



CASES NR/0001/2010 onwards

IN THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

FINANCIAL SERVICES

Andrew Bartlett QC (Judge of the Upper Tribunal)

BETWEEN

NORTHERN ROCK APPLICANTS

Applicants

- AND -

(1) ANDREW CALDWELL

(As the Independent Valuer of Northern Rock plc)

(2) HM TREASURY

Respondents

RULING ON WHAT IS TO BE COMPRISED IN THE MAIN HEARING

24 February 2011

1. This is a case management hearing in the Northern Rock references. I have to decide how the references and the issues that arise in them are to be heard.
2. Mr Phillips QC for Harbinger submits that Harbinger's case should be heard as lead case, together perhaps with the case of Mr Hulme, and that all issues in Harbinger's case should be determined at the same hearing.
3. Mr Hulme is represented today by Ms Butt. Mr Hulme is a chairman of the Northern Rock Shareholders Action Group. His role in relation to other shareholders is as a coordinator

rather than a representative. He is content for Harbinger to take a lead but Ms Butt submits on his behalf that other references should also proceed, and the additional points which arise in them should be determined.

4. Mr Howard QC for the Valuer, supported by Mr Cromie for the Treasury, submits that the Tribunal should hear first a preliminary issue on the interpretation of the withdrawal assumption, which is one of the 4 statutory assumptions which the Valuer was required to make, together with what have been called the bias complaints which are discussed at paras 170-178 of the Valuer's statement of case.
5. The pros and cons of these courses have been extensively set out in the helpful written skeleton arguments and further debated at some length this morning.
6. In order to decide this point I have reminded myself of the authorities and guidance referred to by counsel, including *Steele v Steele* 2001, and the warning in *Tilling v Whiteman* about treacherous shortcuts. I also have in mind the overriding objective set out in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules to deal with cases fairly and justly, which includes the all matters set out in rule 2(2).
7. Mr Howard submits that the interpretation issue is likely to be determinative whichever way the issue is decided, that it is independent of the other issues raised, and that it will save costs and time.
8. Mr Phillips urges that the expert reports are central to the presentation of Harbingers' case on both the interpretation issue and the issues of methodology, and that the two kinds of issues should be heard together.
9. It emerged that there was a disagreement between the parties on what is the relevant test of reasonableness of the Valuer's decision. Mr Howard argued that under the Financial Services and Markets Act s133(5) as substituted by paragraph 18 of the Compensation Scheme, it was the so-called Wednesbury test, which meant that the valuer had a wide margin of appreciation. Mr Phillips disagreed, having regard to the words used in subsection (5) and also to the provisions of s133(4), which permit the Tribunal to take into account new material which was not available to the Valuer. Mr Phillips has submitted that the Valuer's decision has to be objectively reasonable. The precise interpretation of s133(5) is not something to be decided today at a directions hearing; for present purposes it is sufficient to say that the matter is in dispute and it cannot be said that Mr Howard's interpretation is necessarily correct.
10. Having weighed up all the various arguments the matters which appear to me to have the most weight are four:
11. First, while I cannot decide today whether looking at the expert reports will ultimately assist the Tribunal's understanding of the interpretation issue, that being a matter in dispute between the parties, I have to take into account that Harbingers' case is that they will indeed assist. More particularly, I am wary of the dangers of considering the interpretation issue in a vacuum, without seeing how the competing interpretations would be applied.

Looking at the possible practical effects of a statutory interpretation can be illuminating in helping a Tribunal arrive at an understanding that is correct in law, particularly when arguments are relied upon that a particular construction would lead to absurd results. Mr Phillips submitted that it is “essential” to look at the facts and see how the various models would work in order to get a proper understanding of the intended meaning of the statutory assumptions. This is an important plank in his case and he says he cannot advance his arguments without referring to the expert reports. I cannot decide today if what he says about that is correct but there may be something in it and I have to take that into account in making a case management decision. My present view, which is provisional, is that the particular facts and matters discussed in the expert reports cannot of themselves affect the meaning of the statutory provisions and indeed are likely to be inadmissible for that purpose, but as I understand it Mr Phillips wishes and intends to use them to illuminate the arguments, and I do not think it would be right to rule that out today. On that basis there is something to be said for examining the methodology issues at the same time, since on those the reports will be potentially admissible as evidence and not merely illustrative. I take Mr Howard’s point that the reports as a whole are not specifically focused on the methodology issues but are somewhat broader, and might need some refocusing, but that will be a matter for Harbinger to consider and does not affect the principle.

12. Second, the valuation of the Northern Rock shares is a matter that is very important to a large number of people, and the Tribunal should do all it can to avoid delay. To take just one point as a preliminary issue risks considerable delay because of the likelihood of appeal. If the Tribunal decides in favour of the Valuer’s interpretation, that is not necessarily the end of every applicant’s case, and it is not even necessarily the end of Harbinger’s case because an appeal court may take a different view on the interpretation issue. If there is to be an appeal, as far as possible all points should go up together. It is not possible to guarantee that here, because certain outcomes might require the Valuer to re-do the whole exercise which he has carried out, which might then lead to further proceedings in relation to a new valuation, but we have to do the best we can to reduce the risks of further delays.
13. Third, the interpretation issue is the issue which is likely to take the most hearing time, probably two to three days; the other issues will add to that time, but probably only by a couple of days; it is more efficient to hear everything together, and it does not appear to me that there is sufficiently strong reason for hiving off the methodology points, when probably everything can be heard in at most five days.
14. Against that Mr Howard advanced the argument set out in paragraphs 16-17 of his skeleton, but I am not sufficiently convinced for today’s purposes by his characterisation of the jurisdiction of the Tribunal or by his submission that decisions on the methodology points will necessarily not assist the valuer if he is required to re-do his valuation. The jurisdiction in FSMA s133(5) is not expressed as mere remission but remission “with such directions as the Tribunal considers appropriate”, which at least arguably may include directions on methodology. It would be unfortunate, as Mr Phillips submitted, if there were a decision by the Tribunal which meant that the valuer re-did his valuation, and then the same methodology points were raised again which have already been raised in relation to the

current valuation. Mr Howard, supported by Mr Cromie, says this cannot arise because points on methodology only arise in the context of a particular valuation based on a certain interpretation; Mr Phillips disagrees and says the same points may arise. I do not think it would be right for me to decide today who is right, and I ought to take into account for the purposes of making case management decisions that Mr Phillips might persuade the Tribunal that he is right, even though in the end it may be Mr Howard and Mr Cromie who are proved right.

15. Fourth, developing the second point concerning delay, considerable time has now passed since the shares were taken into public ownership. I am aware from reading all of the reference notices, that many of the former shareholders are suffering hardship; they need to know where they stand, and the whole matter needs to be resolved as soon as it reasonably can be.
16. Balancing all the matters that have been put to me, I consider that the better course is to take the interpretation issue at the same time as the other issues.
17. Coming to Mr Phillips' submission that the Tribunal should take the cases of Harbinger and possibly of Mr Hulme alone, and stay all others, that would be highly undesirable in my judgment, as it would leave a rump of unconsidered complaints which can be dealt with at the same hearing without undue inconvenience. I do not consider that the additional complaints are likely to add very greatly to the hearing time, but, even if they did so add, I am not satisfied that that would justify giving unique precedence to Harbinger's reference notice, notwithstanding Harbinger's interest in preference shares. Other people's cases are just as important to them as Harbinger's case is to it. I accept the points made in paragraphs 30-33 of Mr Howard's written skeleton argument. If the additional arguments raised by other applicants are as minor as Mr Phillips submits they are, they are easily and shortly included and determined. If the points are of more substance, there is all the more reason for hearing them.
18. There should be a single hearing to deal with all points that are live and fall within the jurisdiction of the tribunal.
19. Paragraph 8 of the Case Management Order of 18 November 2010 provided for further submissions where any party considered that complaints outside categories a and b identified in the Case Management Memorandum were within jurisdiction.
20. I have only received two submissions of that nature. The Valuer has identified a category which he calls "bias complaints", which are dealt with in his statement of case. In addition the Tribunal received a letter dated 29 November 2010 from Mr Madgwick arguing that wider aspects of fairness should be taken into account.
21. My ruling is that the hearing should cover all the issues that have been addressed in the Valuer's statement of case, including the so-called bias complaints and the other miscellaneous complaints which the Valuer's legal team has identified as arguably falling within the Tribunal's jurisdiction. The matters raised in Mr Madgwick's letter of 29

November 2010 are included only to the extent that they are within the issues addressed in the Valuer's statement of case.