Reference number FS/2011/0009 – 12 & 14

STRIKE OUT – Whether no reasonable prospect of Applicants' case succeeding – Whether Applicants failed to cooperate such that Tribunal cannot deal with proceedings fairly and justly – Tribunal Procedure (Upper Tribunal) Rules 2008 rule 8(3)(b) and (c)

ON REFERENCES OF DETERMINATIONS OF THE DETERMINATION PANEL OF THE PENSIONS REGULATOR

ON REFERENCES OF DECISIONS OF THE REGULATORY DECISIONS COMMITTEE OF THE FINANCIAL SERVICES AUTHORITY

BETWEEN

(1) QUARTERS TRUSTEES LIMITED
(2) JOHN JAMES QUARRELL
(3) SUSAN MCKENZIE BEAUMONT **Applicants**

- and -

(1) THE PENSIONS REGULATOR
(2) THE FINANCIAL SERVICES AUTHORITY **Respondents**

TRIBUNAL: SIR STEPHEN OLIVER QC

Sitting in public in London on 18 July 2012

Ms Susan Beaumont, appeared in person and as representative of Quarters Trustees Ltd and James Quarrell for the Applicants

Paul Newman QC for the Pensions Regulator
Adrian Berrill-Cox for the Financial Services Authority for the Respondents

DECISION

Introduction

1. The Pensions Regulator applies to strike out the Applicants' Reference Notice served on 13 April 2011 by which the Applicants sought to refer to the Upper Tribunal the Order made by the Determinations Panel of the Pensions Regulator ("the Determinations Panel") dated 20 August 2009 prohibiting the Applicants from acting as trustees of any occupational pension scheme established under trust pursuant to section 3(1)(c) of the Pensions Act 1995.

2. The application of the Financial Services Authority ("FSA") seeks to strike out the references served by Mr John Quarrell and Ms Susan Beaumont on 14 April 2011. By those References, those two Applicants referred to the Tribunal the Decision Notices of the FSA dated 18 March 2011 withdrawing those Applicants' approval and prohibiting them from performing any function in relation to regulated activity carried on by any authorised person, exempt person or professional firm.

3. The applications of the Pensions Regulator and of the FSA are linked and were heard together. Both seek a strike out of the Applicants' References under rule 8(3)(c) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules"). Both seek a strike out of the References pursuant to rule 8(3)(b) of the Rules on the basis that the Applicants have failed to cooperate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly.

4. The Order made by the Determinations Panel dated 20 August 2009 had remained unchallenged for some twenty months until applications were made in April 2011 for an extension of time to make a reference in respect of that Order and for a reference of the Order. The Tribunal, on 2 September 2011, granted the extension application and ordered that the References of the Pensions Regulator's Determination and of the FSA's Decision be heard and case managed together. In accordance with the directions then given by the Tribunal, the Pensions Regulator served its Statement of Case on 31 October 2011; the |FSA served its Statement of Case on 5 December 2011.

5. By the time that the Statements of Case were filed, prosecutions of Mr Quarrell and Ms Beaumont by the Solicitors' Regulatory Authority, which had commenced in December 2008 and October 2009 respectively, had concluded with an order of the Solicitors Disciplinary Tribunal ("SDT") dated 3 October 2011 and a judgment of that Tribunal dated 14 October 2011.

6. Under the Rules, the Applicants were required to file a Reply to the Statements of Case by 4 January. No such reply was served by them, or has since been served, despite directions made by the Upper Tribunal to serve such a Reply by 25 January 2012, by 3 February 2012 and by 7 February 2012. Those failures led to a direction made by the Tribunal on 13 February 2012 that, if no Reply was served by

24 February 2012, the Applicants would not be permitted, without permission of the Upper Tribunal, to rely at the hearing of the Reference in question on any matter or fact not hitherto disclosed or advanced by them and which could or should have been set out in a Reply.

No reasonable prospect of success

7. Rule 8(3)(c) of the Rules provides that the Upper Tribunal may strike out the whole or a 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 reasonable prospect of the appellant's or the applicant's case, or part of it, succeeding."

The Tribunal's jurisdiction in strike out matters

8. Before it can exercise its power to strike out the Reference in question, the Upper Tribunal must be satisfied that it does not have before it either an appeal from the decision of another tribunal or judicial review proceedings.

9. The Applicants challenged the authority of the Tribunal to exercise the strike out power. They say that the Determinations Panel and the Regulatory Decisions Committee fall within the scope of the expression "another tribunal" in rule 8(3)(c). They should be regarded as "tribunals", so the argument runs, because they are committees or courts that have been convened to address special issues. I do not accept that. The References have not been made from decisions of another tribunal. The Determinations Panel is not a tribunal: nor is the Regulatory Decisions Committee of the FSA. Both are committees of the particular regulator. This is made clear, as regards the Determinations Panel by section 9(1) of the Pensions Act 2004. Both the Determinations Panel and the Regulatory Decisions Committee are to be contrasted with the body that hears references from them; that is, and always has been a tribunal. It will be noted in this connection that the Rules take their authority from the Tribunals Courts and Enforcement Act 2007; they are designed to cover and apply to tribunals falling within the scope of that Act. Moreover, the Rules themselves distinguished between courts and tribunals. I refer, for example, to rule 5(3)(k). This deals with case management issues in a context where neither of the terms "courts" and "tribunals" can be read as a committee such as the Determinations Panel.

10. Nor is either Reference an appeal. Warren J remarked in *Michel van der Welde NV v Pensions Regulator* [2011] PLR 109 at paragraph 37:

> "The decision which the Tribunal makes is, however, its own decision, formed after its own assessment of the evidence before it (which may differ from that before the Panel) and after hearing the arguments addressed to it (which may differ from those presented to the Panel).

> The Tribunal does not sit as an appellate body from a decision of the Panel; it is not necessary to show that the Panel was in error."

Those remarks are equally applicable to decisions of the Regulatory Decisions Committee of the FSA.

11. For the reasons given above, I am satisfied that this Tribunal has the authority to strike out the References on the grounds set out in rule 8(3)(c) of the Rules, i.e. that there is no reasonable prospect of the Applicants' case succeeding.

The substantive test applicable to "strike out" applications

12. Before granting a strike out application the Tribunal needs to be satisfied that there is a real, and not simply a fanciful, prospect of success on the part of the Applicants. "Success" means that the Applicant in question 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 Notice of the Regulator in question. The Tribunal is required to examine the circumstances including all challenges and admissions of the Applicants. But the fact that the application to strike out the reference may raise difficult issues does not mean that those issues should be addressed only at the final hearing: a difficult issue may, on analysis, admit of a clear answer in favour of striking out in which case an order should, as was observed in paragraph 2 of the *Van der Welde* decision, be made.

13. When the Applicants applied to the Tribunal in September 2011 to extend time to make a reference of the Decision of the Determinations Panel, the Tribunal refused to strike out the proceedings (as the Pensions Regulator had asked) on the basis that enough was not known about the circumstances underlying the determination to enable the Tribunal to express a view on the prospects of success or failure with sufficient confidence. Since then, the Applicants' prospects for successfully challenging the cases of both the Pensions Regulator and the FSA have been affected by the findings and conclusions set out in the judgment of the SDT referred to above.

The circumstances relied upon by the Pensions Regulator and the FSA

14. Both regulators relied upon the matters that are now briefly outlined.

15. First there were the circumstances relating to receipts of payments from HMRC in respect of two pension schemes (the Blagden Industries Pension Scheme and the Sunley Turriff Pension Scheme). The circumstances are summarised below. Reliance was placed on the conclusion of the Determinations Panel that in respect of the payments to both Schemes, the money had been wrongfully placed and the trustees had either been unaware of the location of the money or had been aware and hadd failed to take appropriate action to ensure its immediate transfer. Moreover, there had been a failure to maintain sufficient records to provide immediate and clear replies to questions raised by the Regulator about the receipt and whereabouts of the money.

16. Second, the Determinations Panel had noted that the transfer of cash holdings (in excess of £20m) belonging to the members of the SIPPs administered by Freedom SIPP Ltd. These had been made from one bank to another without the relevant trustees having received the consent of some 150 members. The Determinations Panel had concluded that although the management of the SIPPs did not fall under the jurisdiction of the Regulator, the Panel considered it to be relevant and admissible evidence relating to the manner in which Mr Quarrell and Ms Beaumont had approached the management of trust funds.

17. The third set of circumstances was the conclusion of the Determinations Panel that there had been an overriding responsibility on the parts of the directors of Quarters Trustees Ltd ("QTL") to exercise proper conduct to the trusteeship and management of trust money.

18. The fourth circumstance was the conclusion of the Determinations Panel that in the management of the Blagden and the Sunley Turriff Schemes, the trustees had failed to act in the best interests of the beneficiaries and had accordingly failed to show the proper standards of care, competence and professionalism expected of trustees. For all those reasons the Determinations Panel took the view that the relevant Applicants were not fit and proper persons to be trustees of trust schemes in general.

19. I note that neither the Regulator nor the FSA relies on any allegation of misappropriation, dishonesty or impropriety on the part of the Applicants or any of them; the two regulators rely on the lack of competence and of financial control.

The receipts relating to the Blagden and the Sunley Turriff schemes

20. I turn now to the circumstances in which the Applicants failed to pay into the funds of the Blagden Scheme and the Sunley Turriff Scheme the sums received from HMRC by way of VAT reclaims in 2005 and 2006.

21. QTL was a professional corporate trustee; its directors were Mr Quarrell and Ms Beaumont. QTL had been trustee of the Blagden Scheme. Following a VAT reclaim made on behalf of the Blagden Scheme, £47,406 ("the first payment") had been received in August 2005. That payment had been paid (on 14 October 2005) into the office account of QTL and applied for its general business purposes and the Applicants had failed to pay, or take any steps to ensure payment of, that amount to the administrators of the Blagden Scheme for the benefit of its members and beneficiaries. In response to a query from accountants, Mr Quarrell stated (in October 2006) that the first payment had been inadvertently paid into the accounts of Quarters' Solicitors on 14 October 2005 and that he had forgotten about the payment. (Quarters' Solicitors was the law firm of which Mr Quarrell and Ms Beaumont were the two partners.) The payment should, Mr Quarrell had stated, have been treated as payment for fees due from the scheme to Quarters' Solicitors. The invoice relating to

the fees had not been issued by QTL until 31 July 2007, i.e. nearly two years after the first payment had been made and nearly a year after the inquiry from the accountants. When asked by the Solicitors Regulatory Authority to provide the client ledger account in relation to the Blagden Scheme, Mr Quarrell was unable to do so.

22. £46,057 ("the second payment") had been paid by HMRC in respect of a VAT reclaim sought on 11 September 2006 on behalf of the Sunley Turriff Scheme of which QTL had been trustee. On 6 October 2006 the second payment had been paid into the office account of QTL. Due to the shortage of QTL's financial records it was not possible to confirm for how long the second payment remained in the office account of QTL. The Statement of Case of the Pensions Regulator notes that there is no evidence that the Applicants had ever paid, or taken any steps to ensure the payment of, the second payment to the administrators of the Sunley Turriff Scheme for the benefit of its members and beneficiaries.

23. In the course of an investigation into the Applicants by the FSA, it was discovered that between May and June 2006 The Freedom SIPP Ltd ("TFSL"), a company which administered the self-invested personal pension scheme known as The Freedom SIPP, had transferred the entirety of the cash holdings of members of the SIPP from the Bank of Butterfield to Newcastle Building Society. Those holdings had amounted to a sum in excess of £20m. That transfer had been affected without the consent of the members of the SIPP from whom consent had been sought. Some 150 of those members had failed to respond and that had been taken by TFSL as amounting to consent on their part. Those moneys were transferred to an online bank account, which required only one password for access, thereby enabling the Applicants to access and transfer funds at will without the authority or consent of the members.

24. The Pensions Regulator's grounds for prohibition of the Applicants had been their failure to meet the standards of (a) fitness to be trustees, including competence and capability and (b) or financial soundness. Specifically, the Pensions Regulator identified as grounds for prohibition the payments of the first payment and the second payment into the office accounts of QTL and the failure to remit those payments, either in time or at all, to the Blagden Scheme and the Sunley Turriff Scheme. Moreover, QTL had failed to have in place appropriate and effective accounting and auditing proceedings: the circumstances of the first and the second payments were symptoms of that shortcoming. Mr Quarrell and Ms Beaumont, as directors of QTL, bore the responsibility for the acts and omissions of QTL. As professional trustees they should be held to a higher standard of competence than unpaid lay trustees; and, as solicitors, Mr Quarrell and Ms Beaumont ought to have been particularly aware of the importance of high standards of probity and efficiency required when dealing with clients' money. The Pensions Regulator also observed that the Applicants had failed to make appropriate and timeous responses to demands for documents and to a request for a meeting to assist in the recovery of the first payment of the second payment.

25. Referring to the investigation into the Applicants by the FSA, the Pensions Regulator's case includes the transfer by TFSL of the entirety of the cash holdings of members of the SIPP from the Bank of Butterfield to Newcastle Building Society. That is referred to above in this Decision; as already noted, the Pensions Regulator observes that those moneys were transferred to an online bank account and its consequences.

26. The FSA's case for withdrawing approval from Mr Quarrell and Ms Beaumont and for imposing prohibition direction is based "primarily on the fact that the Pensions Regulator Determination had been made against the Applicants". The FSA relies on both the fact of the Pensions Regulator Determination, on some of the issues underlying that Determination and on the FSA's own primary investigation into those two Applicants' alleged misconduct (see paragraph 30 of the FSA's Statement of Case). Specifically the FSA relied on:

> (i) the improper transfer of members' funds from the Butterfield account to the Newcastle Building Society accounts;
> (ii) a "skilled person's report" of July 2009 on TFSL's handling of client assets and systems and controls. This had concluded that there had been serious failures by either or both of TFSL and QTL to maintain proper trust records of scheme members' entitlements. Attention had been drawn to the alleged mishandlings, by TFSL, QTL and Quarters' Solicitors, of the assets of the schemes' members and
> (iii) the handling of the amounts due to the Blagden Scheme and the Sunley Turriff Scheme.

The proceedings before the SDT and its judgment

27. On 20 August 2009, the Determinations Panel made a determination against Mr Quarrell and Ms Beaumont prohibiting them from acting as trustees of any trust based scheme. The judgment of the SDT was released on 14 October 2011.

28. The Solicitors Regulatory Authority had investigated the Applicants and Quarters Solicitors and, in December 2008, had intervened into the practices of QTL and Quarters Solicitors in order to protect clients' interests and money. The practising certificate of Mr Quarrell had been suspended and the registration of Ms Beaumont as a "Registered Foreign Lawyer" had been cancelled.

29. A hearing of the SDT took place on 3 October 2011. The Applicants were represented by leading counsel (acting *pro bono*). Mr Quarrell had attended. Ms Beaumont did not attend because, she explained to this Tribunal, she had assumed that the hearing was to be concerned only with the signing of the Memorandum of Agreed Terms. Mr Quarrell had undertaken to remove his name from the Roll of Solicitors. The recognition of QTL as a "recognised body" was revoked. Ms Beaumont was prohibited from being reregistered as a registered foreign lawyer. The Applicants undertook joint and several liability for costs of some £94,000.

30. The SDT upheld ten allegations of breaches of the Solicitors' Accounts Rules. The Memorandum of Agreed Terms recorded admission by all three Applicants to those allegations. The ten agreed failings were listed in paragraph 1 of the SDT's judgment.

31. The SDT upheld allegations of breaches of the Solicitors' Code of Conduct. These breaches were stated, in the judgment, to cover the following:

> (i) That QTL and Ms Beaumont had transferred client moneys without adequate authority. (This had covered the transfer of £20m from Bank of Butterfield to the Newcastle Building Society. The judgment observed that Mr Quarrell had admitted that the amounts should not have been transferred without the consent of the clients. Moreover, the SDT observed, the moneys transferred to Newcastle Building Society had not been shown as being in a client account);
> (ii) The handling of the VAT repayments due to the Blagden Scheme and the Sunley Turriff Scheme; and
> (iii) A careless attitude to billing and to reviewing bills.

32. The conclusion of the SDT was that overall the Applicants had shown a wholesale disregard of the Solicitors' Accounts Rules and the way in which a proper solicitor's practice should be run. The SDT had concluded that the admitted allegations had been so serious that, even without the allegations of dishonesty, Mr Quarrell's conduct had been so bad that a striking off order would have been warranted. Regarding the breaches of the Solicitors' Accounts Rules, the SDT observed that it "was clear that the accounts of the various organisations in which the [Applicants] were involved had been a shambles. There had been two Accountants' Reports which had qualified, those for 2006 and 2007, and no improvements were made to the accounting systems. The state of the books meant it was impossible to distinguish between funds belonging to individual clients or to see clearly how those funds were composed.

No reasonable prospect of success

33. I turn now to rule 8(3)(c) with the above facts and circumstances in mind. I should mention, at this stage, the direction given by Judge Bishopp on 13 February 2012 following failures on the part of Applicants to serve their replies on time. He directed that the Applicants would not be permitted, without the permission of the Upper Tribunal, to "rely at the hearing of the Reference on any fact or matter not hitherto disclosed or advanced by them and which could or should have been set out in a Reply".

34. I have already concluded that this Tribunal has jurisdiction to deal with the strike out applications of the two regulators. To what extent is it permissible for this Tribunal to take into account the outcome of the judgment of the SDT? In this

connection both regulators rely on the preliminary decision of the Financial Services and Markets Tribunal in *Elliott v FSA* [2005] UKFSM 019 as authority for the proposition that findings of the SDT are admissible evidence before the Upper Tribunal as to a person's fitness and propriety and that the FSA may rely upon them without needing to re-prove each and every allegation which the SDT found to be proved. In *Elliott* the Tribunal had observed that its task had been to decide whether the applicant in question had been a fit and proper person. Paragraph 36 of the Tribunal's decision contains these words:

> "We conclude that it will be an abuse of process to permit the Applicant to mount a collateral attack on the findings and order of the Solicitors' Disciplinary Tribunal because he had a full opportunity of contesting the decision by way of appeal to the Divisional Court and also in his judicial review proceedings. Accordingly, we are of the view that we are free to make such use of the Solicitors' Disciplinary Tribunal findings as is proper in the circumstances."

On the strength of that decision, and of the authorities on which it is based, I conclude that it is permissible to take account of the conclusions of the SDT in the present case. I mention in this connection that no attempt has been made to challenge or lodge an appeal against the SDT's judgment; indeed the facts upon which its conclusions were based were not challenged before me.

35. The FSA and the Pensions Regulator also rely upon the case of *Sharma v FSA* [2010] UKUT 25 FS as authority for the Upper Tribunal's powers to strike out references of FSA's decision notices under rule 8(3)(c).

36. I turn now to address the question of whether the References of any of the Applicants stand any reasonable prospect of success.

37. For the Pensions Regulator, it is contended that the Applicants were not, on the evidence and in the light of the judgment of the SDT, fit and proper persons to be trustees of any scheme. In this connection the Pensions Regulator emphasised that the SDT had proceeded on the basis of the Memorandum of Agreed Terms in which all three Applicants had admitted to all the allegations made against them by the Solicitors' Regulatory Authority (barring two allegations which had concerned the falsification of documents and the dishonest overcharging of clients). Secondly, the Pensions Regulator emphasises that the SDT had reached certain stated conclusions, summarised above, which were directly relevant to the "fit and proper" issue. In the light of those factors I do not consider that the Applicants can successfully oppose the case put forward in the Statement of Case of the Pensions Regulator. The conclusions of the SDT shut off any effective opposition on the part of the Applicants to the Pensions Regulator's case. Moreover, by reason of the order of Judge Bishopp referred to above, the Applicants have been prohibited from relying on any undisclosed fact or matter at the hearing of the Reference. I am therefore satisfied that there is no reasonable prospect of the Applicants demonstrating that they are fit and proper persons to act as trustees of trust-based occupational pension schemes.

There is therefore no reasonable prospect of the Applicants' case on the Reference succeeding.

38. The case for the FSA is that the Applicants (i.e. Mr Quarrell and Ms Beaumont) lacked integrity and reputation on account of the determination of the Determinations Panel and of the judgment of the SDT. The resulting prohibition of the Applicants from acting as trustees of any occupational pension schemes established by a trust demonstrates that those two individuals are not "fit and proper" for FSA regulatory purposes. The determination of the Pensions Regulator and the SDT judgment refusing the Applicants the right to act as trustees of such a scheme and, as regards those two individuals, to practise as solicitors in England and Wales, demonstrates (so the case for the FSA goes) that they are not fit and proper under the FSA's FIT provisions. The case for the FSA that the Applicants lack integrity and reputation is based, additionally, on the following matters:

(i) the liquidation of TFSL in November 2009 which demonstrates that the Applicants are not fit and proper because they have been directors of a business that had gone into liquidation while they were connected with it;

(ii) bankruptcy orders had been made against Mr Quarrell and Ms Beaumont in February and March 2010; these demonstrate that they are not financially sound for the purposes of FIT;

(iii) the improper transfer of members' funds from Bank of Butterfield to Newcastle Building Society demonstrated a serious level of incompetence and was a reason for prohibition;

(iv) the inadequacy of TFSL's client money procedures had been a matter of serious incompetence and a reason for prohibition; in this connection reference was made to the conclusions of the SDT, e.g. that "… the accounts of the various organisations in which [Applicants] were involved had been a shambles" and that the Applicants dealt with accounts matters in a "totally cavalier fashion" (paragraph 46 of the judgment of the SDT).

39. In the light of those unchallenged findings and the other circumstances raised in the present proceedings, I am satisfied that there is no reasonable prospect of the Applicants' Reference of the FSA's Decision Notice succeeding.

Conclusion on "no reasonable prospect of success

40. I agree that, in the light of the Applicants' admissions and the conclusion of the SDT, there is no reasonable prospect of any of the Applicants sustaining the objections taken in their Reference Notices.

The failure to cooperate

41. Rule 8(3)(b) of the Rules provides that this Tribunal may strike out the whole or a part of the proceedings if:

> "The … Applicant has failed to cooperate with the Upper Tribunal to such an extent that the Upper Tribunal cannot deal with the proceedings fairly and justly."

42. I have already noted that under the Rules, the Applicants were required to file their Replies by 4 January 2012. The failures to serve replies had provoked directions from this Tribunal made on 25 January, 3 February and 7 February. Those failures had led to the direction given by Judge Bishopp, referred to above.

43. The function of this Tribunal is to determine what (if any) is the appropriate action for the relevant authority to take in relation to the matter referred to it. I refer, for example, to section 133 of the Financial Services and Markets Act 2000. The Tribunal cannot carry out its function in a fair, just and reasonable way without the full cooperation of the parties involved. In particular the Tribunal relies on the full Statement of Case on the part of the "Authority" in question and a comprehensive Reply on the part of the Applicant or Applicants. Only if those are available to the Tribunal can it properly and fairly determine what is the appropriate course for the Authority in question to take. The Applicants have left the Tribunal in the dark. The Applicants' explanations of their grounds for appeal in their Reference Notices have been vague. They refer for example to the fact that the investigation by the FSA had cleared Mr Quarrell and Ms Beaumont of any misappropriation, dishonesty and impropriety. The findings of the FSA, it is noted, "have now been shown to be inaccurate and incorrect". That is not so, at least so far as the propriety of the Applicants is concerned. The approach of the Applicants has, in my view, been unacceptable. Their failure to serve replies coupled with the prohibition placed on them from relying on any undisclosed fact or matter places both Regulators at risk of not having the ability properly to prepare for any case that the Applicants may seek to make at the hearing of their References. The result will be that the Upper Tribunal will not be in a position to deal with the References fairly and justly.

44. The excuses put forward by Ms Beaumont refer to illness on the part of Mr Quarrel as well as extremely unfortunate circumstances relating to their personal affairs. Those do not, in my view, excuse them for their failure to cooperate. The excuses, such as they are, do not in my view amount to acceptable reasons for their failure to cooperate. The references should therefore be struck out on that ground.

Conclusion

45. In the light of the Applicants' admissions and the conclusions of the SDT, I direct that the References be struck out on the grounds that they demonstrate no reasonable prospect of success. Further, there has been a failure to cooperate on the

part of the Applicants and on that ground also I direct that the References be struck out.

SIR STEPHEN OLIVER QC
JUDGE OF THE UPPER TRIBUNAL
RELEASE DATE: 17 August 2012