Neutral Citation: **[2023] UKUT 00270 (TCC)**

Case Numbers: UT/2021/000137 & 000138

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing Venue: The Rolls Building
London EC4A 1NL

FINANCIAL SERVICES – costs - whether all or any part of costs claimed by successful applicants should be awarded – whether the referred decisions were unreasonable- whether the Authority conducted the proceedings unreasonably - Tribunal Procedure Upper Tribunal) Rules 2008 rule 10 (3) (d) and (e)

Heard on: 23 October 2023
Judgment date: 9 November 2023

Before

UPPER TRIBUNAL JUDGE TIMOTHY HERRINGTON
(Sitting in Retirement)

Between

THOMAS SEILER
LOUISE WHITESTONE

Applicants

and

THE FINANCIAL CONDUCT AUTHORITY

The Authority

Representation:

For Mr Seiler: Ben Strong KC and Constantine Fraser, Counsel, instructed by Mishcon de Reya LLP

For Mrs Whitestone: Sarah Clarke KC, Counsel, instructed by Charles Douglas Solicitors LLP

For the Authority: Andrew George KC, Celia Rooney and Ava Mayer, Counsel, instructed by the Financial Conduct Authority

DECISION

Introduction

1. On 23 June 2021 the Financial Conduct Authority ("the Authority") through its Regulatory Decisions Committee ("RDC"), issued Decision Notices to each of Mr Thomas Seiler, Mrs Louise Whitestone and Mr Gustavo Raitzin (together "the Applicants").

2. In those Decision Notices the Authority decided to make orders prohibiting each of the Applicants from performing any function in relation to any regulated activities carried on by an authorised or exempt person, or exempt professional firm, pursuant to section 56 of the Financial Services and Markets Act 2000 ("FSMA").

3. Each of the Applicants referred their respective Decision Notices to the Tribunal. The subject matter of the references was the conduct of the Applicants in respect of arrangements entered into in July 2010 by Bank Julius Baer & Co. Ltd ("BJB") with Mr Dmitri Merinson, an individual connected with the Yukos group of companies ("Yukos Group"), pursuant to which it was contemplated that Mr Merinson would introduce companies within the Yukos Group to banks within the Julius Baer group of companies ("Julius Baer Group") and would receive remuneration for doing so.

4. The Authority alleges that Julius Baer's conduct in its relationship with the Yukos Group demonstrated a lack of integrity. They say that Julius Baer must have appreciated the clear risk that, by entering into the arrangements with Mr Merinson, it might be facilitating or participating in financial crime.

5. Each of the Applicants had roles within Julius Baer and was involved in the arrangements described above. However, on the Authority's case, each Applicant had very different levels of responsibility and knowledge. In short:

> (1) Mrs Whitestone was employed as a relationship manager by Julius Baer International Limited ("JBI"), Julius Baer's UK regulated subsidiary. Mrs Whitestone was the Relationship Manager for the Yukos accounts which are relevant to these references and the principal Julius Baer point of contact for both Mr Feldman, the sole director of the relevant Yukos entity, and Mr Merinson.
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> (2) Mr Seiler was employed as the Sub-Regional (Market) Head for Russia and Central and Eastern Europe at BJB in Switzerland and was Mrs Whitestone's functional line manager. In that role, he had responsibility for considering, and providing approval of, certain aspects of the relevant arrangements and payments.
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> (3) Mr Raitzin was employed as the Regional Head for Latin America, Spain, Russia, Central and Eastern Europe and Israel at BJB in Switzerland and was Mr Seiler's line manager. In that role, he was responsible under Julius Baer's written policies, for the final approval of the payments to Mr Merinson.

6. The Authority decided to make the prohibition orders referred to at [2] above because the Authority had concluded that each of the Applicants had acted recklessly and with a lack of integrity in respect of the events arising from the relationship between Julius Baer and Yukos and the dealings with Mr Merinson. In essence, the Authority's case against the Applicants was that they lacked integrity on the sole ground that they disregarded risks of which they were actually aware that Julius Baer might be facilitating or participating in financial crime by participating in the arrangements with Mr Merinson. The Authority decided that each of the Applicants lacked integrity on the basis of

recklessness, that is that they were actually aware of the relevant risks and it was unreasonable of them to take those risks.

7. The basis of the Applicants' challenge to the Authority's decision to make prohibition orders against them was that they did not act recklessly and therefore did not lack integrity because they were not aware of the relevant risks of financial crime relied on by the Authority.

8. Each of the references was a "non-disciplinary reference" with the result that the Tribunal's powers were limited as set out in section 133 (4) to (6A) of the Financial Services and Markets Act 2000 ("FSMA").

The Tribunal's decision on the references

9. In a decision ("the Decision") dated 13 June 2023 ([2023] UKUT 00133 (TCC)) the Tribunal determined the Applicants' references.[1] The reader is referred to the Decision for the detailed findings.

10. The Tribunal decided that the Authority had not made out its case that the Applicants acted recklessly and consequently with a lack of integrity in relation to the subject matter of the references. Accordingly, the Tribunal remitted the question of whether a prohibition order should be imposed on any of the Applicants to the Authority for it to reconsider its decisions in that regard.

11. The Tribunal rejected the Authority's case that the Applicants recklessly failed to have regard to what the Authority said were obvious risks of breach of duty on the part of Mr Merinson and Mr Feldman or other risks of financial crime inherent in the arrangements between Yukos Capital and Julius Baer, defined in the Decision as the "Relevant Risks" and set out at [806] of the Decision. That case was rejected on the basis of the Tribunal's factual findings that the Applicants were not aware of the Relevant Risks, contrary to the contentions of the Authority in that regard.

12. In relation to Mrs Whitestone, the Tribunal concluded that the Relevant Risks would have raised suspicions in the mind of a reasonably competent Relationship Manager, but they did not raise suspicions with Mrs Whitestone: see [809] (6). It said this at [836] to [838]:

> "836. It is undoubtedly the case that establishing all the relevant facts as to the nature of the relationship between Mr Merinson and Yukos and the role of Mr Feldman was something of a jigsaw puzzle because of the manner in which the relevant facts were recorded and were dealt with in a somewhat piecemeal fashion. Mrs Whitestone was not particularly careful in the manner in which she recorded the details she was given so that those reviewing the documents may not have fully appreciated the risks that the relationship involved, as it transpired to be the case. As we have found, even an experienced banker such as Mr Fellay was unable to appreciate the full picture immediately when he reviewed the file.
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> 837. We have accepted Mrs Whitestone's own candid acceptance of her competence and capability at the relevant time. We accept that she was naïve, lacking in competence and experience, and that she made errors of judgment. She had inadequate support from her superiors and the management systems and controls in place were, as the Authority has subsequently found, completely inadequate to deal with the situation, particularly guidance as to who qualified as a Finder and how the arrangements were to be documented.
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> 838. Mrs Whitestone also frankly admitted, with the benefit of hindsight and further wisdom and experience, that she was out of her depth, and could have done more to probe Mr Feldman's and Mr Merinson's explanations for various matters. At one stage she described herself as having

[1] Terms defined in the Decision and used in this decision bear the same meanings given in the Decision.

been a "bit of an idiot". This is a matter of great regret for her and one that she has reflected on considerably over the many intervening years. This, together with the strain of this investigation has caused her considerable anguish."

13. In relation to Mr Seiler, as in the case of Mrs Whitestone, the Tribunal made various findings to the effect that although he was not aware of the Relevant Risks, a more diligent approach on his part would have resulted in him becoming aware of them. For example, in relation to its findings as to Mr Seiler's involvement in the arrangements for the Second FX Transaction and the Second Commission Payment the Tribunal said at [854]:

> "Those findings indicate that Mr Seiler did not exercise due skill, care and diligence in considering the proposals before making his recommendation to Mr Raitzin that the arrangements be approved. However, in our view, the findings are not sufficient to support a conclusion that we should draw an inference that Mr Seiler was aware of the Relevant Risks at the time, as opposed to simply missing them. We accept that those risks would have been obvious to a person of Mr Seiler's experience had he given the proposals more detailed consideration and asked for more information regarding the relationship between Mr Feldman and Mr Merinson. However, he did not and in those circumstances, we accept that the Relevant Risks simply did not occur to him. In the absence of any awareness of the Relevant Risks, Mr Seiler was not aware of a reason for objecting to Mr Raitzin's commercial decision to approve the arrangements."

14. In its overall conclusions as to Mr Seiler's integrity the Tribunal said this at [874] to [878]:

> "874. In our view, what emerges from the facts is that Mr Seiler overall was a weak manager. His failings in that regard were exacerbated by the failings in Julius Baer's matrix management structure. Mr Seiler failed to get to grips with a situation which, with the benefit of hindsight, resulted in the duping of an inexperienced Relationship Manager who Mr Seiler placed too much reliance on without further enquiry in circumstances where he did not ensure that her line manager managed her effectively.
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> 875. This situation was combined with the fact that Mr Seiler placed complete reliance on other senior individuals within Julius Baer having considered the information provided to them by Mrs Whitestone, which as we have found, was incomplete but was the same as, or at various points more, than Mr Seiler himself was given.
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> 876. It appears that this reliance was, as it turned out, misplaced, not because it was inappropriate to seek their advice but because those senior individuals also failed to pick up the Relevant Risks at all stages in the events that we have considered, up to the point at which Mr Campeanu sent his email on 30 November 2012. We think it is most unlikely that all of these individuals were aware of the Relevant Risks and ignored them, as has been alleged against Mr Seiler. If the risks did not occur to them, including a banker as experienced and diligent as Mr Fellay, this leads to the strong inference that they did not occur to Mr Seiler.
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> 877. As we have found in a number of important respects, if there had been a better effort to put all the pieces in the jigsaw together it should have been apparent that the features of the transactions were suspicious and should have been investigated. Mr Seiler must take his share of the blame for this. As we have found, and as he candidly admitted in his evidence, he missed a number of what with hindsight were obvious signs of impropriety and he failed to act with due skill, care and diligence in a number of respects.
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> 878. Mr Seiler also sought in his evidence to distance himself from a number of the decisions taken on the grounds that technically his approval of them was not required. However, the fact was, regardless of the formal position, that he was asked to look at various matters and, probably

due to his wide-ranging responsibilities and pressure of work, did not give them the attention they deserved."

15. In view of the fact that Mr Raitzin has not made an application for payment of his costs in this matter, we make no further reference to the findings against him in this decision.

16. The Tribunal observed at [911] that on the basis of its findings, it would be irrational of the Authority to make a prohibition order against any of the Applicants on the basis that they acted without integrity. However, the Tribunal said this at [912] to [916] in relation to the question as to whether it may be appropriate to make a prohibition order on the grounds of a lack of competence and capability:

> "912. However, the Authority's guidance makes it clear that it will in appropriate cases consider whether either a full or partial prohibition order should be made in circumstances where the individual concerned demonstrates a lack of competence or capability.
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> 913. We do not consider that we should, on the basis of our findings, make a further finding at this stage that the imposition of a prohibition order of some kind would be disproportionate or irrational. As we have found, there are a number of instances in which each of the Applicants in this case have demonstrated varying degrees of a lack of competence and capability.
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> 914. Nevertheless, there are a number of important factors that we consider that the Authority should take into account if it were to consider whether a prohibition order of any kind could be justified on the facts of this case.
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> 915. Most importantly, a prohibition order should not be considered as a proxy for a disciplinary sanction in circumstances where, as in this case, the imposition of a disciplinary sanction against the Applicant concerned cannot be imposed either because he or she was not an approved person at the relevant time or, where he or she was an approved person, the relevant limitation period has since expired. The imposition of a prohibition order can only be justified where it is necessary to do so in order to protect consumers and the integrity of, or confidence in, the financial system.
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> 916. In that regard, we direct that the Authority must take into account the following matters in reconsidering its decisions:
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> (1) Neither Mr Seiler nor Mr Raitzin considered any of the transactions in question in the performance of any controlled function, or any function for which he required approval.
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> (2) There was no allegation of wrongdoing undertaken in the UK on the part of Mr Seiler or Mr Raitzin.
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> (3) The primary regulator with jurisdiction over Mr Raitzin and Mr Seiler was the Swiss regulator, FINMA, who reviewed the matter and decided to take no action.
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> (4) Neither Mr Seiler nor Mr Raitzin had responsibility for day-to-day supervision of Mrs Whitestone.
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> (5) The Authority has taken no action against any individual in the UK responsible for the systems and controls at JBI which it found to be severely deficient.
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> (6) There have been serious delays in bringing the proceedings against the Applicants and these proceedings have become unduly prolonged. The events in question happened many years ago.
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> (7) All three Applicants have expressed regret for what had happened and have admitted to a number of failings. Mrs Whitestone, in particular, was very candid about her lack of competence and capability at the time.

(8) The evidence shows that Mrs Whitestone, although expressing no interest in returning to the financial services industry, has sought to learn from her experiences and, with the effluxion of time, it is clear that any process of rehabilitation will have started some time ago."

17. In the event, shortly after the Decision was released the Authority discontinued the regulatory proceedings against the Applicants and accordingly did not seek to make a further decision prohibiting any of the Applicants on the grounds of lack of competence or capability.

18. In the Decision, the Tribunal made a number of very serious criticisms of the Authority, both in relation to the manner in which it conducted its investigation into the Applicants and the regulatory proceedings and also in relation to certain aspects of its conduct of the Tribunal proceedings.

19. As Mr Strong correctly summarised in his skeleton argument for the costs hearing:

(1) At [926] the Tribunal observed that the Authority should consider the appropriateness of conducting contested proceedings against individuals on the basis of its acceptance of a version of events put forward by the employer of those individuals who is keen to settle the separate proceedings taken against that firm without the Authority conducting its own rigorous investigation into the individuals concerned. The Tribunal went on to say that many of the difficulties in this case arose as a result of the Authority taking that course of action and relying primarily on the internal investigations commissioned by JBI into the events which are relevant to these references.

(2) This was a particularly serious problem in this case because the Authority failed to take into account the clear conflict of interest between JBI and Mr Seiler: see [141].

(3) At [928] the Tribunal observed that the Authority "swallowed hook, line and sinker" Mr Campeanu's email of 30 November 2012 notwithstanding that as found at [145] the Authority considered there was ample evidence that he was reckless as to the truth of what he said during his interview":

(4) The Tribunal found at [139] that Mr Neary, the Authority's witness regarding the conduct of the investigation accepted that "there was a failure to probe the evidence gathering and disclosure made by JBI".

(5) At [138] to [140] the Tribunal found that the Authority's investigation "failed to capture obviously relevant material" in six different categories, such that it was "highly likely" that relevant documents were never uncovered.

(6) At [127] to [134] the Tribunal found that the Authority's review of the documents it did gather was seriously deficient, at least partly as a result of frequent changes in personnel. It emerged after the hearing that a highly material document, which the Authority identified as relevant in both 2016 and 2018, was not taken into account because it had not been identified as relevant when the case was handed to a new case team in 2018 and was not identified as potentially undermining on a further review. The Tribunal found that it could not "be satisfied that there are no other relevant documents that should have been disclosed"

(7) The Authority's investigation into the individuals proceeded "at a glacial pace", with the "lengthy delay […] entirely attributable to the Authority": see [117]. Mr Seiler was not invited for interview until 5 June 2018, leaving little time for anything he might say to be properly assessed before the case was then expected to be submitted "for legal review": see [141].

20. The Tribunal found at [125] that in June 2020, during the course of the RDC proceedings, there was a late disclosure by the Authority of documents which included some highly material documents showing BJB Compliance involvement in August 2010, just after the implementation of the First FX Transaction, and their knowledge of Mr Merinson's position as the Finance Director for Yukos International. The Tribunal found that those documents demonstrate that Mr Seiler had no more information than BJB Compliance had regarding the relevant matters at that stage. In addition, the documents disclosed show that senior people in BJB other than Mr Seiler and Mr Raitzin were considering whether Mr Feldman had a conflict of interest in relation to the First FX Transaction.

21. In relation to the conduct of the Tribunal proceedings, the Tribunal observed that the Authority had failed to call a number of witnesses who it is likely had material evidence to give about a number of key issues. These individuals were referred to at [93] in the following terms:

> (1) Mr Jashmir Narrandes, a member of JBI Compliance who worked with Mrs Whitestone, particularly in the early days of her relationship with Yukos. Mrs Whitestone contended that Mr Narrandes had a role in relation to the creation of the so-called "veto letter" referred to at [318].
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> (2) Ms Carolyn Thomson Bielmann, head of Anti-Money Laundering and Sensitive Clients for BJB and a member of BJB Compliance. Ms Thomson Bielmann had a significant role in relation to the scrutiny of the arrangements which are relevant to these proceedings by BJB Compliance and, it is contended by the Applicants, was aware of the detail of the arrangements, and in particular the matters which the Authority says raised suspicions and "red flags". Mr Seiler and Mr Raitzin contended, in particular, that Ms Thomson Bielmann was aware of information that was not made known to them.
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> (3) Mr Sylvain Courrier, head of external asset managers and Finders for BJB and who was involved, among other things, in settling the revised arrangements for paying Finder's fees to Mr Merinson.
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> (4) Mr Viorel Campeanu, Managing Director and Senior Adviser at JBI and line manager of Mrs Whitestone with a direct reporting line to Mr Seiler. It is clear that Mr Campeanu played a significant role in the matters which are the subject of these proceedings and Mr Neary in his evidence accepted that Mr Campeanu would have had relevant evidence to give about a number of key issues, including whether or not the First FX Transaction raised red flags at the time it was executed, whether the fees were unusual or surprising, what Mr Campeanu's responsibility was as line manager in relation to transactions in the substance of his discussions with Mrs Whitestone, what he told Mr Seiler and who actually came up with the fee structure.

22. At [94] the Tribunal observed that it was a striking feature of the case that those witnesses connected with JBI whom the Authority called in support of its case had only a peripheral involvement with the arrangements.

23. At [97] the Tribunal said that there may be a satisfactory explanation for the absence of particular potential witnesses. It said that there may have been practical difficulties in obtaining evidence from those who were resident in Switzerland, but the Tribunal observed that it had had no explanation from the Authority as to whether they did at any stage consider seeking assistance from these potential witnesses in any respect, observing that those witnesses would clearly have had highly relevant evidence to give. As we describe later, the Authority had in fact contacted both Ms Thomson Bielmann and Mr Courrier who both declined to provide witness statements on behalf of the

Authority. That was not a matter that was disclosed to the Tribunal and the Applicants until shortly before the hearing of the costs application.

24. The Tribunal said at [99] that it did not regard the absence of Mr Campeanu as being satisfactory. At [113] the Tribunal rejected the Authority's submissions that the Authority had sound and justifiable reasons for choosing not to call Mr Campeanu because it did not believe that he could be tendered as a witness of truth and the Authority was therefore not prepared to rely on his evidence. As a result, the Tribunal stated at [114] that it would, where appropriate, draw adverse inferences from the Authority's failure to call Mr Campeanu when considering particular matters where Mr Campeanu's evidence may have been relevant.

25. At [918] to [931] the Tribunal made some observations on the effect of these failings when considering whether or not to exercise its powers pursuant to section 133A (5) of FSMA.

26. At [921] the Tribunal expressed its exasperation that despite failings identified in previous cases that had been before the Tribunal, basic errors in the Authority's approach to disclosure were still occurring.

27. At [924] the Tribunal expressed its disapproval of the Authority as a tactical decision declining to call a witness who can assist the Tribunal with relevant information so as to benefit its own theory of the case.

28. At [925] the Tribunal encouraged the Authority to give serious consideration as to whether it is appropriate to continue with an investigation which it does not have the resources to complete within a reasonable period of time and where it has decided that its priorities for the use of its limited resources lie elsewhere. It went on to say the following at [929] and [930]:

> "929.It does not appear that at any point the Authority stepped back and considered whether it was more likely that the Applicants, with nothing in their background and life experiences to suggest that they would act without integrity over a prolonged period of time, were aware of the risk of fraud and did nothing about it, as opposed to it being more likely that, against a background of defective systems and controls, the Applicants in a number of respects failed to demonstrate the level of competence expected when faced with two individuals who were able to exploit the weaknesses concerned.
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> 930.It appears that the Authority became anchored in its initial impressions of what happened, informed by Mr Campeanu's email, so that the subsequent disclosures late in the process simply gave rise to a mindset of confirmation bias."

The costs applications

Mr Seiler

29. On 11 July 2023 Mr Seiler made an application for an order for costs against the Authority pursuant to Rule 10(3)(d) and 10(3)(e) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Rules"). A schedule of costs was enclosed with this application.

30. The grounds for the application in respect of Rule 10(3)(e) of the Rules was that it was unreasonable for the Authority to issue the Decision Notice at all because it was unreasonable, in light of the multiple failings of the Authority in both its investigation of Mr Seiler and analysis of the evidence to conclude at the time of the Decision Notice, that Mr Seiler recklessly disregarded risks of which he was actually aware. Mr Seiler contends that it was therefore unreasonable to conclude

that Mr Seiler lacked integrity on that basis, and the Authority's decision to impose on him a prohibition order under section 56 of FSMA was unreasonable.

31. Mr Seiler relies on the Tribunal's observation at [929] set out at [28] above, in circumstances where numerous other individuals, with all or most of the information that Mr Seiler had, showed no signs of being aware of the risks of which the Authority concluded Mr Seiler was aware.

32. Further, Mr Seiler contends that it was unreasonable for the Authority to issue the Decision Notice imposing a prohibition order on him on the basis that he posed a serious risk to confidence in the UK financial system in light of the matters found by the Tribunal as to the delays in the investigation and the late disclosure of documents referred to at [19] and [20] above, as well as the factors referred to at [916] of the Decision as set out at [16] above.

33. Further or alternatively, Mr Seiler contends that it was in any event unreasonable for the Authority to base any decision on the allegations in the Decision Notice concerning the Third FX Transaction. In addition to the multiple failings of the Authority referred to above, contrary to section 387 of FSMA, the Authority did not issue to Mr Seiler a Warning Notice including reasons concerning the Third FX Transaction referred to in the Decision Notice.

34. Mr Seiler contended that a variety of different allegations had been put to Mr Seiler concerning various transactions labelled "the Third FX Transaction", but not the allegations in the Decision Notice.

35. Further or alternatively, in light of the multiple failings of the Authority referred to above, Mr Seiler contends that in any event the decision made regarding his response to Mr Campeanu's 30 November 2012 email was unreasonable. In this regard, Mr Seiler relies on the Tribunal's findings at [104]-[105] and [785]-[799] of the Tribunal's Decision, which are referred to below.

36. The grounds for the application in respect of Rule 10(3)(d) of the Rules are:

> (1) That it was unreasonable for the Authority to defend the reference and pursue before the Tribunal the allegations in its Statement of Case that Mr Seiler was actually aware of the Relevant Risks. Mr Seiler contends that it was unreasonable to do so in the light of the multiple failings in the Authority's investigation referred to above, which it did not remedy in the course of the Tribunal proceedings.
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> (2) That it was further unreasonable of the Authority to decline to advance any case on the matters raised in Mr Seiler's Request for Clarification, to decline to answer the requests for details regarding its investigation made in the letters from Mishcon de Reya dated 8 April, 23 May and 9 June 2022 respectively, and to fail to obtain relevant evidence for the Tribunal hearing including from witnesses who would have had evidence to give which was highly relevant to the Authority's case against Mr Seiler.
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> (3) Further or alternatively, Mr Seiler contends that it was in any event unreasonable, for the Authority to include the Third FX Transaction in its Statement of Case and pursue the allegations made therein in relation to the Third FX Transaction before the Tribunal. As the Tribunal found, the Authority was not entitled to pursue the allegations in its Statement of Case in relation to the Third FX Transaction, having failed to comply with section 387 of FSMA.
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> (4) Further or alternatively, Mr Seiler contends that it was in any event unreasonable for the Authority, to include in its Statement of Case and pursue the allegations made therein regarding Mr Seiler's response to Mr Campeanu's 30 November 2012 email.

Mrs Whitestone

37. On 10 July 2023 Mrs Whitestone made an application for an order for costs against the Authority, also pursuant to Rule 10(3)(d) and 10(3)(e) of the Rules. A schedule of costs was enclosed with this application.

38. The grounds for the application in respect of Rule 10(3)(e) of the Rules was that it was unreasonable for the Authority to issue the Decision Notice at all because it was unreasonable, in light of the multiple failings of the Authority in both its investigation of Mrs Whitestone and its analysis of the evidence to conclude at the time of the Decision Notice, that Mrs Whitestone recklessly disregarded risks of which she was actually aware. It was therefore unreasonable to conclude that she lacked integrity on that basis, and the Authority's decision to impose a prohibition order under section 56 FSMA was therefore unreasonable.

39. Further, Mrs Whitestone contends that it was unreasonable for the Authority to issue the Decision Notice imposing a prohibition on her on the basis that she posed a serious risk to confidence in the UK financial system, particularly in light of the matters considered at [911], [914] and [916(5)-(8)] of the Decision.

40. Further or alternatively, Mrs Whitestone contends that the Authority's decision in respect of the Third FX Transaction was unreasonable, given the Tribunal's ruling at [782-784] and [932-1023] of the ision, declining to exercise its discretion to permit this matter to be pleaded.

41. The grounds for the application in relation to Rule 10(3)(d) are:

> (1) That the Authority acted unreasonably in bringing, defending or conducting the Tribunal proceedings and pursue before the Tribunal the allegations in its Statement of Case that Mrs Whitestone was actually aware of the Relevant Risks. It was unreasonable to do so in the light of the multiple failings in the Authority's investigation referred to above, which it did not remedy in the course of the Tribunal proceedings.
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> (2) Further or alternatively, Mrs Whitestone contends that it was in any event unreasonable, in light of the matters referred to above, for the Authority to include the Third FX Transaction in its Statement of Case and pursue the allegations made therein in relation to the Third FX Transaction before the Tribunal. As the Tribunal found, the Authority was not entitled to pursue the allegations in its Statement of Case in relation to the Third FX Transaction, having failed to comply with section 387 of FSMA.

Relevant Law

42. Section 29 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA"), so far as relevant, provides that:

> "(1) The costs of and incidental to –
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> (a)….
>
> (b) all proceedings in the Upper Tribunal,
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> shall be in the discretion of the Tribunal in which the proceedings take place.
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> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules."

43. This provision makes it clear that whether or not costs are to be awarded in any particular case and, if so, of what amount, is a matter of discretion for the Tribunal. Like all judicial discretions, it must be exercised having taken account of all relevant circumstances and ignoring all irrelevant factors.

44. Section 29 (3) TCEA makes it clear that the power to award costs is also subject to Tribunal Procedure Rules. The relevant rules in this case are Rules 10(3)(d) and 10(3)(e) of The Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Rules") which provide so far as relevant as follows:

"(3) …. the Upper Tribunal may not make an order in respect of costs or expenses except—

…

(d) if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings;

(e) if, in a financial services case … the Upper Tribunal considers that the decision in respect of which the reference was made was unreasonable."

45. These particular provisions, or provisions in the same form in other jurisdictions, have been considered in a number of recent cases, in particular *HMRC v Jackson Grundy* [2017] UKUT 0180 (TCC) ("*Jackson Grundy*"), *Alistair Rae Burns v FCA* [2019] UKUT 0019 (TCC) ("*Alistair Burns*"), *Financial Solutions (Euro) Limited v FCA* [2020] UKUT 243 (TCC) ("*FSE*") and *Markos Markou v The Financial Conduct Authority* (Costs Decision, UT-2021-00025, 16 June 2023) ("*Markou*").

46. The principles to be derived from these decisions were summarised at [13] to [16] of *Markou* as follows:

"13. In [*Alistair Burns*] the Tribunal confirmed (at [15]) that Rule 10(3)(d) focusses on conduct during the Tribunal proceedings. Rule 10(3)(e) focusses on the nature of the decision that is the subject of the reference. The Authority accepts that there is some overlap between the provisions.

14. In [*Alistair Burns*] the Tribunal made reference to the principles set out in the decision of the Upper Tribunal in [*Jackson Grundy*] a case in which the Upper Tribunal considered the equivalent provision to 10(3)(d) in the rules for the Tax Chamber. It summarised those principles as follows:

"(1) The rule is a threshold condition. It is only if the tribunal concludes that a party has acted unreasonably in the relevant respect that the question of the exercise of a discretion to award costs can arise. A determination of the question whether a party has, or has not, acted unreasonably is, accordingly, not the exercise of a discretion, but a matter of value judgment;

(2) The phrase "bringing, defending or conducting the proceedings" is an inclusive phrase designed to capture cases in which an appellant has unreasonably brought an appeal which he should know could not succeed, a respondent has unreasonably resisted an obviously meritorious appeal, or either party has acted unreasonably in the course of proceedings, for example by persistently failing to comply with the rules and directions to the prejudice of the other side;

(3) HMRC would be acting unreasonably in defending an appeal if they ought to have known that their view of the case had no reasonable prospect of success but not otherwise; it cannot be that any wrong assertion by a party to an appeal is automatically unreasonable;

(4) The restriction in s.29 Tribunals, Courts and Enforcement Act 2007 to the recovery of costs "of and incidental to" the proceedings means that there is no power to make an order in respect of anything else and, particularly, in respect of any investigation or decision made which preceded the institution of the proceedings or the preparation of those proceedings before the tribunal; and

(5) Nevertheless, although it is not possible for a party to rely upon the unreasonable behaviour of the other party prior to the commencement of the appeal, nor can costs incurred before that period be ordered, behaviour of a party prior to the commencement of proceedings might well inform actions taken during proceedings." …

15. The principles were summarised by the UT in [*FSE*] namely that the Upper Tribunal may only award the Applicant its costs pursuant to Rule 10(3)(d) or (e) if it considers that either:

a. The Authority has acted unreasonably in the course of the proceedings under the Reference, for example, by persistently failing to comply with the rules and directions to the prejudice of the other side; or

b. The RDC's decision as recorded in the Decision Notice was "unreasonable".

16. At [28]-[37], the FSE Tribunal said:

> 28. In *Jackson Grundy*, the Tribunal elaborated on how the question of whether a decision could reasonably be defended could be assessed. It said at [85] that this could be done by considering whether
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> "…it should have been apparent to [the Respondent], considering the matter dispassionately, and by reference to the information available to them when the notice of appeal was served on them, that the review decision was so flawed that it could not properly be defended."
>
> 29. It seems to me, as the Applicant submitted, that this formulation is correct and should be applied when the Tribunal has to consider the question as to whether it was reasonable of a party to have taken a decision on receipt of the other party's case to defend the proceedings. I also consider that another example of where a party could be held to have acted unreasonably is where it fails to produce evidence to support its case.
>
> 30. At [18] and [19] of *Alistair Burns* the Tribunal referred to two points of importance to be considered in the context of an application made under Rule 10 (3) (e) of the Rules by reference to the decision of the Financial Services and Markets Tribunal, this Tribunal's predecessor, in *Baldwin v FSA* (5 April 2006). The applicable rule at that time was in broadly identical terms to Rule 10(3)(e). The points concerned can be summarised as follows:
>
> (1) Judging whether something is reasonable or unreasonable is wholly distinct from judging whether it is right or wrong: a decision may be wrong without being in the slightest degree unreasonable.
>
> (2) The Tribunal needs to take account of the fact that proceedings before the RDC are administrative rather than judicial. The Tribunal is required to focus on the decision itself. The right approach is to ask whether the Authority's decision was unreasonable, given the facts and circumstances which were known or ought to have been known to the Authority at the time when the decision was made. The Tribunal needs to remind itself that the process leading to the Authority's decision is not a full judicial hearing of the kind conducted by the Tribunal but is conducted informally and speedily so that the Authority is not expected or compelled to follow procedures or express its conclusions, as required of a court.

> 31. As the Authority observed in its submissions, the language of unreasonableness in the cost rules overlaps of the test for whether, on determining a reference, the Tribunal should remit the matter to the Authority, as articulated in the Tribunal's case law and referred to at [21] and [22] above. In this case, the Tribunal concluded that the decision set out in the Decision Notice was not within the range of reasonable decisions open to the Authority and accordingly remitted the decision to the Authority for reconsideration.
>
> …
>
> 34.In the light of those submissions, the Authority summarised the test to be applied in considering whether a decision was unreasonable for the purposes of Rule 10 (3)(e) was whether the Decision was not simply wrong, but so obviously wrong that the Authority is to be criticised for seeking to defend it on the reference at all.
>
> 35. Again, in my view the Authority has sought to place a gloss on the ordinary meaning of the Rule which is not justified. The question as to whether a particular decision was a was not "reasonable" requires a multifactorial assessment to be undertaken by the Tribunal taking account of all the relevant circumstances. The question of whether or not a particular matter or decision was "reasonable" is not primarily a question of law. The Tribunal has an unfettered power, to be exercised judicially, as to whether it considers a decision to have been "reasonable".
>
> 36. The Tribunal rejected in *Baldwin* the proposition that the question of "reasonableness" should be assessed by reference to the *Wednesbury* principles. The formulation suggested by the Authority in my view comes very close to a "Wednesbury" test and is too narrow. Likewise, it would be too simplistic to proceed on the basis that where the Tribunal has decided to remit the matter to the Authority for further jurisdiction, that in itself leads to the inevitable conclusion that the decision concerned was "unreasonable". As the Authority correctly submitted, the test for the purposes of the costs rules has not been changed following the enactment of s 133 (6) (a) FSMA and the formulation of the test by the Tribunal in its case law as to the circumstances in which a matter should be remitted to the Authority for further consideration.
>
> 37. It seems to me that there is a degree of overlap between Rule 10 (3)(d) and Rule 10 (3)(e). Therefore, for example, if the Authority seeks to defend on a reference a decision which it ought to have known was seriously flawed, there would be jurisdiction to consider an award of costs under either rule. On the other hand, at the time the decision was made it may well have been reasonable but in the light of a change of circumstances or new evidence that the Applicant seeks to adduce, it may be the case that the Authority should have considered whether it should continue to defend the proceedings and, if it failed to do so, there may be a case for a costs order under Rule 10 (3)(d). Obviously, if the Tribunal finds that both the decision itself was unreasonable and the conduct of the Authority during the proceedings was also unreasonable, the case for the Tribunal to award costs is strengthened."

47. An issue which did not arise for consideration in the cases referred to above was the relevance of a causal nexus between the alleged unreasonable conduct and the costs incurred. In that context, Mr George drew my attention to the following two authorities.

48. In *McPherson v BNP Paribas* [2004] 4 Costs LR 596, the Court of Appeal considered the approach which the Employment Tribunal ought to adopt to an application for costs pursuant to Rule 14 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, which permits the making of an order for costs where a party, or its representative, has acted vexatiously, abusively, disruptively or otherwise unreasonably. Mummery LJ explained at [40] that, whilst there

was no obligation on the party seeking costs to "prove that specific unreasonable conduct by the applicant caused particular costs to be incurred", the "principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion."

49. In *Willow Court Management Co (1985) Ltd v Alexander* [2016] L. & T.R. 34, the Upper Tribunal (Lands Chamber) considered the similar power under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (to award costs as a result of a party's alleged unreasonable behaviour in bringing, defending or conducting proceedings). In line with the approach endorsed in *McPherson*, whilst causation was not a pre-requisite to the award of costs, the Tribunal said at [42] that "the unreasonable conduct, its nature, extent and consequences are relevant factors to be taken into account in deciding whether to make an order for costs and the form of the order".

50. Bearing in mind the similarity of the provisions considered in *McPherson* and *Willow Court* to the provisions of Rule 10 (3) (d) and (e) of the Rules in this case, in my view this Tribunal should adopt a similar approach. Accordingly, as submitted by Mr George:

> (1) The Tribunal's power to award costs in the present case is not constrained by the need to prove that specific unreasonable conduct by the Authority caused particular costs to be incurred by the Applicants.
>
> (2) However, in exercising its discretion to award costs, the Tribunal must have regard to the consequences of any conduct that is found to have surpassed the threshold of unreasonableness.
>
> (3) Accordingly, the existence and extent of any causal connection between the behaviour to be sanctioned and the costs sought is a relevant factor which must be taken into account by the Tribunal when deciding whether to award costs.

51. As Mr George observed, consistent with this approach, in *Angela Burns v FCA* [2015] UKUT 601 the Tribunal refused to award costs pursuant to Rule 10(3) where unreasonable conduct did not in fact have any material impact on the legal costs incurred (at [42] and [64]-[65]). It was only in respect of unreasonable conduct which the Tribunal considered had actually increased Ms Burns' legal costs that an award of costs was made (at [57]). Whilst the Tribunal was highly critical of the Authority's approach to the case as a whole, and "deplore[d] the Authority's… failure to retain a sense of proportion in its approach" (at [67]), the Tribunal did not consider it appropriate to make any costs order beyond recovery of the costs caused by unreasonable conduct.

52. In these proceedings, the primary case of both Mr Seiler and Mrs Whitestone is that the Authority's decision to prohibit them on the basis of a lack of integrity as a consequence of the Authority's allegation that they were actually aware of the Relevant Risks and ignored them was unreasonable, and that it was unreasonable of the Authority to defend the references in the Tribunal proceedings on the basis of those allegations of actual knowledge of the Relevant Risks.

53. It seems to me that if either or both of Mr Seiler and Mrs Whitestone were able to satisfy me that those actions of the Authority were unreasonable then it should follow that the starting point is that they should be entitled to recover the whole of the costs that they had incurred in respect of the proceedings in the Tribunal. If the threshold of unreasonableness has been crossed by virtue of it having been unreasonable for the Authority to defend the references, for example because it should have been obvious to the Authority that its case could not succeed, then the starting point is that the successful party should have all of their costs. That indeed was the approach taken by this Tribunal in *Jackson Grundy*, where it found that HMRC ought to have realised that there was no realistic

prospect of them defending the appeal in that case and awarded the appellant the whole of its costs incurred in respect of its appeal. Consequently, the approach taken was that once the threshold had been passed, the normal approach in cases where cost shifting applies should be followed. Consequently in that situation, subject to the exercise of the Tribunal's discretion taking account of all relevant circumstances, the appellant should expect to be awarded the whole of their costs. The question of causation has been satisfactorily dealt with by following that approach.

54. The question of causation requires a more nuanced approach in cases where the applicant for costs alleges unreasonableness in respect of only some of the conduct of the other party in the proceedings or in respect of only certain aspects of a decision. That is the position, for example, in relation to Mrs Whitestone's and Mr Seiler's case in relation to the Third FX Transaction and their allegations in respect of the Authority's failure to call relevant witnesses. It seems to me that in that situation the question of causation is a highly relevant factor which the Tribunal will need to take fully into account in determining the extent to which it should award costs based on the unreasonable conduct in question.

55. Mr George submitted by reference to cases determined under the Civil Procedure Rules, that the courts had recognised that the status of an unsuccessful party as a regulatory body may be relevant to whether costs should be awarded, and the amount of any award. Mr George referred to a number of cases where the courts had held that if a regulatory body were to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful that might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage: see for example *Competition and Markets Authority v Flynn Pharma Ltd* [2022] 1 W.L.R. 2972 at [97] (per Lady Rose JSC).

56. In my view this principle, while clearly relevant to jurisdictions where the starting point is that the successful party should expect to recover their costs, has no relevance to this Tribunal's cost jurisdiction under Rule 10 (3). The protection for the regulatory body against the "chilling effect" of a costs award is clearly already catered for by the fact that an award can only be made in cases where the decision in question was unreasonable or the regulatory body has acted unreasonably in conducting or defending the proceedings. None of the cases cited to me by Mr George indicated that this was a relevant factor in jurisdictions where the defendant is typically a regulatory or other governmental body and where the jurisdiction to award costs is similar to that contained in Rule 10 (3) of the Rules.

Discussion

57. It is clear from the discussion of the relevant law set out above that in this decision I need to decide first whether there is jurisdiction to make a costs order in favour of either or both of Mr Seiler and Mrs Whitestone. That will be the case if I find either or both of the following contentions by each of them to be made out:

(1) The RDC's decision as recorded in the Decision Notice was "unreasonable";

(2) The Authority has "acted unreasonably" in bringing, defending or conducting the proceedings on the relevant reference.

58. If I accept all or some of the Applicants' contentions, I must then consider whether, as a matter of judicial discretion, I should make a costs order in favour of either or both Applicants and, if so, whether such order should extend to the whole or a specified part of the costs claimed by them. If I determine that a costs order is appropriate, I will then consider whether I can undertake a summary

assessment of the costs concerned myself or whether to direct that the application be made the subject of a detailed assessment.

59. I shall therefore proceed to deal with each of these issues in turn.

Issue 1: Whether the RDC's decision was unreasonable

60. I shall consider the contentions made in that regard by Mr Seiler and Mrs Whitestone separately, although to a large extent they rely on the same matters. I shall deal first with the primary case advanced by each of them, before considering the alternative case, as described at [30] to [41] above.

Mr Seiler

Primary case

61. Mr Strong's primary submission was that it was unreasonable for the RDC to have made findings of such seriousness as it did without a fuller investigation having been carried out. Consequently, the RDC's decision was unreasonable because of the flawed nature of the Authority's investigation. Mr Strong submitted that the Authority should have known that the investigation was flawed so that it was unreasonable to have made a decision to prohibit Mr Seiler on the basis of lacking integrity without remedying the problems that had occurred during the investigation. Mr Strong submitted that the Authority should have known that the documentary evidence was incomplete and that should have been taken into account when making its decision. In particular, the Authority did not seek any proper account of relevant matters from Compliance, or from Mr Courrier, all of whom played important roles in key events.

62. Mr Strong also submits that given the passage of time, the only proper way to deal with the matter was to undertake a close examination of the documents. He submitted that it was clear that Mr Seiler did not remember much of the events concerned and that should have been taken into account.

63. As regards the late disclosure, Mr Strong submitted that when the Authority did receive the further documentation in June 2020 it failed to see the implications of those documents which demonstrated knowledge of the arrangements which was shared by many others and that in some cases others within Julius Baer had more knowledge of the matters concerned than Mr Seiler did. Mr Strong submitted that at that stage, the Authority, and in particular the RDC, in giving its decision, should have stepped back and considered whether in the light of the new material and the inherent unlikelihood of a person of Mr Seiler's background and experience having ignored the Relevant Risks, its failure to do so rendered the RDC's decision unreasonable.

64. Mr Strong submitted that in the absence of direct evidence of Mr Seiler's actual knowledge of the Relevant Risks, the Decision Notice relied on inference. The Tribunal noted at [67] of the Decision that the safety of such inferences depended on the completeness of the evidence, the integrity of the investigation and the inherent unlikelihood of the allegations. The evidence should have been approached with an open mind.

65. It is clear from the Tribunal's findings in the Decision that there were serious failings in the Authority's investigation. These failings were exacerbated by the delays that occurred in pursuing the investigation, as described in the Decision. It is also clear that the documentation disclosed in June 2020, which provided more evidence as to the knowledge of others at BJB in the arrangements, meant that it was necessary for the RDC to take account of that evidence and weigh its significance in the light of the Authority's case theory at the time that evidence was received.

66. The new evidence did not cause the Authority to change its stance and consider, perhaps, whether if it was to continue to pursue the proceedings, it should do so on the basis of a lack of competence rather than a lack of integrity on the part of the Applicants.

67. The key question at the time was whether it was unreasonable for the RDC to issue a Decision Notice on the basis of a lack of integrity on the part of Mr Seiler in the light of the developments that had occurred.

68. On balance, whilst the Tribunal's Decision has demonstrated that it was wrong of the RDC to take the course it did, in my view it was not unreasonable on its part to have done so. In my view, the decision to prohibit Mr Seiler on the basis that he was actually aware of the Relevant Risks and failed to address them was a finding that was within the range of reasonable decisions open to the RDC.

69. As this Tribunal has observed in the case law referred to above, RDC proceedings are different to judicial proceedings. Witness evidence plays no part and the nature of the proceedings necessitates the RDC drawing inferences from the documentary evidence. Although the documentation was incomplete, the key documents which were available to the RDC give a clear picture of the essential elements of the transactions concerned and the communications that took place in relation to them. There is no question that these documents were open to a number of different interpretations and each of the Applicants had different views on what the documents demonstrated. They each from time to time in their representations to the RDC urged the RDC not to accept the explanation of the other Applicants. Both Mr Seiler and Mr Raitzin in particular urged the RDC not to accept that the explanations of Mrs Whitestone were credible. Mr Raitzin went so far as to describe Mrs Whitestone as having gone "rogue", a position which he resiled from in the Tribunal proceedings.

70. Mr Seiler did not advance a case before the RDC that he failed to spot the Relevant Risks because of a failure to act with due skill, care and diligence. Before the Tribunal he accepted he had so failed in a number of important respects, as recorded in the Decision.

71. Accordingly, the documentary evidence that the RDC was faced with, which was essentially the same as that before the Tribunal, was that a highly experienced senior manager failed to notice obvious signs of suspicious activity on the part of Mr Merinson and Mr Feldman. The Tribunal, having heard Mr Seiler, accepted his explanation but it did so against a background where Mr Seiler was prepared to accept that he should have done better in carrying out his duties.

72. It is, as Mr George submitted, most unusual for a person of Mr Seiler's experience and seniority to have failed in that way. In those circumstances, it was not unreasonable for the RDC to take the position, as it clearly stated in the Decision Notice, that Mr Seiler must have been aware of the Relevant Risks.

73. It is also clear from the Decision Notice that the RDC did take account of the material from the late disclosure and explained why that material did not affect its conclusion on the key point as to Mr Seiler's knowledge of the Relevant Risks. It is clear from the Tribunal's findings that the Authority should have stepped back and considered what was the more likely explanation for what had happened and it is surprising that in all the circumstances, bearing in mind the delays and inadequacy of the investigation, it did not do so.

74. However, in the light of the strong indications of suspicious activity over a considerable period of time and the lack of a full explanation from Mr Seiler at the relevant time as to why he did not pick up the Relevant Risks and probe matters further, it cannot be said that it was unreasonable for the RDC to draw the inference that Mr Seiler must have been aware of the Relevant Risks.

75. Neither in my view was it unreasonable of the Authority, as explained in the Decision Notice, to take the position that the time taken to conclude the investigation did not diminish the seriousness of the misconduct and therefore the need to address it if the evidence was sufficient to justify proceeding with the action proposed. Although it is clear from the Tribunal's observations about the effect of delay on investigations and the need to consider whether to proceed with an investigation that cannot be properly resourced within a reasonable period of time, that the Tribunal would have taken a different view if put in the shoes of the Authority at the time, I do not consider that in the circumstances of this case and the nature of the allegations made it was unreasonable of the Authority to proceed with the action proposed.

76. Accordingly, I conclude that on Mr Seiler's primary case I have no jurisdiction to make an order for costs under Rule 10(3)(e).

77. In the light of the seriousness of the allegations against Mr Seiler, I do not consider that any failure on the part of the Authority to take into account the matters set out at [916] of the Decision, as set out at [16] above, affects my decision on this issue.

Alternative case

78. As summarised at [33] to [35] above, Mr Seiler contends that it was unreasonable for the Authority to base any decision on the allegations in the Decision Notice concerning the Third FX Transaction or Mr Seiler's response to Mr Campeanu's 30 November 2012 email.

79. In relation to the latter point, Mr Strong submits that all of the matters identified by the Tribunal at [796] to [798] of the Decision should have been apparent to the Authority at the time of the Decision Notice and it was unreasonable to disregard them. Mr Strong submits that it was particularly unreasonable given the inadequacies of the Authority's investigation to draw a conclusion on the basis of a lack of documentary evidence that JBI Compliance had not approved the retrocession arrangement, as set out at paragraph 117 of Annex B to the Decision Notice.

80. The Tribunal said this at [796] to [798]:

> "796. As regards the first statement relied on by the Authority regarding the approval of the First Commission Payment, as set out at [792 (1)] above, in our view, there was nothing misleading in Mr Seiler failing to disclose that none of the transactions had been pre-approved. Mr Baumgartner was copied to Mr Raitzin's "fait accompli" email referred to at [489] above and therefore was fully aware of how the transaction and payment to Mr Merinson had come to be approved. Compliance were therefore not misled; they were aware that the payment had been approved after the event.
>
> 797. As regards the second statement with which the Authority takes issue, regarding the approval of the retrocession agreement and the disclosure regarding Mr Merinson's employment status:
>
> (1) As explained at [208] above, arrangements with new Finders for JBI had to be vetted by JBI Compliance before being passed for approval to the CEO or other senior managers in London. In the absence of evidence as to whether this in fact occurred, we are prepared to accept Mr Seiler's evidence that this was required and that he believed at the time that JBI Compliance would have reviewed the arrangements.
>
> (2) Mr Seiler's understanding is consistent with the evidence of Mr Bates, who confirmed that, irrespective of whether someone in JBI actually looked at the arrangements with Mr Merinson,those arrangements should have been approved by JBI Compliance and local management, and in particular, that "any commissions that were outside the norm should have been discussed at local level".

(3) As we have found, it was at the time the invariable practice at Julius Baer for one-off retrocessions not to be recorded in a written agreement and accordingly there was nothing misleading about Mr Seiler saying that the arrangements had been agreed. As Mr Strong observed, an agreement of this kind does not have to be in writing.

(4) As we found at [430] above, Mr Seiler recalls that he personally asked Mr Gerber whether the arrangements with Mr Merinson were in order and Mr Gerber assured him they were. It is also notable that Mr Baumgartner received Mr Seiler's email stating that "[t]he Retro agreement was approved by Compliance" and did not object or say that this was incorrect.

(5) We have found that when he received the 7 February Memorandum, that was the first time Mr Seiler became aware that Mr Merinson was employed in the Yukos Group. Mr Seiler's evidence and cross-examination was that he believed that he was told something different during the conference call with Mrs Whitestone and others following the 7 February Memorandum and Mr Schwarz's subsequent email muddied the waters with reference to Mr Merinson being an "external employee", that is akin to a consultant. In those circumstances, we do not consider Mr Seiler was making a statement which he believed to be inaccurate. In any event, by this time BJB Compliance knew as much about Mr Merinson's employment status as Mr Seiler did, so it could not reasonably be said that Mr Baumgartner would reasonably have been misled by Mr Seiler's statement.

798. As regards the final statement with which the Authority takes issue, namely that regarding the second signature, as set out at [792 (3)] above, again we accept Mr Strong's submissions on this point as follows:

(1) It is clear that the "additional signature" to which Mr Seiler was referring here was Mr Feldman's signature on the letters, which was what BJB Compliance had sought and was content with, and which had been received on 24 February 2011. What Mr Seiler meant was that the signature of Mr Feldman on those letters was additional to whatever signature(s) had already been obtained in respect of the execution of the first transaction itself. Mr Seiler was aware that Mr Feldman had previously approved the rates at which the transaction had been effected.

(2) Mr Feldman was the sole director of Yukos Capital and a director of Fair Oaks and, as such, had full authority to consent to payments to third parties on behalf of those companies. Mr Seiler knew that BJB Compliance was satisfied with his signature on both letters. In the circumstances, we accept that Mr Seiler did not focus when writing his email on whether the signature which BJB Compliance had requested was from the same person as had confirmed the execution of the transaction or was from another person.

(3) In any event, Ms Thomson Bielmann had not requested written confirmation from Mr Misamore, as Mr Campeanu incorrectly asserted."

81. I accept that on the basis of the documentation available to the RDC at the time of the Decision Notice it should have been apparent to the Authority that it was more likely than not that the retrocession arrangements had been approved by Compliance. However, in my view that does not in itself make the findings that the RDC made as regards Mr Seiler's response to Mr Campeanu's email unreasonable. I have found that it was not unreasonable on the balance of probabilities for the RDC to find that Mr Seiler was actually aware of the Relevant Risks, given the contemporaneous documentation which indicated that various matters had been brought to his attention. It was not, therefore, unreasonable for the Authority to allege that Mr Seiler's response to Mr Campeanu's 30 November 2012 email contained inaccurate or misleading statements which contradicted the factual matters of which the Authority contended he was aware.

82. The different findings that the Tribunal made were clearly informed by the other findings that the Tribunal made as regards Mr Seiler's awareness of the Relevant Risks and therefore, contrary to Mr Strong's submissions, were informed by Mr Seiler's oral evidence at the hearing. I therefore do not

accept that the matters referred to at [796] to [798] of the Decision would have been apparent to the Authority at the time of the RDC's decision.

83. Accordingly, I conclude that I have no jurisdiction to make an order for costs on the basis that this aspect of the RDC's decision was unreasonable.

84. I do, however, have a different view in relation to the RDC's decision in relation to the Third FX Transaction.

85. Whether or not, as Mr George submitted, the Authority advanced a properly arguable factual and legal case in respect of the Third FX Transaction, in my view it was unreasonable of the RDC to have considered the revised case that the Authority advanced before the RDC following the issue of the Warning Notice.

86. As the Tribunal found at [935] of the Decision, the reason that the Authority changed its case on the Third FX Transaction was that it did not properly investigate the transactions which occurred in 2011 prior to the issue of Mr Seiler's Warning Notice. At [938] the Tribunal found that the allegations made in the Tribunal proceedings in relation to this transaction were not made at any stage before the issue of the Decision Notice, notwithstanding, as found by the Tribunal [938], that Enforcement indicated that the Warning Notice needed to be changed.

87. Regardless of whether there was a legal argument to be had as to the jurisdiction of the RDC to consider the revised allegations, in the absence of an amendment to the Warning Notice, it is clear that it was not appropriate to include the revised allegations, whether as a matter of jurisdiction or fairness. In circumstances where, as the Authority accepts and the Tribunal found, the findings in relation to the Third FX Transaction would not have made any material difference to the outcome of the case, the RDC should not have made findings in relation to the Transaction. As the Tribunal found at [144], as a result of its failings in relation to the investigation, the Authority found itself in an embarrassing situation when it transpired that it was putting forward a case based on entirely the wrong transaction. It was at that point that the only reasonable course of action for the Authority to take was to discontinue any proceedings in relation to the Third FX Transaction.

88. I therefore conclude that I have jurisdiction to make an order for costs incurred by Mr Seiler in the Tribunal proceedings in respect of the Third FX Transaction.

Mrs Whitestone

Primary case

89. The RDC in Mrs Whitestone's Decision Notice found that Mrs Whitestone had acted recklessly on the basis of subjective awareness of the Relevant Risks. It decided that Mrs Whitestone must have been aware of the obvious risks arising from Julius Baer's relationship with Mr Merinson and Yukos, and that she failed to have regard to those risks and failed to take appropriate action in light of them. On that basis, the Authority decided that Mrs Whitestone acted recklessly and without integrity.

90. Ms Clarke submits that it was unreasonable for the Authority to issue a Decision Notice on this basis because:

> (1) There were failings by the Authority in terms of its (i) wholly inadequate approach to disclosure, missing documents and failure to gather relevant documents (ii) over reliance on the JBI/BJB investigation and findings (iii) insufficient resourcing of the investigation

and unacceptable delay and (iv) failure to properly consider the likelihood of Mrs Whitestone behaving with a lack of integrity given her background and life experience.

(2) At no point did the Authority step back and consider whether these fundamental flaws meant that it was unreasonable to decide to prohibit Mrs Whitestone on the basis of reckless lack of integrity. Instead, the Authority approached the case from the outset with a closed mind and confirmation bias.

91. As I said at [65] above there were serious failings in the Authority's investigation. I repeat what I said in that paragraph and at [66] above.

92. However, my conclusion on the key question as to whether it was unreasonable for the RDC to issue a decision notice on the basis of a lack of integrity on the part of Mrs Whitestone in the light of the developments that occurred during the RDC proceedings is the same as that in relation to Mr Seiler.

93. On balance, in my view whilst the Tribunal's Decision has demonstrated that it was wrong of the RDC to take the course it did, in my view it was not unreasonable on its part to have done so. In my view, the decision to prohibit Mrs Whitestone on the basis that she was actually aware of the Relevant Risks and failed to address them was a finding that was within the range of reasonable decisions open to the RDC. I also repeat my observations at [69] above and observe in addition that Mrs Whitestone from time to time in the course of the RDC proceedings urged the RDC not to accept the credibility of the explanations given by both Mr Raitzin and Mr Seiler.

94. Unlike Mr Seiler, however, Mrs Whitestone did accept that she had behaved in a number of respects without competence and capability, and demonstrated a degree of naïveté based on her life experiences. Against that, it was clearly the case that Mrs Whitestone was closer to the events concerning Mr Merinson's and Mr Feldman's interactions with Julius Baer and therefore was in a better position to assess whether the circumstances of their interactions with Julius Baer were suspicious.

95. Against Mrs Whitestone's representations that her naïveté and life experiences made her ill-equipped to notice the Relevant Risks, there was also ample evidence of Mrs Whitestone's intelligence and forceful and confident manner. Those are matters that the RDC had to weigh, in the same way as the Tribunal had to, in assessing whether or not there was a plausible explanation for Mrs Whitestone having failed to notice the Relevant Risks, particularly her recording of the fact that Mr Merinson's commission was to be shared with Mr Feldman. In our view, notwithstanding Mrs Whitestone's inexperience, that on the face of it is particularly surprising, even for a relatively inexperienced Relationship Manager. The Tribunal explained in the Decision that the issue was a difficult one for Mrs Whitestone but having considered all the evidence and circumstances in the round it concluded that she was not aware of the risk of fraud at that point.

96. In those circumstances, it was not unreasonable for the RDC to take the position, as it clearly stated in the Decision Notice, that Mrs Whitestone must have been aware of the Relevant Risks.

97. The Authority's response to Mrs Whitestone's representations, as set out in the Decision Notice, shows that they did not ignore what she said about her naïveté and lack of experience. The RDC gave adequate reasons as to why notwithstanding the testimonials they received and the representations she made about the working environment at JBI they considered that the evidence regarding the Relevant Risks supported the conclusion that those risks must have been obvious to her.

98. Therefore, although as I said in relation to Mr Seiler, the Authority may be criticised for not standing back and considering an alternative explanation as to why Mrs Whitestone might not have been aware of the Relevant Risks, in the light of the strong indications of suspicious activity over a considerable period of time and in respect of which Mrs Whitestone was directly involved, it cannot be said that it was unreasonable for the RDC to draw the inference that Mrs Whitestone must have been aware of the Relevant Risks.

99. I also repeat what I said at [75] above as regards the delays in concluding the investigation. Those observations are equally applicable to Mrs Whitestone's position.

100. Accordingly, I conclude that on Mrs Whitestone's primary case I have no jurisdiction to make an order for costs under Rule 10(3)(e).

101. As with Mr Seiler, in the light of the seriousness of the allegations against Mrs Whitestone, I do not consider that any failure on the part of the Authority to take into account the matters set out at [916] of the Decision, as set out at [16] above affects my decision on this issue.

Alternative case

102. For the reasons I gave in relation to Mr Seiler's application, I conclude that I have jurisdiction to make an order for the costs incurred by Mrs Whitestone in the Tribunal proceedings in respect of the Third FX Transaction.

Issue 2: Whether the Authority has acted unreasonably in bringing, defending or conducting the proceedings

Mr Seiler

Primary case

103. Mr Strong submitted that the decision of the Authority to repeat in its defence of the reference the allegation that Mr Seiler was actually aware of the risks referred to in the Decision Notice was unreasonable. He submits that in the light of the multiple failings with the investigation the Authority ought to have known that that contention was flawed for the reasons given in relation to Issue 1 above.

104. Mr Strong also submits that the Authority failed to undertake a rigorous review of the position when pleading its case, and simply repeated (almost verbatim) the Decision Notice. The Authority made no attempt to remedy the flaws in its investigation or the gaps in its document gathering exercise, nor did it review the case as a whole with a fresh eye. In fact, the Authority appears to be blind to its own failings: the preparation of Mr Neary's witness statement, which explained features of the investigation, should have alerted the Authority to the problems. In the circumstances, Mr Strong submits that it was unreasonable to plead the allegation that Mr Seiler was actually aware of the Relevant Risks and to defend and conduct the Tribunal proceedings on that basis which underpinned both the Decision Notice and the subsequent Tribunal proceedings.

105. For the reasons given in relation to Issue 1 above, notwithstanding the obvious failings on the part of Authority which Mr Strong refers to, I do not consider that the conduct of the Authority in defending Mr Seiler's reference and conducting the proceedings in the Tribunal, except as identified below in relation to Mr Seiler's alternative case, was unreasonable.

106. In the light of my findings as to the reasonableness of the RDC's decision on the key question of whether Mr Seiler was aware of the Relevant Risks, it is clearly the case that the Authority had an

arguable case on that point. It cannot be said that it was obvious that this allegation would fail or that the Authority should have known that it would have done so.

107. As the authorities demonstrate, the fact that the Tribunal rejected the Authority's case on this point does not make the allegation unreasonable in itself. As Mr George observed, the Tribunal made numerous criticisms of Mr Seiler's conduct as part of its reasoning to demonstrate why, although culpable to a degree, the appropriate inference to be drawn from all the evidence, including Mr Seiler's oral evidence, was that he was not aware of the Relevant Risks, despite the Tribunal's finding that they would have been obvious to a reasonably competent manager in Mr Seiler's position.

108. The Authority failed to establish its case on the balance of probabilities. However, as indicated by the length of the decision and numerous comments throughout the Decision the matter was not determined without some difficulty on the Tribunal's part. Whilst it was undoubtedly the case that the Tribunal's task was made more difficult as a result of the defects in the investigation and, as mentioned in more detail below, the absence of potentially key witnesses, Mr Seiler's evidence was not satisfactory in every respect and because of the differing explanations of the three Applicants, the Tribunal had a number of difficult conflicts of evidence to resolve. The following examples from the Decision mentioned at [109] to [113] below support these observations.

109. At [77] the Tribunal had this to say about Mr Seiler's credibility:

> "Although we do not consider that Mr Seiler sought deliberately to mislead the Tribunal or that he was reckless in that regard, we found that some of his evidence lacked credibility. In many instances his evidence was to the effect that in relation to matters that were sent to him for his approval he could not remember reading the communications and attached documents. In relation to conversations with him that were alleged to have taken place often his evidence was either that he could not remember the conversation taking place or, if it did, what was said during the conversation."

110. Immediately after this observation, at [78] the Tribunal said:

> "There were other instances, however, where he purported to remember clearly the details of conversations that took place in circumstances where it was in his interest to give an account of the conversation that supported his case."

111. And then at [79]:

> "These examples show a lack of care on Mr Seiler's part, either in preparing his witness statement or, more likely, in reviewing what was written for him in that statement."

112. At [85] the Tribunal explained the key reason for it being able to accept that Mr Seiler was not aware of the Relevant Risks:

> "Nevertheless, the clear impression given from Mr Seiler's evidence overall was that in relation to the events which are the subject of these proceedings he paid insufficient attention to the matters which passed by his desk having taken the position that he was entitled to rely on the judgment and approval of others, particularly in circumstances where he asserted that he had no formal responsibility to approve the matters in question."

113. At [874] to [878] in its conclusions on the integrity issue the Tribunal said:

> "874. In our view, what emerges from the facts is that Mr Seiler overall was a weak manager. His failings in that regard were exacerbated by the failings in Julius Baer's matrix management

structure. Mr Seiler failed to get to grips with a situation which, with the benefit of hindsight, resulted in the duping of an inexperienced Relationship Manager who Mr Seiler placed too much reliance on without further enquiry in circumstances where he did not ensure that her line manager managed her effectively.

875. This situation was combined with the fact that Mr Seiler placed complete reliance on other senior individuals within Julius Baer having considered the information provided to them by Mrs Whitestone, which as we have found, was incomplete but was the same as, or at various points more, than Mr Seiler himself was given.

876. It appears that this reliance was, as it turned out, misplaced, not because it was inappropriate to seek their advice but because those senior individuals also failed to pick up the Relevant Risks at all stages in the events that we have considered, up to the point at which Mr Campeanu sent his email on 30 November 2012. We think it is most unlikely that all of these individuals were aware of the Relevant Risks and ignored them, as has been alleged against Mr Seiler. If the risks did not occur to them, including a banker as experienced and diligent as Mr Fellay, this leads to the strong inference that they did not occur to Mr Seiler.

877. As we have found in a number of important respects, if there had been a better effort to put all the pieces in the jigsaw together it should have been apparent that the features of the transactions were suspicious and should have been investigated. Mr Seiler must take his share of the blame for this. As we have found, and as he candidly admitted in his evidence, he missed a number of what with hindsight were obvious signs of impropriety and he failed to act with due skill, care and diligence in a number of respects.

878. Mr Seiler also sought in his evidence to distance himself from a number of the decisions taken on the grounds that technically his approval of them was not required. However, the fact was, regardless of the formal position, that he was asked to look at various matters and, probably due to his wide-ranging responsibilities and pressure of work, did not give them the attention they deserved."

114. It is clear that the Tribunal was only able to make this assessment having considered all the evidence in the round, including Mr Seiler's oral evidence. Contrary to Mr Strong's submissions, the Tribunal's assessment of the oral evidence did play a significant part in its overall assessment. Where the Tribunal formed the impression that the Relevant Risks would have been obvious to a reasonably competent manager in Mr Seiler's position, a highly detailed and careful review of the evidence is necessary in order to explain why the Relevant Risks were not obvious to Mr Seiler. Accordingly, it was not obvious to the Tribunal that the Authority's allegation that Mr Seiler must have been aware of the Relevant Risks was bound to fail.

115. Accordingly, I conclude that it was not unreasonable of the Authority to defend Mr Seiler's reference on the basis that he must have known of the Relevant Risks and accordingly acted recklessly and without integrity. I therefore have no jurisdiction to make a costs order on the basis that the Authority acted unreasonably in that regard.

Alternative case

116. Mr Seiler submitted that there were also specific aspects of the Authority's conduct in the course of the proceedings which were unreasonable as follows:

(1) The Authority unreasonably failed to call material witnesses:

(a) The Tribunal noted at [93(4)] that the Authority's own witness accepted that Mr Campeanu would have had relevant evidence to give about a number of key issues. His evidence would have been relevant in Mr Seiler's case to what Mr Campeanu's responsibilities were, what Mr Seiler believed he was

doing and what he told Mr Seiler: [109]. The Authority should have called him in the public interest: [112].

(b) The Authority interviewed, but did not call Mr Narrandes, although he could have given evidence of Compliance procedures in London. This was directly relevant to Mr Seiler's understanding of what reviews would have been carried out in London by the time the arrangements came to him, and to the allegation concerning Mr Campeanu's email of 30 November 2012.

(d) The Authority provided no explanation of whether it even considered seeking assistance from Ms Thomson Bielmann or Mr Courrier, although they would clearly have had highly relevant evidence to give: [97].

(2) The Authority refused to answer Mr Seiler's request for clarification about what it said multiple other individuals knew about the transactions and relationship between Mr Merinson and Mr Feldman. The Authority said that it did not advance a positive case on those individuals' knowledge. Yet, as Mr Neary accepted and the Tribunal found, "in assessing whether a person's reaction showed a lack of integrity, it is relevant to look at how other people reacted at the time": [153]. The Authority simply refused to engage with this seriously undermining aspect of the evidence. That failure was unreasonable, and rendered its entire case, and the way it was brought before the Tribunal, highly unsatisfactory.

(3) The Authority unreasonably declined to respond to Mr Seiler's repeated requests for details of its investigation. By letters dated 8 April and 23 May 2022, Mr Seiler asked the Authority to provide details of requests for information and documents made in the course of its investigations. The Authority's response was that it had complied with its disclosure obligations and the request was disproportionate. Aside from the fact that such confidence was misplaced, the Authority considered its document gathering processes sufficiently relevant that it decided to call Mr Neary to explain them in detail. His witness statement revealed significant gaps and flaws in the investigation. Had the Authority answered Mr Seiler's questions in April or May 2022, attention could have been drawn to these gaps and the Authority could have reconsidered whether to discontinue the proceedings, or to seek to remedy its investigative failings.

(4) The Authority's decision to continue to rely on the Third FX Transaction.

117. I can deal very briefly with the Third FX Transaction. For the same reasons given as to why it was unreasonable for the RDC to have relied on that transaction in the Decision Notice, it was clearly unreasonable of the Authority to persist with the allegation in the Tribunal proceedings. Accordingly, I have jurisdiction to consider the making of a costs order in relation to that matter.

118. As far as the absence of material witnesses is concerned, there is no question that the Tribunal would have been assisted by evidence from Mr Campeanu, Mr Courrier, Ms Thomson Bielmann and Mr Narrandes.

119. I accept that the fact that the Authority was of the view that Mr Campeanu could not be tendered as a witness of truth created some difficulty. I also accept that the Authority did not seek to rely in these references primarily on what Mr Campeanu said in his 30 November 2012 email, as opposed to the position it took in the JBI Final Notice. Nevertheless, the Authority was clearly influenced by Mr Campeanu's account of events and he was subject only to a less than challenging interview. In the circumstances, the Authority should have sought directions from the Tribunal as to whether Mr Campeanu should be called as a witness and, if so, how that should be managed. However, the Authority gave no consideration to that issue.

120. In relation to the other potential witnesses the Tribunal said this is at [97] and [98] of the Decision:

> "97. Of course, there may be a satisfactory explanation for the absence of particular potential witnesses. There may have been practical difficulties in obtaining evidence from Ms Thomson Bielmann and Mr Courrier, who we understand to be resident in Switzerland, but we had no explanation from the Authority as to whether they did at any stage consider seeking assistance from these potential witnesses in any respect. They would clearly have had highly relevant evidence to give.
>
> 98.However, that does not appear to be the case as regards Mr Narrandes and it is clear from the transcript of his interview with the Authority, which was in the trial bundle, that he had some recollection of dealing with Mrs Whitestone as regards issues arising out of the proposed arrangements with Mr Merinson."

121. I do not accept Mr George's submission that the Tribunal's comments at [98] were not sufficient to justify a finding that the Authority acted unreasonably in failing to call Mr Narrandes. The Authority appears to have given no consideration as to whether he should be called and it was clear from what the Tribunal said at [99] as well as [98] that the Tribunal regarded his absence as unsatisfactory.

122. As regards Ms Thomson Bielmann and Mr Courrier, at [97] the Tribunal made it clear that it had not been told whether or not attempts had been made to seek the attendance of these potential witnesses. At the time of the hearing of the references the Authority knew that attempts had been made. That the Authority chose not to disclose that fact to the Tribunal during the hearing or at the time of receiving the draft decision which contained what was said at [98] is totally unacceptable. It was only shortly before the hearing of the costs application that the correspondence the Authority had had with those potential witnesses in June and July 2022 was disclosed to the Tribunal and the Applicants.

123. The correspondence demonstrates that the efforts the Authority took to obtain the assistance of Ms Thomson Bielmann and Mr Courrier, initially through FINMA, were utterly feeble. The steps that the Authority took cannot be regarded as reasonable efforts in that regard. It was quite clear from the tone of the correspondence that the Authority was in effect encouraging a negative answer to its request and that it was in effect only going through the motions to give the pretence that it was serious about obtaining the assistance of these individuals. This is apparent from paragraph 16 of Mr Neary's letter of 16 June 2022 to FINMA where he said:

> "We think it is quite likely that many, if not all, of the individuals will decide not to participate in the UK proceedings, but it is important for the FCA to demonstrate to the Upper Tribunal that we tried to obtain all relevant evidence for the Tribunal's consideration."

124. As is apparent from what I have said above, the Authority took no steps to demonstrate to the Tribunal that it had tried to obtain all relevant evidence.

125. As Mr Strong submitted, it is not the case that further steps could not have been taken to obtain assistance from those potential witnesses notwithstanding the fact that they were outside the jurisdiction. The Tribunal has by virtue of s 25 of the Tribunals, Courts and Enforcement Act 2007 the same powers as the High Court as regards the attendance and examination of witnesses, so that the issue of Letters of Request was one possible course of action.

126. It does not appear that any consideration was given by the Authority to this possibility. In these days of global financial institutions, matrix management and cross-border business it is inevitably the

case that in complex investigations, evidence from witnesses based overseas is frequently going to be highly relevant. It is no good for the Authority simply to wring its hands and say there is nothing we can do to secure the attendance of a witness, who if he or she is asked only on the basis that it is up to him or her whether they wish to assist or not, will inevitably politely decline to assist, as happened in this case.

127. In any event the gentle requests that were made came impossibly late, only a few months before the fixed date of the substantive hearing.

128. I therefore conclude that the Authority acted unreasonably in the conduct of the proceedings in relation to its approach to potential witnesses referred to above.

129. As regards the Authority's failure to engage with Mr Seiler's request for clarification about the knowledge of others within Julius Baer and details of the investigation, I find the Authority's response to these requests to be unreasonable. I accept Mr Seiler's submissions that the Tribunal would have been assisted had the Authority given a more positive response, because, as Mr Neary accepted in his evidence, it is relevant to look at how other people reacted at the time. However, for the reasons I have given, this failure has not affected my conclusion that the Authority's decision to defend the references was not unreasonable.

Mrs Whitestone

Primary case

130. In essence Ms Clarke relied on the same matters that she relied on in relation to her submissions that the RDC's decision was unreasonable, as summarised at [90] above.

131. For the reasons given in relation to Issue 1 above, notwithstanding the obvious failings on the part of the Authority which Ms Clarke refers to, I do not consider that the conduct of the Authority in defending Mrs Whitestone's reference and conducting the proceedings in the Tribunal, except as identified below in relation to Mrs Whitestone's alternative case, was unreasonable.

132. The observations that I made at [106], [107] and [108] above in relation to Mr Seiler, are equally applicable to Mrs Whitestone. Despite the Tribunal's generally positive assessment of Mrs Whitestone, as set out at [70] to [76] of the Decision, the Tribunal found that much of her evidence involved a mistaken reconstruction of events and in common with the other Applicants the Tribunal treated her evidence with caution when it was not clearly corroborated by the underlying documents. The Tribunal stated at [72] that it had no predisposition to prefer Mrs Whitestone's evidence over either Mr Seiler or Mr Raitzin.

133. The Tribunal accepted at [70] that Mrs Whitestone was naïve and inexperienced when the events in question took place and at [837] that she was lacking in competence and experience, and that she made errors of judgment. At [838] the Tribunal acknowledged that Mrs Whitestone admitted, with the benefit of hindsight and further wisdom and experience, that she was out of her depth and could have done more to probe Mr Feldman's and Mr Merinson's explanations for various matters.

134. That assessment had to be considered in context and with the findings of fact that the Tribunal made as to the extent of Mrs Whitestone's actual knowledge of the Relevant Risks, as detailed in the examples set out at [134] to [140] below.

135. With respect to the size of the retrocession payment to be made to Mr Merinson and the rationale for it, the Tribunal accepted at [558] that if all of these pieces of information were put together and

considered as a whole by a reasonably competent and experienced Relationship Manager they would have raised suspicions that the Relationship Manager concerned should have probed further. However the Tribunal found that the relevant information did not raise suspicions with Mrs Whitestone.

136. As to the information regarding the commission sharing between Mr Merinson and Mr Feldman recorded in Mrs Whitestone's contact note, the Tribunal concluded at [526] that it would have been obvious to a reasonably competent Relationship Manager that there was a clear conflict of interest in the arrangements but that Mrs Whitestone did not recognise the significance of that information at the time that it was recorded on the contact note: see [828].

137. At [809(1)] the Tribunal said:

> "Despite Mrs Whitestone's knowledge of the connection between Mr Merinson and Yukos and her recording of the proposal by Mr Merinson to share his commission with Mr Feldman, it did not occur to Mrs Whitestone there was a risk of conflict between Yukos on the one hand and Mr Merinson and Mr Feldman on the other. Due to her naïveté and inexperience and the apparent strong credentials of Mr Feldman she did not consider that there was anything suspicious about the arrangements."

138. At [809(2)] the Tribunal said:

> "She took Mr Feldman on trust and considered, naïvely as its transpired, that his approval as the sole director of Yukos was sufficient in the circumstances. Neither did Mrs Whitestone appreciate the significance of what she was told about the commission sharing arrangements."

139. Then at [809(6)]:

> "If all of the pieces of information known to Mrs Whitestone were put together and considered as a whole by a reasonably competent and experienced Relationship Manager they would have raised suspicions that the Relationship Manager concerned should have probed further. However, they did not raise suspicions with Mrs Whitestone. As she readily accepts, she was out of her depth and had inadequate management support."

140. As Mr George observed, the findings on commission sharing had significant ramifications for the remainder of the Tribunal's other findings, and its assessment of her awareness of other Relevant Risks.

141. There were plenty of other instances where the Tribunal referred to Mrs Whitestone failing to spot obvious signs of potential fraud due to her naiveity and inexperience: see [572], [632], [606], [726] and [747].

142. The frequency of these occurrences over a prolonged period of time obviously calls into question whether in the light of the Tribunal's assessment of Mrs Whitestone as an intelligent, thoughtful and confident person, she was in fact aware of the Relevant Risks but decided not to raise them, rather than her having failed to notice them. As Mr George submitted, in order to resolve that issue, the Tribunal had to draw inferences in the context of the Tribunal's overall assessment of her as a witness and her oral evidence played a significant part.

143. As was the case with Mr Seiler, where the Tribunal formed the impression that the Relevant Risks would have been obvious to a reasonably competent Relationship Manager in Mrs Whitestone's position, a highly detailed and careful review of the evidence is necessary in order to come to a conclusion as to why the Relevant Risks were not obvious to Mrs Whitestone. Accordingly, it was not obvious to the Tribunal that the Authority's allegation that Mrs Whitestone was aware of the Relevant Risks was bound to fail.

144.Accordingly, I conclude that it was not unreasonable of the Authority to defend Mrs Whitestone's reference on the basis that she must have known of the Relevant Risks and accordingly acted recklessly and without integrity. I therefore have no jurisdiction to make a costs order on the basis that the Authority acted unreasonably in that regard.

Alternative case

145. Ms Clarke made essentially the same submissions on this case as Mr Strong. Accordingly, for the reasons given in relation to Mr Seiler, I conclude that I have jurisdiction to make an order for costs in favour of Mrs Whitestone in relation to the matters referred to at [116] above.

Issue 3: Whether and to what extent a costs order should be made

146. As a result of my conclusions on the Applicants' primary case, I only have jurisdiction to make a costs order in respect of the Third FX Transaction and the other matters referred to at [116] above.

147. In relation to the Third FX Transaction, it is clear that the appropriate order to be made is that each of Mr Seiler and Mrs Whitestone should have the costs which have been incurred by them in dealing with that issue in the Tribunal proceedings. It is clearly the case, as a result of my decision that the Authority acted unreasonably in defending the proceedings in the Tribunal on the basis of the allegations relating to that transaction, that each of those parties have incurred extra costs.

148. In relation to the other matters, it seems to me that it cannot be established that either party has incurred any cost in the Tribunal proceedings that can clearly be said to have been caused by the failures on the part of the Authority that I have identified. However, as the authorities demonstrate, causation is only one of the factors that I must take into account in deciding whether to exercise my discretion to make a costs order. It may well be the case that the issues which the Tribunal had determined would have been easier to determine had, for example, the other potential witnesses referred to been available to give evidence. I accept, as Mr George submitted, that it may have been the case that extra costs were incurred as a result of there being additional witnesses to cross-examine. Likewise, it may well be the case that had the Authority responded more appropriately to the request for clarification the issues would have been easier to determine.

149. In my view the failings of the Authority in relation to its approach to potential witnesses were serious. The Tribunal has in previous cases criticised the Authority for its failure to call appropriate witnesses. Mr Neary's letter to FINMA referred to above indicates that the Authority is aware of those criticisms bur did not take them sufficiently seriously in this case.

150. Likewise, I consider, informed by the background of the Authority's failings in its investigation, that the failure to engage with Mr Seiler regarding the request for clarification and details of the investigation were serious matters.

151. Therefore, I consider that it would be appropriate to make a limited costs order. I therefore direct that the Authority pay to each of Mr Seiler and Mrs Whitestone 5% of the costs incurred by each of them in relation to the proceedings in the Tribunal, other than in respect of the Third FX Transaction which I have dealt with separately above.

Issue 4: Quantum

152. In view of the complexity and length of the proceedings, it would not be appropriate for me to attempt a summary assessment of the relevant costs. I therefore direct that the costs concerned be

subject to detailed assessment by a costs judge unless the amount of the costs concerned can be agreed by the parties.

Postscript

153. Although the Authority has been largely successful in relation to these costs applications, it should not take any great comfort from its conduct in relation to these references.

154. Had it not been for the restrictive nature of the costs regime which Parliament has decided is appropriate for proceedings in the Upper Tribunal, there is no doubt that Mr Seiler and Mrs Whitestone would have been entitled to the whole of their costs in relation to this matter, as would have been the case in comparable commercial litigation. I have considerable sympathy for the fact that the Applicants have had to bear the vast majority of the costs that they have incurred in a case where the Authority has been rightly criticised for the manner in which it conducted its investigation and certain aspects of the Tribunal proceedings.

155. Others may wish to consider whether there is a case for the modification of the costs regime in relation to complex matters in the Tribunal's financial services jurisdiction. This has been recognised in relation to tax cases where in the First-tier Tribunal cost shifting applies in relation to cases which are categorised as complex, by reference to the length of hearing, difficulty of the issues and the amount at stake. The appellant can opt out of this costs regime, but it does give an appellant who believes that they have a strong case the opportunity of being awarded their costs if the case is successful.

156. I also cannot finish without making reference to the highly inappropriate statement that the Authority made following the issue of the Decision. It was referred to by the Applicants as evidence that the Authority had not perhaps learned the lessons that it should have as a result of the Tribunal's criticisms of its conduct in the Decision. The statement, published on 13 June 2023 shortly after the release of the Decision started with the statement:

> "We have already had a successful outcome in this case…"

157. This was highly misleading, because the outcome being referred to was the settled decision between the Authority and JBI, as set out in the JBI Final Notice. Emphasis was put on the fact that the Tribunal had been critical of aspects of the conduct of the Applicants and there was no link to the Tribunal's decision, as is usual in statements that the Authority makes after the conclusion of Tribunal proceedings. No mention was made that the Authority was going to discontinue its proceedings against the Applicants. The statement also sought to downplay the criticisms that the Tribunal had made of the Authority's investigation, giving the impression that only one document of limited significance was not disclosed and that was because of human error.

158. In short, the statement was nothing short of disgraceful and should never have been made. It was also very disappointing, to say the least, that it took the Authority almost a month and after detailed discussions with the Applicants to agree to take the statement down from the Authority's website.

159. If it was the case that this statement was issued by a member of the communications team and that Enforcement had no responsibility for it then that is a clear failure of systems and controls within the Authority. If Enforcement had approved the statement, then there was clearly a serious error of judgment on its part.

160. I trust that never again will the Authority seek to give such a misleading impression of the result of a Tribunal decision and that it will act fairly, as it usually does, in summarising the results of a decision and providing an appropriate link to the decision.

TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE
RELEASE DATE: 09 November 2023