Reference number: FS0017&0018

DECISION NOTICE – Publication – Prohibition – Whether Upper Tribunal should prohibit on grounds of prima facie unlawfulness, absence of necessity or unfairness to Applicants – Relevance of ECHR principles – Respect for privacy of Applicants – Interference with Applicants' rights of peaceful enjoyment of possessions or deprivation of possessions – FSMA 2000 s.391(1A) – Trib Proc (UT) Rules 2008 r.14(1) – Art 8 and Art 1 of First Protocol to ECHR

IN THE UPPER TRIBUNAL
FINANCIAL SERVICES

(1) 7722656 CANADA INC
(formerly carrying on business as Swift Trade Inc)
(2) PETER BECK **Applicants**

- and -

THE FINANCIAL SERVICES AUTHORITY **The Authority**

TRIBUNAL: SIR STEPHEN OLIVER QC

Sitting in private in London on 21 July 2011

Philip Engelman, counsel, instructed by Ford & Warren, solicitors, for the Applicants

Timothy Otty QC. for the Authority

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DECISION

Background

1. Following references to the Upper Tribunal of a Decision Notice issued by the FSA on 6 May 2011 ("the Decision Notice"), the Applicants have applied pursuant to rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 for a direction prohibiting the disclosure and/or publication of the Decision Notice.

2. The Decision Notice contains a decision of the FSA to impose on "Swift Trade" (being the name under which the first Applicant carried on business) a financial penalty pursuant to section 123(1) of Financial Services and Markets Act 2000 ("FSMA") for engaging in market abuse. The primary reason given for the FSA's action is that during the period 1 January 2007 until 4 January 2008 Swift Trade "systematically and deliberately engaged in manipulative trading activity known as layering." The manipulative trading, it was said, caused a series of small price movements in a wide range of individual shares on the London Stock Exchange from which Swift Trade was able to profit.

The Judicial Review proceedings

3. On 9 June 2011 the Applicants applied to the High Court for permission to apply for judicial review of the decision of the FSA, taken under section 391 FSMA, to publish the Decision Notice. The High Court granted to the Applicants (referred to as the Claimants) permission to bring judicial review proceedings –

> "On condition that, by 23 June 2011, the Claimants do make an application to the Upper Tribunal pursuant to Rule 14 … for a direction that there be no publication of the Decision Notice concerning them and dated 6 May 2011, the Defendant [the FSA] whether by itself, its servants, agents or whomsoever be restrained from publishing the Decision Notice until whichever is the earlier of:
>
> (a) 14 days after the determination of that application by the Upper Tribunal; or
> (b) the determination of the Claimants' application for judicial review."

The Application

4. The Applicants applied to the Upper Tribunal on 15 June 2011 pursuant to rule 14(1)(a) for the direction prohibiting disclosure and/or publication of the Decision Notice. On 1 June 2011 the Applicants had applied pursuant to paragraph 3 of Schedule 3 to the Upper Tribunal Rules for a direction that no details regarding the case be contained within the Tribunal's register. At the present hearing Mr Philip Engelman, counsel for the Applicants, announced that the paragraph 3 application

was withdrawn. The Applicants make no application under rule 37 for the hearing or any part of it to be in private.

5. The application before me was therefore concerned only with the issue of whether publication of the Decision Notice was to be prohibited.

6. The Applicants submit that the Tribunal should follow the judgment of the High Court and restrain publication on grounds that publication by the FSA would be contrary to the decision of the Court which had ruled that publication was "prima facie unlawful". The Applicants further argue that publication of the Decision Notice is not necessary in the present circumstances nor would it be fair. Moreover, they say, prohibition would violate their rights under Article 8 (respect for privacy) and Article 1 of the First Protocol (protection of property) of ECHR.

The statutory provisions

7. Section 391 FSMA, as amended, contains general rules relating to publication of Decision Notices. So far as relevant these provide:

> "(1A) A person to whom a Decision Notice is given or copied may not publish the notice or any details concerning it unless the Authority has published the notice or those details.
>
> (4) The Authority must publish such information about the matter to which a Decision Notice or final notice relates as it considers appropriate;
>
> (6) But the Authority may not publish information under this section if publication of it would, in its opinion, be unfair to the person with respect to whom the action was taken or prejudicial to the interests of consumers."

8. When a decision is referred to the Upper Tribunal the Tribunal procedure (Upper Tribunal) Rules 2008 are engaged. Rule 14 is headed "Use of Documents and Information". So far as relevant it provides:

> "(1) The Upper Tribunal may make an Order prohibiting the disclosure or publication of:
>
> > (a) specified documents or information relating to the proceedings; or
> > (b) …
>
> (2) The Upper Tribunal may give a direction prohibiting the disclosure of document or information to a person if:

(a) the Upper Tribunal is satisfied that such disclosure will be likely to cause that person or some other person serious harm; and

(b) the Upper Tribunal is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction."

This Application concerned only paragraph 14(1), i.e. disclosure generally. Paragraph 14(2) relates to disclosure of a document to a particular individual and has no application here.

9. The Applicants contend that I should follow the order of the High Court. That Order, as they interpret it, is that the FSA would be acting unlawfully were it to publish the Decision Notice prior to the determination of the reference by this Tribunal. Because the FSA is prohibited from publishing the Decision Notice (as they interpret the High Court Order), the Tribunal, being "a person to whom a Decision Notice is given" (see the words of section 391(1A) FSMA), is forbidden by that provision from publishing.

The effect of the High Court decision

10. I do not read the High Court judgment as deciding that the publication of the Decision Notice by the FSA would be prima facie unlawful. Consequently the judgment (as I read it) does not impact on the power given by rule 14(1) to me, as the Upper Tribunal judge, to make an order prohibiting the disclosure or publication of the Decision Notice. The effect of the High Court decision was that the Applicants had conditional permission to seek a judicial review of the FSA's decision (dated 20 May 2011) to publish the Decision Notice in advance of any consideration of the primary issues by the Tribunal. I refer to the order of the High Court which is set out above. The condition is that the Applicants (referred to as Claimants in the Order) are to apply to the Tribunal for a rule 14 direction. If the Upper Tribunal rejects that application and does not prohibit publication the FSA will then have to make a fresh decision, taking account of the terms of the Tribunal's ruling, as to whether or not to publish.

11. For those reasons I see no constraint resulting from the High Court judgment and Order on the exercise by the Tribunal of its rule 14(1) discretion.

12. I turn now to address two related contentions of the Applicants, i.e. that publication is unnecessary and unfair to them.

Consideration of necessity and unfairness

13. The Applicants contend that the FSA's decision to publish could not in the circumstances be justified on grounds of necessity; consequently, as I understand the Applicants' case, the Tribunal should disregard arguments as to the necessity of publication when deciding whether to make an order prohibiting publication. This

argument addresses the contention of the FSA that publication is necessary in order to protect the integrity of the market. The Applicants acknowledge that necessity to publish is not a statutory criterion. They point instead to the publication of the London Stock Exchange (N78/07) that warns the market specifically about the practice of layering. As that is the type of abuse to which the FSA's Decision is directed, it cannot (say the Applicants) be necessary for the Decision Notice to be published in order to protect the integrity of the market. The Applicants then claim that publication of the Decision Notice would be unfair so far as concerns Swift Trade and Mr Beck. The Decision Notice, they point out, makes prejudicial comments about the activities of the Applicants. An investigation is being conducted by the Ontario Securities Commission (OSC) and the Applicant's counsel in Canada is, they say, "extremely concerned that publication of the Decision Notice would adversely affect the conclusion of the OSC because of the weight which a decision of the FSA carries".

14. Before addressing those two arguments I need to summarise what I see to be the principles relating to the questions of whether the disclosure or prohibition of documents should be prohibited and whether the hearing should be in public or private. Those have been identified and repeated in decisions of the Financial Services and Markets Tribunal and the Upper Tribunal. I refer to *Eurolife Assurance Company Ltd v FSA* (26 July 2002), *Sonaike v FSA* (13 July 2005) and *Karpe and Others v FSA* FIN/2010/0019. There is an overall public interest in openness of proceedings and this is consistent with the principle enshrined in Article 6(1) ECHR. There is a strong presumption to be found in the provisions of the FSMA and the rules of the Tribunal that references will be dealt with in public; consequently the onus must lie with an applicant to demonstrate the need for privacy. I refer to paragraph 21 of the Upper Tribunal's decision in *Karpe and Others*. Moreover, the embarrassment to a party that could result from the publicity and might draw that party's clients and others to ask questions that he would rather not answer does not amount to unfairness: see *Sonaike*. Finally, and of particular relevance to the issues here, an applicant seeking to demonstrate potential unfairness to him from publication (or a public hearing) will have to provide cogent evidence of how that unfairness may arise and of how he could suffer a disproportionate level of damage. See paragraphs 35 and 47 of the *Eurolife Assurance* decision.

15. I cannot see that there is any basis on which I should make an order prohibiting publication of the Decision Notice. As a preliminary point I observe that whereas the Applicants applied for an order (under Schedule 3 paragraph 3 to the Upper Tribunal Rules) that the Tribunal Register should contain no entry of their reference, this was withdrawn in the course of the present hearing. The fact that they are challenging a decision of the FSA will therefore be available to any member of the public who looks at the Register.

16. The fact that the Stock Exchange has already issued a warning notice about the practice of layering cannot, I think, affect my decision under rule 14(1). The FSA, as regulator, has a different function from the Stock Exchange. Moreover, once a reference is made the FSA is bound to provide the facts and matters on which it relies

as the basis for the decision. These will demonstrate that the case is based on allegations of a layering exercise. The necessity for it to carry out its regulatory function in order to preserve the integrity of the market cannot in any way be displaced by the warning notice from the Stock Exchange.

17. Regarding the Applicants' suggestion that the publication of the Decision Notice will somehow prejudice the investigation being undertaken by the OSC into their activities, I cannot accept this. There is no basis for suggesting that the OSC will be unable fairly to determine the issues before it if it were to become aware of the content of the Decision Notice. In this connection I mention that I have been shown details of the composition of the OSC. Every member is independently appointed and, to judge from their CVs, highly qualified. It is unthinkable that they would be influenced by the content of a Decision Notice that has not been tested in the course of a full hearing of the reference.

The Convention

18. To summarise so far, I am satisfied that this is not a case in which I should prohibit disclosure or publication of the Decision Notice. But do ECHR principles require a different conclusion?

Article 8 : respect for the Applicants' privacy

19. The Applicants contend that the assertions of the FSA in the Decision Notice violate Mr Beck's Article 8 right to privacy; and there can be no justification under Article 8(2) because of the unlawfulness of the FSA's decision to publish it and because of the absence of any pressing need to publish it.

20. Article 8 reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The "disrespect" shown by the FSA for Mr Beck's privacy is found in their assertion (assuming it to be publicly available) that, for example, he has participated deliberately in manipulative trading with the intention of creating a false and misleading impression. That, it is said, is an attack on his reputation and it cannot be justified under Article 8(2).

21. I do not accept that Article 8 applies in the circumstances of this reference to require me to show respect for Mr Beck's privacy when exercising the power in rule 14 to prohibit publication of the Decision Notice. There is no evidence from Mr Beck, the person affected by the publication; all I have is a generalised assertion that the FSA would be showing disrespect for his privacy were it to exercise its obligation to publish imposed implicitly if not expressly by section 391(1A) and (4). More to the point, the OSC has in the course of its investigation published a set of detailed allegations against Mr Beck suggesting that he has been responsible for a culture of non-compliance with regulatory requirement. His privacy has already been substantially breached.

22. Turning to Article 8(2), the FSA as a public authority is, in its capacity as regulator, responsible for the economic well-being of the country, for the prevention of disorder or crime and for the protection of rights and freedoms of others. Specifically, it is argued for the FSA that publication of the Decision Notice would fall fairly within the scope of Article 8(2). That will be so even if, contrary to my conclusion, the decision to publish failed to respect Mr Beck's privacy. The conclusion is reinforced by the following passage from the decision of the Court of Appeal in *R v Legal Aid Board ex parte Kaim Todner* [199] QB 966 paragraph 8:

> "In general, however, parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which can be inherent in being involved in litigation. The protection to which they are entitled is normally provided by a judgment delivered in public which will refute unfounded allegations. Any other approach would result in wholly unacceptable inroads on the general rule."

Article 1 of the First Protocol : right to peaceful enjoyment of possessions

23. The Applicants contend the publication would necessarily damage their property rights. Article 1 of the First Protocol reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The Applicants say that publication of the Decision Notice would, without justification damage the financial interests of BRMS Holdings Inc (the majority shareholder in Swift Trade) and Mr Beck. (Mr Engelman proposes that the interests of BRMS Holdings Inc should be taken into account when exercising my discretion

under rule 14(1); I note however that BRMS Holdings has not referred the decision to this Tribunal.) The interference with or deprivation of that property cannot, they say, be justified under the second paragraph of Article 1 and in the present circumstances justification is the only question to be addressed. They rely on a decision of the ECHR, namely *Sporrong and Lonnroth v Sweden* (1982) 5 EHRR 35.

24. I do not accept this. Given that the Tribunal rules against prohibition of publication of the Decision Notice, there will (as already observed) be no legal impediment in the FSA deciding to publish it and the information to which it relates. In doing so the FSA will be enforcing the regulatory powers given it by law "to control the use of property in accordance with the general interest". However, I am not satisfied from the evidence available to me that the rights of peaceful enjoyment and of non-deprivation of possessions of either Applicant (or of BRMS Holdings) will in fact be violated should the FSA decide to publish the Decision Notice. The Applicants have not specified what possessions they are referring to. Substantial "damage" has already been done through the publication by the OSC of its own detailed allegations against Mr Beck. And when the reference comes on for hearing, all relevant information against and in favour of the Applicants will be presented in open Court.

25. I have not been able to draw any assistance from the decision in *Sporrong and Lonnroth*. The proceedings before the ECHR were concerned with state-imposed restrictions on the use of the Applicants' properties due to planning regulations. The Court held that while a wide margin of appreciation should be allowed to Sweden in respect of such restrictions and prohibitions, that margin had been exceeded since procedural safeguards were not in place which allowed the Applicants to seek a reduction of the time limits on the prohibitions. A fair balance between their interests and that of the community in general had not been struck. By contrast to the present case, the "possessions" and the manner in which the Applicants are deprived were both clearly defined. Here, in the absence of evidence, it is all a matter of surmise.

26. For those reasons I reject the Application for prohibition of publication of the Decision Notice. It is now back into the hands of the FSA to decide on publication.

SIR STEPHEN OLIVER QC
JUDGE OF THE UPPER TRIBUNAL
RELEASE DATE: 2 August 2011