UT Neutral citation number: **[2024] UKUT 394 (TCC)**

UT (Tax & Chancery) Case Number: UT-2023-000064

Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: The Rolls Building, London

Heard on 18 and 19 November 2024
Judgment date: 3 December 2024

FINANCIAL SERVICES – procedure – whether Tribunal should direct evidence from further witnesses- whether Applicant should be permitted to give evidence in chief orally- whether Authority should have permission to amend its Statement of Case- whether Authority should be directed to disclose further documents

Before

JUDGE TIMOTHY HERRINGTON
(Sitting in Retirement)

Between

JAMES EDWARD STALEY

Applicant

-and-

THE FINANCIAL CONDUCT AUTHORITY

Respondent

Representation:

For the Applicant: Robert Smith KC and Nichola Higgins, Counsel, instructed by Arnold & Porter LLP

For the Respondent: Leigh-Ann Mulcahy KC, Eleanor Davison and Lara Hassell-Hart, Counsel, instructed by the Financial Conduct Authority

DECISION

Introduction

1. This decision relates to four applications for procedural directions involving a reference made by the Applicant ("Mr Staley") on 26 June 2023. The reference relates to a Decision Notice dated 30 May 2023 (the "Decision Notice") given by the Financial Conduct Authority (the "Authority") to Mr Staley pursuant to which the Authority decided that Mr Staley was in breach of three provisions of the Authority's Handbook, namely ICR1 (the requirement to act with integrity), ICR 3 (the requirement to be open and cooperative with regulators and SMCR 4 (the requirement to disclose appropriately any information which the Authority would reasonably expect notice). The Authority decided to impose upon Mr Staley a penalty of £1,812,800 and to make an order prohibiting him from performing any senior management or significant influence function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm pursuant to s 56 of the Financial Services and Markets Act 2000 ("FSMA").

2. In brief, the Authority considered that Mr Staley had recklessly and with a lack of integrity approved a letter being sent to the Authority on 8 October 2019 (the "Letter") that contained misleading statements, (i) as to the nature of his relationship with Mr Jeffrey Epstein ("Mr Epstein") and (ii) as to the time that they were last in contact. The Letter said that the relationship was not close and that the last contact was well before the Applicant joined Barclays Bank plc as its Chief Executive Officer in December 2015. The Authority contends that both these statements were untrue.

3. On 26 June 2023 Mr Staley referred the Authority's decision to the Tribunal. He denies that the Letter contained misleading statements.

4. The four applications before the Tribunal are as follows:

> (1) An application by Mr Staley dated 13 September 2024 that the Tribunal invite the Authority to call three individuals who are in the current or previous employ of the Authority, and one individual currently employed by the Prudential Regulation Authority as further witnesses to assist the Tribunal ("the Potential Witnesses Application").
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> (2) An application by Mr Staley dated 13 September 2024 that he may give part of his evidence in chief orally ("the Evidence in Chief Application").
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> (3) An application by the Authority to amend its Statement of Case by making those amendments set out in the Amended Statement of Case filed by the Authority on 2 August 2024 ("the ASOC") which are objected to by Mr Staley ("the Statement of Case Application").
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> (4) An application by Mr Staley for specific disclosure by the Authority of various documents made by the Applicant on 23 October 2024 ("the Specific Disclosure Application").

5. As regards the Potential Witnesses Application, Mr Staley had originally also asked the Tribunal to consider making a direction that the Authority should serve evidence from three individuals employed by JP Morgan Chase & Co ("JPM"), Mr Staley's former employer, during the period that is relevant for the purposes of this reference. The Tribunal gave permission for those individuals to make submissions as to why they should not be called as witnesses. In the event, the application in relation to those potential witnesses was withdrawn shortly before the hearing. Mr Farhaz Khan KC, on behalf of JPM, made some limited submissions at the hearing as regards material held by JPM which may be of relevance to the proceedings on this reference but there is no need for me to say anything further about that issue at this stage.

Background to the reference

6. As helpfully summarised by Ms Mulcahy in her skeleton argument, between December 2015 and October 2021, the Applicant was the Chief Executive Officer ("CEO") of Barclays Bank Plc ("Barclays"). Before he became the CEO of Barclays, the Applicant was for most of his career employed by JPM, from 1979 to January 2013. The Applicant met Mr Jeffrey Epstein in 1999 or 2000, while the Applicant was the Head of JPM's Private Bank, of which Mr Epstein was a client. The Applicant became the CEO of the Investment Bank at JPM in around September 2009. The Applicant left JPM in January 2013. He became the Managing Partner of Blue Mountain Capital Management LLC, remaining in that role until he joined Barclays as CEO in December 2015, an appointment that was announced in October 2015.

7. In July 2019, Mr Epstein was arrested on federal charges for sex trafficking minors in Florida and New York. Around this time, articles appeared in the press concerning connections between Mr Epstein and various prominent figures, including Mr Staley. Mr Epstein died in prison in August 2019. The press articles prompted the Authority to make an inquiry of Barclays that led to the Chairman of Barclays, Mr Nigel Higgins, sending the Letter (as approved by Mr Staley) on 8 October 2019.

8. In November 2019, JPM informed the Authority that, as a result of investigations by authorities in the US, it had identified various documents relating to the relationship between Mr Epstein and Mr Staley. The Authority exercised its powers to compel JPM to produce the emails it had identified between Mr Epstein and Mr Staley. The Authority opened an investigation into Mr Staley in December 2019, which led to the present proceedings.

9. On 29 October 2021, the Authority informed Mr Staley of its preliminary conclusions of its investigation, sending him a draft Annotated Warning Notice to open without prejudice settlement discussions in line with its standard practice. Those discussions did not result in agreement.

10. On 3 November 2022, the Authority issued a Warning Notice to Mr Staley who provided written and oral representations to the Authority, following which the Authority issued the Decision Notice on 30 May 2023.

The reference proceedings to date

11. As mentioned above, Mr Staley referred the Authority's decision to the Tribunal by a notice dated 26 June 2023. On 25 July 2023, the Authority filed its Statement of Case and its Primary Disclosure List. Mr Staley filed his Reply on 21 August 2023. Following this, on 30 October 2023, the Authority filed its Secondary Disclosure List.

12. The Tribunal has made directions for the service of witness statements by both parties, which were exchanged on 9 August 2024.

13. The Authority served seven witness statements from the following individuals:

> (1) Mr Jonathan Davidson. Between September 2015 and December 2020, Mr Davidson was the Director of the Retail Supervision and Authorisations Division at the Authority. As Director of that Division, he was responsible for the supervision of some of the UK's largest retail financial institutions, including Barclays. Mr Davidson's evidence covers the call between the Authority and Mr Nigel Higgins, the Chair of Barclays, which took place on 15 August 2019. Mr Davidson's evidence is that during that call he asked Mr Higgins

what Barclays had done to satisfy itself that there was no impropriety in any relationship between Mr Staley and Mr Epstein that would cast doubt on Mr Staley's fit and proper status. His evidence also covers (i) a further call on 4 October 2019 following which the Letter was issued and (ii) his involvement in the process that led to the decision (which he approved) to open the investigation into Mr Staley's conduct in relation to the Letter on 10 December 2019.

(2) Mr Andrew Bailey, currently the Governor of the Bank of England. Between 1 July 2016 and 15 March 2020 Mr Bailey was CEO of the Authority. Mr Bailey's evidence covers information he received from Ms Megan Butler ("Ms Butler"), then head of Wholesale Supervision at the Authority and Ms Kate Tuckley ("Ms Tuckley") regarding a call she had with JPMorgan in November 2019. His evidence also covers (i) discussions he had with the then Governor of the Bank of England, Mr Mark Carney, and the Deputy Governor responsible for the Prudential Regulation Authority ("PRA"), Mr Sam Woods, regarding the decision to open the investigation into Mr Staley and (ii) his meeting with Mr Higgins (also attended by Mr Carney and Mr Woods) on 10 December 2019.

(3) Mr Stephen Doherty. Mr Doherty at the relevant time was Group Head of Corporate Relations at Barclays. His evidence deals with communications he had with the press regarding Mr Staley's relationship with Mr Epstein and his discussions with Mr Staley on that subject.

(4) Mr Nigel Higgins. Mr Higgins is the Group Chairman of the Barclays Group. His evidence covers (i) his discussions with Mr Staley about the latter's relationship with Mr Epstein (ii) his discussions with the Authority and others on that matter between August and October 2019 which led to the issue of the Letter and (iii) the discussions with the Authority which led to the opening of the investigation into Mr Staley's conduct in December 2019.

(5) Mr Mark Steward. From October 2015 until April 2023, Mr Steward was the Executive Director of the Enforcement and Market Oversight Division of the Authority. His evidence covers his own involvement in the Authority's request for information from Barclays in August 2019 and the subsequent decision to open the investigation into Mr Staley's conduct in December 2019.

(6) Ms Sasha Wiggins. Ms Wiggins is the CEO of Barclays Private Bank and Wealth Management. She was Group Chief of Staff to Mr Staley from 2018 until his resignation in November 2021. Her evidence covers her knowledge regarding the relationship between Mr Staley and Mr Epstein.

(7) Mr Robert Hoyt. Mr Hoyt was at the relevant time Group General Counsel at Barclays. Among other things, his evidence covers (i) his conversations with Mr Staley regarding his relationship with Mr Epstein, (ii) the assistance he provided with Barclays' response to enquiries made by the media and others about Mr Staley's relationship with Mr Epstein and (iii) the assistance he provided to Barclays in relation to the preparation of the Letter.

14. Mr Staley provided a witness statement from himself. He has also provided a Character Statement from Ms Idara Otu.

15. A Pre-Trial Review is listed for one day on 30 January 2025 and the substantive hearing begins on 3 March 2025.

16. Since service of its Statement of Case in July 2023, the Authority has come into possession of material which it considers relevant to these proceedings. This material has been provided following requests from the Authority to the US Securities and Exchange Commission in the United States ("SEC") and includes material obtained from Mr Epstein's Estate, and material arising from proceedings in the United States involving Mr Staley (the "US Proceedings"), including the deposition he gave under oath in those proceedings. Accordingly, in July and August 2024, the Authority served (i) amended Lists of Documents (on 9 July 2024) and (ii) draft amendments to its Statement of Case (on 2 August 2024). Some of those amendments are objected to and accordingly the dispute in relation to those amendments is resolved by this decision on the Statement of Case Application.

17. The rationale for the other applications which are the subject of this decision are explained in relation to each application below.

The pleadings as currently filed

The Authority's Statement of Case

18. The Authority's original Statement of Case contained a summary at [10] to [19] as follows:

> "10. In August 2019, following various media reports, the Authority contacted a member of Barclays Board requesting a written assurance that the Board had informed itself and was comfortable regarding any association of Mr Staley or Barclays with Mr Epstein.
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> 11. Barclays through its senior executives, engaged in discussions with Mr Staley regarding the response to be made. It was originally intended that Mr Staley would provide a letter which Barclays would send to the Authority, but it was decided, after discussion, including with Mr Staley's own legal adviser, that Barclays should send the response instead.
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> 12. On 8 October 2019, in response to the enquiry by the Authority, Barclays sent a letter (which will be referred to throughout this Statement of Case as "the Letter") which contained two inaccurate and misleading statements: firstly, about the nature of Mr Staley's relationship with Mr Epstein (stating "[*Mr Staley] has confirmed to us that he did not have a close relationship with Mr Epstein*") and secondly, about the recency of the last contact between Mr Staley and Mr Epstein (stating that "[*Mr Staley's] last contact with Mr Epstein was well before he joined Barclays in 2015*.")
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> 13. Mr Staley reviewed a near final draft of the proposed Letter which contained those two statements. He was expressly asked to confirm that the language was fair and accurate. Mr Staley confirmed he was comfortable with the language and in doing so recklessly approved its content.
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> 14.The two statements were material to the Authority's enquiry, which sought to ascertain whether, in light of media reports, Barclays had informed itself and was comfortable regarding any association of Mr Staley and Barclays with Mr Epstein. The enquiry made by the Authority necessarily involved consideration of the media reports and the relationship between Mr Staley and Mr Epstein. The enquiry was not limited to a concern about whether Mr Staley was involved in or witnessed the conduct which was the subject of the allegations against Mr Epstein set out in the media reports but extended to the association between Mr Staley and Mr Epstein more generally and what Barclays had done to satisfy itself in this regard. In any event, statements as to the nature of the relationship and recency of contact were themselves relevant to whether Mr Staley was involved in or witnessed the conduct alleged on the part of Mr Epstein.
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> 15.Mr Staley must have appreciated because it was obvious (and the Authority contends, he did so appreciate) that the Authority would rely on the content of the Letter, in circumstances including that the Authority had made a specific enquiry of Barclays and required the provision of a written response,

Mr Staley held a very important role as CEO of one of the UK's most significant financial institutions and the fact of his association with Mr Epstein inevitably raised questions about his conduct and judgment.

16. Further, Mr Staley must have been aware (and, the Authority contends, was so aware) that there was a risk that the Letter would mislead the Authority by inaccurately stating the nature of the relationship and the recency of the contact between them.

17. The conduct in allowing the misleading statements to be made to the Authority also constituted a failure to be open and transparent with the Authority and to make appropriate disclosure.

18. Such conduct was in breach of ICR 1, ICR 3 and/or SMCR 4.

19. The proposed financial penalty and prohibition order are appropriate sanctions and are proportionate to Mr Staley's failings, taking account of all relevant circumstances."

19. The Authority has not sought to amend this summary of its case.

20. The Statement of Case set out alleged facts in great detail at [46] to [100] concerning Mr Staley's relationship with Mr Epstein during the period between 1999 and the announcement of Mr Staley's appointment as CEO by Barclays on 28 October 2015.

21. At [101] to [114] the Authority pleads alleged facts relating to press enquiries to Barclays and statements made by Barclays in 2015 about the relationship between Mr Staley and Mr Epstein. At [114] the Authority originally pleaded that as far as it was aware, Mr Staley had no contact with Mr Epstein after 25 October 2015.

22. At [115] to [116] the Authority pleads alleged facts concerning media reports following Mr Epstein's arrest in July 2019, in particular press articles regarding Mr Staley's visit in January 2009 to Mr Epstein when Mr Epstein was on work release during his prison sentence, a large transaction Mr Epstein was alleged to have introduced to JPM via Mr Staley and Mr Staley's visit to Mr Epstein's Island in the US Virgin Islands in April 2015.

23. At [117] to [124] the Statement of Case deals with the Authority's request for information in August 2019.

24. Paragraphs [135] to [162] deal with (i) the drafting of the Letter, (ii) Mr Staley's involvement in the process, (iii) the discussion between Mr Staley and a member of Barclays Board on 4 October 2019, (iv) the call that took place on 4 October 2019 between the Authority and Mr Higgins, (v) the approval of the draft Letter by Mr Staley, (vi) the Letter itself and (vii) why The Authority regarded statements in the Letter to be misleading. In particular, the Authority pleaded that Mr Staley was in contact with Mr Epstein up to and during October 2015.

25. It should be emphasised that it is no part of the Authority's case that Mr Staley was either involved in any of the serious acts of sexual misconduct attributed to Mr Epstein or that he committed similar acts himself. Nor does the Authority allege that Mr Staley was aware of such misconduct on the part of Mr Epstein. As is clear from the summary of the Authority's case, as set out at [10] to [20] of its Statement of Case, as set out at [17] above, the Authority's case relates purely to what it says were misleading statements made in the Letter with Mr Staley's approval regarding the closeness of Mr Staley's relationship with Mr Epstein, and the recency of his contact with him.

Mr Staley's Reply to the Statement of Case

26. In his Reply Mr Staley summarised the issues in dispute between the parties as follows:

> "(i) The Authority's decision-making process to commence a formal investigation was not conducted fairly and impartially. The Authority made its decision without giving either the Applicant or Barclays an opportunity to provide the Authority with an explanation of the circumstances in which the letter was approved. On the facts available to the Authority at the time of its decision, it would have been reasonable and proportionate to have done so. The material so far disclosed by the Authority suggests that the PRA and the Authority concluded that the letter which was sent by Barclays to the Authority on 8 October 2019 ("the letter") was factually incorrect and misleading based on email correspondence supplied to the Authority by JP Morgan Chase ("JPM") on 22 November 2019 and 3 December 2019, in circumstances which have not so far been disclosed to the Applicant. Any reasonable decision maker, acting in all the circumstances which the Authority was presented with, would have offered the Applicant and Barclays the opportunity to provide an initial explanation of any apparent inconsistency between the email correspondence and the terms in which the letter was expressed. The Authority failed to provide the Applicant with any opportunity to clarify the circumstances in which the letter had been approved, prior to the decision to formally commence the investigation. Instead, the PRA and the Authority prejudged the issue of the Applicant's culpability and then directed that an investigation should be commenced. Their process was unfair and disproportionate.
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> (ii) Once the facts had been established by the appointed Investigators and the investigation concluded, the Authority's decision could not have reasonably resulted in the conclusion that the Applicant had been responsible for material misconduct. The Authority's decision to issue the Notice that is the subject of the Reference was grossly disproportionate and paid no proper regard to the evidence relating to the circumstances in which the Applicant approved the draft of the letter.
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> (iii) The Applicant is not proved to have acted recklessly in approving the draft of the letter of 8 October 2019 and / or in failing to take steps to correct what are alleged to be factual inaccuracies in its content. He is not proved to have acted in contravention of any of the Conduct Rules."

27. At [3.26] of the Reply it was stated:

> "(i) ….[Named] senior executives and board members knew the history of the relationship and they had been informed by the Applicant on a number of occasions that the Applicant had had a professional, fairly close relationship with Mr Epstein and that he had had no contact with Mr Epstein since joining Barclays in December 2015. It follows that it is irrational for the Authority to assert that the Applicant was aware of a risk that the letter might mislead the Authority.
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> (ii) An issue which the Authority should have addressed, but has not, is why the letter was drafted in these terms when Mr Hoyt, who was responsible for the drafting, and Mr Higgins, who was responsible for approving the draft and sending this information to the Authority, were both aware that the Applicant had consistently informed Barclays first, that he had had a professional, fairly close relationship with Mr Epstein and second, that he had had no contact with Mr Epstein since joining Barclays. The Applicant's case is that the answer to that question lies in the nature of the enquiry made by the Authority on 15 August and the perception that Mr Hoyt and Mr Higgins had and shared in relation to its scope and purpose, namely that its limited purpose was to assure the Authority that the Applicant had neither been aware of nor involved in Mr Epstein's unlawful activities. That was the reputational issue for the Bank and the Authority, and was answered by the letter, as the last paragraph thereof demonstrated. It reads as follows:
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> > "In sum, neither our discussions with Jes nor our review of the bank's records have revealed any cause to suspect that Barclays or Jes have played any role in the activities of Mr Epstein that have been under investigation."

28. At [3.28] of the Reply it was stated:

> "It would be incorrect to characterise the Applicant's interactions with Mr Epstein over a period of 15 years, as the Authority has done, as that of "a personal friendship, albeit predicated on a business connection". The evidence for such a proposition does not exist and it would be unreasonable to characterise the relationship in such terms. The relationship existed for reasons which were of benefit to the Applicant and the organisations by which he was employed over the period from 1999 to 2015. Personal interaction extended to occasional dining invitations to Mr Epstein's home in New York and on other isolated occasions at other venues, at which many well connected persons were often present. The purpose of the Applicant's interaction with Mr Epstein over the period in question was for business. Many business relationships of mutual value include social contact, such as hospitality events, summer parties and religious celebrations. Longstanding commercial relationships are not built upon a complete absence of social contact. The "closeness" of any such relationship cannot be judged by the nature of the social activity engaged in, in the absence of regular interaction in the course of personal and social lives. No relationship whatsoever existed when the Applicant joined Barclays and, by the time the Authority's investigation commenced, the last contact between the Applicant and Mr Epstein had taken place more than four years prior."

29. At [4.5] and [4.6] of the Reply it was stated:

> "4.5 Mr Staley's consistent instructions to Barclays, provided by him to its senior executives and two board members, were that his relationship with Mr Epstein had been at times "professionally fairly close" and that the last occasion he had met with Mr Epstein was in April 2015 when he and his wife had visited Mr Epstein on his island, for no more than two or three hours while they were sailing in the Caribbean, and that he had had no contact with Mr Epstein since his appointment as CEO of Barclays in December 2015. This information was accurate and by 15 August 2019 was already in the public domain.
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> 4.6 Those senior executives and board members at Barclays who were engaged in preparing the response to the Bowdoin College and the Authority's enquiry therefore knew that Mr Staley's relationship with Mr Epstein had been described by him as "professionally fairly close", that it had not been one of personal friendship and that Mr Staley's last meeting with Mr Epstein had been in April 2015 when he had visited Mr Epstein's island in the company of his wife while sailing in the US Virgin Islands. They were also aware that Mr Staley's repeated position was that he had had no contact with Mr Epstein since joining Barclays on 1 December 2015."

The Potential Witnesses Application

30. This application arises as a consequence of paragraph 7 and 8 of directions that Judge Jones made on 20 November 2023 (as amended in January 2024) as follows:

> "7. If any party considers that there are any persons ("potential witnesses") in addition to those for whom statements of fact have been served pursuant to Directions [4] & [5] above whose evidence would be of substantial assistance to the Tribunal in its determination of the reference, it shall notify the other party by 13 September 2024 of (i) the identity of those potential witnesses, (ii) the reasons why the potential witness would be of substantial assistance in the Tribunal's determination of the reference(s), (iii) any efforts made by the relevant party to adduce a witness statement from each of the potential witnesses, (iv) the reasons why the relevant party has been unable to adduce a witness statement from each of the potential witnesses, and (v) any order or directions sought in respect of the potential witness.
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> 8. If any party has notified the other party in accordance with Direction [7] above, there should then be a hearing as soon as possible for the Tribunal to consider whether, and if so what, further directions are required in relation to the potential witnesses identified. Skeleton arguments are to be exchanged a week before any such hearing."

31. The Authority had sought the making of these directions in view of the Tribunal's observations in *Seiler and Ors v FCA* [2023] UKUT 133 (TCC) at [93] to [114]. In that decision, the Tribunal observed at [94] that the witnesses called by the Authority to support its case had only a peripheral involvement with the arrangements and criticised the Authority for failure to call particular witnesses who might have been expected to have material evidence to give on an issue in the proceedings.

32. At [112] , relying on observations it had previously made in *Frensham v FCA* [2021] UKUT 0222 (TCC) at [88] and [89] to the effect that the Authority had a duty to assist the Tribunal with full and accurate explanations of all the facts which are relevant to the issues which the Tribunal must decide, the Tribunal observed that the public interest is served by the Authority calling relevant evidence before the Tribunal even if it might exculpate the individuals which the Authority believes ought to have regulatory action taken against them.

33. I therefore understand why the Authority felt that it was necessary that the question as to whether there were further potential witnesses that the Tribunal might regard as having relevant evidence to give should be considered by the parties, and if necessary determined after the case management hearing.

34. In response to these directions, in his application dated 13 September 2024, Mr Staley identified seven further witnesses he asserted the Authority should call in these proceedings. As mentioned above, the application now only relates to four individuals associated with either the Authority or the PRA. Furthermore, Mr Staley is not asking the Tribunal to issue a witness summons in relation to those individuals under its own initiative under Rule 16 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Rules") or a direction that the Authority should call as its witnesses the individuals concerned, but merely invites the Tribunal to give an indication as to whether those individuals ("the Potential Witnesses") could give relevant and material evidence that would be of assistance to the Tribunal.

35. The Authority has responded constructively to this request, indicating to the Tribunal that if the Tribunal indicated that it would be materially assisted by any or all of the Potential Witnesses and that in all the circumstances it should direct that these witnesses give evidence, then it would do all that it reasonably could to assist the Tribunal in its regard. The Authority accepted that in relation to those witnesses who were associated with the Authority or the PRA, that if the Tribunal indicated that it would be assisted if they were called as witnesses, then they would be called as witnesses of the Authority.

36. As Ms Mulcahy correctly identified, a witness summons will only be issued where the Tribunal considers that there is a real likelihood that the witness will give evidence that will materially assist the Tribunal in its determination of an issue or issues in the proceedings: see *Ford and Owen v FCA* [2017] UKUT 147 (TCC) at [12].

37. In determining what is an "issue in proceedings", as Ms Mulcahy submitted, the starting point is the pleadings. It is now well established, and as Mr Smith accepted in his submissions, the conduct of an investigation is not an issue the Tribunal must determine on a reference so that the Tribunal will not be assisted by the cross-examination of witnesses in respect of that issue: see in this regard *Banque Havilland SA and Ors v The Financial Conduct Authority* [2024] UKUT 115 (TCC) at [133].

38. As Ms Mulcahy also submitted, even if the witness is expected to have highly relevant evidence, it does not follow that the Tribunal will direct that witness to give evidence. Relevant evidence is a pre-condition…but it is not itself a sufficient condition: see *Barclays v FCA* [2024] UKUT 00214 ("*Barclays")* at [45]. Factors that the Tribunal may take into account are (i) the fact that the Authority

does not consider it essential for the witness to give evidence in order to make good its case on the reference(s), (ii) that evidence relevant to the disputed matters is available from other sources, and (iii) the potential witness's stance on giving evidence. Each case will, however, turn on its own facts and merits: See *Barclays* at [44] and [46].

39. The four potential witnesses are as follows:

> (1) Ms Natalie Rivett who was a manager in the Authority's Enforcement Division but was not involved in the Authority's decision to open the investigation into Mr Staley. She was appointed as an investigator to lead the investigation after it had been opened.
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> (2) Ms Megan Butler. As mentioned above, at the relevant time Ms Butler was Executive Director of one of the Authority's Supervision Divisions. It appears that her involvement in the events which are connected to this matter was limited to participation in one telephone call with JPM on 22 November 2019 during which JPM informed the Authority of documents they had obtained as part of a separate process which was underway in the United States. The matters discussed during that call are recorded in a note which has been disclosed.
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> (3) Ms Kate Tuckley. At the relevant time, Ms Tuckley was the Manager of the Authority's Relationship Management and Strategy Team. She was not one of the individuals who made the decision to open the investigation.
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> (4) Mr Sam Woods. Mr Woods, as noted above, was the Deputy Governor for Prudential Regulation at the Bank of England and CEO of the PRA. He was present at two meetings and one telephone call, namely a meeting on 11 December 2019 with Mr Higgins, Mr Carney and Mr Bailey, a meeting on 18 December 2019 with Mr Higgins, Mr Carney, Mr Bailey and Mr Crawford Gillies, the latter being a director of Barclays, and a call with Mr Higgins on 16 December 2019.

40. With regard to Ms Butler, I cannot see that the Tribunal will be assisted in any material respect by her providing evidence. The note of the telephone call has been provided and I am not aware of any dispute as to its contents.

41. With regard to Ms Tuckley, the Authority is tendering Mr Jonathan Davidson as a witness. Mr Davidson was a senior official at the Authority and whose approval was necessary to open the investigation. He is therefore ideally suited to provide evidence as to the circumstances of which the decision was taken to open the investigation. In those circumstances, I cannot see that the Tribunal would be assisted by any evidence from Ms Tuckley.

42. With regard to Ms Rivett, as lead investigator she was responsible for the interview with Mr Staley on 20 December 2019. Mr Smith submitted that Mr Staley was entitled to know why disclosure of email correspondence with legal advisers in that interview was limited in the way it was, particularly in the light of the request made by his legal advisers for adequate pre-interview disclosure. Mr Smith submits that this is a matter of real significance given the Authority's approach to the accuracy of Mr Staley's answers in interview.

43. This appears to me to be a criticism of the manner in which the Authority conducted its investigation, which, as the authorities demonstrate, is not an issue to be determined on the reference. Mr Smith will of course, at the substantive hearing, be entitled to ask the Tribunal to place limited weight on the interview evidence because of the way the interview was conducted and the Tribunal will have regard to any such submissions. However, I do not consider that the Tribunal will be

materially assisted by evidence from Ms Rivett as to the manner in which the interview was conducted.

44. With regard to Mr Woods, what was discussed during the telephone call and meetings referred to above in which he participated are clearly matters which are relevant to these proceedings. Mr Smith says that Mr Staley proposes at the substantive hearing to rely upon a note of the meeting at the Bank of England on 18 December 2019 and that if any issue arises as to the accuracy of the note of that meeting at which persons other than Mr Woods were present the Tribunal may be assisted by his evidence, depending on the nature and extent of any dispute.

45. In my view, the fact that Mr Woods's evidence may be of assistance of the Tribunal is not sufficient to invite the Authority to ask him to give evidence. The test is whether the Tribunal will be materially assisted by his evidence. The Authority proposes to call Mr Higgins and Mr Bailey who have relevant evidence to give on these matters. The Authority has taken the view that there is no need to call Mr Woods to corroborate relevant evidence that may be given by Mr Bailey and Mr Higgins in order to assist their case and in those circumstances I see no reason to consider that evidence from Mr Woods will advance matters any further.

46. Accordingly, the Potential Witnesses Application is dismissed.

The Evidence in Chief Application

47. I accept, as Mr Smith submitted, that there is no procedural bar to this application. Rule 15 (1) (e) of the Rules gives the Tribunal the power to direct the manner in which any evidence is to be provided, which may include a direction for it to be given orally or by witness statement.

48. However, in over 20 years of financial services cases being heard in this Tribunal and its predecessor, there has been no case in which evidence in chief has been given other than by witness statement. It is also now the case that evidence in chief is rarely given orally in civil litigation, although the Civil Procedure Rules do, like the Upper Tribunal's Rules, make provision for evidence in chief to be given orally if the Court so directs. In particular, the Civil Procedure Rules envisage that evidence in chief may be given orally in order to amplify evidence that has already been given.

49. This is therefore a unique application, as Mr Smith accepted. Mr Smith says, however, this is a unique case in that the Tribunal is not concerned with financial misconduct, but the core issue of Mr Staley's state of mind on 6 October 2019 when he approved a draft of the Letter. Mr Smith submits that on these facts, Mr Staley needs to be able to tell the Tribunal in his own words what was his state of mind when he told Mr Hoyt that he approved the Letter.

50. The application only related to part of Mr Staley's evidence in chief, in particular that part of his evidence which related purely to Mr Staley's state of mind and his belief as to the purpose and status of the letter which he approved. Although the application covered other matters which related to the conventional relationship between a banker and his client, Mr Smith did not press that issue, and made no submissions on that point.

51. Mr Smith submits that Mr Staley's credibility is an important aspect of the factual history in issue in these proceedings and resolution of those proceedings one way or the other is dependent on his credibility. If Mr Staley can persuade by his evidence that at the time when he approved the draft of the Letter, he was not aware of any risk that the Authority might be misled by the terms of the Letter, then the Authority's case falls away. Mr Smith submits that is a matter upon which oral evidence can assist the Tribunal. The alternative is simply to put him in the witness box and ask him to confirm

simply the truth and accuracy of his witness statement. That does not give him the opportunity at all of telling the Tribunal in his own words, uninterrupted and unhurried, what his state of mind was at the material time. This would also give the Tribunal the advantage of setting Mr Staley's credibility in the light of his demeanour in the witness box. Mr Smith submits that it is a question of fairness; if a party to proceedings wishes to give evidence orally on a specific aspect of the case, upon which the determination of the issue terms, then serious consideration should be given to permitting that course.

52. Mr Smith submits that there will be no significant disruption to the efficient management of the case or prejudice to the opposing party. He agreed that the questions to be put to Mr Staley would be disclosed in advance to the Authority so there would be no question of ambush. It was anticipated that the examination in chief orally would take no more than 2 hours. There would be no question of Mr Staley seeking to say anything which expanded upon the evidence in his witness statement or which contradicted it.

53. Mr Smith submits that cross-examination alone does not give Mr Staley sufficient opportunity to explain to the Tribunal his thinking at the time he approved the draft of the Letter. He says what is going to happen, inevitably, is that the Authority is going to present Mr Staley with what it believes to be questions which he cannot answer, which will place him in a difficult position. He submits that the general rule in cases where integrity and credibility is very much an issue and to be judged by a Tribunal, the general rule is that the person who is under investigation should be given the opportunity of explaining their position.

54. I am not persuaded by these submissions for the following reasons.

55. This is not a unique case, although it is a unique application. The Tribunal has in many cases had to consider the credibility of an applicant who is accused of lacking integrity either through acting dishonestly or recklessly. The Tribunal is well used to assessing the subject's state of mind when considering particular documents and their implications. The most recent example was the case of *Seiler and others,* referred to above, where the Tribunal had to assess the state of knowledge of the subjects as to the many risks of financial crime that were alleged to be apparent to them through their dealings with a situation over an extended period. That case also reflected modern judicial thinking that it is important for the Tribunal to have regard to the contemporary documents and the overall probabilities and consider the witnesses' oral evidence in that context.

56. As was said at [62] of *Seiler and others*, the contemporaneous documents are usually more reliable than witness evidence. There are many documents in this case which, for example, relate to the question of the closeness of the relationship between Mr Staley and Mr Epstein. As the Tribunal said in *Seiler and others*, quoting from *Simetra Global Assets Ltd and another v Ikon and others* [2019] EWCA Civ 1413 at [48] and [49], contemporary documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence.

57. When it comes to oral evidence, in my view, the process of cross-examination can and does test to the full the evidence given in a witness statement without any suggestion of unfairness. The Tribunal is alert to the need to allow the subject of cross-examination to give full explanations as to their state of mind in answering the relevant questions.

58. Accordingly, as Ms Mulcahy submitted, the reasons why it is said by Mr Smith that oral evidence in chief is necessary are all met by the process of cross-examination. The purpose of cross-examination is to test the accuracy of the evidence put forward, which in this case is clearly explained Mr Staley's witness statement, and to test credibility. I am not persuaded that any evidence given

orally covering the same ground as the evidence in the witness statement without amplification will assist the Tribunal in any material respect.

59. As Ms Mulcahy also submitted, there needs to be a proper justification for the highly unusual course of permitting oral evidence in chief. I can think of circumstances where oral evidence may be necessary in the interests of fairness. That may be so, for example, where the applicant is in person and does not have the necessary skills to prepare a proper witness statement. This case is far removed from that situation; Mr Staley has held senior positions in the financial services industry and is well represented. His witness statement reflects that situation.

60. Accordingly, the Evidence in Chief Application is dismissed.

The Statement of Case Application

Background

61. In her skeleton argument Ms Mulcahy helpfully explained the background which led to the Authority filing the ASOC on 2 August 2024 as follows.

The US Proceedings

62. In late 2022 and early 2023, two sets of proceedings were brought in the US against JPM. One set of proceedings was a class action on behalf of alleged victims of Mr Epstein. The other set of proceedings was a claim brought by the US Virgin Islands in respect of Mr Epstein's misconduct. The claims sought damages from JPM for its facilitation of Mr Epstein's activities. JPM brought a third-party complaint against Mr Staley claiming that if it was liable to the plaintiffs (which it denied), Mr Staley should indemnify it against that liability.

US Proceedings documents and Epstein Estate Emails

63. On 10 and 11 June 2023, Mr Staley was deposed in the US Proceedings. The Authority did not become aware of the evidence the Applicant gave in that deposition (the "Deposition") until September 2023, i.e. after filing of its Statement of Case and its Primary Disclosure List on 25 July 2023. Mr Staley filed his Reply in these proceedings on 21 August 2023.

64. Also in September 2023, the Authority became aware that on 8 September 2023 in the context of the US Proceedings, JPM had filed (i) the Statement of Undisputed Material Facts and Counterstatement of Additional Material Facts (the "Statement of Undisputed Material Facts") and (ii) a Memorandum of Law in Opposition to Summary Judgment (the "Memorandum of Law") (which had a number of exhibits attached to it).

65. The Authority wrote to Mr Staley's lawyers on 14 September 2023 noting that, in the Memorandum of Law, JPM alleged that Mr Staley had asserted to Barclays that he had had no contact whatsoever with Mr Epstein at any time since taking up his role as Barclays Group CEO in December 2015, and referred to emails which JPM said disclosed that a person had acted as an intermediary for messages between Mr Staley and Mr Epstein thereafter. At [4.13] of his Reply in these proceedings Mr Staley states that he "ceased all communications with Mr Epstein on or about 25 October 2015".

66. On 5 October 2023, the Authority wrote to Mr Staley noting that it had now received the transcript of his Deposition. It identified three parts of the Deposition in which Mr Staley was shown emails indicating that he had been in contact with Mr Epstein through an intermediary after he joined

Barclays, and sought disclosure of those emails and any others that he had which undermined the case set out in his Reply. Mr Staley refused that request.

67. In November 2023, the Authority made a request to the SEC to obtain copies of a limited selection of documents from the US Proceedings, of which the Authority had become aware solely due to the Deposition and other documents that had at that time recently been filed in the US Proceedings.

68. As a result of this request, the Authority received from the SEC a large number of emails from the Epstein Estate, which were disclosed to Mr Staley.

69. Given the contents of these documents, and of Mr Staley's Deposition and the US Proceedings documents, the Authority indicated that it intended to amend its Statement of Case. The Authority subsequently provided the Applicant with a list setting out those documents which it intended to add to its Primary Disclosure List (the "Epstein Estate Emails"). The Authority subsequently provided a number of further documents that had come into its possession other than via the US Proceedings, and accordingly provided a consolidated list of the proposed amendments to its Primary Disclosure List and its Secondary Disclosure List on 9 July 2024.

Mr Staley's position

70. Many of the amendments to the Statement of Case are agreed. However, there are a number of amendments to which Mr Staley objects. These are divided into 7 different categories in Mr Staley's skeleton filed for the purposes of this hearing. It is convenient to adopt those categories for the purpose of determining which of those amendments which are objected to should be permitted.

71. Mr Staley's stated basis for objecting to those categories essentially boil down to two arguments as follows:

> (1) Some amendments are objected to on the basis that they raise matters falling outside the Tribunal's jurisdiction because they are not capable of forming part of the subject matter of the reference.
>
> (2) Otherwise, Mr Staley relies on the Tribunal's inherent discretion to disallow amendments and raises various arguments as to why the Tribunal should exercise that discretion in this case.

Relevant Legal Principles

Jurisdiction Gateway

72. Section 133 (4) FSMA provides:

> "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."

73. In a number of cases over the years, the Tribunal has considered the width of this jurisdictional gateway. When authorised firms or individuals refer decisions of the Authority made against them to the Tribunal, the Tribunal can only consider "the matter" referred to it. There has been some past uncertainty as to what this includes, especially where the Authority seeks to include new allegations in its case that were not part of its original statutory notices (warning, decision or supervisory), or considered by the Regulatory Decisions Committee ("RDC"), which is the decision-maker of the Authority on contested Enforcement cases.

74. In *FCA v BlueCrest Capital Management LLP* [2024] EWCA Civ 1125 the Court of Appeal determined that s 133(4) creates a very wide gateway. Popplewell LJ, who gave the leading judgment, said this at [201] to [203] of the judgment:

> "201. The FCA's secondary case comes closest to an appropriate test, namely that "matter" encompasses anything which arises from the same factual situation which gave rise to the regulatory action in the statutory notice referred to the Tribunal or is otherwise connected with the circumstances, the evidence and/or the allegations, whether factual or legal, which were before the FCA's decision-maker, but is in my view still too narrow.
>
> 202. What is clear is that there must be some sufficient relationship between the matter referred and the decision which triggers the right to refer, and the critical question is: what is required by the concept of sufficiency in this context? The answer is to be found in the fact that the decision is a stage in the regulatory process, and the Tribunal reference a further stage in that process. The logical answer is therefore that something is sufficiently related to the decision which triggers the reference to amount to or be included in "the matter" if it has a real and significant connection with the subject matter of the process, in the sense of its procedural or substantive content, which has culminated in the decision notice or supervisory notice. Such connection must be real and significant, not fanciful or tenuous. But if so, that is sufficient. It need not be something upon which the FCA has specifically relied during the process, provided that it has a real and significant connection with the subject matter of the process. What is required when the FCA seeks to rely on something new in the Tribunal is an examination of what is new, and of the procedural or substantive content of the process culminating in the decision or supervisory notice, and the establishment of a real and significant connection between them. If what is new has this connection it is within the Tribunal's jurisdiction. It is a separate question whether the FCA should be permitted to rely upon it in any particular case, which is a matter for the exercise of the Tribunal's case management powers as to whether it would be just and fair."
>
> 203. If it be objected that this is not hard-edged, I would respond that it is undesirable to seek to define it more prescriptively because it must be flexible enough to take account of over 300 types of decisions, set out in DEPP Chapter 2 Annexes 1 and 2, which may give rise to a reference to the Upper Tribunal. However, it is consciously and deliberately a very wide gateway, for the reasons I have discussed. Accordingly, I would expect it to be a rare and obvious case which fell outside it so as not to come within the Tribunal's jurisdiction."

75. Applying these principles, it is therefore necessary to assess what is the "subject matter" of this reference.

76. It is clear that throughout the prior regulatory proceedings and the original Statement of Case, the Authority's case for disciplining Mr Staley and prohibiting under s 56 FSMA is that in approving the draft of the Letter he breached ICR 1, ICR 3 or SMCR 4.

77. It is also clear that this remains the position in the ASOC. The question from the jurisdiction point of view is whether, as contended by the Authority, the amendments do no more than seek to add evidence which supports the breaches which have always been alleged in this case.

78. Mr Staley's Reference Notice identified the issues which he wished the Tribunal to consider, namely that the imposition of a financial penalty and a prohibition order on the basis of the regulatory provisions referred to at [75] above was wrong as the misconduct alleged was not proven against Mr Staley.

79. It is clear that in the original Statement of Case, the Authority advanced the same alleged breaches as was contained in the Warning Notice and the Decision Notice which were issued by the RDC in

this case. The Statement of Case set out all facts and matters which the Authority relied on to support the referred action, based on the evidence that was then in its possession.

80. The question therefore for the Tribunal in this case is whether, in respect of the alleged facts and matters pleaded by the Authority for the first time in the ASOC and to which Mr Staley objects have a "real and significant connection with the subject matter of the process" , as stated by Popplewell LJ at [202] of *BlueCrest,* in the sense of its procedural or substantive content, which has culminated in the Decision Notice.

The Tribunal's discretion to allow amendments

81. If a proposed amendment falls within the jurisdictional gateway described above because it is part of the subject matter of the reference, the Tribunal has wide case management powers permitting or requiring a party to amend the document: see Rule 5(3) (c) of the Rules. In exercising that power, the Tribunal must have regard to the overriding objective set out in Rule 2 of the Rules. This requires the Tribunal to deal with cases fairly and justly.

82. Popplewell LJ commented on this case management power at [132] of *BlueCrest* as follows:

> "It is to be noted that the general jurisdiction of the Upper Tribunal may be narrowed in any individual case either by the parties, or by the Upper Tribunal itself exercising its case management powers. It may be narrowed by the firm in framing the issues in its reference notice or reply. It may be narrowed by the FCA in framing its statement of case. It may be narrowed by the Upper Tribunal exercising its powers in Rule 5(3)(c) to require the respondent to amend its statement of case to remove allegations which it would not be in accordance with the overriding objective to permit it to pursue; or the applicant to amend the reply on similar grounds. It was common ground between the parties that this would allow it not merely to refuse amendments as a matter of discretion, but to impose deletions for the same discretionary reasons. By this means the Upper Tribunal's jurisdiction contains a wide discretion to refuse to allow the FCA to pursue allegations in the reference if it would not be fair and just to allow it to do so, notwithstanding that they fell within its gateway jurisdiction of "the matter" referred. Defining the scope of that gateway jurisdiction is not, therefore, the only means of limiting the scope of what the Upper Tribunal may decide upon, or even the primary means of so limiting it: whatever the scope of the gateway jurisdiction, the Upper Tribunal retains the ability to restrict it by reference to what is just and fair in relation to each individual case applying its powers flexibly."

83. In *BlueCrest* the Court of Appeal considered that the Upper Tribunal had exercised its discretion correctly in permitting one particular amendment on the basis of this principle set out at [80] and [81] of its decision in that case ([2023] UKUT 00140 (TCC)):

> "80. Pursuant to Rule 5(3)(c) of the UT Rules, the Tribunal has power to "permit or require a party to amend a document", including a party's statement of case.
>
> 81. The Tribunal must exercise that power: (1) in accordance with the overriding objective (as set out in Rule 2 which includes consideration of what is just and fair); and (2) with regard to the well-established principles that apply to amendments to statements of case under the Civil Procedure Rules. These principles include those explained in *Bittar v Financial Conduct Authority* [2017] UKUT 0082 (TCC) *("Bittar")* at [53]-[55]:
>
> (1) that the proposed amendments have real (as opposed to "fanciful") prospects of success;
>
> (2) "the timing and circumstances in which the proposed amendments are advanced";
>
> (3) "whether there is a good reason why the relevant allegations were not advanced

sooner"; and

(4) "whether the proposed amendments have been formulated with sufficient clarity and particularity."

The proposed amendments

84. As regards those amendments that are not objected to by Mr Staley, I am satisfied that all of those amendments fall within the scope of the criteria identified in *Bittar*, as set out [82] above and accordingly the Authority is permitted to make those amendments.

85. I now turn to the seven categories of amendment objected to by Mr Staley and deal with each in turn. In relation to those amendments, Mr Staley rightly takes no issue with the second and third of the criteria in *Bittar*. There is a good reason why the relevant allegations were not advanced sooner in that they result from the fact that the Authority received a considerable amount of relevant material after it filed its original Statement of Case. The Authority has acted promptly in seeking to amend its Statement of Case as soon as practicable after it received and assessed the new material and accordingly there is no issue regarding the timing of the proposed amendments. In relation to the fourth of the criteria, no issue arises except in relation to the new pleading of dishonesty which is discussed at [92] to [96] below.

Ground (i) - introduction of new allegations

86. There are three particular amendments that Mr Staley takes issue with on this ground as follows:

(1) An amendment at paragraph 162A which pleads that the Applicant was not candid with the Authority in interview such that answers given were misleading, and that the Applicant has filed a Reply in the proceedings which was misleading or risked being misleading in material respects. This amendment is pleaded in the alternative as being conduct which was carried out either dishonestly or recklessly by Mr Staley. Associated with that amendment are the amendments at paragraphs 162C, 162D and 231A which expand upon allegations that Mr Staley's Reply is misleading.

(2) An amendment at paragraph 72F, which pleads that Mr Staley shared confidential information with Mr Epstein as evidence of the closeness of his relationship with Mr Epstein whilst employed by JPM.

(3) An amendment at paragraph 64B which pleads that Mr Staley and Mr Epstein exchanged emails inconsistent with a business relationship because such emails would not have been exchanged by individuals who were anything other than close friends.

87. The text of the amendments referred to at [86 (1)] is as follows:

> "162A The Authority's position is that Mr Staley has not been candid with the Authority in his interview to the extent that his answers are misleading and that he has filed a Reply in these proceedings that is misleading, or at risk of being misleading in material respects, and that he has done so dishonestly or recklessly.
>
> 162C Mr Staley's Reply in these Upper Tribunal proceedings is dated 21 August 2023, shortly after he was deposed on 10 June 2023 in the US Proceedings on matters relating to his involvement with Mr Epstein, including his contact with Mr Epstein via his daughter after he had joined Barclays. He must therefore have been aware the Reply was misleading in material respects.

162D The Authority considers the following assertions in the Reply are misleading on the basis of answers given in the deposition by Mr Staley and/or on the basis of the Epstein Estate emails:

i. The assertion in the Reply at paragraph 3.28 that "personal interaction extended to occasional dining invitations to Mr Epstein's home in New York and on other isolated occasions at other venues, at which many well connected persons were often present." The personal interaction revealed by the emails between Mr Staley and Mr Epstein cited in the amended Statement of Case extends well beyond this description.

ii. The assertion in the Reply at paragraph 3.28 that "the purpose of the Applicant's interaction with Mr Epstein over the period in question was for business." The emails and Mr Staley's evidence in the deposition show the interaction was not solely for business purposes.

iii. The assertion in the Reply at paragraph 3.28 that "the evidence to be deduced from the email correspondence over the period from 2008 to 2015 establishes… that no personal friendship existed between the two men." This statement is misleading including in light of the Epstein Estate emails which clearly show a personal friendship between the two men.

iv. The assertion in the Reply at paragraph 3.28 that "no relationship whatsoever existed when the Applicant joined Barclays" (and the numerous other assertions in the Reply that Mr Staley had no contact with Mr Epstein since joining Barclays at paragraphs 3.11, 3.17((iv), 3.28, 4.5, 4.6, 4.11(v), 4.13, 4.33 and 4.53(ii) already set out at paragraph 162D above) when in fact he continued to communicate with Mr Epstein via his daughter Alexa Staley until at least February 2017 as is clear from the Epstein Estate emails and the deposition.

v. The assertion in the Reply at paragraph 4.36(ii) that Mr Staley travelled on Mr Epstein's plane on one occasion around 2006 with his wife and daughters when it is plain that the number of trips he took on Mr Epstein's private planes was greater.

231A As set out at paragraphs 162A to 162D above, the Authority's position is Mr Staley has not been candid his interviews with the Authority and filed a misleading Reply in these proceedings. It is the Authority's view that Mr Staley's statements in interview and decision to file such a Reply, demonstrate a continuing lack of insight into why his conduct lacked integrity and are also material considerations in relation to the protective purpose of a prohibition order under section 1D FSMA. The Authority contends that Mr Staley's ongoing conduct in filing a misleading Reply is sufficient grounds alone to justify the imposition of a prohibition order."

88. Mr Staley concedes that the Tribunal has the jurisdiction to consider these amendments but contends it should exercise its case management discretion to decline permission to make the amendments.

89. The Authority says that the rationale for the amendment regarding the interview is that in interview on 20 December 2019 Mr Staley said that he had had "zero contact" with Mr Epstein whilst he had been at Barclays, that he "had no contact at all, of any nature" with Mr Epstein since joining Barclays and gave another answer in similar terms.

90. The Authority's position is that these assertions were plainly inaccurate in the light of emails obtained from the Epstein Estate and answers that he gave in his Deposition to the effect that he continued contact and engagement with Mr Epstein after his appointment at Barclays via his daughter Alexa. These are the emails referred to at [65] above.

91. An examination of these emails leads me to conclude that they are highly relevant evidence to the issue as to whether Mr Staley had contact with Mr Epstein after he joined Barclays, contrary to what was indicated in the Letter. It seems to me that the Authority has a real as opposed to fanciful prospect of success of proving that the emails that Mr Staley's daughter exchanged as an intermediary between Mr Epstein and Mr Staley amounted to contact with Mr Epstein that took place after he joined Barclays. It seems to me that the Authority has a real rather than fanciful prospect of success of proving that Mr Staley's statements in interview were reckless, if it is able to demonstrate that he was aware of a risk that his answers were misleading because of what he knew about the contact that took place through his daughter.

92. However, I am not satisfied that the Authority has a real prospect of success on the question as to whether Mr Staley's answers were dishonest. In order that the Authority makes good its case on this point, it will have to demonstrate that Mr Staley lied in his interview, that is he knew that the statements in question were untrue.

93. As Mr Smith submitted, in order for the Authority to plead dishonesty, it will need to satisfy me that on the basis of the facts pleaded, an inference of dishonesty is more likely than one of recklessness.

94. The relevant test was set out by the House of Lords in *Three Rivers D.C. v Governor and Company of the Bank of England* [2001] UKHL 16. In *JSC Bank of Moscow v Kekham and others* [2015] EWHC 3073 (Comm) Flaux J carried out an exhaustive analysis of this judgment at pages 592 to 596 concluding at [20] as follows:

> ". ……. The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact "which tilts the balance and justifies an inference of dishonesty". At the interlocutory stage, when the court is considering whether the plea of fraud is a proper one or whether to strike it out, the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge. This is made absolutely clear in the passage from Lord Hope's speech at [55]-[56] which I quoted above."

95. In my view, the Authority does not explain in the ASOC why Mr Staley's answers in interview are more likely to give rise to an inference of dishonesty rather than recklessness. The two standards are simply pleaded in the alternative on the basis of the same facts. There is no reference to some fact which tilts the balance from recklessness to dishonesty and which would justify an inference of dishonesty. Nothing is said as to why the Authority considers that Mr Staley deliberately lied in his answers. Consequently, the pleading fails to satisfy the criterion in *Bittar* that it is formulated with sufficient clarity and particularity.

96. Accordingly, the allegation of dishonesty cannot stand in the ASOC. Subject to what I say below in relation to the Authority's allegations regarding the Reply, the amendment at paragraph 162A is permitted subject to the deletion of the words "dishonestly or".

97. In relation to the allegations regarding the Reply, I am not satisfied that it is fair to permit these allegations to stand. I accept Mr Smith's submission that it is not appropriate for these amendments to be included in the ASOC because they are matters for submission at the hearing, and in particular to support the Authority's case that Mr Staley was reckless in approving the statements in the Letter which the Authority contends are misleading.

98. The allegations as to the Reply being misleading rely on the allegations made elsewhere in the ASOC based on the new material received by the Authority, in particular (i) the communications with Mr Staley's daughter, (ii) the question as to whether Mr Staley's relationship with Mr Epstein was purely of a business nature, (iii) whether he continued to have contact with Mr Epstein after he joined Barclays, and (iv) the number of trips he took on Mr Epstein's private plane. Since I have not permitted the allegation of dishonesty to stand, the allegations regarding the Reply being misleading add nothing to the Authority's case.

99. Furthermore, it seems odd that there should be allegations in a Statement of Case as to the contents of a Reply, a document which follows on from the Statement of Case. Mr Staley will be permitted to serve an amended Reply in response to the ASOC and in that context may amend or explain some of the statements that the Authority alleges are misleading.

100. Ms Mulcahy submits that it is plain from *Hussein v FCA* [2018] UKUT 186 (TCC) that the Tribunal has the ability to prohibit an individual for an integrity breach founded on behaviour which occurred within regulatory proceedings, even in circumstances where the underlying conduct which was referred to the Tribunal is found not proven and resolved in the Applicant's favour. In *Hussein* the Tribunal found that the Applicant had been dishonest in his evidence before them and observed (at [224]):

> "Therefore, whilst it might be understandable why Mr Hussein behaved the way he did, we cannot excuse it. It is a very serious matter not to be candid and truthful with one's regulator and equally serious, if not more so, to give untruthful evidence under oath to a Tribunal. Those are failings that we cannot ignore and go right to the heart of whether a person wishing to work in the financial services industry can be relied on to act honestly and with integrity."

101. It is important to note that the ability of the Tribunal to take into account Mr Hussein's conduct during the hearing of the reference was not dependent on that matter being pleaded. It was simply a matter that the Tribunal took into account in deciding whether or not to remit the Authority's decision to prohibit Mr Hussein. The Tribunal found that the conduct of Mr Hussain relied on by the Authority did not demonstrate that Mr Hussein lacked integrity. In the normal course, that would result in the matter being remitted to the Authority for it to reconsider its decision. However, the Tribunal said this at [225]:

> "…we cannot see that there is any basis on which we could properly ask the Authority to reconsider its decision to make a prohibition order against Mr Hussein. It cannot be said that in the light of the circumstances, the decision to prohibit is one that is not reasonably open to the Authority to make"

102. The "circumstances" that the Tribunal was referring to in this passage was the fact of Mr Hussein's conduct during the hearing of the reference. Likewise, in this case if the Tribunal finds the Authority's allegations against Mr Staley to have been proved, and it does so to any extent on the basis of the matters referred to at [97] above, it will necessarily follow that Mr Staley's Reply will have been found to be misleading on the basis of his recklessness, thus supporting a finding of a lack of integrity. Such a finding would in the usual course lead to the Tribunal dismissing the reference as it relates to the prohibition order rather than remitting the decision to the Authority.

103. Accordingly, I refuse permission to make the amendments set out at paragraphs 162C and 162D. Paragraph 231A can stand insofar as it is limited to the allegations regarding Mr Staley's conduct at his interview.

104. The text of the second of these amendments is:

" 72F Between 2008 and 2011, Mr Staley shared confidential information relating to his then employer, JPM with Mr Epstein showing the closeness of their relationship and Mr Staley's willingness to breach obligations owed to his employer including where there was a conflict of interest between JPM and Mr Epstein:…"

105. In this regard, the Authority relies on various emails summarised in the Statement of Undisputed Material Facts as follows:

"45. On multiple occasions, Staley shared with Epstein confidential information about transactions the Bank was structuring or exploring"

46. Staley discussed the confidential status of other Bank clients with Epstein.

47. Staley shared information protected by the attorney-client privilege about Epstein's ongoing litigation against JPMC with Epstein. JPMC Ex. 104.

…

49. Staley kept Epstein informed about the status of the Bank's investigation into the allegations against him in March 2011."

106. Mr Staley objects to this amendment on jurisdictional grounds and, in the alternative, on the basis that the Tribunal should not exercise its discretion to commit the amendment.

107. In my view the objection on jurisdictional grounds must fail. The amendment does no more than seek to add evidence which supports the breaches which have always been alleged in this case. The allegation therefore has a real and significant connection to the procedural and substantive subject matter of the reference.

108. The basis of Mr Staley's contention that the amendment should be refused in the Tribunal's discretion, is that there is no supporting evidence against the mass of background to establish that there was a breach of duty on Mr Staley's part in terms of his employment. The question therefore is whether I should refuse this amendment on the grounds that it does not have a real, as opposed to fanciful prospect of success.

109. In my view, the allegation has a real as opposed to fanciful prospect of success in supporting the allegation that there was a close relationship between Mr Staley and Mr Epstein. It seems to me that evidence as to the willingness of Mr Staley to share confidential information with Mr Epstein, if proved, is capable of supporting the key allegation that the relationship between Mr Staley and Mr Epstein was a close one and went beyond normal professional contact. It seems to me that it is self-evident that information regarding transactions that JPM were involved in, the status of other clients of JPM with Mr Epstein and the ongoing litigation with Mr Epstein is more likely than not to be regarded as confidential so that disclosure of such information is likely to be a breach of his terms of employment. It is not appropriate for me at this stage to review the underlying evidence in that regard, but there is some evidence to support the allegation and it seems to me that if the underlying evidence supports the allegation, then it will support the allegation that the relationship between Mr Staley and Mr Epstein was a close one.

110. Accordingly, the amendment is permitted.

111. The text of the third of these amendments is as follows:

> "64B There are a number of emails in the 2009-2011 period which the Authority considers are inconsistent with a business or professional relationship of any type. The Authority's view is that emails of this nature would not be exchanged between or in relation to individuals who were anything other than close friends. Several emails in 2009 and 2010 show Mr Epstein sending Mr Staley photographs of women and Mr Staley responding to some of those emails, and Mr Epstein and Mr Staley exchanging other types of emails which are described in the JPMC Statement of Undisputed Material Facts and Counterstatement of Additional Material Facts filed in US Proceedings under the heading "Staley exchanged Suggestive Emails with Epstein About Women."

112. Mr Staley does not dispute that the emails referred to in the proposed amendment can be relied upon by the Authority to show the nature of the relationship between Mr Epstein. Mr Staley's concern arose solely from the reference to the emails being described in the Statement of Undisputed Material Facts and the reference to the heading under which that description occurs in that document. Mr Smith submitted that these references give rise to an unfair innuendo that Mr Staley was involved in some way with Mr Epstein's misconduct.

113. I accept that the heading referred to at the end of the proposed new paragraph 64B is unnecessary and in the interests of fairness it should be deleted. I do not, however, consider that the reference to the Statement of Undisputed Material Facts should be deleted. It is a convenient way of describing the source of the material. As will become apparent later in this decision, the hearing bundle should only include those parts of that document which are relevant to the issues in this case which in my view is sufficient to dispel any suggestion of innuendo.

114. Accordingly, the amendment is permitted subject to the deletion referred to at [113] above.

Ground (ii) - unnecessary citation of evidence

115. There is no need for me to say anything about this Ground in this decision. I expressed the view at the hearing that the ASOC was unnecessarily long and detailed. The parties agreed to cooperate so as to ensure that the volume of evidence referred to in the amendments proposed by the Authority does not exceed that which is reasonably required to satisfy the requirements of the Rules or the relevant provisions of FSMA and this is reflected in my directions which are made alongside this decision.

Ground (iii) - correspondence between the Authority and the Applicant's lawyers – no probative value

116. This ground relates to the amendment at paragraph 162B the text of which is as follows:

> "162B The Authority has sought an explanation as to why Mr Staley's Reply was misleading, and none has been provided:
>
> i. Correspondence sent by the Authority on 9 May 2024 noted that "in August 2023 Mr Staley approved his Reply in these proceedings containing numerous assertions that he had had no contact with Mr Epstein since joining Barclays in December 2015. He did so in circumstances where he must have known that such assertions were inaccurate, having provided his Deposition in the US Proceedings during which he was questioned about the emails set out...above (and other matters) only two months previously."
>
> ii. Mr Staley's legal representatives responded to the 9 May 2024 correspondence on 17 May 2024 noting that "the Authority makes criticism of the Applicant which is unreasonable and unsupported by the law. The Applicant has not failed to comply with any legal obligation", but not including any explanation as to why that was considered to be the case.

iii. Correspondence sent by the Authority on 24 May 2024 noted that "Mr Staley is obliged to help the Upper Tribunal to further the overriding objective of dealing with cases fairly and justly. By filing a Reply which Mr Staley must have known was misleading in material respects and refusing to assist by producing documents which he knows undermine his case, Mr Staley is clearly in breach of that obligation.

iv. Mr Staley's legal representatives responded to the 24 May 2024 correspondence on 30 May 2024, but omitted to address the question clearly posed by the Authority as to the misleading nature of the Reply.

v. Correspondence sent by the Authority on 26 June 2024 noted the "continued failure to address, let alone explain or apologise for the fact that your client has submitted a Reply which he must have known was material in misleading respects."

vi. Mr Staley's legal representatives responded to the 26 June 2024 correspondence on 2 July 2024, and again omitted to address the question clearly posed by the Authority as to the misleading nature of the Reply."

117. Mr Smith submits that the absence of engagement with the Authority in correspondence by Mr Staley's legal representatives has no probative value and their introduction in the pleadings should be refused and the exercise of the Tribunal's discretion. He submits that it is neither just nor fair for the Authority to be entitled to engage in correspondence with an opposing party's legal advisers, what is a "live" issue in the proceedings, and then seek to invite the Tribunal to draw adverse inferences from the absence of engagement.

118. I can deal with this very shortly. For the reasons set out above, I have refused the amendment that would permit the Authority to rely on its allegation that Mr Staley's Reply was misleading. Paragraph 162B engages solely with that issue in the context of the correspondence that the Authority had with Mr Staley's lawyers on that issue. It therefore follows that I must refuse permission the amendment set out at paragraph 162B.

Ground (iv) – email correspondence and by imessaging between Mr Epstein and third parties

119. Mr Staley objects to the inclusion of some but not all emails and iMessaging evidence between Mr Epstein and third parties on the basis that Mr Staley was not a party to them and it cannot reasonably be inferred that Mr Staley initiated, prompted, had knowledge of, or approved, the correspondence or iMessaging. Mr Staley appears to be inviting the Tribunal to refuse the amendments in the exercise of its discretion.

120. The amendments concerned are set out at paragraphs 64C, 64E, 79A,81A and 100A of the ASOC. There is no need to set out the text of the paragraphs here, but in summary the Authority relies on the material in question because of the way that Mr Epstein describes Mr Staley to third parties, for example, "he is one of us" "my buddy Jess Staley" "very close friend" "like my brother" "a great friend".

121. I agree with the Authority that this material is of probative value on the basis that they show Mr Epstein's view of the relationship between the two men, and his view of Mr Staley, and other third parties' view of Mr Staley, and their closeness. I do not consider that it would be in any way unfair to Staley for the Authority to seek to rely on this material in support of its allegation regarding the closeness of the relationship between Mr Staley and Mr Epstein.

122. I therefore permit the amendments referred to at [120] above.

Ground (v) - no probative value

123.Mr Staley objects to footnote 87, which is a footnote to paragraph 64B of the ASOC, the text of which is set out at [111] above. The footnote merely refers to the Statement of Undisputed Material Facts as being the source of the emails referred to at paragraph 64B.

124.I have at [113] above permitted the reference to the Statement of Undisputed Material Facts to stand at paragraph 64B. On that basis, it is right that Footnote 87 should also stand.

Ground (vi) – failure to characterise the evidence in an accurate, balanced or objective manner

125.This ground relates to the amendments at 114A, 159, 160, 162D, 165 and 176. These paragraphs contain allegations that contrary to Mr Staley's position, contact between Mr Staley and Mr Epstein continued to take place after 25 October 2015. Mr Staley objects to the references in these paragraphs to contact having continued between Mr Staley and Mr Epstein through Mr Staley's daughter. These emails, which passed between 14 March 2016 and 23 February 2017, demonstrate that Mr Epstein asked Mr Staley's daughter to make various enquiries of Mr Staley. Mr Staley did not reply directly to Mr Epstein but replied to his daughter who in turn relayed the essence of his responses to Mr Epstein.

126.The basis of Mr Staley's objection is that in the amendments the Authority has unreasonably and inaccurately mislabelled these emails all of which were initiated by Mr Epstein, by inaccurately describing or characterising them in the draft pleading to assert that in some way this correspondence took place on Mr Staley's initiative and/or with his consent or connivance, in order to support the Authority's proposed case by way of allegations of lack of candour and recklessness.Mr Smith submits that it is self-evident that the fact that Mr Staley did not initiate any of this correspondence with Mr Epstein and did not personally engage with him by way of any form of response that he had, as he had consistently explained to senior executives and directors at Barclays and in interview with the Authority, ended his relationship with Mr Epstein upon joining Barclays and had ceased contact with him. The suggestion that Mr Staley intended to meet with Mr Epstein is not reasonably to be inferred from the correspondence in question. These emails were conducted between Mr Epstein and the Applicant's daughter. The evidence given by Mr Staley when deposed in the United States was not an acknowledgement by him that he had contacted or been in contact with Mr Epstein. The Authority, bearing as it does the obligation to prove its case against the Applicant has been unable to produce a single instance of any contact or attempted contact with Mr Epstein by Mr Staley since October 2015; these five e mails are therefore consistent with that position. The Authority's attempt to characterise this correspondence as "continuing their close relationship" is perverse.

127.In my view Mr Smith's objections are all matters for submission at the hearing on the question as to whether these emails can be characterised as demonstrating that contact between Mr Staley and Mr Epstein continued after 25 October 2015. It is clearly a question of what is meant by "contact" and whether Mr Staley was aware that by not disclosing the fact of these emails in interview or in the Letter there was a risk that the statements in the Letter regarding the recency of his contact with Mr Epstein were misleading. It seems to me that the Authority has a realistic prospect of success on the question as to whether these emails demonstrate that contact between Mr Epstein and Mr Staley continued after 25 October 2015 and that Mr Staley was aware that by not disclosing that such contact had taken place that there was a risk that the relevant statement in the Letter was misleading.

128.If the Tribunal accepts that the emails exchanged between Staley's daughter and Mr Epstein are evidence of ongoing contact between the two men, that will be evidence from which the Tribunal could find that the Letter was misleading.

129.I therefore permit the amendments referred to at [125] above.

Ground (vii) – inaccuracies

130.The Applicant suggests substantive errors arise in respect of paragraphs 9A, 40B, 52, 52C, 55, 73, and 165.4.of the ASOC.

131.The Authority accepts that there is an error at paragraph 52C which will be corrected. The Authority disputes that there are errors in the other paragraphs. In those circumstances, I agree with the Authority that the appropriate response to the errors is for Mr Staley to deal with them in his amended Reply.

132.Accordingly, I permit these amendments to be made, subject to the Authority correcting the error in paragraph 52C.

The Authority's List of Documents

133.Mr Staley objects to the inclusion on the Authority's List of Documents of two documents which were added to the List following receipt by the Authority of the additional material from the SEC.

134.The documents concerned were added as documents 589 and 590 in the List and are the two documents referred to at [63] above, namely the Statement of Undisputed Material Facts and the Memorandum of Law.

135.Mr Staley objects to the inclusion of these documents because they contain statements which JP Morgan sought to present to defend its position in the US proceedings. Mr Smith submits that these documents have no value in these proceedings.

136.It is clear that the Authority has relied in the ASOC to an extent on some of the material referred to in these two documents. On that basis it is perfectly proper that the documents should be included in the Authority's List of Documents.

137.However, I accept Mr Smith's submission that there are large amounts of material in these documents which are not relevant to this reference. Accordingly, I direct that for the purposes of the hearing bundle, the Authority shall redact the two documents so that only those contents of the documents on which the Authority relies are included.

The Specific Disclosure Application

138. Pursuant to this application Mr Staley sought disclosure of:

> (1) Correspondence leading up to or relating to the call that took place on 28 November 2019 between JPM and the Authority and the Note for the Record of that call.
>
> (2) The Note for the Record of the call between JPM and the Authority that took place on 2 December 2019.
>
> (3) Any substantive correspondence between the Authority and its witnesses which has a bearing upon their evidence or the content of their witness statements.
>
> (4) Confirmation that the material referred to by each witness in their witness statement is the totality of the material disclosed to the witness in the course of preparing their

witness statement – and the identification of any additional material referred to in the body of the statement but shown to the witness.

139. During the hearing, Ms Mulcahy confirmed that all material relating to items (1) and (2) had already been disclosed. Mr Smith accepted that assurance and accordingly that part of the application fell away.

140. As regards item (3), Ms Mulcahy confirmed that there was nothing to disclose and that any material that fell within this category was subject to legal professional privilege. Again, Mr Smith accepted that assurance.

141. As regards item (4), Ms Mulcahy confirmed that the Authority would provide Mr Staley with a list of all the documents shown to the witnesses and accordingly I have made a direction to that effect.

Directions

142. I have made directions to give effect to the matters resolved by this decision. Those directions also deal with the timetable for the service and filing of amended pleadings and supplemental witness statements.

JUDGE TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE
RELEASE DATE: 04 December 2024