Reference number: FS/2012/24

DECISION NOTICE – publication – whether Upper Tribunal should prohibit publication on grounds that it would be likely to deprive the applicant of her livelihood – FSMA 2000 S.391-– Trib Proc (UT) Rules 2008 14(1) and Sch 3 para 3(3)

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
FINANCIAL SERVICES

ANGELA BURNS **Applicant**

- and -

THE FINANCIAL CONDUCT AUTHORITY **Respondent**
(formerly the Financial Services Authority)

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

Sitting in private in London on 21 March 2013

Javan Herberg QC, instructed by Clifford Chance LLP, for the Applicant

Andrew Hunter QC, instructed by the Financial Conduct Authority, for the Respondent

DECISION

Background

1. The Applicant, Angela Burns ("Ms Burns") made a reference to the Upper Tribunal of a Decision Notice issued by the Respondent ("the Authority") on 28 November 2012 (the "Decision Notice"). The decision to which the Decision Notice relates was made by the Financial Services Authority ("FSA") but following implementation of the regulatory reform effected by the Financial Services Act 2012 on 1 April 2013 that decision is now treated as a decision by the Financial Conduct Authority, the FSA's successor in this regard. References in this decision to the Authority therefore refer to the FSA in relation to matters occurring before 1 April 2013.

2. Following this reference the Applicant has applied for a direction pursuant to paragraph 3(3) of Schedule 3 to the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules") that the register of references maintained by the Upper Tribunal ("the Register") contain no particulars of Ms Burns' reference in respect of the Decision Notice. Ms Burns has also applied for a direction pursuant to Rule 14(1) of the Rules to prohibit publication by the Authority of the Decision Notice and such other documents or information that would allow Ms Burns to be identified. Ms Burns has not at this stage applied for a direction pursuant to Rule 37(2) of the Rules that the hearing of the reference be held in private but has indicated that she might do so at an appropriate time in the future. I refer to these applications together as "the Applications".

3. From early 2009 until May 2011 Ms Burns was a non-executive director of two mutual insurance societies, namely Marine and General Mutual Life Assurance Society ("MGM") and Teachers Provident Society ("Teachers") (together "the Mutual Societies"). Acting as a non-executive director of a person authorised to carry on regulated activities under the Financial Services and Markets Act 2000 ("FSMA") is a controlled function under section 59 of FSMA and accordingly as the Mutual Societies are persons so authorised Ms Burns was approved by the Authority pursuant to section 61 of FSMA to carry out the function of acting as a non-executive director for those entities.

4. The Authority carried out an investigation into Ms Burns' conduct as a non-executive director of the Mutual Societies. Following the completion of this investigation the Authority alleged that Ms Burns, while acting as a non-executive director, failed to disclose to the Mutual Societies a manifest conflict of interest, namely that she was soliciting a non-executive director position and consulting work from an Investment Manager ("the Investment Manager") at the same time as recommending the Investment Manager to the Mutual Societies and also that she used her non-executive position at the Mutual Societies to solicit the non-executive and consulting roles at the Investment Manager. The Authority took regulatory proceedings against Ms Burns pursuant to its powers to discipline approved persons for misconduct under section 66 of FSMA and also proposed that Ms Burns be made subject to a prohibition order under section 56 of FSMA.

5. The allegations were contested by Ms Burns before the Regulatory Decisions Committee of the Authority (the "RDC"). On 28 November 2012 the RDC decided (after reviewing the Applicant's written representations and receiving oral representations from her) to issue the Decision Notice.

6. The Decision Notice records that the Authority has decided that Ms Burns, as a result of the matters described in paragraph 4 above, breached Principle 1 of the Authority's statements of principle for approved persons by acting recklessly and thus without integrity. The Decision Notice provides that Ms Burns should be prohibited from performing any function in relation to any regulated activity pursuant to section 56 of FSMA on the grounds that she lacks fitness and propriety and that a financial penalty of £154,800 be imposed on her pursuant to section 66 of FSMA.

7. Ms Burns strongly contests the allegations. She denies that there was any conflict of interest which she failed to disclose. She contends that the Authority has mischaracterised her dealings with the Investment Manager given that the Investment Manager was not her client at any time whilst she carried out her non-executive director roles for the Mutual Societies, nor were there any negotiations for the Investment Manager to become her client whilst she was a non-executive director nor did the Investment Manager have any intention of becoming, or desire to become, her client. She contends in any event that the findings of breach of Principle 1 and of unfitness are unjustified, and the financial penalty unwarranted.

Issues for Determination

8. Ms Burns submits that the Applications should be granted for the following reasons:

(1) Ms Burns' entire livelihood since she resigned her two non-executive director positions is derived from consultancy work which she carries out either personally or through a company which she controls, Aktiva Limited ("Aktiva"). Aktiva's sole business is the provision of Ms Burns' services.

(2) Ms Burns has no source of income other than her consultancy work, which affords her a modest level of income, apart from *de minimis* sums by way of interest.

(3) Ms Burns' consultancy work is provided to a small number of clients, predominantly based outside the UK. This work does not require her to have authorisation by the Authority. She relies wholly on her standing and reputation in the industry to get consultancy work.

(4) If the Applications were not granted it would be inconceivable that she would be engaged to work on future mandates, even if clients or potential clients were told she was vigorously contesting the Authority's findings in the Tribunal. This is because clients would be inherently cautious about engaging a consultant who they perceive to be facing a regulatory issue.

(5) There is a significant likelihood that her clients on existing projects would seek to withdraw their instructions because of reputational concerns.

(6) Consequently if the Applications were not granted her livelihood would be destroyed and this destruction would be irreversible even if she was successful on her reference. This result would be profoundly unfair and if privacy was not granted in this case it was difficult to see what it would ever be.

9. In response the Authority contends:

(1) Where the Authority issues a Decision Notice which is referred to the Tribunal, the relevant FSMA provision, the Authority's policy and the Rules (as interpreted by the Tribunal) provide that – save in exceptional circumstances where the applicant can produce "cogent evidence" of real unfairness causing "a disproportionate amount of damage" – (a) the Decision Notice should be published; and (b) the Tribunal proceedings should be in public. This reflects both the manifest legislative intent that enforcement proceedings brought by the Authority should become public at this point, and the basic presumption in favour of open justice.

(2) There are no sufficiently exceptional circumstances here. Whilst it is possible that publication may have some adverse impact on Ms Burns' consultancy business, the reality is that much of that impact would be likely to occur in any event, as Ms Burns' history would be likely to be revealed during due diligence or reference taking. To the extent that there would be any prejudice, it is not sufficiently disproportionate or exceptional to displace the presumption in favour of publication and open justice.

(3) Moreover (although it is not necessary for the Authority to show this), there are compelling reasons why the Decision Notice should be published in this case (and why any reference should take place in public). In particular, the very fact that the Applicant is continuing to undertake and seek financial consultancy work means that there is a public interest in ensuring that the Applicant's prospective clients are able to make a properly informed choice as to whether to instruct her, and are not left with an incomplete or selective picture.

The Legal and Regulatory Background

10. There was no dispute between the parties as to what is the proper approach of this Tribunal to privacy applications. This was set out in the Tribunal's decision in *Arch Financial Products and Others v. FSA* [2012] FS/2012/20 which Mr Herberg generously described as "authoritative".

11. I set out the relevant statutory provisions in the Annex to this decision, namely the relevant provisions of section 391 of FSMA, Rule 14 of the Rules and paragraph 3(3) of Schedule 3 to the Rules. These provisions were analysed in paragraphs 16 to 28 of the decision in *Arch* and the effect of them can be summarised as follows:

(1) Section 391 gives rise to a presumption that publicity will be the norm and this is equally the case with Decision Notices as it is with Final Notices although regard has to be paid to the fact that a decision notice that is being challenged in the Upper Tribunal is necessarily provisional: see paragraph 45 of *Arch*;

(2) The exercise of the power to prohibit publication under Rule 14(1), and by analogy the exercise of the power to direct that a hearing be held in private under Rule 37(2) and the power under paragraph 3(3) of Schedule 3 to the Rules is a matter of judicial discretion to be considered against the context of this presumption; and

(3) The discretion should be exercised taking into account all relevant factors ignoring irrelevant factors and giving effect to the overriding objective in Rule 2 of the Rules that requires the Tribunal to deal with cases fairly and justly. This involves carrying out a balancing exercise between those factors that tend towards publication and those that would tend against.

12. *Arch* and the cases reviewed in that decision (which I do not need to review in further detail here) establish the following principles:

(1) The same legal approach should be taken on an application to the Tribunal (i) to direct that the Register should not include particulars of a reference under paragraph 3(3) of Schedule 3 to the Rules; (ii) to make an order prohibiting the disclosure or publication of the Decision Notice or other documents or information revealing its content under Rule 14(1) of the Rules, and (iii) to give a direction that the substantive hearing, or part of it, be held in private under Rule 37(2); see *Arch*, paragraph 42 and paragraph 14 of the decision in *Canada Inc. and Peter Beck v FSA* FS0017/18 which was specifically approved in *Arch*.

(2) The open justice principle, as articulated by Toulson LJ in paragraph 85 of his judgment in *R (Guardian News and Media Limited) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, is applicable to permit access to documents that have been placed before a judge and referred to in the course of proceedings. Consequently, as stated in paragraph 43 of *Arch*:

> "… the open justice principle is to be applied when considering whether to prohibit disclosure of documents that relate to references before the Upper Tribunal, and in particular decision notices which in due course, consistently with these principles, could be made available to public inspection. It also follows that I should apply no different test to the question as to whether details should be withheld from the Register in a case where that issue is being determined alongside a decision on publication of a Decision Notice. … I accept that in paragraph 85 of *City of Westminster Magistrates Court* Toulson LJ made it clear that the question as to whether any particular document should be made available is to be determined by a proportionality exercise that will be fact specific, but it is clear that the starting point is a presumption in favour of disclosure in accordance with the strong presumption in favour of open justice generally."

(3) The onus is on the Applicant to demonstrate a real need for privacy by showing unfairness. The balancing exercise referred to in paragraph 11 (3) above, as stated in paragraph 44 of *Arch*:

> "… starts with the scales heavily weighted in favour of publication with the burden on the Applicants to produce cogent evidence of how unfairness may arise and how they could suffer a disproportionate level of damage if publication were not prohibited."

(4) A "ritualistic assertion of unfairness" is unlikely to be sufficient: see paragraph 35 of *Eurolife Assurance Company v Financial Services Authority* (26 July 2002) cited in paragraph 34 of *Arch* and nor, ordinarily, is the risk of damage to reputation: see paragraph 47 of *Eurolife*, cited in paragraph 36 of *Arch.* In *Canada Inc*, cited at paragraph 41 of *Arch*, it was held at paragraph 14 that 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. The fact that some information concerning the subject matter of the reference was already in the public domain is a factor tending in favour of publication: see paragraphs 53 and 54 of *Arch.*

13. In addition, I was referred to *Revenue and Customs Commissioners v Banerjee (No.2)* [2009] STC 1930, where in the context of a request for privacy in relation to a tax appeal Henderson J said at paragraphs 34 and 35 of his judgment:

> "34. In my opinion any taxpayer has a reasonable expectation of privacy in relation to his or her financial and fiscal affairs, and it is important that this basic principle should not be whittled away. **However, the principle of public justice is a very potent one, for reasons which are too obvious to need recitation, and in my judgment it will only be in truly exceptional circumstances that a taxpayer's rights to privacy and confidentiality could properly prevail in the balancing exercise that the court has to perform.**
>
> 35. It is relevant to bear in mind, I think, that taxation always has been, and probably always will be, a subject of particular sensitivity both for the citizen and for the executive arm of government. It is an area where public and private interests intersect, if not collide; and for that reason there is nearly always a wider public interest potentially involved in even the most mundane-seeming tax dispute. Nowhere is that more true, in my judgment, than in relation to the rules governing the deductibility of expenses for income tax. Those rules directly affect the vast majority of taxpayers, and any High Court judgment on the subject is likely to be of wide significance, quite possibly in ways which may not be immediately apparent when it is delivered. These considerations serve to reinforce the point that in tax cases the public interest generally requires the precise facts relevant to the decision to be a matter of public record, and not to be more or less heavily veiled by a process of redaction or anonymisation. **The inevitable degree of intrusion into the taxpayer's privacy which this involves is, in all normal circumstances, the price which has to be paid for the resolution of tax disputes through a system of open justice rather than by administrative fiat."**

14. This passage reinforces the strong presumption in favour of open justice which is apparent from *Arch* and the cases cited in it.

15. It was not necessary in *Arch* to consider in any detail the question as to what constitutes a "disproportionate level of damage" justifying a prohibition on publication (see paragraph 44 of *Arch*) as the decision in *Arch* was based on a lack of cogent evidence of unfairness.

16. It was argued in this case by Mr Herberg that damage would be disproportionate if it went beyond issues of embarrassment and reputational damage of a type which the cases cited in *Arch* have identified ordinarily occur as a result of publication in any event and which therefore do not amount to disproportionate damage. Mr Herberg submits that a destruction of livelihood which he submits would be the effect of publication in this case would be disproportionate.

17. In my view destruction or serious damage to livelihood is at a higher level than embarrassment or reputational damage. However, in assessing whether such damage is disproportionate it is necessary to consider whether the damage is so severe that it is out of proportion to the public interest that is served in the particular case by the principle of open justice. Some damage is to be tolerated because of the importance of the open justice principle, but it is where the impact of publication on the individual concerned is so severe that it outweighs that principle that publication should be prohibited.

Relevant Facts

18. In order to support the Applications Ms Burns filed a witness statement setting out the background of her career in the City of London and in particular the current state of the consultancy work she carried on, mainly through Aktiva.

19. It is important that applications of this type, where the contention is that a business will suffer irreparable harm if publication is not prohibited, are supported by detailed evidence as to the current position regarding the value of existing contracts and how they would be affected by publication as well as clear evidence of the business opportunities that are being or might be pursued in the period up to the reference being determined.

20. Ms Burns' first witness statement did not give a full and up to date picture of the position of her consultancy work and neither did a second witness statement, which was filed the day before the hearing of the Applications in response to certain requests for further information from the Authority. These requests had been aired in correspondence with Ms Burns' solicitors since the filing of the first witness statement. In those circumstances it was right that Ms Burns was called to give oral evidence and be subjected to cross-examination and answer questions from the Tribunal as a result of which a fuller picture emerged.

21. Attached to Ms Burns' first witness statement was an Annex listing the ten clients for whom Aktiva and Ms Burns had provided consultancy services since 2006

together with a brief description of the status and business of those clients. Ms Burns had sought a direction that the Annex should not be disclosed. In the event, the parties accepted that a formal direction was unnecessary if the Tribunal followed the usual practice in respect of commercially sensitive information of this type where it is not necessary for disclosure to take place to explain the outcome of the Applications, and referred to the information concerned in anonymised form. The Tribunal is content to follow that practice in this case and would not be minded to permit disclosure of this information on the application of any third party. It is understood that Ms Burns is not seeking to restrain the Authority from using the information in the proper performance of its functions.

22. From the evidence heard and documents submitted I find the following facts.

23. Ms Burns commenced her career in the City of London in 1986, after she had obtained a first class honours degree in economics. Initially, she worked as a successful oil analyst for leading stockbroker firms and then moved into fund management, performing a number of senior roles between 1991 and 2000 in which she was subject to regulation as an approved person by the Authority and its predecessor regulator.

24. Between 2000 and 2001 Ms Burns provided strategic consultancy to Delmore Asset Management and arranged a management buy-in in 2000 to become Managing Director and a controlling shareholder. In 2002, she moved to Standard Life Investments ("SLI"), where she became Head of Net Funds and was responsible for managing and promoting SLI's fund range to end clients and other fund managers, receiving an industry award for the performance of SLI's managed insurance range.

25. In September 2004 Ms Burns established Aktiva. Although Ms Burns provided no direct evidence of this, it is likely that in view of the senior positions that Ms Burns had held, and in particular as a controlling shareholder in Delmore Asset Management following a management buy-in, that she would have accumulated a degree of personal wealth from her career up to that point.

26. Aktiva is owned equally by Ms Burns and her husband. It has no permanent employees and its sole business is the provision of Ms Burns' consultancy services.

27. Through Aktiva Ms Burns provides advisory services to clients in the pensions, insurance and asset management sector. This work has covered advising non-UK clients who are looking to enter the UK and European market and work in promoting the products of non-UK clients to institutional investors and fund managers.

28. In addition, last year Ms Burns was engaged personally as a special adviser on two projects funded through the sponsorship of an international agency. Ms Burns was engaged personally rather than through Aktiva at the request of the client concerned.

29. The first project involved advising a national monetary authority on revising draft regulations for the local insurance sector, together with guidelines for regulatory supervisors. She was also responsible for training supervisors in data gathering and

analysis and inspection of insurance companies and credit institutions. The second project was an advisory appointment to a national pension and provident fund. This involved reviewing the fund's investment strategy and loan portfolio and making recommendations as to future strategy and the development of the local pension industry.

30. Since 2004 Ms Burns' consultancy work (both via Aktiva and personally) has been provided to a client list of ten entities, seven of whom are private sector clients and the remainder of which are public sector clients. Ms Burns has no UK clients and has no plans to take any on. The services provided are performed in such a manner so as not to require her or Aktiva to be regulated in respect of them.

31. Ms Burns does not actively market her services or those of Aktiva. She relies on recommendations from existing clients or other contacts, who recommend her on the basis of her standing and reputation in the industry.

32. The client list that Ms Burns provided and the work done for them is largely historic; she has carried out work over the last twelve months only for four clients, the two public sector assignments referred to in paragraph 28 above, which were arranged through the international agency who funded them after a tendering process, a single private sector US based company operating in the investment management sector, which is described in more detail below, and a further client for whom the work was unspecified. Ms Burns did not indicate that she is likely to obtain any further work from the other clients on the list that she provided and did not indicate that those clients were likely to introduce other potential clients to her. I therefore find that to be the case.

33. In terms of her income from her consultancy activities, the material she provided shows, after a small loss in Aktiva's first year of operation in accounting year 2005/6, a small profit in the following years, and more substantial profits in the year 2009/10 (£36,000), 2010/11 (£69,000) and 2011/12 (£39,000). In addition, in 2011/12 she provided services personally as described above. I was told that in accounting year 2011/12 Ms Burns had personal income of approximately US$10,000, so that combining Aktiva's profit with her personal income would give a total profit in the region of £45,600. In relation to the current accounting year, profits have not been determined but Aktiva had revenues of approximately £77,000 primarily derived from the private sector client referred to in paragraph 32 above, and Ms Burns personally is expected to have personal profits in the region of £59,000, derived from the contracts arranged through the international agency referred to in paragraph 32 above.

34. The profits earned in Aktiva are not all distributed to its shareholders and in recent years Ms Burns has not been paid a salary for the work she undertook through Aktiva. She has taken a dividend in her own words "as and when I have required income, but these have been relatively small amounts, typically less than 10% of Aktiva's gross revenue".

35. Consequently, Aktiva has built up distributable reserves, which currently amount to some £200,000 in total, half of which would be distributable to her in respect of her 50% shareholding in the company.

36. During the period that she was a non-executive director of the Mutual Societies (from 19 January 2009 to 22 May 2011 in the case of MGM and from 5 May 2010 until 31 May 2011 in the case of Teachers) Ms Burns received directors' fees, which explained why the dividends from Aktiva had been modest during those periods, although the dividend was not increased during 2012.

37. In terms of prospective work for Aktiva or Ms Burns personally it amounts to the following. First, Ms Burns is tendering for two further projects for the same monetary authority that she worked for last year. As before, the process involves tendering through the international agency which funds the projects. Although Ms Burns has some advantage in having carried out the previous projects, the tendering process is competitive and there can be no guarantee that she will be successful. It would therefore be inaccurate, as Ms Burns suggested was the case in her first witness statement, to describe the international agency or the underlying monetary authority as a current client. Her previous assignments have been completed and she will have to be successful in the tendering process that is currently underway to be able to describe the entities as current clients. If Ms Burns was successful in her tender, work on the projects was likely to start in two or three months time and continue for up to thee months.

38. Secondly, Ms Burns has, through Aktiva, her ongoing relationship with the US based private sector client which I will refer to as the "US client". This relationship is currently governed by the terms of a written contract dated 22 June 2009, which as was described by Ms Burns in her oral evidence, has been amended orally recently as regards the remuneration Aktiva receives.

39. The contract is essentially a marketing contract under which Aktiva is engaged as agent of the US client to perform the following functions to the extent requested by the US client:

(1) to identify institutional investors who might instruct a named UK based investment manager, which is a licensee of the US client's proprietary investment indices, to use that manager's investment management services, thus generating income for the US client whose licensing fee is based on the volume of clients who have the benefit of the indices concerned by using the investment manager's services; and

(2) to identify potential licensees who may desire a licence to manage their own assets using the US client's indices.

40. Originally the contract provided for Aktiva to be remunerated for its services as follows:

(1) The issue to Ms Burns personally of 10,000 shares in the US client on March 1 and September 1 each year. On the basis of this agreement, and

an earlier agreement which it replaced Ms Burns will have been issued with some 100,000 shares which have a current market value of approximately US$1million;

(2) A fee payable to Aktiva amounting to 20% of the gross investment management fees paid to the investment manager referred to in paragraph 39(1) above from clients of that investment manager who use the US client's indices;

(3) A fee payable to Aktiva amounting to 20% of the gross licence fees paid to the US client by institutional investors in the UK and the rest of Europe introduced to the US client by Aktiva, such fee to be payable for a period of two years; and

(4) A quarterly fee payable to Aktiva on an incremental scale of between £5,000 and £20,000 depending on the value of assets gathered in by the US client for the US exchange traded funds that the US client has sponsored, regardless of whether Aktiva can show the value of the assets concerned that it has procured for this purpose.

41. This remuneration structure was amended in March last year so that Ms Burns no longer receives any shares in the US client and instead of the other remuneration identified above Aktiva receives a fee of US$25,000 per quarter as a retainer and an additional quarterly fee of £10,000 on the basis that Ms Burns may have helped generate some sales of shares in exchange traded funds sponsored by the US client.

42. Thus it can be seen that Aktiva's remuneration and that of Ms Burns under this contract has been substantially reduced but it is now based on fixed fees payable regardless of the level of business introduced. Ms Burns confirmed that she had not in the past twelve months introduced any clients falling within sub-paragraph (1) or (2) of paragraph 40 above to the US client but she had shown the US client where there were publicly available mandates where their indices could be used, and some such potential clients may have invested in the US client's sponsored exchange traded funds.

43. Ms Burns confirmed that she had a personal business relationship with the President and Chief Operating Officer of the US client who she could talk to were it considered necessary to discuss the events with which the Decision Notice is concerned. Ms Burns was not aware that the US client had entered into similar contracts with other agents in Europe, but thought it had done so in Latin America.

44. The contract with the US client can be terminated by either party on giving 30 days prior notice without reason. I therefore observe that as under the new remuneration arrangements Aktiva is paid entirely regardless of results, it would be open to the US client to terminate the arrangements if it felt that it was receiving insufficient returns for its fees. The new arrangements, with the ending of the share issues which were made regardless of the level of business introduced, has resulted in a significant reduction in the remuneration that was previously received that was not based on results, but on the evidence before me I can make no finding as to whether

the reason for the reduction reflected the volumes of business that were being generated.

45. There is no specific provision in the agreement with the US client that puts Aktiva or Ms Burns under an obligation to notify the US client if it or she were subject to any regulatory action. Indeed all the obligations on the agreement are imposed upon Aktiva alone and not Ms Burns personally. There are two paragraphs in a clause headed "Legal and regulatory requirements" as follows:

> "The Company and Aktiva each undertake that (save as expressly disclosed in writing to the other) it has and shall maintain all necessary consents and authorisation required for the Engagement to be carried out lawfully. The Company and Aktiva each agree that it will comply, and will procure that all its Associates will comply, to the extent applicable, with all relevant law and regulations in any applicable jurisdiction.
>
> The Company and Aktiva each undertakes to obtain appropriate advice in respect of all laws and regulations which may be applicable to it in the United Kingdom or any other jurisdiction in connection with the Engagement and to communicate such advice to the other if it is, or may reasonably be considered to be relevant to the carrying out by Aktiva of its services to the Company."

46. In respect of the contractual terms that would apply were Ms Burns to be successful in her tender through the international agency for the additional projects, it is to be inferred that she would be asked to sign an agreement in similar form to the agreement that I was shown that was entered into in respect of the earlier projects.

47. The contract that I was shown contained no specific duty to inform the international agency were Ms Burns to be subject to any regulatory action but my attention was drawn to a provision in the general conditions of the contract that provided:

> "[International agency] requires that consultants and consulting firms under [international agency] financed contracts observe high ethics …"

Further detail on what was expected is set out in Guidelines on The Use of Consultants which the international agency has issued; these refer specifically to the requirement:

> "to observe the highest standard of ethics during the selection process and in the execution of such contracts …"

It is to be noted, however, that this statement is made in the context of the requirements of the international agency's anti-corruption policy. That policy requires the international agency's own staff to report "suspected acts of fraud, corruption and other forms of misconduct" and "any suspected integrity violation".

48. Were Ms Burns to be successful in her tender for the additional projects she stated that she would be so busy that she would not be seeking any further work during the time over which the proceedings relating to her reference were likely to be ongoing. If she was unsuccessful, she said that she would seek alternative work but it

was unclear how such work would arise; it would be dependent on referrals being made by her contacts because, as I have found, Ms Burns carries out no marketing.

49. Ms Burns explained in detail in her witness statements why in her view the effect of publication would be to end her livelihood and therefore her ability to earn a living.

50. Ms Burns' starting position is that her existing contract with the US client and the terms on which she would contract with the international agency (assuming her tender was successful and the terms were the same as the contract she recently concluded) does not put her under any obligation to inform those persons about the Decision Notice. She states that she is aware that it is necessary for her to answer any questions which are put to her by current and prospective clients truthfully and accurately. She states that she has not been asked by a current or prospective client about her status as an approved person or her relations with the Authority and she does not anticipate (from her dealings with clients and the appointment process for the new engagement) that this will be an issue over the period up to the determination of the reference.

51. Ms Burns' evidence is therefore that she has not yet had cause to disclose the existence of the Decision Notice to a current or a prospective client, nor does she anticipate such need. However, she is aware that it could become necessary for her to do so if she were asked questions to which it is relevant. In that case, she says she would have to choose between not pursuing the position, and making permitted disclosure. But even if, as a result of either course, she says, she did not thereby obtain an engagement, the consequences would be far less damaging than the impact of publication.

52. Neither, she says, has the fact of her resignation from her non-executive director positions from the Mutual Societies caused any press comment or any enquiries from existing or potential clients.

53. As regards the likely reaction of existing or prospective clients to the fact of the Decision Notice or the reference, Ms Burns relies on her knowledge of the persons concerned, the processes they follow in identifying and engaging external consultants and the influences and limitations under which they act. She says she believes that her close familiarity with their decision making and the influences upon them mean that her views are reliable.

54. As Ms Burns relies on word of mouth recommendations in order to win new mandates she says that her reputation (both in terms of her integrity as well as the technical skills she brings) is central to the possibility of her being considered for new projects. She says she believes that it would be inconceivable that she would be engaged to work on future mandates, whether through Aktiva or by way of direct instruction were the Decision Notice published.

55. In relation to the international agency, for example, she says that a finding by the Authority that she lacks integrity would inevitably lead to such serious

reservations about engaging her that there would be little prospect of even being considered for a new mandate. This would be so, she says, even if it were explained that the finding was subject to a judicial re-hearing before the Tribunal and even if her contacts continued to have personal faith in her. In her view, anybody involved in that decision-making process would perceive there to be additional risks involved in making such an appointment. At the heart of those concerns would be the principle that, if it ever became necessary to justify such an appointment publicly, it would be very difficult to do so. In effect, the existence of the Decision Notice would be a very strong reason not to engage her. She says that public sector bodies would be inhibited by their public corporate governance polices and she believes that it would be almost impossible for a decision-maker at such a client to justify to their own line managers (or, ultimately, to their governing bodies and governments) that they were proposing to engage a consultant against whom a public finding had been made that they lack integrity.

56. She goes further and says she considers that there is a significant likelihood that the US client would seek to withdraw their instructions. This is because they will have the same sort of reputational concerns about her continuing involvement in a project in circumstances where it is asserted that she lacks integrity. Even if the client continued to have personal faith in her, she says, they would be aware of taking an increased business risk and reputational risk should the publication of the Decision Notice take place, even in the knowledge that the decision was vehemently contested and was subject to full reconsideration by the Tribunal.

57. Ms Burns says she does not believe that she could mitigate the potential damage caused by publication by informing her existing and prospective clients that she is challenging the Decision Notice. Her assessment is, given the seriousness of the allegation that the Authority makes, that existing and prospective clients will for the reasons explained above take the view that the mere fact that such a serious allegation has been made by the Authority is sufficient, even though denied, to mean that it is not possible to retain or continue to retain her services. This is not necessarily because they will believe the allegations, but it is a reflection of the context in which both her private sector and public sector clients operate that they cannot take the risk of continuing to rely upon advice of the sort which she delivers from someone who is facing such allegations. The fact that she is challenging the Authority's decision will not alter this view. By way of example she points out that she was employed for two and a half years as a non-executive director on the board of MGM, and worked with her fellow board members through a series of difficult challenges. After MGM became aware of the Authority's investigation she was instructed the next day that she should resign, even in circumstances where she made it clear that the allegations were vehemently denied, and that the Authority had not yet completed the initial fact-finding phase of its investigation.

58. She also says that she anticipates that prospective clients would not necessarily view the fact that she was challenging the Decision Notice in a positive light. She says she believes that prospective clients would be concerned (rightly or wrongly) that the process of challenging the Decision Notice would be a distraction to her work, and one that will take a long time to reach its conclusion. They may also have a concern,

she says, (whether well-founded or not) that the work involved in challenging the Decision Notice will impact on her ability to travel abroad for assignments.

59. Ms Burns' assessment of the effect of all of this will be that Aktiva will be left with no active business, nor prospects of winning future business. There will be no obvious reason to keep the company active so its activities would be suspended and the company potentially wound up in due course.

60. Ms Burns says that her consultancy work is her sole source of income so the consequences described above would not merely significantly reduce her income, but it would end her livelihood and therefore her ability to earn a living. It is likely to be necessary for her to try to re-train and seek to build an entirely new career. After nearly thirty years in regulated roles in the asset management and insurance industries, this would be no small undertaking. It is unlikely that this will have come to fruition before the hearing of the reference. In essence, she says, her business would effectively be destroyed before she had even had an opportunity to contest the Decision Notice before the Tribunal.

61. Ms Burns also commented on whether a successful challenge before the Tribunal would ultimately mitigate to any substantial degree any damage that was caused by publication of the Decision Notice. In her view she said it would not. As a result of publication taking place, she says some damage would persist merely from the allegations having been made. Further, even to the extent that people would in principle be willing to re-employ her, the gap of up to a year likely to have been caused by the length of the Tribunal proceedings would, because of her business model, be hugely destructive. This would be because the business would have lost its track record, the flow of word of mouth introductions would have been interrupted, and people will have retained new consultants by then. She says she would hope to pick up new work in the longer term but was absolutely clear that major and, to a substantial degree, irreversible damage will have been done to the business. The effect of publishing the Decision Notice would be the irremediable loss of her clients and an extended period of time in which she would be unable to generate any new business.

62. In assessing the impact of publication, Ms Burns referred only to her sources of income in her witness statements. She did not provide any evidence as to her personal wealth. Mr Herberg submitted that this approach was entirely proper and that the focus of the Tribunal in carrying out the balancing exercise should be on the effect of publication on Ms Burns' livelihood without regard to the fact that she may have other assets built up over a period of years. The fact that Ms Burns could maintain a reasonable standard of living by liquidating her assets even if her earning power had been completely destroyed was irrelevant. It was on that basis, Mr Herberg explained, that Ms Burns had not disclosed any particulars of her assets.

63. Some evidence as to Ms Burns' personal wealth did emerge during Ms Burns' cross-examination. She disclosed that she had made various gifts to her husband over the past twelve months, all during the period after the Authority's investigation into her conduct had commenced. First, she had transferred to her husband the shares in the US client she had received as described in paragraph 40(1) above. As mentioned

above, those shares have a current market value of approximately US$1million. Secondly, she has transferred to her husband her equity in the marital home and approximately £100,000 in cash. She retains her interest in Aktiva, and as indicated above, if Aktiva's distributable reserves were distributed she would receive a gross amount of approximately £100,000.

64. Mr Hunter sought to draw adverse inferences from these transfers. It would be wrong of me to do so without any full enquiry into Ms Burns' assets and the circumstances regarding the transfers having been undertaken. That may be a matter for this Tribunal to consider in the context of the substantive hearing of the reference. I do, however, observe that historically Ms Burns has allowed the income that Aktiva has earned to accumulate; she herself states that she has only taken dividends when she has required income. There is no evidence that her lifestyle has been affected by the transfers of assets. It is not uncommon for transfers of assets to take place between spouses for tax planning and other purposes but it is often the case that in reality those assets remain available to meet the needs of either of the spouses if necessary. There is no evidence that this would not be the case here, so I proceed on the basis that the assets that have been transferred are available to maintain Ms Burns' lifestyle during the period up to the determination of the reference alongside any other assets that she has retained, in particular her share of the distributable reserves of Aktiva.

65. I now turn to consider whether Ms Burns' assessment of the likely impact on her consultancy activities is well founded. I do so in the context of the business of Aktiva and Ms Burns personally as it now stands or might reasonably be likely to stand during the period up to the determination of the reference. I do so on the assumption that Ms Burns is successful in her reference; her whole case is based on the premise that the Authority's allegations are not well founded and that she will ultimately be vindicated. I should also assume that if she does win her reference there will be a published outcome in the form of a published decision of this Tribunal and a notice from the Authority discontinuing its proceedings against Ms Burns. Although it is not inconceivable that Ms Burns would be granted anonymity even after a successful reference, that would be a very unusual course and it would be dependent on Ms Burns satisfying the Tribunal that there was cogent evidence of disproportionate damage occurring even where there was a Tribunal decision in her favour, which would be a very heavy burden to discharge.

66. Aktiva's current business consists entirely of its existing contract with the US client. There is no likelihood of Aktiva receiving any further instructions in the period up to the determination of the reference that Ms Burns has identified, whether or not the Decision Notice is published. On the basis of Ms Burns' evidence, which I accept, that all of Aktiva's business is derived through recommendations from existing clients or contacts and there is no intimation of the likelihood of any such recommendations occurring in the foreseeable future it would be very difficult for Ms Burns to write a business plan indicating any likely level of income from new business in the way that such a plan would be possible in the context of a history of regular instructions from an active client base. Ms Burns' existing client base is largely historic.

67. Ms Burns currently has no current instructions in her personal capacity. She is, as described above tendering for more work from the international agency and I accept her evidence that if successful in that tender there will be adequate work in the period up to the determination of the reference so that she will not seek further instructions. If she is unsuccessful in her tender, then the same position as described in paragraph 66 above will apply in relation to the prospects of alternative work.

68. Mr Herberg encourages me to give strong weight to Ms Burns' assessment of the likely reaction of her existing and prospective clients to publication. He submits that her assessment cannot be described as speculative or a ritualistic assertion and she has made a careful attempt at assessing the likely impact of publication, taking into account her knowledge of the decision-makers involved.

69. It is correct that I should give due weight to Ms Burns' assessment up to a point. However, I must take account of the fact that her assessment is necessarily subjective. I must consider her assessment objectively and assess its plausibility in the light of all the evidence before me concerning her relationship with her existing and prospective clients, and without ignoring entirely my own assessment of how market participants are likely to react in such situations.

70. I accept that if the Decision Notice were published, assuming it came to the international agency's attention which I also accept is likely, the international agency is most unlikely to award the tender to Ms Burns whilst the reference is undetermined. Bearing in mind that Ms Burns would be engaged to advise in relation to regulatory supervision and regulatory standards it would be a courageous decision on the part of the decision-maker to engage a consultant who had been found to have acted without integrity by the principal regulator in her home state. I therefore accept Ms Burns' assessment in that regard as set out in paragraph 55 above.

71. In relation to the international agency, it is unnecessary to consider what its likely reaction would be if there was an existing contract between it and Ms Burns. Her evidence, which I accept, was to the effect that any decision on the tender will not emerge before the Applications are decided.

72. I also accept Ms Burns' assessment as to whether it is likely that she will be asked questions about her relations with regulators and in particular whether there are any outstanding regulatory proceedings concerning her, either by the US client in relation to the ongoing relationship or by the international agency in relation to the tender process. As I have found, neither the existing contract with the US client nor the potential contractual terms with the international agency contain any specific terms concerning an obligation to disclose. Mr Hunter submitted that there was such an obligation, which I deal with later. However, the fact that there are no specific provisions and the fact that Ms Burns' resignation from the non-executive director position with the Mutual Societies did not generate any publicity that might have led to her being asked about the circumstances of her resignation lead me to conclude that any unsolicited questions on the issue are unlikely. There is no evidence that the US client is likely to carry out any on-going due diligence on Ms Burns or any evidence that the international agency is likely to do so in the context of the current tender

process, bearing in mind that Ms Burns has only recently completed a project under their sponsorship.

73. I am less convinced that if publication were to take place, or if prior to publication Ms Burns informed the US client of the existence of the Decision Notice that the US client would thereupon terminate their contract with Aktiva.

74. In my view the considerations in a contract of this nature are different to those which relate to a contract procured through an international agency to carry out work for an overseas regulatory authority. The contract concerned is essentially a marketing contract and the underlying services which are being marketed would not be performed by Ms Burns. Ms Burns has a longstanding relationship with the US client's President and it is to be presumed that they know each other well. The US client's President will be in a better position to assess whether in the light of his knowledge of Ms Burns and the way she has conducted herself under the existing contract whether the allegations in the Decision Notice give rise to concerns. The services provided by Aktiva under the contract are not themselves subject to regulation and therefore the US client may have limited concerns that its own regulator will take an adverse view on the relationship (if it has one and I was shown no evidence that the US client itself was subject to regulation).

75. In my view the analogy she draws with what happened with her non-executive directorship with MGM when it became aware of the investigation is not on all fours. In that case the investigation related to Ms Burns' relationship with MGM itself whereas that is not the case with the US client.

76. Consequently, in my view there are a number of reasons why the US client may take the view, if the continuation of the contract continues to be of value to them because of the business that Ms Burns generates for them, that the contract should continue whilst the reference is being determined. Ms Burns' evidence was to the effect that her activities had recently largely been confined to showing the US client where there were publicly available mandates where their indices could be used so if that pattern continued the contract would effectively be performed behind the scenes without Ms Burns coming into contact with any potential clients of the US client.

77. Whilst it therefore cannot be ruled out that the contract would be terminated if the Decision Notice were published and I cannot assess with any certainty that it would or would not be, I note that Ms Burns herself, as referred to in paragraph 56 above, only refers to a "significant likelihood" that the US client would seek to withdraw its instructions. I would assess the risk of termination as being a "significant possibility" rather than a "significant likelihood" and I would not go so far as to say that it is more likely than not on the evidence before me that the US client would seek to terminate the contract simply because it became aware of the Decision Notice. There must also be a "significant possibility" that it would terminate the contract as it is entitled to do on 30 days notice if it felt that the substantial remuneration that Aktiva receives, not any longer being based on the amount of business generated, was not justified by the levels of new business that were being generated.

78. I accept that although Ms Burns is clearly an experienced market professional with transferable skills to other sectors, that it would be difficult in practice to generate significant income from pursuing other opportunities outside the regulated sector during the period before the reference is determined.

79. With regard to Ms Burns' assessment that the damage could not be mitigated by rebuilding the practice after a successful challenge to the Decision Notice in the Tribunal, in my view her assessment is over pessimistic. This issue should be looked at on the assumption that during the period up to the determination of the reference the work from the US client and the international agency has disappeared. I have already found (see paragraph 48 above) that it would be unclear from where any alternative work would arise, whether or not the Decision Notice were published and, as I have already found, the rest of Ms Burns' client base is largely historic.

80. It is therefore likely that Ms Burns would pursue further opportunities with the entities with whom she had most recent contact, namely the US client and the international agency, both of whom who had significant knowledge of her capabilities. If her actions were fully vindicated by the Tribunal there seems to me to be no reason in principle why she should not be considered for further work. In relation to the international agency, there is always a tendering process for new work and it does not seem to me that Ms Burns would be unduly hampered by the fact that she had been out of the market for a period of up to a year, the fact that in the meantime other consultants would have been able to tender for and obtain work does not mean that she would not be in a good position to obtain work on future projects if her experience was shown to fit the project in question and her fees were competitive. Likewise in relation to the US client, whilst there must be a risk that they would have found another agent to take Aktiva's place, as the role was a marketing role there seems no reason why the US client would not consider it appropriate to appoint Aktiva if it felt that valuable business could be generated. There is nothing in the contract that I have seen suggesting that Aktiva had been appointed on an exclusive basis.

81. I can therefore summarise my findings of fact as follows:

(1) Aktiva currently has one active client which generates remuneration in the region of £120,000 per year under a contract which is terminable by either party on 30 days notice. Under the terms of this contract Aktiva is obliged to market the client's services but its remuneration is not dependent upon any particular volumes of business being generated. Aktiva has not generated any new mandates for the client in recent times and its activities have generally been confined to showing the client what mandates are available which potentially might use the client's services.

(2) Ms Burns personally has tendered through an international agency for work advising an overseas regulatory authority on regulatory supervision and regulatory standards. It is by no means guaranteed that she will be successful in her tender but the fact that she has recently completed two projects for the same client will be of advantage to her.

(3) There are no other current opportunities to generate work from other sources. Aktiva and Ms Burns rely on personal recommendations and carry out no marketing activities. The rest of her client base is largely historic.

(4) There is nothing in the existing contractual arrangements with the US client or the potential arrangements with the international agency that requires Ms Burns to notify those persons of the fact of the Decision Notice and it is unlikely that it will be necessary to do so before the reference is determined in the absence of publication. There is nothing in the public domain regarding the regulatory proceedings against Ms Burns and her resignation from her non-executive positions has not generated any adverse comment.

(5) If the Decision Notice were published it is most likely that Ms Burns would not be appointed to carry out any further projects through the international agency until the reference was determined.

(6) In that scenario there is a significant possibility that the contract with the US client would be terminated, but there is also a significant possibility of such termination if the US client did not believe that the current level of business generated justified its continuation.

(7) Ms Burns is unlikely to be able to generate an alternative source of income before the reference is determined but there are reasonable prospects of her being able to rebuild her consultancy business following a successful reference with her most recent clients.

(8) Ms Burns has no sources of income other than through Aktiva and her personal consultancy services. Significant assets are available to her, much of which has been transferred as a gift to her husband but significant distributable reserves remain in Aktiva, half of which would be available to her.

Discussion

82. Against that factual background, I can now turn to the balancing exercise and in the light of the parties' submissions consider whether the factors put forward by Ms Burns outweigh the strong presumption, as established by the authorities, that the Decision Notice should be published and details of her reference should be put on the Register. As discussed above, Ms Burns needs to satisfy me that the factors put forward provide cogent evidence of how unfairness might arise from publication and how she could suffer a disproportionate level of damage.

83. Mr Herberg submits that Ms Burns has produced cogent evidence that her business and that of Aktiva would be severely damaged by publication and that this would persist even if the reference were allowed. The effect of publication in his submission is that Ms Burns' entire livelihood would be destroyed by publication as Ms Burns' entire income was derived from her consultancy work. The circumstances in this case were of a wholly different order that those pertaining in *Arch* and the cases referred to in that decision. This was a case on livelihood rather than reputation

and it was to protect a person's livelihood from destruction that the discretion to prohibit publication exists.

84. Mr Herberg observes that the Authority has recognised, in its recent consultation paper on how it proposes to exercise its new power to give publicity about warning notices, that it would be unfair to give publicity where the subject can demonstrate that publication could result in a disproportionate loss of income or livelihood: see paragraph 2.12 of the Authority's consultation paper CP13/8 published in March 2013. Mr Herberg submitted that Ms Burns had demonstrated that to be the case here; although an example given in the consultation paper of what in the Authority's opinion amounted to unfairness in a livelihood case focused on whether insolvency would result. Mr Herberg submitted that there was no need to demonstrate actual insolvency to demonstrate destruction of livelihood.

85. Mr Herberg submits that the correct test is whether, as Ms Burns put it in her witness statement, there is a significant likelihood of the damage she has identified occurring and that the evidence shows that to be the case.

86. Mr Herberg submits that in the absence of a legal obligation to make disclosure of the fact of the Decision Notice to her existing or prospective clients, it is improper to consider whether in any event the appropriate course for Ms Burns would be either to make disclosure or not to pursue a particular opportunity. In his submission it was not improper for Ms Burns to seek to manage the disclosure process in the way she set out in her witness statements. The existence of the discretion to prohibit publication means that it is inevitable that if it were exercised people who might otherwise be influenced by what is published are kept in the dark, and if a client or potential client had a concern about being informed about such matters it would be addressed in the contractual documentation, which was not the case here. There was no justification to go any further than the client or potential client had chosen to prescribe.

87. Mr Herberg submits that the Tribunal should take account of the fact that until recently it was not possible to publish Decision Notices pending a reference and therefore it was not highly unusual not to publish a Decision Notice and when considering the impact of publication the Tribunal should resist starting from the position that publication was an absolutely fundamental principle requiring truly exceptional circumstances before it was departed from.

88. Finally, Mr Herberg submitted that the fact that Ms Burns had other assets available to her which would mean that she would not be destitute in the absence of income from her consultancy activities was not a relevant factor to consider in the balancing exercise and would lead to the discretion being confined to rare cases; it was fundamentally wrong in principle to say that the damage would not be disproportionate notwithstanding the destruction of Ms Burns' livelihood because other assets would be liquidated.

89. I accept that cogent evidence of destruction of or severe damage to a person's livelihood is capable of amounting to disproportionate damage such that it would be unfair not to prohibit publication of a Decision Notice. Although I should be careful

not to approve specifically the criteria that the Authority sets out in its recent consultation paper on publishing information about Warning Notices at a time when that paper is still open for comment, it appears to me that by including paragraph 2.17 of that paper the Authority accepts that a disproportionate loss of income or livelihood would mean that it would be unfair to publish. In my view damage of that kind is of a different and more serious kind than damage of reputation alone.

90. The requirement of cogent evidence in applications of this kind leads me to conclude that the possibility of severe damage or destruction of livelihood is insufficient; in my view the evidence should establish that there is a significant likelihood of such damage or destruction occurring. Mr Herberg in his submission summarised at paragraph 85 above appears to accept that to be the correct test. It would be too high a hurdle to surmount which would make the jurisdiction almost illusory if the requirement were to show that severe damage or destruction was an inevitable consequence of publication.

91. It is clear in this case that there is no information in the public domain at this stage that would indicate that Ms Burns is subject to regulatory proceedings. If that were the case this would be a factor that would tend in favour of publication.

92. It is also clear, however, that if it could be said that Ms Burns was under an obligation to notify her existing client and any client she was seeking new business from of the fact that regulatory proceedings were being taken against her then the discretion should not be exercised in her favour. In those circumstances the damage concerned would occur in any event and it would obviously be wrong to exercise the discretion to prohibit publication in order to protect Ms Burns from the need to make a disclosure that she was obliged to make in any event.

93. Mr Hunter made submissions on this point on two levels. First, he submitted that in relation to both the US client and the international agency there was a contractual obligation on the part of Aktiva or Ms Burns personally as the case may be to make disclosure.

94. With regard to the US client, as I have found in paragraph 45 above, there is no specific contractual provision that puts Aktiva or Ms Burns under an obligation to notify the US client if it or she were subject to any regulatory action. Mr Hunter suggested that as Aktiva acted as an agent of the US client in performing its obligations under the contract it was a fiduciary and that this would give rise to a duty of disclosure. However, there are levels of fiduciary duty and an agreement of this type which is essentially a marketing agreement is in my view unlikely to give rise to a disclosure obligation of this nature. Mr Hunter therefore rightly in my view did not press this point.

95. Mr Hunter also submitted that the clause regarding compliance by Aktiva with all legal and regulatory obligations which is set out in paragraph 45 above could be construed as requiring Ms Burns to make disclosure. However, it is clear to me that this obligation relates purely to Aktiva's obligations under the agreement with the US client and it cannot be construed so as to mean that if Aktiva was subject to regulatory

proceedings in relation to matters which had nothing to do with its performance then it had an obligation to inform the US client of these proceedings. In any event, the contract is between Aktiva and the US client. Ms Burns is not a party and there is nothing in the contract suggesting that matters concerning Ms Burns personally are relevant for this purpose.

96. I therefore conclude that there is no contractual obligation that would require Ms Burns or Aktiva to disclose to the US client the fact of the Decision Notice.

97. In relation to the potential contractual arrangements with the international agency, again there is no specific provision requiring a disclosure of this type. The closest that one gets is the statement referred to in paragraph 47 above that consultants observe high standards of ethics during the selection process and in the execution of contracts. Therefore in my view these provisions, in a contractual context, are dealing with the manner in which the consultant goes about the selection process and performs the contract and the policy is stated in the context of the international agency's anti-corruption policy. It does not seem to me to embrace the behaviour of the consultant in relation to matters which are not connected with the tendering for or performance of that contract.

98. I therefore conclude that there is no contractual obligation that would require Ms Burns to disclose to the international agency the fact of the Decision Notice.

99. At the second level, Mr Hunter submits that regardless of the contractual position, it is right that the US client and the international agency should be aware of the fact that the Authority regards Ms Burns as posing a risk to the public that goes beyond regulated activities. The fact of these allegations would be important to the US client and the international agency for governance reasons so that Ms Burns' position, which is essentially that the decision-maker at those organisations would want to know about these matters but I am entitled to keep them in the dark, is unacceptable. In the Authority's view, the fact that Ms Burns is continuing to undertake and seek financial consultancy work, notwithstanding the fact that such work is not itself a regulated activity, means that there is a public interest in ensuring that Ms Burns' prospective clients are able to make a properly informed choice as to whether to instruct her. The Authority's position is that such prospective clients can only be properly protected if they are presented with the full picture, and that they are entitled to know the position when considering whether to instruct her.

100. In my view the principle put forward by Mr Hunter is too wide. It is not the function of the Authority to seek to protect entities which it does not regulate, where the subject matter of the consultancy arrangements is not a regulated activity and does not relate to a regulated activity and where the mischief that the Authority seeks to address could have been dealt with by the parties in contractual arrangements which they were well placed to negotiate themselves without the need for regulatory protection.

101. This is particularly so in relation to the arrangements with the US client. As I have found, the contract is limited to marketing a specialised product to institutional

investors. The activities currently carried out by Aktiva do not appear to result in Aktiva having any contact with those investors and Aktiva is not paid by results, so the potential for mis-selling of any kind is limited. The contract can be terminated without reason on very short notice. The fact that the situation concerns an existing rather than a proposed contract means that the need to consider disclosure is less material as the matter is a new situation that has arisen after the contract was concluded. In those circumstances, it seems to me reasonable that a party to an existing contract of the type that exists between Aktiva and the US client would consider carefully whether the situation that has arisen would cause it to believe that, aside from any legal obligation, the appropriate course was to make disclosure of that situation. If the party concerned does not make disclosure it may be of course that when the facts do emerge the other party may feel that it should have been informed and terminate the contract, whereas it might have taken a different view had the other party been upfront about the situation. It appears to me that in the context of this particular contract, it is reasonable to leave the decision as to whether to disclose or not to the commercial judgment of Ms Burns and that it would not be unreasonable if Ms Burns took the view, as she does, that disclosure was not necessary.

102. It is apparent from the foregoing that in my view the correct approach to this issue is not that suggested by the Authority, but to examine what would be a reasonable approach that a market professional such as Ms Burns would take when faced with such a situation. In my view if the reasonable approach would be to make disclosure then there is a clear factor favouring publication, indeed in my view it would not be proper for the Tribunal to prohibit publication in circumstances where it believed that disclosure was a reasonable approach.

103. In the circumstances where the Tribunal believes that a decision taken by the party concerned not to make a disclosure would not be unreasonable, as I find to be the case in relation to the contract with the US client, then this factor becomes neutral in the balancing exercise.

104. I therefore need to consider whether the approach to disclosure that Ms Burns believes to be appropriate in the context of her tender for further work through the international agency would be considered by a market professional in Ms Burns' position to be a reasonable approach.

105. In my view there is a much wider public interest in the work that Ms Burns wishes to undertake through the international agency than is the case with the services she currently provides to the US client. The work involves advising an overseas regulatory authority on regulatory supervision and regulatory standards. The fact that the work is for an overseas regulator in a developing country does not diminish the public interest element. The fact that the person who is seeking to provide those services is subject to a finding, albeit provisional, that calls into question her integrity would be a highly relevant factor and, as I have found, if known could be likely to result in the contract not being awarded.

106. If the contract were awarded and either the fact of the Decision Notice became known or the reference was determined against Ms Burns the consequences would be

extremely inconvenient at the least for the international agency or overseas regulator. Questions may be asked about the credibility of the work that had been performed and whether it was appropriate to have it reviewed or undertaken again. Faced with those possible outcomes, in my view a market professional in that situation adopting a reasonable approach is likely to take the view that he or she should put the interests of its potential client ahead of his or her own interests and decide that the appropriate course of action was to decline to tender for the work in question until the reference had been determined.

107. In light of that finding, I should not take into account in the balancing exercise the fact that publication may result in Ms Burns not being awarded the work on the new projects that she has tendered for. In any event, I should give limited weight to the damage that could occur to Ms Burns' livelihood as a result of publication causing her not to be awarded the work concerned because it is not certain that she would be awarded the work in any event.

108. I reject Mr Herberg's submission that I should have regard to the fact that the power to publish Decision Notices is comparatively recent. As I have observed in paragraph 11 above, the statutory scheme creates a strong presumption in favour of publication. That was a clear break with the previous philosophy that the private nature of regulatory proceedings should be preserved up to the hearing of the reference and the fact that the change is a recent one does not diminish that clear intention. Much as those who were comfortable with the previous philosophy would wish otherwise, the starting point must be that there is a strong presumption in favour of publication created by the combination of the statutory provision and the principle of open justice.

109. I now turn to the question as to whether the fact that Ms Burns has other assets which would be available to mitigate the potential loss of her consultancy business is a relevant factor.

110. In my view Mr Herberg's submissions if accepted would lead to the adoption of too narrow an approach. In carrying out the balancing exercise between the principle of open justice and the effect of publication in terms of the impact on the individual concerned in my view the overall financial position of the individual is a relevant factor to which some, but not very heavy, weight should be given. This is particularly so in the case of a business such as I am faced with in the current case where the revenue streams are uncertain from a limited range of sources such that Ms Burns would in any event be required to fall back on her other resources if further business did not materialise or existing arrangements were terminated. As Ms Burns seemed to indicate, reserves were retained within Aktiva to enable an income flow to continue if there were fluctuations in business levels at times when she needed income. This would be different to a more deeply established business employing others who would also be impacted by the fact of publication where it would be less relevant to consider only the personal position of the proprietor.

111. I therefore now turn to the balancing exercise in the light of all of these factors.

112. My conclusion on the facts of this case as to the likely effect of publication on Ms Burns' livelihood is as follows:

(1) Ms Burns has only one existing client, the US client, which if the current terms of the contract between the parties remained in place would produce income in the region of £120,000 in total over the next 12 months. My assessment is that there is a significant possibility, but not a significant likelihood that the US client would terminate the contract if it learned of the Decision Notice, but there is also a significant possibility, bearing in mind the current level of activity under the contract, that the US client would terminate the contract in any event.

(2) There is no certainty that Ms Burns regardless of publication would be in a position to win other work over the next twelve months. There is no potential work from previous clients or contacts identified and whether Ms Burns will be successful in tendering for further work from the international agency is uncertain. In any event, in my view the correct approach would be to assume that Ms Burns would not pursue the opportunities with the international agency until the reference had been determined.

(3) In the worst case scenario, therefore, that publication took place and the US client terminated its contract with Aktiva on learning of the Decision Notice, there would be a loss of income during the period the reference took place, but Ms Burns would not be destitute as she has other assets to fall back on, in particular the accrued reserves in Aktiva. This would be no different to what would be the situation if the US client decided to terminate the existing contract for any other reason.

(4) If the reference is successful, my assessment is that there is a reasonable prospect of Ms Burns being considered for further work from previous clients and contacts. Consequently, the overall result would be that her consultancy business would have been put "on hold" whilst she pursued the reference but would be capable of being revived as she does on recommendation from personal contacts who know her well.

(5) There are no other individuals, such as employees whose position would be adversely affected as a result of publication.

113. In my view the effects described above are not sufficient to satisfy me that the effect of publication will cause damage to Ms Burns' livelihood which is so severe that it is out of proportion to the public interest in the principle of open justice that will be served by permitting publication of the Decision Notice and including particulars of the reference on the Register.

114. Whilst I have identified that some damage to Ms Burns' livelihood may be caused by publication, the scale of the business concerned, the uncertainties in its future prospects in any event, the prospects for reviving it after the determination of the reference, and the fact that the financial impact on Ms Burns is not such to leave her insolvent or destitute lead me to conclude that Ms Burns has on the facts of this case been unable to discharge the heavy burden on her to satisfy me that the evidence

shows that the impact of publication on Ms Burns is so severe that it outweighs the strong presumption that publication should be permitted.

115. I therefore conclude that the Applications must be dismissed. I do however, believe that Ms Burns should be given an opportunity to consider whether she would wish to prepare the ground for publication by discussing the regulatory proceedings with her existing and potential clients and contacts to the extent that it is currently permissible in case she feels that this may help to minimise the impact of publication. I therefore direct that publication of the Decision Notice and entry of particulars of the reference on the Register shall take place not earlier than 21 days after the date of release of this Decision.

116. I also reiterate the concerns that I expressed in *Arch* that adequate steps are taken when publicising the Decision Notice to ensure that it is clear that the decision is provisional in the light of the fact that it is being challenged in the Upper Tribunal. In particular, any press release issued by the Authority should state prominently at its beginning that Ms Burns has referred the matter to the Upper Tribunal where each party will present their case and the Tribunal will then determine the appropriate action to take, which may be to uphold, vary or cancel the Authority's decision. Likewise in referring to the findings made, rather than give any suggestion of finality they should be prefaced with a statement to the effect that they reflect the Authority's belief as to what occurred and how the behaviour concerned is to be characterised. The dismissal of the Applications is therefore conditional upon compliance with these principles.

TIMOTHY HERRINGTON
JUDGE OF THE UPPER TRIBUNAL
RELEASE DATE: 01 MAY 2013

ANNEX

RELEVANT STATUTORY PROVISIONS

1. Section 391 Financial Services and Markets Act 2000

(1) Neither the Authority nor a person to whom a warning notice is given or copied may publish the notice or any details concerning it.

(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.

(2)(3) …

(4) The Authority must publish such information about the matter to which a decision notice or final notice relates as it considers appropriate;

(5) …

(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.

2. Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

(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 a 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.

3. Paragraph 3(3) of Schedule 3 to the Tribunal Procedure (Upper Tribunal) Rules 2008

(3) The Upper Tribunal may direct that the register is not to include particulars of a reference if it is satisfied that it is necessary to do so having regard in particular to any unfairness to the Applicant or prejudice to the interests of consumers that might otherwise result.