[2015] UKUT 0601 (TCC)

Case number FS/2012/0024

Financial Services and Markets Act 2000 – reference of Authority's decision to Tribunal – Tribunal Procedure (Upper Tribunal) Rules 2008 rule 10(3)(d)-(e) – whether some costs should be awarded to largely unsuccessful applicant

IN THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

FINANCIAL SERVICES

IN THE MATTER OF THE FINANCIAL SERVICES AND MARKETS ACT 2000

BETWEEN

ANGELA BURNS

Applicant

-and-

THE FINANCIAL CONDUCT AUTHORITY

(formerly known as the Financial Services Authority)

Respondent

Tribunal: **Andrew Bartlett QC (Judge of the Upper Tribunal)**

Catherine Farquharson

Mark White

Determined on the papers

Date of written decision: 3 November 2015

DECISION

DETERMINATION

1. For the reasons set out below, we award costs to Ms Burns to the extent stated in paragraph 66.

INTRODUCTION

2. By a decision notice dated 28 November 2012 the Authority imposed on Ms Burns a financial penalty of £154,800 and made a prohibition order pursuant to s56 of the Financial Services and Markets Act 2000. These sanctions were based on findings by the Authority that she had misused non-executive director positions to seek to advance her own commercial interests and failed to disclose conflicts of interest, so that she was in breach of APER Statement of Principle 1 (approved person must act with integrity in carrying out controlled function) and lacked fitness and propriety under the 'Fit and Proper' test for approved persons.

3. Ms Burns denied the Authority's allegations and referred the matter to the Tribunal.

4. The discrete allegations of misconduct pursued by the Authority upon the reference were ten in number. Following an oral hearing, by our substatntive decision dated 15 December 2014, [2014] UKUT 0509 (TCC), we upheld or partly upheld four of the allegations and dismissed six of the allegations. We concluded that Ms Burns was in breach of APER Principle 1 and was not a fit and proper person to carry out the CF2 function.

5. Following further written submissions from the parties, we determined on 14 May 2015, [2015] UKUT 0252 (TCC), that the appropriate action for the Authority to take was to prohibit Ms Burns from carrying out a CF2 function in relation to any regulated activity carried out by an authorised person, exempt person or exempt professional firm, and to impose a financial penalty of £20,000.

6. Ms Burns now pursues an application for an order against the Authority for the payment of her legal costs. We gave directions on procedure and we received written submissions concerning costs as follows:

a. "Application for Costs" 28 May 2015 (14pp, plus voluminous attachments). We refer to this as the '***Application'***.

b. "Submissions of [the Authority] regarding the Applicant's Application for Costs" 9 July 2015 (7pp). We refer to this as the '***Authority's submissions'***.

c. "Application for Costs – Applicant's 2nd Response" 17 July 2015 (45pp, plus voluminous attachments). We refer to this as the '***Response***'.

d. "Brief Submissions of [the Authority] regarding the Applicant's Second Response for Costs" 27 July 2015 (4pp). We refer to this as the '***Authority's Reply***'.

e. "Applicant's Riposte to the Respondent's Late Submission" 28 July 2015 (7pp, plus voluminous attachments, largely duplicating earlier submissions), with a typographical correction on 30 July 2015. We refer to this as the '***Riposte***'.

7. Only the first three of these items were served pursuant to our directions. The Authority's Reply arose from a desire to answer new submissions on law introduced in Ms Burns' Response. Ms Burns objected, but also further responded, in her Riposte. We consider it will be conducive to justice for us to take into account all of the submissions which we received.

8. Ms Burns did not request an oral hearing of the application for costs, leaving it to the Tribunal to decide on the appropriate procedure. The Authority submitted that an oral hearing of the application for costs was unnecessary, and would result in additional, unnecessary costs. Having considered the parties' written submissions, we have determined that an oral hearing is not required.

9. The sum sought by Ms Burns in her application of 28 May 2015 was £1,865,139.67. Out of this sum, £1,494,562.32 was claimed on behalf of insurers who instructed solicitors and counsel on her behalf pursuant to a D&O policy. In her Response, the new total was £1,885,820.90. This sum includes charges for her own time at the rate of £565.15 per hour, plus VAT.

10. Ms Burns was represented at the substantive hearing. She is now representing herself. In our view her written submissions show a lack of good judgment regarding which arguments to pursue. They contain many points or sub-points that in our judgment are misconceived, or irrelevant, or obviously lacking the necessary evidential support, and

which are argued repetitiously. In our reasons below, we have included only brief remarks on matters falling into those categories. Others of her points are attempts to re-run matters which we decided against her; we have not dealt with these all over again. However, we have reminded ourselves that her inclusion of many ill-considered and sometimes intemperate points does not of itself lead to a conclusion that all her points are bad; we have tried to identify from within her prolix submissions the matters which appear to us to be reasonably arguable in her favour; these we have dealt with more fully.

THE RELEVANT LAW

11. The application is made under the Tribunal Procedure (Upper Tribunal) Rules 2008, as amended, rule 10(3)(d) and 10(3)(e).

12. The relevant rule states that the Upper Tribunal may not make an order in respect of costs except:

    (d) if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings;

    (e) if the Upper Tribunal considers that the decision in respect of which the reference was made was unreasonable.

13. Thus paragraph (d) refers to acting unreasonably in the conduct of the Upper Tribunal proceedings, and paragraph (e) refers to the FCA's Decision Notice being unreasonable.

14. The parties made reference to the discussion of the previously applicable rules in *Baldwin v FSA* (5 April 2006). In particular, we were reminded:

    a. Judging whether something is reasonable or unreasonable is wholly distinct from judging whether it is right or wrong: a decision may be wrong without being in the slightest degree unreasonable.

    b. In considering whether the Authority's decision (in the Decision Notice) was unreasonable, we should have regard to the facts and circumstances which were known or ought to have been known to the Authority at the time when the decision was made. The hearing before the RDC is not to be equated with a

Tribunal hearing which considers fuller evidence and oral witness evidence subjected to cross-examination.

15. Ms Burns also refers to *Davidson and Tatham v FSA* (7 September 2006) to support her application for costs. In her Riposte she argues that the *Davidson* decision provides a clear precedent for the current application for costs in a number of respects. The Authority's primary submission in regard to *Davidson* is that it was no more than an example of the application of the relevant principles, and did not alter the approach to be adopted. We agree. The criterion of reasonableness has to be applied to the particular circumstances of the instant case.

THE AUTHORITY'S CONDUCT OF THE UPPER TRIBUNAL PROCEEDINGS

16. Ms Burns' Application lists seven initial points which relate to the FCA's conduct of the proceedings. These points overlap with one another and are followed by 28 paragraphs which are not organised in a way that clearly relates to the initial seven points. These in turn overlap with matters advanced in her Response. Putting these various expositions together, we understand the main gist of her complaints to be as follows:

    a. The Authority should not have persisted with the allegation that her 5 November 2010 email was a demand for corrupt payments.

    b. The Authority unlawfully tampered with the evidence.

    c. The Authority misconducted the hearing of what can conveniently be called her application for privacy.

    d. The Authority added into the main hearing tangential matters which it had not properly investigated.

    e. The Authority misunderstood the relevant facts and law.

    f. The Authority sought to maintain an excessive level of penalty.

17. We deal with these complaints below in (approximate) ascending order of apparent merit.

18. Ms Burns also complains about the Authority's lack of thorough investigation into the circumstances in which she left the Pearl Group. She states in her Response that the Tribunal's decision concluded that she was asked to resign, with the implication of fault on her part. This is a misunderstanding. The Tribunal found that she was dismissed on the ground of redundancy, which implied no fault on her part, and noted that an allegation by the FCA of misconduct at Pearl had not been pursued (see paragraphs 10-11 of our substantive decision.) We expressly stated at paragraph 128b that her being made redundant from Pearl was not a matter which implied any fault or shortcoming on her part. We are not persuaded that she has any grounds for seeking costs arising from the extent to which the Authority did or did not investigate the circumstances of her departure from Pearl.

Evidence-tampering?

19. Ms Burns asserts that there were material omissions from the transcripts of her second compelled interview, of her RDC oral hearing, of the privacy hearing before the Upper Tribunal, and of the substantive hearing of the reference. She contends that these were the result of a nefarious conspiracy involving FCA staff and lawyers, and the transcribers. (Her allegations also include criticisms of her own former lawyers.)

20. The Authority's submissions (appropriately, in our view) respond to these allegations very briefly.

21. We have not seen evidence capable of supporting these conspiracy allegations, and they seem to us to be highly improbable. It is not necessary for us to make a finding on why Ms Burns has pursued them.

22. In more detail:

    a. Ms Burns states that the CD which she received of the privacy hearing was defective, in that there was a 5 minute segment of the hearing which was transcribed but was not on the CD, and there was a 10 minute repeated segment which the transcribers failed to transcribe. If so, this may amount to evidence that she was given a defective CD, or that a section of the tape was not transcribed as it should have been. Mistakes can happen. She likewise claims that the recording of her RDC hearing must have been edited, given that the recording was 34 minutes shorter than the duration of the hearing itself. We do not know enough about these matters to draw any conclusions. They do not appear to us to lend substantial support to her conspiracy allegations.

b. As regards the hearing before us, we stated our view of her allegation in paragraph 126 of our substantive decision. In the course of our deliberations we did not become aware of any omission from the transcript of any evidence that was material to the making of our decision; some of her allegations of omission were clearly erroneous, since the relevant passage was there to be seen in the transcript. For the most part we concluded that her recollection, where it differed from the transcript, was mistaken.

c. The conduct of the second compelled interview and the RDC oral hearing were not part of the Upper Tribunal proceedings. The evidence from them was submitted to us in the proceedings, but we have no material that in our view would justify us in concluding that the transcripts were deliberately tampered with for the purpose of suppressing evidence.

23. Ms Burns states: 'Tangible evidence of this tampering has been passed to the Police and to the Court of Appeal'. We have not seen such evidence.

The privacy hearing

24. Ms Burns contends that the course of justice at the privacy hearing was perverted because the Authority concealed from her the original source of the allegation that she had sought corrupt payments (namely, Vanguard's external counsel), and because the Authority's counsel's cross-examination of her during the privacy hearing was premised on a number of errors.

25. We have looked at the published decision of Judge Herrington which followed the privacy hearing on 21 March 2013. He had to decide whether the strong presumption that justice should be done in public was outweighed in the particular circumstances of the case. He decided it was not.

26. The source of the corrupt payments allegation was not relevant. It could have had no possible impact on his reasoning. This is because the allegation was not in play at the time of the privacy hearing; and in any event he expressly assumed for the purposes of the application that the Authority's allegations would turn out to be unfounded and Ms Burns would be vindicated (paragraph 65).

27. If we assume in Ms Burns' favour that the Authority's counsel made the various errors which she alleges, we do not see how they either did or could have altered Judge Herrington's decision. According to Ms Burns' account, during cross-examination she

dealt robustly with his errors. If so, Judge Herrington must have heard her answers, irrespective of her complaints about the accuracy of the transcript. Moreover, the matters which she describes as errors seem to us to be peripheral to whether she could overcome the presumption in favour of open justice. Nor has she satisfied us that, even if such errors were made, the Authority, through counsel, acted unreasonably in its conduct of the privacy hearing.

The relevant facts and law

28. Ms Burns makes numerous criticisms of the Authority's grasp of the relevant facts concerning her and her clients' business activities, and of the Authority's factual and legal submissions for the purpose of the substantive hearing. We leave wholly out of account under this heading the Authority's pursuit of the allegation of seeking corrupt payments, which forms a separate head of complaint.

29. Some of the Authority's factual and legal submissions were proved wrong, in the sense that we did not accept them in our decision. That does not establish that the Authority acted unreasonably in its conduct of the proceedings. We did not find the Authority's contentions to be unreasonable. She argues that some submissions by the Authority which we accepted were also wrong. From the nature of the case, we are unable to agree and, even if she is proved right in the Court of Appeal (as to which we cannot speculate), this would not establish that the submissions were unreasonably made.

30. She further suggests that the Authority should have clarified its view of ethical duties concerning potential conflicts of interest by issuing guidance, rather than by pursuing the Tribunal proceedings. Where the Authority considered that Ms Burns had contravened existing guidance (and indeed was upheld by us to an extent), we cannot see that it was unreasonable to pursue the proceedings.

31. Ms Burns has not persuaded us of any unreasonableness under this head of her complaint.

Tangential matters added into the main hearing

32. Ms Burns stated in her proposed grounds of appeal:

'I wish to Appeal the proportion of wholly un-pleaded matters aired at the Hearing, which took up much of my cross-examination and the attendant confusion over 'the case to answer'. My former legal team advised that I was not required to address un-

pleaded matters in my witness statement, and advised the removal of relevant material from my draft statement accordingly; nor was I required to provide documents or evidence in my defence of these un-pleaded matters, I was advised. My points of testimony to provide such relevant documents to the Panel for consideration are amongst the 22 omissions to the Hearing transcript. My attempts to submit such documents were rejected.'

33. The chairman's ruling on her application to appeal from our substantive decision stated:

'The Tribunal dealt with the relevance of the unpleaded matters, and their role in the hearing and in contributing to the Tribunal's conclusions, at paragraphs 12, 45, 81, 84a-b, 120-121, 124-125, and 127-128. At the time of the hearing and at the time of writing and re-considering the decision the Tribunal was satisfied, on the information available to it at the time, that Ms Burns had a fair opportunity of dealing with the unpleaded matters. If, as she now asserts, there was substantial additional material which would have addressed the unpleaded matters, and which on advice was removed from her evidence because of the scope of the pleadings, I consider it is just possible that this may be regarded as providing a reasonably arguable ground of appeal on a point of law. In addition, since this kind of situation is not unusual in Financial Services appeals in the Upper Tribunal, the Court of Appeal might wish to consider whether to give further guidance for Tribunals and for the FCA concerning how, in accordance with *FCA v Hobbs* and within the general framework of proportionality, the Upper Tribunal should most effectively ensure that the twin aims of protecting the public interest and avoiding any injustice to an appellant are fully met.'

34. In the materials now provided to us by Ms Burns in connection with her costs application there are items which it appears she would wish to rely upon in support of her appeal. A prime example is an email from Mr Evans dated 2 December 2008 addressed to her at a Pearl Group email address. She states that this shows that Mr Evans knew that she had worked at Pearl. Her general allegation is that, positively, the Authority introduced unpleaded matters on the issues of her credibility, fitness and propriety, and, negatively, the Authority failed to gather evidence which would have shown that these unpleaded matters were unfounded.

35. It is not for us to comment further on the issues in the appeal. The question before us is the reasonableness of the Authority's conduct of the proceedings. Against the legal and factual background set out in our substantive decision (particularly at paragraphs 120, 125, 127 and 128), we are not persuaded that the Authority acted unreasonably in its reliance on unpleaded matters.

Attempt to maintain excessive penalty

36. Ms Burns criticises the Authority for the nature of its submissions on the question of the penalty to be determined by the Tribunal. In short, while the Tribunal rejected six of the Authority's allegations, and only upheld or partly upheld four allegations, the Authority argued for the same penalty as had been imposed by the Decision Notice in accordance with the decision of the RDC.

37. We stated in our decision on penalty [2015] UKUT 0252 (TCC):

> [15] In our judgment the Authority did not make a realistic reassessment of the position in the light of the fact that six out of its ten allegations failed and, out of the four which succeeded, three were upheld to only a limited extent. We find the Authority's submissions to be unsatisfactory and unpersuasive in a number of respects, including the following:
>
> a. The Authority painted a picture of misconduct over a period of two years, in contrast to the isolated instances (three days in February 2009 and one incident in November 2010) which we found to be established.
>
> b. The Authority incorrectly interpreted our decision as having held that Ms Burns improperly misused her position as a director to try to benefit herself. We found that the problem with her approaches to Vanguard on 24 and 26 February 2009 and 5 November 2010 was not the fact that she made reference to her non-exec positions but that she made the approaches without prior disclosure to and consent of MGM or Teachers.
>
> c. The Authority referred to and relied upon our concerns, as expressed in our decision, about the unsatisfactory nature of some aspects of Ms Burns' evidence, and about the untrue application forms. While we were entitled, and indeed required, to take those matters into account in deciding on fitness and propriety, we do not consider that they either can or should be taken into account in the consideration of the appropriate financial penalty. They did not form part of the alleged misconduct which was the subject of the Authority's Decision Notice and which was referred to us.
>
> d. The Authority contended that Ms Burns' conduct had caused detriment to both Vanguard and Teachers. We did not find this to be proved. Vanguard could have continued with its presentation to Teachers if it had chosen to do so. It

was not shown that Vanguard, if it had done so, would have had a realistic prospect of being selected (see paragraphs 61 and 69 of our first decision).

[16] In the circumstances, we find ourselves in wholesale disagreement with the Authority's assessment of the level of seriousness of the proven breaches, and accordingly with the level of financial penalty arrived at by the Authority. ….

38. We reduced the financial penalty from £154,800 to £20,000.

39. The Authority's Reply contends that the Authority's submissions on penalty were appropriate and proportionate on the basis of the Authority's understanding of the seriousness of Ms Burns' behaviour given the Tribunal's findings of lack of integrity and recklessness against Ms Burns and to allow for deterrence.

40. We do not agree. The Authority wholly failed to adjust its approach to the case in the light of the findings in our substantive decision. In our view the Authority's submissions on penalty, in the respects referred to above, were not reasonable.

41. However, we have a discretion whether to order costs where there has been unreasonable conduct. We draw attention to the following features of the case:

    a. Our substantive decision did not vindicate Ms Burns; rather, we found that the Authority was correct in determining that she failed the test of fitness and propriety and that she was in breach of APER Statement of Principle 1.

    b. The Authority's submissions on penalty were made in writing, for the purposes of a decision made without a hearing. This approach kept the costs of that part of the proceedings to a minimum.

    c. We have examined the breakdown of the costs said to have been incurred by Ms Burns in dealing with the Authority's submissions on penalty. They are quantified on the basis of a charge for her own time. A substantial proportion of the time claimed does not truly relate to the question of penalty but is concerned with a range of other matters, such as her complaints about transcripts.

    d. We have considered whether the nature of the Authority's submissions on penalty added, to any significant or material extent, to the time which she spent

on the preparation of her own submissions. In our view it did not. She had to deal in her submissions with the prospect of prohibition and with the level of any fine. If the Authority had re-assessed its position properly, in the light of the Tribunals' findings, so as to seek a smaller financial penalty, we do not consider that Ms Burns would have spent any less time in preparation.

42. In the circumstances of this case we place particular importance on the last of these features. To award costs to Ms Burns in relation to the submissions on penalty would amount to a windfall, since she would have incurred no greater burden of dealing with the question of penalty if the Authority's submissions had been reasonable. Our conclusion is that we should not award costs to Ms Burns on the grounds of the nature of the Authority's submissions on penalty.

The allegation that her 5 November 2010 email was a demand for corrupt payments

43. The Authority's allegations in paragraph 5.1(2) and paragraph 5.2(2)(c) of the Authority's Statement of Case included a contention that Ms Burns' email of 5 November 2010 was a proposal to Vanguard that they should make corrupt payments to her for securing the MGM and Teachers mandates. At paragraph 2(4)d of the written opening submissions of Mr Hunter QC on behalf of the Authority the email was described as a solicitation of remuneration, or of appointment to a remunerative position, in return for misuse of her position and/or for future similar conduct (see also paragraph 84 of Mr Hunter's written opening). This was a very serious allegation. We considered it, and rejected it (see paragraphs 62-69, 79d, 94-108, 116 and 122e of our substantive decision).

44. Ms Burns contends that the source of the allegation was Vanguard's external lawyer. The Authority states in its submissions that his views had no bearing on the Authority's decision to advance the allegation, and that it was based on the wording of the email itself. We accept this part of the Authority's submissions.

45. Ms Burns makes a further point that the Authority made no attempt to involve the Police, despite the serious nature of the allegation. We are not persuaded that this point has any validity. It does not appear to us to indicate any unreasonableness in the conduct of the proceedings before the Tribunal.

46. Ms Burns' central contention is: 'In the course of preparations for the Full Hearing, the Respondent sought unreasonably to reinstate the unfounded allegation of bribery'. In our view the main burden of Ms Burns' case under this heading can be summarised in the following points:

a. The bribery allegation may be contrasted with the allegations that ultimately succeeded at the Tribunal, which involved only failures to disclose a potential conflict of interest at the proper time (see paragraph 122c, d and e of our substantive decision).

b. The allegation was fully considered in the process which led to the decision of the RDC. This included her interviews, the Authority's investigations with other witnesses, and the representations made to the RDC.

c. The RDC, having considered the allegation, rightly rejected it.

d. Accordingly the allegation, having been included in the Warning Notice, was not included in the Decision Notice.

e. This was the only outcome consistent with common-sense. Despite the email being poorly worded, on any sensible consideration of what it actually said, the interpretation of it as intended to be a demand for corrupt payments was very improbable, given the request in the email for the matter to be placed before the company lawyer in order to be progressed. As she states in her Response: 'It is plain common sense that no-one would openly ask for a bribe and ask to negotiate a bribe with the recipient's lawyer in an email. The self-evident absence of plain common sense on the part of the Respondent is at the heart of this Application.'

f. It is a serious step for the FCA to reinstate and try to prove an allegation of serious wrongdoing that the RDC has rejected. To justify such a step, there ought to be cogent reasons.

g. The Authority had no such reasons. It had no new arguments and no new evidence. Accordingly, the allegation was rightly not included in the Authority's original Statement of Case for the Tribunal.

h. It was introduced into the Authority's Statement of Case by an amendment. Substantial grounds of objection were prepared on Ms Burns' behalf, but she was ultimately advised to allow the amendment to be introduced by consent. (If we have understood her submission correctly, this change of approach resulted from the publication of the decision of Judge Herrington in *Granada UK Rental & Retail Ltd v Pensions Regulator* FS/2012/0001-5, 13 December 2013, which her advisers considered undermined her proposed grounds of

objection.) However, the Authority's second thoughts, as represented by the amendment, were not based on new arguments or new evidence.

i. In terms of seriousness, the allegation of seeking corrupt payments was at an altogether different level from the other allegations which were in play in the proceedings. In the circumstances of the case the Authority needed particularly strong grounds to justify reintroducing the rejected allegation so as to substantially raise the level of seriousness of the Tribunal proceedings. The Authority had no such grounds.

j. The allegation that she sought corrupt payments in return for misuse of her non-exec positions added a more serious dimension to the case both as regards the reputational damage which she faced if the allegation were upheld and as regards the legal resources which it was appropriate to deploy to ensure that this unfounded allegation did not succeed. It increased the burden of legal costs.

47. Ms Burns also observes that the Authority 'has continuously failed to accept that an allegation of demanding corrupt payments would have a wholly disproportionate impact upon an Applicant, in terms of the negative reaction of industry colleagues, clients and contacts'.

48. The Authority raises a number of opposing arguments in its submissions. The first is that, on a literal reading, the email appeared to be a demand for corrupt payments; this was how the original recipient (Vanguard) read it, and Ms Burns' counsel conceded that Vanguard was not unreasonable in doing so.

49. In our view this argument does not meet the points which Ms Burns' makes. By the time the matter was decided by the RDC, Vanguard's first reaction on reading the email was water under the bridge. What was important was to determine, on mature objective consideration, the true intention of the email. The RDC did not uphold the allegation of corrupt intent. Moreover, as we observed in our substantive decision (paragraph 100), a literal reading of the email would have indicated that Vanguard had discussed with her the making of corrupt payments. It is clear that the Authority did not believe or allege that Vanguard had in fact done this. Thus the Authority itself never really espoused a literal reading of the email, even before the RDC made its decision.

50. The Authority argues that the RDC rejected the allegation without Ms Burns' evidence or explanation being tested in cross-examination; given the clear terms of the email, it

was not unreasonable for the Authority to take the view that the Applicant's explanation might not be accepted when tested at a full hearing before the Tribunal.

51. We find this argument unpersuasive. We cannot see a rational basis for the view that cross-examination, in the absence of some clearly adverse further document on the same topic, might turn the email into an expression of corrupt intent. Putting such a case in cross-examination would always come up against the hurdle that someone acting with corrupt intent would hardly be requesting that the matter be placed before the company lawyer to be progressed.

52. The Authority further states in its submissions that the allegation was reinforced by the emergence of evidence casting doubt on the Applicant's credibility more generally, and it refers to the Tribunal's statement that it accepted Ms Burns' explanation 'notwithstanding the wider reservations about her evidence' (Authority's submissions, paragraphs 7 and 9). The Authority's Reply puts it like this:

'Subsequent evidence … came to light once the Tribunal proceedings had commenced regarding Ms Burns' failure to disclose her employment and subsequent dismissal from Pearl, undermining her credibility and her explanation of events, incuding her explanation of the 5 November 2010 email.'

53. The Authority submits that the subsequent evidence was 'cogent'. (This submission arises from consideration of the Tribunal's statement in *Davidson* that the RDC should base its decision on 'cogent evidence'. We consider that a decision to reintroduce into proceedings an allegation rejected by the RDC should likewise be based on cogent evidence, or at least on cogent reasons, capable of demonstrating that the RDC, in rejecting the allegation, misapprehended the true position.)

54. In our judgment, these points are not weighty in the Authority's favour; if anything, they weigh in the opposite direction. The Authority needed to consider whether the additional evidence contained something which showed, implied or pointed to any intention to seek corrupt payments in return for misuse of influence as a non-exec director. It did not contain any such material. Even though there were wider concerns in certain other respects about Ms Burns' integrity and the credibility of her evidence, these were not capable of providing a sound basis for rejecting the conclusion reached by the RDC and reading the email in a way that would have flouted common-sense.

55. The Authority relies on the fact that Ms Burns consented to the amendment and the Tribunal permitted it. We do not consider that this feature is of assistance to the Authority. It is reasonable to suppose that Ms Burns was advised that her opposition

to the amendment would be unsuccessful. Her consent to it did not involve any undertaking to treat the allegation as reasonably made. Where an amendment is being made by consent it is rare for a Tribunal to embark on a full investigation of why the amendment is being made and whether there is sufficient evidence for it to be reasonably pursued. We do not understand the Authority to be saying that at the time of the amendment the Tribunal made a finding on the reasonableness of pursuing the allegation.

56. The Authority further contends that the Authority's position was based on a reasonable interpretation of events; the fact that the Tribunal came to a different decision on the basis of the evidence does not of itself make the Authority's position unreasonable. We fully agree with the principle underlying this contention. The difficulty faced by the Authority is the difficulty of showing that it was reasonable, after the rejection of the corrupt payments allegation by the RDC, to reinstate it as part of the Tribunal proceedings.

57. In the circumstances, particularly the lack of supporting material capable of leading to a different outcome than was reached by the RDC, we have come to the conclusion that the Authority acted unreasonably in reintroducing the corrupt payments allegation into the proceedings. We also consider that this unreasonably increased the gravity of the proceedings and increased Ms Burns' legal costs; in the absence of the amendment the proceedings would have cost less than they did. In these circumstances we judge that we ought to make an award of costs to Ms Burns pursuant to rule 10(3)(d), despite the fact that in overall terms she was the loser in the proceedings.

58. We have examined the breakdowns of legal costs that were provided to us. These include figures for the legal costs spent on the amendments and on the full hearing. It is not possible to make a scientific assessment of the addition to Ms Burns' reasonably incurred costs which resulted from the reinstatement of the corrupt payments allegation. It was the most serious allegation in play in the proceedings. We keep in mind that, if the allegation had not been reintroduced, the matter would still have proceeded to a full hearing on the other allegations, on whether she was in breach of the relevant standard, and on the question of fitness and propriety; these were serious matters in their own right, with important consequences. The best that can be done is to make a broad judgment, having regard to the figures provided to us, to our knowledge of the case, to our experience of how cases are run, and to our general knowledge and experience of levels of recoverable legal costs. In our view it is proper to award Ms Burns the sum of £100,000 by way of costs. This sum is assessed on a VAT-exclusive basis. It will enure to the benefit of Teachers' D&O insurers, who incurred the relevant legal costs on Ms Burns' behalf.

UNREASONABLENESS OF THE RDC DECISION?

59. Ms Burns contends that the decision of the RDC (being the decision in respect of which the reference to the Tribunal was made) was unreasonable.

60. She makes a number of miscellaneous criticisms which do not appear to us to be adequately substantiated or to demonstrate that the RDC decision was unreasonable.

61. Her most substantial point appears to us to be that the RDC, despite deciding that she had not made a demand for corrupt payments, decided upon a penalty of £154,800. She says that this level of penalty assumed that she had indeed made such a demand.

62. The Authority's submissions state in response:

> "The justification for the penalty of £154,800 is set out in the Decision Notice and is explained by the serious integrity findings made by the RDC against Ms Burns in addition to the length of time over which Ms Burns' breaches were found to have continued. The RDC did not act unreasonably in issuing the Decision Notice on the terms that it did and the basis of the facts that it had before it at the time."

63. We have re-examined how the RDC arrived at its conclusion on penalty. On the face of the Decision Notice, at para 8.24, the seriousness percentage of 30% has been applied to the income in para 8.21, which does not include the proposed corrupt payments in para 8.23(1)(a). This tends to undermine Ms Burns' submission. On the other hand, the Notice states that the seriousness percentage of 30% takes into account the facts in para 8.23, and that paragraph states that Ms Burns would have received payments of £120,000 per annum. The lack of clarity in this reasoning leaves us unsure whether Ms Burns' contention is accurate or not. It is possible that the difference between the RDC's view and the Tribunal's view as to penalty is explained by the difference in the facts found. Notwithstanding the rejection of the corrupt payments allegation, the RDC's view of the facts, based on the materials which it had, was markedly different from the view ultimately taken by the Tribunal. The RDC, unlike the Tribunal, considered that there had been a continuing serious failure of disclosure of conflicting interests over a long period of time. The RDC also, unlike the Tribunal, concluded that Ms Burns' conduct had caused actual detriment to Vanguard and to Teachers (para 2.4(3) of Decision Notice).

64. It is not necessary for us to resolve this question of interpretation of the Decision Notice, because there are other considerations which we find decisive. In the

proceedings which followed the Decision Notice Ms Burns challenged all of the RDC's adverse findings, the sanction of prohibition, and the financial penalty. Even if the size of the original financial penalty was affected by an unreasonable error in the RDC's reasoning, we do not consider that this had a material impact on the legal costs which Ms Burns incurred. It is clear that, if there had been a smaller financial penalty, she would still have challenged all of the RDC's adverse findings, the sanction of prohibition, and the financial penalty. While the size of the financial penalty was an important matter, it was within her means to pay, and the most important matters for her were the corrupt payments allegation and the prohibition order. On both of those matters the Tribunal substantially upheld the RDC's decision. In other words, the RDC was correct to reject the corrupt payments allegation, and the RDC was also correct to make a prohibition order pursuant to s56 of the Financial Services and Markets Act 2000.

65. In these circumstances, we do not consider that in the exercise of our discretion we ought to make an award of costs to Ms Burns arising from any unreasonableness in the RDC's decision.

CONCLUDING REMARKS AND FORM OF ORDER

66. We have determined that Ms Burns should be awarded the sum of £100,000 in respect of legal costs because of the Authority's unreasonable reinstatement of the corrupt payments allegation into the proceedings, despite its rejection by the RDC, and despite the lack of any further material capable of providing a sound basis for upholding the allegation. The Authority must pay this sum. We assume that the receiving party will have been able to recover VAT when the solicitors' invoices were discharged. If not, our order would need to allow for this by requiring the gross sum of £120,000 to be paid by the Authority (*Miskin v St John Vaughan* (2002) 146 SJLB 217, Supreme Court Costs Office, 18 September 2002). If our assumption as to recovery of VAT is incorrect, the parties have liberty to apply to vary the form of order, if necessary, so as to to give effect to our assessment of the VAT exclusive sum of £100,000.

67. While we have upheld Ms Burns' application on one point, we wish to state that we deplore the fact that she has seen fit to make unsubstantiated and intemperate allegations of malicious wrongdoing against the Authority and its lawyers. The Authority wisely concentrated in its submissions on costs on the matters of greater substance. However, we also deplore the Authority's own failure to retain a sense of proportion in its approach to this case. While Ms Burns was guilty of failing to make timely disclosure, that was all the true case amounted to. The interpretation which the Authority sought to put on the email of 5 November 2010 was against common-sense. She received no improper benefit from anyone. She did not misuse her influence in her

positions with MGM or Teachers. We concluded that Vanguard's withdrawal was its own decision. The evidence did not establish that Vanguard, if it had not withdrawn, would ultimately have taken over the Teachers mandate. If the Authority's approach had been more moderate, and if Ms Burns for her part had not persisted in disputing that she had failed in her obligation to make disclosure, the whole matter could have been resolved more satisfactorily and with less expense.

Andrew Bartlett QC

Judge

Released 5 November 2015