UT Neutral citation number: **[2025] UKUT 00211 (TCC)**

UT (Tax & Chancery) Case Number: UT/000097/2023

Upper Tribunal
Tax and Chancery Chamber

Hearing venue: Decided on Paper
Judgment date: 27 June 2025

Financial Services – procedure – Authority's application to amend statement of case – withdrawal of penalty – whether required to serve notice of discontinuance under section 389 FSMA 2000 – requirements of Rule 17(2) in relation to withdrawal of part of the Authority's case.

Before

JUDGE JONATHAN CANNAN

Between

NAILESH MANUBAI TERAIYA

Applicant

and

THE FINANCIAL CONDUCT AUTHORITY

Respondent

The application was decided on paper on the basis of written submissions by the parties

DECISION

Background

1. The Authority has made an application dated 25 March 2025 for permission to amend its statement of case and to amend the formulation of the preliminary issue in this case. The preliminary issue is listed to be heard on 29 July 2025. The Applicant has objected to both applications in a reply dated 25 April 2025. The Authority responded on 9 May 2025 and the Applicant made a further reply on 16 May 2025. I have dealt with the applications on paper taking into account all the submissions made.

2. The Authority proposes to amend the statement of case to reflect the fact that it no longer seeks to pursue a financial penalty against the Applicant. It has reached that decision following a request from the Danish Tax Authority. The Danish Tax Authority has stated that if the Authority pursues a financial penalty, its civil proceedings against the Applicant and others to recover their losses could be prejudiced. In January 2025 the Danish Tax Authority obtained judgments against the Applicant in Dubai finding him jointly and severally liable for approximately £71m. In the circumstances the Authority has determined that it is no longer in the public interest to pursue a penalty against the Applicant. The Authority has made clear that it has not altered its view of the Applicant's conduct or that he should be prohibited from performing any function in relation to any regulated activities.

3. The Authority's position in relation to the prohibition and the financial penalty is set out at [5A] of the proposed amended statement of case as follows:

> The Authority seeks to maintain its order prohibiting the Applicant from performing any regulated activities under section 56 of the Act. It no longer seeks to impose any financial penalty on the Applicant

4. The proposed amendment removes references to section 66 Financial Services and Markets Act 2000 ("FSMA 2000") and to the Authority's Statement of Principle 1. Allegations that the Applicant dishonestly participated in the Purported Trading are retained as is the allegation that his conduct was dishonest and lacked integrity. The particulars of those allegations have not changed. References to a limitation issue in connection with the financial penalty have been removed together with the basis on which the financial penalty had been calculated. In the conclusion at [139] the Authority invites the Tribunal to take certain action. The amended statement of case removes a request that the Tribunal should determine that Principle 1 had been breached and that it was appropriate to impose a penalty of £5,951,754. A request that the Tribunal should dismiss the reference in relation to the prohibition is maintained and a request is added that the Tribunal should direct the Authority <u>not</u> to impose any penalty on the Applicant.

5. The proposed amendment to the terms of the preliminary issue set out in my direction released on 18 February 2025 removes the question of whether the Authority was acting as a Qualifications Body within the meaning of section 54 Equality Act 2010 when it purported to exercise its powers to impose a penalty on the Applicant pursuant to section 66 FSMA 2000 such that its actions fell within the restrictions on discrimination in section 53 Equality Act 2010. The amended preliminary issue would therefore read as follows:

> Was the Authority acting as a Qualifications Body within the meaning of section 54 Equality Act 2010 when it purported to exercise its powers to impose a prohibition order on the Applicant pursuant to section 56 Financial Services and Markets Act 2000 such that its actions fell within the restrictions on discrimination in section 53 Equality Act 2010.

6. The Applicant objects to the Authority's application to amend its statement of case and to its application to amend the preliminary issue. I shall consider each objection separately.

Application to amend the statement of case

7. The Applicant objects to the proposed amendment on three broad grounds:

> (1) That the Authority has failed to follow the procedure for discontinuance in FSMA 2000.
>
> (2) The Authority has failed to follow its own policies and procedures having failed to publish the discontinuance of the penalty.
>
> (3) That the proposed amendments are inconsistent in that references to a failure to act with integrity and honesty are removed from some but not all parts of the statement of case.

8. The Applicant also observes that the Authority has provided no evidence of discussions with the Danish Tax Authority or that it has decided not to impose a penalty. I do not consider that evidence going beyond what is said in the application is necessary. I am prepared to accept at face value the reasons put forward by the Authority in the application for seeking to withdraw the penalty decision. That is consistent with the overriding objective of dealing with cases fairly and justly, which includes dealing with matters in a proportionate way.

9. Section 389 FSMA 2000 provides as follows:

> **389 Notices of discontinuance.**
>
> (1) If a regulator decides not to take —
>
> (a) the action proposed in a warning notice given by it, or
>
> (b) the action to which a decision notice given by it relates,
>
> it must give a notice of discontinuance to the person to whom the warning notice or decision notice was given.
>
> …
>
> (3) A notice of discontinuance must identify the proceedings which are being discontinued.

10. The Applicant says that the Authority cannot discontinue enforcement proceedings in relation to the penalty without issuing a notice of discontinuance. It is also said that in the absence of a notice of discontinuance, the Tribunal has no power to consent to the proposed amendment to the statement of case. In the alternative, as a matter of discretion the Tribunal should refuse permission for the amendment because of the failure to follow section 389.

11. I agree with the Authority that section 389, on its true construction, requires the Authority to issue a notice of discontinuance only where it decides not to take any action at all in relation to a decision notice. In other words, where the proceedings are being discontinued in full. The section refers to a decision by the Authority not to take "the action" to which the decision notice relates rather than "an action". That would be a more natural way of describing the position if the Applicant is right that a notice of discontinuance must be served if the Authority decides not to take one of the actions described in a decision notice whilst continuing with other actions described in the notice. I also take into account that the provision appears under a heading "conclusion of proceedings" which at least suggests that it relates to decisions which have the effect of concluding not just one aspect of enforcement action being taken by the Authority but all the actions in a decision notice which may

be said to comprise the proceedings. In this case, whilst the Authority is not pursuing the penalty, the proceedings will continue in relation to the prohibition referred to in the decision notice.

12. I do not consider that this construction gives rise to any unfairness for persons who are subject to enforcement action by way of decision notices. The proceedings will effectively terminate if the Authority serves a notice of discontinuance, or they will continue in respect of those actions which the Authority seeks to maintain by reference to the decision notice.

13. The Applicant says that the distinction is important in relation to how the Authority publicises a decision not to take the action specified in a decision notice. Section 391 deals with publicity, both generally and specifically in relation to a notice of discontinuance:

> **391 Publication**
>
> …
>
> (1A) A person to whom a decision notice is given or copied may not publish the notice or any details concerning it unless the regulator giving the notice has published the notice or those details.
>
> (2) A notice of discontinuance must state that, if the person to whom the notice is given consents, the regulator giving the notice may publish such information as it considers appropriate about the matter to which the discontinued proceedings related.
>
> (3) A copy of a notice of discontinuance must be accompanied by a statement that, if the person to whom the notice is copied consents, the regulator giving the notice may publish such information as it considers appropriate about the matter to which the discontinued proceedings related, so far as relevant to that person.
>
> (4) The regulator giving a decision or final notice must publish such information about the matter to which the notice relates as it considers appropriate.

14. I do not consider that the question of what is published in relation to a notice of discontinuance has any bearing on how section 389 should be construed. Where the Authority decides not to take any of the action described in a decision notice, then a notice of discontinuance must be issued and there is provision in relation to publication. If the decision is not to take some of the action then the proceedings will continue. As I shall explain below, there can still be provision for publicity. There is no unfairness to the Applicant in relation to publicity on the Authority's construction of section 389.

15. That is sufficient to address the Applicant's first objection. The Authority also submitted in the alternative that even if section 389 does require it to serve a notice of discontinuance, such a notice could only be served after the Tribunal had permitted the proposed amendments.

16. It does not affect my conclusion on this aspect of the application, but I do not accept that submission. The provision states clearly that if the Authority decides not to take the action described in a decision notice then it "must" serve a notice of discontinuance. There is no suggestion that the position is any different where the decision notice has been referred to the Tribunal.

17. The Authority also submitted that once a decision notice had been referred to the Tribunal, the Tribunal assumed sole responsibility for determining what if any action ought to be taken in relation to the matter. It relied on section 133(5) FSMA 2000 which provides that on a disciplinary reference (such as a penalty), the Tribunal must determine what action it is appropriate for the decision-maker

to take and remit the matter to the decision-make with appropriate directions. Unilateral service of a notice of discontinuance would usurp the role of the Tribunal.

18. I do not accept that submission. In circumstances where a decision notice has been referred to the Tribunal, Rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008 makes separate provision for any party, including the Authority, to withdraw its case before the Tribunal or any part of its case:

> **Withdrawal**
>
> 17(1) Subject to paragraph (2), a party may give notice of the withdrawal of its case, or any part of it —
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> (a) by sending or delivering to the Upper Tribunal a written notice of withdrawal; or
>
> (b) orally at a hearing.
>
> (2) Notice of withdrawal will not take effect unless the Upper Tribunal consents to the withdrawal except in relation to an application for permission to appeal.
>
> …
>
> (5) The Upper Tribunal must notify each party in writing that a withdrawal has taken effect under this rule.

19. It seems to me that in withdrawing the penalty, the Authority is seeking to withdraw part of its case on this reference. The Authority did not reference Rule 17 in its application, and I agree with the Applicant that the Authority should have given a notice of withdrawal at the same time as applying to amend its statement of case. It would then be a matter for the Tribunal whether it should consent to the withdrawal. In practical terms, however, no prejudice flows from the Authority's failure to give notice of withdrawal of its case on the penalty. The Authority requires permission from the Tribunal to amend its statement of case. It also requires consent from the Tribunal to withdraw its case on the penalty. On the facts of this case, there is no reason to think that different factors would be relevant to the Tribunal's discretion on each procedure. They would stand or fall together.

20. In summary, where the Authority decides not to take any action in relation to a decision notice, it must serve a notice of discontinuance under section 389. It should at the same time serve a notice of withdrawal under Rule 17. The Tribunal will then consider whether to consent to the withdrawal.

21. The Authority in the present proceedings should therefore serve a notice of withdrawal of its case on the penalty pursuant to Rule 17. I hereby direct that should be done within 7 days of the date on which this decision is released.

22. Turning to the Applicant's second objection, he contends that the Authority has not followed its own policy in relation to the publication of notices of discontinuance. At the time of the application, the Authority's Handbook stated as follows at EG 6.2.16 and 6.2.19:

> 6.2.16 Publishing notices is important to ensure the transparency of FCA decision-making; it informs the public and helps to maximise the deterrent effect of enforcement action. The FCA will upon request review warning notice statements, decision notices, final notices and related press releases that are published on the FCA's website. The FCA will determine at that time whether continued publication is appropriate, or whether notices and publicity should be removed or amended.
>
> 6.2.19 In cases where the FCA publishes a warning notice statement and the FCA subsequently decides not to take any further action, or where it publishes a decision notice and the subject of enforcement action

> successfully refers the matter to the Tribunal, the FCA will make it clear on its website that the warning notice or the decision notice no longer applies. The FCA will normally do this by publishing a notice of discontinuance with the consent of the person to whom the notice of discontinuance has been copied.

23. The Applicant says that the Authority has not made clear on its website that it is discontinuing the penalty proceedings, nor has it sought the Applicant's prior consent to publish a notice of discontinuance. In applying for permission to amend its statement of case, the Authority is seeking to circumvent its own policy. The Applicant also says that the Authority has not complied with its obligations in relation to publication and consents in section 391(2).

24. The Authority says that the policy described in its Handbook is not engaged because the decision notice has not been successfully referred to the Tribunal. However, it acknowledges in the application that if it is permitted to amend its statement of case and if directed it will issue a further decision notice seeking only to impose a prohibition and will publish an update reflecting the change.

25. For the reasons given above, there is no obligation on the Authority to issue a notice of discontinuance and therefore section 391(2) is not engaged. Nor does the Tribunal have a supervisory jurisdiction in relation to the Authority's application of its policy on publication of notices and whether previously published details should be amended.

26. Whilst the Tribunal does not have any general supervisory power over the Authority's enforcement actions, there is no reason why the Tribunal should not, in appropriate circumstances, require the Authority to publish details of a withdrawal under Rule 17. Effectively, that would be a condition of granting consent pursuant to Rule 17(2). It seems to me that in exercising power to consent under Rule 17(2) it would be in accordance with the overriding objective of dealing with cases fairly and justly to require the Authority in this case to undertake to publish its decision not to pursue the penalty as a condition for granting consent to the withdrawal of that aspect of its case.

27. The Applicant's third objection is that the proposed amendments are inconsistent because allegations of a failure to act with integrity and honesty have been removed in some parts of the statement of case but not all. I do not consider that objection is well-founded. The Authority clearly relies on allegations of failure to act with integrity and honesty in relation to the prohibition. Those allegations remain in the amended statement of case.

28. Overall, I am satisfied that it would be consistent with the overriding objective to grant permission to the Authority to amend its statement of case in accordance with the draft annexed to the application. The Authority should lodge its notice of withdrawal pursuant to Rule 17(2) together with the undertaking referred to above within 7 days. The permission to amend shall take effect when consent is expressly granted by the Tribunal pursuant to Rule 17(2).

Amendment of the preliminary issue

29. This part of my decision should be read together with my decision to direct a preliminary issue, published with neutral citation [2025] UKUT 00034 (TCC).

30. The Applicant says that the Authority's decision not to pursue the penalty does not affect the scope of the preliminary issue even if permission is granted to amend the statement of case. That is because the Applicant's referral and his reply to the Authority's statement of case alleges that the Authority discriminated against him in initiating and continuing the enforcement proceedings, including proceedings for the penalty. It remains the Applicant's case that the Authority breached the Equality Act 2010 by imposing the penalty and in maintaining the penalty. The discrimination alleged in relation to the penalty is not "undone" by the Authority's decision not to pursue the penalty. The

Tribunal will still have to determine as part of the reference whether the Authority breached section 53 Equality Act in this regard.

31. In considering this application I shall assume that permission to amend the Authority's statement of case has taken effect and the Tribunal has consented to the withdrawal of its case on the penalty.

32. On the basis that the Authority is not pursuing the penalty, it cannot be said that it is subjecting the Applicant to a detriment which falls within section 53(2)(c) Equality Act 2010 in relation to the penalty. It may be the case that it had sought to subject the Applicant to a detriment, but that is now historical. Unless the penalty is part of the proceedings, the Tribunal would have no jurisdiction to consider whether there had been a breach of the Authority's obligations under section 53(2)(c) in respect of the penalty. The Tribunal has no freestanding jurisdiction under the Equality Act 2010 or otherwise to consider whether there has been a breach, to provide a remedy for any breach or to make any declaration in that regard. I agree with the Authority that whether the Authority was acting as a "Qualifications Body" within section 54 in seeking to impose a penalty, which it is now not pursuing, would be irrelevant to the question of whether it was acting as such and in breach of section 53(2) in deciding to impose a prohibition.

33. I did not appreciate, until a draft of this decision was circulated to the parties, that if section 53 is engaged then the parties agree that a prohibition amounts to a detriment within section 53(2)(c) as well as the withdrawal of a qualification within section 53(2)(a). I amended paragraph 32 accordingly, but those amendments do not affect my reasoning.

34. The Applicant says this is an "entirely conventional discrimination claim" and there is nothing hypothetical about it. I do not accept that submission. In my view the question of whether the Applicant was acting as a "Qualifications Body" within the meaning of section 54 in seeking to impose a penalty is now of academic interest only in these proceedings. There is no good reason to determine an issue that has no relevance to the continuing proceedings against the prohibition.

35. The Applicant says that the past conduct of the Authority is bound to be relevant in determining whether the present reference is justified. I can accept that if the Applicant is successful on the preliminary issue in relation to the prohibition, then in establishing discrimination it may be that evidence of discrimination in relation to the penalty is relevant. However, that does not mean that there is any need to determine whether the Authority was acting as a Qualifications Body in purporting to impose the penalty on the Applicant.

36. In the circumstances, I direct that the preliminary issue shall be amended in accordance with the draft attached to the application.

Conclusion

37. For the reasons given above, I direct that the Authority shall have permission to amend its statement of case on the terms described above and the form of the preliminary issue shall be amended as indicated at [5] above.

JUDGE JONATHAN CANNAN

Release date: 30 June 2025