Neutral citation: **[2024] UKUT 00156 (TCC)**

UT (Tax & Chancery) Case Number: UT/2022/000100 and UT/2022/000107

Upper Tribunal
Tax and Chancery Chamber
Financial Services

FINANCIAL SERVICES – preliminary hearing – privacy applications dismissed – warning notice only referring to alleged lack of integrity – question whether the "matter referred" included an allegation of lack of due care and skill– order for joint hearing of references – consideration of other amendments to FCA's statements of case - other directions

By remote video hearing

Heard on: 22 March 2024
Judgement Date 04 June2024

Before

DEPUTY UPPER TRIBUNAL JUDGE MARK BALDWIN

Between

STEPHEN JOSEPH BURDETT
The Applicant in UT-2022-000100

JAMES PAUL GOODCHILD
The Applicant in UT-2022-000107
and

THE FINANCIAL CONDUCT AUTHORITY
The Authority

Representation:

The Applicants in person

For the Authority: Adam Temple, of counsel, instructed by the Authority

DECISION

INTRODUCTION

1. Mr Burdett has referred to the Tribunal a Decision Notice dated 19 August 2022 (the "SJB Decision Notice"), by which the Authority concluded that Mr Burdett lacks integrity and is therefore not a fit and proper person to perform functions in relation to any regulated activity and that Mr Burdett poses a significant risk to consumers and the integrity of the United Kingdom financial system. In light of those findings the Authority decided to:

> (1) make an order prohibiting Mr Burdett from performing any function in relation to any regulated activities carried on by any authorised or exempt persons or exempt professional firm pursuant to section 56 of the Financial Services and Markets Act 2000 (the "Act"); and
>
> (2) impose on Mr Burdett a penalty of £311,762 pursuant to section 63A(1) of the Act.

2. Mr Goodchild has referred to the Tribunal a Decision Notice dated 19 August 2022 (the "JPG Decision Notice" and together with the SJB Decision Notice the "Decision Notices"), by which the Authority concluded that Mr Goodchild lacks integrity and is therefore not a fit and proper person to perform functions in relation to any regulated activity and that Mr Goodchild poses a serious risk to consumers and the integrity of the United Kingdom financial system. In light of those findings the Authority decided to:

> (1) make an order prohibiting Mr Goodchild from performing any function in relation to any regulated activities carried on by any authorised or exempt persons or exempt professional firm pursuant to section 56 of the Act; and
>
> (2) withdraw, pursuant to section 63 of the Act, the approval given to Mr Goodchild to perform the controlled function of SMF27 (Partner) at Westbury Private Clients LLP ("Westbury"); and
>
> (3) impose on Mr Goodchild a penalty of £47,600 pursuant to section 66 of the Act.

3. This preliminary hearing is concerned with applications by each of the Applicants for:

> (1) a direction under rule 14(1) and (2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Rules") that there be no publication of the Decision Notice relating to him pending the outcome of the substantive hearing of his reference; and
>
> (2) a direction pursuant to paragraph 3 of Schedule 3 to the Rules that the register is not to include particulars of his reference.

(each a "Privacy Application" and together the "Privacy Applications").

Mr Goodchild made his Privacy Application in his reference notice dated 16 September 2022. Mr Burdett made his Privacy Application in an email sent to the Tribunal on 22 October 2022.

4. The hearing is also concerned with two applications by the Authority, firstly an application for permission under rule 5(3)(c) of the Rules to amend its statement of case in relation to each reference and secondly an application for a direction under rule 5(3)(b) of the Rules that the two references be case managed and heard together by the Tribunal. Finally, the hearing considered proposed directions for the future management of the references until the substantive hearing.

BACKGROUND

5. As summarised by the Authority, the factual background is as follows:

   (1) Mr Burdett was a director of and 50% shareholder in Synergy Wealth Limited ("Synergy"), which was an Appointed Representative of Strategic Wealth UK Limited ("SWUK").

   (2) Mr Burdett had worked as a financial adviser for 11 years and held the CF30 (Customer) controlled function at SWUK.

   (3) Mr Burdett did not personally advise the majority of Synergy clients, but he was involved in the production of template documents described below.

   (4) Despite being a director, Mr Burdett was not approved by the Authority to perform the CF1 (Director) controlled function at Synergy.

   (5) Mr Goodchild was the founder and Chief Investment Officer of Westbury Private Clients LLP ("Westbury"), a discretionary investment manager. He had ultimate responsibility for deciding on Westbury's business activity and investment decisions.

   (6) Synergy advised retail pension holders to switch their pensions into a scheme called the Westbury SIPP, which was created and managed by Westbury. Westbury put investors' monies into 'Model Portfolios', designed by Westbury, described as 'Global Cautious', 'Global Balanced', and 'Global Growth'.

   (7) The Resort Group PLC ("TRG") is or was an offshore property developer which intended to develop hotels in Cape Verde. TRG offered three different types of investment. On the Authority's case, all TRG investments were high risk.

6. It is the Authority's case that:

   (1) Mr Burdett and Mr Goodchild set up a structure by which Synergy would recommend that clients switch pensions into the Westbury SIPP, and that clients would be allocated by Westbury to Model Portfolios by reference to risk profile scores calculated by Synergy. For example, a client with a low risk profile score would be allocated to the 'Global Cautious' portfolio.

   (2) Both men knew and intended that, despite their different names, each of the Model Portfolios would invest 40% of pension holders' funds in TRG investments.

   (3) Mr Burdett was involved in the production of template documents for Synergy which informed clients that the Westbury SIPP was appropriate to achieve the clients' objectives and suggested that the clients would obtain a 'highly diversified portfolio'. The reports provided 'target asset mixes', complete with pie charts suggesting how funds should be allocated. There was no mention of TRG, and the pie charts were inconsistent with the allocation of 40% of funds to TRG investments. The Authority considers the reports to be misleading, and Mr Burdett to be at least reckless as to their contents.

   (4) Both under the relevant rules and Westbury's contract with Synergy, Westbury (in effect, Mr Goodchild) was responsible for ensuring that the allocations were suitable for the clients' risk appetites. The allocation of 40% TRG investments to clients with lower risk profile scores was unsuitable, and Mr Goodchild acted recklessly in respect of the allocations. Further, the 'Global Cautious' and 'Global Balanced' names were recklessly inappropriate, given the high risk of those portfolios.

THE PRIVACY APPLICATIONS

7. Section 391 of the Act includes the following:

> "(1A) A person to whom a decision notice is given or copied may not publish the notice or any details concerning it unless the regulator giving the notice has published the notice or those details.
>
> (2)-(3) …
>
> (4) The regulator giving a decision or final notice must publish such information about the matter to which the notice relates as it considers appropriate.
>
> (5) …
>
> (6) The FCA may not publish information under this section if, in its opinion, publication of the information would be-
>
> (a) unfair to the person with respect to whom the action was taken (or was proposed to be taken),
>
> (b) prejudicial to the interests of consumers, or
>
> (c) detrimental to the stability of the UK financial system…"

8. The Authority is, therefore, obliged to publish such information in such manner as it considers appropriate, in relation to both Decision Notices, unless it considers that to do so would be unfair to Mr Burdett or Mr Goodfellow (as the case may be).

9. Schedule 3 to the Rules makes provision for procedure in financial services and wholesale energy cases. Paragraph 3 of Schedule 3 provides that the Tribunal must keep a register of references, which is to be open to inspection. Paragraph 3(3) of Schedule 3 provides:

> "The Upper Tribunal may direct that the register is not to include particulars of a reference if it is satisfied that it is necessary to do so having regard in particular to any unfairness to the Applicant or prejudice to the interests of consumers that might otherwise result."

10. Whilst a decision by the Authority to publish a decision notice is not a matter which can be referred to the Tribunal, the Tribunal has jurisdiction to prohibit such publication pursuant to rule 14 of the Rules (on "Use of documents and information"), which provides:

> "(1) The Upper Tribunal may make an order prohibiting the disclosure or publication of—
>
> (a) specified documents or information relating to the proceedings; or
>
> (b) …
>
> (2) The Upper Tribunal may give a direction prohibiting the disclosure of a document or information to a person if—
>
> (a) the Upper Tribunal is satisfied that such disclosure would be likely to cause that person or some other person serious harm; and

(b) the Upper Tribunal is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction."

11. The principles to be applied in deciding whether to direct that a reference is not to be included in the register or to prohibit disclosure of a decision notice have been discussed in a number of cases, which are helpfully summarised by Judge Redston in *Fox-Bryant v FCA*, [2023] UKUT 000224 (TCC) at [39]:

> '(1) FSMA s 391 gives rise to a presumption that Decision Notices will be published, albeit there must be regard to the fact that a Decision Notice under challenge in the Upper Tribunal is necessarily provisional (Prodhan at §20(1)).
>
> (2) The exercise of the Tribunal's power to prohibit publication is a "matter of judicial discretion to be considered against this presumption" (Prodhan at §20(2)).
>
> (3) The exercise of this discretion involves a balancing exercise of all relevant factors and giving effect to the overriding objective of dealing with cases fairly and justly (Prodhan at §20(3)).
>
> (4) The open justice principle is to be applied such that the starting point is a presumption in favour of publication in accordance with the strong presumption in favour of open justice generally (PDHL at §36(1)).
>
> (5) The onus is on the applicant to demonstrate a real need for privacy by showing unfairness (PDHL at §36(2)).
>
> (6) The scales are thus heavily weighted in favour of publication. In order to tip the scales, the applicant must produce cogent evidence of how unfairness may arise and how it could suffer a disproportionate level of damage if publication were not prohibited (PDHL at §36(3)).
>
> (7) A ritualistic assertion of unfairness is unlikely to be sufficient. The embarrassment to an applicant that could result from publicity, and that it might lead the applicant's clients and others to ask questions which the applicant would rather not answer, does not amount to unfairness (PDHL at §36(4)).
>
> (8) If it is established by cogent evidence that publication of a Decision Notice would result in the destruction of, or severe damage to, a person's livelihood, it would be unfair to publish that Notice (PDHL at §37, citing Angela Burns v FCA [2015] 5 UKUT 0601 ("Burns") at [89]).
>
> (9) A "possibility" of severe damage or destruction is not enough; there must be a "significant likelihood" of such damage or destruction occurring (PDHL at §37, citing Burns at [90]).
>
> (10) An applicant is not required to show that damage or destruction is an inevitable consequence (PDHL at §37).
>
> (11) A risk of damage to reputation in unlikely to be sufficient to justify a prohibition on publication (Prodhan at §22).
>
> (12) The nature of the dispute, including questions as to whether the applicant has been treated fairly in comparison with others, or penalised too harshly, are matters to be considered by the Tribunal when it hears the substantive reference and are not matters that can bear upon the question of publication (Ford at [50]).

> (13) The fact that some information concerning the subject matter of a reference is already in the public domain is a factor which tends in favour of publication (Ford at [54]).
>
> (14) The protection afforded to an applicant who is concerned that readers of the decision notice might not understand its provisional nature is to refer the matter to the Tribunal (Prodhan at [26]). That paragraph is followed by this citation from Arch:
>
>> "50…..Mr Stanley…submits that it is likely that there will be an unreasonable body of investors, fuelled by high emotions as a result of what has happened to the Arch cru funds, who will fail to appreciate that the decisions are provisional and will assume that the Applicants are guilty of what is alleged.
>>
>> 51. The protection to which the Applicants are entitled in this situation is the right to have the allegations tested in this Tribunal which will in due course deliver a decision in public which will refute unfounded allegations. In addition the Decision Notices themselves set out in detail a summary of the representations that the Applicants made to the RDC which goes some way to explaining their side of the case. No doubt the media will be interested in hearing from the Applicants why they believe the allegations are unfounded."'

12. In support of his Privacy Application Mr Goodchild says that the effect of the reference being public knowledge would be to ruin his reputation and harm his livelihood. Discretionary investment management is Mr Goodchild's "stock in trade" and he has had to step back from this because of the reference. He is not working in the financial services industry at present. Westbury was effectively closed down and Mr Goodchild had no alternative but to put it into voluntary liquidation. He has stepped back from the financial services industry because he is unable to get a job in it as a result of the stigma that will attach to him between now and the substantive hearing. If he applied for a job in the financial services sector, he would need to disclose the existence of these proceedings and that would mean that he would not be offered the job. He explained in his skeleton argument how he feels that he has been badly treated by the Authority in its investigation and, if the reference were made public, he would need to "go public" with his criticisms of the Authority in order to defend himself.

13. Mr Burdett endorsed Mr Goodchild's submissions from his position. He submitted that the allegations made against him are untrue and that it would be unfair to publish them before the reference is substantively disposed of. He says that people will say there is "no smoke without fire" and so, even if his reference is successful, people will pick up on the Authority's actions and this will be detrimental to his career for the rest of his life. Mr Burdett suffered a heart attack in 2023 and he is currently not working.

14. Mr Temple submitted that, beyond their statements as to the effect of publicity on them, the Applicants had not suggested that publishing the Decision Notices would cause severe damage to their livelihoods and they have not produced any evidence (let alone cogent evidence) of severe harm to them of any kind being likely to result from publication of the Decision Notices.

15. Each of the Applicants is, understandably, concerned about the impact on him of the Decision Notice relating to him being made public. It is an inevitable feature of litigation of all kinds that disagreeable things (including untrue allegations) may be said about parties and witnesses. As a general rule, the courts have tended to regard that as an acceptable price to be paid for open justice. That is why, as Judge Redston observed in *Fox-Bryant*, the presumption is that decision notices will be published. In *Khuja v Times Newspapers Ltd*, [2017] UKSC 49, the claimant sought an injunction preventing the publication of information referred to in open court likely to lead to his identification

as a person who had been arrested (and subsequently released without charge) during a criminal investigation into child abuse. The Supreme Court held the order sought should be refused. Lord Sumption observed at [34(2)]:

> "[T]he impact on PNM's family life of what was said about him at the trial is no different in kind from the impact of many disagreeable statements which may be made about individuals at a high profile criminal trial. A defendant at such a trial may be acquitted, possibly on an issue of admissibility, after bruising disclosures have been made about him at the trial. Within the limits of professional propriety, a witness may have his integrity attacked in cross-examination. He may be accused by other witnesses of lying or even of having committed the offence himself. All of these matters may be exposed in public under the cloak of the absolute immunity of counsel and witnesses from civil liability, and reported under the protection of the absolute privilege from liability for defamation for fair, accurate and contemporaneous publication. The immunity and the privilege reflect the law's conviction that the collateral impact that this process has on those affected is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public."

16. Our starting point, therefore, must be the principle of open justice, and with it a presumption in favour of publication. This was recently emphasised, in the context of an application for proceedings in the Tax Chamber of the First-tier Tribunal to be heard in private, by Bacon J (the President of this Chamber of this Tribunal) and Judge Thomas Scott in *HMRC v The Taxpayer*, [2024] UKUT 00012 (TCC). An assertion by an applicant of unfairness in publishing a decision notice (even when augmented, as it is here, by the Applicants' criticisms of the Authority's behaviour) is unlikely to be sufficient. The embarrassment to an Applicant that could result from publicity, in particular that it might lead to people asking questions or voicing criticisms which the applicant would rather not answer, does not amount to unfairness. All the issues and criticisms raised by the Applicants can be ventilated at the substantive hearing and, if an Applicant's reference is successful, there will be a public decision that vindicates their position.

17. Something which might (if established by cogent evidence) make it unfair to publish a decision notice would be where publication would result in the destruction of, or severe damage to, a person's livelihood. No evidence was led before me to support any assertion that publication of the relevant Decision Notice would destroy, or severely damage, an Applicant's livelihood. Neither of them is working in the financial services industry at the moment, and Westbury has been closed. As Mr Goodchild explained, it would be impossible for either of the Applicants to get a job in the financial services industry at the moment because of the need to disclose these proceedings. The Authority's actions to date have, no doubt, impacted on the Applicants' livelihoods, but I cannot see how publication of the Decision Notices would make their current position any worse, let alone sufficiently seriously to outweigh the presumption in favour of publication.

18. For these reasons I will dismiss the Privacy Applications.

JOINDER/CONSOLIDATION

19. The question whether the references should be heard together is to be determined by reference to the Tribunal's overriding objective, to deal with cases fairly and justly, with rule 5(3) expressly referring to the power to:

> 'consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues, or treat a case as a lead case'.

20. I agree with Mr Temple's submission that this points to 'common issues' as being central to the question of consolidation: it generally will be appropriate to consolidate where there is a high degree of overlap in issues between references and will not be appropriate without such overlap.

21. Mr Goodchild does not oppose the references being heard together, but Mr Burdett does. He is anxious that his case he heard on its own merits. He also submits that there is only a small amount of overlap between the cases; he says the overlap is concerned solely with the nature/terms of the contract between Synergy and Westbury. His reference raises a limitation issue and part of his case relates to his role at Synergy, which is clearly quite separate from anything Mr Goodchild may raise in his reference, as Mr Goodchild was involved with a different business (Westbury). His reference also deals with the Authority's case that he acted as a director whilst not approved to discharge that function.

22. I agree with Mr Temple that, whilst the two references need to be determined separately, they arise out of a common factual continuum, namely the way that Synergy clients were given a risk score and then passed to Westbury with a view to being allocated to one of Westbury's model portfolios. Although there are clear differences in what Westbury and Synergy did (most obviously, Westbury performed its role in relation to individual clients after Synergy had handed them over), the references do relate to the same overall facts and issues (how Synergy clients came to be exposed to investments in TRG and whether those investments were suitable for them). A lot of evidence before the Tribunal will relate to issues common to both references and hearing both references together will enable the Tribunal to reach a better-informed conclusion on the overall factual matrix.

23. There is an issue about where, under the contract between Westbury and Synergy, responsibility for ensuring that investments were suitable lies. Clearly that issue is better determined after a hearing where the Tribunal can hear all parties. A single hearing will mean that the Tribunal has a fuller picture of the relationship between the two businesses and this will remove the risk of differently constituted tribunals reaching inconsistent conclusions. I note that the fact that defendants in a criminal trial may seek to blame each other is a factor to be considered in deciding whether to order separate trials, but it is not conclusive against a joint trial; *R v Hoggins and ors*, [1967] 1 WLR 1223.

24. The current time estimate for a substantive hearing of both references is 8 days. That is not unduly long or onerous for a financial services case in this Tribunal.

25. In my judgment, the interests of justice and fairness to all parties favour a single hearing of both references, where the Tribunal can come to a single, fully informed conclusion on the factual matrix to the extent it is common to both references. Clearly, it will need to take account of the separate allegations made against each of the Applicants, and there will be factual or other issues relevant only to one reference or the other, but the Tribunal is perfectly capable of keeping the two references separate when it comes to reaching its decision. The effect of hearing the two references together will not produce an unduly long or over-complicated hearing, nor is there any risk (and it was certainly not suggested to me that there is any such risk) of either Applicant being prejudiced in the eyes of the Tribunal because of his reference being heard with the other Applicant's.

26. For these reasons I will direct that the two references be case managed and heard together.

AMENDMENTS TO THE AUTHORITY'S STATEMENT OF CASE

27. The Authority has applied to amend (in the case of Mr Burdett to further amend) its Statement of Case in both references. As against Mr Burdett, the main changes are: (a) to introduce an alternative allegation that Mr Burdett failed to act with due skill, care and diligence (which by way

of shorthand I refer to as an allegation of negligence), if he is not found to lack integrity; (b) the Authority no longer alleges that Mr Burdett instructed an advisor at Synergy not to consider the suitability of the investments within a client's SIPP; and (c) the Authority no longer alleges that Mr Burdett misled others at SWUK as to the contents of the Model Portfolios. As against Mr Goodchild, the main changes are: (a) to introduce an alternative allegation that Mr Burdett acted in breach of Statement of Principle 2 (acting with due skill, care and diligence, which again I refer to as negligence by way of shorthand), if he is not found to lack integrity; and (b) the Authority no longer relies on an email dated 26 February 2016, which it previously asserted referred to 50% of the Model Portfolios being invested in a TRG investment. The draft Re-Amended Statement of Case (in Mr Burdett's case) and draft Amended Statement of Case (in Mr Goodchild's case) are in the Hearing Bundle with the proposed changes marked in green (in Mr Burdett's case) and red (in Mr Goodchild's)

28. The main proposed amendment in both references is to include an alternative allegation of negligence if either Applicant is not found to have lacked integrity. Both Applicants oppose the proposed amendments.

29. In relation to this amendment, there are two issues to consider. The first (the "Jurisdiction Issue") is whether the matter referred in each case includes the alternative allegation. If it does not, then the Authority cannot amend its Statement of Case to include the alternative allegation as it is not part of the matter before the Tribunal. The second issue (the "Discretion Issue") only arises if the matter referred includes the alternative allegation, and in that case the Discretion Issue is whether the Tribunal should exercise its power under rule 5(3)(c) of the Rules to allow the Authority to amend its Statement of Case.

The Alternative Allegation: the Jurisdiction issue

30. Section 67 FSMA provides that, if a regulator proposes to take action against a person under section 66, it must give him a warning notice, if it decides to take action against a person under section 66 it must give that person a decision notice, and that person "may refer the matter to the Tribunal".

31. Similarly, section 57 FSMA provides that if a regulator proposes to make a prohibition order it must give the individual concerned a warning notice, if it decides to make a prohibition order it must give the individual concerned a decision notice, and "[a] person against whom a decision to make a prohibition order [under section 56] is made may refer the matter to the Tribunal".

32. Finally, section 63 FSMA provides that if a regulator proposes to withdraw an approval, it must give each of the parties a warning notice, if it decides to withdraw an approval it must give each of the interested parties a decision notice and if it "decides to withdraw an approval each of the interested parties may refer the matter to the Tribunal".

33. Section 387 FSMA provides that a warning notice must state the action the Authority proposes to take and give reasons for the proposed action. The warning notice must give the person to whom it is given a reasonable period in which to make representations to the Authority (essentially, the RDC procedure outlined below). The Authority must then decide whether to give the person concerned a decision notice. Section 388(1) FSMA provides that a decision notice must "give the reasons of [the Authority] for the decision to take the action to which the notice relates".

34. A warning notice will in most cases be followed by engagement with the Authority's Regulatory Decisions Committee ("RDC"), which is a committee of the FCA Board which takes contested regulatory decisions on behalf of the Authority. A person who may be subject to regulatory sanction can make representations to the RDC, which could extend to a hearing at which the party is

represented. However, there is an expedited reference procedure under which a person can decline to engage with the RDC and instead refer the matter directly to the Tribunal. Mr Goodchild exercised his right to expedite his reference to the Tribunal.

35. The operative provision for the Tribunal's jurisdiction is section 133 FSMA ("Proceedings before Tribunal: general provision"). It provides, so far as relevant for us:

> "133(1) This section applies in the case of a reference or appeal to the Tribunal (whether made under this or any other Act) in respect of—
>
> (a) a decision of the FCA or the PRA […]
>
> (4) The Tribunal may consider any evidence relating to the subject-matter of the reference or appeal, whether or not it was available to the decision-maker at the material time.
>
> (5) In the case of a disciplinary reference or a reference under section 393(11), the Tribunal –
>
> (a) must determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter; and
>
> (b) on determining the reference, must remit the matter to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination. […]
>
> (6) In any other case, the Tribunal must determine the reference or appeal by either—
>
> (a) dismissing it; or
>
> (b) remitting the matter to the decision-maker with a direction to reconsider and reach a decision in accordance with the findings of the Tribunal.
>
> (6A) The findings mentioned in subsection (6)(b) are limited to findings as to—
>
> (a) issues of fact or law;
>
> (b) the matters to be, or not to be, taken into account in making the decision; and
>
> (c) the procedural or other steps to be taken in connection with the making of the decision."

36. So, in the case of a disciplinary reference (which these references are so far as the financial penalties are concerned), the Tribunal "must determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter". In other cases (which would include the Authority's other proposed actions) the Tribunal may remit "the matter to the decision-maker". The Tribunal's jurisdiction is, therefore, circumscribed by "the matter"; it can only make directions/determinations in relation to "the matter". As this Tribunal observed in *Bluecrest* (considered in more detail below) at [48], the words "subject-matter of the reference" (in section 133(4)) and "matter" (in section 133(5) and (6)(b)) in respect of which the Tribunal must determine the appropriate action are not defined. In its broadest terms, reading sections 67(7), 63(5) and 67(5) (as the case may be) and section 133(4) together, the subject matter of the references might be thought to be the decisions of the Authority to impose a financial penalty, to make a prohibition order or to withdraw Mr Goodchild's approval. However, as we shall see, the authorities give this expression a narrower interpretation.

37. The question of what is within the subject matter of a reference to the Tribunal has been considered in a number of authorities, and I turn to these now. Before embarking on this tour, I should explain that the Authority has published certain principles as to how a regulated firm should conduct its business. These include Principles 1 (that a firm should conduct its business with integrity) and 2 (that a firm should conduct its business with due skill, care and diligence). Where an approved person (such as Mr Goodchild) is concerned, these are referred to as Statements of Principle as to how an approved person should act in carrying out their FCA controlled functions. Mr Burdett was not an approved person (which, of course, is one of the Authority's criticisms of him), but the Authority's view is that the same factors should be considered in deciding whether he is a fit and proper person. The relevance of this is that the same issues arise when considering whether an allegation of lack of due skill and care or breach of Statement of Principle 2 can be raised when only lack of integrity or breach of Statement of Principle 1 was initially articulated, as arise when only a breach of Principle 1 was alleged, and the Authority then seek to allege a breach of Principle 2. At intervals below I may refer only to a Principle or Statement of Principle or allegation, but the issue is the same whichever expression I use.

38. Our journey starts with *Jabre v Financial Services Authority*, [2002] UKFSM FSM035, a decision of the Financial Services and Markets Tribunal (the "FSMT"). In that case the Authority imposed a financial penalty on Mr Jabre for market abuse and breach of Principles 2 (Due Skill, Care and Diligence) and 3 (Market Conduct) of the Authority's Statements of Principle for Approved Persons. The Authority made no findings in relation to Principle 1 (Integrity). The Authority did not withdraw Mr Jabre's approval, but before the FSMT it sought to contend that Mr Jabre's approvals should be withdrawn. Mr Jabre submitted that the Tribunal had no jurisdiction to entertain the Authority s contentions either that his approval should be withdrawn on the grounds that he was not a fit and proper person to perform the regulated functions or that he should be subject to a prohibition order.

39. The FSMT held that it did have jurisdiction to entertain the matters raised in the Authority's statement of case, observing as follows:

> 28. The meaning of the expressions the matter referred , or the subject-matter of the reference in section 133 has to be derived from their context. The first point relevant to this is the Tribunal s function. It provides a stage in the regulatory process to determine what is the appropriate action for the Authority to take having considered any evidence relating to the subject-matter of the reference. As the Tribunal s role is not to adjudicate on the rightness or otherwise of the decision as expressed in the decision notice, the decision itself is not strictly a relevant consideration for the Tribunal to take into account. Instead it is the allegations made in the decision notice and the circumstances on which these are based that fall to be considered and evaluated. They comprise the matter referred. It is in relation to those circumstances and any further relevant evidence that was not available to the Regulatory Decisions Committee that the Tribunal s function is to determine the appropriate action for the Authority to take. The indications, so far, are that the circumstances, the evidence and the allegations before the Regulatory Decisions Committee, and not the decision, are the subject-matter of the reference.
>
> 29. The second point is that in the present case the facts and circumstances on which the Authority relies in its statement of case were before the Regulatory Decisions Committee. They are either set out within the decision notice or are recorded in the decision notice as matters on which the Regulatory Decisions Committee did not reach a concluded factual finding. In this respect it can be said that the facts and matters before the Regulatory Decisions Committee are the facts and matters relied

> upon by the Authority for the purposes of the present reference. This is not a case such as that considered in *Parker v FSA* (an unreported decision on a preliminary issue) where a new allegation unconnected with the factual context that gave rise to the original decision was sought to be raised. Nor is the present situation comparable to that found in Ryder (No.2) (2006), a Pensions Regulator Tribunal reference. There the matter that Mr Ryder had sought to raise related to factual issues that had not been in front of the Determinations Panel of the Pensions Regulator and therefore formed no part of the body of facts to which the determination notice related."

40. The point here is that the warning notice had sought a withdrawal of Mr Jabre's approvals on the grounds that Mr Jabre had committed breaches of Principles 1 and 3 and had engaged in behaviour constituting a deliberately conceived plan to abuse the market and was therefore not fit and proper. The warning notice expressly sought a withdrawal of approvals on the grounds that Mr Jabre was not fit and proper. Everything the Authority was seeking to argue before the Tribunal (both in terms of allegations of wrongdoing, the conclusions to be drawn from that behaviour (that Mr Jabre was not a fit and proper person) and the Authority's proposed response) was addressed in the warning notice and "in play" (my expression) before the RDC.

41. In *FCA v Hobbs*, [2013] EWCA Civ 918, the Authority proposed to make a prohibition order on Mr Hobbs on the basis that he had engaged in market abuse. The Authority had also contended, in the warning notice issued to Mr Hobbs, that he had lied to his employer and the Authority during the investigation into his conduct and these allegations also formed part of the basis of the RDC's decision to prohibit Mr Hobbs. Mr Hobbs referred the matter to the Tribunal, which allowed his reference as it decided that Mr Hobbs' trading did not amount to market abuse. The Tribunal found that Mr Hobbs had lied to the Tribunal about why he had undertaken the trades in question, but decided that, since the Authority's case had rested on a consideration of Mr Hobbs' alleged conduct in committing market abuse and then lying about it, it was not satisfied that the Authority had made its case that Mr Hobbs was not a fit and proper person.

42. The Court of Appeal gave two reasons why the Tribunal should have considered the issue of Mr Hobbs' lies and whether that justified a prohibition order. The first reason centred on a question of statutory construction. In paragraph 32 of his judgment Sir Stanley Burnton stated:

> "The issue of statutory construction concerns the meaning of "the matter" which a person subject to a decision notice is entitled to refer to the Tribunal under section 57. Happily, Mr Jaffey and Mr Hunter were agreed that that expression should be given a wide meaning. "The matter" includes the facts and evidence referred to in the decision notice on the basis of which the Authority concluded that the person in question was not a fit and proper person and that a prohibition order was appropriate."

43. Consequently, as Mr Hobbs' lying was part of the case before the RDC and Mr Hobbs' lying was one of the bases for the Authority's conclusion that Mr Hobbs was not fit and proper, it was incumbent on the Upper Tribunal to address the issue.

44. The second reason was a broader point of principle as to the nature of the proceedings before the Tribunal. This was expressed in paragraph 38 of Sir Stanley Burnton's judgment as follows:

> "Furthermore, in my judgment it is important for the Tribunal to consider all the facts and evidence put before it on a reference under section 57. There are two reasons for this. The first is that its consideration of a reference is not ordinary civil litigation. There is a public interest in ensuring, so far as possible, that persons who are not fit and proper persons to perform functions in relation to a regulated activity are precluded from doing so. A narrowing of the inquiry by the Tribunal that excludes

> relevant material from its assessment of an application is to be avoided, provided, of course, that the applicant is given a fair opportunity to address the Authority's case. In Mr Hobbs' case, it could not be suggested, and was not suggested, that he did not have a fair opportunity to address the allegations that he had been guilty of repeated and persistent lying. The second reason is that if the Tribunal incorrectly restricts its determination, it may be difficult for the Authority to rely on the excluded facts in future in assessing, for example, whether the Applicant is a fit and proper person, or should be granted an authorisation he seeks to engage in a regulated activity."

45. The point for us is that the Court of Appeal recognised that there is a wider public interest in regulatory proceedings than is the case with ordinary civil litigation, and so the Tribunal should avoid any narrowing of the inquiry and any potential prejudice to the applicant could be addressed by giving him a fair opportunity to address the case.

46. In *Seiler* (discussed further below - at [982]) this Tribunal thought it important to note that in *Hobbs* the Authority sought to rely on facts and circumstances which arose after the regulatory process had been completed and therefore were not capable of being included in the original warning notice. It considered that *Khan v Financial Conduct Authority*, [2014] UKUT 186 (TCC), suggested that, where the facts and matters concerned could have been contained in the warning notice but were not, the Tribunal should have regard to the overall purpose of the statutory scheme and the place of the Tribunal in the regulatory process and consider whether it should exercise its case management powers to prevent the Authority relying on a matter which was not relied on in the warning notice.

47. Next, we have *Carrimjee v FCA*, [2015] UKUT 0079 (TCC). Mr Carrimjee referred to the Tribunal a decision of the Authority to withdraw his individual approvals, make a section 56 prohibition order and impose a financial penalty. The Authority decided to take these actions because "Mr Carrimjee failed to act with integrity in breach of Statement of Principle 1 when he recklessly assisted his client, Mr Rameshkumar Goenka, in Mr Goenka's plan to manipulate the closing price of Gazprom GDRs in April 2010". The Tribunal went on to consider what might happen if it were to decide that there was a degree of culpability on Mr Carrimjee's falling short of failing to act with integrity, but which constituted a failure to act with due skill, care and diligence. In relation to that question, the Tribunal commented:

> "59. … It was common ground that even if we were to find that Mr Carrimjee's behaviour did not demonstrate a lack of integrity, it was open to us to make a finding as to whether his behaviour demonstrated breach of a Statement of Principle to a lesser degree. In this case therefore, it would be open to us, having made the relevant findings of fact, to make a finding that those findings demonstrated a failure to act with due skill care and diligence as required by Statement of Principle 2.
>
> 60. That course of action is open to us because a reference is not an appeal against the Authority's decision, it is a determination of what is the appropriate action to take in the circumstances falling within the subject matter of the reference, that is the circumstances that have been the subject of the prior regulatory proceedings, rather than the particular outcome as found in the Decision Notice."

48. In *Seiler and others v FCA*, [2023] UKUT 0033 (TCC), this Tribunal considered prohibition orders issued by the FCA to three executives of Bank Julius Baer & Co. Ltd. Of relevance to us is the Tribunal's consideration of whether the Tribunal had jurisdiction to take certain matters (defined as the Third FX Transaction and the Third Commission Payment) into account. These were said to be different in the Authority's statement of case from the matters referred to as such in the warning notices. The Tribunal concluded (at [995]) that the FCA should "put its cards on the table at the

Warning Notice stage rather than seek to introduce further allegations as the proceedings developed" and went on to comment as follows:

> "998. … [W]e conclude that the starting position is, consistent with the intention of Parliament, that the Tribunal should not in relation to proceedings concerning the imposition of prohibition orders consider facts and circumstances not relied on by the Authority in its Warning Notice unless, in its discretion, it decides that it would be appropriate to do so. In that context, we consider that the term "reasons" as used in s 387 FSMA means, in relation to proceedings seeking the imposition of a prohibition order, the facts and matters on which the Authority relies in coming to its conclusion that the subject of the proceedings is not a fit and proper person and accordingly should be made the subject of a prohibition order. It is clear in this case that the Third FX Transaction is such a matter and in order to be relied on by the Authority the relevant facts relating to that should be accurately formulated and clearly stated in the Warning Notice."

49. The point Mr Temple directs us to here is not the importance of warning notices in the statutory procedure but the Tribunal's reference to the "facts and circumstances" relied on by the Authority, in contrast to the decision it reached after considering those facts and circumstances.

50. Finally, we come to the most recent (and, in the Authority's submission, most controversial) decision, that of this Tribunal in *Bluecrest Capital Management (UK) LLP v FCA*, [2023] UKUT 00140 (TCC). This was a decision on two case management applications, one of which was an application by the Authority to amend its statement of case. The Authority had imposed a financial penalty on Bluecrest for breaches of Principle 8 ("A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client.") and later sought to amend its statement of case to include a breach of Principle 7 ("A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading") and the requirement in the Conduct of Business Rules ("COBS") that "A firm must ensure that a communication or a financial promotion is fair, clear and not misleading". Bluecrest submitted that, as a matter of law, the Tribunal did not have jurisdiction to entertain the amendment, which raised a new case in fact and in law to that relied on in the statutory warning and decision notices. It was not the subject of the original case that Bluecrest failed to communicate relevant information to investors in a way that was clear, fair and not misleading and (Bluecrest submitted) a substantial purpose of the amendments was to add two entirely new cases to the effect that Bluecrest breached obligations under Principle 7 and COBS. The Tribunal held that the allegations the Authority sought to include were not part of the "matter" referred to the Tribunal and so it did not have jurisdiction to determine the Principle 7/COBS case and the Authority could not amend its statement of case to include it.

51. In reaching its conclusion the Tribunal noted (at [192]) that:

> "The freshness of the new Principle 7/COBS case means that the Authority failed to follow the mandatory statutory procedure in respect of them. It did not issue a Warning Notice embodying any such case, as is required pursuant to s 207 FSMA. As a consequence, BCMUK was not afforded any opportunity to make any representations (and to decide whether or not to make representations) to the RDC in respect of the new allegation."

52. An important reason why the allegations of regulatory breach must have been properly before the RDC to form part of the "matter referred" is that this ensures satisfaction (or substantial

satisfaction) of the objective of the statutory notice requirements. The Tribunal cited the following passage from *Markou v FCA*, UKUT 2023 101 (TCC):

> "434.While Mr Brown points out that it is in the public interest for the Tribunal to make relevant findings on all matters under consideration, this should not usurp the Authority's function to decide, with clarity and certainty, the regulatory case that it wishes to pursue. <u>The starting point should be that if the Authority wishes to pursue an alternative or lesser case it should plead this from the outset of enforcement proceedings before the RDC and then the Tribunal itself.</u> Pleadings on a reference to the Tribunal are in no way akin to an indictment in criminal proceedings or particulars of claim in civil proceedings. A reference is a continuation of a regulatory process that has begun by way of a Warning Notice and enforcement proceedings before the RDC. In those proceedings the Applicant is entitled to know the full nature of the allegations, findings and decisions made against him by the Authority in order to consider whether to contest the regulatory action proposed or whether to make a reference to the Tribunal.
>
> 435.An application by the Authority to amend a Statement of Case on a reference, or even to introduce fresh factual or legal allegations without such an amendment, is therefore not akin to amending pleadings in criminal, disciplinary or civil proceedings. In those proceedings allegations are free-standing and the court may exercise its discretion to permit amendments subject to the standard principles of procedural fairness. However, if the Authority seeks to amend factual or legal allegations within a reference, the first question will always be whether they fall within the subject matter of the reference and the Tribunal's jurisdiction."

(The emphasis in paragraph [434] is mine.)

53. In relation to this passage, the Tribunal commented (at [194]) that:

> "This passage emphasises that the proceedings in the Tribunal, although starting afresh and not an appeal, are part of the regulatory process started by the Authority. Therefore, particularly in relation to disciplinary references, the Tribunal stands in the shoes of the Authority and makes a decision as to the appropriate action to take on the basis of the case investigated by the Authority. The scheme did not envisage that the Authority could change significantly the basis of the action it wishes to take when it came to the Tribunal proceedings. Parliament intended that the subject of enforcement action should have the right to have the Authority's decision reviewed through a judicial process but that did not mean that the process in the Tribunal could become significantly divorced from the regulatory proceedings."

54. The Tribunal considered that this feature of the process had been emphasised in *Seiler*, citing paragraphs [1001]-[1012] of that decision, and went on to conclude that:

> "197. In our view it is not necessary to enquire into the extent to which the facts and evidence included in the warning notice and/or canvassed by the RDC could have supported a breach of Principle 7 or COBS. The consistent line of case law requires that the allegations of regulatory breach be at the very least canvassed before the RDC and potentially must be (a) at least referred to if not relied on in the decision notice (Jabre) and (b) fall within the scope of the allegations made in the warning notice for them to form part of the "matter referred". We agree with the Applicant that the failure to present the Principle 7 and/or COBS case at any point prior to the current application goes beyond a failure to attach legal "labels" to the Authority's case. It involves a new and different allegation."

55. In relation to *Jabre* and earlier cases, the Tribunal commented:

> "73. In our view, the authorities demonstrate that where the allegations sought to be introduced by the Authority in its Statement of Case relate to matters which arose after the issue of the warning notice then provided those allegations fall within the scope of the "matter referred" then the Tribunal has jurisdiction to consider those allegations, subject to exercising its case management powers so as to permit the Authority to rely on a matter which was not relied on in the warning notice. In both *Allen* and *Hobbs*, for instance, the subject matter of the relevant reference was whether the applicant was not fit and proper by reason of a lack of honesty and integrity. Thus, the Tribunal had, as a matter of jurisdiction, the power to consider allegations which post-dated the warning notice. Whether it chose to do so, would be a matter for the exercise of its case management powers, taking into account any potential prejudice to the applicant.
>
> 74. Therefore, when the Tribunal is faced with the situation where the Authority seeks to rely on allegations which were not made in the warning notice but could have been the starting point is to consider whether those allegations and the facts relied on in support of the allegations form part of the subject matter of the reference.
>
> 75. We are satisfied that the passages from *Jabre* and the later authorities are to be read as follows. In order for such allegations to form part of the subject matter of the reference and be considered or determined by the Tribunal, they must be of the same nature and based upon the same factual background as the allegations made to the RDC and contained in the warning and decision notices, even if no findings are made upon them therein.
>
> …
>
> 170. As we stated at [75] above, in order for an allegation to form part of the subject matter of the reference and be considered or determined by the Tribunal, they must not only be based on the same factual background as the allegations made to the RDC but also must be of the same nature. In our view, where the allegation is in respect of a different regulatory provision then it cannot be considered to be of the same nature.
>
> 171. The reason we consider that a hard edge should be identified is because, as we observed at [58] and [59] above, Parliament has placed particular importance on the need for there to be a statutory notice which "must" state the reasons for the action the Authority proposes to take. That enables the subject to take an informed decision as to whether to contest the matter contained in the warning notice before the RDC or to contest a matter contained in a decision notice in a reference to the Tribunal knowing clearly what the allegations are being made against him."

56. At [199] the Tribunal then considered *Carrimjee.* In *Bluecrest* the Authority suggested that the Principle 7 allegation regarding Bluecrest failing to make sufficient disclosure was subsumed as a matter of law within the existing Principle 8 allegations. The Authority relied by analogy on *Carrimjee*, where the Tribunal, with the consent of both parties, went on to consider an allegation of a breach of Statement of Principle 2 (acting without due skill, care and diligence) as an alternative to Statement of Principle 1 (a lack of integrity) despite it not being pleaded or pursued before the RDC. The Tribunal in *Bluecrest* noted that the question of jurisdiction was not argued in *Carrimjee* and the alternative case proceeded on an agreed basis. Secondly, the Tribunal did not accept that allegations of failures to communicate or disclose for the purposes of Principle 7 automatically form a subset of the non-disclosure of conflicts for the purposes of Principle 8. As the Tribunal put it, "There is no sense in which a Principle 7 allegation can be <u>automatically</u> deemed to be subsumed within a Principle

8 allegation as an alternative or lesser allegation" (my emphasis). Third, the nature of the factual allegation upon which the Principle 7 amendment relied was to some extent different from that contained within the original Principle 8 allegation.

57. Mr Temple told us that the Authority has appealed the decision in *Bluecrest*, and the appeal is due to be heard by the Court of Appeal over three days in July. The basis of the appeal, he explained, is that the Tribunal failed in *Bluecrest* to consider cases on similar provisions in the Pensions Act 2004 ("PA04") which suggest that, subject to a possible proviso that the Authority cannot seek more onerous sanctions than those sought in the warning notice, the Tribunal is free to consider evidence and allegations beyond those considered by the regulatory authority and reach its own conclusion on the regulatory decision referred to it. In other words, *Bluecrest* (and potentially several of the earlier authorities) wrongly limits the wide jurisdiction given to this Tribunal by Parliament.

The cases on the Pensions Act 2004

58. Under the PA04 The Pensions Regulator ("TPR") can take regulatory action to protect the benefits of members of occupational pension funds, including requiring additional funding from employers and associates, if there are grounds for doing so. The procedure for doing this is similar to the Authority's regulatory procedure with which we are concerned, as (perhaps unsurprisingly) is the language of the relevant statutory provisions. Section 96 of PA04 sets out the "standard procedure" to be adopted, as follows:

> "(2) The "standard procedure" is a procedure which provides for—
>
> > (a) the giving of notice to such persons as it appears to the Regulator would be directly affected by the regulatory action under consideration (a "warning notice"),
> >
> > (b) those persons to have an opportunity to make representations,
> >
> > (c) the consideration of any such representations and the determination whether to take the regulatory action under consideration,
> >
> > (d) the giving of notice of the determination to such persons as appear to the Regulator to be directly affected by it (a "determination notice"),
> >
> > (e) the determination notice to contain details of the right of referral to the Tribunal under subsection (3),
> >
> > (f) the form and further content of warning notices and determination notices and the manner in which they are to be given, and
> >
> > (g) the time limits to be applied at any stage of the procedure.
>
> (3) Where the standard procedure applies, the determination which is the subject-matter of the determination notice may be referred to the Tribunal . . . by—
>
> > (a) any person to whom the determination notice is given as required under subsection (2)(d), and
> >
> > (b) any other person who appears to the Tribunal to be directly affected by the determination."

59. Section 103 of PA04 applies to references to a tribunal and provides:

> "(3) On a reference, the tribunal concerned]may consider any evidence relating to the subject-matter of the reference, whether or not it was available to the Regulator at the material time.
>
> (4) On a reference, the tribunal concerned must determine what (if any) is the appropriate action for the Regulator to take in relation to the matter referred to it.
>
> (5) On determining a reference, the tribunal concerned must remit the matter to the Regulator with such directions (if any) as it considers appropriate for giving effect to its determination.
>
> (6) Those directions may include directions to the Regulator—
>
> > (a) confirming the Regulator's determination and any order, notice or direction made, issued or given as a result of it;
> >
> > (b) to vary or revoke the Regulator's determination, and any order, notice or direction made, issued or given as a result of it;
> >
> > (c) to substitute a different determination, order, notice or direction;
> >
> > (d) to make such savings and transitional provision as the [tribunal concerned] considers appropriate."

60. *Re Bonas Group Pension Scheme,* (UT reference FS/2010/0007), is a decision of this Tribunal on a reference under PA04. In relation to the scope of "the matter referred" in section 103(4), the Tribunal observed:

> "On a reference, the Tribunal must, under section 103(4), determine what (if any) is the appropriate action for the Regulator (which would include the Panel where relevant) to take "in relation to the matter referred to the Tribunal". The matter referred to the Tribunal is, so far as relevant to the present case, the determination which may be referred pursuant to section 96(3). … I should emphasise that what is referred is the determination and not the reasons given for it. The Tribunal will, of course, pay due respect to the reasoning of the Panel and will agree or disagree as the case may be. But what gives the Tribunal jurisdiction is the referral of the determination."

61. Mr Temple drew my attention to paragraph [70] of the decision where Warren J observed:

> "In my view, the Regulator is entitled to argue that the Tribunal should depart from the determination of the Panel so as to exercise the relevant regulatory function in the way which it, the Regulator, considers appropriate at the time when the matter is dealt with by the Tribunal. The Panel, as we have seen, exercises powers on behalf of the Regulator; it is no doubt for that reason that the Regulator itself cannot refer the determination of the Panel to the Tribunal. But once the decision of the Panel has been challenged, there is no reason, in my view. why the Regulator should be bound by that determination. By referring the matter to the Tribunal, the target must accept that he becomes subject to the power of the Tribunal to determine the appropriate action. The Regulator must be allowed, in my judgment, to present to the Tribunal what it sees as the appropriate regulatory action at that time. It may be that it cannot go beyond the relief sought in the warning notice, but that issue does not arise in the present case."

62. Mr Temple sees *Bonas* as authority for the proposition that the Authority can raise new arguments before the Tribunal and that *Bluecrest* is wrong to suggest that consideration of the regulatory process leads to the conclusion that the Authority is limited in the points it can raise in the Tribunal by the arguments raised earlier in the process.

63. I am not sure that paragraph [70] is very helpful to Mr Temple. At this point in his decision, Warren J was considering whether the regulator could argue that a larger contribution should be made by one person than the Panel (broadly equivalent to the RDC) determined. In particular, he was considering how to deal with a situation where a pension shortfall is £2X and the regulator had issued two people (Mr A and Mr B) with a contribution notice of £X each. Mr A refers his determination to the Tribunal and facts come to light which show that Mr A should not be liable. Assuming that the determination against Mr B is before the Tribunal, could the regulator argue for a different outcome to that decided by the Panel, in particular (at [69]) Warren J asked whether it could "argue in favour of a larger sum, at least up to the amount specified in the warning notice?". That is the context of his comments at [70]. Against that background, where the facts and allegations against a person appear to be settled, he considered the regulator could re-open the appropriate action to be taken. Once a determination is referred to the Tribunal, it has full power to determine the appropriate action, so a conclusion that the regulator must be allowed to argue for what it sees as the appropriate regulatory action at the time does not seem to me to be at all surprising. The point did not arise in *Bonas*, but at [69] and [70] Warren J was careful to suggest that the warning notice might limit what the regulator could argue for. That, of course, was exactly the point in *Jabre.*

64. Against that background, I do not consider that paragraph [70] of *Bonas* provides much (if any) support for the proposition that, once a matter has been referred to the Tribunal, the Tribunal can consider any allegations which could be made against an applicant if they are based on the facts and circumstances canvasses in the warning notice.

65. However, later in his decision (at [79]) Warren J considered whether the regulator can seek to rely on different arguments, or different elements of the evidence before the Panel, to support the determination which it seeks, and in relation to that he commented:

> "It is not, I think, possible to answer this question in the abstract; a different argument might, on the one hand, raise a completely new case which is entirely outside the scope of the warning notice properly understood or it might, on the other hand, simply be a new way of putting something the essence of which is already included in the warning notice.
>
> 80. However, it is possible to give an answer in relation to reliance on difference elements of the evidence in some respects. Returning to the example, suppose that a warning notice relies on an act or failure within section 38(5) to justify a contribution notice. Suppose that the evidence within the scope of the warning notice reveals another act which might fall within section 38(5) but is not identified as such in the warning notice. Can the Panel take account of that act in making its determination? In my view it can do so as a matter of jurisdiction but it must act fairly, in particular in relation to the procedure to be adopted, in doing so."

66. He considered the position to be broadly the same in the Tribunal, commenting:

> "84. The position is the same, in my view, on a reference to the Tribunal. Once the relevant determination has been identified (for instance a determination to issue a contribution notice to a person in a specified sum) it is open as a matter of jurisdiction for the Tribunal to rely on any act identified in the evidence before the Tribunal to

support the regulatory action originally sought in the warning notice But it is not open to the Tribunal to decide that regulatory action not identified in the warning notice should be taken."

67. *ITV plc and others v The Pensions Regulator*, [2015] EWCA Civ 228, is mentioned in *Seiler,* but was not included in the Authorities Bundle and was only briefly referred to by Mr Temple. Having read that case for myself, I consider that it is an important authority. The case concerned a reference to the Upper Tribunal of a decision by TPR that five companies should contribute to the Box Clever pension scheme, the point at issue being the extent to which, following a warning notice, TPR can rely on grounds that it did not mention in the warning notice if its action is challenged.

68. The Court of Appeal held that it could. Arden LJ (with whom Floyd and Christopher Clarke LJJ agreed) noted (at [57]-[58]) the importance of warning notices as a protection for targets in the statutory scheme, but there were other protections too (discussed at [61]-[62]). Despite the role of warning notices, she said this at [60]:

> "60. But it is significant that [PA04] does not go on to say that either the Determinations Panel or the Upper Tribunal are constrained in the conclusions they can reach by the absence of a relevant ground in the [warning notice]. In my judgment, the absence of a provision to that effect firmly indicates that Parliament left the question whether the Determinations Panel or the Upper Tribunal could do so to their discretion.
>
> 63. I therefore conclude that Mr Stallworthy and Mr. Hilliard are correct in their submissions that the Upper Tribunal's discretion to allow TPR to rely on additional grounds is not fettered by a threshold test of "good reason". I accept Mr Stallworthy's submission that, as Warren J held in paragraphs 72, 79 and 80 of *Re Bonas Group Pension Scheme*, the Upper Tribunal can on a reference permit further evidence to be filed and receive fresh arguments, and that this supports the conclusion that it must be open to TPR, in an appropriate case, to adduce additional grounds for its proposed regulatory action on a reference to the Upper Tribunal."

69. She made some comments on the Upper Tribunal's decision in that case, as follows:

> "65. Moving from my conclusion that there is no threshold test of good reason, I turn to consider how the Upper Tribunal should approach the introduction by TPR of allegations which go outside the [warning notice]. The test applied by the Upper Tribunal in this case is unclear and unsatisfactory. It is either
>
> - a test of relevancy (paragraph 114), or
> - a test whether the new allegation has been "aired" before the Determinations Panel (paragraph 118) or
> - a test whether the new allegation affected the core allegations against the targets or
> - whether the issue was aired in the WN or before the Determinations Panel or
> - whether the issues formed part of the facts and circumstances before the Determinations Panel (paragraph 171).
>
> 66. In my judgment, each of these tests is in its own way too narrow and too prescriptive.
>
> 67. In my judgment, the exercise of the Upper Tribunal's discretion to allow TPR to raise a new case not contained in the [warning notice] should depend on a consideration of all the relevant factors in the case, and not just the narrow question whether TPR had good reason for seeking to enlarge its case. The Upper Tribunal has to weigh up all the facts and circumstances in deciding

> whether to permit TPR to adopt a new case. It would be impossible to provide a comprehensive list of those facts and circumstances, though I can give a few examples.
>
> 68. The Upper Tribunal has to consider the nature of the new allegations, and their impact on the case. If the new case involves fraud or bad faith, it may be less willing for a new case to be brought forward unless the case is clearly pleaded and appropriate detail given. It has to consider the reasons why the case was not previously put forward.
>
> …
>
> 70. Accordingly, I do not consider that it is sufficient for the Upper Tribunal to conclude that the matters were in some way "aired" at some earlier stage or to limit its inquiry to asking whether the new case arises from facts and matters which were before the Determinations Panel."

There are clearly echoes here of the language used in the analyses adopted by the Upper Tribunal in relation to similar issues in the context of FSMA references.

The Jurisdiction Issue: Discussion and Conclusion

71. There is clearly a tension between the approach to the question of the "matter" referred and the Tribunal's jurisdiction in cases such as *Bonas* and *ITV*, where the provisions of PA04 are concerned, and the approach taken to the corresponding FSMA provisions we are concerned with. The interpretation in the PA04 cases appears to be a much broader one of focusing on the relevant decision (see [36] above), and that informs both the approach to the extent to which the "matter referred" can include fresh allegations and also the different levels of importance accorded to warning notices and the pre-Tribunal proceedings. Like the waters of rivers which meet but do not mix, the Pensions Act cases do not seem to have influenced the approach in the FSMA decisions (The Pensions Act cases were not mentioned in *Bluecrest*, which Mr Temple says is one of the Authority's criticisms of that decision), nor the other way round; see Arden LJ's comments in *ITV* at [72]. As explained by Mr Temple, the basis of the Authority's appeal in *Bluecrest* is that PA04 cases should influence the approach in FSMA cases and that there should be a common approach to the interpretation of the equivalent provisions in both statutes.

72. A second tension is between decisions such as *Jabre* and *Carrimjee,* which would suggest that, before the Tribunal, the Authority can make allegations (that the target has committed a particular regulatory breach) which were not made in the warning notice, as long as the allegations are based on facts and circumstances referred to in the warning notice (and so considered, even if rejected, in coming to a decision) or other evidence which can properly be produced in the Tribunal and the regulatory outcome sought is no more severe (from the point of view of the target) than that for which the Authority argued in the warning notice, and other decisions such as *Khan*, *Seiler* and *Bluecrest*, which suggest that, where the Authority seeks to rely on allegations which were not made in the warning notice but could have been, to be part of the "matter referred" the fresh allegations must be based on the same factual background and of the same nature as the allegations in the warning notice (and thus before the RDC). The difference between these two approaches boils down to the requirement that the new allegations are of the same nature as existing allegations in the warning notice; the requirement that, subject to an exception for facts and circumstances which could not have been included in the warning notice, they arise out of the factual matrix before the RDC is common to both approaches. As to what amounts to an allegation of the same nature, this Tribunal in *Bluecrest* was clear that, where the allegation is in respect of a different regulatory provision, then it cannot be of the same nature.

73. It is not easy to choose between these approaches based on policy. On the one hand, just as in the tax jurisdiction of the tribunals there is a "venerable principle" that the task of the tribunals is to determine the right amount of tax due, not to decide who has the better argument (see, for example, *Shinelock Limited v HMRC*, [2023] UKUT 00107 (TCC)), there is here a public interest in getting to the "right" regulatory outcome, in particular ensuring, so far as possible, that persons who are not fit and proper persons to perform functions in relation to a regulated activity are precluded from doing so. On the other hand, Parliament has established a process for resolving disputes between a subject of enforcement action and the Authority, which is based on through, fair and effective administrative decision-making procedures, which are less formal, less expensive and quicker than tribunal or court proceedings. These involve a process of investigation, followed by warning and decision notices. Those objectives will be compromised if the Authority does not ensure that all relevant matters are placed on the table at the warning notice stage. That is why it has been observed, on several occasions (see, for example, *Seiler* at [1010]), that it is generally to be expected that the Authority will have completed its investigation before the commencement of regulatory proceedings and will carry forward the same case both through the regulatory proceedings and into the Tribunal.

74. The Authority is not seeking to introduce any new evidence here. It simply submits that, if the facts do not support an allegation of lack of integrity (which includes reckless behaviour as well as outright dishonesty), they would allege that the Applicants have not behaved with due skill and care, in other words they were negligent. If I were to follow what I have described as the broader approach, I would conclude that the matter referred could include an allegation of a lack of skill and care if it were no more than a new analysis of facts already included in the warning notice and there were no suggestion that it should lead to a more stringent sanction. If I were to follow the approach in *Bluecrest*, then the new allegation would not be part of the "matter referred" as what is alleged is a breach of a different Principle.

75. As I have already indicated, there is a clear and obvious tension between the approaches to the question of the "matter referred" in the PA04 cases on the one hand and those on similar provisions in FSMA. I have considered whether the decision of the Court of Appeal in *ITV* is binding on me or otherwise is a decision which I should follow. Clearly, if the approach in *ITV* is mapped across into the FSMA provisions, then it is hard to see how, at least as a matter of jurisdiction, the alternative allegation could not be raised.

76. The decision in *ITV* is a decision on provisions of PA04 and, therefore, is not binding authority on the interpretation of similarly worded provisions in FSMA. It is, of course, a decision which should be taken into account in construing similarly worded provisions in FSMA, but it is not possible for me to determine the extent this should be the case. Although the provisions in PA04 are similarly worded to those in FSMA and both sets of provisions are dealing with a similarly structured statutory process, there are differences between the two regimes which may make it inappropriate to construe the two sets of provisions in the same way. By way of example, the financial support which can be required under PA04 is not fixed by statute, depends on such matters as TRP thinks relevant and fault is not a necessary condition for liability (although it is something which can be taken into account). On the other hand, the FSMA provisions are very clearly penalty provisions based on fault. Secondly, as Arden L J noted in *ITV*, whilst warning notices are an important part of PA04 regime, there are other protections for the target (see paragraph [61]). During these proceedings, we have not analysed the two regimes and the protections they offer and contrasted them. Finally, proceedings between the Authority and the subject of regulatory action are proceedings between the two parties. On the other hand, in PA04 cases parties other than TPR itself (for example pension scheme trustees) can participate in the proceedings. The Court of Appeal will have the benefit of three days of argument

on this issue in July, but, for myself at this stage, I cannot gauge the relevance of the approach in *ITV/Bonas* to the interpretation of the relevant FSMA provisions.

77. Turning to the decisions of this Tribunal on the FSMA provisions, clearly none of those decisions is binding on me, but (following the approach outlined at paragraph 32 of Halsbury's Laws of England, volume 11(2020)) I consider that I should follow the approach taken in those decisions, unless I am convinced that any of them is wrong, which I am not. Further, to the extent there is conflict between (or, perhaps more accurately, evolution over the course of) any of those decisions, then I should follow the later decision if it is reached after full consideration of earlier decisions. Since the decision in *Bluecrest* was clearly reached after full and careful consideration of the earlier decisions of this Tribunal on the relevant FSMA provisions, then I consider that I should follow that decision.

78. It follows from what I have just said that I will approach the question of jurisdiction on the basis that there is no jurisdiction to entertain the Authority's alternative argument, given that it was not articulated in the warning notice, unless it is of the same nature and based on the same facts as allegations which were. Subject to the points discussed immediately below, given that the new allegation relates to a breach of Principle 2 whereas the articulated allegations relate to Principle 1, the new allegation is not of the same nature as allegations contained within the warning notice.

79. The next question is whether a shift from an allegation of lack of integrity (at lease where recklessness rather than dishonesty is alleged) to one of a failure to exercise due skill and care involves making an allegation of a different nature. Mr Temple submits that this is not the case (even though it involves moving from Principle 1 to Principle 2). So, he says, even if *Bluecrest* is correct, then the new allegation could still be part of the "matter referred".

80. Mr Temple says that, as a rule, the Authority does not plead negligence (Principle 2) as an alternative to recklessness (Principle 1) where they are both value judgments which could be reached in relation to the same conduct. (I pause to observe that this is a surprising position to adopt bearing in mind the observations in *Markou*.) Whilst there is a difference between moving between Principles 7 and 8, which involve doing (or failing to do) different things, moving between Principles 1 and 2 does not involve considering different facts, just forming a different view on the same facts. Mr Temple noted the Tribunal's comment that "There is no sense in which a Principle 7 allegation can be automatically deemed to be subsumed within a Principle 8 allegation as an alternative or lesser allegation" (my emphasis again), but it might be said that an allegation of negligence could be subsumed within Principle 1 as an alternative or lesser allegation. Put another way, if a person alleges recklessness on the part of another, they cannot possibly accept that they acted with due care and skill. Finally, Mr Temple noted that the Tribunal in *Bluecrest* did not say that it thought *Carrimjee* was wrongly decided; it merely noted that it proceeded on the basis that it was common ground that an allegation of a breach of Principle 1 automatically engaged Principle 2.

81. Attractive though this approach is, I do not consider this is an approach we should adopt at this stage. I say this because:

- At [171] the Tribunal in *Bluecrest* very clearly stated that there should be a "hard edge" between hitherto unarticulated allegations which form part of the matter referred and those that do not. That hard edge is the "same nature" requirement and, whatever else may be an allegation of a different nature, allegations referring to different regulatory provisions will be. To adopt Mr Temple's approach would be to blunt the hard edge.

- In any event, I am not persuaded that an allegation of failure to use due skill and care is of the same nature as an allegation of acting recklessly and without integrity. For example, the SJB Decision Notice the Authority say (at paragraph 2.3) that Mr Burdett "was aware of the obvious risk that the Model Portfolios were high risk and unsuitable for the pension holders … Despite knowing of this risk, he unreasonably caused Synergy to recommend the Westbury SIPP to most of the pension holders. His conduct was reckless." Similar allegations of actual knowledge and ignoring a risk "which he must have recognised" are made at 2.7, 2.8 and 2.12. Although not phrased in the same way, the essence of the allegations in the JPG Decision Notice is that Mr Goodchild acknowledged (and so was aware of) risks which made the Model Portfolios he designed unsuitable for the SIPP investors and yet he still proceeded with them. To my mind, there is a material difference between alleging that someone has been reckless (as alleged here, deliberately carried on in the face of a known risk that made the proposed course of action obviously unsuitable) and alleging that a person did not have, or did not use, the required level of skill or was not sufficiently careful or diligent. Recklessness, at least as alleged here, involves knowing/appreciating an obvious risk and proceeding despite this, whereas a failure to act with due skill, care and diligence does not engage the same level of conscious culpability. Without a shadow of doubt, both allegations engage blame, but the degree and nature of the misconduct are very different between the two types of behaviour, and the two allegations are not of the same nature.

- Whilst an allegation of negligence is clearly less serious than one of recklessness or dishonesty, it is not a trivial matter. We can see that here because the Authority does not suggest that "merely" demonstrating negligence should lead to a lesser penalty. A person who is alleged to have failed to use due skill and care should be told that, so that they can prepare their defence, and not be left to guess that it might be alleged if the Authority fails to bring home its primary contention.

- It is possible that a subject who thought they were only being accused of demonstrating a lack of integrity might have a different view of their chances of success if they also had to defend an allegation of negligence in the alternative. Clarity and openness by the Authority are more likely to bring about the swift and fair outcomes the statutory process is set up to achieve.

- These considerations support the approach in *Markou* (cited at [54]) that, "The starting point should be that if the Authority wishes to pursue an alternative or lesser case it should plead this from the outset of enforcement proceedings before the RDC and then the Tribunal itself." As this Tribunal indicated in *Bluecrest* (at [196]), considerations of this nature go to the jurisdiction question as much as to the discretion issue.

The Alternative Allegation: The Discretion Issue

82. If I had decided that the Tribunal had jurisdiction to consider the proposed amendments relating to the alternative allegation of negligence, I would have needed to consider whether, in exercise of my discretion, I should permit the Authority to amend its statements of case in that regard.

83. In exercising its power under rule 5(3)(c) of the Rules to permit a party to amend a document, the Tribunal should have regard to the overriding objective as set out in rule 2, asking whether it would be fair and just to permit the Authority to add the allegation. It should also have regard to the relevant factors set out by Judge Herrington in *Bittar v Financial Conduct Authority*, [2017] UKUT 82 (TCC) at [53] to [55], which are:

(1) that the proposed amendments have real (as opposed to "fanciful") prospects of success;

(2) the timing and circumstances in which the proposed amendments are advanced;

(3) whether there is a good reason why the relevant allegations were not advanced sooner; and

(4) whether the proposed amendments have been formulated with sufficient clarity and particularity.

84. As far as the first factor referred to in *Bittar* is concerned, it has not been suggested by either Applicant that the pleading is bad in law or that the pleaded facts and circumstances could not support a finding of lack of due skill and care. However, as I indicated at [81], a lot of the language of the Decision Notices pleads a level of conscious wrongdoing which is hard to equate with a distinct allegation of lack of due skill and care. That notwithstanding and not without some reservations, I am satisfied that the Authority would have a more than fanciful prospect of success in establishing a lack of due skill and care based on its proposed amended statements of case if it failed to establish recklessness/lack of integrity.

85. As regards the timing of the amendment, if I had allowed the statements of case to be amended now (and ignoring the complicating feature of the Authority's appeal in *Bluecrest* for the moment, but see more on this at [71]-[73] below), there would have been plenty of time (even with a substantive hearing scheduled for early 2025) for the Applicants to respond to an alternative analysis of the same facts and circumstances which have been pleaded for some time. The underlying facts and circumstances which the Authority says support the allegation made by the amendment are the same as those before the RDC and are already pleaded in the statements of case.

86. As to whether there was a good reason why the relevant allegations were not pleaded earlier, the reason given by the Authority is that the amendments are a response to the decision in *Bluecrest*, which has made them aware of the need to be open and specific about their allegations. As we have already noted, the Authority's policy (Mr Temple tells us) before that decision would have been not to plead negligence as an alternative to recklessness on the same facts. I have noted the comment in *Markou*, which suggests that this is not a sound approach, but the assumption of the Tribunal in *Carrimjee* (that negligence would automatically be considered as an alternative to recklessness) might appear to lend some support the Authority's practice. The Authority's explanation of why this allegation was not previously raised is understandable, if not in line with best practice as articulated in the authorities.

87. I accept that the proposed amendment is set out with appropriate detail and clarity. In my view, there can be no suggestion that the Applicants are unable adequately to respond to the proposed case.

88. Looking at the factors in the round, I would have concluded that the Applicants would not have been prejudiced by the proposed amendments, to introduce the alternative allegation of negligence, and would have allowed the Authority to make them if I had concluded that the Tribunal had jurisdiction to do that.

Conclusion on the Alternative Allegation

89. I have concluded that the alternative allegation is not part of the matter referred and so I will refuse the Authority permission to amend its statements of case to include that allegation.

Other amendments to the statements of case

68. In addition to the principal amendment sought by the Authority, it seeks to amend the two statements of case in some other, more minor regards. I will deal first with the proposed amendments to the statement of case relating to Mr Burdett. Leaving aside minor corrections, the first significant change is at paragraph 57, where the Authority seeks to change its submission that Mr Burdett gave instructions to Mr O'Donovan. Their focus is now on Mr Burdett's role in establishing the structure, rather than giving detailed instructions to Mr O'Donovan. This change results from new evidence received from Mr Burdett and, Mr Temple submits, the statement of case should reflect the (different and potentially less serious) allegations the Authority now considers it should make. The same points arise in relation to paragraph 63A and 67, which put more focus on Mr Burdett's role in establishing the overall structure, rather than giving instructions to Mr O'Donovan (who is no longer available as a witness). The Authority has also withdrawn its submission (in paragraphs 100 et seq) that Mr Burdett provided misleading information to others at SWUK and Synergy. Mr Burdett is, understandably, annoyed that the Authority appears to be changing its case and, in particular, that it has started proceedings against him and, at least as far as these points are concerned, has now "watered down" the allegations made against him. Mr Temple's response to this is to point to the large tracts of the statement of case which remain unamended and to make the points that these amendments are not prejudicial to Mr Burdett and that it makes sense for the statement of case to reflect the position the Authority now adopts in the light of evidence subsequently presented to it.

69. Turning now to Mr Goodchild's statement of case, the only change proposed here (beyond those consequential on the introduction of the alternative allegation) is to remove the Authority's reference to an email which the Authority now accepts relates to a different pension scheme not under consideration here. I can see no prejudice to Mr Goodchild in removing this paragraph.

70. So, whilst I can understand Mr Burdett's exasperation, I consider that neither Applicant is adversely affected (indeed to some extent they are assisted) by the Authority's proposed changes, which result from a consideration by the Authority of material subsequently provided to it, and accordingly I give permission for the Authority to amend (in Mr Burdett's case further amend) its statements of case to that extent.

Adjournment

71. Finally, I should consider Mr Temple's suggestion that, if I consider myself bound to conclude that I should not allow the statements of case to be amended on the basis that the Tribunal does not have jurisdiction to admit the alternative allegation, I should consider adjourning consideration of this question until the Court of Appeal has given its decision in the Authority's appeal in *Bluecrest*.

72. [Redacted]

73. [Redacted]

74. I have decided that the way forward which is most consistent with the overriding objective would be to refuse the Authority permission to amend its statements of case to introduce the alternative allegation of lack of due skill and care at this time, but to give it permission to renew that application at any time no later than three months before the first scheduled day of the substantive hearing if at that time the Court of Appeal has given its judgment in *Bluecrest* and it has become clear that that decision will not be the subject of an appeal. (I have selected a period of three months to allow a month to consider the Authority's application and two months for the Applicants to prepare for the substantive hearing in light of the amended statements of case if the Authority is allowed to make the amendments it seeks.)

OTHER DIRECTIONS

75. In the Schedule to this decision notice, I set out directions for the future conduct of the references up to the substantive hearing. These were largely uncontentious.

DISPOSITION

76. In conclusion, for the reasons set out above:

(1) the Privacy Applications are refused.

(2) I refuse permission for the Authority to amend its statements of case to include alternative allegations of lack of due skill and care, but give it permission to renew that application as set out in paragraph [74];

(3) I give the Authority permission to make the other amendments to the statements of case it proposes.

(4) I direct that the two references are to be case managed and heard together; and

(5) I make the further directions set out in the Schedule to this decision notice.

DEPUTY UPPER TRIBUNAL JUDGE MARK BALDWIN

RELEASE DATE: 04 June 2024

[NOTE: This decision was not originally published. Following an application by the Authority, and after considering representations from the Applicants, Judge Baldwin directed that this decision should be published subject to the redaction of paragraphs [72] and [73], which contain personal information in relation to one of the Applicants which is unnecessary for a proper understanding of the decision.]

SCHEDULE

1. The substantive hearing of the references shall be listed commencing on, or as soon as possible after, 6 January 2025 with a time estimate of up to 8 days.

2. Each party shall be deemed to admit the authenticity of a document referred to on the lists of documents unless he or it serves a notice on the relevant party that he or it wishes the document to be proved at trial. A notice to prove a document must be served not later than 28 days after receipt of a list or 19 April 2024, whichever is later. If thereafter further documents are added to the lists of documents, an appropriate deadline for any further notice to prove a document shall be agreed.

3. The Applicants and the Authority shall serve and file with the Tribunal the statements of all witnesses upon whom they intend to rely by 21 June 2024.

4. If a party considers that there are additional persons ("Potential Witnesses") whose evidence would assist the Tribunal, he/it must notify the other parties and the Tribunal by 12 July 2024 and the Tribunal will convene a case management conference to consider whether any further directions should be made in relation to the Potential Witnesses.

5. Each party shall serve and file with the Tribunal any supplemental witness statements in response to the statements served pursuant to paragraph 3 above by 13 September 2024.

6. The parties may not (unless otherwise directed) call a witness unless a signed written statement of the evidence of that witness has been served in accordance with paragraphs 3 and 5.

7. The witness statements served in accordance with paragraphs 3 and 5 shall stand as evidence in chief.

8. Each party shall confirm by no later than 4 weeks prior to the substantive hearing the identity of those witnesses whose witness statements have been served in accordance with these Directions and whose attendance is required for the purpose of cross examination.

9. The parties have permission to rely on expert evidence in relation to the risks, and risk level, of the TRG Investments and Model Portfolios (as defined in the Authority's Statements of Case). Such evidence shall be exchanged as follows:

    - The Authority shall file its expert report by 27 September 2024.
    - The Applicants may each file an expert report by 25 October 2024.
    - If one or both of the Applicants files an expert report, the experts shall hold discussions, by 22 November 2024, for the purpose of identifying the issues, if any, between them and, where possible, reaching agreement on those issues.
    - If one or both of the Applicants files an expert report, the experts shall prepare a joint statement, setting out the issues on which they agree and disagree by 6 December 2024.

    If a party wishes an expert to attend the substantive hearing for cross examination, it must confirm this by the later of 13 December 2024 and 4 weeks prior to the substantive hearing.

10. Should the Applicants make an application for any disclosure accompanied by detailed written reasons, the Authority must respond in writing 14 days thereafter.

11. If the Applicants remain of the view that they consider an oral hearing is needed in relation to disclosure, they should specify this in their application. Determination of any disputed disclosure application for which the Applicants seek a hearing is to be listed for half a day for the first available and convenient date after receipt of all written submissions on the issue.

12. Each party shall provide to the Tribunal an updated time estimate for the trial by 13 December 2024.
13. The Authority shall prepare and serve the Applicants with a paginated draft electronic hearing bundle index no later than 8 weeks before the first day of the substantive hearing.
14. The Applicants shall reply to the Authority in respect of the draft hearing bundle index no later than 6 weeks before the first day of the substantive hearing.
15. The parties shall agree a final paginated electronic hearing bundle index no later than 4 weeks before the first day of the substantive hearing including any additional documents upon which any of the parties rely.
16. No later than 1 week before the first day of the substantive hearing, the Authority shall prepare and provide to the Applicants and the Tribunal the final paginated electronic hearing bundle.
17. The Authority shall serve on each Applicant a written skeleton argument (including a suggested reading list for the Tribunal) no later than 10 clear days prior to the substantive hearing.
18. Each Applicant shall serve on the Authority and the other Applicant a written skeleton argument (including a suggested reading list for the Tribunal) no later than 5 clear days prior to the substantive hearing.
19. No later than 2 clear days prior to the substantive hearing, the Authority shall prepare and provide to the Applicants and the Tribunal a paginated electronic authorities bundle containing copies of all legislation and authorities referred to by the parties in their skeleton arguments.
20. If the Tribunal notifies the parties on or before 2 clear days prior to the substantive hearing, by no later than 5 pm on 1 clear day prior to the substantive hearing, the Authority shall provide to the Tribunal by email an electronic copy of a Core Bundle which shall comprise, unless otherwise directed:
    - The Authority’s amended statements of case and the Applicants’ replies;
    - The skeleton arguments of the parties served in accordance with these Directions;
    - The witness statements (but not any exhibits thereto) served in accordance with these Directions; and
    - Any other documents which either party has requested, in its skeleton argument, that the Tribunal read prior to the hearing (other than authorities).
21. If the Tribunal notifies the parties that it will in addition to the electronic hearing and authorities bundles, require a hard copy of the Core Bundle and / or the hearing bundle and/or the authorities bundle, the Authority shall place in court no later than 9.30am on the first day of the hearing such number of copies of the hearing bundle and the Core Bundle, and the bundle of authorities as the Tribunal shall notify is required.
22. There be liberty to all parties to apply to vary or for further directions.