[2016] UKUT 0549 (TCC)
Appeal number: FS/2016/0003

FINANCIAL SERVICES – prohibition order – procedure – whether parts of Applicant's Reply should be struck out – whether Authority should be directed to disclose further documents –Rules 2,5(3)(c) and (d), 8(3)(c), 16(1)(b) and paras 4 (3), 5(2) and 6 Sch 3 Tribunal Procedure (Upper Tribunal) Rules 2008

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

ARIF HUSSEIN

Applicant

- and -

THE FINANCIAL CONDUCT AUTHORITY

The Authority

TRIBUNAL: Judge Timothy Herrington

Sitting in public at The Royal Courts of Justice, Strand, London WC2 A2LL on 10 October 2016

Sara George, Partner, Stephenson Harwood LLP, for the Applicant

Benjamin Strong QC, instructed by the Financial Conduct Authority, for the Authority

DECISION

Introduction

1. This decision relates to two applications for procedural directions involving a reference made by the Applicant ("Mr Hussein") on 19 February 2016. The reference relates to a Decision Notice dated 22 January 2016 (the "Decision Notice") given by the Financial Conduct Authority (the "Authority") to Mr Hussein pursuant to which the Authority decided to make an order pursuant to section 56 of the Financial Services and Markets Act 2000 ("FSMA") prohibiting Mr Hussein from performing any function in relation to any regulated activity carried on by an authorised person, an exempt person or an exempt professional firm.

2. The Authority decided to make a prohibition order against Mr Hussein because it contends that Mr Hussein, while employed by UBS AG ("UBS") as a derivatives trader in sterling denominated instruments, engaged in internal chats with a UBS trader-submitter knowing that it would be improper to participate in conduct intended to influence UBS's LIBOR submissions, but closed his mind to the possibility that the information he provided during those chats would be used for an improper purpose.

3. The first of the two applications before the Tribunal (the "Strike-Out Application") is an application by the Authority dated 30 June 2016 for directions pursuant to Rule 8 (3) (b) and/or (c) of The Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Rules") for directions that certain paragraphs of the Applicant's Reply to the Authority's Statement of Case be struck out. The second (the "Disclosure Application") is an application by Mr Hussein dated 23 June 2016 for the disclosure of further documents by the Authority on the grounds that the Authority has not complied with its disclosure obligations under FSMA or the Rules.

Background to the reference

4. As is well known, the Authority has undertaken a number of investigations into the conduct of leading banks as regards allegations that those banks had manipulated their LIBOR submissions over a considerable period of time. LIBOR, or to give it its full name, the London Interbank Offered Rate, is a benchmark reference rate fundamental to the operation of both UK and international financial markets including markets in interest rate derivatives contracts. During the period to which the Authority's investigations related, LIBOR rates were set by a process of averaging submissions made by banks on a panel constituted by the British Bankers Association ("BBA"). The definition of LIBOR published by the BBA was:

> "The rate at which an individual contributor panel bank could borrow funds, were it to do so by asking for and then accepting interbank offers in reasonable market size, just prior to 11.00 am London time."

5. Interest rate derivative contracts typically contain payment terms that refer to a benchmark rate such as LIBOR, which is a prevalent benchmark rate used in OTC interest rate derivatives contracts and exchange traded interest rate contracts.

6. As the Authority found in its Final Notice given to UBS, which is described below, the definition of LIBOR does not allow for consideration of factors unrelated to borrowing or lending in the interbank market.

7. UBS was one of the banks whose practices concerning the making of LIBOR submissions was investigated by the Authority. The investigation concluded with UBS accepting the terms of a settlement with the Authority which resulted in the Authority imposing on UBS financial penalty of £160 million, as set out in a Final Notice given by the Authority to UBS on 19 December 2012 (the "Final Notice").

8. The Final Notice records findings that UBS breached Principle 3 of the Authority's Principles for Business (failure to take reasonable care to organise and control its affairs responsibly and effectively) and Principle 5 of those Principles (failure to observe proper standards of market conduct). The period during which those failures were found to have occurred was between 1 January 2005 and 31 December 2010 (the "Relevant Period").

9. In so far as they are relevant to this reference, the Principle 5 breaches can be summarised as follows. UBS's traders who also had responsibility for making LIBOR submissions ("Trader-Submitters") routinely took the positions of its interest rate derivatives traders ("Traders") into account when making LIBOR submissions. In particular, UBS's Traders routinely made requests to the individuals at UBS responsible for determining its LIBOR submissions to adjust their submissions to benefit their trading positions. The Final Notice states that in relation to sterling LIBOR at least 90 documented requests were made, directly involving at least 9 individuals, three of whom were Managers, that is UBS employees with direct line management responsibility over Traders and/or Trader-Submitters. From 1 January 2005 to 1 September 2009, sterling LIBOR submissions were made by Trader-Submitters from the short term interest rate desk (known as the STIR Desk) which was located in Zürich.

10. The Final Notice records that a number of Managers knew about and accepted the practice of manipulating submissions in certain LIBOR currencies. For example, paragraph 98 of the Final Notice states:

> "For reasons explained later in this Notice, on 9 August 2007, Manager C sent an email to Manager D, and Senior Manager A, Senior Manager B and Senior Manager C stating: *"... It is highly advisable to err on the low side with fixings for the time being to protect our franchise in these sensitive markets. Fixing risk and PNL thereof is secondary priority for now"*. The statement that *"Fixing Risk and PNL thereof is secondary priority for now"* means that by no later than this date, all the recipients of the email were aware that *"fixing risk and PNL"* (i.e. the financial exposure on derivative positions and improving profits through LIBOR manipulation) was (if only in Manager C's view) usually the first

> priority and would be of only secondary importance *"for now."* The email was not limited to any particular currency or currencies.

11. Insofar as they are relevant to this reference, the findings in the Final Notice as to the Principle 3 breaches can be summarised as follows.

12. During the period from 1 January 2005 to 1 September 2009, UBS combined the roles of determining its LIBOR submissions and proprietary trading in derivative products referenced to LIBOR. This created a clear conflict between the obligation to make submissions in accordance with the published criteria and the responsibility for the profitability of trading positions. In addition to manipulating their submissions to take account of requests from Traders, Trader-Submitters also had the unfettered opportunity to try to manipulate the published rates that determine the profitability or otherwise of their own trading positions.

13. During the period from 1 January 2005 to 7 August 2008, UBS had no systems, controls or policies governing the procedure for making LIBOR submissions. In addition, no formal training was provided to submitters about the submission process. A review of UBS's LIBOR processes and procedures was undertaken during 2008 culminating in the preparation of formal procedures and guidelines on 7 August 2008. However, these procedures were inadequate in design because, among other things, they did not provide any practical guidance to LIBOR submitters or compliance in determining rates; no specific training was provided to those involved in the LIBOR submission process and the procedures did not direct Traders and Trader-Submitters that it was improper to attempt to manipulate LIBOR to benefit trading positions.

14. In its analysis of the nature, seriousness and impact of the breaches found, the Final Notice makes the following finding:

> "There was a culture where the manipulation of the LIBOR… setting process was pervasive. The manipulation was conducted openly and was considered to be a normal and acceptable business practice by a large pool of individuals."

15. Since the Final Notice, a number of individuals employed by banks have been made subject to either criminal or regulatory investigations as a result of concerns that they may have been involved in the manipulation of LIBOR along the lines described in the Final Notice. Therefore, for example, in addition to the corporate failings identified in the Final Notice, the Authority has investigated the conduct of some of the individuals involved in the behaviour described in the Final Notice so as to determine whether or not sanctions may be pursued against those individuals.

16. I have been made aware of two individuals formerly employed by UBS who have been the subject of such an investigation in addition to Mr Hussein.

17. First, Mr Tom Hayes, was made the subject of a criminal investigation and subsequently convicted on eight counts of conspiracy to defraud in relation to the manipulation of the Japanese Yen LIBOR. The basis of the conviction was that Mr Hayes together with others, agreed to manipulate Yen LIBOR in order to advance his trading interest, the profits of the bank for which he worked and indirectly the rewards

which he would receive in the form of bonuses and status, to the disadvantage of the counterparties to the trades. Mr Hayes appealed against his conviction and I refer later to the judgment of the Court of Appeal which in dismissing his appeal made findings as to the relevance of certain evidence as regards market practice and the approach of regulators to the question of whether Mr Hayes acted dishonestly.

18. Secondly, Mr Panagiotis Koutsogiannis, a colleague of Mr Hussein who, I was told, was senior to Mr Hussein but in the same team and who like Mr Hussein engaged in chats with respect to LIBOR submissions with Trader-Submitters was investigated by the Authority and made subject to regulatory proceedings. Like Mr Hussein, Mr Koutsogiannis was given a Warning Notice informing him that the Authority proposed to impose a financial penalty on him and make him the subject of a prohibition order. The primary allegation against Mr Koutsogiannis was that he was dishonest and lacked integrity because he was aware of, condoned and participated directly in the practice by traders at UBS of making requests to Trader-Submitters in an attempt to influence LIBOR submissions with a view to benefiting UBS's trading positions. However, the Authority's decision-maker, the Regulatory Decisions Committee ("RDC"), decided that Mr Koutsogiannis did not behave dishonestly or without integrity in making requests for submissions. The RDC decided not to issue a decision notice and consequently the proceedings against Mr Koutsogiannis were discontinued. I refer later in more detail to these proceedings when considering Ms George's submissions as to the relevance of this decision to Mr Hussein's reference.

The regulatory proceedings

19. It is necessary to refer to the regulatory proceedings in some detail as they are relevant to a number of the issues that arise in respect of both the Strike-Out Application and the Disclosure Application.

20. The case put to Mr Hussein in the Authority's Warning Notice given on 26 February 2014 was in essence that Mr Hussein acted improperly and was knowingly concerned in UBS's breaches of Principle 5 because he made requests to UBS's sterling LIBOR Trader-Submitters in an attempt to influence their LIBOR submissions. The Warning Notice states that Mr Hussein knew that the definition of LIBOR required submissions from Panel Banks based on their cost of borrowing in the interbank market. It states that Mr Hussein understood the factors that were proper, and improper, to take into account when determining LIBOR submissions. In particular, he knew that the LIBOR definition did not allow for consideration of trading positions. The Warning Notice also states that Mr Hussein was motivated by profit when making requests to UBS's sterling LIBOR Trader-Submitters and knew therefore that it was wholly improper of him to act in the manner described.

21. The Authority relied on what it described as 29 improper communications with Trader-Submitters in which Mr Hussein attempted to influence LIBOR submissions for the benefit of his trading positions.

22. In its description of the communications, the Warning Notice states that in some cases Mr Hussein would tell the Trader-Submitter that he was "paying the fix" on a

particular day and requested a low LIBOR submission, meaning that on that day he was due to pay out on the floating leg of an interest rate swap, with the payment referenced to LIBOR and would therefore benefit from a lower LIBOR fix. In other communications he would say he was "receiving the fix", and requested a high LIBOR submission.

23. The Warning Notice refers to a conversation which took place on 27 January 2009 between Mr Hussein and "Trader-Submitter F" (later identified as Mr Adrian Keller) during which they discussed the mutual benefits in improving communication between them. This was as a result of the merger of STIR and Mr Hussein's business area, the Rates Desk. The Warning Notice then states that for almost two months after that conversation, Mr Hussein and Mr Keller engaged in frequent chats through which Mr Hussein gave Mr Keller his preferences for LIBOR submissions. It said that these chats typically took place after an approach from Mr Keller, although on occasions the communications were initiated by Mr Hussein.

24. The Warning Notice alleged that Mr Hussein's actions when making requests to UBS's Trader-Submitters in an attempt to influence their LIBOR submissions were dishonest and lacked integrity. It concluded that this misconduct warranted the imposition of a financial penalty of £500,000 and the making of a prohibition order against Mr Hussein as the Authority considered that he was not a fit and proper person to perform any function in relation to any regulated firm.

25. Mr Hussein made both written and oral submissions to the RDC on the Warning Notice.

26. The focus of Mr Hussein's written representations dated 9 May 2014 was that he did not know that Mr Keller or any of the other Trader-Submitters were LIBOR submitters. In the conversation on 27 January 2009 Mr Keller had represented to Mr Hussein that the increased emphasis on communication between STIR and the Rates Desk had legitimate business drivers: hedging positions internally and showing narrower pricing spreads to customers and Mr Keller did not at any point represent that information which Mr Hussein provided would have an inappropriate impact on LIBOR submissions. Mr Hussein therefore had neither actual or constructive notice that the chats were actually about the alteration of LIBOR submissions to benefit his trading positions; it was wholly reasonable for him to assume that the Trader-Submitters were engaging with him in their capacity as short-end derivatives traders.

27. Mr Hussein also represented that he did not at any point seek improperly to influence LIBOR submissions; the chats rather demonstrate Mr Hussein's motivation to hedge or "net" his trading positions. He said that his references in the internal chats to the "fix" or "fixing" were in respect of the 11 AM LIBOR market fixing not UBS's LIBOR submissions.

28. Mr Hussein, however, stated in his written representations that in respect of one chat (dated 20 March 2008) he did "appreciate contemporaneously that something may have been awry". He thought that in that chat Mr Keller had incorrectly understood him to be requesting a high LIBOR submission; as he said in his interview

this caused him "no small concern" and to be "very uncomfortable" so he showed the chat to his supervisor, Mr Leeming, and ceased to interact with Mr Keller. Mr Hussein had previously said in interview with the Authority that he had become increasingly uncomfortable with the chats in 2009 because they offered no meaningful benefit (since Mr Keller was not in fact providing hedging transactions), but they created the danger that his motives might be questioned later.

29. Mr Hussein represented that the merger of Rates and STIR was part of "a deliberate programme improperly to influence the published LIBOR rate" but UBS's senior management falsely represented to Mr Hussein "that the new system was being driven by legitimate business interests. It deliberately kept Mr Hussein ignorant of the nefarious motivations behind the merger and used that ignorance to its advantage".

30. It was at this point that lengthy and prolonged correspondence was entered into between the Authority and Mr Hussein's solicitors regarding the question of disclosure. In particular, the solicitors repeatedly asked for disclosure of documents relating to UBS's senior management's instructions to traders such as Mr Hussein encouraging them to try and influence published LIBOR rates as well as documents going to a culture at UBS of permitting manipulation.

31. Two unfortunate lapses on the part of the Authority's Enforcement Division ("Enforcement") as regards its disclosure obligations served to increase the temperature on this issue. First, on 25 July 2014 the Authority wrote to Mr Hussein informing him that Enforcement had, on the basis of limitation concerns, decided to discontinue its case against Mr Hussein for the imposition of a financial penalty under s 66 Financial Services and Markets Act 2000 ("FSMA"). In later correspondence, Enforcement confirmed to Mr Hussein's solicitors that they decided not to pursue the s 66 case because of concerns as to whether material received for the CFTC, the relevant US regulator, may have triggered the commencement of the three-year limitation period prescribed by s 66 earlier than had hitherto been thought to be the case. The Authority acknowledged that the change in its position at this stage in the proceedings was unsatisfactory and accepted that it did not give adequate consideration to the potential impact of the contents of the documents received for the CFTC in their analysis of the limitation period. The Authority apologised for this but denied any bad faith on its part.

32. This incident is the subject of an ongoing complaint to the Authority which is being investigated under the Authority's Complaints Scheme.

33. Secondly, Enforcement had discounted that the discussion referred to at [28] above between Mr Hussein and Mr Leeming actually took place because it believed that Mr Leeming had ceased to work with Mr Hussein at that time. That belief turned out to be incorrect, as Mr Hussein's solicitors demonstrated subsequently by reference to documents they obtained from UBS, and Enforcement failed to check documents that were in their possession which would have established the correct position. Those documents should have been disclosed.

34. A discussion of these incidents took up a large part of Mr Hussein's initial oral representations meeting with the RDC which took place on 8 December 2014. At that meeting, Ms George submitted that the RDC should decline to issue a decision notice because of systematic failings on the Authority's part in complying with their disclosure obligations under s 394 FSMA.

35. The RDC decided, at the end of that initial meeting, that it did not feel sufficiently comfortable on the disclosure position to go ahead and conclude oral representations to finalise a decision on the overall case. Enforcement were asked to revisit the question of whether disclosure had been adequate.

36. There was then considerable correspondence over a period of months involving Enforcement, the RDC and Mr Hussein's solicitors. The RDC took the view that the reasons the disclosure failures had occurred was not due to isolated mistakes but to failings in the process of analysing what documents fell to be disclosed. However, they said that those failings were discrete in that they related only to certain parts/stages of the process and therefore had a discrete impact on the disclosure exercise overall, rather than infecting the process as a whole. The RDC therefore did not consider it necessary for the entire disclosure process to be repeated from the beginning.

37. Accordingly, the RDC considered that only a limited class of specific documents should be searched for and disclosed, namely communications between Mr Hussein and the LIBOR submitters and others relating purely to the subject of hedging and the initial/early communications between Mr Hussein and each of the submitters.

38. As a result of further searches by Enforcement, a limited number of further documents were disclosed on 30 April 2015, namely three chat messages which Enforcement said contain, or might have contained, attempts by Mr Hussein or his colleagues to hedge exposures.

39. Shortly afterwards, it appears that Mr Hussein became aware of the fact that the regulatory proceedings against Mr Koutsogiannis had been completed. The result of those proceedings was that the RDC decided not to issue a decision notice against Mr Koutsogiannis and accordingly the proceedings were discontinued. Mr Hussein took the view that this decision undermined Enforcement's case that Mr Hussein's chats (which he contended followed precisely the same language and pattern found in Mr Koutsogiannis's chats and were by and large with the same Trader-Submitter) evidenced dishonesty on Mr Hussein's part. Accordingly, Mr Hussein's solicitors took the view that both the fact of the issuance of the notice of discontinuance and the circumstances which gave rise to it fell to be disclosed under s 394 (1) (b) FSMA and in a letter dated 10 July 2015 requested the Authority to disclose all materials generated in connection with Mr Koutsogiannis's RDC process which undermines, or potentially undermines, the Authority's case against Mr Hussein, including a copy of the transcript for Mr Koutsogiannis's oral representations meeting which was held on 12 March 2015.

40. The RDC responded to that letter on 30 September 2015 and declined to make any further disclosure regarding Mr Koutsogiannis's proceedings as they took the view that there was no additional undermining material, or material which might be undermining, which has not already been disclosed. The RDC did, however, disclose that its Record of Decision had concluded that the evidence was "ambiguous and insufficient to support" relevant allegations, in the specific circumstances of the case against Mr Koutsogiannis. It is clear, therefore, that the RDC took the view that the specific facts and circumstances of Mr Koutsogiannis's case were different to those relating to Mr Hussein.

41. In fact, shortly before the hearing of the applications which are the subject of this decision, Mr Hussein's solicitors obtained from Mr Koutsogiannis a copy of the RDC's Record of Decision dated 2 April 2015. This document records that Mr Koutsogiannis admitted that he had on a number of occasions made requests to Trader-Submitters in an attempt to influence LIBOR and EURIBOR submissions with a view to benefiting UBS's trading positions but that he had only made suggestions which he understood to be within a range of possible submissions, all of which would be objectively justifiable, and left it to the Trader-Submitter to decide what submission to make.

42. The Record of Decision then records the RDC's reasoning for its decision as follows:

> "The Panel considered that the evidence in support of [Mr Koutsogiannis] having made requests for submissions outside what he understood to be an acceptable range was slight, and not persuasive. The Panel did not reach a concluded view on the issue whether or not private profit (for a trader or for the bank) could ever have been a proper motive for deciding on (or contributing to a decision on) [UBS]'s benchmark submissions, within a range of genuinely equally acceptable possibilities. However, even on the assumption that this could never be considered proper they considered that [Mr Koutsogiannis] did not behave dishonestly or without integrity in making requests for submissions within what he understood to be an acceptable range. In reaching this conclusion, they took into account all the evidence, including: his particular experience and lack of training or guidance from his employers on the benchmark submissions process; the insignificant part of his day-to-day role which the submissions process occupied; the non-compliant culture within both the bank and the market at large which, on the particular facts of this case, would afford [Mr Koutsogiannis] some excuse for not appreciating that this was improper conduct; and the fact that there was some evidence that he had altered his behaviour after learning more, through contact with the BBA, about how LIBOR submissions were supposed to be made…."

43. Mr Hussein has also obtained from Mr Koutsogiannis copies of notes of two meetings held between the RDC Chairman and his legal advisers and representatives of Enforcement following the issue of the Record of Decision. It appears that the meetings were held at Enforcement's request; the note of the first meeting (held on 5 May 2015) recording that the purpose of the meeting was for Enforcement "to understand the basis of the decision as we need to understand what it means for other cases". It is normal practice for meetings of this type to take place after the RDC has

made a decision, particularly in cases where the RDC makes a decision not to issue a decision notice. At the first meeting, the RDC Chairman stressed the point that whether a particular individual was dishonest or lacked integrity was "a question of fact and when assessing questions of fact it is very much about the particular individual." The RDC Chairman said that it was a question of fact as to whether a non-dishonest person could believe that it was appropriate to take into account profit when deciding to suggest a submission within a reasonable range. The RDC Chairman referred to the factors that had led to the RDC's conclusion that Mr Koutsogiannis was not dishonest, in particular that he had been recruited as a graduate and had never worked anywhere else, had received no guidance or training and that "the only direction from above was an inappropriate one, to be in the middle of the pack." The RDC Chairman also referred to "the email that says that P & L is of secondary importance for now, which implicitly suggests it can be relevant in some circumstances." This appears to be a reference to the email set out at paragraph 98 of the Final Notice, as referred to at [10] above.

44. The RDC Chairman explained that in the RDC's view it was possible for someone to communicate their preferences to a submitter and that they had concluded that it could be possible for a defence to succeed where an individual made submissions they can consider to be in a reasonable range. He said that "a relevant factor was that this happened in 2007 and 2008, when this was not at the forefront of people's minds…. the evidence was that the market had dried up, which made it difficult to work out the correct rate. They should have been looking at where they were actually lending [i.e. where cash was trading], even though that is not the test. The evidence though shows that the submissions of other banks were away from where they were actually lending." When questioned by Enforcement as to whether the RDC considered the potential conflict of interest the RDC Chairman said that "in 2015 we all see that staring us in the face, but this happened in 2007 and 2008, where sensitivities to conflicts and the view of the market was quite a bit different than it is today."

45. The RDC Chairman explained the importance of "the presence of the directive (understood to be the email that referred to P & L being of secondary importance for now) and the absence of training"; he said that "of the positives that [Mr Koutsogiannis] had to make out for his defence to succeed he had quite a lot of them."

46. The second meeting was held on 11 May 2015. This covered some of the same ground as the first meeting, but I observe that the Acting Director of Enforcement was present at the second meeting but not the first. I infer from this that she had received feedback as to what transpired from the first meeting and wished to follow up on some of the issues discussed herself. Moreover, the impression from the tone of the note of the first meeting was that it was largely a question of the RDC clarifying its reasons for its decision, whereas at the second meeting there was more of an emphasis on feedback from Enforcement, and particularly from the Acting Director of Enforcement, on those aspects of the RDC's decision that caused it concern, notably the suggestion that it was acceptable to take into account the impact on profit when making requests to LIBOR submitters. The RDC Chairman reiterated the points he made at the first meeting regarding the lack of trading or guidance on LIBOR, the

failure of UBS to structure itself to avoid the conflict of interest and the fact of that there was no guidance "save Group Treasury saying at one point [an email of 09/08/2007] that submitters should "err on the low side" when making submissions and that fixing risk was a "secondary priority for now"." He also said that Mr Koutsogiannis "received guidance suggesting that he could take into account P & L, and everyone in his organisation seems to have thought it was okay…".

47. The RDC Chairman emphasised again that each case had to be dealt with on its own facts and when it came to Mr Koutsogiannis the RDC considered "what was in his mind and what someone in his position might reasonably do". He said that the RDC remained open to be persuaded on these issues depending on the facts of the case before them and that "these cases are … fact specific".

48. Mr Hussein's adjourned oral representations meeting with the RDC was resumed on 20 October 2015. As well as his lawyers, Mr Hussein was supported by Mr Michael Zapties, who provided expert evidence as to whether the language used by Mr Hussein in the various chats that formed the basis of the Authority's case against Mr Hussein was consistent with him engaging in discussions about hedging with the Trader-Submitter.

49. The case that Mr Hussein put in his oral representations was consistent with that he set out in his written representations, as described at [26] above. In particular, he reiterated that he believed that the Trader-Submitters who were the counterparties to his chats were derivatives traders, did not believe that they were cash traders and consequently did not believe that any of them were LIBOR submitters.

50. Mr Zapties characterised the chats, where they dealt with the question as to where Mr Hussein would prefer the LIBOR submission to be, as nothing to do with an individual bank submission but as regular chats as to where the trader would like the futures contract he has to move. Mr Zapties saw the communications as setting a tone of a strategy to share positions and try to be more efficient with hedging those positions. Mr Zapties saw the initial exchanges as demonstrating an intention to share trading information, ensuring that the overall net position is prioritised and help is given to manage risk through hedging. Mr Zapties referred to Mr Hussein's daily "reset reports", which showed the size of the positions that he had on his book and considered that Mr Hussein's use of these reports was consistent with his aim in moving his LIBOR fixings risk rather than looking to profit potentially from any manipulation of internal submissions. Mr Zapties also said that the report acted as a basis for the chats as it showed the fixings on a particular day.

51. Mr Zapties's conclusion was that the primary concern on the communications between Mr Hussein and the Trader-Submitters was hedging.

52. Mr Hussein did not explicitly put his case before the RDC on the basis that he did not know that any discussion with a Trader-Submitter would be inappropriate in so far as he sought to influence submissions to take account of the profitability of his trading positions. On the contrary, the RDC Chairman observed that Mr Hussein had said (presumably on the basis of which Mr Hussein had previously said in interview

to the Authority) that he would recognise that trying to influence LIBOR for commercial interest was wrong and he would not do that. Ms George responded to that observation by stating "that he would recognise it was wrong and he did raise it as a concern". I take that to be a reference to the chat of 20 March 2008 referred to at [28] above. In addition, at his interview Mr Hussein, in being asked about a later chat which took place on 3 February 2009, which he says from his perspective was a discussion about hedging, expressed concerns about what the Trader-Submitter was seeking to achieve, stating:

> "I would rather not be having these conversations because I'm not gaining anything out of them. There is obviously some doubt about them. If I had the choice I would not be involved in these conversations… I would not want anyone to think that I am… asking for a LIBOR submission to be changed because on a personal point of view I don't think that is something that is… that I would want to do if I had my choice about it."

53. However, in answer to questions from members of the RDC, Mr Hussein confirmed that his feeling uncomfortable with the conversations was not because he was doing anything wrong, because that did not come into his mind at that time, but because the conversations were a waste of time because he was not achieving anything out of them in terms of hedging opportunities and also because he believed that the focus of the business had changed from a customer facing, market making business to one "where we had to talk internally". He also said that he had no concerns about the propriety of the chats as he assumed that there was compliance oversight of the decision that there should be this level of communication between the different parts of the business when it was brought together.

54. There was therefore the implication in some of what Mr Hussein said in answer to the RDC's questions that he believed he was not doing anything wrong by having these conversations because it was the policy of UBS, as demonstrated by the merger of the Rates Desk and STIR that trading positions could be freely disclosed and taken into account in fixing a LIBOR submission.

55. Nevertheless, it is clear that the essence of Mr Hussein's case before the RDC was that from his perspective the conversations were all about how his positions might be hedged. Any discomfort he felt about the conversations was because the opportunities to hedge did not arise and he therefore considered them to be a waste of time.

56. The RDC gave Mr Hussein the Decision Notice on 22 January 2016. Because the disciplinary action under s 66 FSMA had been dropped since the Warning Notice was given by reason of limitation, the basis for the decision to make a prohibition order necessarily had to be made on a different basis.

57. The Decision Notice records that the RDC considered that Mr Hussein was not a fit and proper person to carry out any functions in relation to any regulated activity carried on by an authorised or exempt person, or exempt professional firm in that he lacks integrity. The RDC made a finding that Mr Hussein understood that it would be improper for Trader-Submitters to make LIBOR submissions with the aim of

benefiting UBS's trading positions, but between 28 January to 19 March 2009 he informed Trader-Submitters of his preferences for LIBOR rates (on the basis of trading positions). The RDC found that he did so while closing his mind to the risk that Trader-Submitters would use those preferences to influence LIBOR submissions they made on behalf of UBS, with the aim of benefitting his trading positions and in so doing, he acted recklessly.

58. Accordingly, although the RDC found that Mr Hussein knew that it would be wrong to permit trading positions to be taken into account in making LIBOR submissions, it rejected Enforcement's case that he acted dishonestly on the basis that he made requests to Trader-Submitters in attempt to influence their LIBOR submissions for the benefit of the profitability of his trading book knowing that to be improper. On the basis of the chat which took place on 20 March 2008, referred to at [28] above, the RDC found that Mr Hussein appreciated that he was communicating with a Trader-Submitter, or that the information about his preference might be passed onto a Trader-Submitter, and that it would be improper for Trader-Submitters to use LIBOR submissions with the aim of benefitting his trading positions. The RDC rejected Mr Hussein's representations that when he said he would have preferred not to be a party to some of these chats it was because he was finding them to be of no benefit to him, in particular because hedging opportunities were not materialising. Nor did it accept his explanation that he was not concerned because he was working in an environment which was subject to supervision by compliance oversight. The RDC found that Mr Hussein's comments in interview on these chats are consistent with closing his mind to the possible purpose of the communications.

59. The RDC seemed to accept that when expressing his preferences for LIBOR Mr Hussein was doing so, as he represented, as a convenient way of indicating his hedging requirements, but in so doing closed his mind to the possibility that the Trader-Submitters intended to use the information for the purposes of influencing LIBOR with the aim of benefiting his trading positions, rather than with a view to internal hedging.

60. The RDC accepted, as reflected in the UBS Final Notice, that UBS routinely sought to manipulate LIBOR but that the improper culture in which Mr Hussein operated did not mean that his own conduct was not improper.

61. The RDC rejected Mr Hussein's representations that the Authority had not complied with its disclosure obligations under s 394 FSMA.

The pleadings in respect of the reference

62. On 19 February 2016 Mr Hussein referred the Decision Notice to the Tribunal. The reasons given in the reference notice for the referral were as follows:

> (1) The decision was based on a fundamental misunderstanding of the evidence and made numerous findings which are factually inaccurate;

(2) The decision was inconsistent with the Authority's decision to discontinue enforcement proceedings against one of Mr Hussein's former colleagues (presumably Mr Koutsogiannis); and

(3) The expert evidence adduced before the RDC was not given adequate weight.

63. Aside from the question of inconsistent decision-making, it therefore appears from this notice that Mr Hussein intended to place before the Tribunal broadly the same case as he had put before the RDC, namely that the relevant chats were consistent with exploring opportunities for hedging Mr Hussein's trading positions.

64. The Authority served its Statement of Case, as required by paragraph 4 of Schedule 3 to the Rules on 29 March 2016. The Statement of Case is very short. It is clear that Enforcement has not accepted the RDC's finding that Mr Hussein did not act dishonestly. It is well-established that it is open to the Authority to pursue before the Tribunal an issue that was rejected by the RDC provided, as is the case here, the issue falls within the scope of the matter referred. However, as is apparent from *Angela Burns v FCA* [2015] UKUT 0601 (TCC), by so doing the Authority risks a costs order if the Tribunal finds that it was unreasonable to pursue the allegation in the light of its rejection by the RDC and the lack of any further material capable of providing a sound basis for upholding the allegation.

65. The Authority's case before the Tribunal was helpfully summarised by Mr Strong in his skeleton argument as follows:

(1) Mr Hussein took part in internal chats with a Trader-Submitter in which he communicated his preference for LIBOR rates by reference to his derivatives positions;

(2) in so doing, Mr Hussein knowingly participated in conduct intended to influence UBS's LIBOR submissions;

(3) he knew that this was wrong;

(4) alternatively, if (as Mr Hussein contended before the RDC) he was, in the relevant chats, soliciting internal trades to hedge his trading position:

(a) he knew that he was communicating with persons who were themselves responsible for UBS's LIBOR submissions or were in communication with such individual; and

(b) he closed his mind to the possibility that the information he provided would be used for an improper purpose

66. In those circumstances, the Authority contends that Mr Hussein:

(1) knowingly or recklessly engaged in conduct which he believed was improper;

(2) was knowingly or recklessly complicit in conduct intended to bring about a misrepresentation to the BBA of the rate or rates at which UBS believed that it could borrow funds on the interbank market; and

(3) displayed a lack of honesty and/or integrity.

67. As required by the Rules, the Authority appended to its Statement of Case a list of the documents on which it relied in support of its case. They were somewhat limited in scope, but in essence the Authority relied on the chats that Mr Hussein had with Mr Keller, a number of other internal group chats, the Final Notice, and transcripts of various interviews, including those with Mr Hussein, Mr Koutsogiannis and Mr Leeming. It was therefore clear that the Authority was seeking to put forward its findings against UBS in the Final Notice as context to its case against Mr Hussein. That case was based entirely on the question whether Mr Hussein's own individual chats with Mr Keller, seen in that context, demonstrated a lack of honesty or integrity on Mr Hussein's part.

68. As also required by the Rules, the Authority appended to its Statement of Case a list of the documents which, in its opinion, might be undermining to its case. It is clear that the documents chosen reflected the case that Mr Hussein had presented to the RDC because they were limited in scope, covering a number of internal group UBS chats (presumably on the basis that they may support Mr Hussein's contentions regarding the subject matter of the chats with Mr Keller being internal hedging) and Mr Zapties's written opinion that had been presented to the RDC in support of those contentions. This was also consistent with the terms of Mr Hussein's reference notice to the Tribunal. I accept Mr Strong's submission that the Authority had prepared its Statement of Case on the basis that the principal issue was whether Mr Hussein truly believed that the chats with Mr Keller were about hedging, or whether he knew that he was facilitating the manipulation of LIBOR submissions, or turned a blind eye to the possibility that he was.

69. Mr Hussein served his Reply, as required by paragraph 5 of Schedule 3 to the Rules on 26 April 2016. Mr Hussein continues to contend that the chats with Mr Keller were from his perspective concerned with the question of internal hedging opportunities. It is, however, fair to say that the primary emphasis of the Reply is that Mr Hussein believed that it was acceptable practice for trading positions to be taken into account in determining LIBOR submissions provided no deviation from the submissions being in the "middle of the pack" resulted, he did not know that such a practice was improper and this was regarded as good practice at UBS at that time. These contentions did not feature in Mr Hussein's representations to the RDC.

70. In particular, Mr Hussein contends in the Reply:

(1) His understanding was that it was consistent with proper market practice and indeed a requirement at UBS that the submitter take into account the aggregate of the bank's LIBOR exposures as one of the factors to be considered when determining the submission and there were systems in place to ensure that the submitter had all the necessary information in a convenient spreadsheet of LIBOR exposures (paragraph 11);

(2) The rationale for the merger of STIR and the Rates Desk in early 2009 was to facilitate the sharing of trading information, thus ensuring that UBS's

LIBOR submissions were closely aligned to its LIBOR exposures (paragraph 14);

(3) When explaining the rationale for the reorganisation, a more senior colleague, Mr Ducrot, ordered Mr Hussein to disclose his positions to Mr Keller on a daily basis in a face-to-face meeting in London and he also received email correspondence from another senior colleague, Mr Seger, to this effect (paragraph 17);

(4) It was not obvious to Mr Hussein, as it was not obvious to the more senior colleagues with whom he worked, including Mr Koutsogiannis, Mr Leeming, Mr Ducrot and Mr Seger, that trading exposures should not be taken into account when determining LIBOR submissions. He understood that UBS's LIBOR submissions had always been calculated by reference to trading exposures (paragraph 42);

(5) At no time was it ever suggested to him that the fundamental premise of taking into account trading exposures was so wrong that to contemplate doing so demonstrated a lack of integrity (paragraph 43);

(6) He was involved in a telephone call where the markets division of the Bank of England were interested in which banks were still setting higher fixings and what the reasons were for this, an example of efforts by the Bank of England to influence banks to keep their LIBOR submissions low after early 2008 (paragraph 57);

(7) He was taught by his line manager at the time in 2005 and 2006 that it was permissible to make a small adjustment to a LIBOR submission to take account of UBS's exposures to LIBOR (paragraph 63);

(8) He knew that LIBOR submissions were made by individuals who combined the role of trader and submitter and that these trader-submitters would routinely take their own LIBOR exposures into account and also ensure that their submission reflected the aggregate of UBS's LIBOR exposure (paragraph 69);

(9) He witnessed communication on public chats between traders and submitters (including chats in which Mr Koutsogiannis and Mr Keller participated) which he understood to be encouraged and desirable (paragraph 73);

(10) All of his senior colleagues encouraged and some participated in the making of requests for LIBOR submissions (paragraph 77);

(11) The senior management of UBS created systems which facilitated the ability of the submitter to ensure he accurately reflected the bank's aggregate exposure to LIBOR by the creation of an internal spreadsheet of LIBOR exposures which traders, including Mr Hussein, were required to upload on a daily basis (paragraph 76);

(12) It was Mr Hussein's hope that the STIR desk would assist him to manage his trading exposures by providing opportunities for netting off or "hedging" his positions (paragraph 79);

(13) He did not know Mr Keller to be a LIBOR submitter, although he knew Mr Keller worked in close proximity to submitters and was likely to be in communication with them and was likely to use the information Mr Hussein provided about his trading position to influence the level of UBS's LIBOR submissions. This was good practice at UBS at that time (paragraph 80);

(14) His purpose of engaging in conversation with Mr Keller was because he wanted the latter to give him information on whether in his opinion the LIBOR fix that day was going to come in at a level which suited Mr Hussein's trading positions and, if it was not, Mr Hussein would have expected Mr Keller to help him to hedge or net off his exposure (paragraph 81);

(15) Mr Hussein understood that it was perfectly permissible to take into account UBS's overall or aggregate LIBOR exposures however he was taught that they should only do so if this did not result in a significant deviation from the market expectation of where UBS's LIBOR submission would be (sometimes described by colleagues as being "in the range" or "the middle of the pack" (paragraph 84);

(16) The concerns that Mr Hussein had with the conversation that took place in March 2008 with Mr Keller and which he referred to Mr Leeming, was whether it was correct, as Mr Keller appeared to think, to reflect Mr Hussein's positions in isolation. He acted diligently in referring the matter to Mr Leeming for the purpose of obtaining guidance as to which factors it was permissible to consider so as to ensure his conduct could not be impugned. He was reassured by Mr Leeming in the conversation that it was not only permissible to take into account UBS's LIBOR exposures when determining UBS's LIBOR submissions but indeed a requirement to do so. Following the conversation with Mr Leeming, Mr Hussein understood that it was Mr Leeming's view that it was acceptable for Mr Keller to take into account Mr Hussein's LIBOR exposures. (paragraphs 12, 14, 86 and 87);

(17) Mr Hussein therefore continued to engage in the communications in the belief that he was acting correctly and in accordance with UBS's policy. This was consistent with his understanding of what his senior colleagues believed, including Mr Koutsogiannis (paragraph 14);

(18) Mr Hussein believed that he was acting in accordance with best practice at UBS and in accordance with a direct instruction (paragraph 92); and

(19) Mr Hussein communicated with Mr Keller exclusively on an internal bank system which both of them knew was constantly monitored by compliance officers and they communicated openly and without subterfuge. It is apparent from this that neither of them believed that they were doing anything wrong (paragraph 93).

71. Those parts of the Reply summarised at [70] above are a direct response to the Authority's contentions in the Statement of Case and indicate the matters in the Statement of Case that Mr Hussein disputes.

72. In addition, the Reply, at paragraphs 22 to 34, makes a number of contentions regarding what Mr Hussein describes as the Authority's adoption of a "fundamentally

flawed procedure" in its investigation of both UBS and Mr Hussein and, in particular, allegations that the Authority has failed to comply with its disclosure obligations. Then, at paragraphs 45 to 54, allegations are made of "inconsistent and irrational decision making" in that it was inconsistent and irrational for the Authority to allege that Mr Hussein was dishonest and lacked integrity whilst discontinuing its action against Mr Koutsogiannis for precisely the same conduct.

73. The Authority seeks to strike out those paragraphs of the Reply referred to at [72] above. The key provisions of those paragraphs can be summarised as follows:

Allegations regarding the Authority's procedures

(1) In relation to its investigation against UBS, the Authority abdicated all responsibility for evidence gathering to UBS and its lawyers. In the course of the investigation into Mr Hussein, UBS decided what information to investigate and presented evidence to the Authority in such a way as to minimise its own culpability and place the blame on Mr Hussein, a junior employee. The Authority allowed UBS's lawyers to have private meetings with the Authority's staff to give verbal feedback on their internal investigation rather than provide them with written materials, and information was provided by UBS which the Authority has since accepted was demonstrably wrong (paragraphs 22 and 23);

(2) Whilst making allegations about Mr Hussein, UBS failed to disclose to the Authority the spreadsheet of his LIBOR exposures which he was required to submit, evidence which the Authority has since refused to require UBS to disclose, thus depriving the RDC of relevant evidence (paragraphs 24 and 25);

(3) The Authority closed its mind to all explanations which did not suit its theory of the case and failed to conduct an impartial investigation (paragraph 26);

(4) Mr Hussein and Mr Koutsogiannis have complained to the Complaints Commissioner with respect to the Authority's conduct of their cases, the complaint centring around allegations of a failure on the part of the Authority to comply with its disclosure obligations regarding the limitation period and (in the case of Mr Hussein) his conversation with Mr Leeming. Accordingly, Mr Hussein has no confidence that the Authority has complied with its disclosure obligations (paragraphs 27 to 32);

(5) The Authority's investigators have accepted an implausible version of events presented by UBS's lawyers, namely that junior individuals acted on their own initiative and without the knowledge of and instructions from the senior management of UBS (paragraph 33);

(6) In preparing his Reply, Mr Hussein has been severely hampered by being deprived by UBS and the Authority of access to every document he requires to advance his defence (paragraph 34);

Inconsistent and irrational decision making

(7) It is inconsistent and irrational for the Authority to allege that Mr Hussein was dishonest and lacked integrity while acquitting Mr Koutsogiannis, the person on whom Mr Hussein relied for teaching and guidance for precisely the same conduct (paragraph 53); and

(8) In particular, given that Mr Koutsogiannis acknowledged that he held the view that there was a potential range of submissions and that it was not improper to make submissions which benefited either UBS's or an individual's trading exposures, which Mr Hussein understood to be the view of senior management at UBS, not only is it clearly unreasonable to expect Mr Hussein to have appreciated that it was obviously wrong to take into consideration trading exposures but that no one at that time with his background, experience and lack of guidance would have appreciated that it was so obviously wrong (paragraph 54).

74. As required by paragraph 5 (3) of Schedule 3 to the Rules, Mr Hussein sent with his Reply a list of all the documents on which he relied in support of his case. A large number of these documents were described in very general terms, as being documents on which he relies but which he is unable to provide as he has not been provided with them or has them only in incomplete or redacted form. In effect, this part of the documents list amounted to a request to the Authority for disclosure of the relevant documents, which ought properly to have been left to be pursued as a disclosure application, as it subsequently was.

75. On 5 May 2016 the Authority wrote to Mr Hussein's solicitors referring to its obligation pursuant to Paragraph 6 to Schedule 3 of the Rules that, in the event that there is any further material which might reasonably be expected to assist Mr Hussein's case as disclosed by his Reply and which has not already been disclosed, to provide a list of such further material within 14 days of receipt of the Reply. The Authority commented that in their view Mr Hussein was advancing a new and different case from the case advanced before the RDC and therefore requested consent for an extension of time to consider the new issues and respond with its position on any secondary disclosure to be provided.

76. There is a dispute as to whether Mr Hussein is now advancing a case before the Tribunal that is substantially different from that which he advanced before the RDC. It is not necessary for me at this stage to make any findings on that point, although it is apparent from my observations at [69] above that Mr Hussein is now making a number of contentions concerning his belief as to the acceptability of taking trading positions into account in determining LIBOR submissions which did not feature in his representations to the RDC. As I have also observed at [55] above, there are differences in his explanation of the chat of 20 March 2008 between what he said in answers to questions from the RDC and what he is now saying in his Reply. That being the case, in my view it was not unreasonable for the Authority to take the position that it needed more time to consider the implications of what was said in the Reply and its effect on disclosure.

77. Extensions of time were duly granted, and on 21 June 2016 the Authority filed its list of Secondary Disclosure pursuant to paragraph 6 of Schedule 3 to the Rules. The list was very limited, mainly consisting of a number of Mr Hussein's reset reports and did not provide any of the extensive disclosure sought by Mr Hussein in his Reply. The Authority, in a separate letter to Mr Hussein's solicitors on 21 June 2016, explained in some detail the steps undertaken to identify secondary disclosure in the light of the exercises undertaken in relation to disclosure to date. I refer to that letter in detail when considering the Disclosure Application.

The Applications

78. There are two applications before the Tribunal and which are the subject of this decision:

(1) The Strike-Out Application, which is an application made by the Authority for directions that paragraphs 22 to 34 and 45 to 54 of the Reply be struck out; and

(2) The Disclosure Application, which is an application made by Mr Hussein for directions for the disclosure of certain documents, the text of which are set out in the Annex to this decision. In broad terms, disclosure is sought in respect of three categories of documents as follows:

(a) Documents relating to evidence before the RDC in respect of Mr Koutsogiannis's regulatory proceedings, disclosure which is sought on the basis that it might undermine the Authority's case;

(b) Documents discovered by the application of the various search terms stated in Schedule 3 to the directions to communications between a number of specified UBS employees; communications emanating from the UBS Compliance Department; training documents; policy or procedure documents issued by UBS relating to IBOR submissions; senior management policy, minutes of meetings and communications in relation to IBOR; appraisals relating to Mr Hussein; and communications between UBS employees or senior management and the BBA or the Bank of England in relation to IBOR, disclosure of which is sought on the basis that it might undermine the Authority's case; and

(c) Documents which Mr Hussein believes might reasonably be expected to assist his case as disclosed by his Reply, relating to such matters as the systems and controls and procedures relating to UBS's IBOR submissions; communications between UBS and the BBA and the Bank of England in relation to UBS's IBOR submissions; communications demonstrating UBS senior management's condoning, encouraging or directing the practice of taking LIBOR exposures into account in calculating UBS's LIBOR submissions (and UBS employees acceptance of the same practice); communications which evidence how UBS's LIBOR submissions were calculated in practice and communications regarding the use of LIBOR reset reports.

The Strike-Out Application

79. This application primarily relies on the powers of the Tribunal contained in Rule 8 (3) (b) and (c) of the Rules which so far as relevant provide:

> "(b) the… applicant has failed to cooperate with the Upper Tribunal to such an extent that the Upper Tribunal cannot deal with the proceedings fairly and justly; or
>
> (c) …the Upper Tribunal considers there is no reasonable prospect of the… applicant's case, or part of it, succeeding."

80. The reasons given for the application in relation to paragraphs 22 to 34 of the Reply, are that Mr Hussein has failed to explain the relevance of these allegations to the matters on which the Tribunal has to make findings on the reference and there is no reasonable prospect of Mr Hussein establishing that the allegations are relevant. The Authority contends that if Mr Hussein considers that the Authority did not disclose relevant documents to him, he can make an application for disclosure. In relation to the allegations in respect of his complaints, the Authority contends that the mere fact of the complaints having been made is not relevant and in so far as Mr Hussein asks the Tribunal to determine the substance of the complaints, the Tribunal does not have jurisdiction to do so.

81. The reasons given for the application in relation to paragraphs 45 to 54 of the Reply are that Mr Hussein has failed to explain the relevance of these allegations to the matters on which the Tribunal has to make findings on the reference and there is no reasonable prospect of Mr Hussein establishing that those allegations are relevant to his case.

The Disclosure Application

82. The Disclosure Application does not specifically refer to the relevant powers of the Tribunal to order disclosure, but it is clear from Rule 5 (3) (d) and Rule 16 (1) (b) that the Tribunal has power to require the Authority to produce any documents in its possession or control which relate to any issue in the proceedings. The reasons given by Mr Hussein for the application are, broadly speaking, that Mr Hussein has been refused access to documents which undermine the Authority's case and would be likely to assist Mr Hussein. Mr Hussein contends that he has been prejudiced by this refusal throughout the entirety of the investigation against him, the regulatory proceedings and now in relation to his reference before the Tribunal.

83. Mr Hussein also relies upon the Authority's failings in respect of its disclosure obligations during the regulatory proceedings. He contends that as a result no reasonable observer could have any confidence in the Authority's ability and willingness to identify documents which either undermine its case or assist Mr Hussein in the absence of directions by the Tribunal.

84. It is convenient at this point to deal with two authorities which are relevant to the way the case is put by the parties in their respective pleadings and consequently to the applications which are the subject of this decision.

85. The first authority is the judgment of the Court of Appeal in *R v Hayes* [2015] EWCA Crim 1944. This judgment concerned the appeal of Mr Tom Hayes, the UBS employee referred to at [17] above, against his conviction for conspiracy to defraud in relation to the manipulation of the Japanese Yen LIBOR.

86. The central issue for the jury at trial was whether or not Mr Hayes had acted dishonestly. The trial judge (Cooke J) directed the jury on the basis of the decision in *R v Ghosh* [1982] 1 QB 1053 where Lord Lane CJ set out the well-known two limb approach to the issue of dishonesty:

> "In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did. For example, Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider themselves to be morally justified in doing what they do, because they know that ordinary people would consider these actions to be dishonest."

87. Cooke J, in directing the jury on the *Ghosh* test, said in relation to the first objective limb of the test that the jury had to decide whether what Mr Hayes agreed to do with others was dishonest by the ordinary standards of reasonable and honest people, not by the standards of the market in which he operated, if different, not by the standards of his employers or colleagues, if different, or the standards of bankers or brokers in the market even if many, or even all, regarded it as acceptable. On his appeal Mr Hayes submitted that, because of the judge's ruling, the defence was wrongly precluded from putting forward matters of evidence as relevant to the jury's consideration of the first objective limb of *Ghosh*. In summary, that evidence was said to be the following:

(1) the ethos of the banking system at the time regarding LIBOR;

(2) the prevalence of commercial LIBOR requests from traders to LIBOR submitters; in this respect the defence relied upon evidence of over one hundred of these requests, in currencies other than Yen, between 2006-

2009, which were within the defence jury bundle; the appellant had not been involved in these requests;

(3) the prevalence of commercial LIBOR submissions in banking generally;

(4) the use of interdealer brokers to discuss potential LIBOR submissions;

(5) the attitude of the BBA, which operated LIBOR and which (since at least 2005) knew of the association between LIBOR submissions and the panel banks' commercial positions and that the benchmark rate was not 'accurate';

(6) the attitude of the Bank of England and the Financial Services Authority (now the Financial Conduct Authority ("the FCA")) towards the benchmark, i.e. a refusal to step in or regulate LIBOR until the US Regulator, the Commodity Futures Trading Commission (the CFTC), commenced an investigation in 2008, despite knowing that (a) the benchmark suffered from flawed governance and (b) the LIBOR rate was not accurate.

It was said that these six factors militated against the suggestion that banks or individuals within the banks who were engaged in the LIBOR market were acting dishonestly. The factors were all evidence of contemporaneous market practice and would not have undermined the *Ghosh* standard the jury were bound to apply.

88. The Court of Appeal held at [32] that there was no authority for the proposition that objective standards of honesty are to be set by a market and that such principle would gravely affect the proper conduct of business because the history of the markets has shown that, from time to time, markets adopt patterns of behaviour which are dishonest by the standards of honest and reasonable people. However, the court held at [33] that although the evidence referred to above was irrelevant to the determination of the objective standards of honesty, it was plainly relevant to the second subjective limb. The Court of Appeal observed that the judge expressly directed the jury to have regard to it and summarised the evidence at length.

89. Ms George relies on this finding to justify the wide-ranging disclosure application that Mr Hussein has made. She submits that all the documents that Mr Hussein seeks fall within the six categories mentioned above and Mr Hussein is therefore entitled to disclosure of them in order that he can properly present his case that he did not know that what he was doing in the chats on which the Authority relies was dishonest.

90. It is of course inherent in Ms George's submissions that this Tribunal will apply the *Ghosh* test, which is part of criminal jurisprudence, in assessing whether Mr Hussein acted dishonestly. It has been the recent practice in this Tribunal in its tax jurisdiction when considering, for example, imposition of civil penalties for the dishonest evasion of tax to apply the test for dishonesty developed in the civil breach of trust cases, notably by Arden LJ in *Abou-Ramah v Abacha* [2006] EWCA Civ 1492. Arden LJ endorsed the approach of the Privy Council in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476 which had found that "it is unnecessary to show subjective dishonesty in the sense of consciousness that the transaction is dishonest. It is sufficient of the defendant knows of the elements of the transaction which make it dishonest according to normally accepted standards of behaviour." In referring to this passage, Arden LJ said in *Abou-Ramah* at [66]:

> "On the basis of this interpretation, the test of dishonesty is predominantly objective: did the conduct of the defendant fall below the normally acceptable standard? But there are also subjective aspects of dishonesty. As Lord Nicholls said in the Royal Brunei case, honesty has a "strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time as distinct from what a reasonable person would have known or appreciated."

91. Consequently, were this test to be applied, the question for the Tribunal would be whether Mr Hussein's behaviour was dishonest when assessed in the light of what he actually knew at the time, as distinct from what a reasonable person in his position would have known or appreciated.

92. It would appear that the Authority takes the view that the correct approach in this case is to apply the *Abou-Ramah* test. I do not need to determine this issue at this time; it will be a matter for submissions at the substantive hearing. In his written representations to the RDC Mr Hussein submitted that whether the *Ghosh* or the *Abou-Ramah* test is applied, he was not dishonest. For the purposes of the Disclosure Application I have therefore considered whether disclosure should be directed on the basis that the documents sought are relevant to the question of what Mr Hussein knew at the relevant time and whether in all the circumstances it is appropriate to direct disclosure.

93. The second authority is the judgment of the Court of Appeal handed down on 21 January 2015 on an interlocutory application made for permission to appeal against certain rulings made by Cooke J in various preparatory hearings relating to the Hayes trial. In particular, Cooke J had made a number of rulings in relation to submissions by the defence as to the definition and true effect of LIBOR. As summarised by the Court of Appeal at [9] of *Hayes*, in refusing leave to appeal to the Court of Appeal, the Court (Davis LJ, Simon and Holgate JJ) said as follows (*R v H* [2015] EWCA Crim 46):

> (1) It was inherent in the LIBOR scheme that the submitting panel bank was putting forward its genuine assessment of the proper rate. Although it had the subjective element inherent in an opinion, it was otherwise to be made by

reference to an objective matter – the rate at which the panel bank could borrow funds etc.

(2) Any submission made had to be made under an obligation that the submitter genuinely and honestly represented its assessment.

(3) Assessments by different panel banks could legitimately differ, but that did not displace the obligation that the submission made must represent the genuine opinion of the submitter.

(4) Where there was a range of figures, the submission made had to represent a genuine view and not a rate which would advantage the submitter.

(5) The submitting bank could not rely on or take into consideration its own commercial interests in making its assessment. The bank was not free to let its submission be coloured by considerations of how the bank might advantage its own trading exposure; that would be contrary to the definition and the whole object of the exercise.

94. It is apparent that in this judgment the Court of Appeal has dealt with the key issue that arose in Mr Koutsogiannis's regulatory proceedings, namely the question as to whether it was dishonest to make a LIBOR submission that was within a reasonable range in order to benefit a bank's commercial interests. It appears to have done so on the basis that the question was relevant to the first objective limb of the test in *Ghosh*. At the time the RDC made its decision in Mr Koutsogiannis's case the Court of Appeal judgment had not been published. The RDC had left open the question as to whether it could ever be considered proper to take a bank's commercial interests into account when deciding on a submission within a range of genuinely equally acceptable possibilities, but it is clear from the Court of Appeal's judgment that where there was a range of figures the submission had to represent a genuine view and not a rate which would advantage the submitter and the submitter could not take into account the bank's commercial interests in making that assessment. Nevertheless, the RDC had decided that even if it was improper to take into account the bank's commercial interests in making a submission within a reasonable range, on the facts of the case, they did not consider that Mr Koutsogiannis acted dishonestly or without integrity in making requests for submissions within what he understood to be an acceptable range. It therefore appears from the Record of Decision that the RDC decided the case on the basis of whether Mr Koutsogiannis had believed that he was acting wrongly in making requests for submissions within a reasonable range, that is by reference to Mr Koutsogiannis's own state of mind. It may well therefore have been the case that the RDC's decision would have been no different even if it was aware of the Court of Appeal's judgment at the time its decision was made.

95. The same issue is of course now on the table in Mr Hussein's case. Therefore, I will have to consider when considering the Applications whether the RDC's decision in Mr Koutsogiannis's case and any of the evidence on which it was based is relevant to Mr Hussein's case.

96. I shall now deal with each of the applications in turn.

The Strike-Out Application

97. The Authority relies on both Rule 8 (3) (b) and Rule 8 (3) (c) in making its application. The Authority puts its case on the basis that it is important to focus the parties on the issues in dispute so that unnecessary and irrelevant allegations are not made and do not have to be responded to. The Authority is of the view that the paragraphs of the Reply which it seeks to be struck out do contain unnecessary and irrelevant allegations. On that basis, in my view the relevant power in this case is that contained in Rule 8 (3) (c). Consequently, I should direct that the relevant paragraphs be struck out if I am of the view that there is no reasonable prospect of any findings on those allegations undermining the specific factual and legal allegations made by the Authority in its Statement of Case and there is no reasonable prospect of any findings on those allegations supporting the grounds on which Mr Hussein relies in disputing the factual and legal allegations made by the Authority in its Statement of Case.

98. In my view the Authority's grounds for its application do not fit easily within the scope of Rule 8 (3) (b). That provision is typically relied on in situations where a party repeatedly fails to cooperate with the Tribunal or the other party, such as where it does not respond to correspondence. In my view it is not appropriate to deal with the situation where, as in this case, the party genuinely believes that it is putting forward its case in the pleadings, unless it seeks to do so in a manner which is contrary to the Tribunal's directions. Sensibly, both parties focused their submissions on the question as to whether it was appropriate to make a direction pursuant to Rule 8 (3) (c) and the complementary power in Rule 5 (3) (c) to require a party to amend a document, the relevant document in this case being Mr Hussein's Reply.

99. In deciding whether to make such a direction, as Ms George correctly submitted, I must have regard to the Tribunal's overriding objective in Rule 2. That Rule requires the Tribunal to deal with cases fairly and justly and, as provided in Rule 2 (2), includes dealing with the case in ways which are proportionate to the importance of the case and the complexity of the issues and ensuring, so far as practicable, that the parties are able to participate fully in the proceedings.

100. Consequently, the power to strike out must be exercised with care: see *Sharma v Financial Services Authority* (2010) FS/2010/0008 at [37], a decision of the Financial Services and Markets Tribunal, the predecessor tribunal to this Tribunal. As was stated by the Financial Services and Markets Tribunal in *Townrow v Financial Services Authority* (2012) FS/2012/007 at [11], no one should be deprived of access to justice summarily save for compelling reason.

101. Therefore, as stated at [43] of *Sharma*:

> "The [Authority] must satisfy [the Tribunal] that there is no real prospect of [the applicant's] case succeeding. "Succeeding" means that [the applicant] must have a real prospect of securing from the Tribunal a determination as to the appropriate action which is more favourable to him than that contained in the Decision Notice."

102. As Ms George correctly submitted, the word "real" distinguishes "fanciful" prospects of success: see Lord Woolf in *Swain v Hillman* [1999] EWCA Civ 3053 at [7]. As was made clear by the Court of Appeal in considering the corresponding civil procedure rules applicable in the courts, which have consistently been regarded in this Tribunal as a source of helpful guidance, a statement of claim should not be struck out as disclosing no reasonable cause of action "save in clear and obvious cases, where the legal basis of the claim is unarguable or almost incontestably bad": see Sir Thomas Bingham MR in *X (Minors) v Bedfordshire CC* [1995] 2 AC 633 at page 693 E.

103. However, all the authorities referred to above deal with situations where it is sought to strike out the whole of a party's case. There is no suggestion here that the grounds for Mr Hussein's reference as a whole are "almost incontestably bad." The Authority does not seek to argue otherwise.

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

Allegations regarding the Authority's procedures: paragraphs 22 to 34 of the Reply

105. In her submissions Ms George justified the inclusion of paragraphs 22 to 34 in the Reply as follows:

> (1) the relevant paragraphs go to the very heart of the issues the Tribunal must determine in order to reach a fair and just decision, that is whether Mr Hussein can have a fair trial when he has been deprived of all contemporaneous material evidencing the understanding and instructions of those around him, evidence of UBS's policy and his state of mind. It is possible that the Authority's abdication of its investigatory responsibility to UBS and its failure to investigate Mr Hussein's defence and a failure to obtain documents specifically drawn to the Authority's attention by Mr Hussein in interview may mean that Mr Hussein's ability to advance his defence is irretrievably prejudiced;

(2) the Tribunal may make findings that there is information which is not now available which could have been made available had the Authority conducted a proper investigation which is likely to assist Mr Hussein;

(3) the Tribunal may conclude that the way in which the Authority has conducted itself has had such an adverse effect on the fairness of the proceedings that a fair trial is no longer possible;

(4) there have been multiple serious disclosure failings; the Tribunal is entitled to give such weight as it sees fit to these failings when determining whether the Authority can be trusted to comply with its disclosure obligations absent directions from the Tribunal and the Tribunal is entitled to have regard to the serious nature of the non-disclosure which has led to the complaints made to the Complaints Commissioner; and

(5) the Tribunal may have regard to the Authority's failure to provide any explanation of how it came to procure the issue of a time-barred Warning Notice whilst being aware that there were circumstances suggesting it was time-barred, information which was concealed from the RDC's legal adviser and Mr Hussein and Mr Koutsogiannis's legal representatives.

106. Neither these submissions, nor the more detailed submissions in relation to the relevant paragraphs of the Reply dealt with below, persuade me that those paragraphs go to the substantive issues that the Tribunal must determine in order to reach a fair and just decision. In particular, whilst the matters raised in the paragraphs concerned may be relevant to the question as to whether further disclosure of documents should be directed (which is of course the subject of the Disclosure Application) they are not relevant to the substantive issues to be determined on this reference.

107. There is one central issue to be determined on this reference which emerges from the summary of the Statement of Case and Mr Hussein's response to it in the Reply set out at [65] to [71] above. That issue is whether the Authority can demonstrate that either Mr Hussein knew that the chats on which the Authority relies were improper (in the sense that they evidence an attempt to influence UBS's LIBOR submissions for the benefit of his trading positions) or alternatively, whether he closed his mind to the possibility that the information provided during those chats would be used for an improper purpose.

108. In determining that issue the Tribunal will have to make findings as to Mr Hussein's knowledge and his state of mind at the time the chats took place, based on such evidence as is available to the Tribunal, both from the documents which are placed before it and any witness evidence which it hears. The Tribunal will take into account what Mr Hussein says about the purpose of the chats, the surrounding circumstances regarding UBS's culture and practices, the organisational arrangements around the business area in which Mr Hussein worked, what he understood to be proper market practice and the findings it makes about what Mr Hussein was told by more senior colleagues and his conversations with his colleagues. In the light of that, the Tribunal will then have to decide whether or not it can conclude, on the balance of probabilities, that the Authority (on whom the burden lies) has made out its case on either of the alternative bases on which that case is put.

109. In my view findings on the contentions put forward in paragraphs 22 to 34 of the Reply will not assist the Tribunal in coming to the conclusions that it needs to make on the substantive issues in the case.

110. Mr Hussein alleges that the investigations against both him and UBS were flawed (paragraphs 22, 23 and 26 of the Reply). The only relevance of that allegation is that it raises questions as to whether there may be documents available which would assist Mr Hussein's case which he has not been able to obtain because the Authority failed to obtain them during the course of the investigations. However, that is an issue which is only relevant to the question as to whether disclosure of documents which Mr Hussein has not seen should be directed by the Tribunal. It is therefore an issue which by necessity must be considered only in the context of a disclosure application and determined prior to the hearing of the substantive reference. Therefore, Ms George's submission that Mr Hussein cannot have a fair trial because of failures in the conduct of these investigations is wholly misguided. In any event, as Mr Strong submitted, the Reply does not contend that Mr Hussein cannot have a fair trial. The Tribunal will consider, applying the overriding objective to do justice between the parties, whether further disclosure should be directed following any necessary interlocutory hearings, taking into account the factors mentioned at [99] above. It will not be a relevant issue on the hearing of the reference itself.

111. Ms George submits that paragraphs 24 and 25 of the Reply are relevant because they show how the Authority made no steps to obtain or consider documents which would have fundamentally undermined their case against Mr Hussein. In particular, the spreadsheets, disclosure of which is sought, evidence the policy of UBS in ensuring that the aggregate of its trading positions was always considered by the submitter when making LIBOR submissions. Again, these contentions are only relevant to the question of disclosure and as with paragraphs 22, 23 and 26 of the Reply, cannot be relevant to the issues that fall to be determined on the substantive hearing of the reference.

112. Ms George submits that the contentions made in paragraphs 27 to 32 of the Reply which relate to Mr Hussein's and Mr Koutsogiannis's complaints to the Complaints Commissioner with respect to allegations of non-disclosure and withholding of evidence are relevant to the question of whether the Authority can now be trusted to comply with its disclosure obligations absent directions from the Tribunal. Again, these contentions are only relevant to the question of disclosure and as with paragraphs 22 to 26 of the Reply, cannot be relevant to the issues that fall to be determined on the substantive hearing of the reference.

113. In relation to paragraphs 33 and 34 of the Reply, Ms George does no more than reiterate her submissions that the Authority has failed to pursue a proper investigation, has accepted an implausible version of events and Mr Hussein has been severely hampered in his defence by the lack of access to the evidence he requires because the Authority failed to obtain it from UBS and consider it. For the reasons given above in relation to paragraphs 22 to 32 of the Reply, these contentions cannot be relevant to the issues that fall to be determined on the substantive hearing of the reference.

114. I therefore conclude that I should direct that paragraphs 22 to 34 of the Reply be struck out. It is apparent from the reasons that I have given above that making findings on the allegations in those paragraphs would have no real prospect of assisting the Tribunal in determining what is at the appropriate course for it to take in determining the central issue in this case, as summarised at [107] above. Striking out those paragraphs will not prevent Mr Hussein from participating fully in the proceedings. In so far as the matters struck out are relevant to the question of disclosure, they can still be considered in the proper context, namely in relation to such disclosure applications as are made. As Mr Strong submitted, if those paragraphs were retained in the Reply it would confuse the issues on which the Tribunal will have to make determinations following the final hearing. It would extend unnecessarily the length of the proceedings and require the parties to spend unnecessary time in preparing evidence in support of the contentions and responding to them. This could result in a delay to the listing of the substantive hearing. For all these reasons, in my view it is not in the interests of justice that the paragraphs concerned remain in the Reply.

Allegations regarding irrational and inconsistent decision-making: paragraphs 45 to 54 of the Reply

115. In her submissions Ms George justified the inclusion of paragraphs 45 to 54 in the Reply as follows:

> (1) like cases must be treated alike by a rational decision-maker, a rational decision-maker would, when presented with identical facts, come to a consistent conclusion but the RDC has acted inconsistently and irrationally in finding Mr Hussein was reckless in engaging in chats which Mr Koutsogiannis also engaged in, which were identical in terms of the participants and the content, but the RDC found him to be acting honestly and prudently which was perverse;
>
> (2) the RDC was concerned with precisely the same factual matters including chats in which both were present and the Tribunal will have to determine precisely the same factual matters including chats in which both participated;
>
> (3) the evidence the RDC considered in Mr Koutsogiannis's case is the same as that the Tribunal would consider in this reference; the inconsistency is in forming a different view on the same chats with the same people using the same language and failing to give the same weight to significant contextual information such as the same lack of training and guidance from UBS as to the benchmark submissions process, the same (if not more) insignificant part of his day-to-day role which the submission process occupied and the non-compliant culture within UBS and in the market at large, which might be thought to weigh much more in favour of the more junior members of staff than the more senior;
>
> (4) conversely and irrationally, the Authority failed to give these factors the same weight in relation to Mr Hussein; and
>
> (5) Mr Hussein relied upon Mr Koutsogiannis's understanding to inform his own and witnessed Mr Koutsogiannis's own participation in chats in identical terms but the converse was not the case.

116. Neither these submissions, nor the more detailed submissions in relation to the relevant paragraphs of the Reply dealt with below, persuade me that Mr Hussein has a reasonable prospect of succeeding on his reference in relation to the allegations he makes in those paragraphs.

117. In summary, the two cases were argued before the RDC on a different basis. According to the Record of Decision, Mr Koutsogiannis's case was that he did not know that it was improper to seek to influence LIBOR submissions so as to benefit his trading positions in circumstances where he made requests for submissions within what he understood to be an acceptable range. Mr Hussein's case was that he did not know that the Trader-Submitter he had his chats with was a submitter, he was encouraged to have the conversations in order to help with the hedging of his positions and the conversations he did have took place in that context.

118. The common factor between the two cases was that they both turned on the question as to what the RDC believed was the state of mind of each of the two individuals concerned, and, in particular, the extent of their knowledge as to whether each of them knew that their respective conversations were improper. That being the central issue in each case, it was clearly open to the RDC to make different findings in relation to the state of mind of each of the individuals concerned, even if very similar documentary evidence was before it in both cases, particularly in a situation where each individual had argued their case on a different basis. The RDC had to make its decision by drawing inferences from both the evidence concerned and from hearing the representations of the two individuals. It cannot therefore be said that just because the RDC came to a different conclusion on the state of mind of the two individuals it was irrational or inconsistent for it to do so. As mentioned at [43] above, the RDC Chairman emphasised at the first feedback meeting that whether a particular individual was dishonest or lacked integrity was a question of fact to be determined by assessing the particular individual. It was not a case of the Authority relying solely on identical chats to which both were a party and both individuals putting up the same argument against the contention that those chats were improper.

119. It appears to be the case that Mr Hussein is in his reference to the Tribunal putting up a similar argument to that which the RDC accepted in Mr Koutsogiannis's case. Obviously the RDC cannot be criticised for not considering that argument in coming to its decision on Mr Hussein's case because that argument was never put to it.

120. Consequently, I reject Ms George's submission that the two cases involved identical investigations relying on identical evidence. Because of the way the arguments were put, Mr Hussein's evidence was necessarily different to that of Mr Koutsogiannis. For that reason, it cannot be said, as Ms George submits, that in reaching the opposite view in relation to Mr Hussein than it had in relation to Mr Koutsogiannis, the RDC ignored all the factors which were found to be mitigating in relation to Mr Koutsogiannis and which were also present in the case of Mr Hussein, namely those set out in the Record of Decision, as quoted at [42] above at the two feedback meetings referred to at [43] to [47] above. There was no need for the RDC to consider those factors in Mr Hussein's case because he did not argue before them

that he did not know that his conversations were improper. His position, unlike that of Mr Koutsogiannis, was that he was not seeking to influence submissions at all, but was engaging in conversations regarding possible opportunities for hedging.

121. In support of her submissions, Ms George relies on *Carrimjee v FCA* [2015] UKUT 79 (TCC).

122. In that case, the Authority alleged that Mr Carrimjee recklessly assisted his client, Mr Goenka, in the latter's plan to manipulate the price of various securities. Mr Goenka settled the regulatory proceedings brought against him by the Authority. Mr Carrimjee and a broker, Mrs Parikh, to whom Mr Carrimjee had introduced Mr Goenka in order that the manipulative trades could be carried out, were referred to in anonymized form in Mr Goenka's Final Notice.

123. Regulatory proceedings were also brought against Mrs Parikh and Mr Carrimjee. Their Warning Notices alleged that Mrs Parikh willingly participated in the plan intended to manipulate the price of the securities and that Mr Carrimjee assisted her, knowing Mr Goenka's plan to manipulate the market in the securities concerned.

124. Following representations by each of Mrs Parikh and Mr Carrimjee to the RDC, Decision Notices were issued which reached different conclusions. The RDC did not find that Mr Carrimjee and Mrs Parikh worked together to assist Mr Goenka to manipulate the market. They decided that Mr Carrimjee suspected that market manipulation was Mr Goenka's goal and turned a blind eye, whereas Mrs Parikh was merely negligent in that she should have been suspicious and should have made further enquiry.

125. Mrs Parikh did not challenge the RDC's decision, and the Authority issued a Final Notice in the same terms as its Decision Notice. Mr Carrimjee referred his Decision Notice to the Tribunal.

126. The Tribunal considered to what extent it was bound by the RDC's findings in the Final Notices given to Mr Goenka and Mrs Parikh. It concluded at [104] that:

> ".... it would be a breach of the Authority's public law duty to act rationally were it to seek to advance a position which is factually inconsistent with the conclusions it had reached with regard to the behaviour of the subject of a Final Notice on the same evidence in respect of the same subject in that Final Notice."

127. Accordingly, the Tribunal held that it was not open to the Authority to make an allegation against Mr Carrimjee that Mrs Parikh's state of mind was different from that set out in the Final Notice issued against her, namely that, as a matter of fact, she knew that Mr Goenka planned to manipulate the market, rather than, as the RDC found, she did not suspect that was the case but should have done. In assessing the evidence against Mr Carrimjee the Tribunal therefore proceeded on the basis that Mrs Parikh's state of mind was as described in the Final Notice.

128. Ms George submits that it is not open to the Authority to depart from its determination that Mr Koutsogiannis was honest, had integrity and was prudent. The Record of Decision is in public law terms a "decision" and is a statement of the Authority's position with regard to Mr Koutsogiannis. Ms George submits that the Tribunal adopted such an approach in *Carrimjee* and determined that it should proceed on the basis that it was not open to it to go beyond the findings of the Authority.

129. I have no doubt that the Authority cannot reopen its decision against Mr Koutsogiannis and I have not seen any suggestion that it intends to do so. Nevertheless, Ms George misunderstands the reasoning in *Carrimjee* if she is suggesting that it was not open to the Authority, acting through the RDC, to have made the findings it did against Mr Hussein on the grounds that it would be inconsistent with the decision it made in respect of Mr Koutsogiannis. It would also misunderstand the *Carrimjee* decision if she is suggesting that it is not open to the Authority to argue in the Tribunal for a different outcome (to that in Mr Koutsogiannis's case) in the case of Mr Hussein on the same basis. All that the Tribunal was saying in *Carrimjee* was that it was not open for the Authority to argue in the Tribunal against an outcome by which it had become bound by virtue of the issue of its Final Notices to both Mrs Parikh and Mr Goenka.

130. The same principle applies in relation to its decision in respect of Mr Koutsogiannis, on the basis that the effect of a decision to discontinue proceedings must be regarded as having the same effect as a Final Notice in terms of its binding nature but that says nothing about the position that the Authority may take in the Tribunal in respect of Mr Hussein. There is no Final Notice in respect of Mr Hussein. The Decision Notice cannot be implemented by the Authority and will be superseded by whatever directions the Tribunal makes on determining the reference following a fresh hearing on the merits. Even if the giving of a Decision Notice against Mr Hussein could be regarded as irrational, the whole purpose of the reference is to determine what is the appropriate action for the Authority to take in the light of all the evidence that the Tribunal considers on the reference. This is the inevitable consequence of the proceedings before the Tribunal amounting to a fresh hearing rather than an appeal. Neither do the proceedings constitute any kind of judicial review of the Decision Notice. Insofar as Mr Hussein complains that the RDC's decision in his case was unlawful on the grounds of irrationality and perversity (a matter which could only be addressed through judicial review in the Administrative Court) he has an adequate remedy through his reference to the Tribunal which will consider the whole matter afresh and deal with the substance of the allegations against him. It will only be in exceptional cases (which in my view this case is not) where the hearing of the reference in the Tribunal will not provide an adequate remedy: see *R (Willford) v Financial Services Authority* [2013] EWCA Civ 677 per Moore-Bick LJ at [36] and [37].

131. Ms George seeks to characterise the purpose of the feedback meetings held between the RDC Chairman and Enforcement following the RDC's decision in relation to Mr Koutsogiannis, details of which are described at [43] to [47] above, as an attempt by Enforcement to put improper pressure upon the RDC to make findings

against Mr Hussein, whose oral representations meeting had at that stage been adjourned but not concluded. I infer from those contentions that Ms George submits that the lawfulness of the RDC's decision against Mr Hussein is therefore called into question. For the reasons given at [130] above, it is not necessary for the Tribunal to make any findings on those matters in relation to this reference and I will therefore say no more about them.

132. Furthermore, should the Authority take the view that the RDC made its decision in Mr Koutsogiannis's case due to a misapprehension as to the correct legal position, as subsequently clarified in *R v H,* whilst Mr Koutsogiannis's decision cannot be revisited that does not prevent the Authority arguing its case before the Tribunal in Mr Hussein's case on the basis of what it believes now to be the correct legal position.

133. For all these reasons, I conclude that I should direct that paragraphs 53 and 54 of the Reply should be struck out. Paragraphs 51 and 52 of the Reply simply provide background to the pleadings made at paragraphs 53 and 54 and should likewise be struck out.

134. However, paragraphs 45 to 50 make no allegations about inconsistent and irrational decision making. In view of the way that Mr Hussein now puts his case before the Tribunal, in my view these paragraphs are relevant to the substantive issues which need to be determined in Mr Hussein's case. The paragraphs concerned recite the case put by the Authority against Mr Koutsogiannis, summarise the essence of the decision made in his favour by the RDC and plead (at paragraph 50) that all the factors that the RDC found highly persuasive in relation to Mr Koutsogiannis are present in the case of Mr Hussein. Bearing in mind the close working relationship between Mr Koutsogiannis and Mr Hussein and the fact that they did participate together on one of the chats on which the Authority relies and Mr Koutsogiannis took Mr Hussein's place on a similar chat, in my view the circumstances relating to the case against Mr Koutsogiannis are relevant to Mr Hussein's case. Mr Hussein is therefore entitled to seek to derive some assistance from those circumstances in presenting his own case. It is also possible that Mr Koutsogiannis could be called as a witness to give evidence regarding the circumstances relating to the operation of the desk on which both he and Mr Hussein worked and other matters.

135. I therefore dismiss the Strike-Out Application in so far as it relates to paragraphs 45 to 50 of the Reply, although the heading before paragraph 45 of "inconsistent and irrational decision making" will have to be changed. I will make directions giving Mr Hussein permission to amend the heading and to make any other necessary consequential amendments to paragraphs 45 to 50 of the Reply so as to reflect my conclusions at [133] above.

The Disclosure Application

136. As described at [78] above, the documents which Mr Hussein seeks to be disclosed fall into three categories. The first category covers a discrete class of documents relating to Mr Koutsogiannis's regulatory proceedings. The second category covers documents which Mr Hussein contends should have been included on

the list which was required to accompany the Authority's Statement of Case pursuant to paragraph 4 (3) (b) of Schedule 3 to the Rules. That provision requires the Authority's list of documents to include "any further material which in the opinion of the [Authority] might undermine the decision to take action."

137. The third category covers documents which Mr Hussein contends should have been included on a list provided by the Authority pursuant to paragraph 6 (1) of Schedule 3 to the Rules. That provision requires the Authority to provide it to Mr Hussein and the Tribunal a list of such "further material which might reasonably be expected to assist [Mr Hussein's] case as disclosed by [his] reply" and which has not been provided in accordance with paragraph 4 (3) of Schedule 3 to the Rules.

138. I note that the obligation referred to at [137] above is qualified by reasonableness whereas that referred to at [136] above is not. However, I do not think that difference is of any significance in this case, although, as Mr Strong submitted, compliance with the latter provision can only be dealt with by the Authority in the light of the case which it expects will be advanced by the applicant and the latter requires disclosure by reference to the case pleaded in the Reply.

139. In deciding whether to make a direction to order disclosure of any document which falls into either category, I must, as submitted by Mr Strong, have regard to the overriding objective and construe the requirements of the rules accordingly. I accept Mr Strong's submission that as a consequence I should have regard to the proportionality of any searches that would be required to identify material required to be disclosed under these provisions. I also accept that I must have regard to the nature of the point which the alleged disclosure goes, how that point might be established, the relevance of the documents sought to the point in issue, and the cost and time involved in any proposed search for the documents. Those considerations must be balanced against the important consideration that Mr Hussein should, where practicable, not be deprived of any material which might reasonably assist his case.

140. In the light of those principles, I now turn to consider what disclosure should be made in relation to the three categories of documents identified by Mr Hussein.

141. In view of my decision at [134] above permitting paragraphs 45 to 50 of the Reply to stand it follows that those documents which were before the RDC in relation to Mr Koutsogiannis's proceedings and which relate to the matters described in Schedule 1 to the draft directions sought pursuant to the Disclosure Application are clearly relevant to Mr Hussein's case as it is now put. The relevant documents should therefore be disclosed on the basis that such material might reasonably be expected to assist Mr Hussein's case as disclosed by the Reply. Schedule 1 to the draft directions sought pursuant to the Disclosure Application does not, as drafted, in all cases seek disclosure of particular documents and therefore in my view the relevant disclosure can be effected by disclosure of those documents that were disclosed to the RDC and which relate to the matters detailed in that Schedule. I will therefore make directions accordingly.

142. I turn now to the question as to what disclosure, if any, should be directed in relation to the classes of document detailed in Schedules 2 and 3 to the draft directions sought pursuant to the Disclosure Application.

143. It is helpful at this stage to summarise the process that the Authority has followed to date in carrying out its investigations relating to UBS and Mr Hussein and the searches of its case files it has carried out in relation to those investigations.

144. The Authority says that it has conducted a very extensive investigation into the LIBOR related misconduct at UBS, involving issuing 30 notices to UBS and its personnel requiring the production of documents. These included demands intended to collate an extensive set of documents which were relevant to the making of LIBOR submissions at UBS during the period between 2005 and 2010, any management instructions in relation to the same, and any reviews of the LIBOR submission process. I was told that over 1 million documents were produced to the Authority in relation to UBS from both that bank and numerous other financial institutions.

145. Ms George makes a large number of sweeping assertions regarding what she describes as the outsourcing of the Authority's investigations to UBS and its lawyers. In particular, she asserts that UBS and its lawyers sought to present a version of events to the Authority which failed to draw to the Authority's attention any of the material which undermines the case against Mr Hussein which would, if given proper weight, have exonerated Mr Hussein. The only evidence before me that Ms George relied on in this regard were two heavily redacted notes of meetings. The first of these notes, dated 6 March 2011, related to an internal meeting at the Authority between one of UBS's supervisors and various other employees of the Authority, including Enforcement staff, which among other things reported some results of UBS's own internal investigations into LIBOR submissions. The second of these notes, dated 10 May 2011, is a record of a meeting between representatives of the Authority on the one hand and UBS and its external lawyers on the other hand which was described as a "scoping meeting". The note records what the external lawyers found regarding possible attempts to influence LIBOR submissions to benefit trading positions, including some allegedly involving Mr Hussein. By no stretch of imagination could it be extrapolated from these notes that UBS's entire investigation had been outsourced. The notes are consistent with the Authority seeking information as to the results of UBS's own internal investigations, assisted by its external lawyers, which would obviously be of assistance to the Authority in the context of the Authority considering the scope of its own investigations. I can therefore find nothing to support Ms George's assertions in this regard and I therefore place no weight on them.

146. I therefore have no reason to doubt what the Authority tells me as to its approach to disclosure in the regulatory proceedings. It says that it collated documents which might be relevant to Mr Hussein in particular. The documentation from UBS was searched for his name, email address and chat handle in order to capture documents which he might have seen or which referred to him. The Authority referred to that set of documents as the "ERS 1 set". The Authority identified obviously irrelevant recurrent circulars in the ERS 1 set. These were excluded, and then search terms applied to the remainder to identify potentially relevant material.

147. As is described at [30] to [38] above, there was extensive correspondence on the question as to whether the Authority's disclosure before the RDC had been adequate. As a response to this correspondence, as the Authority subsequently set out in detail in its letter of 21 June 2016 to Mr Hussein's solicitors, the Authority carried out searches of the contemporaneous documentation in its possession which was sent to or by Mr Hussein, and chats to which he was party, to look for instances where there appears to be in any form of LIBOR manipulation or encouragement of LIBOR manipulation. The Authority says the search was scoped in that way because Mr Hussein had not suggested that there were any relevant contemporaneous documents which he saw or which evidenced any communication to him in relation to this subject but which are not within the ERS 1 set. The results of that search, which led to the disclosure list provided to Mr Hussein in February 2015, was supplemented with additional documents provided in response to requests by Mr Hussein, including electronic copies of UBS's LIBOR submissions for each day during Mr Hussein's relevant period, a copy of his human resources file at UBS and his appraisals and a transcript of the Authority's interview with Mr Leeming. Further disclosure followed as a result of directions from the RDC, as described at [37] and [38] above.

148. In the course of the correspondence, the Authority confirmed that it had not identified any evidence that Mr Hussein was encouraged by senior management to try to influence the published LIBOR rate, and that it would have disclosed any document in which Mr Hussein was instructed to share his positions while being kept unaware of the uses to which that information would subsequently be put.

149. In my view, bearing in mind what was then known as to the case that Mr Hussein was putting before the RDC, the additional searches that were made and the disclosures that followed as a result were appropriate in the circumstances. As Mr Strong submitted, it was not necessary for searches to be carried out for other categories of document sought by Mr Hussein, including in relation to management instructions and UBS's culture, because such documents related to conduct which he said he did not participate in, namely the knowing manipulation of LIBOR submissions. It is quite clear that the RDC was concerned about the unfortunate lapses in the disclosure process but ultimately was satisfied as to the process that had been followed and the quality of the disclosure that resulted.

150. It is therefore not surprising that the Authority prepared its primary disclosure list which was served with its Statement of Case on the basis of the case that Mr Hussein had advanced before the RDC and, as I have found at [63] above, Mr Hussein's reference notice put forward broadly the same case as he had put before the RDC. I find that the Authority's approach to disclosure with its Statement of Case was appropriate in the circumstances.

151. As mentioned at [69] above, Mr Hussein now makes a number of contentions in the Reply which did not feature in his representations to the RDC. The Authority has reviewed its disclosure in the light of the Reply and has carried out further searches for material which might assist Mr Hussein's case on these points, which it is required to do in order to meet its secondary disclosure obligations pursuant to the Rules.

152. The approach that the Authority has taken to secondary disclosure is described in its letter of 21 June 2016 to Mr Hussein's solicitors. In particular, the entirety of the material contained on ERS 1 (less relevant material) was searched and generated 1,029 documents, all of which were reviewed. The Authority used search terms which were designed to identify the following:

(1) any documents mentioning Mr Hussein in the relevant period and also mentioning Mr Ducrot, Mr Seger and two other UBS employees who Mr Hussein had identified in the Reply at having given him instructions to disclose his positions to Mr Keller;

(2) any examples of spreadsheets setting out Mr Hussein's trading positions;

(3) any examples of communications between Mr Hussein and the other employees mentioned at (1) above;

(4) any documents generated in 2009 mentioning Mr Hussein, Mr Holger, and Mr Keller together;

(5) any evidence of relevant meetings between Mr Hussein and either Mr Ducrot or Mr Holger; and

(6) any evidence relating to the call with the Bank of England mentioned at paragraph 57 of the Reply.

153. The Authority's letter also states that documents in Enforcement's case files which could potentially have been relevant were also identified and re-reviewed and all records of interviews not previously disclosed to Mr Hussein were re-reviewed. The Authority states that the disclosable documents identified as a result of the searches and reviews were listed in the Authority's list of secondary disclosure.

154. The letter also referred to the large list of documents described in general terms as being documents on which Mr Hussein sought to rely but which had not yet been disclosed to him, being the list sent with the Reply and described at [74] above. The Authority stated that in response to that list it had considered whether it should conduct any further searches for documents mentioned in that list. The Authority observed that the Reply made a number of "sweeping assertions" that a large number of individuals at UBS did not regard taking into account LIBOR exposures to be impermissible when determining submissions and that Mr Hussein was "taught" (but only by oral communication) that this was permitted. The Authority accepts that a number of individuals at UBS were involved in the taking of trading exposures into account when determining LIBOR submissions and considered it unnecessary and disproportionate to conduct a very extensive disclosure exercise in relation to these matters in circumstances where it accepted that cultural issues existed at UBS (as noted in the Final Notice) and where Mr Hussein himself would not have seen such documents as may be identified by relevant searches. The Authority contended that such evidence would not illuminate the Tribunal as to Mr Hussein's knowledge and state of mind. It was therefore clear that the Authority did not intend to search documents passing between individuals other than Mr Hussein which might cast light on the acceptability or otherwise of this practice within UBS.

155. In this letter the Authority also refer to a number of matters accepted by the Authority and which were therefore not included within the secondary disclosure exercise, including the fact that the cash market was illiquid from late 2007 until early 2009 and that there was pressure within UBS to ensure that fixings were kept low and to ensure that there were no diversions from the submissions made by other panel banks.

156. It is against that background that Mr Hussein has made the Disclosure Application.

157. Ms George explained that the main objective of the Disclosure Application was to obtain disclosure of those documents falling within the six categories of evidence which in *Hayes* had been held to be relevant to the second subjective limb of dishonesty formulated in *Ghosh,* and which are set out at [87] above. Ms George submits that Mr Hussein is entitled to disclosure of documents falling within these categories so that he can properly present his case that he did not know that what he was doing in the chats on which the Authority relies was dishonest.

158. In support of this objective Ms George submits as follows:

(1) The Authority carried out a flawed investigation, outsourcing it to UBS and its external lawyers. UBS represented to the Authority that they had come across attempts in 2008 to internally manipulate LIBOR, the implication being that there were a few individual attempts and not a wholesale policy of ensuring submissions always reflected UBS's commercial interests;

(2) UBS failed to disclose to the Authority the spreadsheet of LIBOR exposures in each maturity on its intranet which Mr Hussein and all other traders in his area were required to submit and the Authority has since refused to require UBS to disclose those spreadsheets, the existence of which remains the central plank of Mr Hussein's defence;

(3) There have been multiple instances where there has been concern relating to the suppression of relevant evidence relating to Mr Hussein as evidenced by the disclosure failures that had taken place;

(4) The Authority's disclosure strategy has been flawed as it was initially restricted to documents which contained Mr Hussein's name, email address and/or chat names. This was an inappropriate restriction and not likely to result in the identification of all documents likely to undermine the Authority's case. In assessing Mr Hussein's state of mind, it is reasonable to analyse the environment in which he operated, the training he received and any instructions from senior management. Many of the documents evidencing these contextual issues do not contain Mr Hussein's name, email address and handle;

(5) The further search terms used terms one would expect to find in chat communications and are therefore not sufficiently comprehensive;

(6) UBS's compliance policies were clearly relevant to Mr Hussein's state of mind but the Authority has not produced a single document which details senior management's policies, any LIBOR related compliance training materials or

similar communications which Mr Hussein received during the relevant period. The search terms used did not include "legal", "compliance", "training" or any of the names of relevant senior management who formulated and/or executed policy;

(7) The Authority's acceptance that there was an improper culture within UBS regarding its LIBOR setting process does not justify the failure to disclose documentation evidencing that culture which shaped and conditioned Mr Hussein's knowledge and state of mind when engaging in communications relating to the LIBOR setting process. This material sets the chats upon which the Authority relies in their proper context, including UBS's culture, policies, procedures, directives, training, information-sharing, compliance oversight LIBOR-related reviews and Mr Hussein's daily LIBOR reset reports/spreadsheets, are all patently relevant to establishing his knowledge and state of mind at the relevant time.

159. In dealing with the submissions I shall start with those relating to the contention that the Authority carried out a flawed investigation and has failed during the regulatory proceedings to comply with its disclosure obligations.

160. As regards the evidence concerning the Authority's investigations against both UBS and Mr Hussein, as I have found at [145] above the very limited amount of evidence that is available to me goes nowhere near establishing the sweeping assertions that Ms George makes in this regard. As I have concluded at [149] and [150] above in my view the Authority made an appropriate level of disclosure during the regulatory proceedings based on the case that Mr Hussein was then advancing and with its Statement of Case in the light of that case.

161. That leaves the question as to whether in the light of the new contentions now being made by Mr Hussein in his Reply, I should take into account any possible inadequacies in the Authority's investigation in that despite its extensive searches it has been unable to disclose any document relating to UBS's culture, senior management policies, training materials or similar communications which Mr Hussein received during the relevant period in respect of its making of LIBOR submissions and the extent to which UBS took into account its own commercial interests in making those submissions.

162. It seems to me that there are three possible reasons why no such documents have been disclosed.

163. The first possible reason is that the Authority has possession of those documents but the way the searches have been conducted to date, and in particular the search terms used, failed to identify those documents. I consider below whether it is appropriate for the Authority to widen its search as Mr Hussein contends it should. Consequently, it seems to me that the question as to whether the Authority has not been as thorough as it might have been in gathering the information in the first place from UBS is irrelevant to that issue.

164. The second possible reason is that there are no such documents. Bearing in mind the findings in the Final Notice summarised at [13] and [14] above, that is a clear possibility. A picture emerges from the Final Notice of there being a general acceptance throughout UBS that because the making of LIBOR submissions was not itself a regulated activity nobody thought to put in place formal compliance procedures, training or management policies and directions regarding the extent to which it was proper to seek to influence LIBOR submissions to benefit trading positions. Indeed, the only document disclosed by the Authority in relation to these matters was a very short document produced in August 2008 headed "UBS procedures for submissions to BBA LIBOR fixing" which, following (the document said) BBA clarification, emphasised that the rate at which each bank submits must be formed from the bank's perception of its cost of funds in the interbank market and that the rates must be submitted by members of staff with primary responsibility for management of a bank's cash, rather than a bank's derivatives book. Obviously, if there are no further relevant documents then the quality of the Authority's investigation is not relevant.

165. The third possibility is that the documents do exist but they have never been provided to the Authority and it has never asked for them. There may be a debate to be had as to whether in investigating UBS and Mr Hussein the Authority should have sought production of those documents but I cannot see how entering into that debate will assist the Tribunal in coming to any decision it needs to make now in relation to disclosure applications in these proceedings.

166. I will only make directions that the Authority should apply appropriate search terms to the documents it does have in order to ascertain whether the Authority has possession of them if I was satisfied that the documents will be relevant to the issues which the Tribunal has to determine on the reference and that it would be proportionate for the directions to be made, bearing in mind the cost and time involved in any proposed search for the documents. If I was not so satisfied that will be the end of the matter and there will be no need to consider what the Authority has done in the course of its investigations any further. If I was satisfied that it was appropriate for the searches to be made and the Authority responded by saying that it has no such documents, then it would be appropriate to make directions for a third-party to produce them (such as UBS itself) or for the Authority to use its information gathering powers to obtain them. Indeed, the Authority has indicated in its correspondence with Mr Hussein's solicitors that when documents are requested of it which it does not hold but which are relevant to the proceedings then it will seek to obtain them when it is reasonable and appropriate to do so. It seems to me that whether the Authority should have asked for the documents concerned before is now neither here nor there.

167. I have considered whether the Authority's failings in the disclosure process during the regulatory proceedings have any bearing on the matter. Ms George characterises these failings as "multiple instances" of "suppression of relevant evidence". There is no evidence before me that it is appropriate to characterise the failures that have taken place in that way. Those are matters which are being dealt with under the Authority's Complaints Scheme and it is not the role of the Tribunal to

duplicate that process. The evidence I do have is evidence of two failures, one of which was admitted to be systemic. The RDC was concerned about the level of disclosure, but was ultimately satisfied with what was provided. It is clearly not appropriate for me to make directions for disclosure simply because there have been past failings; disclosure will be directed only where it is appropriate to do so bearing in mind the relevance of the documents concerned and the other relevant factors which I have identified above. However, I clearly must bear the past failures in mind when considering whether the Authority has complied with the terms of any directions that are made following this decision should that become an issue. Essentially, the criticisms that Ms George now makes about disclosure are directed at the strategy and the search terms used, not about the failure of the strategy to identify any particular document.

168. I turn now to the question as to whether the Authority's disclosure strategy has been flawed and, in particular, whether it should now be required to search for documents evidencing instructions given to persons other than Mr Hussein directly or further evidence of culture, policies, procedures, directives, training, information sharing, compliance oversight and LIBOR-related reviews.

169. My conclusion is that no further directions should be made to that effect for the following reasons.

170. It is not necessary for disclosure to be made regarding issues which are not in dispute. As summarised at [13] and [14] above, the Authority has made findings in the Final Notice that until August 2008 UBS had no systems, controls or policies governing the procedure for making LIBOR submissions and no formal training was provided to submitters about the submission process. From this can be inferred that UBS compliance took no interest in this area. Even after August 2008, which would cover the period when the communications which are the subject of this reference took place, no specific training was provided to those involved in the LIBOR submission process and such procedures that had been introduced did not direct traders and trader-submitters (which would clearly include Mr Hussein) that it was improper to attempt to manipulate LIBOR to benefit trading positions. In the light of these findings and the further findings in the Final Notice that there was a culture where the manipulation of the LIBOR setting process was pervasive, was conducted openly and was considered to be a normal and acceptable business practice by a large pool of individuals, it will not be open to the Authority to argue otherwise before the Tribunal on this reference. Consequently, Mr Hussein's case must be considered against a background of there being no directions whether from compliance, senior management or otherwise to the effect that taking trading positions into account in determining LIBOR submissions was improper. The Tribunal will be entitled to make appropriate inferences from those findings when considering Mr Hussein's state of mind.

171. In those circumstances, it seems to me that evidence going to UBS's admitted culture can only be relevant in so far as it influenced Mr Hussein personally in coming to his own subjective view that taking trading positions into account in determining a LIBOR submission was not improper as long as the submission was

within a reasonable range, bearing in mind that the issue on this reference is Mr Hussein's state of mind rather than that of anybody else. Therefore, documents which demonstrate that Mr Hussein was told for instance, that he should, cooperate more closely with the Trader-Submitters, share details of his trading positions with them, and express preferences for submissions within a reasonable range and that this was considered to be proper practice would be relevant to this question and would assist Mr Hussein's case. As described at [152] and [153], the Authority has, in response to the case set out in the Reply, searched for documents addressed to Mr Hussein that might contain such instructions or directions.

172. What the Authority has not done, but which Mr Hussein says in effect it should have done, is to conduct a search for documents evidencing communications between other employees of UBS regarding such matters. Mr Hussein makes no contention that he has ever seen such documents so it is difficult to see how they could have influenced his state of mind. In any event, documents showing that a person requested that UBS's trading positions be taken into account in determining LIBOR submissions do not in themselves show that the person making the request believed that such conduct was proper. In my view therefore, the approach of the Authority to this issue, as set out in its letter of 21 June 2016 and summarised at [154] above, was entirely appropriate and it would have been unnecessary and disproportionate to conduct an extensive disclosure exercise in relation to such documents, bearing in mind there is a strong likelihood that they did not in fact exist at all.

173. As Mr Strong correctly submitted, what Mr Hussein is seeking in the Disclosure Application is a search of all communications over a period of more than 9 years seen by 14 named individuals and by anyone described as being in the UBS "senior management" or Compliance Department, using keywords which capture anything at all to do with LIBOR. That would result in the Authority needing to review all those documents to identify any document in which "senior management" condoned, encouraged or directed that the LIBOR exposures should be taken into account. I accept Mr Strong's submission that such a large undertaking is unlikely to cast any light on Mr Hussein's state of mind in early 2009.

174. It follows that I reject Ms George's primary submission that Mr Hussein is entitled without more to disclosure of all documents falling within the six categories of evidence described at [87] above in order that he can present his case as to his own state of mind. This is because there is no dispute that the general ethos and culture at the time was not to regard attempts to manipulate LIBOR submissions to take account of trading positions as improper. What is relevant, however, is the extent to which there are documents (which may fall within any of those categories) which influenced Mr Hussein's own state of mind. Mr Hussein has been unable to point to any particular documents which fall into that category other than ones which were addressed to him and which the Authority has searched for.

175. That does not mean that Mr Hussein will be unfairly hampered in presenting his case. I have already mentioned the fact that the Tribunal will be able to draw inferences from the findings in the Final Notice. Mr Hussein makes a considerable number of statements in the Reply as to what he was told by more senior colleagues

and encouraged to do. In the absence of any available documentary material to support those statements, the obvious way forward is for Mr Hussein to call as witnesses those individuals who he says gave him the relevant instructions and guidance.

176. For example, in relation to the chats in which Mr Koutsogiannis and Mr Keller participated which Mr Hussein says at paragraph 73 of the Reply he witnessed, Mr Koutsogiannis could give relevant evidence. Indeed, because of their close working relationship Mr Koutsogiannis's evidence could be highly relevant to what they both understood to be proper practice. It is clear that Mr Koutsogiannis has been co-operative with Mr Hussein in providing him with material regarding his own regulatory proceedings and the fact that he is now resident in New Zealand is no bar to evidence being given by video link or deposition. I find unconvincing Ms George's observation at the hearing of the applications that Mr Koutsogiannis would be reluctant to give evidence because of fears of extradition to the United States.

177. Mr Coombs, the line manager who Mr Hussein contends taught him that it was permissible to make a small adjustment to submissions to take account of exposures could likewise give evidence, as could Mr Leeming in relation to the conversation that took place between them on 20 March 2008. Those who Mr Hussein said at paragraph 92 of the Reply gave him a direct instruction to cooperate more closely with the trader-submitters could likewise give evidence. Mr Hussein makes no contention that any of the training or teaching that was given to him is evidenced in written form and accordingly adducing witness evidence is the appropriate way to corroborate what he says. Whether or not any further evidence is adduced, the Tribunal will nevertheless be able to consider whether it believes what Mr Hussein says on these matters in his own evidence, on which he will be cross-examined.

178. As regards Ms George's submission that the spreadsheet of LIBOR exposures which Mr Hussein was required to submit on a daily basis was the "central plank" of Mr Hussein's defence, the Authority accepts that Mr Hussein saved the spreadsheet and the Authority does not dispute that it could be used to help hedge positions when provided to Mr Keller. The Tribunal will also be able to consider whether this evidence supports what Mr Hussein says about this evidence supporting the direction he said he had to share his positions in order that they could be taken into account when UBS made LIBOR submissions. The Authority has disclosed six emails from Mr Hussein to external brokers but has not found any examples of this spreadsheet saved to the UBS intranet. Despite that, it does not appear that the Authority disputes that spreadsheets similar to those provided to external brokers would have been provided internally. In the circumstances, in my view no further searches are required and it can be inferred that spreadsheets were provided internally as Mr Hussein contends. Mr Hussein does not contend that the spreadsheet contains anything showing specifically that it was be taken into account when making LIBOR submissions.

179. I now turn to the specific disclosure requests set out in the draft directions which are annexed to this decision. In the light of my conclusions set out at [170] to [178] above I can deal with these briefly.

180. The disclosure that is sought in relation to the documents falling within the scope of Schedule 2 to the draft directions is said to relate to the Authority's primary disclosure obligations. However, as I have found at [150] above, the Authority's approach to disclosure with its Statement of Case was appropriate in the circumstances and accordingly I have considered the request for disclosure of documents falling within Schedule 2 in the context of the Authority's obligations regarding secondary disclosure.

181. My conclusions on each of the paragraphs in Schedule 2 are as follows:

Paragraphs 1 to 9 and 12: for the reasons given at [172] and [173] above, disclosure is refused. In my view the documents concerned are unlikely to assist the Tribunal in determining the primary issue on this reference, namely Mr Hussein's state of mind at the time that he engaged in the relevant chats. It would be unnecessary and disproportionate to conduct an extensive disclosure exercise in relation to such documents.

Paragraph 10: This appears to extend the request for Mr Hussein's spreadsheets to similar documents that may have been uploaded by his colleagues. For the reasons given at [178] above, no further disclosures in relation to those documents is required. Paragraph 10 covers a much wider range of documents and it is not clear to me how they could be relevant to Mr Hussein's case. In any event, the disclosure request is drawn far too wide and it would be disproportionate to require the requested searches to be made. The disclosure request is therefore refused.

Paragraph 11: I understand that all relevant appraisal documents in the Authority's possession have already been disclosed so no further direction is necessary.

Paragraph 13: This request appears to have been prompted as a result of Mr Hussein's allegation at paragraph 57 of the Reply that he was involved in a telephone call with the Bank of England. The Authority has searched the ERS 1 document set using keywords intended to identify any communication relating to this call but nothing was found. It is not clear to me in any event that any matters relating to the standards of behaviour to be expected of individuals in relation to LIBOR submissions was discussed on this call so it is difficult to see how any evidence relating to it would be relevant. In the circumstances, I accept Mr Strong's submission that the search that was carried out was adequate but no case has been made in my view which would justify any further extensive searches designed to obtain documentary evidence of any further calls or other communications with the Bank of England. Mr Hussein does not allege that he was involved in any other call with the Bank of England.

182. My conclusions on each of the paragraphs in Schedule 1 are as follows:

Paragraph 1: The Authority says that it has reviewed its notes of this interview after service of the Reply and they do not contain any material which might reasonably be expected to assist Mr Hussein's case. In the absence of any submissions to the contrary, the request is refused.

Paragraphs 2 to 4, 6 to 10, 12 and 13: For the reasons given at [181] above in relation to paragraphs 1 to 9 and 12 of Schedule 2 the requests are refused.

Paragraph 5: For the reasons given at [181] above in relation to paragraph 10 of Schedule 2 the request is refused.

Paragraph 11: The Authority has undertaken searches for relevant communications seen by Mr Hussein in 2008 and 2009 relating to the merger of Rates and STIR but has not found anything which had not already been disclosed. The Authority has also said that it does not possess either all UBS internal organisational announcements or all management correspondence in respect of the merger. There is no suggestion that Mr Hussein has seen any other documents relating to this matter and in the circumstances it would be disproportionate to ask the Authority to carry out any further extensive searches. The request is refused.

183. In conclusion on the Disclosure Application, save for the matters referred to in Schedule 1 to the draft directions, bearing in mind the proportionality of any searches that would be required to identify material which is the subject of Mr Hussein's disclosure requests, the cost and time involved in any proposed search for the documents and their lack of relevance to the issues that the Tribunal needs to determine on the reference I refuse the disclosure request. I am satisfied that Mr Hussein will not be prejudiced by these refusals bearing in mind his right to call witnesses to assist him in satisfying the Tribunal as to the matters which he relies on and the limited disclosure that I will direct.

Conclusion

184. Directions will be made as follows:

(1) to strike out paragraphs 22 to 34 and 51 to 54 of the Reply;

(2) to permit the Mr Hussein to amend paragraphs 45 to 50 of the Reply; and

(3) for the Authority to make further disclosure in relation to evidence before the RDC in respect of Mr Koutsogiannis's regulatory proceedings.

TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE
RELEASE DATE: 15 DECEMBER 2016

ANNEX

Directions for disclosure sought by the Applicant

Disclosure by the Authority in accordance with Rule 4(3)(b) of Schedule 3 of the UT Rules

1. By 4pm on [date] the Authority is to disclose the evidence referred to in Schedule 1.

2. By 4pm on [date] the Authority is to identify those categories of documents in Schedule 1 which it does not have in its possession.

3. The "initial document universe" to which search terms will be applied as set out in Schedule 3 must not be limited but must consist of all documents within the Authority's possession which fall within Schedule 2.

4. By 4pm on [date] the Authority is to apply the search terms set out in Schedule 2 to the "initial document universe" and identify those documents which might undermine the Authority's decision to take action. Undermining documents include all documents relating to market practice and policy and views as to the acceptability of considering LIBOR exposures of any sort in the IBOR submission process.

5. By 4 pm on [date] the Authority must serve the Applicant and the Upper Tribunal with its primary disclosure of documents by list, in accordance with Rule 4(3)(b) of Schedule 3 of the UT Rules.

6. By 4 pm on [date] any request must be made to inspect the original of, or to provide a copy of, a disclosable document.

7. Any such request unless objected to must be complied with within 14 days of the request.

Disclosure by the Authority in accordance with Rule 6 of Schedule 3 of the UT Rules

1.By 4pm on [date] the Authority shall provide the Applicant with all documents within its possession which fall within Schedule 4.

2. By 4pm on [date] the Authority shall identify to the Applicant those categories of documents within Schedule 4 which it does not hold.

3. By 4pm on [date] the Authority shall serve its list of secondary disclosure documents (in accordance with Rule 6 of Schedule 3 of the UT Rules) on the Applicant and the Upper Tribunal.

4. By 4pm on [date] the Authority is to provide an explanation to the Applicant as to why it does not consider any document within Schedule 3 which it has in its

possession might reasonably be expected to assist the Applicant's case as disclosed by the Applicant's Reply.

Schedule 1 Evidence referred to by the RDC Chairman in the related case of Panagiotis Koutsogiannis on 2 April 2015, 5 May 2015 and 11 May 2015 but withheld from the Applicant

The Authority to disclose by [date]:

Evidence that it was the policy of UBS to take into account the Bank's positions when making LIBOR Submissions

1 The evidence upon which the RDC Chairman relied when finding "the only direction from above was an inappropriate one" on 5 May 2015.

2 The evidence upon which the RDC Chairman relied when finding "there was also the email that says P&L is of secondary importance for now which implicitly suggests it can be relevant in some circumstances" on 5 May 2015.

3 The evidence upon which the RDC Chairman relied when finding "there was no guidance save Group Treasury saying at one point [an email of 09/08/2007] that submitters should "err on the low side" when making submissions and that fixing risk was a "secondary priority for now" on 11 May 2015.

4 The evidence upon which the RDC Chairman relied when finding "the only guidance they provided suggests P&L should be taken into account" on 11 May 2015.
Evidence of the culture of the Bank and the market at large

5 The evidence upon which the RDC relied when coming to the conclusion that "there was a non-compliant culture within both the bank and the market at large" on 2 April 2015.

6 The evidence upon which the RDC Chairman relied when finding "everyone in his organisation seems to have thought it was OK" on 11 May 2015.

7 The evidence upon which the RDC Chairman relied when stating "AL said that a relevant factor was that this happened in 2007 and 2008, when this was not at the forefront of people's minds" on 5 May 2015.

8 The evidence upon which the RDC Chairman relied when he "explained that the market had dried up, which made it difficult to work out the correct rate. They should have been looking at where they were actually lending [i.e. where cash was trading], even though this is not the test. The evidence though shows that the submissions of other banks were away from where they were actually lending" on 5 May 2015.

Conflicts of interest at UBS

9 The evidence upon which the RDC Chairman relied when he found "the bank failed to structure itself to avoid this conflict of interest" on 11 May 2015.

10 The evidence upon which the RDC Chairman relied when finding "in 2015 we all see this staring us in the face, but this happened in 2007 and 2008, when sensitivities to conflict and the view of the market was quite a bit different than it is today" on 5 May 2015.

Failure by legal and compliance at UBS to identify obvious conflicts of interest

11 The evidence upon which the RDC Chairman relied when finding "legal and compliance did not spot this and the organisation thought it was the right way to set up things" on 11 May 2015.

Lack of training and guidance at UBS

12 The evidence upon which the RDC Chairman relied when finding "if there was an iota of training that said do not take P&L into account it would have been clear" on 11 May 2015.

13 The evidence upon which the RDC Chairman relied when he found "the lack of training plus the lack of something official which says it is OK (or not OK). AL explained that the presence of the directive (understood to be the email that referred to P&L being of secondary importance for now) and the absence of training is quite important" on 5 May 2015

Schedule 2 Primary disclosure given by the Authority

Scope of search to include:

1. All communications (including but not limited to email, chat and telephone communications) sent during the Relevant Period between and amongst the following:

1.1 Riaz Daya;
1.2 Yvan Ducrot;
1.3 Arif Hussein;
1.4 Patrick Heusser;
1.5 Carsten Kengeter;
1.6 Panagiotis Koutsogiannis;
1.7 Gaspare Lasala;
1.8 David Leeming;
1.9 Mike Pieri;
1.10 Sascha Prinz;
1.11 Holger Seger;
1.12 Marc Silverman;
1.13 Andrew Smith;

1.14 David Snowden; and
1.15 Adrian Walsh.

2. All communications between UBS Compliance Department and UBS employees during the Relevant Period in relation to IBOR submissions.

3. All Compliance Documents issued by UBS Compliance Department during the Relevant Period.

4. FICC Compliance Review of the LIBOR submission procedures within UBS in 2008.

5. All IBOR related Training Documents issued by UBS during the Relevant Period.

6. Any other policy or procedure document issued by UBS relating to IBOR submissions.

7. Any Senior Management policy available during the Relevant Period in relation to IBOR.

8. Any minutes of meetings held by UBS Senior Management relating to IBOR at UBS during the Relevant Period.

9. Any communications sent from or received by Senior Management relating to IBOR at UBS during the Relevant Period.

10. Any other IBOR-related documents uploaded to the UBS intranet or released internally by UBS during the Relevant Period.

11. All appraisals or any other relevant supervisory or evaluation document that relates to the Applicant.

12. Any communications between UBS employees or UBS Senior Management and the British Bankers Association during the Relevant Period in relation to IBOR.

13. Any communications between UBS employees or UBS Senior Management and the Bank of England during the Relevant Period in relation to IBOR.

Schedule 3 Search Terms for Filtering Initial Document Universe

Search terms should include the following:

1.1 Name, email address and handle of each individual listed in paragraph 3 of Schedule 1.
1.2 "3m high"
1.3 "algorithm*"
1.4 "any libors"

1.5 "any preferences"
1.6 "any spec"
1.7 "any spec* fixings*"
1.8 "any spec* interest"
1.9 "any spec* wishes"
1.10 "axe"
1.11 "Bank of England"
1.12 "BBA"
1.13 "British Bankers Association"
1.14 "compliance"
1.15 "FCA"
1.16 "Financial Conduct Authority"
1.17 "Financial Services Authority"
1.18 "FSA"
1.19 "fixings"
1.20 "forward rate agreement"
1.21 "FRA"
1.22 "libor"
1.23 "low 6s"
1.24 "reset"
1.25 "submission"
1.26 "training".

Schedule 4 Secondary specific disclosure by the Authority

Item	Date	Description of item
1.	Undated	Transcript of interview between ASIC and Mike Pieri
2.	Undated	Copies of all documents relating to the BBA's review of the LIBOR benchmark and submission process (including, but not limited to, all submissions made by UBS personnel to the BBA in connection with the BBA's review and all internal correspondence in connection with the review and UBS's submissions)
3.	Undated	Copies of all documents relating to UBS's internal review of the Bank's systems and controls for LIBOR submissions (including, but not limited to, all submissions made by UBS personnel in response to this internal review)
4.	1 January 2000 to 19 March 2000 (inclusive)	Copies of all UBS Group Treasury directives relating to UBS's IBOR submissions
5.	1 January 2000 to 19 March 2009 (inclusive)	Copies of all documents relating to UBS's weekly Exception Reports regarding the Bank's IBOR submissions (including, but not limited to, emails, email attachments, attendance notes, spreadsheets, reports and submissions)

6. 1 January 2000 to 19 March 2009 (inclusive) UBS's middle office procedures relating to the setting of IBOR submissions

7. 1 January 2000 to19 March 2009 (inclusive) Email correspondence between multiple participants, including (but not limited to) Gaspare LaSala, Holger Seger, Panagiotis Koutsogiannis, Jeff Webster, Marc Silverman, Sascha Prinz and Mike Pieri, relating to UBS's IBOR submission policies (including "low-balling", remaining within "the middle of the pack", dealing with reset risk and accommodating big fixes, taking into account "P&L" and "fixing risk")

8. 1 January 2000 to 19 March 2009 (inclusive) Copies of all emails, reports and correspondence between UBS and the BBA and Bank of England in relation to UBS's IBOR submissions

9. 1 January 2000 to 19 March 2009 (inclusive) Copies of all documents, correspondence, emails, Bloomberg chats and other chat communications which demonstrate UBS senior management's condoning, encouraging or directing the practice of taking IBOR exposures into account in calculating UBS's IBOR submissions (and UBS employees' acceptance of the same practice)

10. 1 January 2000 to 19 March 2009 (inclusive) Copies of all documents, including correspondence, emails, Bloomberg chats and other chat communications which evidence how UBS's sterling IBOR submissions were calculated in practice

11. 1 January 2008 to 19 March 2009 (inclusive) Email correspondence from Holger Seger to the STIR and Rates businesses, and attendance notes of conference calls, regarding the daily LIBOR reset reports/spreadsheets (including, but not limited to, their purpose, completion and instructions for uploading onto a shared drive within UBS)

(One of the emails/calls arranged by Holger Seger was referenced in the Applicant's chat with Adrian Keller on 27 January 2009)

12. 12 October 2007 Email correspondence between Sascha Prinz and Mike Pieri regarding UBS Group Treasury's directive that all LIBOR submissions should be placed in "the middle of the pack" and also relating to the management of big fixings

13. December 2007 Email correspondence between Sascha Prinz and Mike Pieri regarding UBS's MMC (Money Market Committee)