



Reference number: FS/2015/0012

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

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

SAIM KOKSAL T/A ARCIS MANAGEMENT CONSULTANCY Applicant

- and -

THE FINANCIAL CONDUCT AUTHORITY

**The
Authority**

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

Sitting in public in London on 13 October 2015

Wafa Shah, Counsel, for the Applicant

**Adrian Berrill-Cox, Counsel, instructed by the Financial Conduct Authority, for
the Authority**

DECISION

Introduction

5 1. This decision relates to an application by the applicant ("Dr Koksai") to make a
reference to this Tribunal out of time in respect of the decision notice issued by the
Authority to Dr Koksai (trading as Arcis Management Consultancy) on 9 December
2014. In that decision notice the Authority decided to refuse Dr Koksai's application
10 to vary Arcis's Part 4A Permission to enable it to carry on various mortgage related
activities.

The Facts

15 2. On 2 December 2013 Dr Koksai applied to vary the permission granted to Arcis
pursuant to Part 4A of the Financial Services and Markets Act 2000 ("FSMA") to
carry on various regulated activities. In the application Arcis sought to add the
following activities to its permission:

- (a) advising on regulated mortgage contracts;
- (b) arranging (bringing about) regulated mortgage contracts; and
- (c) making arrangements with a view to regulated mortgage contracts.

20 3. At the time of the application, Dr Koksai did not employ any additional staff
and Arcis was wholly dependent on Dr Koksai to carry out the proposed activities
which were the subject of the application (" the Mortgage Activities").

25 4. The Authority's authorisation team considered that Dr Koksai did not meet the
appropriate qualification requirements which would enable Arcis to carry on the
Mortgage Activities. Following written representations made by Dr Koksai the
Authority's Regulatory Decisions Committee issued a decision notice on behalf of the
Authority on 9 December 2014 refusing the application.

30 5. On 27 November 2014 Dr Koksai had also applied to vary Arcis's Part4A
permission so as to permit it to continue to carry on various consumer credit related
activities (the "Consumer Credit Activities"). In relation to that application an
associate of the Authority from its Debt Department and Credit Authorisation
division wrote to Dr Koksai as follows:

"Thank you for your application to vary your permission. I am your case officer.

I understand that you currently have another variation of permission application with us, which is currently in the regulatory decisions committee (RDC) process.

5 That being the case (and given the connection between the two applications), I feel the most appropriate course of action at this stage in respect of this particular application would be to pursue one of the following options:

10 (1) Await the outcome of the other application (The RDC process) before progressing this application further.

(2) Withdraw this application at this time, and reapplying once the outcome of the RDC process is known.

15 I would appreciate if you could revert back to me with your thoughts on the above."

6. By virtue of paragraph 2(2) of Schedule 3 to the Tribunal Procedure (Upper Tribunal Rules 2008) a reference of a decision of the Authority to this Tribunal must be received no later than the 28 days after the notice of the decision in question is given. Accordingly the time for referring the decision notice in this case expired on 9
20 January 2015.

7. On 24 December 2014, Dr Koksai wrote to the RDC Secretariat informing them that he was not taking the case further to the Upper Tribunal. At some point thereafter, however, it appears that Dr Koksai changed his mind. It appears that he took legal advice from a number of different firms of solicitors which he described in
25 his later correspondence with this Tribunal as "confusing". However, he did on 26 May 2015 receive clear advice from another firm, Berwin Leighton Paisner, which he chose to disclose to the Tribunal. In that advice Dr Koksai was advised that if he wished to make a reference to the Tribunal then it ought to be made as soon as possible in order to maximise the chances of it being considered, bearing in mind that
30 it was out of time, and that he should not wait until after the determination of any complaint that Dr Koksai had in relation to the conduct of the Authority in relation to the application.

8. Accordingly on 8 June 2015 Dr Koksai referred the decision notice, 151 days out of time. As it appears from his reference notice and his subsequent
35 correspondence with the Tribunal, the reasons for the lateness of the reference given by Dr Koksai are as follows. First, he has complaints regarding the conduct of the Authority in relation to his dealings with them which are under consideration pursuant to the Authority's complaints scheme and he was of the view that his complaints had to be dealt with before he could make his reference to the Tribunal so as to give it any
40 prospect of success. Second, he believed that the Authority's letter of 9 December

2014 in relation to the application in respect of the Consumer Credit Activities was being considered together with the application relating to the Mortgage Activities. He therefore thought it would be better to deal with what he described as the "baseless allegations and misinformation" which had emerged from the Authority's consideration of the application in respect of the Mortgage Activities in the context of the application in respect of the Consumer Credit Activities which he did not wish to prejudice by referring the decision in respect of the application relating to the Mortgage Activities to the Tribunal.

The law and factors to be considered

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

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

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

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

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

10. In addition in *Martin-Artajo* this Tribunal considered that there were two other factors that should be taken into account.

11. First, there is a public interest in the Authority's decisions being as accurate as possible and this will be more likely to be achieved if those decisions are properly tested. This Tribunal is an integral part of the regulatory scheme designed to produce quality decision-making. Consequently, if there had been no opportunity for the applicant to make representations to the Authority's decision-maker, the Regulatory

Decisions Committee (RDC) before the decision notice was issued that would be an additional matter that should be taken into account. That factor was relevant in *Martin-Artajo* because in that case the Authority had taken the view that the applicant was not a third party for the purposes of s 393 FSMA and consequently he had been given no opportunity to make representations to the RDC. It is not a relevant factor here because Dr Koksall has engaged with the RDC process.

12. Second, regard should be had to the merits of the applicant's reference as there would be no point extending the time if the reference had no reasonable prospect of success, conversely if the reference had merit that is a factor in favour of extending time: see [50] of the Decision.

13. In relation to this second point the recent judgment of the Supreme Court in *Global Torch Ltd v Apex Global Management Ltd (No 2)* [2014] UKSC 64 calls for a modification of the approach. Lord Neuberger of Abbotsbury PSC said at [29] to [30] :

15 “29. In my view, the strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management issues of the sort which were the subject of the decisions in these proceedings. The one possible exception could be where a party has a case whose strength would entitle him to summary judgment

20 30. A trial involves directions and case management decisions, and it is hard to see why the strength of either party's case should, at least normally, affect the nature or the enforcement of those directions and decisions. While it may be a different way of making the same point, it is also hard to identify quite how a court, when giving directions or imposing a sanction, could satisfactorily take into account the ultimate prospects of success in a principled way. Further, it would be thoroughly undesirable if, every time the court was considering the imposition or enforcement of a sanction, it could be faced with the exercise of assessing the strength of the party's respective cases: it would lead to such applications costing much more than taking a much more court time than they already do. It would thus be inherently undesirable and contrary to the aim of the Woolf and Jackson reforms.”

14. Consequently, the merits of the case should only be a factor to be weighed in the balance where the case is either obviously hopeless (in which case there is no point extending time) or so overwhelmingly strong that there is no realistic prospect of there being a defence to it.

Discussion

15. I now turn to consider whether I should extend time in the light of the facts found and the principles I have identified above. I do so by carrying out a balancing exercise in respect of those factors that tend to favour the grant of an extension and those which do not, giving appropriate weight to the various factors in the light of the facts found and coming to a conclusion as to whether as a result of that balancing exercise it is fair and just to grant an extension. I start by considering the five questions identified in *Data Select*.

The purpose of the time limit

16. Mr Berrill-Cox correctly identified that the time limit serves an important public
5 interest in the finality of litigation. As this Tribunal observed in *Martin-Artajo* at [54],
in principle the time limit should be enforced and it should be regarded as a precise
limit and not a vague target. Generally, the time limit should not be departed from
unless there is a good reason to do so. This is a strong factor against extending time.

The length of the delay

10 17. The delay in this case (over five months) is not trivial or insignificant, as Ms
Shah accepted. This is also a strong factor against extending time.

The explanation for the delay

18. Ms Shah submitted that Dr Koksals had good reasons for delaying the making of
the reference in the context of an application made by an unrepresented applicant. The
15 delay arose from a fundamental misunderstanding on his part. He understood that for
the reference to be successful he would have needed to have successfully challenged
the underlying factual assumptions of the Authority that have led it to refuse the
application to vary the Part 4A permission in respect of the Mortgage Activities
through the Authority's complaint scheme. Ms Shah submitted that Dr Koksals had
20 received legal advice to that effect.

19. Secondly, Dr Koksals had formed the conclusion from the Authority's letter of 9
December 2014 that the application in respect of the Mortgage Activities and the
application in respect of the Consumer Credit Activities were being considered
together and that it would reflect badly on the latter application if he were to pursue a
25 reference with the Tribunal in respect of the application relating to the mortgage
Activities.

20. In my view neither of the reasons given are good reasons for the delay. No
person in the position of Dr Koksals, as a principal of a firm regulated by the Authority
who it is reasonable to expect would read carefully both the basis on which the
30 complaints scheme operated before making a complaint and the circumstances in
which a reference may be made to the Tribunal and the time limits for so doing, could
reasonably have come to the conclusion that the making of the reference to the
Tribunal should be deferred pending the consideration of his complaint regarding the
underlying facts and assumptions relating to the Authority's decision. This is the case
35 regardless of whether he was represented or not. Neither could such a person have
reasonably believed that the Authority's letter of 9 December 2014 indicated that the
two applications were being considered together. The wording of the letter quite
clearly refers to them as two separate applications. As Dr Koksals's letter to the RDC
on 24 December 2014 makes clear in stating that he was not referring the decision
40 notice to the Tribunal, he was aware that the two applications were being dealt with

separately. I can take no account of Ms Shah's submission regarding the taking of legal advice as there was no evidence before me to that effect. Therefore, in this case the explanation for the delay does not amount to a factor in favour of extending time.

The consequences for the parties of an extension of time

5 20. Should an extension of time be granted, then Dr Koksai will have the opportunity
of challenging the Authority's decision in the Tribunal. I accept Mr Berrill-Cox's
submission that an extension of time would cause a degree of prejudice to the
Authority in that it quite reasonably relied on finality in decision-making to determine
and plan how to deploy limited resources, particularly in circumstances such as those
10 in this case where Dr Koksai had indicated clearly soon after the decision notice was
issued that he was not going to make a reference. In this case therefore the factor
tends to be a factor against extending time.

The consequences for the parties of a refusal to extend time

15 21. As far as the Authority is concerned, a refusal to extend time would mean that it
would not have to devote any of the resources of its Enforcement Division to the
matter. The effect on its Authorisation Department is unlikely to be significant
because it is still considering the application relating to the Consumer Credit
Activities. As far as Arcis is concerned, although it would not be able to pursue the
reference, it would be open to it to make a fresh application to vary its permission.
20 Consequently, a failure to extend time would not be fatal to its prospects of varying its
permission if it were able to satisfy the Authority that it was in a position to satisfy the
threshold conditions in a new application. Indeed Ms Shah indicated that if the
reference was admitted steps would be taken to hire additional staff to meet the
Authority's concerns regarding the availability of resource with sufficient knowledge
25 and qualifications in respect of the Mortgage Activities. It seems to me that this
course of action could be equally followed in the context of a fresh application to vary
the permission. Therefore in this case the factor does not tend to support an extension
of time.

The merits of the application

30 21. Mr Berrill-Cox submitted that the merits of the application were very weak
because Dr Koksai had essentially said that he should be the exception to the rules
and be granted permission to perform the Mortgage Activities despite not meet the
minimum qualification requirements which the Authority contends are necessary in
order to satisfy the threshold conditions. I did not hear sufficient argument in detail to
35 form even a preliminary view as to whether there were means by which Dr Koksai
could satisfy the threshold conditions other than through obtaining the qualifications
referred to by the Authority and accordingly I shall regard the merits as being a
neutral factor in this case.

Conclusion

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

5 23. My reasons for this conclusion are as follows:

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

10 (2) There will be some resource implications for the Authority if the reference were admitted but not to the extent that it would be seriously prejudiced. In this particular case, because of the nature of the application, the prejudice to Dr Koksai of not pursuing his reference is not substantial because he would be in a position to submit a fresh application in which he would have the opportunity of addressing the concerns that have been expressed by the Authority in its decision. This factor, combined with the strong factors against granting time set
15 out at (1) above weighs heavily against granting an extension of time.

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

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**TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE**

RELEASE DATE: 17 November 2015