Reference number: FS/2012/20

DECISION NOTICE – publication – whether Upper Tribunal should prohibit publication on grounds of potential serious reputational damage prejudice to civil proceedings or possible settlement discussions – 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

ARCH FINANCIAL PRODUCTS LLP (1) **Applicants**
ROBIN FARRELL (2)
ROBERT STEPHAN ADDISON (3)

- and -

THE FINANCIAL SERVICES AUTHORITY **Respondent**

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

Sitting in private in London on 19 November 2012

Paul Stanley QC, instructed by SJ Berwin LLP for the Applicants

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

DECISION

Background

1. The Applicants Arch Financial Products LLP ("Arch"), Robin Farrell ("Mr Farrell") and Robert Addison ("Mr Addison") made references to the Upper Tribunal of Decision Notices issued by the Respondent ("FSA") on 14 September 2012 (the "Decision Notices"). Following these references the Applicants have applied pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules") for an order prohibiting the publication of the Decision Notices. The Applicants have also applied under paragraph 3(3) of Schedule 3 to the Rules for a direction that the register of references maintained by the Upper Tribunal ("the Register") be amended so as not to include particulars of the references made by the Applicants in respect of the Decision Notices.

2. Arch is an investment manager which was authorised by the FSA from March 2005. Mr Farrell is the Chief Executive Officer of Arch. Mr Addison is Arch's Chief Operating Officer and previously was its Chief Financial Officer and Compliance Officer.

3. In June 2006 and September 2007, Arch assumed the investment management responsibilities in respect of two open-ended investment companies (known as the Arch cru funds). Some 6,400 investors invested in these funds. Distinct from those responsibilities, Arch was also responsible for establishing Arch Guernsey ICC Ltd, which was an incorporated cell company in Guernsey that had a number of discrete cells. Arch was appointed as investment manager in respect of 22 of those cells, into which it caused the Arch cru funds to invest from the time of its appointment.

4. In March 2009, trading in all the Arch cru funds was stopped by their authorised corporate director, Capita Financial Managers Limited ("Capita"), as Capita considered that the funds had insufficient liquidity to meet anticipated redemption requests. The realisation and distribution of the funds' assets is not complete and may yet take several years. However it appears that investors in the funds may sustain very substantial losses.

5. In April 2009, the FSA commenced investigations into the Applicants (and Capita) and their role in relation to the circumstances that led to the Arch Cru funds ceasing to operate.

6. Capita established a hardship fund for investors in December 2009. In 2011 Capita agreed voluntarily (together with BNY Mellon Trust & Depositary (UK) Limited and HSBC Bank plc who were the two depositories for the funds) to establish a £54 million payment scheme ("the Payment Scheme") for affected investors. The Payment Scheme remains open until 31 December 2013. The FSA has made findings in relation to Capita's role regarding the Arch cru funds which are set out in a Final Notice given to Capita under Section 390 of the Financial Services and Markets Act 2000 ("FSMA") which had not been published at the date of the hearing of these applications but which was published on 26 November 2012.

7. The FSA is also presently considering a consumer redress scheme under Section 404 of FSMA in respect of unsuitable advice given to consumers to invest in the Arch cru funds. The FSA consulted about this proposed scheme in April 2012 and, that consultation having concluded, is considering the responses received.

8. As regards the Applicants, the FSA issued Warning Notices in February 2012 setting out its findings as to their role in the collapse of the Arch cru funds and the actions it proposed to take. The Applicants contested the findings before the Regulatory Decisions Committee of the Authority (the "RDC"). On 14 September 2012, the RDC decided (after reviewing the Applicants' written representations and receiving oral representations from them) to issue the Decision Notices.

9. The findings in the Decision Notices primarily relate to what it is alleged is a failure by each of the Applicants to manage appropriately multiple conflicts of interest arising out of the various connections which Arch had with the underlying investments of the Arch cru funds and out of the relationship between the Arch cru funds and the cells of the Guernsey incorporated cell company referred to in paragraph 3 above.

10. Each of the Decision Notices records that the FSA has decided that the Applicants breached various regulatory requirements, including the requirement to act with integrity, a finding which was based on findings of recklessness against the Applicants and not on any adverse finding of dishonesty. In addition the Decision Notices allege breaches of the requirement to act with due skill, care and diligence. The FSA has stated that it considers the failings to be serious breaches of their type but it does not find that the Applicants caused any of the losses sustained by the funds managed by Arch. The Decision Notice relating to Arch provides that Arch should be publicly censured under Section 205 of FSMA and states that a substantial financial penalty would also have been imposed but for Arch's financial position. The Decision Notices relating to Mr Farrell and Mr Addison provide that their approvals to act as approved persons under FSMA be withdrawn under Section 63 of FSMA, that they be prohibited from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm under Section 56 of FSMA and that substantial financial penalties be imposed on each of them under Section 66 of FSMA.

11. In addition to the regulatory proceedings the Applicants are also defendants to a number of sets of civil proceedings the subject matter of which overlaps to a degree with the Decision Notices as follows:

(1) Arch itself is a defendant to proceedings in the Commercial Court in England in which (among other things) transactions that are the subject of the Decision Notices are in issue;

(2) Mr Farrell is personally a defendant in the proceedings in the Commercial Court in England in which he is personally accused of dishonesty in relation to one of the transactions which is the subject of his Decision Notice; and

(3) Mr Addison is a defendant to proceedings in Guernsey arising from his directorships of the Guernsey "cells", in which (among other things) transactions that are the subject of the Decision Notices are in issue.

Issues for determination

12. The Applicants, when making their references of the Decision Notices, applied to the Upper Tribunal on 12 October 2012 for an order pursuant to Rule 14 prohibiting publication of each of the Decision Notices. In the reference notices the Applicants' representatives had left blank the section in which they could have applied for a direction that the Register contain no particulars of the references. Consequently, shortly after 12 October 2012 the Register was updated to include details of the references which named each of the Applicants as persons who had made references, a matter which it appears has been reported in the financial press. On 14 November 2012, the Applicants applied for a direction to amend the register so as to remove the names of the Applicants. So far the Applicants have made no application under Rule 37 of the Rules that the substantive hearings of the references be heard in private but have indicated their intention to do so. Mr Stanley submits that it would be premature to do so at this stage as it is not known yet what issues will be at stake if and when the references come to be heard.

13. The Applicants submit that publication of the Decision Notices at this stage would cause serious harm to Mr Farrell and Mr Addison for the following reasons:

(1) It will, in and of itself, cause serious reputational damage to Mr Farrell and Mr Addison. The serious nature of the allegations is, apparently, a reason why the FSA wishes to publish – and, apparently, it wants the public to know that. But if it turns out (as the Applicants contend) that there has in fact been *no* serious misconduct by Mr Farrell and Mr Addison, they will have been irreparably harmed by the publication – not merely as allegations but in the form of a 'decision' – of statements that they have committed serious misconduct.

(2) In the context of this case, that is a particularly serious matter because of the number of people who have been affected, and the strength of feeling that they have about the matters that have been subject to investigation. Put shortly, the decisions in this case are likely to be read (however wrongly) as an encouragement to blame Mr Farrell and Mr Addison (and Arch) for the failure of the funds managed by Arch and as attributing those failings to a lack of integrity on their part. Such would occur despite the fact that there are no causative elements found by the FSA (as regards investor losses) in the Decision Notices. There is a real risk that Mr Farrell and Mr Addison's lives (and those of their families) will be adversely affected by the actions of disgruntled investors misinterpreting the findings.

(3) The Applicants have legitimate concerns that the publication of the Decision Notices might adversely affect them in the civil proceedings referred to in paragraph 11 above, not because they consider that the court hearing those

cases will be adversely prejudiced by the contents of the Decision Notices, but because there is a concern with prejudice to witnesses and on settlement negotiations. The latter concern is heightened by the fact that the FSA itself seems to consider that the Decision Notices are something that third parties could be expected to take into account in deciding whether to settle cases.

14. In response the FSA points out that some information is already in the public domain, namely the fact of the references having been made and the identities of those who have made them which have resulted in press reports to the effect that the Applicants have commenced proceedings in the Upper Tribunal. Nevertheless, the Applicants submit, it is central to the FSA's desire to publish that additional and currently unknown information would be brought into the public domain, notably the contested findings that the Applicants acted with a lack of integrity and it is that information, presented as decided fact, that will harm the Applicants. If, after the Upper Tribunal proceedings, those findings are held to be incorrect, damage which is not realistically reparable will have been done.

15. Mr Stanley submits that in these circumstances the question is one of proportionality and the Tribunal needs to balance, against the harm that will be done to the Applicants by publication, whether it is in the interests of justice to allow publication.

The Legal and Regulatory background

16. I start with the statutory provisions concerning publication of notices relating to the FSA's enforcement proceedings. Section 391 of FSMA contains general rules concerning this. So far as relevant these provide:

"(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.

(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.

17. I observe that Section 391 when enacted prohibited publication of both warning notices and decision notices. The policy behind that prohibition was that with the FSA's regulatory proceedings being of a purely administrative nature and held in private, the outcome of those proceedings should remain so until the subjects of the proceedings had been given the opportunity of contesting them in an independent tribunal. This was against a background of the previous regulatory structure which was the responsibility primarily of self-regulating organisations and where participants in the financial markets were generally subject to discipline through

wholly internal tribunals where the facts of those proceedings and the outcome was only ever published if they were determined against them. It was that policy as regards the regulator's own proceedings that was carried on into FSMA in 2000, Parliament then accepting that the public interest in open justice was outweighed by the reputational and commercial prejudice that could potentially be suffered by those who it was made known were subject to regulatory proceedings, and also keeping private the basis on which a decision had been made until the issues had been aired in the independent tribunal provided for in FSMA if the decision were challenged.

18. The introduction of an independent tribunal, part of the judicial system, as a means of challenging the administrative decisions of the FSA brought with it the application of the general principle that hearings before such a Tribunal should be held in public. This was referred to in paragraph 25 of the decision of the Financial Services and Markets Tribunal (the predecessor to the Upper Tribunal in terms of jurisdiction over references in respect of decisions of the FSA) in *Eurolife Assurance Company Limited v Financial Services Authority* (26 July 2002), where that Tribunal referred to the considerable public debate over whether its hearings should be in private or in public. As referred to in that decision, in the course of the parliamentary debate on that issue, the relevant government minister referred to the then rule, which as the default position provided for public hearings unless certain conditions were met in which case the Tribunal could direct a private hearing , as "a very flexible tool."

19. The effect of what turned out to be the norm of public hearings in the Tribunal but no publication of the decision notice because of the prohibition in Section 391 of FSMA, necessarily meant, bearing in mind the inevitable delay between an FSA decision and the hearing of any reference made in respect of it, that there would be a long period during which it would be known that a particular reference had been made but little information as to the basis of the decision that had led to the reference being made.

20. In effect, this situation was changed by the amendments that were made to Section 391 of FSMA by the Financial Services Act 2010. After these amendments, the absolute prohibition on the publication of warning notices was retained but the FSA was given the power to publish decision notices. As pointed out by Mr Hunter, this effectively moves the boundary between the private and public stages of regulatory proceedings. It does so, as Mr Hunter observes, in a manner which gives rise to a presumption that publication will be the norm in that Section 391(4) states that the FSA "**must** publish such information about the matter to which a decision notice or final notice relates as it considers appropriate" (emphasis added). It therefore puts decision notices in the same category as final notices, which are routinely issued after a decision becomes final, either because the subject does not contest the findings before the Tribunal or as a result of directions given by the Tribunal following the determination of a reference.

21. Likewise, Section 391(6), which provides an exception to the general provision in Section 391(4), applies in identical terms to both decision notices and final notices. It provides no additional factors beyond those which applied to final notices before the legislation was changed. Thus in the case of both types of notice the FSA may not

publish if publication would be in its opinion "unfair to the person with respect to whom the action was taken or prejudicial to the interests of consumers".

22. It must therefore be assumed that Parliament did not intend that any additional criteria should be applied because it was extending the power to publish to decision notices, knowing, as it is presumed it did, that a decision notice remained open to challenge in the Tribunal in a way that a final notice did not. This statutory framework therefore does not give rise to the presumption that a different approach is dictated by the fact that the decision notice itself is, as Mr Stanley puts it, provisional if challenged in the Tribunal. Parliament has now decided that the fact that proceedings are pending in the Tribunal should no longer be a bar to publishing the decision notice, subject to the exercise by the FSA of its discretion not to publish in Section 391(6) and the exercise by this Tribunal of its discretion under Rule 14.

23. Mr Hunter submits in fact that once the FSA has decided that publication would not be unfair it has a duty to publish because of the use of the word "must" in Section 391(4). He points to the FSA's published policy on publication of decision notices and final notices set out in Section 6 of the FSA's published Enforcement Guide. In particular paragraph 6.8 of this Guide provides that whilst the decision as to what to publish is taken on a case by case basis the FSA:

> "expects normally to publish a decision notice if the subject of enforcement action decides to refer the matter to the tribunal"

And paragraph 6.9 of this Guide states that:

> "the FSA will not publish information if publication of it would, in its opinion, be unfair to the person in respect of whom the action is taken…"

Whilst this policy makes it clear that the FSA will not publish in circumstances where it has found that it would be unfair to do so notwithstanding the discretionary language in Section 391(6), in paragraph 6.8A of the Guide it states that it will not normally decide against publication solely because it is claimed that publication could have a negative impact on a person's reputation.

24. I do not accept that the FSA is obliged to publish once it has decided that publication would not be unfair. It is clear from Section 391(6) that the obligation is to publish "such information about the matters to which the notice relates as it considers appropriate." So for example, it could confine publication to certain details about the decision notice such as the fact of the decision, the rules that the FSA has decided have been breached and the penalties it has decided to impose without going into any further detail about the basis on which those findings have been made. It could decide to delay publication, for example pending the completion of regulatory proceedings in other cases,or it could decide that it was appropriate not to publish anything at all indefinitely. It seems to me that the discretion in this regard is wider than that submitted by Mr Hunter.

25. I am however not concerned directly with the basis on which the FSA has taken the decision to publish the Decision Notices. The question as to whether the discretion has been properly exercised is not a matter that falls within the jurisdiction of this Tribunal in the sense that it is not one of the FSA decisions that may be referred to the

Tribunal under Section 133 of FSMA. The Tribunal must make its own decision based on the relevant factors to be considered in the context of an application under Rule 14 but it should do so against the background of a statutory framework that clearly gives rise to a presumption that the FSA will in normal circumstances publish decision notices in the same manner as it publishes final notices, subject to the terms of the policy that it has adopted in that regard. The Tribunal must also bear in mind the requirement that hearings of references will be held in public unless the Tribunal directs otherwise, for which provision is now made in Rule 37 of the Rules.

26. I therefore turn to Rule 14. As 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 a document or information to a person if:
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> (a) the Upper Tribunal is satisfied that such disclosure will be likely to cause that person or some other person serious harm; and
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> (b) the Upper Tribunal is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction".

Although the Application was expressed to be made under Rule 14(2) it seems to me that Rule 14(2) relates to the disclosure of a document to a particular individual and has no application here. Mr Stanley accepted that Rule 14(1), which covers publication generally, was applicable but that it was proper for the Tribunal to approach the issue as to whether to exercise the power to prohibit publication by considering whether to refuse to do so would cause the Applicants serious harm.

27. I therefore approach the issue on the basis that Rule 14(1) is the relevant provision and will treat the application as having been made on that basis. There are no specific conditions that need to be satisfied before the power in the Rule can be exercised but it is subject to the overriding objective in Rule 2 of the Rules which requires the Tribunal to deal with cases fairly and justly. Consequently this imports the requirement that the discretion should be exercised judicially, that is taking into account all relevant factors ignoring irrelevant factors and exercising the power in a manner which seeks to give effect to the overriding objective. This involves carrying out a balancing exercise between those factors that tend towards publication and those that would tend against.

28. Allied to the Application under Rule 14 is the Application under paragraph 3(3) of Schedule 3 to the Rules. This provides:

> "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."

There was an equivalent rule under the Financial Services and Markets Tribunal Rules 2001 which contained very similar words.

29. At this point I turn to the relevant case law on the exercise of the Rule 14 and Schedule 3 paragraph 3(3) powers.

30. Mr Hunter submits that in exercising the power in Rule 14 a heavy weighting should be given in favour of the principle of open justice. He referred me to a recent Court of Appeal decision in R (*Guardian News and Media Limited) v City of Westminster Magistrates Court* [2012] EWCA CIV420 which he submitted demonstrated an extension of this principle beyond the public nature of the hearing itself into the question of public access to documents relating to the hearing. The facts of that case, so far as relevant, were that during extradition hearings held in public in the Magistrates Court which had generated a significant amount of public interest, various documents were referred to in oral argument which were not imported into the judgments. Those documents included opening notes and skeleton arguments and affidavits or witness statements. The applicant, the Guardian newspaper, wrote to the court seeking copies of these documents. This request was refused by the District Judge on the basis that, inter alia, the Magistrates Court being a creature of statute could not invoke an inherent jurisdiction to permit disclosure of documents on the footing that they had been referred to in open court, and that the principle of open justice did not extend to the disclosure of such documents. Toulson LJ who delivered the principal judgment dealt with the argument that the Magistrates Court had no jurisdiction to order disclosure at paragraphs 69 and 70 of the judgment as follows:

> "69. The open justice principle is a constitutional principle to be found not in a written text but in the common law. It is for the courts to determine its requirements, subject to any statutory provision. It follows that the courts have an inherent jurisdiction to determine how the principle should be applied.
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> 70. Broadly speaking, the requirements of open justice apply to all tribunals exercising the judicial power of the state. The fact that magistrates courts were created by an Act of Parliament is neither here nor there…."

31. Toulson LJ dealt with the countervailing arguments against disclosure in paragraphs 78 to 85 as follows:

> "78 Are there strong countervailing arguments? The four main counter-arguments are that the open justice principle is satisfied if the proceedings are held in public and reporting of the proceedings is permitted; that to allow the *Guardian's* application would be to go further than the courts have considered necessary in the past; that in the present case the issues raised in the extradition proceedings were ventilated very fully in open court, and there is no need for the press to have access to the documents which they seek for the purpose of reporting the proceedings; and that to allow the application would create a precedent which would give rise to serious practical problems.
>
> 79 The first objection is based on too narrow a view of the purpose of the open justice principle. The purpose is not simply to deter impropriety or sloppiness by the

judge hearing the case. It is wider. It is to enable the public to understand and scrutinise the justice system of which the courts are the administrators.

80 The second objection is correct but not of itself decisive. The practice of the courts is not frozen. In *Waterfield*, on which the courts below placed considerable weight, the issue was quite different. It was whether the exclusion of the press from the viewing of a pornographic film rendered the criminal proceedings a nullity. I do not regard the observations of the court in that case, 35 years ago, as determining how the present case should be resolved.

81 In *GIO Personal Investment Services Ltd v Liverpool and London Steamship P & I Association Ltd* an insurance company sought access to documents in a case which did not directly concern it, because it was facing a claim giving rise to similar issues. Both claims were brought under reinsurance contracts placed at about the same time through the same chain of brokers. In both cases the re-insurers purported to avoid for non-disclosure. The applicants wanted sight of the evidence filed in the first action in the hope that it would strengthen their position in the second action. Issues about informing the public regarding matters of general public interest did not arise.

82 I do not regard the third objection as a strong objection on the fact of this case. The *Guardian* put forward credible evidence that it was hampered in its ability to report as fully as it would have wished by not having access to documents which it was seeking. That being so, the court should be cautious about making what would really be an editorial judgment about the adequacy of the material already available to the paper for its journalistic purpose.

83 The court has recognised that the practice of receiving evidence without it being read in open court potentially has the side effect of making the proceedings less intelligible to the press and the public. This calls for counter measures. In *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* Lord Bingham referred to the need to give appropriate weight both to efficiency and to openness of justice as the court's practice develops. He observed that public access to documents referred to in open court might be necessary. In my view the time has come for the courts to acknowledge that in some cases it is indeed necessary. It is true that there are possible alternative measures. A court may require a document to be read in open court, but it is not desirable that a court should have to take this course simply to achieve the purpose of open justice. A court may also declare that a document is to be treated as if read in open court, but that is merely a formal device for the exercise of a power to allow access to the document. I do not see why the use of such a formula should be required. It may have the advantage of ensuring that other parties have an opportunity to comment, but that can equally be achieved if, in a case such as the present, the applicant is required to notify the parties to the litigation of the application.

84 I am not impressed by the fourth objection, based on the practical problems which it is said would arise if the *Guardian's* application were to succeed. Rule 5.8 of the Criminal Procedure Rules 2011 provides a sensible and practical procedure where a member of the public, including a reporter, wants to obtain information about a case or to inspect or copy a document. The applicant may be required to pay an appropriate fee; it must specify what it wants; and it must explain for what purpose the information is required.

> 85 In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong. However, there may be countervailing reasons. In company with the US Court of Appeals, 2nd Circuit, and the Constitutional Court of South Africa, I do not think that it is sensible or practical to look for a standard formula for determining how strong the grounds of opposition need to be in order to outweigh the merits of the application. The court has to carry out a proportionality exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others."

32. Mr Hunter submits that in the light of this decision it is clear that the question of whether the Tribunal should exercise its power under Rule 14 to prohibit publication of the Decision Notices goes hand in hand with the question as to what is consistent with the principle of open justice. It would be inconsistent to have a public hearing yet not publish the Decision Notices and in any event the FSA's Statement of Case in respect of the reference, which I was told is expected to be based largely on the matters found in the Decision Notices and was going to be filed with the Tribunal on the day of the hearing of these applications, would inevitably be referred to extensively in the proceedings in this Tribunal. To exclude a right of access to that document would only be consistent with a decision that the hearing itself was to be held in private.

33. Mr Stanley submits that it is clear from paragraph 85 of Toulson LJ's judgment, quoted in paragraph 30 above, that the question as to whether publication should be prohibited or not is authority for his submission that the issue is one of proportionality to be carried out by reference to the specific facts of the case.

34. In *Eurolife*, which has already been referred to in paragraph 18 above, the Financial Services and Markets Tribunal considered an application for the substantive hearing of a reference to be heard in private. The Tribunal considered whether the risk of damage to reputation was in itself unfair, unfairness being one of the specific circumstances which the Tribunal could take into account under its procedural rules of the time in deciding whether a hearing should be held in private. In paragraph 35 of its decision the Tribunal stated:

> "The rule refers to unfairness or prejudice that might result from a hearing in public. The Tribunal is unlikely to be influenced by a "ritualistic assertion" of unfairness or prejudice (the pejorative phrase is from In re an inquiry [1988] 1 AC 660 at 709G). The applicant will need to produce cogent evidence of how the unfairness or prejudice may arise".

35. In relation to the question as to whether the risk of damage to reputation amounted to unfairness in paragraph 47 of its decision the Tribunal stated:

> "We have already observed in paragraph 32 above that the risk of damage to reputation will not of itself normally be unfair; it is the suffering of disproportionate damage that could be unfair."

36. There are two further cases which have considered applications not to include particulars of references on the Register. The first of these is *Sonaike v FSA* (13 July 2005), a case under the corresponding rule of the Financial Services and Markets Tribunal Rules 2001, where the Tribunal stated in Paragraph 12 of its decision:

> "It may be that…. publication of Mr Sonaike's reference would embarrass him, and might cause clients and others to ask him questions he would rather not answer. But that will always be a consequence of the inclusion in a register of details of a reference… Mere embarrassment falls far short of satisfying the criteria set out in the rule. In our view an applicant for such a direction must establish something out of the ordinary if he is to succeed."

37. In the second case, *Karpe and others v FSA* FIN/2010/0019 the Upper Tribunal indicated that the fact that some information concerning the subject matter of the references was already in the public domain is a relevant factor when considering whether the power to allow privacy regarding the reference should be exercised. Sir Stephen Oliver QC dealt with this at paragraph 26 to 28 of the decision as follows:

> "26. I turn now to Mr Karpe's representations as to why the Register should not contain details of his reference. Mr Michael Blair QC for Mr Karpe explained that publication of the reference at this stage would have a disproportionate impact on his professional standing and employment prospects both in India and elsewhere. My attention was also drawn to the potential threat to Mr Karpe's family and himself should former and present customers of the Bank form the view that Mr Karpe has given details of their personal affairs, which may have involve breaches of Indian law to the Indian authorities or to the FSA direct.
>
> 27. Regarding damage to Mr Karpe's reputation, I am not satisfied that the evidence supports this. The fact is that both Mr Karpe and Mr Ahuja have been named publicly in Internet reports. I see that as undermining his case. Any damage to reputation could be said to have already been done. In any event, Mr Karpe has not shown any reputational damage that is sufficiently "out of the ordinary" as referred to in the *Sonaike* decision as would justify the reference not being included on the Register.
>
> 28. Nor am I satisfied that entry of Mr Karpe's reference on the Tribunal's register would result in a threat to his family or himself from former or present Bank customers. Mr Karpe's customers at the Bank have been on notice of the issues for a significant period of time through the Bank's remediation process which took place in 2007/2008. As part of this process, the Bank presented customers with transactions which the Bank, as a result of its investigation, believed to be unauthorised. The Bank agreed to pay compensation to the customers and this alerted them to issues on their accounts, as did the FSA's investigation where certain customers were contacted and interviewed. Thus, any "potential threat" to Mr Karpe or his family would have crystallised well before the present proceedings. Even if such "potential threat" exists, it is unlikely to have been made any worse as a result of publication of Mr Karpe's reference on the Register."

38. Mr Stanley points out that unlike the publication of a decision notice, the Register only contains limited information, no more at this stage than the applicant's name and the date of the reference and this was referred to in paragraph 30 of *Karpe and others* as follows:

> "30. Bearing in mind the very limited amount of information that will appear on the Register being made public, I do not see that there is any unfairness to either Mr Karpe or Mr Ahuja. And neither has whoever produced any cogent evidence of disproportionate damage. Nor has either established anything out of the ordinary such that any unfairness might result from the Register simply containing their names and the date of their references."

39. In a very recent case in the First-tier Tribunal (Tax Chamber) *Mr A v HMRC* [2012] UKFTT 541TC, the Appellant sought a private hearing because he had a high public profile and was thus liable to be the subject of substantial adverse press comment if it were known that he had been a participant in a tax avoidance scheme, with potential damage to his reputation having serious effects on him and his career.

40. Judge Bishopp, in declining to follow previous decisions which had allowed privacy in such cases, observed in paragraph 13 of the decision that the presumption of a public hearing is nowadays stronger than it might have been perceived even a few years ago. In dealing with the issue of the prominence of the subject he said at paragraph 14:

> "The fact that a taxpayer is rich, or that he is in the public eye, do not seem to me to dictate a different approach; on the contrary, it may be that hearing the appeal of such a person in private would give rise to the suspicion, if no more, that riches or fame can buy anonymity, and protection from the scrutiny which others cannot avoid. That plainly cannot be right".

41. Sir Stephen Oliver QC considered the only other application so far under Rule 14(1) to prohibit publication of a decision notice. This was in *Canada Inc* and *Peter Beck v FSA* FS0017/18 where he reviewed the cases and the principles underlying them. In paragraph 14 of the decision he stated:

> "….. 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, Sonaike v FSA* and *Karpe and Others v FSA*. 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."

42. It is clear from this passage that Sir Stephen Oliver QC, whose reasoning I adopt, was setting out principles which in his view were equally applicable to the

three different circumstances in which the right to privacy has to be considered, namely the issue as to whether details should be withheld from the Register, whether the FSA should be prohibited from publishing a decision notice and whether the substantive hearing of the reference should be held in private. In *Canada Inc* Sir Stephen Oliver QC was only considering a Rule 14 application. Consistent with the circumstances in the present case no application had yet been made for the hearing to be held in private. Nevertheless it is clear that the same considerations apply in all three situations.

43. I therefore accept Mr Hunter's submission, which is supported by the reasoning of Sir Stephen Oliver QC and the reasoning of Toulson LJ in *City of Westminster Magistrates Court*, that 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. Paragraph 30 of the decision in *Karpe and others* can be distinguished on that basis. 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.

44. Therefore, in carrying out the balancing exercise that I referred to in paragraph 27, it 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.

45. This starting point is also influenced in this case by the statutory scheme for publication set out in Section 391 of FSMA. The fact that it treats decision notices and final notices on the same footing is a matter that again weighs in favour of publication although I do accept that regard has to be paid to the fact that a decision notice that is being challenged in the Upper Tribunal is necessarily provisional. In any event any publication of a decision notice should make it clear when it is known to be the case that it is being challenged. I return to this point later.

Discussion

46. Against that background, I can now turn to the balancing exercise and consider whether the factors put forward by the Applicants outweigh the strong presumption, as established by the authorities, that the Decision Notices should be published. As discussed above the Applicants need to satisfy me that the factors put forward provide cogent evidence of how unfairness might arise from publication and how they could suffer a disproportionate level of damage.

47. The first factor relied on by the Applicants is the serious reputational damage and the infringement of personal privacy that the Applicants allege would result from publication. Mr Farrell provides in his witness statement the basis on which this contention is made and Mr Addison specifically adopts Mr Farrell's evidence in this regard, both for himself and on behalf of Arch. He states that he is concerned for his personal privacy and that of his family (even safety) if the Decision Notices were published. He believes this to be so because of the seriousness of the allegations relating to a lack of integrity combined with the severe penalties particularly the proposed prohibition order which, he says, may lead to inappropriate action by readers of the Decision Notices. The fact that there were over 6,000 investors in the Arch cru funds, many of whom may have lost significant amounts of their investments led to concerns on Mr Farrell's part that those investors may not appreciate that the FSA is not linking their losses to his actions or those of Arch. He went on to say that in this case, involving significant losses to a large number of investors and where he fundamentally disagrees with the factual findings and has serious concerns as to the process of the investigation underlying the Decision Notices, publication of those notices is unwarranted and indeed counter-productive to the stated object of providing certainty to those affected investors.

48. In my view Mr Farrell's concerns do not amount to cogent evidence of how unfairness can arise out of publication leading to disproportionate damage. He gives no evidence of circumstances that would lead me to conclude that his fears concerning his personal safety and that of his family are well founded. No doubt the publication of the Decision Notices will lead to heightened public interest in what led to the failure of the Arch Cru funds and Mr Farrell and Mr Addison will be asked by the media to comment on that. That attention will no doubt be unwelcome to them but it is the inevitable consequence of their leadership of a firm that has been the investment manager responsible for the management of assets for a large number of investors and where for whatever reason there is the potential for very serious losses. The fact that the publication of the Decision Notices will bring the issue back to the forefront of the minds of those who are affected and the interested media and thus cause this discomfort I put in the same category as the embarrassment suffered by Mr Sonaike. In my view it does not amount to anything out of the ordinary that would be expected to arise in this particular situation.

49. I do not accept that the high level of public interest in itself takes the matters out of the ordinary run of the mill case where publication can have a detrimental effect on reputation. Consistent with Judge Bishopp's reasoning in Mr A, the fact that the situation, born out of what was clearly originally a very successful investment product in terms of the amounts raised from a large number of investors, has turned sour and created a considerable public interest in what the consequence of that will be should not shield the Applicants from the glare of publicity. To do so, would as indicated by Judge Bishopp, be counter-intuitive and give rise to the implication that the more serious the situation and the more prominent the subject the stronger the case for privacy.

50. Nor do I believe that the fact that serious allegations are made about the Applicants' integrity and their concerns about the quality of the reasoning in the

Decision Notices shift the balance in this case. Mr Stanley submits that the public who read the Decision Notices will not understand the difference between an allegation of a lack of integrity based on recklessness which is being made and an allegation of dishonesty, which is not being made. He submits that it is likely that there will be an unreasonable body of investors, fuelled by high emotions as a result of what has happened to the Arch cru funds, who will fail to appreciate that the decisions are provisional and will assume that the Applicants are guilty of what is alleged.

51. The protection to which the Applicants are entitled in this situation is the right to have the allegations tested in this Tribunal which will in due course deliver a decision in public which will refute unfounded allegations. In addition the Decision Notices themselves set out in detail a summary of the representations that the Applicants made to the RDC which goes some way to explaining their side of the case. No doubt the media will be interested in hearing from the Applicants why they believe the allegations are unfounded. Indeed Mr Farrell has already done that to an extent, in an interview he gave to The FT Adviser in February 2012, which was written under the following heading;

> "CEO of Arch Financial tells FT Adviser his side of the story of how a £150m firm can be reduced to having assets of £47k."

52. Although Mr Farrell would obviously have been constrained about what he could have said at that time, which was prior to the FSA's investigation having been concluded, there is no reason why with the heightened interest inevitably following publication that he will not have similar opportunities with the ability to provide much more information regarding his side of the case. Indeed, because of the public interest in the situation, he is likely to get a greater opportunity that would be the case were the interest less.

53. I must also take account of the fact that there is already significant information in the public domain concerning the situation. Significantly, aside from Mr Farrell's interview I was shown another article in The FT Adviser reporting the fact that the references have been made (information that could have been obtained because the fact of the references was disclosed on the Register for a period) and Mr Farrell is quoted in that Article as fundamentally disagreeing with the FSA's approach in this matter. In the light of this there is bound to be speculation as to the basis of the FSA's decisions that have led to the references. On the basis of the Applicant's own concerns about uninformed comment, this speculation could well be adverse to the Applicants and their reputation.

54. In the circumstances it may be of benefit if the Decision Notices were published and the Applicants were then free to explain their position and give greater clarity to the situation. I therefore see the circumstances as being similar to the situation described in paragraph 27 of *Karpe and others*, where to a degree the damage has already been done and in those circumstances I do not see that publication as opposed to non-publication will make the situation materially worse from the Applicants' perspective.

55. Finally, on this issue I was told that the pleadings in the High Court proceedings and the proceedings in Guernsey referred to in paragraph 12 above are available for inspection by members of the public. These documents will undoubtedly give significant information about some of the matters dealt with in the Decision Notices as I was told that there is an overlap between the matters which are the subject of the two sets of proceedings. Again the salient points at issue in these proceedings have been the subject of what I am told are accurate press reports. It is noted that in the High Court proceedings there is an allegation of dishonesty which in itself, on the Applicants' case, is likely to have had a damaging effect on Mr Farrell's reputation, so it is unclear why publication of details of decisions alleging a lesser degree of culpability will add significantly to that damage if it has already occurred.

56. For all these reasons I conclude that none of the evidence advanced with regard to the effect of publication on the reputation or privacy of the Applicants meets the requirements of cogent evidence of disproportionate damage.

57. The second factor relied on by the Applicants is that the publication of the Decision Notices will influence the manner in which witnesses may give evidence in the Court proceedings referred to above. Mr Farrell describes this in his witness statement as follows. He states that he is concerned with the possibility of unintentional (or otherwise) contamination of evidence or inappropriate influence of witnesses or potential witnesses through the publication of factual findings which are relevant and common to both the civil and regulatory proceedings, but which are entirely in dispute at the time of publication. In addition Mr Farrell expressed concern that his credibility as a witness may be unduly prejudiced or unfairly affected, irrespective of the best efforts of any judge or other party involved in the civil proceedings before the High Court.

58. In my view this is pure speculation on Mr Farrell's part. He provides no specific evidence to support this speculation so he comes nowhere near meeting the standard of providing cogent evidence. Indeed he states that he is concerned about the *possibility* that the issues will arise. In any event it appears to me that in the civil proceedings witnesses can be cross examined about their knowledge of the Decision Notices and questions asked which are pertinent to the concerns expressed by Mr Farrell. His asserted concerns about how he may be perceived as a witness have no evidence to support them.

59. The final factor relied on by the Applicants is that publication of the Decision Notices would prejudice the possibility of any meaningful settlement discussions in relation to all or any of the civil proceedings referred to above. Mr Farrell in his witness statement states that although Arch and he do not accept the matters alleged against them they would consider settlement on agreeable terms and have asked the other parties whether they might be amenable to participating in a mediation in order to find a resolution for the benefit of investors and avoid possibly protracted and expensive legal proceedings. He believes that the public nature of having disputed facts traversed by publication of the Decision Notices would be likely to make any settlement more difficult, at a time when he was actively engaged in endeavouring to

arrange such discussions. Mr Stanley submitted that the Decision Notices would be used as a stick to beat the Arch cru parties into a settlement of the civil proceedings.

60. Again I find these statements to be pure speculation. No evidence is provided as to the state of any settlement discussions and any particular issues which are the subject of those discussions that would quite clearly be seen to be affected by publication. It could equally be said that the publication of the Decision Notices could facilitate a settlement as providing more detail as to what might have happened, giving the Arch cru parties the opportunity to explain their position in more detail. I therefore find no cogent evidence in relation to this factor that I can give weight to in the balancing exercise.

61. The FSA sought to put forward positive reasons why publication should be permitted, including the desirability of providing further information as to what might have happened, an explanation as to the regulatory standards applicable to the management of conflicts of interest and the creation of a deterrent effect. The Applicants sought to counter these reasons by submitting that what the FSA saw as virtues they saw as vices.

62. In my view there is no need to for me to consider whether there are positive reasons for allowing publication. I have already concluded that the principle of open justice and the statutory provisions create a presumption in favour of publication. That presumption can only be rebutted if cogent evidence of a disproportionate level of damage if publication is allowed is produced. It follows from the analysis of the evidence set out in paragraphs 46 to 60 above that I have not found any cogent evidence. That being so, I need no further assistance by considering the reasons why the FSA wishes to publish. Likewise if I had found that there was cogent evidence of disproportionate damage then the presumption in favour of publication would be rebutted and unless there were other exceptional factors which should lead me to conclude that it would be in the interests of justice to publish, the decision should be to prohibit publication regardless of the additional benefits that the FSA believes should follow from publication. I have therefore treated these factors as purely neutral in the balancing exercise.

Conclusion

63. I therefore conclude that both the Applications must be dismissed. I should however, express my concern that it is important that adequate steps are taken when publicising the Decision Notices to ensure that it is clear that the decisions are provisional in the light of the fact that they are being challenged in the Upper Tribunal. I am concerned that some of the benefits expressed by the FSA to flow from the fact of publication, such as the need to establish a deterrent effect could be said to be predicated on the basis that the findings are a fait accompli. Mr Hunter referred to the fact that when a decision notice is published which is being challenged in the Upper Tribunal a legend to that effect is added to the notice. In my view the publicity material should go further than that. In particular any press release issued by the FSA should state prominently at its beginning that the Applicants have referred the matter to the Upper Tribunal where each will present their case and the Tribunal

will then determine the appropriate action to take, which may be to uphold, vary or cancel the FSA's decision. I understand this formulation to have been used in previous cases of publication. 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 FSA'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 and both parties have liberty to apply for further directions if, which I hope not to be the case, there is any doubt on what is expected.

TIMOTHY HERRINGTON

JUDGE OF THE UPPER TRIBUNAL
RELEASE DATE: 30 NOVEMBER 2012