Neutral Citation: **[2022] UKUT 00275 (TCC)**

Case Number: UT/2022/000088

UPPER TRIBUNAL
(Tax and Chancery Chamber)

By remote video hearing

FINANCIAL SERVICES – procedure – supervisory notice discontinuing listing of shares under s77 FSMA 2000 – application to extend time to make reference granted – application under Rule 5(5) of UT Rules to suspend effect of notice pending determination of reference dismissed

Heard on: 5 October 2022
Judgment date: 14 October 2022

Before

UPPER TRIBUNAL JUDGE SWAMI RAGHAVAN

Between

UMUTHI HEALTHCARE SOLUTIONS PLC

Applicant

and

THE FINANCIAL CONDUCT AUTHORITY

Respondent

Representation:

For the Applicant: David Hugo, Attorney

For the Respondent: Charlotte Eborall, Counsel, instructed by the Financial Conduct Authority

DECISION

INTRODUCTION

1. On 4 July 2022, the Financial Conduct Authority ("**FCA**") issued a decision, in the form of a First Supervisory Notice ("**FSN**"), to Umuthi Healthcare Solutions PLC ("**Umuthi**") discontinuing Umuthi's standard listing of shares on the Official List with immediate effect. Umuthi's listing had, the previous year, been suspended by the FCA on 4 June 2021, with the consequence the shares could not be traded on the Main Market of the London Stock Exchange. Although the listing of the shares was suspended, it remained possible nevertheless that the shares could be restored by the FCA to the Official List and that trading could resume at some future point. The effect of the FCA's decision to discontinue the listing ruled out that possibility.[1]

2. Umuthi referred the FSN, to the Upper Tribunal ("**UT**") on 5 August 2022 which was three days outside of the relevant 28 day time limit stipulated in the UT Rules[2].

3. This decision deals with Umuthi's applications to:

   (1) extend the 28 day deadline for the UT receiving a reference notice;

   (2) suspend the effect of the FSN (under Rule 5(5) of the UT Rules) pending determination of the reference. (If that application were successful, it would mean Umuthi's shares would revert to being suspended from listing, rather than discontinued, until the UT determined the reference.)

4. The tribunal grants Umuthi's time extension application. That means the reference may go ahead to a substantive hearing once the necessary preparations for that have been worked through by the parties in the normal way. Umuthi's application to suspend the effect of the FSN is refused. The listing of the relevant shares on the Official List therefore remains discontinued pending the determination of the reference. The tribunal's reasons for reaching those decisions are set out below.

BACKGROUND

5. The detailed background leading up to the FCA's decision to discontinue Umuthi's listing was set out in the FSN. The following summary is set out with a view to understanding the parties' arguments on Umuthi's applications, which in turn requires an appreciation of the issues raised by Umuthi's referral to the UT. Although much of the underlying factual background, for instance when certain correspondence was written, what it contained, and the fact that the FCA took certain actions is not in dispute, the issue of whether it was open to the FCA to decide as it did would be a matter for the UT hearing the substantive reference after having considered the relevant evidence at that hearing.

Umuthi's listing

6. Shares of Umuthi, which is a parent company of LEMS Pharmaceutical Ltd, a South-African-based healthcare business, were admitted to the Official List on 4 March 2021. The FCA suspended the listing on 10 March 2021 due to the lack of provision of information. Following Umuthi's publication of audited financial information between 12 and 19 May 2021, the FCA lifted the suspension on 25 May 2021. Shortly afterwards, on 4 June 2021, the FCA suspended the shares again. Prompted by complaints from certain investors and the FCA's own subsequent enquiries, the FCA was concerned that certain shareholders were unable to deal with their shares because of lack of access to their trading accounts or because

[1] Discontinuance would not prevent the issuer from making a fresh application for admission in respect of the shares

[2] The Tribunal Procedure (Upper Tribunal) Rules 2008

certain shares had not been allocated to them. The FCA also considered it was unclear, because of what it regarded as anomalies in the information Umuthi had provided, whether Umuthi's major shareholdings had been accurately disclosed and whether pursuant to a listing rule requirement a sufficient percentage of the shares were held in public hands (the percentage was 25% at the relevant time).

7. The shares remained suspended until they were discontinued by the FSN of 4 July 2022. That FSN detailed the financial reporting deadlines that Umuthi had missed: 31 August 2021 (to publish its year end results) and 31 December 2021 (to publish its half-yearly financial report). It also recounted a letter the FCA received on 13 September 2021 from a non-executive director informing of the director's resignation in response to allegations of a fraud in the sale of shares and the subsequent arrest in October 2021 of a consultant who it was suggested had been held out as an advisor to the company. The FCA made a number of information requests but regarded the responses provided as late and materially incomplete. No response in respect of outstanding material having been received, the FCA warned it was considering discontinuance of the listing. Umuthi responded on 28 March 2022 providing a revised share register which it assured the FCA was correct and could be relied on. Umuthi maintained that the issues as to share issuance and allocation had been resolved. For a variety of reasons, the FCA considered it was unable to rely on Umuthi's assurances and that it saw no reasonable prospect that the uncertainties as to the supply of shares and Umuthi's financial position would be resolved. It noted financial statements had not been published and that Umuthi had not, as the FCA had requested, adequately diagnosed its previous reporting mistakes or provided adequate information on its current systems and controls. Nor had it addressed the FCA's concerns regarding governance around resolution of the issues which had given rise to the suspensions of listing by providing the relevant internal documentation and communications. It had also not, as requested, provided the identities of the persons who had had managerial responsibilities and the relevant decision making responsibility during the listing process.

FCA's decision to discontinue

8. On 4 July 2022 the FCA decided to discontinue the shares pursuant to sections 77(1) of the Financial Services Markets Act 2000 ("**FSMA**").

9. Section 77(1) permits the FCA "in accordance with Listing Rules" to discontinue the listing of securities:

> "if satisfied that there are special circumstances which preclude normal regular dealings in them".

10. Section 77(2) permits the FCA to suspend the listing; that was the provision which enabled the FCA to carry out the earlier suspensions.

11. Under s78(2), where the FCA discontinues the listing, it must give the issuer of securities written notice. (s395(11) FSMA terms such notice a "supervisory notice" and under s391(5) the FCA must publish "such information about the matter to which the notice relates as it considers appropriate" when the supervisory notice takes effect).

12. The Listing Rules (LR 7.2.1 R) set out principles that a listed company must follow namely that it: 1) "must take reasonable steps to establish and maintain adequate procedures, systems and controls to enable it to comply with its obligations" 2) "deal with the FCA in an open and co-operative manner".

13. Guidance issued by The FCA describes the purpose of the principle as:

> "to ensure that listed companies pay due regard to the fundamental role they play in maintaining market confidence and ensuring fair and orderly markets".

14. Under LR 5.1.1 R(2), an issuer that has the listing of any of its securities suspended must nevertheless comply with all listing rules applicable to it. Pursuant to the Disclosure and Transparency Rules ("**DTR**"), which are referred to in the Listing Rules, issuers are required to make public annual and half yearly financial reports, the deadlines for which are respectively four months and three months after the period to which the report relates (DTR 4.1.3 R and DTR 4.2.2 R).

15. As regards the FCA's exercise of power under s77 FSMA, the FCA's guidance, in LR 5.2.2 G, gives non-exhaustive examples on when the FCA may discontinue the listing of securities. The examples include situations:

> "where it appears to the FCA that …
>
> (2) the issuer no longer satisfies its continuing obligations for listing, for example, if the percentage of shares in public hands falls below [25%[3]] (the FCA may however allow a reasonable time to restore the percentage, unless this is precluded by the need to maintain the smooth operation of the market or to protect investors); or
>
> (3) the securities listing has been suspended for more than six months."

16. The FCA considered there were special circumstances, in summary, because there were fundamental uncertainties i) as to Umuthi's financial position, given the lack of financial reporting ii) the supply and allocation of its shares and the accuracy of its Share Register. The FCA also considered that there was no realistic prospect of the issues being resolved in the foreseeable future and noted Umuthi's response to the issues the FCA raised had been consistently late, incomplete and/or inadequate. It noted that adequate systems and controls and timely responses to the FCA were an important part of Umuthi's continuing obligations for listing. It also noted (referring to the example given in the guidance above of a special circumstance being that the securities had been suspended for more than six months) that the most recent suspension had been in force for more than 12 months and shares had been suspended in total for all but two weeks since their listing in March 2021.

17. Umuthi's reference states the following grounds:

> "The Financial Conduct Authority failed to objectively consider the facts as presented to them by Umuthi when making their decision to delist the company.
>
> Umuthi believes that the Financial Conduct Authority were negatively influenced by unsubstantiated articles that appeared in the media which came about predominantly as a result of an external fraud perpetrated on Umuthi."

18. The parties were agreed that the hearing of Umuthi's application for suspending the effect of the FSN, which Umuthi made when filing its reference, should take place as soon as possible. Directions were agreed for the application to be listed at a remote video hearing, the scope of which was subsequently expanded by the tribunal to include the time extension application. The form of hearing, as a remote video hearing, was confirmed once it was clear that the FCA did not require Umuthi's witness (Umuthi's CEO, Gerhardus Viljoen, who was based in South Africa)[4], to be cross-examined. The hearing took the form of oral submissions

[3] This has since changed to 10%

[4] In *Agbabiaka (evidence from abroad; Nare guidance)* [2021] UKUT 286 (IAC) the UT identified, when remote oral evidence was taken from abroad, the need to first establish the tribunal could take such evidence

only; Umuthi too did not require the FCA's witness (Timothy Edgar, Manager in the Primary Market Oversight Department in Enforcement and Market Oversight Division) to be cross-examined. Both parties asked the tribunal to note they reserved the right to challenge the other's evidence at any substantive hearing.

EVIDENCE

19. Mr Viljoen's evidence dealt with the history of the allocation and issue of shares, the challenges faced, and Umuthi's communications with the FCA.

20. He explained the numbers of shares issued at various points, were in certificated form, and the plan to dematerialise some of them. However because, following the admission to trading decision by the LSE, there had been insufficient time to enable CREST, the shares were transferred to the nominee company of a broker (Pello) who had been assisting with opening trading accounts for the predominantly South African shareholders. There were shareholders who, despite repeated and continuous communications from Pello, did not or were not able to provide all the KYC (Know your client) information e.g. because a passport required had expired. It is submitted that any difficulties which resulted from such cases were beyond Umuthi's control. Mr Viljoen goes on to explain that an unauthorised consultant made share commitments to both existing shareholders (legitimate shareholders) and persons who thereby considered themselves shareholders but who were not (illegitimate shareholders). In relation to the latter Mr Viljoen's evidence stated:

> "there were a few shareholders with whom the company concluded compromise arrangements in order to save the listing. In some cases the company's view is that there was extortion, but the company had no choice due to the threats that were levied by the individuals".

21. Mr Viljoen's evidence details the further issue and allocation events that took place before a final share register was presented to the FCA on 28 March 2022. He submits, by reference to that register, that there was certainty regarding the company's shareholders.

22. As regards the financial information that had been provided, and Umuthi's attempts to bring its own reporting up to date, he confirmed the South African subsidiary had been audited and the results released to the RNS (Regulatory News Service) on 30 September 2022 and submitted to the National Storage Mechanism of the FCA on 4 October 2022. While Umuthi had sought to engage UK auditors, and as at 18 August 2022 had been told by those auditors that, subject to payment of a bill, work could begin on outstanding accounts, Umuthi was subsequently informed by them on 28 September 2022 that the firm could not assist. This arose out of the firm's decision to withdraw from acting for LSE listed companies due to increased regulations for auditing such companies. Mr Viljoen's latest evidence[5] is that Umuthi

> "…is in the process of engaging alternative auditors in order to complete the audit and will publish financial statements as soon as the audit is complete."

23. On behalf of the FCA, Mr Edgar detailed the background to the FSN, and adopted the facts contained therein. His evidence also went through statements made about Umuthi both before and after its de-listing. This included a RNS announcement Umuthi made on 28 January 2022 that its Annual Report and accounts were "in the process of being finalised and will be released as soon as practicable" and that its management was "in [the] final stages of

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without damaging the United Kingdom's diplomatic relationship with the other country and that the stance of the Foreign Commonwealth Development Office (FCDO) is determinative in that regard. A specific unit within FCDO (The Taking of Evidence Unit) FCDO has, since 29 November 2021 been tasked with determining the relevant stance.

[5] As set out in his supplementary statement of 6 October 2022

securing financing from shareholders". He also exhibited an 8 August 2022 Moneyweb article entitled "Massive damages claim over 'sabotage' of Umuthi Healthcare's London Listing". In addition his evidence dealt with the further developments that had occurred since the issuance of the FSN.

24. In particular, regarding the share supply issue, Mr Edgar exhibited a 12 August 2022 letter Umuthi wrote to certain shareholders which explained an intention on the part of certain of the company's shareholders to hold others who were members of a shareholder action group liable for the losses incurred in de-listing. (The shareholder action group was said to be authorised and supported by a particular named shareholder who caused "malicious and negative communications" to the FCA, press and others, which led to suspension and delisting). Given a concern that the identity of shareholders in the action group was mispresented by that named shareholder, the letter sought details of whether the recipient was part of the action group. It also asked the recipient:

> "Are you in agreement that you are entitled to 25,000 [Umuthi] shares…"

25. Following on from that communication, the FCA, on 17 August 2022, received a series of similarly worded e-mails from individuals stating that they were Umuthi shareholders and that:

> "…As of today's date, there are more than 30 shareholders who represent over 25 million shares due and not yet allocated to them who have not had any confirmation from the company of these shares being confirmed as valid and recognised."

26. On 22 September 2022 the FCA updated its press release to record that Umuthi had made a referral to the UT on 5 August 2022 and that the discontinuance continued to have effect pending any decision by the UT to the contrary.

27. I deal with other matters mentioned in Mr Viljoen's and Mr Edgar's evidence as appropriate when discussing the particular applications.

TIME EXTENSION APPLICATION

Relevant Law and Legal approach

28. Under Schedule 3, para 2(2) of the UT Rules:

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

29. Rule 5(3)(a) of those Rules grants the Tribunal the discretion to:

> "extend…the time for complying with any rule…"

30. There was no dispute that, in exercising its discretion, the tribunal should follow the approach set out in *Martland v HMRC* [2018] UKUT 0178 (TCC). While that case dealt with an appeal against an excise duty assessment that was notified late to the First-tier Tribunal ("FTT"), the relevant principles were just as applicable to an extension of time in relation to a reference to the Upper Tribunal. Having reviewed the relevant authorities (which including *Denton and others v TH White Limited and others* [2014] EWCA Civ 906 and *BPP Holdings Limited v Revenue & Customs Commissioners* [2017] UKSC 55, the UT suggested following a three stage approach:

> "(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much

> time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
>
> (2) The reason (or reasons) why the default occurred should be established.
>
> (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.
>
> 45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected…"

31. As regards evaluation of the merits the UT explained:

> "46. In [*exercising its judicial discretion taking account of all relevant factors*], the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal…
>
> It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances."

Application of principles to this case

32. In support of its application, Umuthi argues the delay is very short and therefore not serious and significant. The delay arose from the misapprehension the 28 day limit referred to business rather than calendar days. There was intrinsic merit in the appeal and the consequences for the applicant in not extending time would be dire.

33. The FCA oppose the application arguing the 28 day time limit should be enforced strictly. Umuthi's explanation regarding confusion of calendar/business days, which was in any case weak, was implausible in the light of the train of communications that took place: the real reason Umuthi was late was because its main concern was to avert publication of the FSN. Umuthi's reference to the UT was obviously hopeless such that there was no point extending time.

34. I deal with these arguments in my discussion of the relevant stages.

Length of delay and whether serious and significant?:

35. It is common ground the length of delay is three days. For Umuthi, Mr Hugo submits that that short delay, which corresponded to around 10% of the 28 day time limit, was clearly

not serious or significant. Ms Eborall's response, on behalf of the FCA, was that such quantitative analysis failed to recognise that the factor of length of delay and whether it was serious and significant required the tribunal's evaluation with regard to the context for the relevant time limit. In a financial services regulatory context there was particular import to the certainty of time limits being complied with. In *Martin-Artajo v FCA* [2014] UKUT 0340, concerning a reference under s393(11) FSMA where the applicant was a third party maintaining he had been prejudicially identified, the reasons for the 28 day time limit accepted by the UT (Judge Herrington) (at 53(4)) included:

> "…the public interest that the position should be clear, so that the market knows what regulatory action has been taken and when that action can be regarded as definitive."

36. The UT continued (at [54]) "…in principle the time limit should be enforced and it should be regarded as a precise time limit and not a vague target."

37. I agree with Ms Eborall that the consideration in respect of the length of delay is a matter of evaluation which will depend on the particular context. It is also clear from the UT's approach in *Martin-Atajo* that the concern over certainty from a market point of view is to be assessed with reference not only in terms of the regulatory system generally but also to the factual background (see [58] where the UT contrasted the certainty regarding others involved – the firm and another individual- and considered the uncertainty regarding Mr Martin-Atajo did not materially affect the position).

38. In this case, shares moved from being suspended, having been in that state for over 12 months, to being discontinued. Although there might not be the same interest in certainty for instance if the shares had moved from admitted to trading to being suspended, or if the special circumstances were such that the FCA had moved straight to discontinuance, there is nevertheless a wider market interest in having certainty over whether a share's listing status has moved from suspension to discontinuance. When the listing of shares is suspended there is the possibility the listing will be restored whereas when the listing is discontinued that prospect is ruled out. The change in status as between suspension and discontinuance will accordingly have an impact on investment and divestment decisions by existing investors and potential investors (the shares could of course continue to be traded privately). The investors in this market would expect, to a degree of certainty (the certainty could not be absolute given the discretion within the rules to extend time) that when the 28 day time limit had passed following a decision to discontinue, the effectiveness of the discontinuance was final.

39. Mr Hugo argues that if regulatory certainty was as important as the FCA maintain, then the FCA would have published the FSN on expiry of the 28 days. This misses the point however that the regulatory certainty provided by the time limit stems from the relative certainty (barring a subsequent extension) of the final effectiveness of the discontinuance once the 28 day limit expires with no referral to the UT having been made. The extent to which, once the notice takes effect, the FSN, or matters it refers to, is published remains a matter of the FCA's discretion (see [11]). The FCA's intention, in any case, as disclosed in its correspondence to Umuthi, was to publish on the day following the expiry of the 28 day deadline[6].

40. While the FCA argue that delay is serious and significant, because it has stopped the publication of the FSN which the FCA argues would correct the misleading impression otherwise created, regarding the reasons for discontinuance, by Umuthi's statements and the Moneyweb article, I am not persuaded such delay makes the breach of the 28 day time limit

[6] A reference in the relevant FCA's e-mail of 29 July 2022 to Tuesday 1 August was a typographical error, the intended date of publication was Tuesday 2 August 2022.

any more serious and significant than it already is. If, Umuthi's reference had been made in time, it would still have included the same application to suspend the effect of the FSN, thereby presumably forestalling the FSN's publication.

41. Although the delay of three days is much shorter than for instance in *Martin-Artajo* (which was four months in relation to which the UT held, using the terminology of the relevant authorities at the time was "not trivial or insignificant"), given the particular market context discussed above, I reject Umuthi's submission that the delay was not serious and significant. However, as the Court of Appeal specifically acknowledged in *Denton* (see [27] and [35]) there are degrees of seriousness and significance. The three day delay in this particular context where the listing has moved from a lengthy period of suspension to discontinuance, is in my view at the threshold of serious and significant and this ought to be recognised when considering the third stage of considering all the relevant circumstances of the case.

Explanation for delay

42. The factual background to the delay was as follows. The FSN explained Umuthi had the right to make written representations to the FCA (whether or not it referred the matter to the Tribunal). The deadline for this was stated as "Friday 29 July…". Under a separate heading "The Tribunal", the notice set out Umuthi's right to refer the FSN to the UT, giving details of the tribunal's contact details and on where further information on the relevant forms and guidance could be found. It stated that Umuthi had "28 days from the date on which this First Supervisory Notice is given to it to refer the matter to the Tribunal."

43. The FCA did not publish the FSN on 4 July 2022 but did issue a press release stating that the FCA had decided to discontinue the listing of Umuthi's shares and stating that "at this stage" the FCA would not provide any further details of the circumstances which had led to the cancellation. The press release referred to the Listing Rule Guidance LR 5.2.2 G (see [15] above) and to Umuthi's right to make representations to the FCA and/or to refer the matter to the UT.

44. Umuthi wrote to the FCA on 28 July 2022 stating that it would not be making representations to the FCA or approaching the tribunal within the time limit stipulated. The FCA's notification to Umuthi on 29 July 2022 that the FCA intended to publish the FSN prompted further exchanges with Mr Hugo requesting on 1 August 2022 amendments which the FCA declined to make. On 4 August in an e-mail @8.15am Umuthi wrote to the FCA with a request to refer the matter to the tribunal. The FCA's response of the same day, which was acknowledged the next day by Mr Hugo, explained that it was for Umuthi to make the referral and pointed out that the 28 day limit had passed. Umuthi made its reference to the UT the following day on 5 August 2022.

45. Umuthi's explanation for the delay, as set out in Mr Viljoen's evidence is to the effect that he assumed the time period referred to working days, rather than calendar days. He explains that he was aware, based on his experience of dealing with medical professionals and the litigation issues facing them over his having been CEO of his own company for 15 years that under the Rules of Court in South Africa, time limits were generally expressed in court days which excluded weekends and public holidays. He accepts he and his legal advisor made an error but argues that confusion arose from the FSN which set out a specific named date for the making of representations to the FCA but then an unspecified time limit of 28 days for reference to the tribunal.

46. That explanation is patently not a good one for reasons which Ms Eborall advanced. Umuthi, who had access to legal representation through the auspices of Mr Hugo, an attorney in South Africa (but the point would still stand even if the company did not have legal

representation) could not reasonably assume, if it was the case that deadlines were specified in business days in South Africa, that the same would apply to deadlines under the Upper Tribunal Rules. Moreover, Umuthi might reasonably have been expected to consult the rules (from which it would have been clear from the distinction in Rule 12 on calculating time which distinguished between "days" and "working days") that the 28 day time limit included non-working days), and if there were any doubt to have sought clarification from the FCA and/or another legal adviser.

47. I need not therefore address the FCA's submission that Umuthi's explanation was implausible given the chronology and contents of the communications Umuthi made before it made its reference which, it was argued, suggested Umuthi only became concerned with the deadline once it was clear the FCA would not accede to Umuthi's proposed amendments to the public statement the FCA said it was going to make regarding the FSN.

Merits - general impression of strength or weakness of case

48. Umuthi's case, in essence, is that the FCA gave undue weight to complaints from shareholders and to press articles, in coming to the view there were special circumstances that justified discontinuing the listing and insufficient weight to Umuthi's own account of its share issue and allocation. It argues that incorrect information was given by a named shareholder and the shareholder action group, which was wrongly taken at face value "without interrogation". The FCA did not also give Umuthi the opportunity to respond to the specific allegations being made against it. Umuthi thus disputes the FCA's view that the supply of shares is fundamentally uncertain.

49. The FCA argue Umuthi's case is hopeless. In circumstances where a company has not published the required financial information and fundamental concerns exist over the supply of shares, in relation to which it is clear there is an ongoing dispute with shareholders, there is no real prospect of Umuthi succeeding on the reference.

50. While there is no question of Umuthi's case being a strong one I am not persuaded it can be regarded as hopeless. The legal backdrop to the reference and the fact that this is the first time, so far as the parties are aware, that s77 FSMA has been used by the FCA to discontinue a listing, suggest the tribunal should not be too quick to dismiss the reference as without any merit. Although the FCA has set out in its guidance examples of the sorts of circumstances which might lead to it discontinuing a listing, a tribunal would focus on interpreting the relevant statutory provisions. It would, it appears, be doing so for the first time and without the benefit of any direct precedent.

51. That does not mean the question of what constitutes the requisite circumstances is entirely at large. Under s77, the circumstances must be "special"; and they must "preclude normal regular dealings in [the securities]". The tribunal will interpret those words in accordance with the established principles of statutory interpretation. In oral submissions Mr Hugo suggested that while the matters referred to in the FSN could justify suspension, they did not entitle the FCA to be satisfied that s77 was met so as to discontinue the listing. In my view an argument that uncertainty in the supply of shares, if established, and a long-standing lack of provision of financial information are incapable of amounting to special circumstances is weak (both are matters which inform normal price formation, and are clearly relevant on their face to "preclude normal regular dealing"). However acknowledging there is room for argument in the interpretation of an uncharted provision, I cannot say the argument is hopeless.

52. Another factor why I consider some caution should be adopted before regarding the merits of the reference as hopeless stems from the nature of the tribunal's jurisdiction when determining a reference in relation to the issues in this case. I explored this with Ms Eborall,

who confirmed the relevant jurisdictional provision was set out in s133 FMSA. That provides, insofar as relevant to non-disciplinary references such as this:

> (4) The Tribunal may consider any evidence relating to the subject-matter of the reference or appeal, whether or not it was available to the decision-maker at the material time….
>
> (6) …the Tribunal must determine the reference or appeal by either—
>
> (a) dismissing it; or
>
> (b) remitting the matter to the decision-maker with a direction to reconsider and reach a decision in accordance with the findings of the Tribunal.
>
> (6A) The findings mentioned in subsection (6)(b) are limited to
>
> findings as to—
>
> (a) issues of fact or law;
>
> (b) the matters to be, or not to be, taken into account in making the decision; and
>
> (c) the procedural or other steps to be taken in connection with the making of the decision.

53. In *North London Van Centre v FCA* [2019] UKUT 0233 (TCC) the UT summarised the tribunal's powers as set out in the UT's earlier decision in *Dr Saim Köksal v FCA* [2016] UKUT 478 ([27]-[31]) as follows:

> (1) The Tribunal may consider evidence relating to the "subject-matter of the reference" that was not available to the FCA when it made its decision (s133(4) of FSMA)…
>
> (2) If, having reviewed all the relevant evidence and the factors taken into account by the FCA in making its decision, and having made findings of fact in relation to that evidence and such other determinations of law as are relevant, the Tribunal considers that the FCA's decision was one that was reasonably open to it, then the correct course is to dismiss the reference….
>
> (3) If the Tribunal is not satisfied, in the light of its findings that the FCA's decision was within the range of reasonable decisions, the correct course is to remit the matter back to the FCA under s133(6)(b) of FSMA …
>
> (4) The Tribunal would be entitled to conclude that the FCA's decision was outside the range of reasonable decisions if it were to make findings of fact that were clearly at variance with findings made by the FCA and which formed the basis of the FCA's decision….

54. In relation to the supply of shares issue, there is clearly a matter of dispute as to whether Mr Viljoen's account of the issue and allocation of shares, which he gave in support of the 28 March 2022 share register provided to the FCA, provides the necessary certainty as he maintains. The FCA's position is that none of the materials provided adequately explained Umuthi's admission that "shares were allocated incorrectly at times" or how the correction process in relation to that occurred. A tribunal hearing the substantive reference, would be able to descend into the detail of the evidence and doubtless have the benefit of seeing the parties' respective evidence tested in cross-examination. It is at least possible the tribunal could make findings of fact that the account given was sufficiently clear to provide enough certainty regarding the supply of shares. Such findings, to the extent they varied from those made by the FCA could lead to the tribunal concluding the FCA's decision was outside the range of reasonable decisions.

55. The tribunal hearing a substantive reference could also, further to Umuthi's grounds, consider the weight to be ascribed to reports the FCA received from shareholders or those claiming to be shareholders in the light of all the evidence and Umuthi's allegations to the effect that certain complaints to the FCA have been maliciously motivated and/or are incorrect. It cannot be ruled out at this stage that the tribunal might make findings of fact to the effect such reports, or the fact of such reports having been received was given undue weight such that the FCA's decision was outside the range of reasonable decisions.

56. Because the above matters related to supply of shares will depend on the detail of the evidence that is eventually before the tribunal at any substantive hearing it is difficult to reach a view one way or the other on the merits of Umuthi's case in respect to certainty of supply of shares.

57. In contrast, Umuthi's case in relation to the lack of published financial information in relation to Umuthi is not disputed and is obviously weak. Umuthi do not squarely address the impact of the lack of that published financial information in their submissions but merely recount the (so far) unsuccessful efforts to get such information published.

58. I canvassed with Ms Eborall whether any financial information Umuthi might publish in the future might provide a basis for findings by the tribunal which would result in the FCA's decision not being one that was within the reasonable range. I understood the FCA to suggest it would not. This was because the matter referred pertained to whether the FCA's decision as at 4 July 2022 was within the reasonable range of decisions. But even if that is incorrect, and subsequent financial information can be taken into account in considering whether to remit, as Ms Eborall rightly points out the fact remains that none of the outstanding financial information has been provided, nor is there any firm date by which it is expected.

59. While this aspect of Umuthi's case can rightly be said to be hopeless, that does not detract from it being difficult to say at this point that the whole case is hopeless. The basis for the FCA's decision was not simply lack of financial information, but also lack of certainty over supply of shares. If the tribunal made findings of fact at variance with those underpinning the FCA's decision on supply of shares, the possibility is left open that the tribunal could, on that basis (see proposition [4] at [53] above), find the decision was one that was not within the reasonable range and direct a new decision to be taken.

60. My overall impression is that although the merits of Umuthi's case do not appear especially strong, they are not so weak as to mean there would be no point to granting the time extension.

61. The FCA argue that it is also relevant to consider at this stage Umuthi's earlier failings in complying with the FCA's information requests as detailed in the FSN and as adopted in Mr Edgar's evidence. While I can see that any such failings could potentially be relevant to the merits insofar as those involve criticisms regarding Umuthi's governance and co-operation with the regulator such failings are not in my view of any significance as a separate factor in the time extension application. It is true the Court of Appeal in *Denton* (see [27] and [36]) considered that the "defaulter's previous conduct in the litigation" might be taken into account as part of consideration of all the relevant circumstances. It can readily be seen how that would be of particular sense where relief from sanctions was in issue. That the previous conduct is expressed in terms of "the litigation" and breaches "of the rules, practice directions and court orders by the parties" (in other words matters overseen by the relevant court or tribunal in the context of litigation before the court or tribunal) suggests that non-compliance with deadlines set by one of the parties to the litigation rather the court or

tribunal, and which take place prior to litigation commencing are not relevant in the same way.

62. I also do not consider Mr Viljoen's submission as to the prejudice Umuthi would suffer, if time were not extended, arising from publication of the FSN which he says would "severely jeopardize future trade in the shares of the company in the listed environment" adds anything beyond the prejudice suffered by Umuthi losing the chance to fight an appeal (which although not overwhelmingly strong is not hopeless). Publication of the FSN could happen eventually. Whether it does, assuming that is what the FCA consider appropriate, under their discretion under s391(5) FSMA, will it appears to me depend on whether Umuthi were successful, following a substantive hearing, in getting the matter under referral remitted back to the FCA for reconsideration.

Balancing exercise

63. Although the delay is classed as a serious and significant breach, reflecting the particular importance of respecting statutory time limits in a regulatory context, and more specifically given the wider interest in the listed status of shares from the market's point of view, it must be acknowledged that it is at the threshold of that kind of breach. The length of delay of three days is very short and because it is in a context where the shares were already suspended for a lengthy period of time, the interest in certainty is not as heightened as if the shares went from being listed to being discontinued straightaway or from moving to suspended status. The shortness of the delay, looked at in the round, is a factor which points towards granting the extension. It is also a factor which means that when it comes to considering the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, there is not, in my view, a significant impact on the litigation in this case or in relation to the litigation of cases more generally. It is undoubtedly the case that Umuthi's explanation for that short delay is a poor one; that points against granting the extension. So far as it is possible to say anything about the merits of the reference, they do not appear especially strong but given much will depend on the particular findings of fact on the evidence, which is yet to be elaborated on and tested, regarding the detail underlying the disputed issues surrounding the certainty of supply of shares, it cannot be said the prospects of success are hopeless.

64. In my judgment the shortness of the delay of three days and that the reference cannot be said to be totally without merit, together, outweigh the poor quality of the explanation for the delay. I consider, in all the circumstances, it is fair and just that the extension sought by Umuthi to the deadline for filing its reference with the UT is granted.

65. **I therefore grant Umuthi's application to extend the time for filing its reference to 5 August 2022.**

SUSPENSION APPLICATION

66. Rule 5(5) of the UT Rules, gives the UT the power to direct that the effect of the decision in respect of which the reference or appeal is made (in this case the giving of the FSN) is to be suspended pending the determination of the reference. The pre-condition (so far as relevant to the facts of this case) is:

> "…if [the UT] is satisfied that to do so would not prejudice
>
> – (a) the interests of any persons (whether consumers, investors or otherwise) intended to be protected by that notice;
>
> (b) the smooth operation or integrity of any market intended to be protected by that notice;…"

67. There was no dispute that the relevant principles to be applied were those set out by the UT in *Sussex Independent Financial Advisers Limited v FCA* [2019] UKUT 228 (TCC) at [14] and [15] as follows (with citations omitted):

> "[14] …
>
> (1) The Tribunal is not concerned with the merits of the reference itself and will not carry out a full merits review but will need to be satisfied that there is a case to answer on the reference…;
>
> (2) The sole question is whether in all the circumstances the proposed suspension would not prejudice the interests of persons intended to be protected by the notice…;
>
> (3) Detriment to the applicant, such as it being deprived of its livelihood, is not relevant to this test;
>
> (4) The burden is on the applicant to satisfy the Tribunal that the interests of consumers will not be prejudiced…; and
>
> (5) So far as consumers are concerned, the type of risk the Tribunal is concerned with is a significant risk beyond the normal risk of a firm that is doing business in a broadly compliant manner…The reference to consumers should for such purposes have the same meaning as in section 1G of Financial Services Markets Act 2000 ("FSMA") which defines consumers to mean persons who use, have used, or may use among other things regulated financial services…
>
> [15] Additionally, as noted in the [cited] decisions, even if satisfied that granting a suspension would not prejudice the interests of consumers, the Tribunal is not obliged to grant a suspension. The use of the word 'may' in Rule 5(5) means that it is a matter of judicial discretion as to whether or not a suspension should be granted. It is necessary for the Tribunal to carry out a balancing exercise in the light of all relevant factors and decide whether in all the circumstances it is in the interests of justice to grant the application. The power is a case management power, which in accordance with Rule 2 (2) of the Rules must be exercised in accordance with the overriding objective to deal with the matter fairly and justly…"

68. The class of persons sought to be protected by the notice, plainly needs to take account of the particular notice under referral. The relevant notice here discontinues the listing on the Official List of an issuer's shares, pursuant to s77 FSMA.

69. Rule 5(5)(a) provides a non-exhaustive list of persons who might be sought to be protected. The list specifically mentions "investors". There is no dispute the FSN sought to protect existing shareholders. Whether the scope extends to potential investors, as the FCA maintain, is however disputed. Mr Hugo submits they are not covered because the Official Listing had already been suspended. I reject that submission. As Ms Eborall pointed out, and as is dealt with in Mr Edgar's evidence, the mere fact that shares are suspended from listing does not stop the shares being bought and sold privately. Even if the shares were suspended, a new or potential shareholder would still have certain expectations regarding the issuer's compliance with ongoing listing rules e.g. in relation to provision of financial information. In the context of this s77 notice the relevant persons intended to be protected are accordingly not only existing investors but potential investors too.

70. The references in the principle set out at 14(5) of *Sussex* to "consumers" and the type of risk the tribunal being concerned with being "a significant risk beyond the normal risk of a firm that is doing business in a broadly compliant manner" also needs revision to take account of the particular nature of the referral here which is by an issuer of listed securities as

opposed to a regulated firm. I proceed on the basis so far as investors and potential investors are concerned, that the type of risk the tribunal is concerned with is a significant risk beyond the normal risk of investing in shares listed on the Official List.

Case to answer?

71. It is relevant first to consider whether findings in the FSN were at least capable of demonstrating that the there were "special circumstances precluding the normal regular dealing" of the securities such that the FCA was entitled to take the action it did in discontinuing the listing. This is on the basis that if the action taken was not even justified by the matters relied on in the decision, there would not be a significant risk to investors and to the smooth running and integrity of the market in suspending the effect of such a decision.

72. In oral submissions Mr Hugo explained Umuthi's challenge centred on the conclusions the FCA reached in relation to the factual findings. In particular while it was accepted the matters in the FSN justified a suspension of the shares until the issues raised could be sorted out, they did not, in his submission justify discontinuing the listing of the shares.

73. Mr Hugo did not elaborate however on why he considered the matters raised did not amount to the requisite special circumstances, or address the FCA's explanation regarding that in Mr Edgar's evidence. The principal findings relied on namely i) the lack of financial information ii) the concern over supply of shares and Umuthi's governance around that are clearly capable, in my view, of amounting to special circumstances which precludes "normal regular dealings" in shares. Access to regular financial information about the performance of the company to which the shares relate are self-evidently important in the way in which a security is priced in its normal regular dealing. Similarly, normal regular dealing in shares takes place where the supply of shares is certain: normal regular dealing entails the participants taking as given the share of the company is in fact what it purports to be and that the number and ownership of shares may be reliably ascertained.

74. In addition another circumstance relevant to the FCA's conclusion was the length of time the shares had been suspended. Umuthi, who accept the FCA were entitled to suspend the shares do not explain why the length of time of suspension - over 12 months - could not amount to a special circumstance. Where the legislative provisions in FSMA have enabled listings not only to be suspended but to be discontinued, an approach which acknowledges that suspensions are not envisaged to last indefinitely appears on the face of it consistent with the basic structure of the regime.

75. I conclude the FSN clearly raises a case for Umuthi to answer.

Suspension would not prejudice those the decision seeks to protect (Rule 5(5)(a) or smooth operation or integrity of any market intended to be protected (Rule 5(5)(b))?

76. Regarding prejudice to persons intended to be protected by the FSN, Umuthi's case was, in essence, that the persons protected were existing investors and that as trading had already been suspended in their shares there could be no prejudice to them. That argument was also deployed to suggest that there was no need to be concerned that potential investors; they were not within the scope of protection. The premise of the argument is flawed for the reasons already discussed – the fact the listing of shares was suspended, or indeed the listing was discontinued, would not prevent the buying and selling of shares privately. The fact that prejudice to potential investors is a live issue was brought out by Mr Edgar's evidence which referred to Umuthi's market update of 28 January 2022 (see [23]) stating that Umuthi was "in [the] final stages of securing financing from shareholders…" together with a communication from Umuthi's representative on 1 July 2022 advising the FCA that "the process to secure additional funding is continuing".

77. The FCA, as elaborated in Mr Edgar's evidence and in Ms Eborall's submissions, is concerned that suspending the discontinuance of the listing (which would allow the listing to revert to suspended status) would expose both existing and potential investors to a serious risk of prejudice. The FCA is also concerned that suspension of the decision to discontinue the listing will undermine the integrity of the UK market in listed securities.

78. Having considered that evidence and the legal provisions and guidance surrounding the regime the clear common theme that emerges in considering both prejudice to investors/potential investors and prejudice to the smooth running of the market and its integrity is an expectation that the status accorded to shares which are listed is backed up by issuers having to comply with certain minimum standards. A key component of this is the regular publication of financial information imposed on issuers (see [14]). As set out in Mr Edgar's evidence "it is essential to the process of proper share price formation that up-to-date, reliable and comprehensive financial information about the listed company is available to the market".

79. The question for the tribunal as regards investors/potential investors is, as set out above at [70]. The type of risk the tribunal is concerned with is a significant risk beyond the normal risk of investing in shares listed on the Official List.

80. Investors in listed shares of course take on the risks inherent in investing in the relevant product but do so within the parameters of the framework of rules underpinning the listing regime which include obligations as to the provision of financial information. That those reporting obligations continue even if a listing is suspended, reflect the expectation that a suspension will not carry on indefinitely. Investors who own or who are contemplating buying shares with the hallmark of listing are entitled to expect certain minimum standards to be upheld. This remains the case even if the listing has been suspended as that status carried with it the possibility the shares' listing will be restored.

81. In circumstances where, as is the case here, financial information has not been disclosed as required by the regulatory regime in respect of multiple reporting periods and there is still no firm date by which such information will be produced, the absence of financial information, does in my view present a significant risk to investors beyond the normal risk of investing in shares listed on the Official List. The evidence Mr Viljoen provided set out Umuthi's most recent attempt to instruct a firm to audit Umuthi's financial information was not accepted because of that particular firm's decision, based on its view of the "increased regulations for LSE listed company auditors", to no longer accepted instructions in relation to LSE listed companies. However for the purposes of considering whether there is prejudice to the relevant persons it is the simple fact financial information that would normally be taken as a given, is lacking, rather than the particular reason for that deficiency which is significant. Umuthi's submissions mention the management has no uncertainty about the financial position of itself or its subsidiary as monthly management accounts are prepared. These submissions did not appear to be grounded in Mr Viljoen's evidence but in any case any certainty on the part of management in relation to unaudited management accounts will plainly be no substitute for the audited financial information that investors in listed securities and the market rightly expect to have access to.

82. As to any impression from Umuthi regarding the imminence with which the information will be provided these must, in my view, be approached with a degree of circumspection given that despite the impression given by the previous statements (see RNS at [22]) there was, as at the date of the 5 October 2022 application hearing, still no disclosure.

83. In oral submissions Mr Hugo suggested it was relevant that Umuthi's was a "small listing" with a small number of shareholders. That point appeared to be most relevant to

whether there was prejudice mentioned in Rule 5(5)(c) ("the stability of the financial system of the United Kingdom"). However, the FCA accept that kind of prejudice is not in issue. If the observation was directed as an answer to concerns over the smooth running or integrity of any market then it misses the point. As suggested above, market integrity in listed securities entails adherence to common minimum standards. That integrity would be compromised if, within a given listing regime, there were laxer expectations of compliance with requirements in respect of listed securities depending on the size of the issuer.

84. Although on the facts here, suspension of the FSN would mean the shares revert to being suspended from the list rather than discontinued, I recognise that there is still an impact to the integrity of the market. Allowing shares to persist in suspended status and in breach of continuing obligations to file financial information would give the impression of a lax regime in which non-compliance was tolerated indefinitely and standards were not enforced.

85. For the above reasons alone regarding the ongoing lack of required financial information I am not therefore satisfied that the interests of investors, both existing and potential, and the integrity of the market in listed securities would not be prejudiced if the suspension were granted.

86. The above conclusion is sufficient to dispose of Umuthi's suspension application. I do not need to address the further issues of prejudice the FCA maintain would arise from the lack of certainty regarding the supply of shares, or that which the FCA submits arises through the FCA not being able to correct, by publishing the FSN, misleading impressions created by statements and press articles surrounding the de-listing.

87. In relation to the supply of shares issue, I have in effect already accepted (at [51] (merits in time extension application) and [73] (case to answer?)) that the certainty over how many shares are in issue, who they are owned by and deficiencies in the issuer's governance of these issues are matters which are at least capable of precluding normal regular dealing. It follows that if uncertainty in share supply and related governance deficiencies are made out on the facts then I would consider there to be prejudice to both investors and the integrity of the market. Whether the share register Umuthi provided in March 2022 was correct and complete is a disputed issue that will no doubt take centre stage at any substantive reference. It is not however an issue I consider I can or should make definitive findings about given the nature of this hearing and the particular constraints placed around my hearing properly tested oral evidence. However, if it had become necessary to consider whether there was no prejudice to the relevant persons and market integrity, purely on the basis of what was before me, I would have failed to be satisfied that there was no prejudice. This is on the basis that Umuthi's own correspondence and evidence does not support the view it has adequately resolved questions of shareholder supply. In particular concerns would arise from the 12 August 2022 letter Umuthi sent after having assured the FCA in March 2022 the register was accurate but which then sought clarification from certain shareholders as to their shareholdings ([24]) and Mr Viljoen's own evidence ([20]) which suggests Umuthi was prepared to accede to share claims which in its view were not legitimate.

88. Umuthi also argued that suspension should be granted because there would be damaging consequences from the FSN being published arising from inaccuracies which it says are stated in that notice (in particular regarding the way allegations of fraud and the company's knowledge of that has been referred to, whereas the FCA say it has been careful to simply recite the allegations made and not make any findings of fact on those). Umuthi also suggested that the persons the notice sought to protect (existing shareholders) would suffer severe financial losses if the shares were discontinued. These points relate to the prejudice suffered if the suspension application is <u>not</u> granted. The relevant question however

under the pre-condition in Rule 5(5) to the exercise of the tribunal's discretion is the risk of prejudice if the suspension is granted (see *Sussex* at [53]). While these points might in principle be considered as part of all the relevant circumstances, that stage of consideration only arises if the tribunal is satisfied suspension would not prejudice the relevant persons and markets. As is clear from above the tribunal is not so satisfied.

89. **Umuthi's application to suspend the effect of the FSN is refused.**

90. Further to the direction made at the hearing, Umuthi must file their Reply to the FCA's Statement of Case within 7 days of the release date of this decision.

SWAMI RAGHAVAN
UPPER TRIBUNAL JUDGE

Release date: 17 October 2022