Neutral Citation Number: [2021] EWHC 396 (Admin)

Case No: CO/3094/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2021

Before:

MR JUSTICE SWIFT

- -

Between:

THE QUEEN

on application of

(1) T
(2) I **Claimants**

- and –

FINANCIAL CONDUCT AUTHORITY **Defendant**

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- -

Saima Hanif & Ravi Jackson (instructed by Keystone Law) for the **Claimant**
Monica Carss -Frisk QC & Ajay Ratan (instructed by The Financial Conduct Authority) for the **Defendant**

Hearing dates: 20 and 22 January 2021

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Approved Judgment

Covid 19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts Tribunals Judiciary website. The date and time for hand down is deemed to be 10:00am 24 February 2021.

MR JUSTICE SWIFT:

A. Introduction

1. The First Claimant challenges the decision of the Financial Conduct Authority's Regulatory Decisions Committee ("the FCA" and "the RDC", respectively) to refuse his application to stay disciplinary proceedings (referred to before me as "the RDC proceedings"). The decision challenged is set out in an email sent on 13 July 2020.

2. The RDC proceedings have progressed so far as a Warning Notice issued by the FCA on 4 June 2020. The FCA's interest in the Claimants' conduct appears to have arisen in or about August 2015 following information supplied to it by the Danish Customs and Tax Administration (the Skatkeforvaltningen, "SKAT"). The Warning Notice was issued by the FCA under section 387 of the Financial Services and Markets Act 2000 ("FSMA").

3. Under the scheme set out in that Act, following service of a Warning Notice the recipient is allowed a period to reply in writing. The Notice served on the First Claimant permitted 14 days for a reply, the minimum period permitted under FSMA. Thereafter, the RDC decides whether or not to issue a Decision Notice under section 388 FSMA. RDC cases are considered by a panel of three members of the RDC. Members of the RDC are drawn from business consumer and financial services backgrounds. Each panel will include either the Chairman of the RDC or one of the Deputy Chairmen of that committee. The RDC panel decides the cases before it on the basis of written and/or oral representations which are received at a meeting of the panel. The procedures followed by the RDC are set out in the FCA's Decision Procedure and Penalties Manual. The process is structured but, it is fair to say, relatively informal. If a Decision Notice is issued the decision may be referred to the Upper Tribunal. The referral is by way of rehearing. If either there is no referral, or the referral is unsuccessful, the FCA then issues a Final Notice under section 390 FSMA.

4. The Warning Notice issued against the First Claimant rests on allegations arising out of his involvement when Chief Executive of the Second Claimant in a dividend arbitrage equity trading strategy (which I will refer to as "the Withholding Tax Rebate Strategy"). It is alleged that this strategy had as its purpose that false claims would be made to SKAT for rebates of a tax payable under the Danish Withholding Tax Act ("Withholding Tax"). Withholding Tax is payable by shareholders on dividends paid by Danish companies. In certain circumstances foreign shareholders are entitled to a rebate of Withholding Tax. The Withholding Tax Rebate Strategy involved claims for rebates by US-based pension funds. These matters have led SKAT to commence proceedings in the Commercial Court. In those proceedings SKAT contends that the Withholding Tax Rebate Strategy was a plan that rebates be claimed by people who neither met the requirements under Danish Law for ownership of the relevant shares nor, again under the requirements of the Danish Law, could be treated as having received dividends. In the Commercial Court proceedings SKAT contends that the Withholding Tax Rebate Strategy operated in breach of the requirements of Danish Law and that it operated in breach of the terms of the Denmark-US Double Taxation Treaty. The First Claimant's contention in this application for judicial review is that what remains of the RDC proceedings – namely the process of written representations in response to the Warning Notice and the process before the RDC itself – should be stayed pending resolution of the proceedings SKAT has commenced in the Commercial Court.

5. The case against the First Claimant in the RDC proceedings is summarised between paragraphs 2.3 and 2.16 of the Warning Notice. That part of the Warning Notice is set out in the Annex to this judgment. For reasons I will explain below, the Annex will remain confidential; it will not be made public unless and until the court so directs. In summary it is contended that the First Claimant's involvement with the Withholding Tax Rebate Strategy amounted to conduct that was "dishonest and lacked integrity" and therefore was in breach of Principle 1 of the FCA's Statements of Principle for Approved Persons. Principle 1 is a requirement that approved persons "must act with integrity in carrying out … accountable functions" (i.e., functions relating to the carrying out of regulated activities). It is well established that the requirement to act with integrity referred to in Principle 1 includes, though is not limited to, a requirement to act honestly.

6. The Commercial Court proceedings comprise five claims commenced by SKAT between 4 May 2018 and 26 June 2020; the Second Claimant is a defendant to certain of the claims; in total there are some 100 defendants to these claims. SKAT's case is that between August 2012 and July 2015 the defendants either assisted in or procured the making of applications for refunds of Withholding Tax and did so on the basis of false representations that the applicants for the refunds owned relevant shares in Danish-registered companies and had beneficially received dividends paid in respect of those shareholdings. SKAT contends these applications were made as part of a fraudulent strategy. Various causes of actions are relied on: there is a claim in conspiracy; equitable claims to the effect that any rebates paid were held on constructive trust for SKAT; a claim in restitution for monies paid by reason or mistake and/or fraudulent misrepresentation; and a claim in negligence. SKAT's claim is for damages and/or repayment of approximately DKK 11 billion, equivalent to £1.3 billion.

7. The First Claimant is not a party to the SKAT claims. However, part of SKAT's pleaded case against the Second Claimant is that the "knowledge, acts and intentions" of the First Claimant should be attributed to the Second Claimant because, at the material time, the First Claimant was the sole shareholder in and director of the Second Claimant. In this way the First Claimant's conduct will be directly in issue in the SKAT claims.

8. The SKAT claims are being managed by two judges of the Commercial Court. Orders have been made for a trial of preliminary issues referred to as the "Validity Trial". That trial is listed for hearing for 6 weeks between October and December 2021. The Validity Trial will address a number of issues which are central to the defendants' defences to SKAT's claim including:

    (1) whether the Withholding Tax Rebate Strategy, criticised by SKAT as fraudulent, was in fact consistent with an established market practice;

    (2) whether SKAT was aware of that market practice;

    (3) what, under Danish Law, were the requirements for a valid refund application so far as concerns an applicant's liability to tax under the Withholding Tax Act, and whether the requirement that an applicant had received a dividend entailed that the applicant had to have owned shares in the company that made the payment, and if so the meaning of ownership for that purpose;

(4) the meaning of the requirements applicable under the Denmark-US Double Taxation Treaty;

(5) was there any principle that the provisions of the Double Taxation Treaty could not be relied upon to secure a favourable tax position that was contrary to the purpose and object of the Treaty, and if so, what criteria determine whether a transaction falls into that class.

It is apparent from the Warning Notice that these issues will also be central to any conclusion reached in the RDC proceedings as to whether or not the First Claimant acted in accordance with the requirements of Principle 1.

B. Should the hearing for this application for judicial review take place in public or in private?

9. When granting permission to apply for judicial review Wall J made orders for the anonymity of the Claimants and, pursuant to CPR 5.4C, restricting access of non-parties to documents on the court file. At the beginning of the hearing before me Ms Saima Hanif who appears for the Claimants (together with Mr Ravi Jackson) applied for an order that the hearing take place in private. The FCA through its counsel, Ms Carss-Frisk QC and Mr Ajay Ratan, remained neutral on this application. I refused the application for the following reasons.

10. The application was made on reliance on CPR 39.2(3). By that provision a hearing or part of it must be heard in private if the court is satisfied that one or more of the matters listed at CPR 39.2(3)(a) – (g) applies and "that it is necessary to sit in private to secure the proper administration of justice". The application relied on matter (a) that publicity would defeat the object of the hearing; matter (c) that the hearing involves confidential information and publicity would damage confidentiality; and matter (g) that there is some other reason such that a hearing in private is necessary to secure the proper administration of justice.

11. I do not consider that the Claimants' reliance on CPR 39.2(3)(g) adds anything material to their application. None of the points advanced by the Claimants falls outside either matter (a) or matter (c).

12. I do not consider that the Claimants' submission in reliance on CPR 39.2(3)(a) is well-founded. The object of these proceedings is not to protect the Claimants' privacy, or to protect the confidentiality of information within the RDC proceedings. The purpose of the application for judicial review is simply to consider whether further progress of the RDC proceedings should await the outcome of the Commercial Court litigation.

13. Nor do I consider that it is necessary for this hearing to take place in private by reason of the matters referred to at CPR 39.2(3)(c). The Claimants point to a number of documents generated by or disclosed in the course of the RDC proceedings to date and contend that these contain information that should be regarded as confidential and which require this hearing to take place in private. This information falls into two broad categories. The first category is information about the First Claimant's financial position; the second category is information about the complaints that the FCA pursues against the First Claimant.

14. As to the former, some of the material provided in support of the application for judicial review is irrelevant to any issue in the claim. The only matter relevant to this application is whether the First Claimant's resources are such that absent a stay he would suffer prejudice to the extent that he could not meet the legal costs of pursuing both the RDC proceedings and Commercial Court claim at the same time. The part of the information in the hearing bundle that is relevant in this regard is little different to the sort of information commonly considered by courts when dealing with issues such as applications for security for costs or applications for costs protection. None of this warrants a requirement that this hearing take place in private. As to the latter, the first point to note is that much of the information contained in the hearing bundle is unnecessary. While it is important for the purposes of the judicial review claim that the court has an understanding of the complaints made by the FCA contained in the Warning Notice, it is not necessary to understand these matters in exhaustive detail. The fact that a court has been presented with documents that descend into an unnecessary level of detail cannot provide the platform for an application that the court sit in private simply for the purpose of protecting information that need not be before the court at all.

15. The Claimants' case on confidentiality really rests on the contents of the Warning Notice and provisions at section 348 FSMA and section 391 FSMA which provide for confidentiality in the context of the FCA's conduct of regulatory investigations. The issue is whether the combined effect of these provisions renders it necessary to sit in private to secure the proper administration of justice. That is a testing standard. It reflects the importance that attaches to the public interest in open justice.

16. The Claimants rely on the approach taken by ICC Judge Jones in *FCA v Carillion PLC (In liquidation)* [2020] EWHC 2146 (Ch), when considering an application to sit in private for the purposes of determining whether the automatic stay on proceedings under section 130(2) of the Insolvency Act 1986 applied to the FCA's power under section 91 FSMA to impose penalties for breach of listing rules. Judge Jones decided that the case should be heard in private. It is clear from paragraph 12 of his judgment that in reaching that conclusion he placed significant weight on the provisions at section 391 FSMA which restrict the FCA from publishing Warning Notices.

17. I do not consider that either section 391 or section 348 FSMA is determinative of whether this application for judicial review should be heard in private. The overall purpose of section 348 FSMA is to place restrictions on the FCA's ability to disclose information gathered in the course of an investigation. It applies to "confidential information" but this term is defined widely, not by reference to whether the information possesses any quality of confidence recognised by the general law but instead by reference to whether the information has been supplied to the FCA for the purpose of any of its functions. I do not doubt that this widely-framed provision has its purpose in the context of the conduct of the FCA during an investigation. However, its rationale dissipates when the context ceases to be that of how the FCA should conduct itself during an investigation and instead is that of litigation in court consequent on a decision taken by the FCA in the course of regulatory proceedings. Section 391(1) FSMA is also rooted to the steps the FCA takes in the ordinary course of regulatory proceedings. Put shortly, provisions such as sections 348 FSMA and 391 FSMA exist for the purposes of regulatory proceedings conducted by the FCA. They are not trump cards for privacy in satellite litigation before the courts. I consider that the conclusion stated by Moore-Bick LJ at paragraph 9 of his judgment in *R (Willford) v Financial*

Services Authority [2013] EWCA Civ 674 is pertinent, namely that although the regulatory proceedings were private, once a party has stepped outside those proceedings by making an application for judicial review, the open justice principle applies and proper weight is to be given to it.

18. Each situation of course must be considered on its own merits. The present case is not litigation which has the protection of privacy as its primary objective. Moreover, the contention that this application to stay should be heard in private to maintain the confidentiality of matters within the RDC proceedings becomes somewhat artificial when it is recognised that Commercial Court proceedings in which all the issues that underly the RDC proceedings are raised, are in progress and are taking place in public.

19. Since each case must be assessed on its own terms, I do not see any necessary inconsistency between the conclusion I have reached, and the conclusion reached by Judge Jones in *Carillion.* However, to the extent that paragraph 12 of his judgment might be taken to suggest that the provisions within FSMA might in many or all cases point to a requirement (or even presumption) that satellite litigation, be it an application for judicial review or some other claim before the courts should take place in private, that suggestion is wrong. Any such approach fails to afford proper weight to the public interest in open justice. The conclusion in *Carillion* ought to reach no further than the facts of that case.

20. Any legitimate desire on the part of the First Claimant to avoid publicity for the allegations made against him by the FCA can be adequately protected by continuing the order made by Wall J for anonymity, continuing the order made by Wall J under CPR 5.4C, and by making a further order preventing publication of the complaints contained in the Warning Notice. It is not necessary that this application for judicial review be heard in private.

C. The merits of the application to stay the RDC proceedings.

21. The decision of the RDC to refuse the First Claimant's application to stay the RDC proceedings is recorded in an email dated 13 July 2020 from Jack Williams of the FCA's Decision-Making Committees Secretariat. He wrote on behalf of Elizabeth France CBE, the chairman of the relevant RDC panel. The email explained

> "… [Ms France] does not consider that [the First Claimant] has demonstrated that there is a real risk of serious prejudice … if the RDC proceedings are to continue. Further, she considers that if there were such a risk the public interest in determining the allegations of serious misconduct … in these proceedings would justify their immediate continuation."

and then went on to state

> "The Panel Chair has considered each of the other factors you mention but does not consider they are indicative of a real risk of serious prejudice from the continuation of these proceedings. As far as any documents generated in the RDC proceedings are concerned, she notes that it is open to you to seek to persuade the

> Commercial Court Judge to address any unfair advantage [the First Claimant] perceives, by the exercise of case management powers.
>
> In the absence of a real risk of prejudice, it is not necessary to consider the countervailing considerations which would weigh in favour of continuing the RDC proceedings notwithstanding such a risk. Nevertheless, the Panel Chair considers the public interest in seeing that the disciplinary process is not impeded to be particularly strong in this case given that the allegations against [the First Claimant], and the risk he poses to the integrity of the UK financial system if those allegations are made out, are of the utmost seriousness."

22. The outcome of this application for judicial review does not depend on any *Wednesbury*-based review of that decision. It is clear from the authorities that the matter is one requiring exercise of an original jurisdiction: see for example the judgment of Stanley Burnton J in *R v Executive Council of the Joint Disciplinary Scheme ex parte Land* [2002] Pens LR 545. At paragraph 22 of his judgment he said this as regards the law applicable on an application to stay regulatory proceedings.

> "22. The two leading cases are the decision of the Court of Appeal in *Brindle* … and the decision of the *Divisional Court in Smith*. The decision of the Court of Appeal in *R v Panel on Take-overs and Mergers ex parte Fayed* … was only on a renewed application for leave to apply for judicial review of decisions of the Panel not to adjourn its disciplinary proceedings against Mr Fayed, but is nonetheless instructive. There were substantial differences between the approach of the Court of Appeal in *Brindle* and the Divisional Court in *Smith*, to which I refer below. However, the general principles were helpfully set out by Dyson J in *R v Executive Counsel of the JDS, ex p Hipps* (1996) (New Law Transcript 296069202), as follows:
>
> > "(i) the court is not concerned with a *Wednesbury* review of Mr Chance's decision not to adjourn the proceedings. Rather I am required to exercise an original jurisdiction whether to grant a stay: see *R v Take-overs and Mergers Panel ex parte Guinness* [1990] 1 QB 146, 178G–H, 184C–E, and *R v Chance, ex parte Smith* (supra) at 1100G.
> >
> > (ii) the jurisdiction to stay one of two concurrent sets of proceedings must be exercised sparingly and with great care: see R v Panel on Take-overs and Mergers ex parte Fayed …, 531E and *R v ICAEW, ex parte Brindle* … 310D–E.
> >
> > (iii) unless a party seeking a stay can show that if a stay is refused there is a real risk of serious prejudice which may lead to injustice in one or both of the proceedings, a stay must be refused: see *ex parte Fayed* at 531, *ex parte Brindle* at 316G–H.

> (iv) if the court is satisfied that, absent a stay, there is a real risk of such prejudice then the court has to balance that risk against the countervailing considerations. Those considerations will almost always include the strong public interest in seeing that the disciplinary process is not impeded. *Ex parte Brindle* 310E–G, *ex parte Smith* 1100G, 1103B–D.
>
> (v) in a case where the balancing exercise is carried out, the court will give great weight to the view of the person or body responsible for the decision as to the factors militating against the stay and the weight to be given to them, but the court is the ultimate arbiter for what is fair: see *ex parte Smith* 1101F–G, 1102H to 1103F and *ex parte Guinness*184D–E.
>
> (vi) each case turns on its own facts. Accordingly, only limited assistance can be derived when comparing the facts of a particular case with those of other cases where a stay was granted (as in *ex parte Brindle*) or where a stay was refused (as in *ex parte Smith*) ….”

23. In this case, the First Claimant’s primary submission is that unless the RDC proceedings are stayed either pending the conclusion of the Commercial Court proceedings or at least until determination of the preliminary issues in the Validity Trial, he will suffer serious prejudice because the RDC is less well-equipped than the Commercial Court to deal with the matters of substantive law and expert practice which are integral to resolving whether or not he acted in breach of Principle 1.

24. Although the First Claimant also makes a number of subsidiary points, I do not consider that any of them is a matter of true substance. One of the subsidiary contentions is that the First Claimant’s financial resources are not such as to allow him to meet the costs for legal work necessary to contest the RDC proceedings and the Commercial Court proceedings at the same time. This submission does not assist the First Claimant because there is no sufficient evidence to make good what his current assets are or what means are presently reasonably available to him to meet those legal costs. Thus, the building blocks for the submission of serious prejudice stemming from financial hardship are absent. The evidence on this, in the First Claimant’s witness statements (dated 27 November 2020 and 15 January 2021), is thin and consists almost entirely of responses to a document relied on by the FCA (which was prepared by Standard Chartered Bank in 2017 as part of a due diligence report on the First Claimant). The First Claimant’s solicitor has also made two witness statements. In the first he comments (at paragraph 78) that the company that he refers to as the First Claimant’s “primary business” operated at a loss in the three financial years to October 2019. Even if all this evidence is taken together it does not come close to providing any sort of detailed picture of the First Claimant’s financial position or the extent of the burden that is and would be imposed on his finances if the RDC procedure continues to run side by side with the Commercial Court proceedings.

25. Another point relied on by the First Claimant is that if the two sets of proceedings are allowed to run together, documents produced in the RDC proceedings may be discoverable documents in the Commercial Court proceedings. This may well be so

but whether that might cause prejudice to the First Claimant and if so the extent of any such prejudice is entirely speculative. The FCA's response to this point was to the effect that were a risk of genuine prejudice in the Commercial Court proceedings to arise the judge dealing with those proceedings could be invited to make orders appropriate to mitigate or remove that risk. I agree. I do not consider that this consideration provides any material support for the First Claimant's application to stay the RDC proceedings.

26. The last of the subsidiary points is the risk that if the RDC proceedings go ahead conclusions reached by the panel might prejudice other parties to the Commercial Court case. I do not attach any specific weight to this matter. The references in the Warning Notice to the others concerned are relatively brief. On the assumption that the RDC proceedings continue to run their course, the matters referred to in the Warning Notice would by reason of the restriction at section 391 FSMA remain confidential at least until such time as a Decision Notice was issued. Even at that point there is no certainty as to what if any conclusions would be set out in that Notice concerning those persons. Even if any were to be the subject of an adverse finding by the RDC, the risk of genuine prejudice (in the context of the Commercial Court proceedings) arising from that seems to be small given that none would have had the chance to participate in the RDC proceedings and for that reason would readily be able to persuade the judge in the Commercial Court proceedings to decide any relevant matter based only on the evidence admitted in those proceedings. Overall therefore, the risk of prejudice under this head is not material.

27. I turn to the First Claimant's primary submission. This starts from the proposition that the premises for the complaint in the Warning Notice that the First Claimant acted contrary to Principle 1 are the same matters as are in issue in the Commercial Court litigation. I agree. There is one part of the narrative in the Warning Notice which is summarised at paragraph 2.4 and set out in greater detail in paragraph 4.26- 4.29 of the Notice that does not feature in the Commercial Court proceedings. These paragraphs concern representations which were said to have been made by the First Claimant to the FCA. Even though the matters do not, so far as I can see, feature in the Commercial Court claims the outcome of the issues in the Commercial Court claims is likely to have a decisive influence on whether or not the representations referred to were accurate. Even if my conclusion on that turns out to be wrong, it remains the case that the allegations advanced by the FCA rest on the complaints made by SKAT in the Commercial Court proceedings. Even if the matter referred to at paragraph 2.4 of the Warning Notice turns out to have an existence that is independent of the Withholding Tax Rebate Strategy, all other matters in the Warning Notice have no such independent existence.

28. The further part of the submission is that the First Claimant will suffer serious prejudice if the RDC proceedings are determined without the benefit of the conclusions of the Commercial Court on the issues arising under Danish tax law (including those concerning the nature of the ownership interest required both in the shares and in respect of the dividend payed for a valid claim for a rebate of Withholding Tax), and concerning the effect of the provisions of the Denmark-US Double Taxation Treaty.

29. The focus of the submission in the present case differs from the arguments before the court in some of the authorities I have been referred to. The submissions made to me have focused on four authorities: *R v Panel on Takeovers and Mergers ex parte Fayed*

[1992] BCC 524; *R v Institute of Chartered Accountants in England and Wales ex parte Brindle* [1994] BCC 297; *R v Chance ex parte Smith* [1995] BCC 1095; and *R v Executive Counsel of the Joint Disciplinary Scheme ex parte Land* (above).

30. In *ex parte Fayed* the Court of Appeal identified the operative principle, namely that the court has the power to intervene to prevent injustice; see per Neill LJ at page 531E. In that case the injustice claimed was that continuation of disciplinary proceedings by the Panel on Take-overs and Mergers arising from the take-over of House of Fraser by a company owned and controlled by the Fayed brothers, would prejudice the outcome of a High Court claim commenced by Lonrhro PLC (which had wanted but failed to acquire House of Fraser) against the Fayed brothers. On the facts, the Court of Appeal was satisfied there was no arguable risk to the conduct or fairness of the High Court trial.

31. The background to *ex parte Brindle* was the collapse of BCCI. Price Waterhouse had been BCCI's auditors. They challenged the refusal of the relevant regulatory body (the ICAEW) to adjourn its proceedings pending various sets of High Court proceedings and other proceedings in California and in the Cayman Islands. The submissions in that case included the contention that the outcome of those other proceedings might be prejudiced, and arguments about the additional burden of the regulatory proceedings, and as to the possible benefit to the regulatory body of findings of fact that would be made in the High Court proceedings (see generally, the judgment of Nolan LJ at pages 308H – to 309H). The Court of Appeal concluded that the ICAEW proceedings should be adjourned.

32. In *ex parte Smith* the regulatory proceedings (again by the ICAEW, and again concerning the work undertaken by auditors) arose from the misappropriation of assets of the Mirror Group Pension fund by pensions controlled by Robert Maxwell. Coopers & Lybrand faced the prospect of a series of substantial claims for damages in High Court proceedings. The firm argued that continuation of the regulatory proceedings risked prejudice to the fairness of the trials of the High Court claims: see per Henry LJ at page 1100D – G. The Divisional Court declined to order a stay of the regulatory proceedings.

33. In a similar way the main submission in *ex parte Land* (which had as its context regulatory proceedings against auditors arising from the Equitable Life debacle) was that the regulatory proceedings would impede or prejudice the defence of High Court claims.

34. Returning to the present case the first matter to consider is whether absent a stay of the RDC proceedings, the First Claimant is at real risk of suffering serious prejudice. If the First Claimant cannot demonstrate the existence of such a real risk, there will be nothing capable of weighing in the balance that might outweigh the important public interest in the prompt prosecution of regulatory proceedings. The FCA submitted that the simple co-existence of regulatory and other proceedings arising out of the same matters did not prove the existence of a real risk of serious prejudice.

35. In his judgment of *ex parte Land*, Stanley Burnton J addressed what appeared to be a controversy on this matter arising from a passage in the judgment from Hirst LJ in *ex parte Brindle* and the judgment of the Divisional Court in *ex parte Smith*. The former it was said was authority for the proposition that serious prejudice will always arise

whenever the same issues fall for determination in two contemporaneous sets of proceedings. It was then submitted that that proposition had been disputed by the judgment in *ex parte Smith*. Stanley Burnton J concluded that concurrent proceedings were not inherently unfair such that injustice would always result: see his judgment at paragraph 30. With respect, I agree. Yet also with respect, I doubt whether the judgment of Hirst LJ in *ex parte Brindle* seeks to claim any contrary position. It is clear that all members of the Court of Appeal in *ex parte Brindle* considered the circumstances in that case to be exceptional. The material part of Hirst LJ's judgment is as follows (at pages 310G – 311B):

> "In the course of his skeleton argument, Mr Carnwath submitted that:
>
> > 'there is no reason to assume that private litigation in connection with auditors' activities should necessarily have priority over the statutory supervision in the public interest.'
>
> I agree. But equally there is no reason (as Mr Carnwath seemed to suggest) that the opposite assumption should be made. Each case must depend on its own facts and the institute's own handbook, para. 14.02, rightly recognises that in some cases it will be appropriate for the statutory supervision to give way ('Disciplinary proceedings must be deferred if they are likely to interfere with the course of justice').
>
> I now turn to the individual factors relied on by Mr Oliver on behalf of Price Waterhouse.
>
> (1) I am satisfied that the degree of overlap between the issues raised in the disciplinary proceedings and those raised in the liquidators' action are so complete as to amount in Mr Oliver's words to virtual total eclipse. In both proceedings the same facts are in issue, and the basic professional standards invoked are identical and non-controversial; the fact that in the action some more controversial embellishments are added does not affect the comparison of the basic standards relied upon. This to my mind is a most important consideration, both because in my judgment it is inherently unfair that two tribunals should contemporaneously be considering the same issue (*Conteh v Onslow-Fane*, The Times 26 June 1975, CAT No. 291) and because it affects the evaluation of (2) below."

Although he refers to "inherent unfairness" Hirst LJ is careful not to identify that as a decisive matter only a "most important consideration" both for its own sake and because of the practical burdens that parallel proceedings might impose. It is fair to say that Hirst LJ's reference after the passage set out above to the reasoning of Sir John Pennycuick in *Conteh v Onslow-Fane* is difficult. But this is not a matter the features in either the judgment Nolan LJ, the leading judgment in the case, or the judgment of Steyn LJ.

36. But be this as it may, all judgments cited to me are consistent in that they demonstrate that existence of the required real risk of serious prejudice requires assessment of all the circumstances. There is no single consideration that will always be a trump card regardless of all else. Where there are parallel proceedings that will often, if not always, create some sort of prejudice: at the very least fighting the same substantive issues on two fronts can be more onerous than fighting them on one. But "mere" prejudice is not the touchstone. The standard is framed by reference to "serious prejudice that may lead to injustice".

37. Turning to the present case I am satisfied that the RDC proceedings should be stayed, in the first instance pending the judgment of the Commercial Court on the issues in the Validity Trial.

38. As explained above there is a very close correspondence of issues in the RDC proceedings and the Commercial Court proceedings. It is no exaggeration to describe the RDC proceedings as a satellite of the Commercial Court claim. This is not any matter of mere timing arising from the fact that the Commercial Court proceedings pre-date the Warning Notice. The RDC proceedings can fairly be termed satellite because any conclusion that the First Claimant acted in breach of Principle 1 is likely to depend entirely on whether the Withholding Tax Rebate Strategy met the requirements of Danish tax law and also did not offend any provision in the Denmark-US Double Taxation Treaty. In this way the present situation is one, perhaps relatively rare, instance where the expertise of the members of the RDC may not be critical to the assessment of whether a breach of Principle 1 has occurred. Rather, this situation is one in which conclusions reached by the Commercial Court on the questions of law and foreign law, reached with the benefit of the forensic procedures available in that Court, will be of particular assistance to the RDC.

39. The FCA's submission on this point was to the effect that there was nothing to stop the First Claimant when responding to the Warning Notice, from putting in as evidence all the material that will be relied on at the Validity Trial. In principle that would be possible. But that submission only tends to expose the nature of these RDC proceedings as in all material respects entirely dependent on the matters in issue in the Commercial Court. The submission also turns a blind eye to the relative expertise of the two forums. To be clear, I am not succumbing to any suggestion that the decision making of the RDC (or any other regulatory body) is "second class". It is not. But in the same way that it is important to recognise that members of the RDC bring with them experience of working in the financial services sector, it would be foolhardy to pretend that they are as well-equipped as judges of the Commercial Court to deal with matters such as the issues to be determined in the Validity Trial.

40. I accept that the same would not ordinarily follow so far as concerns the part of the defence to the Commercial Court claims that asserts that the Withholding Tax Rebate Strategy was structured and operated consistent with established market practice. Had this been the only relevant matter arising in the Commercial Court proceedings my conclusion might have been different. But it is not the only relevant matter; and looking at the matter in the round, a pragmatic approach is called for. In the Commercial Court proceedings, and specifically at the Validity Trial, the court will hear expert evidence as to the existence of established market practice. I am told this will cover questions of practice and the approach taken by regulators across a number of jurisdictions. The

court will I have no doubt, reach clear conclusions on the nature, extent and relevance of any such practice.

41. Drawing matters together I am satisfied that absent a stay of the RDC proceedings pending the Validity Trial there is a real risk of serious prejudice to the First Claimant. The circumstances of this case are unusual. The allegation in the Warning Notice that the First Claimant acted in breach of Principle 1 is contingent on the matters that will be before the Commercial Court at the Validity Trial. The bulk of those issues are of their nature, outside the expertise of the members of an RDC panel. The prejudice in this case does not arise from the possibility that conclusions reached on these matters by any RDC panel would be likely to change the way in which those same matters were approached and determined by the Commercial Court. Whatever conclusion was reached by the RDC panel would not formally bind the court and would not in any other way affect the judge's ability to reach whatever conclusion he considered correct. In this case, the risk of serious prejudice arises because any conclusion that the First Claimant's actions in pursuit of the Withholding Tax Rebate Strategy resulted in a breach of Principle 1 should, given the existence and substance of the Commercial Court proceedings, take account of the findings of that Court on the issues for determination at the Validity Trial.

42. I must now balance this risk of serious injustice against the strong public interest in seeing that regulatory proceedings are not impeded. The generic public interest in favour of prompt enforcement action by regulators such as the FCA is a weighty consideration in all cases. Prompt and effective regulatory action not only provides individual deterrence, but also has a general deterrent effect, supports the integrity of the financial services sector, and promotes public confidence. In this specific case it is also important to have in mind that the complaint made against the First Claimant is a serious complaint, dishonest engagement in a scheme by which millions of pounds in tax rebates were (it is said) wrongfully claimed and obtained from the Danish tax authority.

43. I have set out above the material parts of the RDC panel's reasons when refusing the First Claimant's application for a stay. Ms France has made a witness statement which explains how she took the decision and confirms the reasons I have set out above (from Mr Williams' email) as the reasons for her decision. The reasons include reference to the fact that the allegations against the First Claimant are serious, and the risk he poses "… to the integrity of the UK financial system if those allegations are made out …". But there are also countervailing considerations. One is that the misconduct alleged is historic, having taken place between 2013 and 2015. Another is that the First Claimant is not now engaged in the provision of financial services: he is resident abroad and pursues an unconnected line of business. For so long as those arrangements prevail some significance attaches to them. A further consideration is that in the context of an investigation by the FCA that has been on-foot since 2015, any delay that a stay would cause is relatively short. I have carefully considered the summary of the history of this investigation set out in the witness statement made out on behalf of the FCA in these proceedings by Mario Theodosiou (the Head of the Wholesale 2 Department of the FCA's Enforcement Market Oversight Division). I do not say this by way of criticism of the FCA, but it must be noted that the sequence of events between November 2015 (when matters were first discussed with the First Claimant) to January 2017 (when the Second Claimant was informed it would be placed under investigation), to the investigation that took place between May 2017 and December 2019, to the issue of the

Warning Notice in June 2020, does not suggest this matter has figured as one of the FCA's high priorities. In this context a further delay pending the outcome of the Validity Trial, say to the beginning of 2022, will not be likely to inflict any significant harm on the generic public interests I have set above.

44. The final point in this regard, one that I consider to be significant, is that any harm that may be occasioned to the public interest by the passage of time between now and the Commercial Court judgment on the Validity Trial will be offset by the advantage that will accrue from the fact that the conclusions the RDC panel will then reach will be informed by the Commercial Court's conclusions on the issues of Danish Law and the application of the Denmark-US Double Taxation Treaty. In this case, where issues that are critical to the regulatory charges are both outside the general experience of RDC panel members and due for early consideration by a specialist court, regulatory conclusions based on those findings will carry particular weight and will for that reason particularly serve the public interest in regulation that is robust, fair and maintains the integrity of the financial system.

45. For these reasons, I am satisfied that the risk of serious prejudice to the First Claimant absent a stay of the RDC proceedings, does outweigh other public interest considerations as they arise in the circumstances of this case. The RDC proceedings should therefore be stayed pending the judgment of the Commercial Court on the issues in the Validity Trial.
