Reference number FS/2010/0008

STRIKE OUT APPLICATION – No real prospect of success – Fitness and propriety – Criminal convictions – Applicant referred decision notice containing prohibition order – Recent convictions for failing to notify change of control and for knowingly or recklessly giving false and misleading information – Whether and in what circumstances it is proper for Tribunal to strike out the Reference on grounds of no real prospect of success – 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

MR VIJAY KUMAR SHARMA **Applicant**

- and -

THE FINANCIAL SERVICES AUTHORITY **The Authority**

TRIBUNAL: SIR STEPHEN OLIVER QC

Sitting in public in London on 2 September and 22 November 2010

The Applicant in person at both hearings

Adrian Berrill Cox and Rowena Wisniewska, for the Authority at the first hearing
James Eadie QC representing the Authority at the second hearing

DECISION

1. The Financial Services Authority ("the FSA") has applied to the Tribunal to strike out the Reference made by Mr Vijay Kumar Sharma ("Mr Sharma") of a Decision Notice containing an order prohibiting Mr Sharma from performing any functions in relation to any regulated activities carried on by any authorised or exempt person or exempt professional firm.

2. The referred decision was based on Mr Sharma's alleged lack of fitness and propriety to conduct financial services business, arising from his convictions of two financial services-related offences in the Westminster Magistrates Court on 9 September 2009.

3. The Decision Notice was dated 21 April 2010 and Mr Sharma referred it to the Tribunal on 26 April 2010. The effect of the Reference is to bring section 133(3) of Financial Services and Markets Act 2000 ("FSMA") into play: this requires the Tribunal to consider any evidence relating to the subject matter of the Reference, whether or not it had been available to the FSA when making the decision. Section 133(4) requires the Tribunal to determine what (if any) is the appropriate action for the FSA to take in relation to the matter referred to the Tribunal. By Section 133(5) the Tribunal is then required to remit the matter to the FSA with such direction (if any) as the Tribunal considers appropriate for giving effect to its determination.

4. The FSA has applied (by letter of 23 June 2010) to strike out Mr Sharma's case without a hearing on the grounds that it has no real prospect of succeeding. That letter described the Reference as "a collateral challenge by Mr Sharma in respect of his criminal convictions, which is an abuse of process." Noting that the convictions were directly relevant to the criteria for making a prohibition order and that the convictions were themselves in respect of regulatory breaches, there could be no triable issue regarding integrity and the prohibition order was, so the FSA claim, appropriate.

The relevant Tribunal Rules

5. Pursuant to Rule 6(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, SI 2698/2008, amended by SI 2009/274, SI 2009/1975, SI 2010/43, SI 2010/44 and SI 2010/747 ("the Rules"), the Upper Tribunal may give a direction on the application of one or more of the parties. Such an application must include the reasons for making that application.

6. Pursuant to Rule 8(3)(c) of the Rules the Upper 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 Upper Tribunal considers there is no real prospect of the Applicant's case, or part of it, succeeding. (The present case is not an appeal from the decision of another tribunal nor is a judicial review proceedings.)

The convictions

7. On 9 September 2009 Mr Sharma was convicted at Westminster Magistrates' Court of the following offences under the FSMA as a result of his behaviour while he was a director (CF1) of Exetra UK Ltd ("Exetra"):

- Failure to comply with the duty to notify the Authority that he had acquired control of Exetra, contrary to Section 191(1) FSMA: and
- Knowingly or recklessly giving the FSA information which was false or misleading in a material particular, contrary to Section 398(1) FSMA.

Mr Sharma pleaded guilty and was fined £3,000 for each of those two offences.

The Section 191(1) offence

8. Mr Sharma was convicted of the Section 191(1) offence on the basis that between 11 May 2007 and 15 January 2009 he had failed to comply with the duty to notify the FSA that he had acquired control of Exetra. (A person acquires control of an authorised person or he owns or can exercise or control the exercise of 10% or more of the shares in the company in question: or where he can exercise a significant influence over the management of the company or its parent. See Section 179(2) FSMA. A person proposing to acquire, increase or reduce a controlling interest in an authorised person must notify the FSA under Section 178(1). The terms increase or reduction in control refer to any alteration in holdings up to 10%, from 10% to 20%, from 20% to 33%, from 30% to 50% and 50% or more: Sections 180(2) and 181(2). The FSA must be notified in writing of the change in control and is required either to approve it or serve a warning notice within three months.)

Particulars of the Section 191 offence

9. The FSA's case was that Mr Sharma had, from 11 May 2007, been the owner and controller of Exetra. Exetra had been an independent financial advisory firm based in Slough and supervised by the Small Firms Division of the FSA. (On 20 July 2010, Exetra's Part IV permission had been cancelled voluntarily.)

10. Mr Sharma had been approved as a CF1 (Director) of Exetra on 24 April 2007 and had ceased to be approved on 20 July 2009.

11. Mr Sharma, it was said, had from 11 May 2007, been the beneficial owner of 25% of the issue share capital of Exetra; on 1 April 2008 he had become beneficial owner of 50%. (The Companies House records show that as at 10 March 2008 Mr Sharma had been the sole shareholder and full controller of Exetra.)

Mr Sharma's explanation of the Section 191 offence

12. Mr Sharma in his Reference Notice states that he had been duly approved to become a director of Exetra in April 2007 and had been recorded as such in the Companies House register. He had become one of four directors. It was not until November 2007 that the officer responsible for Companies House returns "put him down as having 25% shares". Neither Mr Sharma nor the officer had, it was said, understood that this constituted "control" for purposes of Section 180 FSMA.

13. Mr Sharma had, in March 2008 and following the departure of one of the other three directors, made the Companies House return and had "put himself as the sole shareholder". This, he said in the Reference Notice, had been "a big mistake". The next month another director left and (again to quote from Mr Sharma's Reference Notice) "I put the shareholding as 50% each for me and" the other remaining director.

14. The other remaining director left on 31 December 2009. Mr Sharma submitted an application for change in controller on 14 January 2009. This was done following an initiative taken by the FSA and it involved Mr Sharma's submission of a "Controller Form".

The Section 398(1) offence

15. According to the FSA's Statement of Case the giving of false or misleading information to the FSA by Mr Sharma arose from his failure to provide the required details in the Controller Form submitted in January 2009.

Particulars of the Section 398(1) FSA offence

16. The Controller Form includes the following two questions:

> "6.3 Have you ever been given a caution in relation to a criminal offence?
>
> 6.14 Are you or have you ever been the subject of an investigation into allegations of misconduct or malpractice in connection with any business activity?"

Mr Sharma answered "No" to both those questions.

17. The case for the FSA was based on five circumstances omitted from what should have been the answers to those questions. These were that:

> 1. Mr Sharma had received a police caution for criminal damage to a hotel room.
>
> 2. On 19 March 2002 Mr Sharma had been suspended by Lloyds TSB pending the outcome of an investigation into his conduct. He had

resigned prior to disciplinary action being taken. The investigation had revealed that Mr Sharma had forged customers' signatures on regulated sales documents. When initially questioned about this, Mr Sharma had denied that the signatures had been forged.

3. On 26 September 2006 Mr Sharma had been suspended by Ashley Law (an FSA authorised firm) pending the investigation of unauthorised periods of absence from work beginning on 29 August 2006 and had been issued with a disciplinary warning notice by that firm.

4. On 8 November 2006 (subsequent to determination of Mr Sharma's employment by Ashley Law), Mr Sharma had set up a fictitious entity called "Ashley Law Slough" without the knowledge or authorisation of Ashley Law.

5. On 22 November 2006 (subsequent to determination of Mr Sharma's employment by Ashley Law), Mr Sharma had cashed a cheque at a pawnbroker for £4,150 made payable to Ashley Law, which had been sent to him in error.

Thus when in January 2009 Mr Sharma had purported to notify the FSA of the change in control, he had provided it with information that was false or misleading because he –

(a) falsely asserted that he had never been the subject of an investigation into allegations of misconduct or malpractice in connection with any business activity;

(b) falsely asserted that he had never been given a caution in relation to any criminal offence (whereas on 30 April 2001 he had received a police caution for criminal damage to a hotel room. The existence of this caution had never been disclosed to the Authority by Mr Sharma) and

(c) falsely asserted that he became the controller of Exetra on 1 January 2009 when the evidence demonstrated that this had occurred as early as 11 May 2007 and that Mr Sharma had been aware of this.

Mr Sharma's case as disclosed in the Reference Notice

18. The Decision Notice containing the prohibition order (summarised at the start of this Decision) was issued on 21 April 2010. Mr Sharma's Reference Notice is dated 26 April 2010. It was produced without the assistance of any solicitor or representative.

19. Regarding the failure to notify changes in control, the Reference Notice admits that Mr Sharma had been shown in the Companies House register as a 25% shareholder in November 2007 and that he had been a 50% shareholder from April

2008. He denied having been a 100% beneficial owner in March/April 2008. He had, he said, been unaware of the significance of "control" and of the compliance procedure relating to the changes of control.

20. He says that in the course of obtaining approval in March 2007 from the FSA as an adviser he had told the FSA of the Lloyds TSB investigation; he had not told them at the time of the Ashley Law investigation because this had not started until January 2007 and the outcome had not been disclosed to him; he had totally forgotten about the caution in 2001 and he had not realised that this had gone onto the police record.

21. Mr Sharma's Reference Notice gives explanations for the Lloyds TSB and the Ashley Law matters.

22. The use of forged signatures had occurred while Mr Sharma had been a regulated adviser working with Lloyds TSB. One of these concerned a £20 per month contribution: the other a £30 per month premium for life assurance. Because the Bank imposed tight time limits to submit for business Mr Sharma was, he explained, driven to using the customers' forged signatures in order to meet deadlines (and his own "KFIs"). Mr Sharma said he had handed in his resignation in March 2002, as soon as the investigation had started. There had been no other compliance issues with the Bank. Mr Sharma recognised that this had been a stupid thing to have done.

23. From March 2003 until 30 September 2006 Mr Sharma had been working for Ashley Law. He and others had decided to set up a directly authorised firm, i.e. Exetra. On 26 September 2006 Ashley Law had suspended Mr Sharma because of his absences. There had been several reasons for those. Setting up Exetra had been one. An altercation that had left Mr Sharma hospitalised for a few days had been another. A new relationship had been another as had an emergency visit to India. Mr Sharma had not notified Ashley Law of those because, he said, he regarded himself as self-employed and working his notice; moreover he had not been getting on too well with some of the Ashley Law senior managers.

24. Mr Sharma accepted that he had set up Ashley Law Slough without Ashley Law's knowledge. This, he said, had been to ease the reorganisation with mortgage clubs, packagers and lenders. In November 2006 Mr Sharma had received the cheque payable to Ashley Law, mistakenly sent to him. At that time, he said, he had been owed a substantial amount of commission from Ashley Law who had not been responding to his requests. So he cashed the cheque and kept the money, setting it off against amounts Ashley Law owed him.

25. Mr Sharma, in his Reference Notice, states that he had pleaded guilty on advice from his barrister; had he done otherwise he might have had to pay prosecution costs of some £30,000.

The case for the FSA

26. Leaving aside the circumstances of the strike out application for the present, the FSA's case for making the prohibition order is based on its conclusion that Mr Sharma is not a fit and proper person to perform the relevant functions. As set out in FIT 1.3.1 regard is had to a number of factors, great importance being placed on the honesty, integrity and reputation of the person in question.

27. FIT2.1.3G states that those factors will include the following three matters. The first is whether the person in question has been convicted of a criminal offence including one under legislation relating to financial services. The second is whether the person in question "has been dismissed, or asked to resign or resigned from employment …". The third is whether the person in question "has been candid and truthful in all his dealings with any regulatory body and … demonstrates a readiness and willingness to comply with the requirements and standards of the regulatory system …".

28. Based on those, the FSA say of Mr Sharma that the fact of his recent convictions alone (as well as the fact that they were in respect of regulatory breaches) justifies the action it took against him in making the prohibition order pursuant to Section 56 FSMA on the basis that he is not fit and proper. Further, the basis of those convictions is the non-disclosure of series of incidents which directly impact on Mr Sharma's fitness and propriety and evidence a pattern of dishonest behaviour.

29. With reference to the risk to consumers posed by Mr Sharma, the FSA refer to EG9.17. This sets out that where the FSA is considering whether to make a prohibition order against someone who is not an approved person, it will consider the severity of the risk posed by the individual and may prohibit him where it considers that a prohibition is appropriate in order to achieve one or more of the FSA's regulatory objectives. The FSA made a number of points. It emphasised that Mr Sharma's two criminal convictions directly impacted on his honesty and integrity, and thereby his fitness and propriety, pursuant to FIT2.1.3G(1). Those convictions, they said, were in respect of matters concerning failure to comply with the requirements of the regulatory system and were themselves directly relevant in determining his fitness and propriety. The convictions were recent. On this basis they said that Mr Sharma poses a serious threat to consumers and confidence in the financial system generally, by virtue of his lack of honesty and integrity due to the convictions. The Lloyds TSB forgeries and the Ashley Law episode (including setting up Ashley Law Slough without any authority) evidence matters that call into question Mr Sharma's honesty and integrity. Overall, they say, Mr Sharma poses a serious threat to consumers and confidence in the financial system given that he intends to work in a customer facing role and in a position where his lack of honesty and integrity could manifest itself at any time.

Determining the sanction : the FSA's case

30. The FSA say that Mr Sharma's convictions are particularly serious from a regulatory perspective and the underlying circumstances of the Lloyds TSB and the Ashley Law episode evidence a pattern of behaviour that directly call into question his honesty and integrity. They point to a passage from Mr Sharma's Reference Notice where he admits:

> "The fact I shouldn't be a Director I agree with based on what I have said so far. I have obviously demonstrated a lack of competence evidenced by my lack of awareness of the change in control procedure and what "control" actually means and my lack of understanding regarding compliance and oversight obligations."

On that basis, say the FSA, a full prohibition is appropriate and necessary, notwithstanding Mr Sharma's status as a person who is not currently approved.

The strike out Application

31. The FSA put forward five reasons on which they urged me to strike out Mr Sharma's Reference. First they say he has no real prospect of succeeding. Then they say that the Reference is a collateral civil challenge by Mr Sharma in respect of his criminal convictions and that is an abuse of process. Third they say that the criminal convictions, made following a guilty plea, are directly relevant and the criteria for making a prohibition order and the convictions themselves are in respect of regulatory breaches. On that basis they say there is no triable issue regarding integrity and a prohibition order is therefore appropriate. Finally the Authority say that their case is very strong on the merits owing to the convictions and other matters that have been recited.

Implications of the strike out Application

32. As already noted Rule 8(3)(c) of the Rules empowers the Upper Tribunal to 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 Upper Tribunal considers there is "no real prospect of the Applicant's case, or part of it, succeeding".

33. Before considering the strike out Application on its merits I need to address two issues.

34. The first is that FSMA imposes on the Tribunal the obligation "to consider any evidence relating to the subject matter of the Reference, whether or not it had been available to the [FSA] when making the decision". With that in mind the Tribunal is then required to determine "what (if any) is the appropriate action for the [FSA] to take in relation to the matter referred". See Section 133(3) and (4). Here the subject matter of the Reference is whether Mr Sharma is not, in the light of the convictions

and their underlying circumstances, fit and proper. Mr Sharma has referred it to the Tribunal asking the Tribunal for its own determination pursuant to Section 133. Can the Tribunal in any circumstances be exonerated from that statutory obligation to reconsider all the evidence on which the decision was made and of giving consideration to any new evidence adduced by the Applicant?

35. When the Application was first before me I expressed concern that, while a strike out application might be granted on some grounds, the rules could not be invoked to require the Tribunal to depart from its obligation under the primary law, namely to exercise its own judgment in the light of all the evidence (old and new) and determine the appropriate course. Could the Tribunal, by using Rule 8(3)(c) disengage itself from the statutory decision making process?

36. Submissions from Mr James Eadie QC for the FSA have satisfied me that that is not the correct question. The question is whether the Tribunal is carrying out its statutory function of determining the appropriate action when it directs that the Reference be struck out on grounds that there is "no real prospect of" the Applicant's case succeeding with the result that the FSA's decision is to stand. Within certain constraints that may be peculiar to the regulatory function of this Tribunal I am satisfied that Rule 8(3)(c) does enable me to strike out a reference of an issue of the present nature on those grounds. I am satisfied of this principally because there is no restriction on the face of Rule 8(3)(c). It does not state or imply that it is not available in financial services cases to just the same extent as in other cases coming before the Upper Tribunal. It is there for the Tribunal to use as a means of producing the result prescribed by Section 133(4), namely the determination of the appropriate action for the FSA to take. In this connection a review of the Rules as a whole shows that the makers of the Rules (working under the guidance of the Tribunal Procedures Committee) made a series of deliberate choices in the context of financial services. The Rules came into force on 6 April 2010 and appended Schedule 3 (Procedure in Financial Services cases) to the earlier set of rules. They were brought into force after the functions of the Financial Services and Markets Tribunal had been transferred over to the Upper Tribunal in January 2010. There had thus been a period during which specific consideration had been given to the Rules that should apply in the Financial Services context. Some rules that would otherwise have applied were excluded and some were modified and some rules specific to the Financial Services context were added in Schedule 3.

37. Having said that, I think that the strike out power must be exercised with care. The Tribunal is not faced with an appeal against the decision. There is no claim and there is no issue to be determined as right or wrong. The task of this Tribunal in this sort of case is to review any evidence relating to the subject matter of the Reference and to issue a determination as to whether, in the light of the statutory and published criteria, the person in question is fit and proper to carry out the relevant activities. By striking out the Reference the Tribunal confines itself (and the Applicant) to written material, namely the Decision Notice, the FSA's Statement of Case and the Applicant's Reference Notice. The Tribunal cannot question the Applicant. And where, as frequently happens in Financial Services References, the Applicant is

unrepresented the Tribunal has to be sure that the Applicant is putting his best case forward.

38. The other reason for circumspection in using Rule 8(3)(c) is that, by Section 133(3), the Tribunal is obliged to consider any relevant evidence "whether or not it was available to the [FSA] at the material time". The written material before the Tribunal may not cover the ground. The burden is on the Tribunal, as part of the decision making process, to ensure that other relevant material (if any) is taken into account.

Article 6(1) of the European Convention on Human Rights

39. My other concern was whether, by striking out Mr Sharma's Reference, I was depriving him of his entitlement to a fair and public hearing. I am satisfied, having heard arguments on this matter, that by exercising the strike out jurisdiction in an appropriate way, the Tribunal is discharging rather than overriding its obligation to provide a fair and public hearing.

40. Article 6(1) provides, so far as is relevant:

> "In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The summary disposal on the claim on the basis that, on analysis, it has no real prospect of success is not, in my view, a violation of Article 6.

41. The decision in *Rampal v Rampal* [2001] EWCA Civ 989 is clear and binding authority to the effect that Article 6(1) does not prevent summary dismissal of claims. (I refer also to *Terry v Hoyer* [2001] EWCA Civ 678 which establishes that Article 6(1) makes no difference to the approach that is to be adopted in strike out proceedings.) Those authorities are consistent with the long established recognition by the Court that "a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the Court". (See *Arrow Nominees Inc v Blackledge* [2000] 2 DCLC 167, per Chadwick LJ in a case dealing with strike out jurisdiction as found in CPR 3.4).

42. Any hearing that precedes a decision to exercise the Rule 8(3)(c) jurisdiction will have been conducted before an independent and impartial tribunal. It will have been in public. It will have involved the Upper Tribunal itself making the determination in accordance with its functions under Section 133(5), for the reasons summarised above. It would also be fair. Both parties would, as in the present case, be afforded an opportunity to be heard on the issue whether the Applicant's position had real prospects of success in whole or in part. On that basis the process is intrinsically fair. The fact that the outcome is of a summary nature does not, I think,

indicate or support the proposition that the process leading to the result is in any way unfair.

Conclusions

43. I turn now to the merits of the FSA's application. The FSA must satisfy me that there is no real prospect of Mr Sharma's case succeeding. "Succeeding" means that Mr Sharma must have a real prospect of securing from the Tribunal a determination as to the appropriate action which is more favourable to him than that contained in the Decision Notice.

44. Mr Sharma's case has been fully and carefully stated in his Reference Notice. It is quite long and circumstantial. It addresses the points made by the FSA in their Statement of Case. It explains the circumstances in which he is said to have failed to notify the FSA and to have knowingly or recklessly given the FSA false or misleading information. When responding to the FSA's application, at both hearings before this Tribunal, Mr Sharma emphasised that he had not changed his position. I have inferred from that that he does not seek to introduce any evidence that had not been available to the FSA when making the decision that has been referred.

45. The strike out application relies on the facts of the conviction on 9 September 2009 as raising serious doubts as to Mr Sharma's integrity and as justifying their action in issuing a Decision Notice with a prohibition order. If the Section 191(1) conviction had stood alone, I might have been reluctant to exercise the Section 8(3)(c) power. Failure to notify changes in control is an offence of strict liability. The concept of control is technical. Moreover, the manner in which, on Mr Sharma's account (which has to be taken at face value), shares appear to have been allocated and re-allocated as directors of Exetra came and went, leaves one in a state of speculation as to what really happened. However, the Section 191(1) offence did not stand alone; it was one of a piece with the Section 398(1) offence. It was because Mr Sharma had not complied with the obligation to notify the changes of control that the FSA did not learn of the earlier caution, of the Lloyds TSB investigation and of the Ashley Law episode; and when the FSA discovered the fact of the change in control, their questions were answered in a false or misleading manner.

46. The fact of those convictions means that the FSA does not have to reprove each allegation made in its Statement of Case. I refer for example to the Tribunal's decision in *Pektar v FSA*, FIN 06/0007. The tribunal states, in paragraph 55 of its decision, that

> "The conviction of Mr Pektar before the Crown Court … in 2002 is admissible evidence of his fitness and propriety (or the lack of it). The Authority can therefore rely on the circumstances on which the conviction is based without the need to reprove each and every allegation."

In the present case the convictions, which are very recent, are wholly relevant to the action that the FSA has taken against Mr Sharma in making the prohibition order pursuant to Section 56 on the basis that he is not fit and proper. Mr Sharma misled the FSA and failed to comply with the requirements of the regulatory system. In both respects his honesty and integrity, and therefore his fitness and propriety, have been adversely demonstrated.

47. Mr Sharma's explanation as to why he did not disclose the caution, why he forged two signatures and why he diverted to himself the moneys payable in the cheque written in favour of Ashley Law, do nothing to displace the fact that those had been dishonest and potentially criminal acts on his part. Those acts and the circumstances in which they took place were, in my view, wholly sufficient to justify a finding that Mr Sharma is not a fit and proper person and that he should therefore be subject to a prohibition notice.

48. The FSA have taken the further point that Mr Sharma should not be seeking to "revisit" the ruling of the criminal court via a civil tribunal. This, they say, is an abuse of process.

Abuse of Process

49. 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.

50. For all those reasons I direct that Mr Sharma's Reference should be struck out.

SIR STEPHEN OLIVER QC
JUDGE OF THE UPPER TRIBUNAL

RELEASE DATE: 7 December 2010