**[2015] UKUT 569 (TCC)**
**Reference number: FS/2015/011**

***FINANCIAL SERVICES – procedure – application to make reference out of time – whether Tribunal satisfied that in all the circumstances application should be granted –yes–Rule 2 and Schedule 3 Paragraph 2(2) Tribunal Procedure (Upper Tribunal) Rules 2008***

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**

**CHRISTOPHER ASHTON** **Applicant**

**- and -**

**THE FINANCIAL CONDUCT AUTHORITY** **The Authority**

**TRIBUNAL: JUDGE TIMOTHY HERRINGTON**

**Sitting in public in London on 30 September 2015**

**Sara George, Partner, Stephenson Harwood LLP, for the Applicant**

**Paul Stanley QC, instructed by the Financial Conduct Authority, for the Authority**

DECISION

**Introduction**

1. This decision relates to an application by the Applicant ("Mr Ashton") to make a reference to this Tribunal out of time in respect of his contentions that he was identified in a decision notice given by the Authority to UBS AG ("UBS") on 12 November 2014, that the reasons contained in the notice ("the UBS Notice") are prejudicial to him and that he should have been given a copy of the notice.

2. In separate proceedings before this Tribunal, Mr Ashton also contends that he was identified in a decision notice given by the Authority to Barclays PLC ("Barclays") on 20 May 2015, that the reasons contained in the notice are prejudicial to him and that he should have been given a copy of the notice. Mr Ashton's reference in respect of that notice ("the Barclays Notice") was made in time and a preliminary issue as to whether Mr Ashton was identified in the Barclays Notice is to be heard on 27 October 2015.

**The Facts**

3. There is no dispute on the facts regarding how it was that Mr Ashton's reference was filed 177 days after the expiry of the 28 day statutory time limit. In that regard I had a witness statement from Mr Alan Ward, a solicitor employed by Stephenson Harwood LLP who has conduct of the proceedings at that firm on behalf of Mr Ashton, which exhibited correspondence and other documents relating to the issue. Mr Ward's evidence was unchallenged. I also had a witness statement from Ms Therese Chambers, Head of Department in the Enforcement and Market Oversight Division of the Authority ("Enforcement"), which dealt with considerations concerning Enforcement's resources should Mr Ashton's reference be admitted out of time which likewise was unchallenged.

4. From the material submitted I make the following findings of fact.

5. Mr Ashton was, from 4 September 2006 to 8 May 2015 employed by a subsidiary of Barclays as a foreign exchange trader. Barclays, in common with a number of other leading banks, has been the subject of an investigation by the Authority with respect to its trading on the foreign exchange (forex) market and on 1 November 2013 Mr Ashton was notified by Barclays that he would be suspended from work whilst Barclays investigated its foreign exchange business.

6. On 12 November 2014 the Authority published Final Notices issued to a number of leading banks, including UBS but not at that stage Barclays, which set out findings that the banks concerned had committed serious breaches of the Authority's Principles for Businesses in the manner in which they had conducted their foreign exchange trading operations. The findings in the UBS Notice relate primarily to failures of systems and controls but also identify examples of attempts by UBS to manipulate the benchmark rate for exchange of Euros with US dollars. In that regard, Mr Ashton contends in his reference notice that various quotations in the UBS Notice attributed to "Firm A" are in fact his words and that persons acquainted with Mr

Ashton or who operated in his area of the financial services industry would reasonably have been able to identify Mr Ashton from the statements made in the notice. Consequently, he contends, he should have been afforded third party rights under s 393(1) of the Financial Services and Markets Act 2000 ("FSMA").

7. At no point has Mr Ashton be notified by any regulator that he is personally the subject of any investigation. Neither did the Authority at any time prior to the publication of the UBS Notice ask him for comment on any of its contents or the findings set out in it.

8. By early November 2014 it had been widely reported in the press that six banks, including Barclays, were engaged in settlement discussions with the Authority in relation to its foreign exchange investigation. Mr Ashton's lawyers, Stephenson Harwood, were aware of these discussions and believed that an announcement of a settlement with Barclays was imminent. Accordingly, on 4 November 2014, concerned that the Authority would issue statutory notices to Barclays without affording Mr Ashton third party rights in accordance with s 393 FSMA, Stephenson Harwood sent the Authority a letter under the Judicial Review Pre-Action Protocol seeking assurances that Mr Ashton would not be prejudicially identified in any Final Notice. The Authority declined to provide those assurances, but it did write to Stephenson Harwood on 10 November 2014 stating that it would comply with its obligations under s 393 FSMA.

9. Contrary to Stephenson Harwood's expectations, no notice was published in respect of Barclays on 12 November 2014 when the Notices in respect of the other banks that had been under investigation, including UBS, were published. The Authority announced that its investigation into Barclays' foreign exchange operations were continuing and Barclays itself announced that it was seeking a more general coordinated settlement with other regulators, notably those in the United States, so that it was clear that Barclays wished to settle with the Authority at the same time as it concluded settlements with other regulators. Stephenson Harwood were nevertheless of the view that because a notice in relation to Barclays was apparently ready for publication on 12 November, publication could reasonably be assumed to be imminent.

10. At the time the UBS Notice was published, the Court of Appeal hearing in the case of the *Financial Conduct Authority v Macris* [2015] EWCA Civ 490 was awaited. The hearing took place on 11 December 2014, two days after the time limit for filing a reference in respect of the UBS Notice expired. Judgment was reserved and ultimately published on 19 May 2015. This judgment set out authoritatively the legal test to be applied in determining whether an individual has been identified in a statutory notice for the purposes of s 393 FSMA, upholding the decision of this Tribunal but refining the test to be applied.

11. Stephenson Harwood were surprised to see statements in the UBS Notice which were attributed to individuals working at another bank. What they were expecting was that a notice relating to Barclays would be published which might contain material prejudicial to Mr Ashton. The quotations concerned in the UBS Notice, which are not

extensive, were contained in paragraph 4. 40 of the UBS Notice but it is Mr Ashton's contention that the words quoted are his and the effect is to accuse him of collusion in manipulating foreign exchange rates through participation in a chat room with traders from other banks.

12. Despite this unexpected turn of events, it is clear that Stephenson Harwood on reviewing the UBS Notice formed the preliminary view, based on the law as it then stood following this Tribunal's decision in *Macris* that Mr Ashton had been identified in the UBS Notice, that the quotations concerned in paragraph 4.40 of the UBS Notice were prejudicial to him and if that were the case he should have been given third party rights with the consequence that he now had the right to refer the UBS Notice to this Tribunal within 28 days of its publication. There is no suggestion that Stephenson Harwood were unaware of the time limit and the fact that that it was running.

13. Mr Ward's evidence was that Stephenson Harwood would, however, consider the question of whether and where Mr Ashton was prejudicially identified in the Authority's foreign exchange notices in the round, and advise Mr Ashton on his potential remedies, having had the benefit of considering the full factual picture, following the publication of the Barclays Notice and the law, and any test for identification promulgated by the Court of Appeal following hand down of the judgment in *Macris.* Mr Ward's evidence was that Stephenson Harwood considered that advising Mr Ashton on the questions of identification and prejudice, definitively, once the Barclays Notice and the judgement in *Macris* had been published, to be sensible, both in terms of the comprehensiveness and the accuracy of the advice the firm would be able to provide, and as regards the use of resources.

14. The Barclays Notice was published on 20 May 2015. As appears from Mr Ashton's reference notice, he took the view, based on the Court of Appeal's judgment in *Macris,* that he had been identified in the Barclays Notice, that his words are cited and attributed to Barclays in paragraphs 4.58 to 4.70 of the Barclays Notice and that the quotations concerned are prejudicial to him.

15. As regards the question of resources, in November 2014 Mr Ashton had no funding from any third party for any legal fees that may be incurred in relation to the UBS Notice, although he was at that time still employed by Barclays. In these circumstances, according to Mr Ward, making a speculative reference in respect of the UBS Notice when such could have been rendered futile had the Court of Appeal judgment in *Macris* been different did not appear, at the time, a wise use of Mr Ashton's resources. Once judgment had been handed down in *Macris,* on 19 May 2015 and the Barclays Notice published Stephenson Harwood conducted a comprehensive analysis of the position and advised Mr Ashton that he should have been given third party rights in respect of both notices. Accordingly Stephenson Harwood filed reference notices in respect of both the UBS Notice and the Barclays Notice on 5 June 2015. By this time of course a reference in respect of the UBS Notice was well out of time.

16. Ms George in her oral submissions suggested there were further reasons why there was a delay in filing the reference in respect of the UBS Notice but, as Mr

Stanley rightly pointed out, I should not have regard to those matters as they did not appear in the evidence put before this Tribunal. I do, however, have regard to Ms George's comment that at the time of the publication of the UBS Notice that Stephenson Harwood were not aware of this Tribunal's decision in *Martin-Artajo v FCA* [2014] 340 and in particular the Tribunal's observation that in a situation where a party was uncertain as to whether to make a reference pending further developments he could nevertheless make a reference and ask for a stay, or explore with the Authority whether they would consent to an extension of time to file a reference whilst the position became clearer and ask the Tribunal to approve such an extension. It was also observed in *Martin-Artajo* that the filing of a reference notice is not an onerous task and can be completed relatively easily.

17. Ms Chambers in her evidence referred to the significant pressure on Enforcement resources in the context of the Authority having a large number of open investigations at any one time. Ms Chambers stated that the Authority was entitled to assume that no tribunal litigation was forthcoming once the time for filing a reference in respect of the UBS Notice expired on 9 December 2014 and that the resource which had been used on the foreign exchange investigations could be redeployed elsewhere. She stated that of the team of eight who were working on the investigation in relation to UBS as at 12 November 2014, two have left, two have moved elsewhere within the organisation, one is shortly to depart on maternity leave and the remaining members are heavily committed to other significant cases. This case team was entirely separate from the team which dealt with the Barclays Notice and other parts of the UBS Notice in which Mr Ashton contends he is identified deal with a different incident to that in the Barclays Notice.

18. Mr Chambers stated that had Mr Ashton made his reference in time, the Authority could have sought to mitigate the risk that a further lapse of time would pose to its position in defending the substance of the matters set out in the UBS Notice by ensuring that the findings of the investigation relevant to Mr Ashton's reference were formally documented prior to the team being disbanded to ensure continuity and that the case could be easily picked up in the future. In the absence of a reference, the Authority was entitled to, and did, assume that no such exercise was necessary. It did not need to undertake such an exercise in relation to Mr Ashton's reference of the Barclays Notice, because the case team was still largely in place at the time of the reference. If the out of time reference were to proceed now, the Authority would therefore be placed in the position of needing to spend significant resources on reconstructing its knowledge to get back into the position it would have been in had Mr Ashton filed his reference on time. Accordingly in her view the Authority would suffer significant prejudice if the reference was to be permitted to proceed out of time.

**The law and factors to be considered**

19. If Mr Ashton has a right to make a reference in respect of the UBS Notice it will arise out of section 393(11) FSMA which applies where neither a copy of the Warning Notice nor Decision Notice relating to the proceedings in which a third party

maintains he has been prejudicially identified has (as in this case) been provided to him. This provides:

> "A person who alleges that a copy of the notice should have been given to him, but was not, may refer to the Tribunal the alleged failure and –
>
> (a) the decision in question, so far as is based on a reason of the kind mentioned in subsection (4); or
>
> (b) any opinion expressed by the regulator giving the notice in relation to him."

20. Mr Ashton accordingly made his reference pursuant to section 393(11).

21. Paragraph 2(2) of Schedule 3 to the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules") provides:

> "A reference notice must be received by the Upper Tribunal no later than 28 days after notice of the decision in respect of which the reference is made."

It is common ground that in this case, the 28 day period starts to run from 12 November 2014, the date the UBS Notice was published.

22. The approach to be taken by this Tribunal in considering an application for an extension of time of this type, which may be granted pursuant to the power to extend time contained in Rule 5 (3)(a) of the Rules, was set out by this Tribunal in *Martin-Artajo* at [ 31] to [ 51] of the Decision. I need not set out the relevant passages in full again but the approach to be taken, which was common ground, can be summarised as follows:

(1) In exercising its power to extend time the starting point is the overriding objective of the Rules which requires the Tribunal to consider whether in all the circumstances it is fair and just to extend time: see [ 32] to [ 35] of the Decision;

(2) As set out by Morgan J, sitting in the Upper Tribunal, in *Data Select Ltd v HMRC* [2012] UK 187 (TCC) there are five questions which as a general rule a Tribunal was to ask itself when considering whether to extend time, namely

(a) What is the purpose of the time limit?

(b) How long was the delay?

(c) Is there a good explanation for the delay?

(d) What will be the consequences for the parties of an extension of time? and

(e) What will be the consequences for the parties of a refusal to extend time? ; and

(3) The time limit concerned must be given great respect and there must be strong factors in favour of departing from it. Time limits should be respected unless there are good reasons not to and time limits are there for a reason: generally speaking the parties are entitled to finality (see [ 40] of the Decision.

23. In addition in *Martin-Artajo* this Tribunal considered that there were two other factors that should be taken into account.

24. First, there is a public interest in the Authority's decisions being as accurate as possible and this will be more likely to be achieved if those decisions are properly tested. This Tribunal is an integral part of the regulatory scheme designed to produce quality decision-making. Consequently, the lack of opportunity for the applicant to make representations to the Authority's decision-maker, the Regulatory Decisions Committee (RDC), on criticisms the applicant says were made of him in a published Final Notice because the Authority took the view that he was not identified in the statutory notices issued to a third party are additional matters that should be taken into account : see [ 48 ] to [ 50 ] of the Decision.

25. Second, regard should be had to the merits of the applicant's reference as there would be no point extending the time if the reference had no reasonable prospect of success, conversely if the reference had merit that is a fact extending time: see [ 50] of the Decision.

26. Mr Stanley submits that matters have moved on in respect of these additional factors since the decision in *Martin-Artajo*.

27. On the first point he refers to *R (Hysaj) v Home Secretary* [ 2014] EWCA Civ 1633 where Moore-Bick LJ, in considering whether to extend time to make an application for permission to appeal, at [41] rejected the submission that when dealing with such an application in a public law case generally the court should adopt a more lenient approach because the appeal would almost invariably raise issues which it is in the public interest for the court to consider. He said :

> " Although many public law cases raise matters of great public interest, that is not invariably the case and indeed many private law cases raise questions of great significance to the public as a whole. Quite rightly, in my view, the Rule Committee has not made a special provision for appeals from the Administrative Court to the Court of Appeal and it would be the quite wrong for us to construct a special regime for such appeals outside the rules….."

28. Moore –Bick LJ did, however, go on to say in the same paragraph:

> "None the less, I would accept that the importance of the issues to the public at large is a factor that the court can properly take into account when it comes as stage three of the decision-making process to evaluate all the circumstances of the case."

29. In my view nothing in these passages casts doubt on the relevance of the matters referred to at [24] above. The Court of Appeal was considering the point in the context of whether it was appropriate to permit an extension of time to apply for permission to appeal a judicial decision. In the current case, this Tribunal is concerned with a situation where there has been no opportunity for the matter to be aired before either the RDC or the Tribunal itself, which as I have already observed is an integral

part of the regulatory process. Therefore in my view the considerations identified at [24 ] may properly be taken into account in the balancing exercise that I must perform in deciding whether to extend time in this case.

30. In relation to the second point Mr Stanley referred me to the Supreme Court's judgment in *Global Torch Ltd v Apex Global Management Ltd (No 2)* [2014] UKSC 64 Where Lord Neuberger of Abbotsbury PSC said at [ 29 ] to [ 30 ] :

> "29. In my view, the strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management issues of the sort which were the subject of the decisions ….. in these proceedings. The one possible exception could be where a party has a case whose strength would entitle him to summary judgment ….
>
> 30. A trial involves directions and case management decisions, and it is hard to see why the strength of either party's case should, at least normally, affect the nature or the enforcement of those directions and decisions. While it may be a different way of making the same point, it is also hard to identify quite how a court, when giving directions or imposing a sanction, could satisfactorily take into account the ultimate prospects of success in a principled way. Further, it would be thoroughly undesirable if, every time the court was considering the imposition or enforcement of a sanction, it could be faced with the exercise of assessing the strength of the party's respective cases: it would lead to such applications costing much more than taking a much more court time than they already do. It would thus be inherently undesirable and contrary to the aim of the Woolf and Jackson reforms."

31. I accept Mr Stanley's submissions on this point. In essence, the merits of the case should only be a factor to be weighed in the balance whether cases either obviously hopeless (in which case there is no point extending time) or so overwhelmingly strong that there is no realistic prospect of there being a defence to it. It was common ground that neither of these features were present in relation to Mr Ashton's reference and I therefore proceed on the basis that the merits of the reference is an entirely neutral factor.

**Discussion**

32. I now turn to consider whether I should extend time in the light of the facts found and the principles I have identified above. I do so by carrying out a balancing exercise in respect of those factors that tend to favour the grant of an extension and those which do not, giving appropriate weight to the various factors in the light of the facts found and coming to a conclusion as to whether as a result of that balancing exercise it is fair and just to grant an extension. I start by considering the five questions identified in *Data Select*.

*The purpose of the time limit*

33. Mr Stanley correctly identified that the time limit serves an important public interest in the finality of litigation. As is apparent from Ms Chambers's evidence, the Authority needs to take decisions about how to deploy its finite resources and if it

knows that a time limit for filing a reference in respect of a particular matter has expired it is entitled to expect with a good degree of certainty that it can safely close an investigation and deploy the resources that had been dedicated to it elsewhere.

34. In relation to a reference of this type by a person who alleges third party rights, UBS as a potential interested party is also affected and is entitled to know where it stands.

35. As this Tribunal observed in *Martin-Artajo* at [54] in principle the time limit should be enforced and it should be regarded as a precise limit and not a vague target.

36. I do however need to consider in this case whether the force of the point about finality is lessened by the fact that there is a considerable linkage between what Mr Ashton complains about in the Barclays Notice and what he complains about in the UBS Notice. In particular, the relevant passage in the UBS Notice concerns the behaviour of Mr Ashton in his capacity as an employee of Barclays and the criticism of Mr Ashton which he seeks to address through his reference is in general terms the same as the criticism of him he perceives is contained in the Barclays Notice, namely the inappropriate disclosure of information between parties through participation in a chat room with traders from other banks. It is the case however, that the relevant incidents in relation to each Notice occurred on different days. Ms George submits that in addressing the matters contained in the Barclays Notice that Mr Ashton contends are prejudicial to him, on the assumption his reference in respect of that notice is admitted, evidence relating to the quotations in the UBS Notice will be relevant. I return to this issue later.

37. There is no suggestion that UBS is concerned about the finality issue. It has chosen not to be joined as an interested party in relation to Mr Ashton's reference and none of the relief sought by Mr Ashton could give rise to any possibility of reopening the conclusions in the UBS Notice as far as UBS is concerned.

*The length of the delay*

38. The delay in this case (nearly six months) is not trivial or insignificant. However, the impact of the delay is lessened by virtue of the fact that if the reference is admitted, it will be consolidated with Mr Ashton's reference in respect of the Barclays Notice (if that is admitted) and progress is being made in a timely fashion on that reference; preliminary issues are to be heard on 27 October 2015. Therefore any concerns about avoidable delays to the litigation process and evidence becoming stale are not significant in this case.

*The explanation for the delay*

39. As appears from the evidence, Mr Ashton, despite being aware of his potential right to make a reference, made, with the benefit of advice from a leading firm of lawyers, a deliberate decision not to make a reference in respect of the UBS Notice until (1) the Barclays Notice had been published (2) the Court of Appeal's judgment in *Macris* had been handed down and (3) Stephenson Harwood had considered the

question of identification and prejudice definitively in the round. This approach was adopted in order, Mr Ward said, to minimise the use of Mr Ashton's limited resources.

40. That strategy of considering the impact of both notices in the round obviously made sense when Stephenson Harwood anticipated that both notices would be published simultaneously. It seems to me, however, that waiting for the Court of Appeal to deliver judgment in *Macris* made no sense at all; at the time the UBS Notice was published the Court of Appeal and not even heard the case and did not do so until after the period for filing a reference had expired. At that point Stephenson Harwood had no information that could lead them reasonably to expect both the *Macris* judgment and the publication of the UBS Notice would be imminent. It could as it transpired to be the case, be that both events would not occur for some months.

41. These circumstances are not dissimilar to the situation in *Martin-Artajo* where another leading firm of lawyers took the view that they would wait for further developments in an investigation against the applicant before filing a reference, which they subsequently did well out of time. This Tribunal observed in that case that in such circumstances the third party could have made a reference and sought a stay until the position became clearer or approached the Tribunal with an application to extend time without making a reference. Neither course would involve a significant use of resource; as this Tribunal observed in *Martin-Artajo* at [50] the filing of a reference notice is not an onerous task and can be completed relatively easily.

42. I have formed the impression that Stephenson Harwood did not take the importance of the time limit seriously enough and it was an error of judgment to assume that it could safely be ignored and if necessary an extension of time applied for. By taking that course and with the Authority, with justification, taking the time limit point the result is that significant resource has had to be devoted to an application to admit the reference out of time, a risk that could easily have been avoided without any significant use of resource had either of the routes described at [41] above been followed.

43. In the light of the observations made in *Martin-Artajo,* Mr Ashton's position would have been worse had Stephenson Harwood been aware of the Tribunal's remarks in *Martin-Artajo.* It appears, however, that they were not aware of the decision in that case. I find this quite extraordinary for a firm which has considerable experience in this specialised area of the law. One might have expected advisers specialising in this area to follow all the tribunal's decisions in financial services cases; there are not very many of them and they are published in easily accessible form on the Tribunal's website.

44. I therefore accept Mr Stanley's submission that there was no good reason for the delay in filing a reference in respect of the UBS Notice. I will therefore have to consider whether the other circumstances sufficiently strong to enable a conclusion to be reached that it is fair and just to extend time.

*The consequences for the parties of an extension of time*

45. Should an extension of time be granted, Mr Ashton will have the opportunity for the first time to make representations on the UBS Notice, subject to it being determined that he has the right to make a reference. This will also assist with regard to the wider consideration that I identified of there being a public interest in the accuracy of administrative decision making.

46. Should the reference be admitted, there will, as Ms Chambers outlined, be implications for the allocation of Enforcement's resources. This is usually a powerful point and as I have already identified finality of litigation is to be given strong weight.

47. Nevertheless, this point is not so strong as it would have been had the Tribunal been considering an application for extension of time for filing the reference in the UBS Notice in isolation, that is on the assumption that there was no reference in respect of the Barclays Notice. Ms Chambers's evidence does not deal with the question as to whether the team that is dealing with the Barclays investigation, which clearly must still be prepared to have work to do if Mr Ashton's reference in respect of the Barclays Notice is admitted, would be in a position to look again at the material which is relevant to the quotations in the UBS Notice without a disproportionate amount of work having to be undertaken. Indeed, it could well be the case, and again Ms Chambers does not deal with this in her evidence, that the material is in fact held with the material that is relevant to the Barclays investigation and therefore readily accessible to the Barclays investigation team. There is clearly considerable overlap between the two investigations and there must have been a considerable degree of coordination between the two teams before the notices were finalised because the two Final Notices are very similar in structure and content. In my view it is more likely than not that when conducting the investigations the Authority would have been examining a large amount of material relating to a number of banks involved in the round, bearing in mind their trading with each other, so that material available to one team would also be readily available to another. This impression is fortified by the fact that but for Barclays' desire to agree an overall settlement with all its regulators, its notice would have been published at the same time as the UBS Notice.

48. Furthermore, there is considerable force in Ms George's submission that the underlying evidence in relation to the UBS Notice in respect of the matter with which Mr Ashton takes issue may fall to be disclosed in any event on the grounds of its relevance to the matters taken issue with in the Barclays Notice. It is also the case that the matter in the UBS Notice with which Mr Ashton takes issue only relates to a single incident on a single day, so that the underlying evidence in relation to this matter, as opposed to the evidence in respect of the points of principle involved which would be required in relation to the Barclays Notice in any event is unlikely to be extensive.

49. Perhaps with this as background, Mr Stanley does not seek to argue that the impact on the Authority and its resources will be severe. It emerges from Ms Chambers's evidence that Enforcement is used to coping with frequent changes in case teams due to staff movements and departures with the result that members of staff working on particular investigations have to be deployed to work on other matters on a regular basis. If that were necessary here than it seems that bearing in

mind the close link of the material in question with material relevant to the Barclays notice that the necessary work can be undertaken without a serious effect on Enforcement's efficiency. Nevertheless, It will undoubtedly be inconvenient to the Authority as it is not something that had been envisaged and it may result in extra cost for it.

*The consequences for the parties of a refusal to extend time*

50. If time is not extended, Mr Ashton will have no opportunity to challenge the criticisms he says are made of him in the UBS Notice, bearing in mind that he has not been under investigation himself and he was not given the opportunity of making representations as a third party under section 393 FSMA in the course of the proceedings taken against UBS.

51. Mr Ashton does of course already have that opportunity in relation to his reference in respect of the Barclays Notice, subject to his reference being admitted. There are some general comments in the UBS Notice about the appropriateness of the nature of the conversations that took place in the chat room and the disclosures of information that were alleged to have been made which are also made in the Barclays Notice. If an extension of time was not granted in respect of the UBS Notice Mr Ashton would still be able to make the same general points that he might have made on that notice without referring to the specific conversations with which he takes issue which are referred to in the UBS Notice.

52. Mr Stanley submits that I should give little weight to the fact that the case involves public law issues, namely the right of an individual to make representations before material which is prejudicial to him is included in a statutory notice of a third party. However, in my view there has been a strong public interest in the behaviour of prominent market participants in relation to the matters covered by the statutory notices issued to the various banks in respect of foreign exchange trading and the public perception is that those individuals whose conduct is criticised in these notices have behaved very badly and should be severely punished. In that climate there would be a understandable sense of grave injustice on the part of such an individual if his statutory rights to make representations in order to answer those criticisms have been bypassed. Mr Ashton is not under formal investigation and there is no other forum open to him in which he may seek to address these criticisms. As the Court of Appeal indicated at [41] of *Hysaj* quoted at [ 28] above, the importance of the issues to the public at large is a fact that the court can properly take into account when evaluating all the circumstances of the case.

**Conclusion**

53. Applying the overriding objective in the light of all of the factors considered above, I am of the view that this is a borderline case but I have concluded that the balancing exercise comes out just in favour of granting an extension of time.

54. At the core of Mr Stanley's strong submissions is the contention that the application to extend time should be dismissed because there is no reasonable

explanation or excuse for the long delay and the delay has caused prejudice to the Authority. Had it not been for the fact that there is a close link between the matters complained of in the UBS Notice and those in the Barclays Notice then I would have accepted this contention and dismissed the application.

55. My reasons are coming to the conclusion that the balancing exercise does come out in favour of granting an extension of time are as follows:

(1) The importance of the time limit is lessened in this case because of the close link between the UBS Notice and the Barclays Notice in relation to the subject matter in dispute and the underlying evidence that relates to them and the fact that the two references can be consolidated and conveniently dealt with without any impact on the efficiency of disposing of the litigation;

(2) Whilst I acknowledge the prejudice to the Authority in terms of the allocation of resources and potential cost and expense, this is lessened because of the considerable overlap of subject matter of the UBS Notice and the Barclays Notice and the fact that the two investigations must have been closely coordinated and in those circumstances the public interest considerations and the fact that Mr Ashton will have no other opportunity to make representations, if his reference submitted, is a strong factor which outweighs the prejudice to the Authority. As Ms George put it, the consequences of not extending time are severe from Mr Ashton but are inconvenient rather than severe for the Authority; and

(3) The factors summarised in (1) and (2) above are not in this particular case outweighed by the fact that there was no good reason for the delay, taking into account that Mr Ashton took the approach he did in good faith upon the professional advice of a leading law firm who are specialists in this field. In the light of the other circumstances identified above, it would be unfair to Mr Ashton to bear the consequences of the approach he took on the advice of his solicitors, but again in the absence of a linkage between the two notices I would not have found this a strong enough factor alone to tip the balance in favour of extending time.

56. I therefore conclude that it is in the interests of justice that time for the making of the reference be extended and accordingly it is admitted.

57. I direct that this reference is consolidated with Mr Ashton's reference in respect of the Barclays Notice and consequently the preliminary issues that are to be heard in respect of each reference shall be heard together on 27 October 2015.

**TIMOTHY HERRINGTON**
**UPPER TRIBUNAL JUDGE**

**RELEASE DATE: 21 OCTOBER 2015**