



Case number FS/2012/0019

FINANCIAL SERVICES — Application to amend Statement of Case and for directions – Whether amendments relate to subject-matter of reference – yes – application granted

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

STEPHEN ROBERT ALLEN

Applicant

- and -

THE FINANCIAL SERVICES AUTHORITY

The Authority

TRIBUNAL: JUDGE GREG SINFIELD

Sitting in public in London on 30 May 2013

Stephen Allen in person

Tiran Nersessian, counsel, for the Authority

DIRECTIONS WITH REASONS

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DIRECTIONS

UPON THE APPLICATION of the Authority by a Notice of Application dated 8 March 2013

5 AND UPON hearing Counsel for the Authority and Mr Allen at a hearing on 30 May 2013

IT IS DIRECTED pursuant to rule 5 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("UT Rules") that:

10 1. The Authority shall have permission to amend its Statement of Case in the form annexed hereto.

2. The Authority shall serve its Amended Statement of Case and a list of documents (in accordance with paragraph 4(3) of Schedule 3 to the UT Rules) on the Applicant and on the Upper Tribunal by not later than 4:00 pm on 14 June 2013.

15 3. The Applicant shall serve his Amended Reply and a list of documents on which he relies in support of his case (in accordance with paragraph 5(2) of Schedule 3 to the UT Rules) on the Authority and on the Upper Tribunal by not later than 4:00 pm on 12 July 2013.

20 4. The Authority shall serve its list of secondary disclosure documents (in accordance with paragraph 6 of Schedule 3 to the UT Rules) on the Applicant and on the Upper Tribunal by not later than 4:00 pm on 26 July 2013.

5. The Applicant and the Authority shall exchange signed witness statements, containing the evidence of any witnesses of fact that they wish to call to give evidence at the hearing of the Reference and file them with the Upper Tribunal by not later than 4:00 pm on 23 August 2013.

25 6. The Applicant and the Authority shall exchange any supplemental signed statements of witnesses of fact (if any) and file them with the Upper Tribunal by not later than 4:00 pm on 20 September 2013.

7. The parties may not call any witness unless a signed written statement of the evidence of that witness has been served in accordance with Direction 5 or 6 above.

30 8. The witness statements served in accordance with Direction 5 or 6 above are to stand as evidence in chief of the witness at the hearing of the Reference.

9. The Applicant and the Authority shall each serve upon the other and file with the Upper Tribunal by no later than 4:00 pm on 4 October 2013:

35 (1) a list of the other party's witnesses required to attend and give oral evidence at the hearing of the Reference;

(2) an estimate of the number of days required for the hearing of the Reference; and

(3) the dates when the party would not be available to attend a hearing during the period 9 December 2013 to 7 March 2014.

5 10. The Reference shall be listed for hearing, subject to the availability of the parties and their legal representatives, on the first available date after 6 December 2013.

11. The Authority shall provide to the Applicant an index for the trial bundle at least 5 weeks before the hearing of the Reference.

10 12. The Applicant shall reply to the Authority specifying any additional documents that he wishes to be included in the index at least 4 weeks before the hearing of the Reference.

13. The Authority shall serve on the Applicant one copy of the paginated trial bundles at least 3 weeks before the hearing of the Reference.

15 14. The Authority shall serve on the Upper Tribunal three copies of the paginated trial bundle at least 1 week before the hearing of the Reference.

15. The Authority shall serve on the Applicant and the Upper Tribunal a written skeleton argument for the hearing of the Reference at least 5 clear working days before the hearing of the Reference.

20 16. The Applicant shall serve on the Authority and the Upper Tribunal a brief written summary of his argument for the hearing of the Reference at least 3 clear working days before the hearing of the Reference.

17. The parties have liberty to apply for further Directions.

REASONS FOR DIRECTIONS

Introduction and decision referred

1. The Authority has applied for permission to amend its Statement of Case in this Reference.

5 2. The background to this matter is as follows. The Applicant (“Mr Allen”) is the subject of a Decision Notice dated 25 July 2012 (the “Decision Notice”) by which the Authority informed Mr Allen of its decision to make an order prohibiting him from performing any function in relation to any regulated activities carried on by any authorised or exempt persons, or exempt professional firms, pursuant to section 56 of
10 the Financial Services and Markets Act 2000 (the “Act”).

3. The Decision Notice was made on the basis of Mr Allen’s conduct during a period when he worked on a consultancy basis for an authorised insurance broker. During this period, Mr Allen arranged insurance for a number of clients, including a firm of solicitors (“the Firm”). The Authority alleged that Mr Allen:

15 (1) overcharged the Firm by adding fees to their insurance premiums without their knowledge or consent;

(2) concealed his conduct by not providing full disclosure of his fees and charges to the Firm;

20 (3) misappropriated money which belonged to his employer by diverting it through another broker, for his own benefit; and

(4) misappropriated money belonging to the Firm by misrepresenting it as money due to him.

4. On the basis of the alleged misconduct, the Authority concluded that Mr Allen lacked honesty and integrity and, therefore, is not fit and proper to perform any
25 function in relation to any regulated activities. Mr Allen referred the Decision Notice to the Upper Tribunal by a Reference Notice and a letter dated 16 August 2012.

5. The Authority based its conclusions on evidence of a witness (“the Witness”) at the Firm. The Authority can no longer rely on the Witness as a witness of truth after a judge, in litigation brought in the High Court by Mr Allen but otherwise unrelated to
30 the Reference, found that the Witness made a draft signed witness statement which referred to things that he did not witness and thus contained untrue statements. The judge found that the Witness’s evidence was unreliable. Mr Allen relied on the judge’s findings in relation to the Witness to undermine the Authority’s case on the Reference. Mr Allen provided the Authority with a redacted excerpt from the
35 transcript of the judge’s comments about the Witness to be used in the Reference.

6. In the same proceedings, the judge found that Mr Allen was guilty of serious misconduct in his conduct of the proceedings. The judge found that Mr Allen had

(1) forged the signature on a document or caused it to be forged;

(2) given an untrue account of a key meeting;

- (3) knowingly colluded with the Witness in the submission of false evidence;
- (4) produced false documents to bolster his case;
- (5) submitted evidence which he knew to be false;
- 5 (6) that he had repeatedly lied to the court; and that he was responsible for forging key documents before the court.

Application to amend the Statement of Case

7. The Authority applies for permission to amend its Statement of Case to remove the references to the evidence of the Witness and to rely on other evidence to prove that Mr Allen is not a fit and proper person to perform any function in relation to any regulated activities.

8. The Authority now alleges, on the basis of the comments made by the judge in the judgment in the High Court proceedings, that Mr Allen’s conduct in the proceedings and his attempt to hide the full details of the judgment from the Authority show a lack of honesty and integrity. As a consequence, the Authority contends that Mr Allen is not a fit and proper person to perform any functions in relation to regulated activities carried on by authorised persons, exempt persons and exempt professional persons.

9. Mr Allen objects to the Authority’s application to amend the Statement of Case. Mr Allen says that the amendment introduces separate and distinct allegations from the allegations that were made in the Decision Notice. Mr Allen points out that the new allegations have never been investigated by the Authority and he had not had any opportunity to present any representations or evidence in relation to the new matters to the Regulatory Decisions Committee of the Authority. He questions whether the Authority had followed the proper procedures. Mr Allen states that he has never had a Warning Notice or a Decision Notice. Mr Allen accuses the Authority of having hijacked the proceedings. Mr Allen said that, if proper procedures were not followed, there was a risk that the Upper Tribunal’s time would be wasted in reviewing evidence that might be filtered out or reduced by the investigation and Decision Notice process. The Upper Tribunal could be inundated with irrelevant evidence.

10. Mr Allen also makes allegations of impropriety against an individual that he says was an associate of the Witness. Mr Allen says that there is a public interest in the allegations being investigated but the Authority refuses to do so while his case is outstanding. Mr Allen says that he is concerned that there should not be undue delay in the Reference process as its conclusion would allow other proceedings to go ahead against other individuals.

Discussion

11. The issues in this application are, first, whether the Upper Tribunal can consider the evidence in relation to the High Court proceedings and, if so, secondly, whether it should allow the Statement of Case to be amended.

12. Section 133 of the Act provides for certain matters in relation to a reference to the Upper Tribunal. Section 133(4) of the Act provides that:

5 “The Tribunal may consider any evidence relating to the subject-matter of the reference or appeal, whether or not it was available to the decision-maker at the material time.”

13. Mr Allen submits that the evidence of his conduct in the High Court proceedings and how he presented the redacted material from the judgment amount to new allegations of misconduct. In effect, he says that they are not evidence relating to the subject-matter of the Reference.

10 14. This issue has already come before the Upper Tribunal and its predecessor, the Financial Services and Markets Tribunal. One of the first cases to consider this issue was *Legal & General Assurance Society Limited v The Financial Services Authority* (2005). The Tribunal stated at [15]

15 “The parties are permitted to raise matters not directly brought before the RDC. ... As a matter of common sense and fairness we would generally expect FSA with the wide powers open to it, having taken time to evaluate matters, and having carefully reviewed and carried forward charges to the RDC, to bring much the same case when taken to this Tribunal. Of course important new evidence may unexpectedly come to light or there may be in other cases special circumstances which change that general expectation. Similarly it seems to us that FSA, having set out its position in the Statement of Case, should usually be confined to the charges contained in it, perhaps refined as the case moves forward.”

25 15. In *James Parker v The Financial Services Authority* (2004), the Authority alleged that the applicant had committed market abuse by the misuse of information between specific dates. The Authority applied to amend its Statement of Case to include an additional allegation of market abuse at about the same time. The Tribunal concluded that the matter referred was the whole decision notice including the allegations made in it and the action proposed. At [21], the Tribunal held that it was not possible to amend the decision notice to introduce new allegations. The Tribunal explained the scope of its decision at [23] as follows:

35 “My decision relates only to the making of new allegations. Under section 133 [of the Act] the Tribunal may consider fresh evidence relating to the subject matter of the reference whether or not it was available to the Respondent at the material time.”

40 16. The case of *Philippe Jabre v The Financial Services Authority* (2006) also concerned an allegation of market abuse, in respect of which a financial penalty was imposed, but the Statement of Case additionally contended that Mr Jabre’s approval should be withdrawn. The Warning Notice had expressly sought a withdrawal of his approval on the grounds that Mr Jabre was not fit and proper. The Decision Notice made no finding that Mr Jabre was not a fit and proper person. The issue was whether the Tribunal could, in the circumstances, determine that Mr Jabre’s approval should be withdrawn. The Tribunal noted, at [25], that:

5 “Bearing in mind the absence of a decision of the Authority to take action to withdraw Mr Jabre’s approval on grounds that he was not a fit and proper person (see section 63(1)), the critical question is whether the issue of Mr Jabre’s fitness and propriety falls within the scope of the expression in section 133(4) the matter referred to the Tribunal.”

17. The Tribunal held that the issue did fall within the scope of the reference. The Tribunal’s reasoning is contained in [28] and is as follows:

10 “The meaning of the expressions ‘the matter referred’, or ‘the subject-matter of the reference’ in section 133 has to be derived from their context. The first point relevant to this is the Tribunal’s function. It provides a stage in the regulatory process to ‘determine’ what is the appropriate action for the Authority to take having considered any evidence relating to the subject-matter of the reference. As the
15 Tribunal’s role is not to adjudicate on the rightness or otherwise of the decision as expressed in the decision notice, the decision itself is not strictly a relevant consideration for the Tribunal to take into account. Instead it is the allegations made in the decision notice and the circumstances on which these are based that fall to be considered and
20 evaluated. They comprise the matter referred. It is in relation to those circumstances and any further relevant evidence that was not available to the Regulatory Decisions Committee that the Tribunal’s function is to determine the appropriate action for the Authority to take. The indications, so far, are that the circumstances, the evidence and the
25 allegations before the Regulatory Decisions Committee, and not the decision, are ‘the subject-matter of the reference’.”

18. The Tribunal said at [29] that:

30 “This is not a case such as that considered in *Parker v FSA* (an unreported decision on a preliminary issue) where a new allegation unconnected with the factual context that gave rise to the original decision was sought to be raised.”

19. As the Tribunal in *Legal & General Assurance Society* observed, the FSA should usually be confined to the charges set out in the Statement of Case but that may not always be the case where important new evidence unexpectedly comes to
35 light or there are other special circumstances. In this case, I do not consider that the charge made against Mr Allen has changed. My view is that, as recognised by the Tribunal in *Parker*, there is a distinction between an allegation or charge and the evidence relating to it. I consider that the allegation in this case is that Mr Allen is not fit and proper to perform any function in relation to regulated activities because he
40 lacks honesty and integrity. It follows that the ‘matter referred’ or ‘subject-matter of the reference’ in this case is whether Mr Allen is a fit and proper person. I regard the circumstances pleaded in the original and amended Statement of Case as evidence that relates to that allegation. The Authority no longer relies on the evidence contained in the original Statement of Case for the reasons set out above. The Authority has not,
45 however, withdrawn its allegation that Mr Allen is not a fit and proper person. The Authority now relies on other evidence which, it says, shows that Mr Allen is not a fit and proper person but the allegation is the same. The factual situation in *Parker* was,

in my view, different. In that case, the allegation was of market abuse relating to specific dealings in shares. Market abuse in relation to other share transactions would be a new allegation involving separate misconduct, albeit of the same type. In the case of Mr Allen, the allegation is general rather than specific. The allegation is not
5 that Mr Allen was not fit and proper in relation to a specific transaction or transactions. As the Tribunal held in *Jabre*, it is the allegations made in the Decision Notice and the circumstances on which these are based that comprise the matter referred. The allegation in the Decision Notice was that Mr Allen is not a fit and proper person to perform any function in relation to regulated activities generally
10 because he lacks honesty and integrity. Any evidence that relates to Mr Allen's honesty and integrity, whether or not it was available to the Authority at the time of the Decision Notice, may be considered by the Upper Tribunal.

20. Even if the Tribunal can consider the new evidence, it is also necessary to consider whether it would be fair and just to allow the Authority to amend the
15 Statement of Case so as to admit it. Rule 2(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("UT Rules") provides that the overriding objective of the UT Rules is to enable the Upper Tribunal to deal with cases fairly and justly. Rule 2(2) provides that dealing with a case fairly and justly includes:

“...
20 (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
... ; and
(e) avoiding delay, so far as compatible with proper consideration of the issues.”

25 21. The Upper Tribunal must seek to give effect to the overriding objective when it exercises any power under the UT Rules. Rule 5(3)(c) of the UT Rules provides that the Upper Tribunal may permit or require a party to amend a document.

22. It seems to me that the Tribunal in *Legal & General Assurance Society* correctly identified the key considerations when it observed at [17]:

30 “... Tribunal procedure [is] designed to ensure that the Applicant knows the charges it faces and that neither party ambushes the other or unfairly takes it by surprise.”

23. I consider that it would be fair and just to allow the Statement of Case to be amended. I consider that not allowing the amendment and, therefore, effectively
35 requiring the Authority to start the process of investigation, Warning Notice, RDC hearing and Decision Notice again would not be fair to either party. Both the Authority and Mr Allen have an interest in having the Reference dealt with as soon as possible. Starting again would almost certainly lead to a considerable delay before the matter could be resolved. Amending the Statement of Case will allow the
40 Reference to proceed to a hearing with much less delay. The Reference has not yet been listed for hearing and a hearing is unlikely to take place until late 2013 or early 2014. It follows that Mr Allen will have plenty of time to make representations and provide any further evidence in response to the new evidence.

24. In the circumstances, I consider that amending the Statement of Case allows the Upper Tribunal to consider further evidence relating to the subject-matter of the reference and will avoid delay which would not be fair to the parties or just and allows proper consideration of the issues by the Upper Tribunal.

5 **Case management directions**

25. The Authority also applied for some case management directions in the event that its application to amend the Statement of Case was allowed. Mr Allen did not object to the proposed directions and, accordingly, I grant them subject to some minor amendments made by the Upper Tribunal of its own motion to take account of the timing of the listing of the appeal.

Conclusion

26. For the reasons given above, I allow the Authority's application to amend its statement of case and for consequential directions. Accordingly, I make the Directions set out above.

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**GREG SINFIELD
JUDGE OF THE UPPER TRIBUNAL**

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RELEASE DATE: 05 JUNE 2012

**REISSUED TO CORRECT CLERICAL
MISTAKE, SLIP OR OMISSION:**

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