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Case No: CO/410/2011

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 May 2012

Before :

MR JUSTICE SILBER

- -

Between :

The Queen (on the application of C)	**Claimant**
- and -	
FINANCIAL SERVICES AUTHORITY	**Defendant**

- -
- -

Dinah Rose QC and Ben Jaffey (instructed by **Herbert Smith LLP**) for the **Claimant**
Michael Brindle QC and Michael Green QC (instructed by **Financial Services Authority**) for the **Defendant**

Hearing dates: 3 and 4 April 2012
Further written submissions submitted on 5 and 6 April 2012

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE SILBER

It would frustrate the relief sought for the Claimant's identity, and the precise allegations made against him by the FSA, to be publicly disclosed at this stage. Paragraphs [21-26] set out a limited factual summary to put this judgment into context. The proceedings to date have been heard in private, with anonymity granted to the claimant. The anonymity granted to the Claimant may be lifted in the future depending on whether his name becomes public in the ordinary course of disciplinary proceedings. If so, this judgment will be published in full and the anonymity order will be lifted.

Accordingly, this judgment has been published in its present form to protect the claimant's identity. The full judgment has been provided, in confidence, to the parties.

MR JUSTICE SILBER:

I. Introduction

1. The claimant challenges the decision of the Regulatory Decisions Committee ("RDC") of the Financial Services Authority ("FSA") to issue a Decision Notice to him dated 27 October 2010, pursuant to the provisions of Section 67 of the Financial Services and Markets Act 2000 as amended ("the 2000 Act"). The Decision Notice censured the claimant and it imposed a fine of £100,000 on him for alleged breaches of Principle 6 of the FSA's Statements of Principle for Approved Persons ("Statements of Principle").

2. The case for the claimant is that the Decision Notice is flawed and that it should be quashed because the RDC has failed to give proper or adequate reasons for its decision in breach of its duty to do so.

3. The FSA contends that adequate reasons were put forward, but their main ground for resisting this claim is that a claim for judicial review cannot be pursued on the grounds that the claimant has available to him an alternative remedy, namely a reference of his case to the Upper Tribunal pursuant to the provisions of Section 67(7) of the 2000 Act.

4. The claimant submits that a reference to the Upper Tribunal is not an adequate alternative remedy, because the central purpose of requiring reasons from the RDC was to enable him to decide whether or not to refer the matter to the Upper Tribunal because of the risks of taking that step which I will explain. So his case is that such a reference cannot therefore be an adequate remedy for the RDC's failure to provide proper reasons. It is also said on behalf of the claimant that the Upper Tribunal's task is to conduct a full *de novo* re-hearing of the substance of the matter, but crucially first that it had no jurisdiction to quash the decision of the RDC or to require that body to give reasons for its decision, and second that it can increase both the charges and the penalties imposed by the RDC.

II. The FSA's Disciplinary Process

(i) The role of the FSA

5. As is well known, the FSA regulates financial services markets in the United Kingdom. This entails authorising firms to conduct "*regulated activities*" as well as

setting the standards that they must meet. The relevance of that to the present case is that Bank D was an authorised firm regulated by the FSA.

6. Under Section 59 of the 2000 Act, authorised firms, such as Bank D, are required to take reasonable care to show that no person performs a "*controlled function*" in relation to the regulated activities of that firm unless the FSA first approves that person to perform that controlled function. One such "*controlled function"* is the function of being a director of an authorised firm. Under section 61 of the 2000 Act, the FSA may only give that approval if it is satisfied that the person concerned is a fit and proper person to perform the relevant function. During the relevant period, the claimant was approved by the FSA to perform a controlled function of Bank D.

7. The FSA is empowered by section 64 of the 2000 Act to issue Statements of Principle setting out the conduct expected of approved persons, and among the seven statements of principle issued by the FSA there is: -

> Statement of Principle 6
>
> "*An approved person performing a significant influence function must exercise due skill, care and diligence in managing the business of the firm for which he is responsible in his controlled function.*"

8. Section 66 of the 2000 Act empowers the FSA to take action against a person if it appears to the FSA that he or she has failed to comply with a Statement of Principle issued under section 64 of the 2000 Act and the FSA is satisfied that it is appropriate in all the circumstances to take action against him. The FSA may impose a penalty of such amount as it considers appropriate and may publish a statement of his or her misconduct. The process leading up to the imposition of a penalty has a number of prescribed stages.

(ii) The Investigation process

9. First, Part XI of the 2000 Act gives the FSA powers to gather information and to carry out investigations for the purpose of enabling it to fulfil its regulatory functions. Thus section 168 of the 2000 Act entitles the FSA to appoint one or more persons to conduct an investigation on its behalf where it appears to the FSA that there are circumstances suggesting that a person may not be a fit and proper person to perform a controlled function, or that he or she may have failed to comply with a statement of principle with the consequence that he or she may be guilty of misconduct under section 66 of the 2000 Act.

10. Substantial powers are given to investigators appointed pursuant to these provisions. The fact that an investigation is or is not being carried out or the findings of an ongoing investigation are all matters which are not normally published. In addition, the FSA notifies persons it contacts in relation to any investigation that the investigation is a confidential matter and that it should be treated by them as such. Those bodies which have been contacted, are required not to discuss or to disclose details of the investigation with any party other than their legal advisors.

11. At the conclusion of the investigation, the Enforcement Division of the FSA has to decide if disciplinary action is merited and, if so, it sends to the subject of the investigation a Preliminary Investigation Report ("PIR") setting out the findings of fact that the investigators consider to be relevant to matters that are under investigation and the preliminary conclusions of the Enforcement Division on those findings. It is common ground that the policy of the Enforcement Division is to provide the subject of the investigation with a reasonable period of time in which to provide comments on the PIR before determining whether to commence disciplinary proceedings.

(iii) The recommendations to the RDC

12. So it follows that if the Enforcement Division after considering any response to the PIR considers that disciplinary action is merited, it must make recommendations to the RDC that a warning notice be issued. The procedure adopted is that the Enforcement Division makes the recommendation by submitting the PIR, its submissions and a draft warning notice to the RDC for consideration. The RDC is the body of the FSA charged with the task of making decisions for the purpose of deciding whether or not to issue a warning notice or a decision notice under section 67 of the 2000 Act.

(iv) Review by the RDC

13. The RDC, which is a committee of the Board of the FSA, exercises regulatory powers and it is accountable to the Board of the FSA for its decisions, but it is important to bear in mind that it is separate from the FSA's executive management structure. Apart from its Chairman, none of the members of the RDC is employed by the FSA. The RDC has its own legal advisers and support staff, who are all separate from the FSA staff involved in conducting the investigation and in making recommendations to the RDC. Thus, there is a clear division between the RDC and the Enforcement Division.

14. When determining whether to issue a warning notice, the RDC must satisfy itself that the action recommended by the Enforcement Division is appropriate in all the circumstances. That means that the RDC has to consider the matter and it may seek additional information or clarification of any relevant matter.

(v) Issuing of the Warning Notice

15. If the RDC decides that the FSA should issue a warning notice proposing disciplinary action, it must settle the wording of the notice. Section 387 of the 2000 Act requires that the warning notice must be in writing and that it must:-

    (a) state the action, which the FSA proposes to take and give reasons for the proposed action;

    (b) specify a reasonable period for the recipient of the Warning Notice to make representations to the FSA regarding the approved action; and

    (c) provide the recipient of the Warning Notice with access to material on which the FSA relies.

(vi) The representation process

16. The recipient of a warning notice has a right to make both written and oral submissions to the RDC concerning the action proposed in the warning notice. A period of at least 28 days has to be allowed to enable the recipient to make written representations, while if oral representations are requested, a date has to be fixed for a meeting at which the RDC will hear those representations.

17. The meeting is conducted so as to enable the recipient to make representations and the Enforcement Division is entitled to respond to the representations. At that hearing, the RDC can also raise points or questions regarding the matter and the recipient of the warning notice is entitled to respond to any points made by the Enforcement Division or the RDC.

(vii) The Decision Notices

18. Before deciding whether to issue a decision notice, the RDC must review the material before it and consider the written and oral representations made as well as any comments by FSA staff or others in respect of the representations. The RDC then has to consider whether to issue a decision notice and its terms.

19. Section 388(1) of the Act requires that a decision notice must, among other things, set out the FSA's "*reasons for the decision to take the action to which the notice relates*". I will return to consider what this duty entails and whether the reasons given by the RDC in relation to the claimant were adequate.

(viii) The Right of Reference to the Upper Tribunal

20. Section 67(7) of the 2000 Act provides that where the FSA decides to take action against a person for misconduct and to issue a decision notice, that person has the right to refer the matter to the Upper Tribunal. Under section 133(5) of the 2000 Act, the Tribunal has to determine what, if any, is the appropriate action for the FSA to take in relation to the matter referred to the Tribunal. When it has determined the reference, the Upper Tribunal must remit the matter to the FSA with such directions as it considers appropriate for giving effect to its determination: section 133(6) of the 2000 Act. I will return to consider how the Upper Tribunal conducts its hearings and its powers on a referral.

III. The Background to this Application

21. From about the middle of 2007, the financial services sector experienced a period of difficulties with problems of increasing bad debts and a need for liquidity support.

22. These problems caused Bank D to take a number of steps to protect its financial position and they included increasing its liquidity and seeking advice from external advisers about the impact of the financial crisis on Bank D's business.

23. At the time of the relevant events in 2008, the claimant was approved by the FSA to perform a "*significant influence function*" (as defined by the then-in-force FSA supervision handbook at SUP 10.4.5) at Bank D. As such, the FSA's Statements of

Principle (as explained at paragraph 7 above) applied to the claimant's performance of the duties attaching to that role.

24. The issues before the RDC included disputed factual issues, such as the date and time at which certain information became available, the matters that were discussed at certain meetings, and the steps that were taken by the claimant to supervise those reporting to him. The RDC also considered disputed matters of judgment, such as the correct approach to analysing a set of figures, the correct conclusion to be drawn from those figures, the correct way to act on that conclusion, and whether the claimant's supervision of others was adequate. Also in issue was the effect on Bank D of the claimant's alleged failings.

25. Following the RDC hearing, the FSA issued a Decision Notice finding that during a two-week period in 2008, the claimant was (or should have been) aware of certain information within the claimant's area of responsibility, but failed appropriately to review, draw proper and correct conclusions from, or escalate that information. The FSA also found that the claimant failed to supervise relevant team-members in relation to the information in question.

26. These failings are said to have resulted in an incorrect public statement being made by Bank D, but it is not alleged that they otherwise negatively affected Bank D's position or performance. The failings are alleged by the FSA to amount to misconduct, in the form of a breach of Principle 6, which requires "*due skill, care and diligence in managing the business of the firm for which he is responsible*".

IV. The Investigation of the Claimant

27. On 27 March 2009, the FSA notified the claimant that it had appointed investigators to conduct an investigation on its behalf and the basis of it was that there were circumstances suggesting first that he may have been guilty of misconduct under section 66 of the 2000 Act, by failing to comply with Statements of Principle 5 to 7, and second that he might not be a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised firm.

28. The more particularised allegations were that the claimant played a key role in determining the appropriate levels of risk for Bank D to assume.

29. The basis of the investigation was that the claimant failed in his duties to ensure that (a) Bank D's Board was provided with accurate information, and that (b) effective systems and controls were put in place to enable Bank D to properly and effectively identify, assess, mitigate and monitor such risks. In essence, the FSA believed that the claimant had failed to ensure that effective risk management was in place at Bank D.

30. The investigation was complex and the claimant was provided with over 23 lever arch files worth of material by way of pre-interview disclosure, and he was then interviewed by the investigators for a total of 3 days. Many of the allegations against the claimant were not substantiated and the only complaint, which survived the investigation, was that he had breached Statement of Principle 6 during a two-week period.

31. The PIR presented what the claimant considered to be a highly misleading picture of the facts and the evidence as well as a number of factual inaccuracies on key points, which were highly significant to the allegations made. The Enforcement Division invited the claimant to comment on the PIR by 12 April 2010. Notwithstanding this time limit and before the claimant had an opportunity to comment on these matters, on 19 March 2010, the Enforcement Division sent the PIR, submissions, and a draft warning notice to the RDC recommending the censure of the claimant and the imposition on him of a financial penalty of £150,000. The claimant contends that in consequence, he therefore had no opportunity to influence the Enforcement Division recommendation to the RDC before it was made.

32. In light of the fact that the Enforcement Division appeared already to have reached concluded views about his conduct, the claimant decided that it would be more appropriate to make written and oral representations to the RDC, in the event that the RDC determined that a warning notice should be issued. So when the RDC considered the matter in order to determine whether to issue a warning notice, therefore, it had not received any representations from the claimant on the matters set out in the PIR and in the draft Warning Notice.

33. A warning notice was issued by the RDC to the claimant on 14 May 2010 ("the Warning Notice").

34. On 16 July 2010, the claimant submitted detailed written representations running to some 100 pages, with supporting documents in response to the Warning Notice. On 23 August 2010, the Enforcement Division filed a written response to the claimant's written representations. The RDC hearing took place on 14 September 2010 at which oral representations were made by the claimant and by his solicitors on his behalf. The Enforcement Division also made submissions at the meeting, and the RDC asked both the claimant and the Enforcement Division questions about the case.

35. The thrust of the claimant's case was that he had complied with Principle 6.

36. The claimant contends that at the hearing before the RDC, certain factual matters were accepted by the Enforcement Division to be incorrect and I will return to consider these points, which the claimant contends were concessions in paragraphs 45ff below. The significance of these concessions was that the claimant contends that they meant that if the RDC were to decide that disciplinary procedure was appropriate, it would need to revisit the allegations set out in the Warning Notice and then to amend them before issuing any decision notice. On 27 October 2010, some six weeks after the RDC meeting, the RDC issued a decision notice to the claimant ("the Decision Notice"). It was in the same terms as the Warning Notice, save that:-

    (a) The Decision Notice imposed a penalty of £100,000 rather than the £150,000 proposed in the Warning Notice;

(b) Certain mitigating factors previously included in the Warning Notice had been removed;

(c) One of the points of mitigation retained from the Warning Notice had been amplified;

(d) A summary of the claimant's representations had been included;

(e) The FSA confirmed that it was not satisfied the claimant had complied with his duties; and that

(f) One additional sentence had been added to the FSA's conclusions, stating that "*You failed to take a necessarily pro-active approach to your responsibilities and thus failed to adequately deal with the emerging information throughout the relevant period. In doing so, you failed to recognise the changes in the "…" information which indicated a material change in the figures*".

V. The Present Proceedings and the Issues.

37. The present judicial review proceedings were commenced on 17 January 2011 and the FSA contended that permission should be refused, because the claimant had an alternative remedy, namely a right to refer the matter to the Upper Tribunal. When I was asked to consider the application for permission on paper, I would normally have resolved the issue of whether the claimant had a suitable alternative remedy at the permission stage. In this case, the claim reached the threshold for granting permission because it was linked to the alleged failure to give reasons in the Decision Notice with the consequence that the right to make a reference to the Upper Tribunal would arguably not be a suitable alternative remedy.

38. I therefore gave permission on the basis that the issue of whether the claimant had a suitable alternative remedy could be dealt with on the substantive hearing and that is what has happened. I have had the benefit of full and impressive oral and written submissions on this issue from Ms Dinah Rose QC for the claimant and Mr. Michael Brindle QC for the FSA.

39. The case for the claimant is that judicial review applications should be rejected where there is a suitable alternative remedy, but that in this case, a hearing in front of the Upper Tribunal would not be a suitable alternative remedy for the failure of the RDC to give adequate reasons. Ms Rose contends that reasons for the decision of the RDC were and are needed in order to enable the claimant to decide whether to refer the matter to the Upper Tribunal, and that was an important decision for the claimant because the Upper Tribunal can increase the charges and it can also impose a more onerous penalty than the RDC. Thus she contends that in the particular circumstances of this case, the judicial review application is well-founded and that it should succeed. The FSA contends that adequate reasons were given by the RDC and so the claimant has no justifiable grievance, but if he did, there was a suitable statutory remedy in the form of the right to go to the Upper Tribunal. I appreciate the significance attached by the FSA to their contention that disputes concerning the correctness and validity of a decision notice should invariably be determined by the Upper Tribunal and not on

an application for judicial review and I will deal with that especially in paragraphs 106 and 107 below.

40. The issues which therefore have to be considered are:-

(a) What complaints are made about the actual reasons given in the Decision Notice? (see paragraphs 41 to 56 below);

(b) If the reasons are inadequate, would the Decision Notice be quashed if there was no right to refer the matter to the Upper Tribunal? (see paragraphs 57 to 76 below);

(c) If the reasons in the Decision Notice are inadequate so that if there was no right to refer the matter to the Upper Tribunal, the Decision Notice would be quashed, then in those circumstances, should the application for judicial review be refused because the claimant has a suitable alternative remedy open to him in the form of a reference to the Upper Tribunal? (see paragraphs 77 to 105 below); and

(d) Some general comments on the availability of judicial review to challenge decisions of the FSA (see paragraphs 106 and 107 below).

VI. What Complaints are made about the Reasons given in the Decision Notice?

(i) Introduction

41. The case for the claimant is that the Decision Notice did not comply with the FSA's statutory duty to give reasons as set out in section 388(1)(b) of the 2000 Act, essentially because the Decision Notice failed to explain how the FSA dealt with the representations made by the claimant and in particular why his representations were not accepted. Ms Rose submits that the FSA needed to show that it had accurately addressed its mind to those submissions and to explain why it had concluded they could not be accepted, but that it had failed to do so.

42. In particular, she contends that the breach by the FSA of its duty to give reasons is shown by the fact that the Decision Notice failed to give any reasons as to why the written and oral submissions made by the claimant were not accepted or not even reflected in the wording of the Decision Notice. Indeed, the only substantive amendment made to the analysis in the Decision Notice from the Warning Notice was a very general statement, which does not deal with any of the representations made by the claimant and which I have set out in paragraph 36(f) above.

43. The complaint of the claimant is that, aside from the matters set out in paragraph 36 above, together with a purported but flawed summary of the claimant's representations, the Decision Notice did not contain any reasons, and that as such the reasons given are inadequate.

44. The summary in the Decision Notice is defective according to Ms Rose as: -

a) It makes no reference to the submissions made by the claimant ;

b) It does not mention the representations made by the Claimant regarding the detailed and extensive work undertaken by him;

c) It fails to set out the response of the claimant to the important allegations in the Warning Notice that he had failed to supervise Bank D appropriately;

d) It did not refer to a key factual element of the claimant's case;

e) It recorded in Paragraph 5.11 of the Decision Notice that the claimant had made a particular representation when no such representation had been made;

f) Paragraph 5.12 of the Decision Notice states that the claimant had made a particular representation but the claimant had not made such representation;

h) It fails to mention the important submission made on behalf of the claimant that even on the FSA's case, his alleged misconduct had not had any detrimental effect on Bank D notwithstanding that such submission must have been relevant to an assessment of the reasonableness of his conduct as well as the culpability of his behaviour; and that

i) It did not accurately summarise the representations of Bank D in the Decision Notice.

(ii) The "concessions" relied on by the claimant

45. Ms Rose contends there was a further reason why reasons were called for in the Decision Notice and that was because the FSA relied on facts and matters in the Decision Notice, which she contends had been conceded by its Enforcement Division before the RDC to be wrong. Consequently, Ms Rose contends that the Decision Notice was based on irrelevant considerations and on material errors of fact.

46. The first matter which Ms Rose contends was a concession was that in its written submissions dated 23 August 2010 to the RDC ("the Enforcement Submissions Document"), the FSA accepted that contrary to the position set out in the Warning Notice the position was different and this according to Ms Rose, was an important concession bearing in mind that the claimant was found to be in breach of Principle 6 so as to justify a fine of £100,000 on the claimant.

47. The response of the FSA was to dispute that the Decision Notice fails to take account of this concession but Ms Rose has shown this not to be the case by pointing to various parts of the Decision Notice.

48. I should add that I have considered the contention of the FSA that "*the references in the… Decision Notice to "…" could have been more precise, depending on which day was being referred to*". The FSA suggests that from the context and bearing in mind the clarification in paragraph 1.3 of the Enforcement Submissions Document, it is

implausible for the claimant to suggest that he and his advisors could have been "*confused as to what was meant*".

49. This argument does not assist the FSA as it cannot rely on the content of the Enforcement Submissions Document to supplement the Decision Notice, which alone contains the FSA's reasons. Having considered the submissions of the FSA, I have concluded that the Decision Notice is defective in this additional respect as it fails to deal with this concession.

50. The second matter which Ms Rose contends was a concession was that during the oral hearing before the RDC, the FSA's Enforcement Division accepted that a comparison between two sets of figures was inappropriate. The significance of this was, according to the claimant's case, that this was a change of position on an important matter because the Warning Notice had expressly relied on a comparison between those two sets of figures. The case for the claimant was that this concession was relevant both in relation to the liability and the punishment imposed on him.

51. To place the matter in context, I should explain that the claimant had explained in detail in his representations to the FSA that the comparison between those two sets of figures was inappropriate. So the case for the claimant is that the case against him had changed since the time when the Warning Notice was drafted and so this required the RDC to reconsider the position and if it then considered that this change made no difference, it would then have had to explain in its Decision Notice why this was the case but it had not done so.

52. The approach of the FSA was to contend that the Decision Notice does not rely incorrectly on comparisons which it had accepted at the oral hearing to be inappropriate.

53. I am unable to accept this contention because although what was stated in the "Conclusions" section supports the FSA's conclusions, the basis for this is to be found in the "Facts and Matters Relied On" section of the Decision Notice and this shows that the contention of Ms. Rose was correct.

54. This point is fortified by paragraphs 7.10-7.11 of the Enforcement Submission Document submitted to the RDC with the PIR and draft Warning Notice.

55. These changes in the FSA's case required the RDC to consider and explain what impact it had on the culpability of the claimant but that does not appear to have been considered. Ms Rose contends that in the light of the concessions, the findings in the Warning Notice could not be maintained and none of the contrary submissions of the FSA answer her points with which I agree.

56. I must add that I do not regard either of what the claimant contends to be the "concessions" as being of critical importance in determining this application. The reason for that is that I am quite satisfied for reasons which I will explain in Section VII below about the correctness of the major submission made on these matters by the claimant which was that the Decision Notice did not explain why his representations had been rejected. This is the position even without considering the "concessions", which do however provide additional support for that contention.

VII. If the reasons in the Decision Notice are inadequate, would it be quashed if there was no right to refer the matter to the Upper Tribunal?

(i) Introduction

57. It is appropriate at the outset to deal with a submission made by Mr Brindle that the duty imposed in section 388 (1) (b) which is to "*give the Authority's reasons for the decision to take the action to which the notice relates*" (with emphasis added) means that the FSA's reasons have to be in respect of the enforcement decision being taken. In consequence, he submits that there is no need for the FSA to have to explain why representations have been accepted or rejected nor anything about the content of "*those reasons*".

58. I am unable to accept that submission, because as I will explain the reasons must go further and they must deal with the substantial points raised by the unsuccessful party so that he knows why he has lost and, in particular, in general terms at least why his submissions and account were not accepted. This is particularly so in a case where it might be necessary to determine what action the losing party might wish to take as a result of the decision.

59. In the case of **In re Poyser & Mill's Arbitration** [1964] 2 QB 467, an arbitrator was appointed under section 77 of the Agricultural Holdings Act 1948 to determine whether a Notice to Quit was valid. The arbitrator held that the Notice to Quit was a good notice and that the tenant requested the arbitrator to state his reasons. Megaw J held that the relevant provisions in the Tribunals and Inquiries Act 1958 imposed a duty to "*furnish a statement, either written or oral, of the reasons for the decision if requested*" and that this meant that:-

> *"Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given."*

60. In that case, the reasons were important because they were needed to enable the losing party to determine what action to take in respect of the decision and to consider whether the arbitrator had made an error of law or had misconducted himself or what was the true position. For those reasons, the award was set aside.

61. In **Save Britain's Heritage v No.1 Poultry Limited** [1991] 1 WLR 153 Lord Bridge of Harwich (with whom the other members of the Appellate Committee agreed) stated at page 165 C that he regarded as "*particularly well-expressed*" the statement of Phillips J in **Hope v Secretary of State for the Environment** (1973) 31 P. and C.R 120,123 in relation to an inspector's planning decision that :-

> *"It seems to me that the decision must be such that it enables the appellant to understand on what grounds the appeal has been decided and be in sufficient detail to enable him to know what conclusions the inspector has reached on the principal important controversial issues."*

62. Lord Bridge later explained at page 167 C:-

> *"the degree of particularity required will depend entirely on the nature of the issues falling for discussion".*

63. This case was followed by the decision of the Court of Appeal in **Clarke Homes Limited v Secretary of State for the Environment** [1993] 66 P & CR 263 when Sir Thomas Bingham MR in dealing with another reasons challenge explained at pages 271 to 272 that:-

> *"I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why"* (emphasis added).

64. The words underlined show the need for reasons and all these cases were considered by the House of Lords in **South Bucks District Council and Another v Porter (No.2)** [2004] 1 WLR 1953, when Lord Brown of Eaton-under-Heywood explained in a speech with which the other members of the Appellate Committee agreed that:-

> *"36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."*

65. It is appropriate at this stage to deal with two submissions of Mr Brindle. First, he contends that the authorities on which the claimant relies and from which I have quoted are not relevant to the present dispute, because in those cases the reasons challenge was the only route available to the particular claimants, but in the present case the claimant could take the matter to the Upper Tribunal. I am unable to accept that submission which is not supported by any statement in any of the authorities.

Indeed, it runs contrary to the basic principle of fairness and justice that a party should know why he or she has lost, especially where those reasons might influence a decision to be taken by the losing party. Indeed in the **Poyser** case to which I referred in paragraphs 67 and 68 above, the reasons were needed to enable the losing party to determine what action to take in respect of the decision and to consider whether the arbitrator had made an error of law or had misconducted himself. Similarly, in planning cases, the losing party has the right to know in Lord Brown's words how the "*approach underlying the grant of permission may impact upon future such applications"*. If Mr Brindle's submission was correct, it would mean that there could be no challenge to a Decision Notice which merely stated, without giving any reasons, that the RDC accepts the submissions of the Enforcement Division and so finds that there was a breach of a particular Statement of Principle requiring an order for suspension, disqualification or a fine.

66. Second, Mr Brindle submits that the RDC was not sitting in judgment between the two sides and that its function was distinct from a trial before a tribunal. The stark fact, as is shown by the nature of its hearings, is that the RDC is indeed determining a dispute between the views of the Enforcement Division and those of a claimant and to that extent it is sitting in judgment between two sides. The procedure before the RDC was very similar to many hearings before tribunals with both sides making oral and written submissions in turn before the decision is considered by the decision-makers.

67. The position therefore is that the claimant will only succeed with a reasons challenge to the RDC's decision if first he does not know, in Lord Brown's words, "*why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues"*, and second, again in Lord Brown's words, he has been "*substantially prejudiced*" by this failure to provide reasons.

(ii) Did the Decision Notice contain "an adequately reasoned decision"?

68. The FSA also contends that the Decision Notice gave adequate reasons but Ms Rose disagrees. Leaving aside for a moment the concessions relied on by the claimant, the fundamental flaw in the Decision Notice is that it attempted to summarise the representations made by the claimant in great detail, but crucially it did not attempt to explain why those representations had been rejected. Indeed the only substantive change made from the Warning Notice in the Decision Notice was a statement that the claimant:-

> *"failed to take a necessarily pro-active approach to your responsibilities and thus failed to adequately deal with the emerging information throughout the relevant period. In doing so you failed to recognise the changes in the "…" information which indicated a material change in the figures"* (Decision Notice paragraph 6.3).

69. That statement does not deal with any of the detailed representations made by the claimant and in particular those representations recorded in the Decision Notice as having been made, and the errors, as well as what has been described as the concessions set out above.

70. There were also errors and deficiencies in the summary in the Decision Notice as explained in paragraph 44 above.

71. Reasons challenges particularly relating to decisions of tribunals have to be treated with caution as they are frequently made as disguised challenges to factual conclusions by claiming far more detailed reasons than are necessary. Lord Brown said in the **South Bucks** case (supra) that if the effect of his analysis of the legal principles applicable to a reasons challenge "*is to discourage such challenges I for one would count that a benefit*" [35].

72. At the end of the day and bearing that warning in mind, I have reached the conclusion that the reasons given in the Decision Notice are basically just saying that the RDC accepts the FSA's case, but it fails to give any or any adequate reasons as to why the detailed case for the claimant was rejected. It is not clear, for example, if the claimant was disbelieved on all or on any parts of his evidence or if his representations were wrong as a matter of law or if he did not understand his duties. In my view, the decision of the RDC fails to satisfy the test for adequacy of reasons, even without considering the concessions.

73. I must mention in deference to the FSA that there is a very marked contrast between the lack of reasoning in the Decision Notice in the case of the claimant and the impressive reasons in two other final Decision Notices issued by the FSA and which I was shown during the hearing. In one of those, the FSA sets out each of the representations made and its response to each of those representations sequentially so the claimant could understand why each of his representations had been rejected. In the other case, all the representations were addressed in a separate section.

74. The claimant has a further obstacle if he is to succeed on the reasons challenge because as I explained earlier, Lord Brown said a reasons challenge could only succeed if the claimant can satisfy the Court that "*he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision"*. That is the matter to which I now turn.

(iii) Did the claimant suffer substantial prejudice because of the absence of an adequately reasoned decision?

75. The case for the claimant is that there is substantial prejudice suffered by the claimant by not having reasons, because they would have enabled him to make a properly informed decision as to whether to accept the findings and the penalty imposed in the Warning Notice or instead to pursue the matter to the Upper Tribunal. Thus it is said by Ms Rose that without proper reasons the claimant could not make an informed decision as to whether to refer the matter at all. As I have explained, the hearing in front of the Upper Tribunal is a de novo hearing and it is common ground that both extra charges can be laid and increased penalties can be made by the Upper Tribunal. When this point was raised during the hearing, the FSA agreed to give an undertaking which was in the following terms:-

> *"Undertakings in relation to a Tribunal Reference*
>
> *It will not seek a higher financial penalty than in the Decision Notice or any other penalty.*

> *In its statement of case the FSA will only make allegations of misconduct during the period "…" ("the Relevant Period") and such allegations will not be more serious than those found in the Decision Notice.*
>
> *SAVE THAT, if new facts and/or matters came to light in relation to the claimant's conduct during the Relevant Period, the FSA is not precluded by the above undertakings from relying on such new facts and matters in either seeking a higher penalty and/or making more serious allegations in its statement of case."*

76. In my view, this undertaking, although giving some comfort to the claimant, does not answer his point that there are serious risks for him in taking the matter to the Upper Tribunal because first the FSA is not precluded from relying on new facts and matters in relation to the claimant's conduct during the relevant period so as to seek a higher penalty or to make more serious allegations. In addition, there remains the risk that the penalty imposed will be increased and this is especially important, as there is not a series of guideline cases setting out the appropriate penalties to be imposed.

VIII. If the reasons in the Decision Notice are inadequate so that if there was no right to refer the matter to the Upper Tribunal, the Decision Notice would be quashed, then in those circumstances, should the application for judicial review be refused because the claimant has a suitable alternative remedy open to him in the form of a reference to the Upper Tribunal?

77. At the heart of the FSA's case is the submission that there is a suitable alternative remedy prescribed by statute in the form of remission to the Upper Tribunal with the consequence that this application for judicial review should be dismissed. Mr Brindle stressed that, by pursuing this claim for judicial review, the claimant is violating the fundamental principle that judicial review should be a remedy of the last resort and is therefore unavailable where an alternative remedy is available.

78. The FSA asked the court to apply the general principle which was set out by Mummery LJ in **R (Davies) v Financial Services Authority** [2003] EWCA Civ 1128, [2004] 1 WLR 185 where he explained at paragraph 31:-

> *"The legislative purpose evident from the detailed statutory scheme was that those aggrieved by the decisions and actions of the Authority should have recourse to the special procedures and to the specialist Tribunal rather than to the general jurisdiction of the Administrative Court. Only in the most exceptional cases should the Administrative Court entertain applications for judicial review of the actions and decisions of the Authority, which are amenable to the procedures for making representations to the Authority, for referring matters to the Tribunal and for appealing direct from the Tribunal to the Court of Appeal."*

79. It is said by Mr Brindle that this statement shows that it is critical to the proper functioning of financial services regulation in the United Kingdom that the

comprehensive statutory regime entitling persons affected to a full hearing of all issues in a specialist tribunal is followed; in consequence the claims like the one put forward by the claimant for judicial review must be dismissed. The case for the FSA therefore is that it was the intention of Parliament that the enforcement decision of the FSA should be challenged in the Tribunal set up by the 2000 Act specifically to protect persons such as the claimant.

80. Thus Mr Brindle contends that if the claimant and others were able to bypass the statutory tribunal by challenging the FSA's decision notices by way of judicial review, this would set an extremely dangerous precedent that could result in serious disruption and extensive delay in the enforcement process. It is said that it is established that the availability of an alternative remedy must be taken into account by the court when exercising its discretion and that, where an alternative remedy exists, the court should exercise its discretion in favour of granting judicial review only in exceptional circumstances. He pointed out that the decision in **Davies** was followed in **R (Griggs) v Financial Services Authority** [2008] EWHC 2587 Admin and I will return to consider both cases in paragraphs 94 to 96 below in order to determine if the present case falls outside that category.

81. It is, of course, settled law that a remedy by judicial review is not to be made available where there is another statutory means for the party to obtain the redress sought. The basic rule has been explained in a number of cases such as **R v IRC, ex parte Preston** [1985] 1 AC 835 in which Lord Scarman explained at page 852D:-

> *"a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge: it is not an appeal. Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision."*

82. The issue in this case is whether the claimant's case fell within one of the exceptions, and Lord Scarman went on to say at page 852F that:-

> *"cases for judicial review can arise even where appeal procedures are provided by Parliament… For instance, as my noble and learned friend [Lord Templeman] points out, judicial review should in principle be available where the conduct of the commissioners in initiating such action would have been equivalent, had they not been a public authority, to a breach of contract or a breach of a representation giving rise to an estoppel. Such a decision could be an abuse of power: whether it was or not and whether in the circumstances the court would in its discretion intervene would, of course, be questions for the court to decide."*

83. The fact that there can be exceptions to the general rule is also shown by the statement of Lord Widgery CJ in **R v Hillingdon LBC, ex parte Royco Homes Limited** [1974] QB 720 at 728 where he said that:-

> *"…it has always been a principle that certiorari will go only where there is no other equally effective and convenient remedy."*

84. The matter was considered further by the Court of Appeal in **R v Birmingham City Council, ex parte Ferrero Limited** [1993] 1 All ER 530, in which the local authority issued a suspension notice under section 14 of the Consumer Protection Act 1987 prohibiting the supply of eggs containing a particular toy for a period of six months. The parties subject to the suspension notice applied for judicial review to quash the decision of the local authority contending that the Council had acted unfairly in failing to consult them before issuing the suspension notice. The judge granted judicial review and the Court of Appeal allowed the appeal on the basis that there was a suitable statutory remedy.

85. The reasoning of the Court of Appeal is of great relevance to this application as Taylor LJ giving the only reasoned judgment of the Court of Appeal explained at page 537c that:-

> *"… where Parliament has provided a statutory appeal procedure it is only exceptionally that judicial review should be granted. It is therefore necessary, where the exception is invoked, to look carefully at the suitability of the statutory appeal in the context of the particular case".*

86. The approach that should be adopted by a judge considering whether the existence of a statutory remedy should preclude a claim for judicial review was further explained by Taylor LJ at page 538J when he said in relation to the judge:-

> *"he should have asked himself what, in the context of the statutory provisions, was the real issue to be determined and whether a s 15 appeal was suitable to determine it."*

87. These comments of Taylor LJ were made after he had cited a similar statement by Glidewell J in **R v Hallstrom, ex p W** [1986] QB 824 at 852 where he explained that:-

> *"whether the alternative statutory remedy will resolve the question at issue fully and directly, whether the statutory procedure will be quicker, or slower, than procedure by way of judicial review, whether the matter depends on some particular or technical knowledge which is more readily available to the alternative appellate body, these are amongst the matters which a court should take into account whether to grant relief by way of judicial review when an alternative remedy is available".*

88. Taylor LJ also cited comments of Lord Denning MR (with whom Danckwerts and Salmon LJJ agreed) in **R v Paddington Valuation Officer, ex p Peachey Property Corp Ltd** [1966] 1 QB 380 at 400 in which he explained that prerogative remedies were available where the alternative statutory remedy was "*nowhere near so convenient, beneficial and effectual"*.

89. These cases show (a) that judicial review will not be granted where there is an alternative remedy available as long as it is in Lord Widgery's words in the **Royco** case "*equally effective and convenient"* or in Taylor LJ's words in **Ferrero** "*suitable to determine*" the issue and (b) judicial review can be brought where the alternative remedy is in Lord Denning's words in the **Peachey** case "*nowhere near so convenient, beneficial and effectual"*.

90. Against that background, Ms Rose contends that an appropriate starting point for determining whether the judicial review should not be granted where there is a statutory review is to ask three questions which are:-

(a) what is the nature of the wrong that is alleged to have been done by the public authority?

(b) Is the alternative statutory remedy *capable* of remedying that wrong (i.e. is it capable of resolving the issue at all?); and

(c) If so is the alternative statutory remedy *suitable* for remedying that wrong?

91. Her submission proceeds on the basis that if the alternative remedy is not *capable* of remedying the wrong, then it follows that there is no alternative remedy available to the claimant and thus there is no good reason for the court to decline to entertain the claim for judicial review. In other words the alternative remedy is not a suitable alternative.

92. In my view, that is a sensible approach to adopt because judicial review is as has been frequently said a remedy of the last resort and so it should be granted where after careful examination of a claimant's grievance, there is not a *suitable* alternative remedy. **Ferrero** was a case in which the claimant had a statutory right of appeal on the merits against a decision, which he was seeking to judicially review contending that the decision under challenge was **Wednesbury** unreasonable, that it had been made after taking into account irrelevant considerations, that there had been an unfair failure to consult the claimant before it was taken and that the council acted irrationally in failing to accede to the request of the appellant to lift the suspension and accept an undertaking instead.

93. The Court of Appeal held that each of these matters could conveniently and appropriately be dealt with by the statutory appeal. In other words, it was a fact-sensitive decision in which the statutory appeal was held to be both capable of remedying the wrong complained and also suitable for doing so. The reasoning in **Ferrero** is consistent with and supportive of this conclusion as there was a suitable alternative remedy available in that case.

94. I have not overlooked three cases on which Mr. Brindle relies, of which the first is the decision of the Court of Appeal in **R (Davies) v FSA** to which I referred in paragraph 78 above. In that case, the claimants sought judicial review of a decision to issue warning notices stating that the FSA proposed to issue prohibition orders against them pursuant to section 56 of the 2000 Act. The case for the claimant was that the FSA had no jurisdiction to make a prohibition order on the particular facts of the case.

95. The Court of Appeal disagreed holding that the claimants had an alternative remedy because, first, they could make representations to the FSA on the issue of jurisdiction

prior to the issue of the decision notice and in any event the claimants were correct. So if the FSA had no jurisdiction to issue a prohibition order, then the tribunal would also have no jurisdiction. In other words this could be dealt with by the Tribunal as a preliminary issue [32]; in summary this case falls within the basic rule that where there was, as there was in that case, a suitable alternative remedy, so judicial review should not and would not be granted.

96. The second decision relied on by the FSA is that of **R (Griggs) v FSA** [2008] EWHC 2587 (Admin), which concerned a claim relating to the unfairness of the investigation process adopted by the Enforcement Division prior to the issuing of a warning notice. Burnett J held that these points were capable of being addressed through engagement with the RDC's representations process and that there was therefore a clear alternative remedy available, which meant that application for permission to pursue the judicial review claim would fail.

97. Finally, Mr Brindle sought to obtain assistance for his submission that the reference to the Upper Tribunal would be a suitable alternative remedy for the claimant from the decision of the Financial Services and Markets Tribunal (which was the predecessor of the Upper Tribunal) in **Legal & General Assurance Society Limited v FSA** [2005] UKFSM 11.

98. This, like a reference to the Upper Tribunal, was not an appeal against the decision of the FSA because it was :-

> *"14… a complete re-hearing of the issues which gave rise to the decision. Once we have reached our own views about the issues we will take into account the RDC Decision and consider L & G's criticisms of that process".*

99. The decision and reasons of the FSA for the decision notice were not relevant. In any event, when the issue is whether a claim is to be taken to the Upper Tribunal the decision of that Tribunal cannot be relevant. I conclude that none of the cases relied on by the FSA are inconsistent with my conclusion based on **Ferrero** and the other cases to which I have referred and which show that a decision can be quashed on the judicial review application where the statutory procedure for redress does not exceptionally on the facts provide a suitable alternative remedy.

100. Turning to the facts of this case as Ms Rose submitted, it is necessary to focus on the nature of the wrong alleged by a claimant which is in this case that the FSA breached its statutory duty under section 388(1)(b) of the 2000 Act by not giving adequate reasons for its Decision Notice. The next and crucial question therefore is whether the statutory remedy or remitting the case to the Upper Tribunal is first capable and second suitable for remedying that wrong.

101. The Upper Tribunal has no jurisdiction to ensure that the FSA complies with its statutory duty to give reasons and indeed in **Jabre v Financial Services Authority** (Jurisdiction) [2006] UKSFM 35, Sir Stephen Oliver QC who was the President of the predecessor of the Upper Tribunal explained that:-

> *"28… 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."*

102. It is clear that the Upper Tribunal would not be able to require the RDC to give adequate reasons for its decision. So although the Tribunal could make recommendations for the future, they could not remedy a wrong such as a failure to give reasons, and in any event by then it would be too late for the claimant to decide whether to remit his case to the Tribunal. It is necessary to stress that this is not just a theoretical prejudice because as I have explained it is a matter of great importance. Indeed I understood, as was explained in the claimant's "Note on Alternative Remedies", that Mr Brindle accepted that there were some circumstances in which it might be appropriate for the Court to entertain an application for judicial review of a decision notice and he said that might include a situation where the RDC had given no reasons at all for its decision. This would fortify my conclusion that a claimant can bring a claim for judicial review where inadequate reasons are given, as in the present case, and where, as in the present case, there is prejudice suffered by the claimant as a result of this failing.

103. Indeed I cannot understand why there would be a difference in principle between the case in which no reasons are given in the decision notice and the case where totally inadequate reasons are given, especially as it was explained by Lord Bridge in **Save Britain's Heritage** case (supra at pages 166 H to 167A) that "*if the reasons given are unintelligible, this will be equivalent to giving no reasons at all*". For those reasons this court has jurisdiction to grant judicial review of the Decision Notice and it will have to be quashed. Ms Rose's questions set out in paragraph 90 above lead to the answers that the wrong suffered by the claimant is a failure to have reasons explaining why his case was rejected by the RDC and a remission to the Upper Tribunal would not be a remedy capable of remedying this wrong as well as not being suitable for it.

104. For the purpose of completeness I should mention two further matters which were raised by the claimant as justifying making a quashing order. First, it was said that the claimant will have to incur very substantial costs in taking the matter to the Upper Tribunal where there will be a full hearing on the merits, but in circumstances in which costs will almost certainly not be made in his favour if he succeeds. Thus it is said that this will cause him great prejudice. It was unnecessary to deal with this submission and indeed there was no evidence before me as to whether the claimant might well have been indemnified by an insurance policy or in some other way for his costs in the Upper Tribunal.

105. The second matter is that while all the proceedings up to date have been heard in private with anonymity granted to the claimant, there is no certainty that the same procedures will be adopted in the Upper Tribunal. I can reach no conclusion on this point because I am uncertain as to whether the Upper Tribunal would adopt a procedure in which any hearing would be heard in private and the proceedings would be anonymised, although its predecessor body did so on at least one occasion.

IX. The Availability of Judicial Review to Challenge decisions of the FSA

106. In deference to the point made on many occasions by and on behalf of the FSA that if this claim for judicial review succeeds, such a decision would undermine the statutory regime, I must disabuse the FSA of this fear and should stress that although the

Decision Notice in this case will be quashed, this does not mean that any challenge or indeed anything other than very few challenges to the decisions of the FSA can be the subject of successful judicial review applications.

107. The law is and has been as was stated by Mummery LJ in **R (Davies) v Financial Services Authority** (supra) and set out in paragraph 78 above. Indeed in the vast majority of cases, the Upper Tribunal provides a suitable alternative remedy especially when the challenge is to the content of a decision notice or when the challenge is to the correctness or the rationality of the actual decision. The present case constitutes an exception to this and the FSA can without difficulty avoid cases like the present one in the future simply by giving full and proper reasons.

X. Conclusion

108. I quash the decision of the FSA because the reasons in the Decision Notice were inadequate and the alternative remedy to a claim for judicial review of remitting the case to the Upper Tribunal is not in Lord Widgery's words in the **Royco** case "*equally effective and convenient"* or in Taylor LJ's words in **Ferrero** "*suitable to determine*" the issue. That alternative remedy is in Lord Denning's words in the **Peachey** case "*nowhere near so convenient, beneficial and effectual"* as the present claim for judicial review.

109. As I understand that many of the relevant members of the RDC have retired, the matter will, subject to counsels' submissions, have to be remitted to a different RDC for reconsideration.