Tricks and Mr David Rowland, knew or understood that Mr Bolelyy provided a copy of the Presentation to a representative of Mubadala and personally discussed the content of the Presentation with a representative of Mubadala. He must have known that the Strategy set out in the Presentation, if implemented, would amount to highly improper market conduct. If he did not have such knowledge, Mr Edmund Rowland turned a blind eye to the obvious and/or acted recklessly and/or his conduct reflected a lack of (or misguided) ethical compass. Once the contents of the Presentation were publicised, Mr Edmund Rowland sought to minimise the significance of the improper market conduct described therein. He considered the publicity a "badge of honour" and agreed with Mr David Rowland that this was an opportunity to be "capitalised" upon. He sought to portray the Presentation as having nothing to do with the Bank, trying to conceal his own role in its creation and seeking to blame others for its creation.

(10) Mr Edmund Rowland's role in the creation, circulation and dissemination of the Presentation, and in the failure to put in train anything resembling compliance procedures

at any point, even following press reports relating to the content of the Presentation, and in trying to cover the misconduct up, made him knowingly concerned in the Bank's breach of Principle 3 and/or SYSC 6.1.1R.

(11) Mr Edmund Rowland's failure to act with integrity demonstrates a lack of fitness and propriety such that he should be prohibited from performing any function in relation to any regulated activity carried on by any authorised or exempt person or exempt professional firm.

(12) From the start of the Relevant Period until he resigned on 9 November 2017, Mr Bolelyy failed to act with integrity in breach of Individual Conduct Rule 1 by creating, circulating and disseminating the Presentation. Mr Bolelyy knew that the Presentation proposed a manipulative trading strategy which aimed to create a false and/or misleading impression as to the market in and/or the price of Qatari bonds and/or related financial instruments. Mr Bolelyy disseminated the Presentation for purposes that included marketing the Bank's services to potential investors. He must have known that the Strategy set out in the Presentation, if implemented, would amount to highly improper market conduct. If he did not have such knowledge, Mr Bolelyy turned a blind eye to the obvious and/or acted recklessly and/or his conduct reflected a lack of (or misguided) ethical compass.

(13) Mr Bolelyy's failure to act with integrity demonstrates a lack of fitness and propriety such that he should be prohibited from performing any function in relation to any regulated activity carried on by any authorised or exempt person or exempt professional firm.

15. At [15] of the Statement of Case the Authority notes that the Statement of Case contains allegations against the Bank and Mr Edmund Rowland that were not contained in their respective Decision Notices. In particular, the Decision Notices did not include a finding of a breach of Principle 3 and/or SYSC 6.1.1R on the part of the Bank or a finding that Mr Rowland was knowingly concerned in the Bank's contraventions of those provisions.

16. It is noted that a finding of a SYSC 6.1.1R contravention was proposed by the Authority in its Warning Notice to the Bank but did not form part of the Bank's Decision Notice in the light of the Authority's finding of a breach of Principle 1.

17. Although not referred to in the Statement of Case, it is also the case that the factual allegation set out at [91] of the Statement of Case, namely that Mr Bolelyy provided a copy of the Presentation to Mubadala and Mr Edmund Rowland's knowledge of the same, which forms part of the Authority's case as to the Bank's dissemination of the Presentation, was not contained in the Warning Notices.

18. In the Statement of Case at [119] the Authority pleaded that by way of the Presentation the Bank carried out the regulated activity of advising on investments (pursuant to Article 53 of the Regulated Activities Order 2001) by virtue of it having been given to an investor or potential investor (namely Mubadala), and also because the Presentation included advice on the merits of the Strategy. Furthermore, the Strategy related to the buying or selling of a particular investment, namely Qatari bonds.

19. At [120] the Authority pleaded that the steps taken in relation to the preparation of the Presentation and its dissemination to Mr David Rowland and Mr Tricks before any discussion

about it and/or its provision to Mubadala were taken with respect to the carrying on of ancillary activities in relation to designated investment business for the purposes of Principle 3.2.1AR.

20. The three allegations detailed at [15] to [17] above (referred to hereafter as "the Principle 3 Case", "the Knowing Concern Case" and "the Mubadala Dissemination Case" respectively and together as "the Disputed Allegations") give rise to a dispute as to whether it is permissible for the allegations to be contained in the Statement of Case. The Authority's case is that they are part of the subject matter of the reference and remain within the Tribunal's jurisdiction on the hearing of the references, but the Applicants submit that they do not. The scope of the Tribunal's jurisdiction to hear allegations not raised or decided in a Warning or Decision Notice was most recently determined in *Bluecrest* and, as previously mentioned, the Tribunal's decision in that case is currently the subject of an appeal before the Court of Appeal which will be heard in July 2024. It is common ground that the Tribunal should not resolve the dispute about these new allegations until the Court of Appeal has delivered its judgment in *Bluecrest.*

21. The Bank denies the allegations made against it. In particular, its primary case, as set out in its Reply, is that none of the persons alleged to be involved in the creation and sending of the Presentation were as a matter of fact acting in the course of the Bank's business and therefore cannot be treated in law as being the directing minds of the Bank in the discharge of the Bank's business such that their actions and knowledge can be attributed to the Bank.

22. In the alternative, the Bank pleads that the business outlined within the Presentation and/or the act of sending the Presentation was not carried out with respect to regulated activities and/or ancillary activities in relation to designated investment business and therefore no liability under the Authority's Principles for Businesses can arise.

23. The Bank denies that the Presentation was disseminated to Mubadala as alleged. The Bank believes that the Presentation came to public attention not because of it being handed over to Mubadala but because personal devices operated by Mr David Rowland were subjected to unlawful hacking by agents who then used the product obtained for political advantage on behalf of the State of Qatar. The Bank also considers that currently undisclosed contact between the Authority and Qatari regulatory authorities may have inappropriately influenced the Authority as to its assessment of the underlying facts and matters upon which these proceedings are based.

24. Mr Edmund Rowland denies all allegations of wrongdoing. In particular, he says that he was not involved in the drafting of the Presentation and did not consider the Presentation to be a marketing tool for the Bank. He contends that he did not disseminate the Presentation whether by giving a copy of it to Mr David Rowland or Mr Tricks or by discussing it with an (unidentified) representative of Mubadala, as alleged by the Authority.

25. Mr Bolelyy also denies all allegations of wrongdoing. In particular, he disputes the Authority's characterisation of him as a senior investment analyst whereas he says that his only role was to act as Mr Edmund Rowland's assistant. He contends that he had limited expertise in relation to the subject matter of the Presentation and relied on Mr Weller throughout the preparation of the Presentation. He contends that Mr Weller was the person who principally prepared the substance of the contents of the Presentation which Mr Bolelyy then transposed on instructions and under the guidance of Mr Weller. Mr Edmund Rowland was the person who had originally asked Mr Bolelyy to undertake a piece of research which he did not understand, and about which he had turned to Mr Weller for help.

26. Mr Bolelyy contends that he did not at any stage understand the Presentation to be a means for the Bank to market itself or signalled its intention to engage in improper conduct, believing it to be related to Rowland Family business, wholly unconnected to the Bank.

27. As regards dissemination, Mr Bolelyy disputes that he disseminated the Presentation beyond passing it on to his principal, Mr Edmund Rowland, consistent with the latter's earlier request that he undertake research and provide him with the outcome of his work.

28. In his Reply, Mr David Rowland rejects that the Presentation was a useful marketing document. He said that the document was only sent in draft to two people, himself and Mr Tricks and therefore was not disseminated as is alleged. He contends that the only reasonable conclusion is that the document came into the public domain as a result of conduct carried out by or on behalf of the State of Qatar furthering their own political interests, to damage those perceived to be associated with their enemies, and to then gain sympathy by painting themselves as victims of an international conspiracy. He contends that agents of the State of Qatar have used unlawful and unauthorised access to computer systems to obtain/plant documents that would appear to incriminate purported enemies, including by hacking Mr David Rowland's email account. He contends that the Authority has been unduly influenced in its approach to this matter as a whole by its willingness to take Qatari allegations at face value and to assist the Qataris by punishing the Bank.

The Postponement Application

29. In his directions of 16 October 2023 Judge Jones noted that at that time no party wished to postpone the substantive hearing of the references until after the Court of Appeal had handed down its judgment in *Bluecrest.* He therefore directed that the parties should file all the evidence (including that addressing the Disputed Allegations) by 1 March 2024. That has now happened. Judge Jones stated at [19] of his directions that the case management hearing could hear arguments so as to determine which of the following options should be adopted:

> (1) The hearing of the reference on 10 June 2024 hears the matters about which there is no dispute about jurisdiction (i.e. to exclude the Disputed Allegations). This would mean the Disputed Allegations would be severed and be the subject of a split trial which is to take place at a separate hearing to be listed following the judgment of the Court of Appeal (or even Supreme Court) in *Bluecrest* on the jurisdiction issue. No evidence or submissions would be heard on the new allegations as part of the substantive reference hearing in June 2024. This was Judge Jones's preferred option.
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> (2) The Authority's proposed option of hearing all the evidence on all the issues during the June 2024 hearing, deciding those matters over which there is no dispute as to jurisdiction and adopting a procedure for determining the Disputed Allegations once the Court of Appeal's decision in *Bluecrest* is known.
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> (3) The Applicants' proposed option of determining the Tribunal's jurisdiction to hear the three new allegations in advance of the substantive hearing. As Judge Jones observed, that option could only be entertained by the Tribunal if the Court of Appeal was likely to hand down its judgment in *Bluecrest* by the period April to May 2024.

30. The third option has been ruled out because the *Bluecrest* appeal will not be heard until July 2024. Accordingly, on becoming aware of that fact, I asked the parties for their views as to whether consideration should now be given as to whether the substantive hearing of the references should be postponed. In response, all parties other than the Authority were in favour

of a postponement. I therefore decided that the case management hearing should decide the way forward. As I observed in an email to the parties on 21 December 2023, the Tribunal would be in a better position to determine the matter at the case management hearing, since it would be able to refer to the totality of the evidence that had been filed. I said that the Tribunal would therefore be able at that time to take into account the point made by the Applicants that a split hearing of the type envisaged by the first option referred to at [29] above was not practicable because of the inextricable link between the question of why the Presentation was created and the question of whether it was ever intended to be, and was in fact, disseminated.

31. At the case management hearing, the Authority argued that Judge Jones's proposal of a split trial was the most appropriate course, with the hearing to proceed in June in accordance with the existing directions and the Tribunal to hand down judgment on all matters other than the Disputed Allegations following that hearing. Mr Purchas submitted that the limited further issues relating to the Disputed Allegations could then be adjourned to a separate short hearing (over the course of a single day or at most two days) along with any other consequential matters following the hand down judgment in *Bluecrest.*

32. Mr Purchas submitted that the resolution of the Disputed Allegations can properly and manageably be severed from the principal issues in the proceedings as to which there is no jurisdictional dispute. He submitted that the Principle 3 Case and the Knowing Concern Case are advanced by reference to the same evidential basis as the balance of the issues in dispute in these proceedings. The only additional work required for the determination of these issues will consist of the parties' legal submissions as to whether the elements of liability in respect of Principle 3 and/or SYSC 6.1.1R and knowing concern have been established on the evidence before the Tribunal. Brief written and oral submissions will be sufficient for those purposes.

33. Mr Purchas submitted that the Mubadala Dissemination Case is a factual issue in respect of which the Tribunal will have evidence at the June hearing. The witness statements of Mr Edmund Rowland, Mr Bolelyy and Mr David Rowland each address this issue.

34. Mr Purchas submitted that the Tribunal can properly form a view in relation to the Authority's key allegation that the Presentation was created at Mr Rowland's behest with the intention that it be circulated/disseminated for purposes that included marketing the Bank's services to potential investors without determining whether the Presentation was in fact given to a representative of Mubadala. He submitted that the separate question of whether a copy of the Presentation was provided to and/or discussed with a representative of Mubadala can properly be assessed on the basis of evidence and submissions relating specifically to that issue to be heard either in the June hearing or at a subsequent hearing. Even if the Tribunal lacked jurisdiction to rely on an allegation of circulation/dissemination to Mubadala as a basis for finding that the Applicants have acted in breach of relevant regulatory requirements, that does not mean that it is precluded from hearing evidence on the point and making such factual findings as it considers appropriate, reserving questions as to the implications of any such findings to a later hearing post-*Bluecrest.*

35. Mr Purchas referred to *Seiler and others v FCA* [2023] UKUT 00133 (TCC) ("*Seiler*").There, the case against the applicants was based on alleged wrongdoing in respect of three transactions. There was dispute as to the jurisdiction of the Tribunal in respect of the third transaction but the Tribunal heard the totality of the evidence in one go (including evidence in relation to matters in respect of which jurisdiction was challenged) and expressed its conclusions on jurisdiction in its final judgment. Mr Purchas submitted that the Tribunal will be in a better position to determine whether it should make any such finding of fact

following the June hearing, when it can consider whether in light of the evidence and submissions that it has heard it is appropriate to do so.

36. With regard to the findings of fact to be made in relation to the Disputed Allegations, Mr Purchas submitted:

> (1) As to the Principle 3 Case and the Knowing Concern Case, the underlying facts upon which such allegations depend are the same as those on which the Decision Notices are based in that they are predicated on: (i) the state of mind, conduct and knowledge of Mr Rowland and Mr Weller in relation to the Presentation; (ii) the circumstances relating to its preparation and its contents; (iii) that nothing was being done to prevent or report such conduct; and (iv) (in Mr Rowland's case) the circulation and dissemination to Mr Tricks and Mr David Rowland and his attempts cover up the misconduct, all of which factual issues are not part of the Disputed Allegations.
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> (2) As to the Mubadala Dissemination Case, this will either be resolved as a question of fact as part of the overall assessment of the evidence before the Tribunal following the June hearing or, if the Tribunal determines not to address that point in its judgment, can be the subject of further legal submissions based on the actual findings of fact made following the June hearing which are relevant to the issue, any findings as to the credibility of the relevant witnesses, and the transcripts of the evidence given by the witnesses.

37. Aside from the question as to whether it would be practicable to determine the references on the basis of a split trial as proposed by the Authority, there are powerful reasons, as put forward by Mr Purchas as to why the June hearing should not be postponed. As Mr Purchas correctly identified, the overriding objective set out in Rule 2 of the Rules requires the Tribunal to deal with cases fairly and justly. That includes the need to avoid delay, so far as compatible with proper consideration of the issues: see Rule 2 (2) (e) of the Rules.

38. It goes without saying that unnecessary and avoidable delay in the resolution of litigation is contrary to the interests of justice. There is also a wider public interest in the finality of regulatory proceedings. In particular where prohibition orders are proposed, if it is appropriate to issue such orders then they should be issued as soon as possible in furtherance of the Authority's statutory objective of protecting the integrity of the UK financial system.

39. The effect of a postponement is that it is unlikely that the case could be heard until January 2025 at the earliest. It is obviously also in the interest of the Applicants that these matters, which have been casting a shadow over their lives for a considerable period of time, should be determined as soon as possible. It is also inevitable that with the passage of time witnesses' recollections will continue to fade.

40. There will also undoubtedly be inconvenience to the parties and their representatives in vacating a hearing which has been fixed in their diaries for some time.

41. It is also possible that findings in relation to the undisputed allegations may allow the parties to narrow the issues and scope of any subsequent hearing or dispense with the need for a subsequent hearing at all.

42. Had the Disputed Allegations been confined to the Principle 3 Case and the Knowing Concern Case, then in my view it would have been appropriate to continue with the June listing on the basis proposed by the Authority. That is because that part of the Authority's case is

based entirely on the same evidence as its case on Principle 1, so that the only additional work required for the determination of those issues which consist of the parties' legal submissions as to whether the elements of liability in respect of Principle 3 and knowing concern have been established on the evidence. However, this point is academic due to my decision, recorded later, to strike out that part of the Authority's case.

43. However, the position with regard to the Mubadala Dissemination Case is in my view completely different. The fact that Mr Purchas suggests that the Tribunal can proceed to make findings of fact in relation to that part of the Authority's case alongside its findings generally in relation to the issue of dissemination indicates that he recognises that there is an inextricable link between the question of why the Presentation was created and the question of whether it was ever intended to be, and was in fact, disseminated.

44. The question of the motive of those who created the Presentation is in my view inextricably linked to the question of whether in fact the Presentation was disseminated by those who the Authority says were acting on behalf of the Bank. The finding as to by whom, if anyone, the Presentation was disseminated will in turn inform the question of motive, so, for example, if there is a finding that it was provided by Mr Bolelyy to a representative of Mubadala and Mr Edmund Rowland understood that to be the case, that will make it much easier to draw the inference that the Presentation was intended to be acted upon by Mubadala.

45. Therefore, in my view it would not be appropriate for the Tribunal to seek to make a finding on the dissemination issue otherwise than on the totality of the evidence. That in my view precludes the Tribunal from making findings of fact on the dissemination issue without determining the question as to whether the Presentation was provided to a representative of Mubadala.

46. Mr Purchas helpfully prepared as an appendix to his skeleton argument a draft List of Issues that the Tribunal will have to determine on the reference. He suggested that the Mubadala Dissemination Case was limited to only part of one of the 24 issues that he identified, namely to whom, and in what circumstances was the Presentation provided to individuals who were not Bank employees. However, in my view, as submitted by the Applicants, the Mubadala Dissemination Case is inextricably linked to the first three issues of Mr Purchas's list:

> (1) What were Mr Edmund Rowland's instructions to Mr Bolelyy in relation to what became the Presentation?
>
> (2) In what circumstances, by whom, and for what purpose(s) was the Presentation created?
>
> (3) What was the nature of the strategy/plan set out in the Presentation and to what extent did that strategy contemplate improper market conduct, market manipulation and financial crime?

47. It is also clear from the Authority's Statement of Case that, although it also relies on the steps taken in relation to the preparation of the Presentation and its dissemination to Mr David Rowland and Mr Tricks before the alleged dissemination to Mubadala, the Mubadala Dissemination Case is the primary basis on which the Authority seeks to make its case on dissemination: see [11] of the Statement of Case. The Authority pleads that if the Presentation was disseminated to Mubadala the Bank was carrying on a regulated activity: see [119] of the Statement of Case as referred to at [18] above. If that case is made good then the activity will come within the scope of Principle 1.

48. In those circumstances, Mr George KC, who made submissions on behalf of Mr Edmund Rowland, was right to say that fairness requires the Statement of Case to set out all matters on which the Authority relies on and his client should not face cross-examination about matters where it is still to be determined whether the pleading concerned is properly relied on.

49. In my view the determination of the Mubadala Dissemination Case is one of the central issues in this case. Were the Tribunal to make findings of fact on that issue it would be faced with the possibility of having to ignore those findings and put them out of its mind when considering what the appropriate action is for the Authority to take in relation to the references, were it to be determined following the *Bluecrest* judgment that the Mubadala Dissemination Case should not have been pleaded. That would put the Tribunal in a difficult position and be unfair to the Applicants.

50. It is likely that had there not been an outstanding appeal on *Bluecrest* at the time the pleadings were closed in this case, that there would have been an application to strike out the Disputed Allegations from the Authority's Statement of Case and the Tribunal would have decided that matter as a preliminary issue before listing the matter for trial. Consequently, a decision not to proceed with the trial before the jurisdiction issues have been determined is consistent with usual practice.

51. I do not consider that *Seiler* indicates that a different approach should be taken. In that case, the third transaction in respect of which the Tribunal's jurisdiction was in dispute was not critical to the Tribunal's decision. It was clear that the Tribunal could decide the issues of integrity that arose in that case without reference to the third transaction, and whether or not it considered that transaction would have made any difference to the overall result. Furthermore, the issue was only raised at the skeleton argument stage and there had been no application to have the issue determined before the trial. In those circumstances, the approach taken by the Tribunal which was to hear the evidence before determining the jurisdiction issue was correct. In the event, the Tribunal decided not to exercise its discretion to consider the issue and made no findings on it.

52. It is also relevant to note that this issue has only arisen because the Authority has chosen to advance a case in the Statement of Case that it had not advanced in the relevant Warning Notices. As the Tribunal has said in a number of decisions, this practice should be discouraged and the Applicants should not be prejudiced by that course having been taken.

53. I am also not convinced that a split trial will necessarily result in a more efficient disposal of the matter. The need for a second trial may mean that the ultimate disposal of the matter may take place no earlier than would have been the case had the single trial been heard, say in January 2025. It also cannot be discounted that witness evidence would be necessary in the second trial. As Mr George observed, that gives rise to issues as to what witnesses would be allowed to do between trials in respect of discussing the case and may result in unnecessary duplication and inefficient use of the Tribunal's time. If the trial can be arranged for the beginning of next year, then the concerns as regards evidence going stale are minimised, when looked at in the context of the length of the preceding investigation.

54. For these reasons, notwithstanding the understandable reluctance of all concerned to vacate a three-week trial that has been listed for some time, I have concluded that it is in the interests of justice to postpone the hearing in order that all the issues in the case can be properly considered, notwithstanding the possibility that this will lead to further delay in determining the references.

The Disclosure Applications

Introduction

55. The Authority's disclosure obligations are set out in Schedule 3 of the Rules at paragraphs 4 and 6 which so far as relevant provide as follows:

> "4 (1) The respondent in a single regulator case must send or deliver a written statement ("a statement of case") in support of the referred action so that it is received by the Upper Tribunal no later than 28 days after the day on which the respondent received from the Upper Tribunal the notification required by paragraph 3(4)(b).
>
> …
>
> (3) The respondent must provide with the statement of case a list of—
>
> (a) any documents on which the respondent relies in support of the referred action; and
>
> (b) any further material which in the opinion of the respondent might undermine the decision to take that action."
>
> …
>
> 6 (1) After the applicant's reply has been sent or delivered, if there is any further material which might reasonably be expected to assist the applicant's case as disclosed by the applicant's reply and which is not listed in the list (or lists) provided in accordance with paragraph 4(3) (or paragraph 4A(6) where applicable), the respondent must send or deliver to the Upper Tribunal a list (or lists) of such further material."

56. The Bank and Mr David Rowland contend that the Authority has not complied with these disclosure obligations and have each applied for a direction under Rule 6 of the Rules requiring the Authority to disclose further material, as detailed below.

57. Putting the two applications together, disclosure is sought of the following material:

> (1) Any of the communications passing between the Authority and the State of Qatar, related entities and their representatives, or between the Authority and any other entities or individuals discussing or reporting on communications with the State of Qatar, related entities and their representatives; any meeting notes recording the Authority's interaction with such persons; internal notes, emails or other communications recording the Authority's investigative response and assessment of that interaction (collectively the "Qatari Material").
>
> (2) The entirety of communications passing between the Commission de Surveillance du Secteur Financier ("the CSSF") and the Authority; any meeting notes recording the Authority's interaction with the CSSF; emails and other communications recording the Authority's investigative response and assessment of that interaction (collectively, the "CSSF Material").

58. The Bank contends that the Qatari Material is relevant to the following issues which arise for determination on the references:

> (1) Whether it is more likely than not that the Presentation entered into the public domain through the passing of the document to Mubadala or whether it was

deliberately leaked by Qatari agents following an unlawful hack of Mr David Rowland's personal communications, as the Bank and Mr David Rowland maintain.

(2) In circumstances where the State of Qatar was encouraging the Authority to take the strongest possible action against the Bank as part of (i) its wider campaign to harm persons perceived to have influence in the UAE and/or (ii) its strategy and the civil litigation at hand at that time commenced against the Bank or was in the process of commencing, whether the Authority was unduly influenced due to the complaints made by the State of Qatar.

59. The Bank contends that the CSSF material is relevant because the limited disclosure of correspondence between the Authority and the CSSF that has been made indicates that the CSSF, the Bank's home regulator, took the view that the Presentation was not bank business, a conclusion wholly consistent with the Bank's primary defence. The material would also be relevant to the question of penalty, particularly when the CSSF's assessment was made following a self-report by the Bank.

60. The Authority has made some limited disclosure of material that falls within the scope of the material defined at [57] above.

61. On 22 June 2023, as an attachment to an email, the Authority disclosed a letter dated 22 January 2018 sent to the Authority by US lawyers acting on behalf of Qatar Central Bank. In that letter a request was made that the Authority examine the "extraordinary conduct of Banque Havilland … which devised a plan to engage in international financial warfare against Qatar." In support of that allegation, the letter referred to the Presentation which by that time had entered the public domain. The letter also contended that the scheme described in the presentation "has been followed", making allegations that several financial institutions had engaged in unlawful market manipulation in relation to Qatari bonds. The letter asked that the Authority "immediately investigate the issues presented" and concluded by saying that there would be a follow up request for the opportunity to meet the Authority to discuss the matter in more detail.

62. In its covering email, the Authority stated that "out of an abundance of transparency and in an attempt to avoid wasting the Tribunal's time on the issue" it was making the disclosure, without prejudice to its contention that the material was not relevant to the matters to be determined by the Tribunal. The Authority stated that there was no suggestion in the letter of "inappropriate influence" being brought to bear on the Authority and the issue of why the Authority opened an investigation "has long been irrelevant".

63. The Authority went on to say that following the letter there were two meetings between the Authority and the representatives of the Qatar Central Bank on the matter as well as further correspondence as a result of which the State of Qatar's representatives supplied the Authority with copies of witness statements from the civil proceedings between the State of Qatar, the Bank and Mr Bolelyy. The Authority confirmed that having reviewed the material it could not reasonably be said to assist the Bank's allegations at the State of Qatar hacked Mr David Rowland's personal communications or be said to assist with the suggestion that the Presentation entered the public domain other than through the Intercept Article. The Authority also asserted that none of the material showed any inappropriate influence being brought to bear on the Authority. The Authority concluded that no disclosure of this material should be made on the basis that it considered that the disclosure provided was sufficient for the purposes

of satisfying any reasonable person that the Qatari Material was irrelevant to the Tribunal proceedings.

64. In relation to the CSSF Material, on 28 March 2023 in relation to a privacy application in these proceedings which at that time the Bank was pursuing, the Authority disclosed as an attachment to an email certain correspondence that the Authority had had with the CSSF in relation to the potential impact of publication of the Authority's findings in its Decision Notices.

65. Attached to the Authority's covering email was an email to the Authority from the CSSF dated 4 March 2022. In that email the CSSF confirmed that in its enquiries into the matter it did not find evidence that the Presentation was a bank project, but rather it was the result of individual misconduct on the part of 3 employees.

66. The Authority assessed the relevance of this letter and a letter of 20 January 2021 which had also been disclosed in its email of 28 June 2023 to the Bank's solicitors referred to above. This letter referred to an investigation that had been carried out on the Bank's behalf by external counsel which had resulted in a report (the Project Gulf Report) which concluded that the Presentation was not a bank project. The Authority contended that neither the Project Gulf Report nor the CSSF's repetition of what the report said on the point about the Presentation being a "non-bank project" had any evidential value.

67. The Authority did confirm that there was further correspondence between it and the CSSF during the Authority's investigation but contended that there was nothing in that correspondence that falls to be disclosed.

The test for disclosure

68. As Mr Fakhoury, who led for the Authority on this issue, submitted, the question of whether any document might undermine the decision to take regulatory action (for the purposes of primary disclosure) or might reasonably be expected to assist the applicant's case as disclosed by the applicant's reply (for the purposes of secondary disclosure) must be assessed by reference to the issues arising for determination on the reference and the nature of the Tribunal's jurisdiction in relation to its determination.

69. As Mr Fakhoury helpfully summarised in his submissions, in *Arif Hussein v FCA* [2016] UKUT 0549 (TCC) ("*Hussein"*), the Tribunal considered a similar application for disclosure in respect of documents it was contended the Authority should have included within its primary and secondary disclosure obligations. The Tribunal summarised the relevant principles at [138] and [139] as follows:

> (1) The obligation to make secondary disclosure under paragraph 6 of Schedule 3 to the Rules is qualified by a requirement of reasonableness ("which might reasonably be expected to assist") which does not apply to the obligation under paragraph 4 of that Schedule.
>
> (2) The Tribunal must have regard to the overriding objective and construe the requirements of the Rules accordingly. It should have regard to the proportionality of searches that would be required to identify material required to be disclosed under these provisions.

(3) The Tribunal should also have regard to the nature of the point to which the alleged disclosure goes; how that point might be established; the relevance of the documents sought to the point in issue; and the costs and time involved in any proposed search for the documents; and

(4) The Tribunal should balance those considerations against the important consideration that the applicant should, where practicable, not be deprived of any material which might reasonably assist their case.

70. In addition, I would add that the Authority should not take a narrow approach to its disclosure obligations; the obligation is to disclose documents that *might* undermine the Authority's case or *might* reasonably assist the applicant's case as disclosed in its reply which indicates a relatively low threshold for disclosure and if there is any doubt on that issue it should be resolved in favour of the applicant. As Mr Campbell submitted on behalf of Mr David Rowland, on the question of relevance it is important for the Tribunal to put itself in the position of the applicants who are not in the same position of knowledge as the Authority in relation to the documentation gathered in the course of its investigation. In those circumstances, where, as in this case, the Authority has made some limited disclosure in relation to the matters with which the Applicants have concerns and the Authority has indicated that they do have other material which falls within the same category in respect of which disclosure is sought it is not unreasonable for the Applicants to press the Authority on the matter and if there is any doubt as to relevance, that doubt should be resolved in favour of the Applicants.

71. The Tribunal has on a number of recent occasions criticised the Authority for its approach to disclosure. For example, in *Alistair Burns v FCA* [2018] UKUT 0246 at [313] the Tribunal said:

> "This is the second occasion in recent times that the Tribunal has had cause to be troubled by the Authority's approach to limitation and disclosure: see *Arif Hussein v FCA* [2018] UKUT 0186 and the earlier interlocutory decision at [2016] UKUT 0549 and it is also a matter that has concerned the Complaints Commissioner, who observed that the approach to the limitation issue in that case was suggestive of a closed-minded attitude."

72. In this case, the Authority has filed a witness statement made by Mr Robin Willard, a senior associate in the Authority's Legal Division which set out the results of a review that Mr Willard undertook of the Qatari Material and the CSSF Material. There are some statements in that witness statement which unfortunately do indicate something of a narrow approach to the question of disclosure on the part of the Authority. In paragraph 7 of the statement, Mr Willard states that the Qatari Material does not contain anything that "would assist" the Bank's case, whereas the test for disclosure is whether the material *might* assist. In the same paragraph Mr Willard states that there was a further document in the CSSF Material which is similar to the 20 January 2021 email previously disclosed by the Authority which has not been disclosed and another document querying how the Authority had taken a different view on the question of bank business. This suggests the fact that a document which is similar to one previously provided need not be disclosed, but that is not consistent with the test outlined above. The question is whether the document might reasonably assist the applicant, regardless of whether in fact it was similar to another document that has been disclosed.

73. However, the authorities also demonstrate that the Authority has no obligation to disclose documents which are unrelated to issues arising on the reference, including in relation to allegations relating to the Authority's approach to the investigation concerned.

74. As Mr Fakhoury submitted, it is well-established that the Tribunal exercises a de novo jurisdiction in the determination of a reference under s 133 of FSMA, pursuant to which it exercises a judicial function on the basis of the evidence before it and makes afresh such factual findings as it considers appropriate in relation to the subject matter of the reference.

75. The Tribunal does not conduct a secondary review of the proceedings before the Regulatory Decisions Committee of the Authority ("RDC"). Rather it considers the evidence presented for itself (even if such evidence was not previously before the RDC) and makes such findings as it considers appropriate in all the circumstances. Accordingly, as the Court of Appeal held in *R (Willford) v FSA* [2013] EWCA Civ 677 ("*Willford"*) per Moore-Bick LJ at [21] and [37]:

> "21. …The disciplinary procedure involves, first, an administrative process under which the FSA decides whether to impose a penalty on a person for whom it has regulatory responsibility. Although the function of the RDC carries with it an obligation to act fairly and to give fair consideration to any representations made to it, the RDC remains an organ of the FSA and the giving of a Decision Notice is the final step in a disciplinary process conducted by the FSA. The statutory right to refer the matter to the Upper Tribunal enables the person subject to the disciplinary procedures to remove the matter from the sphere of the FSA for a fresh decision by an expert tribunal exercising a judicial function. That is the context in which the question falls to be decided. Although separate from the FSA both in terms of its constitution and function, the tribunal is nonetheless an integral part of the regulatory scheme established under the Act.
>
> …
>
> 37. The purpose of establishing the FSA to regulate the financial services industry and associated markets was to place responsibility for ensuring the maintenance of high standards in the hands of an expert body. It is not surprising, therefore, that the statutory scheme included provision for disputes relating to decisions taken by the FSA in the exercise of its regulatory functions to be referred to an expert tribunal. It would be surprising, therefore, if Parliament had intended that disputes relating to the procedure adopted by the FSA should be reviewed by the courts, save in the most exceptional cases. Davies is authority for the proposition that the court should not entertain an application for judicial review, even in a case where it is said that the FSA has exceeded its powers with the result that its decision is a nullity. The assertion in the present case that the FSA failed to give adequate reasons for its decision seems to me to be no more, and if anything rather less, serious. The argument that the tribunal is incapable of giving Mr Willford the remedy he needs in this case is, I think, overstated. It is true that the tribunal cannot quash the Decision Notice and remit the matter to the RDC for it to give better reasons, but it can reconsider the whole matter afresh and thus deal with the substance of the allegations against him […] Since the tribunal would have to consider the matter completely afresh, I find it hard to see how he would be assisted by obtaining further reasons from the RDC. The tribunal is not concerned with the reasoning of the RDC and Mr Willford is presumably already well placed, no doubt with the benefit of professional advice, to assess the strength of his case."

76. Although in that case the Court was referring to the Authority's decision-making process as opposed to the investigation process that led to its decision, in my view the same principles apply in relation to Enforcement's conduct of its investigation and the reasons why the investigation was opened. That is not to say that the Tribunal will never consider issues that relate to the investigation; for example such issues may be relevant when questions of limitation or unreasonable behaviour that may lead to a costs order are concerned, or where there has been a failure to consider exculpatory material.

77. *Willford* was followed in *Hussein,* where also the Tribunal rejected an argument that Enforcement had put improper pressure upon the RDC to make particular findings was relevant to the issues that the Tribunal had to determine: see [131] of the Decision.

78. The issue was also addressed in *Ford & Ors v FCA* [2016] UKUT 41 (TCC) ("*Ford"*) where the Tribunal refused an application for specific disclosure in relation to alleged misconduct by the Authority, holding as follows at [38] to [40]:

> "38. Any application for specific disclosure must be tested by reference to relevance and proportionality. Relevance must be considered in the context of the matters which are within the jurisdiction of the Tribunal to determine. That jurisdiction is a statutory one, contained in s.133 of the Financial Services and Markets Act 2000. By s.133(4), the evidence which the Tribunal may consider is any evidence relating to the subject matter of the reference.
>
> 39. A reference is not an appeal from any decision of the Authority or the RDC. The Tribunal has a first instance jurisdiction, and considers the subject matter of the reference afresh by way of complete rehearing. It is concerned with the decisions that have been taken by the Authority with respect to the conduct of the Applicants and, in the light of its own findings in relation to the subject matter of the reference, what action in relation to the financial penalty it considers is appropriate to be taken by the Authority, and in relation to prohibition, whether the reference should be dismissed or remitted to the Authority to reconsider and reach a decision in accordance with the findings of the Tribunal (s.133(5), (6)).
>
> 40. The subject matter of the references in this case is the conduct of the applicants. It is that conduct which must be considered by the Tribunal. Mr Ford was unable to persuade me that his disclosure requests going to the decision-making processes of the Authority had relevance in these proceedings to the conduct of the applicants."

Discussion

79. Applying those principles, it is self-evident that the applications to disclose the Qatari Material must be dismissed insofar as they relate to the question of whether the Authority was subject to undue influence from the State of Qatar or its agencies in relation to its decision to open an investigation or how it conducted that investigation.

80. I reject Mr Bailin's submission that in deciding the reliability of the inferences that the Authority ask the Tribunal to draw in this case the Tribunal will want to consider why the Authority assembled the evidence and the way they did. In this case, the issues that the Tribunal must decide relate purely to the personal conduct of the Applicants. Those issues are the motive of those involved in the production of the Presentation and its possible dissemination, as well as the question as to whether it was disseminated, and to whom. Those issues will be decided on the basis of the pleadings and the evidence that is put before the Tribunal on those issues alone.

81. Accordingly, I will not direct that any of the Qatari Material should be disclosed on the basis that it will assist in determining whether or not the Authority was subject to undue influence in relation to its decision to carry out an investigation and the manner in which it was conducted. Those are not issues that the Tribunal needs to determine in these proceedings and accordingly insofar as the Qatari Material relates to those issues it is not relevant material that should be disclosed.

82. I take a different view in relation to the Qatari Material insofar as it relates to the question of dissemination. In my view, the Authority has taken too narrow a view on this issue. Its

position is that the Tribunal does not need to determine whether or not the State of Qatar or its agents or representatives were involved in hacking and whether the Presentation came into the public domain as a result of such activity. The Authority contends that such hacking would neither undermine the Authority's case (in circumstances where the contrary allegation forms no part of that case) nor assist the Bank's case (in circumstances where the Presentation's entering the public domain through hacking is entirely consistent with the Authority's allegations in relation to circulation/dissemination). The Authority contends that the question of how the Presentation subsequently entered the public domain after, as it contends, it was provided to Mubadala forms no part of (and has no material bearing upon) the subject matter of the reference such that it could have been reasonably expected to assist the Bank's case.

83. I do not agree. In deciding whether or not the Authority's case that the Presentation was disseminated to Mubadala is made out, the Tribunal will have to look at all the relevant circumstances and in that context will need to consider the other possibilities as to how the document left the Bank's systems. Some evidence has been filed in this case as to potential hacking so it is not correct to say that this part of the Bank's and Mr David Rowland's case is based purely on assertion. As Mr Campbell submitted, if hacking could be established that fact will be highly relevant in assessing the question of intention and the seriousness of the document and whether or not Qatar's claims that the document was produced as part of an attempt to manipulate the market in its bonds is to be taken seriously.

84. If the Qatari Material reveals how seriously the State of Qatar or its agents and representatives took the Presentation that will be highly relevant to the issues that the Tribunal needs to determine. The Authority has already disclosed one document which goes to that issue so that if there are other documents bearing on that issue they ought to be disclosed.

85. As far as the CSSF material is concerned, although in determining the question as to whether the Presentation amounted to "bank business" the views of the CSSF, which may be informed by different legal considerations to those which arise under English law are unlikely to carry significant weight, it is difficult to say that they are of no relevance at all. The material may reveal information in the hands of the CSSF which has not been made available to the Applicants and which is relevant to the issue. Again, I have had regard to the fact that the threshold for disclosure is a relatively low one and that the Authority appears to have adopted a narrow approach in this regard.

86. Because I had concerns about the narrowness of the approach taken by the Authority, as revealed in Mr Willard's witness statement, I directed that the Authority provide me with the Qatari Material and the CSSF Material so that I could decide, applying the principles set out above, whether or any part of it should be disclosed.

The CSSF Material

87. In compliance with my direction the Authority provided me with a bundle of documentation of 1030 pages relating to the Authority's dealings with the CSSF on this matter. Except for three documents referred to below all of the documents provided related purely to the conduct of the investigation and, in particular, the liaison between the CSSF and the Authority regarding requests for information to the CSSF from the Authority for the purposes of the Authority's investigation. For the reasons I have given in relation to the Qatari Material at [79] to [81] above, that material is not relevant to the issues that the Tribunal must determine on these references and accordingly none of it requires to be disclosed.

88. However, I have decided that material relating to the discussions that took place between the Authority and the CSSF regarding the question as to whether the Presentation amounted to bank business should be disclosed. That material consists of (i) a note of a conference call between the Authority and the CSSF which took place on 10 November 2020; (ii) an email from the CSSF to the Authority of 17 November 2020; and (iii) the Authority's response to that email. In those documents there is a reference to the bank business issue, but in no more detail than was disclosed in the 20 January 2021 email referred to at [72] above. The documents are the documents referred to in Mr Willard's witness statement but, as stated at [72] above, the fact that the documents contain similar information to a document previously provided does not mean that they need not be disclosed.

The Qatari Material

89. In compliance with my direction the Authority provided me with a bundle of documentation of 804 pages relating to its dealings with the State of Qatar, other Qatar related entities and their respective legal advisers.

90. Virtually all the documentation relates to contact between the Authority and lawyers acting for the State of Qatar that took place following the institution of High Court proceedings by the State of Qatar against the Bank and others in relation to the Presentation. In essence, the material I have seen demonstrates liaison between lawyers acting for the State of Qatar and the Authority as to the progress of those proceedings and the provision to the Authority by the State of Qatar of documents created during the proceedings, such as pleadings, witness statements, orders and judgments. All of this material was provided in order to assist the Authority with its investigation and, for the reasons I have set out above, do not fall to be disclosed. In any event, most, if not all of the material provided, would already have been in the possession of the Bank as a party to the proceedings.

91. There are, however, three documents that I consider should be disclosed, although I think it is unlikely that they could be considered either to undermine the Authority's case or assist the Applicants' case. However, the documents might demonstrate how seriously the State of Qatar and the Qatari Central Bank were taking the Presentation, and as I have indicated, that is a relevant issue in these proceedings. Accordingly, I have decided that disclosure should be made of (i) a note of the meeting held on 25 April 2018 between representatives of the Qatar Central Bank and their lawyers and the Authority; (ii) an email chain between the Authority and the Qatari Central Bank's lawyers between 25 April and 27 April 2018; and (iii) a note of a meeting held between the Authority and the Qatari Central Bank's lawyers on 17 September 2018.

The Weller Witness Application

Introduction

92. The Authority has invited the Tribunal to call Mr David Weller as what it describes as a "neutral witness", using the Tribunal's power to summons a witness on its own initiative as contained in Rule 16 of the Rules.

93. Rule 16 so far as relevant provides:

> "(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; or

(b) order any person to answer any questions or produce any documents in that person's possession or control which relate to any issue in the proceedings.

….

(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."

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.

Relevant law

98. Subject to what is said later as to the Tribunal having the power to perform an inquisitorial role where necessary, the proceedings in this Tribunal are largely based on the adversarial tradition, particularly when, as in this case, all the parties are well represented.

99. Accordingly, the starting position is that it is for each party to decide who they wish to call as witnesses to support their case, although it is well established that adverse inferences

may be drawn against a party by the Court or Tribunal in circumstances where the party concerned has failed to call a witness who may have given material evidence.

100. Furthermore, the law regards a party implicitly putting its own witness forward as credible. Thus a party should not put forward as its own witness a person who it does not consider would be a witness of truth.

101. Consequently, as was said long ago in *Ewer v Ambrose* (1825) 3 B. & C. 746 KB at 750 per Holroyd J:

> "..it is undoubtedly true, that if a party calls a witness to prove a fact, he cannot, when he finds the witness proves the contrary, give general evidence to shew that that witness is not to be believed on his oath, but he may shew by other evidence that he is mistaken as to the fact which he is called to prove."

102. This is known as the "non-impeachment principle". Thus s 3 of the Criminal Procedure Act 1865 states:

> "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony."

103. The principle applies in civil as well as criminal cases. In *Greenough v Eccles* (1859) 141 ER 315, a judgment of the Court of Common Pleas, Williams J said:

> "… it is impossible to suppose the legislature could have really intended to impose any fetter whatever on the right of a party to contradict his own witness by other evidence relevant to the issue,—a right not only fully established by authority, but founded on the plainest good sense. The other is, that the section requires the judge to form an opinion that the witness is adverse, before the right to contradict, or prove that he has made inconsistent statements, is to be allowed to operate."

104. All three judges in that case agreed that "adverse" in this context meant "hostile", and Willes J contrasted a hostile witness with one who merely "gives evidence opposed to the interest of the party who calls him".

105. As Mr Strong observed, the principles applicable in criminal cases are derived from *Greenough v Eccles* and were summarised by Leggatt LJ in *R v Smith (Jordan)* [2019] EWCA Crim 1151 at [28]:

> (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.

106. I see no reason why these principles should not apply in relation to regulatory proceedings such as those in this case.

107. This Tribunal has made a number of observations in recent cases as to how regulatory proceedings have significant differences to civil litigation. In *Frensham v FCA* [2021] UKUT 0222 (TCC) the Tribunal said at [88] and [89]:

> "88.We understand that the proceedings in this Tribunal are largely based on the adversarial tradition and that it is normally a matter of choice on the part of a party as to which witnesses it will choose to call. However, regulatory proceedings of this kind do have important differences from the usual adversarial processes of civil litigation. Tribunal proceedings are designed to be more informal and flexible than traditional court proceedings. It will be sometimes necessary for the Tribunal to perform a more inquisitorial role. That follows from the fact that the Tribunal is part of the regulatory process and in many respects stands in the shoes of the Authority when considering the subject matter of references.
>
> 89.In relation to a non-disciplinary reference, the powers of the Tribunal are more limited, and, as envisaged by s133 (6A) (c) FSMA, the Tribunal needs to consider the procedural and other steps taken in connection with the making of the Authority's decision. Consequently, the Tribunal's proceedings in such cases are very similar in character to judicial review proceedings. It is well established in such proceedings that a duty of candour on the part of a public authority is expected, it having been recognised that in such circumstances a public authority is not engaged in ordinary litigation but in a common enterprise with the court to fulfil the public interest in upholding the rule of law. That means that the Authority should assist the Tribunal with full and accurate explanations of all the facts which are relevant to the issues which the Tribunal must decide."

108. Reference to these passages was made by the Tribunal in *Seiler* at [112] where the Tribunal observed that the public interest is served by the Authority calling relevant evidence before the Tribunal even if it might exculpate the individuals which the Authority believes ought to have regulatory action taken against them.

109. However, there is very little authority on the question as to how and in what circumstances the Tribunal should exercise its power to call a witness on its own initiative.

110. In *Kesse v Home Secretary* [2001] EWCA Civ 177, the Court of Appeal considered the power of the Immigration Appeal Tribunal to call a witness of its own volition when the parties had declined to do so.

111. The facts in that case were very unusual. The case concerned a deportation order made against Mr Kesse on the grounds that he had obtained leave to remain in the UK by deception. Mr Kesse had obtained his leave on the basis that he was the spouse of a British Citizen, referred to as "Morgan". The Tribunal heard the evidence of the lady who called herself Morgan and Mr Kesse accepted that he had never met her. He accepted that in order to obtain

his leave to remain he had produced documentation proving the identity of Morgan and purporting to show that he had married her. The Tribunal accepted that evidence and none of those facts were disputed by Mr Kesse. His case was that he had married a lady who had told him that she was called Morgan and had produced the documents concerned and that he had no reason to disbelieve her assertions as to who she was. The Tribunal, having heard him and Morgan, found that Mr Kesse was not a credible witness, and he well knew that his first wife was not called Morgan and that he conspired with some person unknown for them to adopt the name of Morgan and to undergo a ceremony of marriage and support his application to stay in the UK.

112. The Court of Appeal observed at [8] that there were several reasons why the Tribunal on the material before it was entitled to come to the conclusion which it did quite apart from the inherent unlikelihood of a lady, without the knowledge of her intended, assuming a false identity for the purpose of marriage and the further unlikelihood of her being able to maintain this deception throughout the marriage. However, Mr Kesse submitted that without her oral evidence the Tribunal might not have found that the Secretary of State had discharged the burden of proof which the law lays upon him in a case such as this.

113. At [34] the Court said:

> "We do not consider it necessary to decide definitively whether a judge in civil proceedings has, at any event since the introduction of the Civil Procedure Rules, power to call a witness in circumstances where neither party wishes to call him. We observe that the position may differ depending on whether the suggestion that the witness be called is first made after final speeches or much earlier in the litigation."

114. The Court, however, did say at [36] that the Tribunal's rules did envisage the possibility and propriety of the Tribunal exercising jurisdiction to call a witness of its own volition. It said at [37] and [38]:

> "37. Before us we have heard many appeals and applications in relation to immigration matters. It is clear that in many of those the litigants in front of the Tribunal and adjudicators were inadequately represented. It will often be in the interest of the litigants for the Tribunal to insist on the production of some evidence before it makes up its mind finally on a matter. So there is nothing surprising in the Tribunal having wider powers than exist in a court of law. It clearly does: see Rule 29(1).
>
> 38. Although the Tribunal does have a power to take evidence against the wishes of the parties it should in general hesitate and hesitate long before doing so. In particular when it has already retired to consider its determination without giving warning that it might take such a course. However, that it has power to do so we do not doubt. It is, we note, common ground that if one of the parties calls a witness in relation to one issue and he is not asked questions about another relevant issue either in chief or in cross-examination the Tribunal nevertheless has power to ask any question relevant to the issue which the parties chose not to explore with that witness."

115. Bearing in mind these observations, and the clear words of Rule 16 of the Rules which gives the power to the Tribunal to call a witness on its own initiative, in my view the Tribunal does have the power where necessary to call a witness on its own volition, without the consent of the parties, although, as the Court of Appeal indicated, it is a power that should be used very sparingly.

116. Against that background, I now turn to the merits of the Authority's application.

Discussion

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 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.

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.

120. However, I have concluded that it would not be appropriate for the Tribunal to call Mr Weller as its own witness for the following reasons.

121. First, it seems to me that the Authority's proposal gives rise to formidable practical difficulties. In my view, the Rules do not give the Tribunal power to order a witness who is summonsed to prepare a witness statement. Mr Weller has made it clear that he would not wish to prepare a statement voluntarily and Mr Strong indicated that Mr Weller did not have the financial resources to instruct lawyers to assist him with that process. In the circumstances, he would need to be examined in chief orally and, since he would be the Tribunal's witness, the burden would lie on the Tribunal to formulate the questions to be asked and carry out the examination in chief. In my view, that would bring the Tribunal into the arena inappropriately and would impose a considerable burden on the Tribunal.

122. In my view, the existence of the power of the Tribunal to call a witness on its own initiative reflects the fact that bearing in mind the desire to avoid formality in proceedings and the fact that in many cases parties come to a tribunal without legal representation, it will from time to time be necessary for the Tribunal to adopt a more inquisitorial approach. That is clear from the observations of the Court of Appeal in *Kesse*, referred to above. In this case all the parties are well represented and the issues which the Tribunal will have to determine have been clearly identified. There may also be cases where the Tribunal has questions of its own which it would like to put to a potential witness who was not present. There will also be cases where the Tribunal can indicate to the Authority that it would be preferable if certain individuals were available to give evidence, as it did in *Seiler* where the Authority was criticised for not addressing the issues satisfactorily before the trial.

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.

129. Accordingly, I dismiss the Weller Witness Application.

The Authority Witness Application

130. The Bank applies for a direction that the Tribunal should issue a witness summons or make an order/direction in accordance with Rule 16 or 6 of the Rules requiring either the Authority's lead investigator or Mr Dan Enraght-Moony ("the Authority Witness") to be tendered for cross-examination at the substantive hearing of the references. Mr Mansell, who made submissions on this application on behalf of the Bank, clarified at the hearing that the Bank was not seeking a direction that whoever was tendered should file a witness statement but merely that he or she would be made available to answer questions that the Bank or other

Applicants may have regarding the conduct of the Authority in relation to the subject matter of these proceedings.

131. The rationale for this application, as set out in the Bank's skeleton argument for this case management hearing, is as follows. The Bank submits that the Authority Witness has substantial and relevant evidence to give and the obligation on the Authority to tender the Authority Witness is well established. It is plainly impracticable for the Bank (or the other Applicants) to call the Authority Witness. The Bank submits that the areas on which the Authority Witness can give substantial and relevant evidence include the following:

(1) The scope of the investigation;

(2) The Authority's investigative steps;

(3) The evolving and changing nature of the case;

(4) The Authority's interactions with the Qatari Central Bank and other Qatari agents;

(5) The Authority's interactions with the CSSF;

(6) The Authority's allegations and the basis for them;

(7) The Authority's approach to disclosure; and

(8) The Authority's approach to penalty.

132. In support of its application, the Bank refers to the Tribunal's observations in *Frensham* where the Tribunal criticised the Authority for not making relevant witnesses available for cross-examination. The Tribunal said this at [79] to [81] and [89] of that decision:

> "79. Consequently, Ms Couzens [for the Authority] was unable to deal with basic questions in cross examination from Mr Sheppard or from the Tribunal as to the impact of matters which went beyond the fact of the criminal conviction, such as whether the fact of Mr Frensham's difficulties with the CII had led the Authority to consider whether it should exercise its supervisory powers to prevent his firm from trading or why it was thought appropriate not to exercise those powers when Mr Frensham was in prison. Those matters are clearly relevant to our consideration as to the extent to which Mr Frensham poses a risk to consumers, as the Authority contends.
>
> 80. It has therefore not been helpful that we have not heard from those who made the relevant supervisory decisions or those who were responsible for the development of the Authority's policy regarding non-financial misconduct not related to the performance of the individual's role in financial services or, at the very least, for Ms Couzens to have ascertained the position.
>
> 81. In addition, Ms Couzens' evidence in her witness statement did not give the full picture on one significant issue and the full position only came out during cross examination and a lengthy re-examination during which Ms Clarke was able to tease out evidence that should properly have been dealt with in the Authority's evidence in chief. We regret to say that in this respect the Authority has not shown the degree of candour which the Tribunal should reasonably expect and which the Authority would expect from the firms and individuals which it regulates, which, ironically, the Authority maintains was not provided by Mr Frensham in this case.
>
> …

> 89. ...a duty of candour on the part of a public authority is expected, it having been recognised that in such circumstances a public authority is not engaged in ordinary litigation but in a common enterprise with the court to fulfil the public interest in upholding the rule of law. That means that the Authority should assist the Tribunal with full and accurate explanations of all the facts which are relevant to the issues which the Tribunal must decide."

133. In view of the discussion set out above in relation to the Disclosure Applications, it is clear that the first five items set out at [130] above do not relate to issues which the Tribunal must determine on these references and accordingly the Tribunal will not be assisted by the cross-examination of the Authority Witness on those matters.

134. On the basis of the authorities referred to in the discussion on the Disclosure Application, namely *Willford*, *Ford* and *Hussein*, the scope of the investigation, the Authority's investigative steps, the evolving nature of the Authority's case, the Authority's interactions with the Qatari State and the CSSF are not matters which are relevant to the issues which the Tribunal needs to decide on these references. Insofar as I have ordered disclosure of documents that relate to the Authority's dealings with the Qatari State and the CSSF, it is clear that the documents will speak for themselves and there is no need to have an Authority Witness to speak to them.

135. As Mr Purchas submitted, to the extent that the Applicants may wish to make submissions on gaps in the evidential record arising from the alleged inadequacy of the Authority's investigation, it will be open for them to do so, and the Tribunal will draw such conclusions as it considers appropriate in light of the evidence it has heard. It would of course be open to the Tribunal in the course of the proceedings to ask the Authority for clarification of any relevant points that arise out of the investigation, and experience of such matters indicates that the Authority will respond promptly to any such requests.

136. In agreement with Mr Purchas's submissions, the Bank's reliance on *Frensham* is misplaced. The concern in that case was that the Authority had not provided relevant witnesses who could assist the Tribunal with understanding its case and, in particular, its policy in relation to non-financial misconduct. It was clear that the Tribunal's concerns were related to the conduct of the proceedings before the Tribunal and the evidence that was put before the Tribunal in support of the Authority's case. In those circumstances, the underlying policy behind the Authority's case was clearly highly relevant to the issues that the Tribunal had to determine. It is relevant to note that in this case, the Authority has endeavoured to provide assistance on policy matters by providing a witness statement from Mr Walls which explains the Authority's policy in relation to the appropriate regulatory response to financial misconduct which is contemplated but not in the event actually implemented.

137. In relation to the remaining matters in respect of which the Bank seeks the attendance of the Authority Witness, as far as the Authority's allegations and the basis for them is concerned, these are clearly set out in the Statement of Case. No assistance will be given to the Tribunal by having a witness explain the matters any further. As far as the Authority's approach to disclosure is concerned, that has been dealt with in the context of the Disclosure Applications. As far as the Authority's approach to penalty is concerned, again the policy is explained in the Statement of Case. In particular, in relation to the Bank, the Authority has explained why it considers that the revenue generated by the Bank's London Branch is not an appropriate indicator of the harm or potential harm caused by its breach. The Tribunal will assess the adequacy of that explanation and, if liability is proven, the amount of the penalty, and make its own decision on the appropriate amount in the light of all the evidence before it. I cannot see that the Tribunal will be assisted by any further evidence from an Authority Witness on this point.

138. Accordingly, I dismiss the Authority Witness Application.

The Strike-Out Application

The Tribunal's approach

139. The Tribunal's approach to a strike-out application was recently set out in *Bluecrest* at [210] to [215] as follows:

> "210. The Tribunal is empowered to strike out part or all of a party's case. This power is set out in UT Rule 8 which provides relevantly as follows:
>
> "8(3) The Upper Tribunal may strike out the whole or a part of the proceedings if—
>
> …
>
> (c) … the Upper Tribunal considers there is no reasonable prospect of the appellant's or the applicant's case, or part of it, succeeding.
> …
>
> (7) This rule applies to a respondent or an interested party as it applies to an appellant or applicant except that—
> (a) a reference to the striking out of the proceedings is to be read as a reference to the barring of the respondent or interested party from taking further part in the proceedings; and
> ...
> (8) If a respondent or an interested party has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Upper Tribunal need not consider any response or other submission made by that respondent or interested party, and may summarily determine any or all issues against that respondent or interested party."
>
> 211.The strike out power under 8(3)(c) may thus be exercised to bar the Authority (as respondent) from taking further part in the proceedings on the FSN Reference by virtue of rule 8(7)(a) and summarily determine proceedings against it by virtue of rule 8(8). The power may be exercised if the Tribunal is satisfied that there is no reasonable prospect of the Authority's case succeeding.
>
> 212.The test for strike out under the above UT Rules is the same as that applied under Part 24 of the Civil Procedure Rules. The relevant principles were set out by Lewison J (as he then was) in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]; (as cited in *The First De Sales Partnership and others v HMRC* [2018] UKUT 396 (TCC) at [33]). One of the principles set out in *Easyair* concerned the proper approach of the Court when considering strike out based on a point of law. Lewison J found as follows (at [15(vii)]):
>
> "…it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be."

> 213.The first stage in BCMUK's strike out application is a pure question of law and the Tribunal has already decided that it should *"grasp the nettle"* and finally determine it – as Judge Herrington indicated in his Reasons for the Directions, at paragraph 27. This stage requires the Tribunal to take the Authority's pleaded case at its highest and determine whether that case has a *"reasonable prospect"* of establishing the matters deemed legally necessary by the first question."

Basis of the Strike-Out Application

140. Mr Edmund Rowland contends that the Authority's contention that he was "knowingly concerned" in breaches of Principle 3 of the Authority's Principles for Businesses and/or SYSC 6.1.1R of the Authority's Handbook has no reasonable prospect of success.

141. Principle 3 provides:

> "A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems".

142. SYSC 6.1.1R provides:

> "A firm must establish, implement and maintain adequate policies and procedures sufficient to ensure compliance of the firm including its managers, employees and appointed representatives (or where applicable, tied agents) with its obligations under the regulatory system and for countering the risk that the firm might be used to further financial crime".

143. At [134.1] of its Statement of Case the Authority alleges that the Bank breached Principle 3 and/or SYSC 6.1.1R because:

> (1) Mr Edmund Rowland and Mr Weller "knew that the Bank had (or should have had) policies and procedures to organise and control its affairs responsibly and to counter the risk that it might be used to further financial crime which required preventing such conduct and reporting of any such conduct".
>
> (2) Mr Edmund Rowland and Mr Weller "knew (or should have known) that the Strategy proposed in the Presentation was obviously improper and placed the Bank at risk of facilitating financial crime or market misconduct";
>
> (3) Mr Edmund Rowland and Mr Weller "knew that the Bank's facilities and employees were being used to prepare, circulate and disseminate the Presentation";
>
> (4) Mr Edmund Rowland and Mr Weller "knew that nothing at all was being done to prevent or report this course of conduct"; and
>
> (5) Mr Edmund Rowland sought to try and cover up things in case there were to be a regulatory investigation, including "by failing to implement anything resembling compliance policies".

144. At [134.2] of the Statement of Case the Authority makes it clear that Principle 3 and SYSC 6.1.1R apply whether or not the preparation, circulation, and dissemination of the Presentation were regulated activities, or ancillary activities in relation to designated investment business because those activities were carried on by the Bank in a prudential context, meaning that those activities had, or might reasonably be regarded as likely to have

had, a negative effect on the integrity of the UK financial system or the Bank's ability to meet the fit and proper test.

145. At [135] of the Statement of Case the Authority pleads that regardless of whether the preparation, circulation and dissemination of the Presentation constituted bank business, the Bank nevertheless deliberately exposed itself to the risk that it might be used to further financial crime in breach of Principle 3 and/or SYSC 6.1.1R.

146. It is therefore clear that the Authority's case under Principle 3 and SYSC 6.1.1, if not struck out, could succeed even if its case on Principle 1 failed because, for example, the Tribunal were to hold that the preparation, circulation, and dissemination of the Presentation was not bank business.

147. At [14.4] of the Statement of Case the Authority pleads that Mr Edmund Rowland's "role in the creation, circulation and dissemination of the Presentation, and in the failure to put in train anything resembling compliance procedures at any point, even following press reports relating to the content of the Presentation, and in trying to cover the misconduct up, made him knowingly concerned …".

148. In addition, at [138] of the Statement of Case, the Authority states that Mr Edmund Rowland was "knowingly concerned" because "of his knowledge of the facts giving rise to those contraventions and his involvement in those contraventions … and his knowledge and involvement of his own conduct in seeking to try and cover up the misconduct in case there were to be an investigation by a regulatory body…"

149. Mr George KC submits that Principle 3 and SYSC 6.1.1R are concerned solely with the organisational framework put in place to run a business and whether reasonable care has been taken in putting that framework in place and supervising it. The provisions are solely concerned with maintaining adequate systems and can only be breached if the Authority can identify the policies that are said to be inadequate. He submits that in order to allege a breach of these provisions the Authority needs to identify that which was not organised and controlled and identify the policies that were inadequate. The Authority needs to point to some kind of systematic failure, but in this case it can only point to Mr Edmund Rowland's own misconduct as being the breach.

150. Accordingly, Mr George KC submits that the pleadings concerned have no reasonable prospect of success and should be struck out.

Discussion

151. It is clear that what I have to decide is a short point of statutory construction and I am satisfied that I have before me all the evidence necessary for the proper determination of the question as to whether the Authority's pleading on Principle 3 and/or SYSC 6.1.1R is bad in law. If I conclude that it is bad in law, then clearly the Authority will have no real prospect of succeeding on this aspect of its case and I should direct that the relevant provisions of the Statement of Case should be struck out.

152. As in all cases of statutory construction, the Tribunal's task is to identify the purpose of the legislation in question and give effect to it. The essence of the approach is to give the statutory provision a purposive construction in order to determine the nature of the circumstances to which it was intended to apply and then to decide whether the actual circumstances answer to the statutory description. The ultimate question is whether the relevant

statutory provisions, construed purposively, were intended to apply to the circumstances concerned, viewed realistically.

153. I should also bear in mind, as submitted by Mr Purchas, the role performed by the Principles in the regulatory framework. This was explained by Ouseley J in *R (British Bankers Association) v FSA* [2011] EWHC 999 (Admin). At [29] the Judge stated that the purpose of the Principles was to reflect the regulatory objectives and to be "a general statement of the fundamental obligations of firms under the regulatory system." At [30] the Judge referred to PRIN 1.1.9G which states that the Principles are also designed as a general statement of regulatory requirements applicable in new or unforeseen situations, and in situations in which there is no need for guidance, so that the Authority's other rules and guidance should not be viewed as exhausting the implications of the Principles themselves.

154. In this case, the point is relevant in that more detailed and amplified provisions of SYSC 6. 1.1R should not be regarded as exhausting the possibilities of application of Principle 3, which should be construed according to its purpose. Obviously, the establishment and operation of proper systems and controls is a fundamental obligation of a firm under the regulatory system and the provision should be construed with that in mind.

155. Therefore, in relation to the pleadings in question I need first to determine, applying the principles of construction that I identified, whether the allegations made against Mr Edmund Rowland, demonstrate that in relation to his role in preparing, circulating and disseminating the Presentation, the Authority has a realistic prospect of success in establishing that the Bank (i) failed to take reasonable care to organise and control its affairs responsibly and effectively (the Principle 3 breach); or (ii) failed to establish, implement and maintain adequate policies and procedures sufficient to ensure compliance of the firm with its obligations under the regulatory system (the SYSC 6.1.1R breach). Secondly, I need to consider whether the allegation that Mr Edmund Rowland was knowingly concerned in such breaches has a realistic prospect of success. That determination will necessarily follow from the first determination, because the Authority relies for its allegation against the Bank on its allegation that the activities of Mr Edmund Rowland in relation to the Presentation can be attributed to the Bank.

156. As Mr Purchas explained in his submissions, the Authority's pleaded case is that Mr Edmund Rowland in full knowledge of what was happening in relation to the preparation, circulation and dissemination of the Presentation was aware of the potential financial crime and he did nothing to stop it happening, which resulted in the Bank's failure to take reasonable care to organise and control its affairs responsibly and effectively.

157. As I understand it, what Mr Purchas is effectively saying is that in the course of his activities in relation to the Presentation, he had a duty to put in place procedures to prevent it being prepared, circulated and disseminated and his failure to do so amounted to a failure on the part of the Bank to comply with the relevant regulatory obligations (because his conduct could be attributed to the Bank) and, self-evidently he was knowingly concerned in that breach. Mr Purchas submits that whatever the precise scope or nature of the Bank's systems, controls, policies or procedures, Mr Rowland's conduct amounted to a deliberate failure to implement (or, expressed another way, a deliberate subversion of) those systems, controls, policies or procedures, the inevitable consequence of which was that the Bank was not in a position to ensure compliance with its obligations under the regulatory system and risked being used to further financial crime.

158. In my view, at its highest the Authority's case is best described, as Mr Purchas did in his submissions, as a deliberate subversion of the Bank's systems, controls, policies or procedures. Describing what happened as a failure to implement systems and controls, or as a failure to organise and control the Bank's affairs responsibly and effectively is in my view an unrealistic interpretation of what is meant by "organise and control" and "implement".

159. In my view Mr George is right in his analysis of the purpose of these provisions which are solely concerned with maintaining adequate systems and the provisions can only be breached if the Authority is able to identify a procedural policy that is said to be inadequate. In other words, in order for the Authority to demonstrate on the facts on which it relies that Mr Rowland's activities amounted to a breach of Principle 3 and/or SYSC 6.1.1R it would have been necessary for the Authority to identify what organisational measures the Bank had taken to guard against the risks of its business being used for the purpose of financial crime, why those measures were inadequate and why the failure of the systems and controls in this particular case demonstrated that there had been a failure to take reasonable care on the Bank's part.

160. As I have said, Mr Rowland's behaviour may, on the Authority's case, have resulted in a failure of those systems and controls but in my view it would be highly artificial, and not within the purpose of the relevant provisions, to say that Mr Rowland himself caused the breach to occur by virtue of not having put in place measures designed to prevent the breach happening. There is no pleading to the effect that Mr Rowland had any personal responsibility to ensure that the Bank implemented and managed the relevant systems and controls. It does not follow that simply because his behaviour caused whatever systems and controls there were to have failed that the Bank, through whoever was responsible for ensuring that those systems and controls were implemented and maintained, failed to take reasonable care in that regard.

161. The wording of the Authority's pleading clearly illustrates how the statutory language has been stretched beyond its reasonable bounds to meet the Authority's case. The Authority's Principle 1 case, as summarised at [14.1] of the Statement of Case, clearly presents the case as being one of deliberate behaviour to design a manipulative trading strategy thus putting the Bank at risk of facilitating financial crime and/or market misconduct. If proved, that would also amount to evidence that the Bank's systems and controls have failed to prevent the breach, and might call into question whether or not the Bank had taken reasonable steps to organise and control its affairs effectively. The Principle 3 case, as summarised at [14.2] of the Statement of Case takes this point no further. It simply says that the same facts that constitute the Principle 1 case without more constitute a breach of Principle 3 and/or SYSC 6.1.1 R. At [14.2] of the Statement of Case the Authority pleads that "Such policies and procedures as the Bank had to organise and control its affairs responsibly and to counter the risk that it might be used to further financial crime were deliberately not implemented in relation to the Presentation." The use of the word "implemented" is not appropriate in this context. What is being described is in reality a failure of whatever policies and procedures were in place to prevent the Principle 1 breach; not a failure to take reasonable care to implement such policies and procedures.

162. In my view, this case has no reasonable prospect of success in the absence of pleadings as to (i) what systems and controls were in fact in place; (ii) the responsibility, if any, of Mr Edmund Rowland to ensure that those systems were adequate so as to establish that his behaviour can be attributed to the Bank; and (iii) an analysis as to why such measures as there were in place at the time the Presentation was prepared, circulated and disseminated were inadequate.

163. Therefore, looking at the purpose of Principle 3 and SYSC 6.1.1 and construing the words used in the light of that purpose, in my view it is not realistic to characterise the alleged behaviour of the Bank pleaded in the Statement of Case, even if such behaviour could be attributed to Mr Edmund Rowland, as a breach of those provisions. The Authority's case is in reality not a case about a failure to implement systems and controls but one that seeks to identify responsibility for the contents of the Presentation. That is rightly characterised as a misconduct case falling within the scope of Principle 1 and cannot be characterised as a Principle 3 or SYSC 6.1.1R case on the basis of the facts and matters on which the Authority relies in its Statement of Case.

164. Accordingly, the Principle 3 Case is bad in law. Mr Edmund Rowland's Strike-Out Application succeeds. I therefore direct that the Authority be barred from relying on [14.2], [14.4], [15], [134], [135] and [138] of the Statement of Case in these proceedings.

Conclusion

165. In summary, my conclusions on the various applications are as follows:

(1) The substantive hearing of the references listed for 10 June 2024 is postponed.

(2) The Disclosure Applications succeed to the extent described at [87] to [91] above.

(3) The Weller Witness Application is dismissed.

(4) The Authority Witness Application is dismissed.

(5) The Strike-Out Application is allowed.

JUDGE TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE

Release date: 08 May 2024