



Reference number FS/2011/0006

STRIKE OUT APPLICATION – real prospect of success – application to revoke prohibition order – whether prohibition order had been properly made – strike out application granted – Tribunal Procedure (Upper Tribunal) Rules 2008(SI 2698/2008) as amended, Rule 8(3)(c)

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

STEPHEN ALLEN

Applicant

- and -

THE FINANCIAL SERVICES AUTHORITY

Authority

TRIBUNAL: SIR STEPHEN OLIVER QC

Sitting in London on 27 July 2011

Stuart Cakebread, Counsel, instructed by Jacksons Solicitors, for the Applicant

Fleur Eysenck, Counsel, for the Authority

© CROWN COPYRIGHT 2011

DECISION

- 5 1. The FSA seek to strike out the reference of the Applicant, Stephen Robert Allen (“Mr Allen”), referred to the Upper Tribunal on 24 March 2011.

Introduction

10

2. On 5 January 2010, by means of a Final Notice, the FSA made a Prohibition Order (“the prohibition order”) against Mr Allen in response to a Direction given by the Financial Services and Markets Tribunal (“The Tribunal”) following a full hearing.

15

3. Mr Allen applied to revoke the prohibition order. His application was refused by the FSA in a Decision Notice dated 24 February 2011. The grounds for Mr Allen’s revocation and for challenging the Decision Notice were as follows:

20

(i) the FSA had failed to follow the correct statutory procedure for making the prohibition order:

25

(ii) the FSA had made the prohibition order for reasons not given by the Tribunal and as such had not acted consistently with the Tribunal’s determination for the purposes of Section 133(10) of the Financial Services and Markets Act 2000 (FSMA) and

30

(iii) that a member of the RDCA panel which had heard Mr Allen’s case in February 2011 had also been on the panel in 2008 which had made the original decision to impose a prohibition order on him.

35

4. The FSA apply for a direction that Mr Allen’s reference be struck out. Their substantive reason for seeking the strike-out direction is that there has been no material change (nor does Mr Allen allege that there has been) since the Tribunal determined that Mr Allen should be prohibited and directed the FSA to do so. Then, regarding the particular grounds advanced by Mr Allen for the present reference, there is no reasonable prospect of his case succeeding.

The facts

40

5. Mr Allen joined Fabien Risk Services Limited (FRS), an insurance intermediary firm, in July 2002 and became a director on 1 October 2002. On 14 January 2005 FRS became authorised by the FSA as an insurance mediation firm with permission to hold client’s money, and Mr Allen was approved to perform the director function (CF1).

45

6. Mr Allen resigned from FRS on 19 September 2005. He ceased to be an approved person from 14 October 2005.

- 5 7. On 19 October 2005 FRS went into creditor’s voluntary liquidation with an estimated deficiency of £701,128 in respect of non-preferential creditors. The sums owed to insurers, brokers and underwriters was £469,741, less around £8,500 held in the client money bank account.
- 10 8. FRS, chief executive, Shane Garvey (CF1, CF3 and CF8) and the accounts manager, Lee Goddard (who was not an approved person), had been deliberately misappropriating clients’ money from the client account in order to keep FRS trading. The FSA made prohibition orders against Mr Garvey and Mr Goddard in September 2007. On 14 December 2007, in accordance with Section 57(1) FSMA, the FSA gave Mr Allen a warning notice notifying him that the FSA proposed to make a prohibition order against him.
- 15 9. On 16 May 2008, in accordance with Section 57(3) FSMA, the FSA gave Mr Allen a decision notice notifying him of the FSA’s decision to make a prohibition order against him. On 13 June 2008, Mr Allen referred the matter to the Tribunal.
- 20 10. By a written decision dated 3 December 2009 the Tribunal found that Mr Allen lacked competence and capability. The Tribunal noted that Mr Allen:

25 “Accepted that his knowledge of the firm’s bank accounts was a neglect of his duties and that he had failed in his duty as a director of the firm. The Authority accepted that, if Mr Allen had acted with honesty and integrity but had lacked competence and/or capability, then the appropriate order would be a partial, and not a total, prohibition. We agree and are of the view that the appropriate order is a partial prohibition”. (Paragraph 135)

30

The conclusion of the Tribunal (in Paragraph 136(2)) was –

35 “... because Mr Allen failed in his duties as a director of the firm he should be prohibited from performing any management or controlled functions”.

11. The Tribunal also stated that:

40 “Section 133(4)... provides that, on a reference, the Tribunal must determine what, if any, is the appropriate action for the Authority to take in relation to the matter referred to it. Section 133(5) provides that, on determining a reference, the Tribunal must remit the matter to the Authority with such directions (if any) as the Tribunal considers appropriate for giving affect to its determination”. (Paragraph 137)

45

“We determine that the appropriate action for the Authority to take in relation to this matter is to make a partial Prohibition Order. We

therefore remit this matter to the Authority and direct that the Authority should only make a Prohibition Order prohibiting Mr Allen from performing any management or control function”. (Paragraph 138)

- 5 12. On 5 January 2010, in accordance with Section 133(1) FSMA, the Authority made the prohibition order against Mr Allen and issued a Final Notice.
13. Neither Mr Allen nor the FSA rely on any further facts; in particular Mr Allen does not challenge the FSA’s statement that there has been no material change in
10 the position since the decision of the Tribunal.

The Tribunal’s power to strike out a reference

- 15 14. Pursuant to Rules 6(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended, the Tribunal may give a direction on an application of one or more of the parties. Such an application must include the reasons for making that application.
- 20 15 Pursuant to Rule 8(3)(c) the Tribunal may strike out the whole or part of the proceedings if, in proceedings which are not an appeal from the decision of another tribunal or judicial review proceedings, the Tribunal considers there is no reasonable prospect of the Applicant’s case, or part of it, succeeding. (This matter is not an appeal from the decision of another tribunal or judicial review proceedings.)
- 25 16. In the case of *Vijay Kumar Sharma –v– the FSA*, published on 2 September 2010, the Tribunal considered its jurisdiction to strike out proceedings before it. Specifically, the Tribunal addressed itself to the question of whether, in directing that a reference be struck out on the grounds that there was no reasonable
30 prospect of the Applicant’s case succeeding, it had carried out its statutory function to determine the appropriate action. The Tribunal held that Rule 8(3)(c) was available in financial services cases as “a means of producing the result described by Section 133(4) FSMA, namely the determination of the appropriate action for the FSA to take.” The Tribunal was further satisfied that a
35 determination pursuant to Rule 8(3)(c) where an Applicant’s claim had no reasonable prospect of success did not infringe an applicant’s right to a fair hearing under Article 6 of the European Convention on Human Rights.

The strike out application

- 40 17. The FSA base their application on two grounds. The first is that there has been no material change in circumstances since the Tribunal determined that Mr Allen should be prohibited and directed the FSA to do so. The second is that, as
45 regards the three grounds given by Mr Allen in support of the reference, there is no reasonable prospect of his case succeeding. Regarding the first ground advanced by the FSA, it points out that the Tribunal determined in its decision of December 2009 that Mr Allen lacked competence and capability; consequently it

5 was appropriate for the FSA to make a partial prohibition order. The FSA had
duly done so and, since then, there had been no material change in Mr Allen's
position in respect of his competence and capability. The result was that there
was no evidence before the Tribunal that would enable it to make a different
determination from that which had been published on 2 December 2009. They
comment (and this is not in dispute) that Mr Allen does not himself allege that
there has been any material change in the circumstances.

10 **Mr Allen's reference**

10

18. I deal now with each of the three grounds advanced by Mr Allen in support of his
reference. These are summarised at the start of this Decision.

15 19. Mr Allen, through Mr Stuart Cakebread, contends that the FSA had not followed
procedures for making the prohibition order as prescribed by Section 57 FSMA.
Section 56, if it is submitted, means that a prohibition can only be made where it
appears to the "Authority" that an individual is not fit and proper; and therefore
when a reference is made to the Tribunal the FSA must by law retain its decision
-making function. It is submitted for Mr Allen that the decision to make a
20 prohibition order must be that of the FSA alone and that the failure by the FSA to
follow the procedure in Section 57 FSMA renders the prohibition order unlawful.

25 20. In common with the FSA, I think that submission is wrong in law. Section 57
makes it clear that where the Authority "proposes" to make a prohibition order it
would issue a warning notice, and where "decides" to make a prohibition order it
should issue a decision notice. In the event of a reference to the Tribunal, the
Tribunal's function is to make its own determination and the Authority is
required by law to act as directed by the Tribunal. In circumstances where the
Tribunal decides that a prohibition order should be imposed, the Authority does
30 not "propose" or "decide" to make a prohibition order; it is directed to do so
Tribunal and compelled to do so by Section 133 FSMA. In this connection I
mention specifically the following provisions of Section 133 which, on their clear
reading, supersede the provisions of Section 56- 58 in the event that a reference is
made to the Tribunal. At the relevant time Section 133 provided that:

35

"(4) On a reference the Tribunal must determine what (if any) is the
appropriate action for the Authority to take in relation to the matter
referred to it.

40 (5) On determining a reference, the Tribunal must remit the matter to the
Authority with such directions (if any) as the Tribunal considers
appropriate for given effect to its determination.

(10) The Authority must act in accordance with the determination of, and
any direction given by, the Tribunal".

45 21 I conclude this point by mentioning that the effect of adopting the interpretation
advanced for Mr Allen would be to compel the FSA to issue a warning notice and

a decision notice, following the Tribunal's determination, with the consequence that the Tribunal's own decision could be referred back to it.

5 22. The second ground advanced for Mr Allen was that the Final Notice announcing
the prohibition order was based on reasons not given by the Tribunal in its
decision of December 2009. Consequently (so the argument ran) the FSA has
exceeded its powers in issuing the final notice. In essence, the point taken for Mr
Allen is that the Tribunal made no finding that he lacked competence and
10 capability at the time to which the Tribunal's determination related, i.e. when it
decided the matter in December 2009.

23. The Final Notice, issued on 5 January 2010, contains the following passages:

15 "2.4 The Tribunal... found that you lacked competence and capability.
The Tribunal noted that you:
"accepted that [your] lack of knowledge of the firm's bank
accounts was a neglect of [your] duties and that [you] had failed
in [your] duty as a director of the firm." (paragraph 135)

20 And concluded that:

"because [you] failed in [your] duties as a director of the firm [you]
should be prohibited from performing any management or controlled
functions." (paragraph 136(2))

25 The FSA's Press Release of 14 January 2010 states:

30 "Allen accepted that his lack of knowledge of Fabien's bank accounts
was a neglect of his duties and that he had failed in his duty as a
director. As a result, it was concluded that, although Allen did not lack
honesty or integrity, he lacked the competence to run a regulated firm."

35 The FSA contends that those passages are wholly consistent with the Tribunal's
decision. The Final Notice therefore complied with the Tribunal's direction in
paragraph 138 of its Decision which remits the matter to the FSA with a direction
to make a prohibition order prohibiting Mr Allen from performing any
management or controlled function."

40 24. For Mr Allen it is said that the Tribunal made no finding as to his lack of
competence and capability at the time when the reference was determined. Mr
Allen accepted that he had conceded to the Tribunal that he had failed as a
director of FRS in the years 2004 and 2005. But that, it was said for him, could
not form the basis for a conclusion that he was lacking in competence and
45 capability in 2009 when the reference was determined. Had the FSA been
seeking a ruling from the Tribunal as to Mr Allen's "current" competence and
capability, it could and should have pleaded an alternative case in respect of that.

25. In my view the Tribunal must be taken to have meant what it had said in paragraph 138. It directed the FSA to make a Prohibition Order prohibiting Mr Allen from performing any management or controlled function. There is no suggestion in the Decision that by the time of the determination Mr Allen's competence and capability had so changed that it was no longer appropriate to direct the making of a prohibition order. The only possible inference to be drawn from the Tribunal's direction is that Mr Allen had demonstrated from his involvement in the events of 2004/05 that he was and remained neither competent nor capable; and on that basis he should be prohibited from performing any management or controlled function.

26. For that reason I am against Mr Allen on ground two. Further, I do not consider that it has any reasonable prospect of success.

27. The third argument advanced for Mr Allen related to the composition of the RDC whose decision led to the publication of the decision of February 2011. Specifically, Mr Allen points to the fact that a member of the RDC who heard his case (on 17 February 2011) had also been on the RDC panel which in 2008 had made the original decision to impose the prohibition order on him. In the circumstances, the Decision Notice of 24 February 2011 should be treated as invalid or a nullity

28. The relevant facts are these. The 2008 panel of the RDC had included an individual to whom I refer as Y. Y had not chaired the 2008 panel. The 2011 panel had been composed of three individuals, X, Y, Z. Y had not chaired the 2011 panel. Sometime in early 2010 (and presumably after the issue of the Final Notice in January 2010) Mr Allen had sought advice from the FSA and an email from the FSA dated 1 April 2010 had stated:

“That the panel that deals with the case going forward is not made up of any committee members who were previously involved.”

An email from the FSA of 2 September 2010 contained the words – “A panel does not include any individual who has previously been involved in your case”. Mr Allen did not attend the RDC hearing on 17 February 2011.

29. Following an enquiry by Mr Allen, he received this explanation from the FSA by email of 23 March 2011:

“You are correct in that I did previously advise that the panel that would consider your case would be made up of members of the RDC who had not been involved in your previous case. However, the RDC were conscious that we had not heard from you or your representative since Mr Webster's email of 5 October 2010, in which Mr Webster advised that he was without instructions and that we should contact you directly. Our attempts to contact you directly went unanswered. As you are aware the RDC is an administrative process and has to be

5 efficient and timely with its decision making. We could not let this
matter continue indefinitely and so arrangements were made for a
panel to consider your written representations. In doing so we were
mindful of your previous request but also had to balance this with the
availability of a panel to consider this matter. ... I am sure you will
appreciated that the RDC has limited availability which was further
limited by your specific request.

10 I would like to re-iterate that the RDC does not accept that the
involvement of any members who have had previous involvement with
your case means that you were not treated fairly.”

15 30. For Mr Allen it was argued that the presence of Y on the 2011 panel was not just
a breach by the FSA of its own standards of fairness: it was demonstrably unfair.

20 31. In the absence of the undertakings given in the emails of 1 April and 2 September
2010 (set out above) I would not have regarded Y’s presence on the 2011 panel
as invalidating or even undermining the effect of the decision recorded in the
Decision Notice of 24 February 2011. The matters for determination by the 2008
panel were whether, in the light of Mr Allen’s conduct as director of FRS, a
prohibition order should be issued prohibiting him from performing any
management or controlled function. The matters for determination by the 2011
panel were these. Should the prohibition order be revoked because the FSA had
failed to comply with the procedures set out in Section 57 FSMA. Second, had
the FSA made the prohibition order for reasons not given in the determination of
the Tribunal. The issues addressed at the 2008 RDC hearing were so different
from those addressed by the 2011 panel that participation by one member in both
panels cannot, in my view, have produced an unfair result; nor can it even be said
to have given an impression of unfairness. Even if the real issue here had been
addressed by the 2011 panel, there would have still been no unfairness. That real,
but unstated, issue is whether the circumstances of Mr Allen had so changed
since the Tribunal made its decision of December 2011 that he should now be
regarded as capable and competent to perform management and controlled
functions. The RDC, it will be noted, make the FSA’s regulatory decisions.
They are not a judicial body. Y’s contribution to the FSA’s decision, as a
member of the Decision Committee, would have been based on his own
assessment of any claimed improvement in Mr Allen’s performance since 2008.

40 32. Finally, in this connection I mention that there has been suggestion that Y was in
a position of conflict of interest.

33. For completeness of this topic I need to mention that the affect of Section 395
FSMA. This states:

45 “(i) The Authority must determine the procedure that it proposes to
follow in relation to the given of –
(a) supervisory notices; and

- (b) warning notices and decision notices
- (ii) The Authority's failure in a particular case to follow its procedure set out in the latest published statement does not affect the validity of a notice given in that case."

5

The affect of Section 395(11) is that even in the event that there was a failure to follow procedure, this could not have the affect of nullifying the Decision Notice issued by the RDC. (The only published statements that I am aware of is in DEPP part III. That governs conflict of interest. There is, however, no specific policy that governs the composition of the panel in a situation like the present. As indicated above, however, I do not base my decision of the wording of Section 395(10).

10

Conclusion

15

35. I have heard full argument for the points advanced for Mr Allen in support of his contention that the right answer to the reference should be a direction that the prohibition order be revoked. I am satisfied that all the relevant material has been made available to me. My conclusion is that in all the circumstances there is no reasonable prospect of Mr Allen's case succeeding. On that basis I think it is right to exercise the Tribunal's strike-out power under Rule 8(3)(c).

20

36. For the reasons given above the application succeeds and the reference is struck out.

25

30

SIR STEPHEN OLIVER QC
JUDGE OF THE UPPER TRIBUNAL
RELEASE DATE: 25 August 2011

35