



Reference number FS/2010/0024

***PROCEDURE – Appeals – Witness Summons – Whether proper to issue
Witness Summons – Tribunal Procedure (UT) Rules, Rules 16***

**UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
FINANCIAL SERVICES**

DAVID HOBBS

Applicant

- and -

THE FINANCIAL SERVICES AUTHORITY

Authority

**TRIBUNAL: SIR STEPHEN OLIVER QC
Sitting in Chambers**

DECISION

5 1. David Hobbs has appealed to the Upper Tribunal for two Witness Summonses.
These are directed at Ms Olivia Dickson (a voting member of the Regulatory
Decisions Committee (“RDC”) panel) and Mr Andrew Fenlon (LIFFE’s Head of
Audit, Investigation and Membership). Mr Hobbs’ application to the Upper
Tribunal is dated 29th June 2011. It states that both of those individuals have
10 indicated their opposition to the applications for them to attend and give evidence
at the Hearing of the reference.

2. I received written representations from Mr Hobbs and from the FSA.

15 **The Law**

3. Rule 16 of the Tribunal Procedure (Upper Tribunal) Rules 2008 deals with the
“summoning or citation of witnesses and orders to answer questions or produce
documents. So far as relevant it reads as follows:

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“(1) On the application of a party or on its own initiative, the Upper Tribunal
may-

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(a) by summons ... require any person to attend as a witness at a hearing
at the time and place specified in the summons ... ; or

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

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(3) No person may be compelled to give any evidence or produce any
document that the person could not be compelled to give or produce on a
trial of an action in a court of law in the part of the United Kingdom
where the proceedings are due to be determined.

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(4) A person who receives a summons, citation or order may apply to the
Upper Tribunal for it to be varied or set aside if they did not have an
opportunity to object to it before it was made or issued.”

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4. It will be noted from Rule 16(1)(a) that a summons can do no more than require
the named person to attend the hearing venue at the stated time. It does not
require for that person to address in advance any questions asked by the
Applicant. It does not require the person in question to come as the Applicant’s
own witness. By Rule 16(3) the person in question cannot be compelled to give
evidence on any matter that he or she could not have been compelled to give
evidence about in a court of law. Thus, the Tribunal will only grant a witness
summons if it is satisfied that the person in question has admissible evidence to
give; and to be admissible the evidence must be relevant. To the same effect is
45 the criterion in Rule 16(1)(b) requiring the production of documents. Mr Hobbs’
application does not specify any questions for which answers are required or the

production of any documents in the possession or the control of the person in question.

The application relating to Ms Olivia Dickson

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5. Ms Dickson's attendance as a witness is, according to Mr Hobbs' application, required because she –

10 “... understood that my actions were of a trader doing his job of trading and not actions with the intention of causing market abuse. Ms Dickson on numerous occasions questioned the FSA's understanding of the events during the RDC hearing (shown in the transcript of the RDC hearing). Also the FSA's leading enforcer..... at the RDC hearing, deferred to Ms Dickson's superior knowledge and expertise to hers on the matters being
15 discussed.”

6. I am not satisfied that the evidence sought from Ms Dickson is relevant. This Tribunal and not the Witness has the statutory responsibility of determining the facts. The question for this Tribunal will be whether the FSA have satisfied it of
20 the facts and matters set out in the Statement of Case and relied upon the FSA. What Ms Dickson understood of Mr Hobbs' action is of no evidential value to the question before the Tribunal. The Applicant identifies nothing relevant to the issues in dispute on which he is said to be able to speak; nor does it identify anything additional to the evidence does has already been addressed by the
25 parties. Moreover, as she has stated that she does not wish to provide evidence, I have taken that as an objection under Rule 16(4) to the grant of a Summons on the justifiable basis that nothing she has to say will be relevant.

7. For those reasons I do not grant the application for a Witness Summons regarding
30 Ms Dickson.

Mr Fenlon

8. Mr Fenlon's attendance as a witness is required, according to Mr Hobbs' application because –
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40 “... he did not believe there had been any market abuse. This is specifically highlighted by Fenlon's... summary and conclusions from his LIFFE investigation into Mr Hobbs' trading activity on the 15 August 2007. The FSA clearly recognise this by specifically indicating that Mr Fenlon's conclusions are one of the main reasons that undermine the FSA's decision to take action against myself and that his evidence would damage the FSA's case. Mr Fenlon also concluded that: “Is also worth noting that it does not appear that the market was adversely affected by
45 Mr Hobbs' trading activity.”

9. Addressing the question of the relevance of Mr Fenlon’s evidence, the FSA acknowledged that he was one of the investigators appointed by LIFFE to carry an investigation in relation to the factual circumstances giving rise to the present reference. The FSA mentioned that Mr Fenlon has stated that he does not wish to appear as a witness on behalf of Mr Hobbs, noting that, in the light of the disclosures previously made by LIFFE to the FSA, he does not consider that he could add anything further by way of witness evidence. Mr Fenlon also stated that, given his role in LIFFE’s investigation, it would be inappropriate for him to act as Mr Hobbs’ expert. The FSA also accept that one of the documents included in its List of Documents was provided by LIFFE. The FSA states that it does not consider that the disclosure of that document supports the assertion made by Mr Hobbs in the passage quoted above.
10. As observed in relation to the application for a summons directed at Ms Dickson, I am not satisfied that Mr Hobbs has specified anything relevant to the issue in dispute that Mr Fenlon should address in evidence. Nor has Mr Hobbs identified anything additional to the evidence that has already been adduced and on which Mr Hobbs invites him to give evidence. Mr Fenlon’s apparent belief that there had not been any market abuse is not relevant. This Tribunal, as mentioned earlier, has the function of determining the matters raised in the reference on the basis of the relevant evidence; and that rules out the main reason for calling Mr Fenlon.
11. To the extent that Mr Hobbs’ applications contain a requirement of either or both of Ms Dickson and Mr Fenlon to be instructed as expert witnesses, I note the objection advanced by the FSA that for the Tribunal to issue a Witness Summons to this affect would be unfair on both of them. The FSA refer to the recent decision of the Supreme Court in *Jones v Kaney* [2011] UKSC 13. There the Supreme Court effectively abolished the immunity previously enjoyed by expert witnesses. The FSA submits, and I agree, that the summonses sought by Mr Hobbs might place Ms Dickson or Mr Fenlon (or both) depending on their evidence) in the “unfair” position of being required to give expert evidence and then subsequently having a claim asserted against them by the Applicant that they had breached a duty of care owed by virtue of their appointment.
12. The terms of Rule 16, as I read them, go nowhere near enabling the Upper Tribunal to issue a summons to a person requiring him to attend and give expert evidence. All the Tribunal can do is to require the person in question to attend at the specified time “as a witness” or to answer specified questions that relate to specified issues in the proceedings.
13. Finally, even if there were any merit in Mr Hobbs’s application, I would disallow it on the grounds that it is long overdue and no reason has been advanced as to why I should give him extended time to apply.

14. The applications are dismissed.

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SIR STEPHEN OLIVER QC
JUDGE OF THE UPPER TRIBUNAL
RELEASE DATE: 02 September 2011