**Reference numbers: FS/2011/0017**
**FS/2011/0018**

***PROHIBITION — application for revocation — refused — whether reference of decision notice recording refusal should be struck out — yes***

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**

**JONATHAN MILROY TOWNROW** **Applicant**

**- and –**

**THE FINANCIAL SERVICES AUTHORITY** **The Authority**

**Tribunal: Judge Colin Bishopp**

**Sitting in public in London on 2 October 2012**

**Mr Joseph Egerton of Ignacity appeared for the Applicant**

**Mr Adrian Berrill-Cox, barrister employed by the Authority, appeared for the Authority.**

## DECISION

1. Mr Jonathan Townrow has referred to the tribunal a decision notice issued by the Authority's Regulatory Decisions Committee ("RDC") on 10 January 2012. That notice recorded the RDC's decision that a prohibition order imposed on Mr Townrow should not be revoked.

2. The imposition of the prohibition order followed a decision dated 12 January 2006 of the Financial Services and Markets Tribunal ("the FSMT"), whose jurisdiction has since been transferred to this Chamber. It prohibited Mr Townrow from performing any function in relation to a regulated activity carried on by an authorised person, on the grounds that he was not fit and proper because of his lack of integrity. Specifically, the FSMT found that Mr Townrow

- presented a severe risk to customers;
- failed to co-operate with and gave false information to regulators, including the Authority; and
- was, to borrow from the FSMT's decision, "temperamentally unsuited to working in a regulated environment".

3. Mr Townrow applied to the Authority for revocation or variation of the prohibition order on 24 June 2011. A warning notice, indicating that his application would be refused, was sent to him on 25 November 2011 and, despite Mr Townrow's representations to the RDC, it was followed by the decision notice which Mr Townrow has referred. The reasons given for the RDC's refusal of Mr Townrow's application were that the misconduct giving rise to the prohibition order was particularly serious; that he had not taken any substantive steps to remedy his misconduct; and that the RDC considered he would pose a risk to customers were the order to be revoked. The grounds on which Mr Townrow relies in his reference are, in summary, that what he describes as a "life time ban" is unlawful, particularly in that it is contrary to the Human Rights Act 1998, is indefensible and disproportionate; that the actions which led to the FSMT's decision were those which only a person exercising a controlled function could perform, but he is not seeking approval to perform a controlled function; that the findings of the FSMT were due to the incompetence of his then solicitor; that he is fit and proper; that revocation of the prohibition would not pose any danger to consumers; and that the continuing prohibition prevents him from taking up certain business opportunities which have presented themselves.

4. Although the Authority has served its statement of case, the reference is still at an early procedural stage. Mr Townrow has issued an application for a direction compelling the Authority to disclose various documents to him, an application which is resisted, and the Authority has applied for a direction striking the reference out, on the grounds that it has no reasonable prospect of success and is an abuse of process. It is agreed by the parties that I should deal with the Authority's application first, and only if it fails with Mr Townrow's application.

5. When the applications came on for hearing Mr Townrow was represented by Mr Joseph Egerton, who is not a lawyer, but who offers assistance to persons

in Mr Townrow's position, and the Authority by Mr Adrian Berrill-Cox, a barrister who is on its staff.

6. The power to strike out a reference is to be found at rule 8(3)(c) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2698/2008, as amended), which provides that

> "(3) The Upper Tribunal may strike out the whole or a part of the proceedings if—
>
> …
>
> (c) in proceedings which are not an appeal from the decision of another tribunal or judicial review proceedings, the Upper Tribunal considers there is no reasonable prospect of the appellant's or the applicant's case, or part of it, succeeding."

7. That the RDC is not "another tribunal" within the meaning of the rule was the conclusion of this tribunal in *Quarters Trustees Ltd, Quarrell and Beaumont v the Pensions Regulator and the Authority* (2012): see especially para 9. I respectfully agree. There can, I think, also be no doubt that it is within my power to grant the relief the Authority seeks, if the grounds it advances in support of this limb of its argument are made out. That was the view of the judge (Sir Stephen Oliver QC) in *Sharma v the Authority* (2010), a case to which I shall come in more detail shortly. Mr Egerton did not suggest otherwise, but instead directed his attention to the merits of the application.

8. There is no rule dealing specifically with abuse of process, the second limb of the Authority's grounds. The abuse asserted in this case is that the reference amounts to no more than a collateral attack on the decision of the FSMT which heard Mr Townrow's reference in 2006; his remedy, the Authority says, was to overturn the decision, by successful appeal, at that time, but he did not do so. He must accordingly accept the FSMT's findings as they are, and cannot invite a tribunal hearing his present reference to reconsider them.

9. The question whether abuse of process (if shown) engages rule 8(3)(c) was also one of the issues considered in *Sharma*. In that case the Authority sought to have the reference struck out because, among other things, it was said to be a collateral attack on the applicant's conviction, following a plea of guilty, by a criminal court of offences contrary to the Financial Services and Markets Act 2000 ("FSMA"). The conviction led to the imposition of a prohibition order, and Mr Sharma referred the RDC's decision to that effect to the tribunal, contending that the acts and omissions which led to his conviction were attributable entirely to the actions of others, and innocent misunderstanding on his part; and that he had pleaded guilty as he feared being ordered to pay substantial prosecution costs if he was convicted after a not guilty plea.

10. At para 49 of his decision the judge said:

> "By seeking to bring a collateral civil challenge to his criminal convictions via the Tribunal, Mr Sharma is, I think, abusing the process. The leading case on the application of the power to dismiss proceedings on this ground as an abuse of process of the court is *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529. That and subsequent authority explain that the decision of a court of competent jurisdiction should not be relitigated. On

> that basis Mr Sharma should not, in my view, be permitted to relitigate the matters behind his criminal convictions before this Tribunal. Nor should he be permitted to go behind these convictions. The right course would have been to have initiated a formal appeal in the criminal courts. I therefore conclude that Mr Sharma's Reference constitutes an abuse of process and should be struck out for that reason (as a component of the wider strike out jurisdiction), as well as on the basis that he has no prospect of success."

11. Again, I respectfully agree with that analysis, which Mr Egerton did not challenge beyond pointing me to the judge's further observation, at para 37, that "the strike out power must be exercised with care", which is plainly right: no-one should be deprived of access to justice summarily save for compelling reason. Nevertheless, if I am satisfied that Mr Townrow's reference, or part of it, is a collateral attack on the FSMT's decision the proper course is to strike it out as an abuse, either in whole or in part, since the Authority, too, should not be put to the expense of contesting litigation which it is bound to win.

12. It is necessary to begin with a brief summary of the background to the FSMT's decision.

13. Mr Townrow was a partner or sole principal of a firm which provided advice on, and arranged and dealt in life assurance, pensions, and collective investment schemes, and which advised on investment. The FSMT's decision relates a history of serious regulatory failings on Mr Townrow's part, and in addition it found that acts or omissions on his part had led several of his clients to suffer substantial losses. Moreover, despite having received payments from his professional negligence insurers, Mr Townrow failed, indeed refused, to pay redress to those clients, for reasons the FSMT found spurious.

14. Against that background it is not altogether surprising that the FSMT made findings adverse to Mr Townrow. The Authority relies also on the strength of its criticism of him as it is encapsulated in the following passages extracted from its decision:

> "13. Mr Townrow's evidence suffered from inconsistency and equivocation. Reminding ourselves that the burden of proof lies on the Authority, and making all possible allowances for misunderstanding or faulty recollection, we have nevertheless been driven to the conclusion that Mr Townrow exhibited a strong tendency in his evidence to say what appeared to him to be expedient, rather than trying to give truthful and accurate answers to counsel's questions.…
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> 92. We can only conclude that Mr Townrow is either constitutionally incapable of going to the trouble of giving truthful and accurate information to a regulator, or is persistently unwilling to do so.…
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> 101. In our judgment the facts disclose very serious shortcomings in Mr Townrow's openness and honesty in dealing with consumers and regulators and in his ability and willingness to comply with requirements placed on him by or under the Act as well as with other legal and professional obligations and ethical standards. We also consider that he presents a severe risk to consumers, as illustrated by his cynical disregard for the interests of customers whom he should have compensated in relation to their pensions. His history of relations with regulators has been unsatisfactory over a long period.

> 102. Mr Fatchett [the solicitor who represented Mr Townrow before the FSMT] submitted on his behalf that a prohibition order was and would be a disproportionate sanction, and that Mr Townrow should be allowed to continue to work in the financial services industry under appropriate supervision. We do not agree. His lack of proper standards of honesty and integrity, his hostility to regulation, and his disregard of his customers' interests lead us to the conclusion that members of the public purchasing financial services should not be exposed to him."

15. The essence of the Authority's case (irrespective of the abuse argument) is that Mr Townrow has not shown, nor has he attempted to show, that he has put his past behind him by compensating his former clients, even if belatedly, or by making any other amends for his conduct, has undertaken no training, has not shown that in other employment he has since led an unblemished life, nor provided anything else which might show that he is no longer of the character described by the FSMT. His reference notice asserts that he has put forward evidence of his propriety; but I see nothing in the material he produced in the course of his application for revocation of the prohibition order which addresses his personal qualities; he merely asserts that what he intends to do will not represent a danger to the public.

16. The Authority has a published policy, set out in the Enforcement Guide ("EG") of its Handbook, which it applies when dealing with applications for revocation or variation of prohibition orders. At para 9.19(8) it identifies as one criterion

> "whether the individual will continue to pose the level of risk to consumers … which resulted in the original prohibition of it is lifted."

17. At para 19.22 it adds

> "The FSA will not generally grant an application to vary or revoke a prohibition order unless it is satisfied that: the proposed variation will not result in a reoccurrence of the risk to consumers … that resulted in the order being made; and the individual is fit to perform functions in relation to regulated activities generally, or to those specific regulated activities in relation to which the individual has been prohibited."

18. This tribunal is, of course, not bound by the Authority's published guidance, but is required to reach its own view of the appropriate action in respect of the reference before it, and to direct the Authority accordingly: see FSMA s 133(5), (6) and (7). Section 133A adds that

> "The Tribunal may, on determining a reference (whether made under this or any other Act) in respect of a decision of the Authority, make recommendations as to the Authority's regulating provisions or its procedures."

19. However, the criteria set out at EG 9.19(8) and 9.22 are, in my judgment, not merely reasonable but essential if a prohibition order is to serve its obvious purpose of protecting (in Mr Townrow's case) consumers and potential consumers. Mr Egerton attempted to address this point by his argument that, as Mr Townrow is not seeking approval, but will (if the prohibition is revoked) be dealing with authorised firms and persons who are approved, and who will

therefore be in a position to ensure that his activities are legitimate, he can present no risk to the public.

20. That argument, in my view, misses the point. Section 56 of FSMA provides for the imposition and revocation of prohibition orders:

> "(1) Subsection (2) applies if it appears to the Authority that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person.
>
> (2) The Authority may make an order ('a prohibition order') prohibiting the individual from performing a specified function, any function falling within a specified description or any function.…
>
> (7) The Authority may, on the application of the individual named in a prohibition order, vary or revoke it."

21. It will be observed that sub-s (2) is permissive; however, the FSMT's decision was (at para 104) that "a prohibition order in the terms issued was and is the correct action for the Authority to take"; thus the FSMT which, on a reference, directs the Authority, determined that the permissive power ought to be exercised. The "terms issued" were of a complete prohibition. Further provisions about revocation appear at s 58, but they provide no indication of the circumstances in which, or the terms on which, revocation may be effected, but instead describe only the formalities which must be followed, and provide for a reference, such as Mr Townrow has made, to the tribunal. Nevertheless, it would make little sense if, having made a prohibition order on the grounds that "it appears to the Authority that an individual is not a fit and proper person", the Authority or this tribunal on a reference should revoke the same prohibition without its being satisfied that the person concerned is now fit and proper.

22. The activities Mr Townrow wishes to carry on, by his own description of them, are "functions in relation to a regulated activity carried on by an authorised person". As I have said, he has made no attempt to demonstrate that he is fit and proper; he merely argues that what he proposes to do will not present any danger to the public. The argument that the prohibition order should be revoked for that reason is hopeless. It would be nonsensical, and plainly contrary to the purpose of FSMA, to allow a person who has been prohibited for what were (in my view inevitably) condemned by the FSMT as very serious failings, to procure revocation of the resulting prohibition order merely because he claims that the activities in which he proposes to engage in future will present no danger to the public. It is almost too obvious to say that the Authority would be failing in its duty if it acceded to such a request, particularly in the case of an individual who attracted the criticism recorded in the FSMT's decision as it is set out above.

23. Mr Egerton's argument that the prohibition should not amount to a "lifetime ban", as he put it, and should be treated in the same way as a conviction which may become spent, and the analogy he suggested with a prison sentence which may be mitigated by probation, also misses the point. A prohibition order is not a punishment, even if its effect may be punitive in an individual case. It is imposed, as s 56 of FSMA makes perfectly clear, for the protection of the public. For the reasons I have already given it would be a plain dereliction of duty for the Authority to revoke a prohibition order merely on the affected person's assurance

that, even though he wishes "to perform functions in relation to a regulated activity carried on by an authorised person", he will no longer present a danger, or for this tribunal to direct it to do so. Moreover, Mr Egerton's argument disregards the fact that some offences are so serious that convictions for them can never become spent.

24. I am not altogether persuaded that the reference amounts, save perhaps to a limited extent, to a collateral attack on the FSMT's decision. Mr Townrow's reference notice does argue that his then solicitor was incompetent, but it does not develop the allegation and does not argue, save obliquely and by reference to the solicitor's supposed incompetence, that the decision was wrong. I would be hesitant about striking out the reference on grounds of abuse alone.

25. However, for the reasons I have given, and leaving arguments of abuse to one side, the reference is without merit and has no conceivable prospect of success. It is indisputable that the RDC reached the only decision open to it, and I am satisfied the proper course is to strike the reference out.

26. I do not need to deal with Mr Townrow's application for disclosure, and shall say no more about it save that, even if the reference had survived, I would regard an unfocussed application, as this is, wholly misconceived.

27. For completeness I mention one further matter which Mr Egerton raised, namely that the Authority had devoted substantial resources to Mr Townrow's case, but had failed to take action, or sufficient action, in relation to a number of large failed institutions. I express no view about the Authority's actions in relation to others; but even if Mr Egerton is right the failings he alleged cannot amount to grounds for the revocation of the prohibition order in this case.

28. The reference is struck out and Mr Townrow's application for disclosure is dismissed.

**Colin Bishopp**
**Upper Tribunal Judge**

**Release date: 10 January 2013**