[2015] UKUT 0220 (TCC)

Reference numbers: FS/2014/0012
FS/2014/0013
FS/2014/0016

DECISION NOTICE – publication – whether Tribunal should prohibit publication on grounds that the consequence of such publication would cause disproportionate damage and outweigh the public interest served by the principle of open justice – whether exceptional circumstances – whether prejudice to other claims made by applicants – whether significant likelihood of conduct of others following publication which could cause disproportionate damage to the applicants – whether Tribunal should direct that references should not be included in the Register - FSMA 2000, s 391 – Tribunal Rules, rule 14(1) and Sch 3, para 3(3)

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
FINANCIAL SERVICES

(1) STEWART OWEN FORD
(2) MARK JOHN OWEN
(3) PETER FRANCIS JOHNSON **Applicants**

- and -

THE FINANCIAL CONDUCT AUTHORITY **Respondent**

TRIBUNAL: JUDGE ROGER BERNER

Sitting in private at The Royal Courts of Justice, Strand, London WC2 on 16 April 2015

The First and Third Applicants, Mr Ford and Mr Johnson, appeared in person.

The Second Applicant, Mr Owen, did not appear and was not represented.

Andrew George QC and Daniel Burgess, instructed by The Financial Conduct Authority, for the Respondents

DECISION

1. In the context of their references to the Tribunal, which have been directed to be heard together, each of the applicants, Mr Ford, Mr Owen and Mr Johnson, has made applications to the Tribunal which fall to be determined. Those applications are for:

(1) a direction of the Tribunal suspending the effect of the Decision Notices dated 7 November 2014 ("the Decision Notices") made by the Authority in respect of each of them, and to which their references relate;

(2) a direction of the Tribunal pursuant to para 3(3), Sch 3 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the UT Rules") that the Register (that is to say, the register of references and decisions in financial services cases and wholesale energy cases kept by the Tribunal under para 3(1)) is not to include particulars of the reference made by each of them; and

(3) an order pursuant to Rule 14(1) of the UT Rules that there be no publication of the Decision Notices.

2. Given the nature of the applications I had directed that they be heard in private.

3. Each of the applicants produced a witness statement and a skeleton argument for the hearing. Mr George and Mr Burgess filed a skeleton argument for the Authority. I heard oral submissions from Mr Ford and Mr Johnson, and from Mr George, which were most helpful, and I am grateful to them. Mr Owen was unable to attend the hearing due to what I understand were family circumstances necessitating him being abroad, and so I did not have the benefit of any oral submissions he might have been able to make. Mr Owen did not seek any adjournment of his own applications. However, following the hearing, Mr Owen did send the Tribunal further representations, including the provision of some further evidence of fact which, along with Mr Owen's witness statement and his written representations, and the Authority's response to the further points made by Mr Owen, I shall consider below.

The suspension applications

4. As Mr George and Mr Burgess submitted in their skeleton argument, the application for a direction to suspend the effect of the Decision Notices is not required, and the Tribunal has no powers in that respect.

5. Under s 133A(4)(b) of the Financial Services and Markets Act 2000 ("FSMA"), where, as in these cases, a decision notice has been referred to the Tribunal, the action specified in the decision notice must not be taken until the reference, and any appeal against this Tribunal's determination, has been finally disposed of. There is, accordingly, already a statutory suspension of the Decision Notices, and no direction of the Tribunal in that respect can have any effect.

6. Those applications must therefore be dismissed.

The law

7. I turn therefore to the law relating to the exclusion of particulars of the references from the Register and the prohibition on publication of the Decision Notices.

8. In relation to the publication of the Decision Notices, s 391 FSMA, so far as material, provides:

> "(4) The regulator [the Authority] giving a decision or final notice must publish such information about the matter to which the notice relates as it considers appropriate.
>
> …
>
> (6) The [Authority] may not publish information under this section if, in its opinion, publication of the information would be-
>
> (a) unfair to the person with respect to whom the action was taken (or was proposed to be taken),
>
> (b) prejudicial to the interests of consumers, or
>
> (c) detrimental to the stability of the UK financial system."

9. Where the Authority decides that none of the criteria set out in s 391(6) are met, and consequently intends to publish, in this case, the Decision Notices, an applicant may apply to the Tribunal for an order under Rule 14(1) of the UT Rules:

> "(1) The Upper Tribunal may make an order prohibiting the disclosure or publication of-
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> (a) specified documents or information relating to the proceedings; or
>
> (b) any matter likely to lead members of the public to identify any person whom the Upper Tribunal considers should not be identified."

10. So far as the Register is concerned, para 3(3), Sch 3 of the UT Rules provides:

> "(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-
>
> (a) any unfairness to the applicant or … any prejudice to consumers that might otherwise result;
>
> (b) as regards a reference in respect of a decision of [the Authority], any detriment to the stability of the UK financial system …"

Relevant case law

11. Helpful guidance has recently been given by the Upper Tribunal with respect to the exercise of its discretion, both as regards the making of an order prohibiting the publication of a decision notice and a direction that the Register is not to include particulars of a reference.

12. At the risk of quoting extensively from another decision of the Tribunal, it is helpful, I believe, to record what the Tribunal (Judge Herrington) said at [11] to [12] of *Burns v The Financial Conduct Authority* [2013] FS/2012/24, referring in particular to the Tribunal's decision in *Arch Financial Products and others v The Financial Services Authority* [2012] FS/2012/20:

> "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 [UT] 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
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> (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.
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> 12. *Arch* and the cases reviewed in that decision (which I do not need to review in further detail here) establish the following principles:
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> (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. The Tribunal in *Burns* went on to consider, and apply in the circumstances of a case of this nature, the principles set out by Henderson J in *Revenue and Customs Commissioners v Banerjee (No. 2)* [2009] STC 1930, a tax appeal. That case emphasised the potency of the principle of public justice from which it follows that 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. Henderson J also observed that the general requirement of the public interest that the precise facts be a matter of public record involves an inevitable degree of intrusion into the taxpayer's privacy which 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 (see *Banerjee*, at [34] – [35]).

14. Any question whether the damage that might be suffered by an applicant as a consequence of publicity would be disproportionate is to be assessed by considering 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. As the Tribunal in *Burns* said, at [17]:

> "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."

15. There was no dispute as to the legal principles to be applied, but as Mr Ford and Mr Johnson pointed out, as applicants in person they had little to submit in that regard. Mr Ford emphasised the discretion which the Tribunal has in respect of both applications, and urged me to exercise that discretion, in the particular circumstances of this case, in his favour (and by extension also in favour of Mr Owen and Mr Johnson).

16. The discretionary nature of the Tribunal's jurisdiction in these matters is of course expressly recognised in *Arch* and *Burns*. In *Arch*, at [27], the Tribunal noted that, in the case of Rule 14(1), there are no specific conditions that need to be satisfied before the power given by that Rule may be exercised. The exercise of powers under the UT Rules is, however, subject to Rule 2, which establishes the overriding objective of dealing with cases fairly and justly. As the Tribunal said in *Arch*, this imports a requirement that the discretion should be exercised judicially, that is taking into account all relevant factors, ignoring irrelevant factors and carrying out a balancing exercise between those factors that tend towards publication and those that would tend against. But in weighing those factors, the starting point is that the scales are heavily weighted on the side of publication.

17. I respectfully agree with the approach adopted by the Tribunal in *Arch* and *Burns*, for the reasons given in those cases. Those, therefore, are the principles of law that I apply in considering these applications.

Background

18. Although I have considered the Decision Notices in respect of each of Mr Ford, Mr Johnson and Mr Owen, and the formal replies they have each made, it is not necessary in this decision to set out in full the background to the present applications. There are serious disputes between the applicants and the Authority, and it would serve no useful purpose to set them out extensively. These applications are not the occasion for this Tribunal to carry out any examination of the merits of what is clearly a complex dispute. Nor is anything I say by way of background a finding of fact.

19. Mr Ford was a director and chief executive officer of a company, Keydata Investment Services Limited ("Keydata"). Mr Owen was Keydata's sales director, and Mr Johnson was, at most relevant times, its compliance officer.

20. Although certain facts relating to its role are disputed, in the relevant period (26 July 2005 to 8 June 2009) Keydata distributed certain investment products to retail customers via independent financial advisers ("IFAs"). Those products were underpinned by investments by Keydata in bonds issued by two special purpose

vehicles incorporated in Luxembourg, SLS Capital SA and Lifemark SA which were themselves asset backed by US senior life settlement policies.

21. Keydata ceased trading in June 2009, and went into administration. The circumstances of that closure are highly contentious. The company has subsequently been dissolved on 2 July 2014.

22. During the relevant period more than 37,000 investors purchased the relevant investment products, investing over £475 million. The Financial Services Compensation Scheme has subsequently made payments to investors of over £330 million.

23. Following an investigation by the Authority, each of Mr Ford, Mr Johnson and Mr Owen was issued with a warning notice on 26 October 2010. There followed judicial review proceedings in which it was held that the Authority had relied upon certain material that was subject to legal professional privilege. Final versions of the warning notices were sent to the applicants on 23 October 2013.

24. The applicants contested the contents of the warning notices and made representations in July 2014 at a meeting of the Regulatory Decisions Committee ("RDC") of the Authority. The Decision Notices that form the basis of these applications were issued to the applicants on 7 November 2014. On the basis of findings that each of the applicants had failed to meet minimum integrity and competence standards, by being in breach of Statements of Principle 1 (integrity) and 4 (relations with regulators), each applicant was made the subject of a prohibition order and a financial penalty was imposed; on Mr Ford of £75 million, on Mr Owen £4 million and on Mr Johnson £200,000.

25. On 4 December 2014 Mr Ford referred the Decision Notice relating to him to the Tribunal. Mr Johnson and Mr Owen did likewise on 5 December 2014.

The Applicants' arguments

26. Each of Mr Ford, Mr Johnson and Mr Owen put their arguments in favour of an order prohibiting publication of the Decision Notices and for particulars of their references not to be included in the Register on the basis, first, that publicity would cause reputational harm, and secondly that it would be prejudicial to other claims made, or to be made by them against the Authority and other parties. They submitted that the circumstances of this case were exceptional such as to merit such an order and direction being made.

27. Although there was much overlap in the three sets of applications, each must be considered individually. I shall therefore summarise the evidence and submissions made by each applicant.

Mr Ford

28. Mr Ford's submissions rested heavily on what he considers to be a flawed Decision Notice in his case, and a flawed process by which the Authority arrived at its decision, and by which the business of Keydata was, in Mr Ford's view wrongly, closed down. He considers that he was wrongly targeted by the Authority and that the Authority was wrong to take the view at the relevant time that Keydata was insolvent.

29. Mr Ford has filed with the Tribunal a substantial reply to the Authority's statement of case in his reference. As I have said, it is not appropriate for me, in applications of this nature, to rehearse the arguments between the parties; still less to indicate any view. That applies as well to certain evidence referred to by Mr Ford which arose between the date of the RDC meeting in July 2014 and the date of issue of the Decision Notice on 4 December 2014 and which was argued by Mr Ford to be of material assistance to his case, an argument disputed by the Authority.

30. As a consequence of the Authority's actions, says Mr Ford, he and his family have suffered considerable loss. In July 2014 he sent a pre-action letter to the Authority making substantial claims against it. That letter asserts that the Authority had an ulterior motive in its interventions in respect of Keydata and Lifemark and its investigations into Mr Ford's conduct, that the Authority's actions were *ultra vires* and caused loss to investors, shareholders, creditors and employees of Keydata. The letter claims that the Authority and individual members of its investigation team are liable to Mr Ford and certain family interests of his by reason of misfeasance in public office. The sum claimed is put at £371 million. I was told that, with Mr Johnson and Mr Owen joining the proposed action, the aggregate sum claimed is now in the region of £700 million.

31. Mr Ford claims that in respect of the allegations that he misled the Authority, he himself was the victim, along with Keydata, of a fraud perpetrated by other persons against whom, by a further pre-action letter issued in September 2014, Mr Ford has intimated that he will take proceedings.

32. Mr Ford submits that the publication of the Decision Notice at this time, prior to the conclusion of his claims in respect of dishonesty and deceit in relation to those persons, could prejudice those claims, as those persons, he argues, would doubtless seek to argue that he was himself tarnished by the Authority's finding against him, regardless of the fact that the decision notice is being contested.

33. Mr Ford makes the same submission in respect of his claims against the Authority, arguing that the unprecedented size of the fine levied against him would give rise to a prejudicial assumption that he must be guilty of a serious regulatory breach.

34. The size of the financial penalty imposed on Mr Ford also formed the basis for his submission that publication of the Decision Notice would cause him reputational harm, and that his reputation would be irreparably damaged by publication at this stage, even if he were exonerated in due course by the Tribunal. He accepted that there had already been a considerable amount of media and internet coverage

following the collapse of Keydata in June 2009, but argued that the Decision Notice covered other matters which had not yet been publicised, and that damage in that respect could not be said to have been done. Furthermore, there was at this time little press interest, the last being in around August 2014, and publication of the decision notice would only go to re-kindle it.

35. Mr Ford also referred to the fact that publicity at this stage of the Decision Notice, and the extent of the financial penalty sought to be levied, would cause suffering to Mr Ford's family who had not been employed by Keydata and could as a result be placed in an unfair and unnecessary situation. Mr Ford explained to me in this regard certain particular circumstances affecting his family, which it is not necessary for me to recite, but which I have taken into account.

36. Mr Ford, with Mr Johnson's assistance, argued that there was past evidence of the likely effect of publicity on his family. In August 2010, according to a report in *IFA Online*, a website by the name of keydatavictims.ning.com, which had apparently been set up as a forum for investors and IFAs, was temporarily taken offline by its internet service provider after Mr Ford's lawyers had complained that contributors had made certain "highly offensive allegations" about Mr Ford's family. Mr Ford's lawyers were also reported as having written to the website's creator and moderator to complain of "false and defamatory material" being posted on the site.

37. Mr Ford accepted that he had himself engaged with the press to put his side of the story. However, he said that he had not courted publicity and had only intervened when the media interest was intruding upon his family. Even that had not been entirely helpful; he had found himself being wrongly quoted by his own adviser.

38. Mr Ford argued that the circumstances he had described were exceptional so as to justify an order prohibiting publication of the Decision Notice and of his reference until at least the substantive hearing before this Tribunal. That, he said, was the fair battleground for the respective cases of himself and the Authority. The circumstances of the unprecedented level of financial penalty for an individual, the conduct of the Authority which would lead to separate proceedings against them, the fact that the Authority had failed to consider relevant material and had ignored a fraud perpetrated on Mr Ford and Keydata and the media frenzy that would no doubt accompany publicity, and which would be traumatic for Mr Ford's family, were, in his submission, exceptional in this respect. The damage would be disproportionate to the public interest in open justice.

Mr Johnson

39. Mr Johnson associated himself with many of the arguments of Mr Ford. He relied upon the same arguments in respect of the prejudice to other proceedings taken by Mr Ford which Mr Johnson told me he intended to join. He argued too, in common with the submissions made by Mr Ford, that the exceptional level of the financial penalty in Mr Ford's case would generate media interest which would result in Mr Johnson's reputation being irreparably tarnished whatever the outcome of the substantive proceedings in this case.

40. Mr Johnson argued that the Authority's case was wrong in every respect. He referred me to certain particular arguments that he had made in his substantial reply to the Authority's statement of case, arguments which, Mr Johnson submitted, had not been properly considered by the Authority throughout the process. He argued that the sanctions sought to be imposed on him were excessive, having regard to other cases to which he referred me.

41. He strongly criticised the conduct of the Authority, both as regards its dealings with Keydata, in particular the closing down of the business and the events leading up to that, and with him personally. He referred me to the method of service upon him of a supplemental provisional investigation report in August 2009 which had been done in person and, he argued, aggressively at his home after 9pm at night. That had been traumatic for his family. His complaints in that regard had been upheld by the Complaints Commissioner, and the Authority had altered its procedures as a consequence. Mr Johnson also explained to me the effect on his family that the stress of these proceedings has had.

42. Other aspects of the process which Mr Johnson argued were unfair and thus gave rise to exceptional circumstances were:

(a) At a meeting regarding the supervision of Keydata one of the Authority's officers had been very aggressive, and had issued an apology.

(b) The Authority failed to notify a change of investigators and one of the supervisory team had moved to Enforcement.

(c) The Authority had wished to accelerate unfairly the RDC process in 2009 and had been prevented from doing so only by the judicial review proceedings concerning the use of legally-privileged materials.

(d) It had not been clear what parts of the original provisional investigation report were not being pursued. This had created stress for Mr Johnson.

(e) Certain discs containing relevant material had been incorrectly labelled.

(f) The Authority had not taken reasonable care with confidential documents. His warning notice had been delivered to Keydata's post room and had been opened by staff there.

(g) A warning notice for Keydata had been sent to PwC (Keydata's administrators) before the applicants had received their notices.

(h) The evidence referred to by Mr Ford that came to light after the RDC hearing, but before the issue of the Decision Notices, had been ignored.

(i) The Authority had acted unfairly in relation to the timing of certain representations which Mr Johnson was entitled to make.

43. As regards prior publicity, Mr Johnson submitted that he had himself received little publicity. He had issued no press release and had kept his head below the

parapet. Not all of the media reporting had been accurate. He argued that the publication of his own Decision Notice would therefore represent new material coming into the public domain.

Mr Owen

44. Mr Owen's written submissions made prior to the hearing mirrored those of Mr Ford and Mr Johnson in all material respects. I need not repeat those points.

45. As I have noted earlier, Mr Owen was unable to attend the hearing. Following it, Mr Owen wrote to the Tribunal to express his support for the submissions which Mr Ford and Mr Johnson had made, and to make certain further representations concerning the effect of publicity on himself and his family.

46. In those representations, Mr Owen said that, following disclosure on a website of his address, he and his family had received an amount of hate and threatening mail, including wording such as "I know where you live and I am going to get you". Mr Owen said that he had been obliged to take steps to have the website in question taken down due to the sensitive nature of the information which was being published by unknown parties. The information did not relate solely to Mr Owen, or his immediate family, but to his extended family.

47. In this regard, Mr Owen submits that in the interests of justice his family, including his children, should not be put at risk in any way whatsoever until after the substantive case has been heard.

Discussion

48. The question, which must be asked in respect of each of the applicants, is whether they have produced cogent evidence of how unfairness may arise and how they could suffer a disproportionate level of damage if publication were not prohibited.

49. Although the applicants have each submitted that the nature of the dispute between them and the Authority in this case is exceptional, and I accept that there are material areas of dispute between the parties, the requirement that there be exceptional circumstances in order that rights to privacy and confidentiality are to prevail over the principle of open justice relates only to such circumstances that are material to the question of publicity. I agree with the submission of Mr George that such circumstances are material only to the extent that they tend towards publication.

50. The submissions of the applicants as to the nature of the dispute, including questions whether they have been treated fairly in comparison with others, or penalised too harshly, are matters to be considered by the Tribunal when it hears the substantive applications. Those are not matters, whether or not it is argued that they are exceptional, that can bear upon the question of publication.

51. The same principle applies to submissions regarding the conduct of the Authority, as regards the cessation of business of Keydata and its entry into administration, and the conduct of the various investigations by the Authority. Although the applicants strongly criticise the actions of the Authority, and there are threatened proceedings against the Authority, there is no evidence before me that the Authority is operating in bad faith in proposing to publish the Decision Notices in accordance with s 391(4) FSMA. I do not consider that the actions of the Authority to which the applicants have referred me can lead to any such conclusion.

52. Nor do I consider that there is any evidence of any risk of prejudice to other proceedings that might be taken by the applicants. Any proper disclosure exercise in such proceedings would reveal the relevant information, and if questioned about the action taken by the Authority it can be assumed that the applicants would answer truthfully. It cannot be a reason for prohibiting publicity that another court might not therefore have information which could assist it. Nor is it arguable that any court or tribunal would regard any of the applicants as "tarnished" by the publication of the Decision Notices, or that any assumption would be made as to the likely outcome of these proceedings as a result.

53. That leaves the question of the effect of the publicity itself. Mr George reminded me that the Tribunal in both *Arch* and *Burns* had made the point that the fact that some information concerning the subject matter of the reference is already in the public domain is a factor tending in favour of publication. He also referred me to what the Tribunal had said in *Arch* concerning the submissions on behalf of those applicants as to the serious reputational damage and infringement of personal privacy they and their families would suffer (at [47] – [48]):

> "[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."

54. I accept that the fact that information concerning the subject matter of a reference is in the public domain tends in favour of publication. In the case of Mr Ford and Mr Owen, there has been substantial publicity, and substantial information in the public domain in respect of them which does tend in that direction. Although not all of the matters dealt with in the Decision Notices are in this category, I do not consider that the presence of unpublished matters alters that analysis. The case of Mr Johnson is rather different, as from the evidence I have seen there has been little material in the public domain that refers directly to him. In his case, therefore, the published material tends less towards publicity.

55. However, I am not satisfied in any of the applicants' cases that publicity at this stage will cause irreparable reputational damage to them. There is no cogent evidence in that regard. The Decision Notices remain provisional, subject to the references that the applicants have made. Those references remain to be determined by the Tribunal. On any publication of the Decision Notices the position would be required to be made clear. I do not accept that there would be reputational damage whatever the outcome of these proceedings.

56. There is, on the other hand, a separate question as to whether the experience of what had arisen as a consequence of such prior publicity provides evidence of what would be likely to happen if further information were to be published, in the form of the decision notice and the registration of the reference. If that is evidence of a likely consequence of further publication that would cause an applicant to suffer disproportionate damage, that would then become a factor that would point in the opposite direction.

57. In this case there is evidence of the Keydata victims' website being taken offline because of complaints of "highly offensive allegations" about Mr Ford's family. I had no evidence whether such behaviour would be repeated, but the nature of such sites, if not properly moderated, means that the possibility of comments of that nature being repeated cannot be discounted. On the other hand, the only evidence before me

that such comments were made was from August 2010, at which time the issue was addressed, and I have no evidence of any repetition since that time.

58. It appears that the reference made by Mr Owen to a website which he took steps to have taken down is to the same victims' website, and that the incident also took place in August 2010, at which time the website was suspended for a period while the website providers dealt with the issue, including barring those individuals who had posted offensive comments.

59. Although Mr Owen did not refer to this matter in his application, in his witness statement or in his skeleton argument, and did not attend the hearing so that he could be asked to amplify his submissions in this respect, including providing further facts, the Authority does not dispute the existence of the threats Mr Owen has referred to. I accept that he and his family did receive such threats, that they were brought about by the publication of his address on the victims' website and that they were addressed at that time in the way that Mr Owen has described.

60. Conduct of the nature described by Mr Ford and Mr Owen is reprehensible whatever the grievance that the instigator of it might perceive. It appears to be a regrettable by-product of the internet age. However, in the circumstances of this case I am not persuaded that, although there is a possibility that such behaviour may re-surface, and do so as a result of interest in the case being revived by publication of the Decision Notices, the evidence has established that there is a significant likelihood of that being the case. There has been no such repetition since August 2010, in spite of the fact that since that time there has been continued media interest in the case. That suggests that, although there was at one time a potential issue, that issue was resolved then, and would not be likely to be repeated. Even if it were, effective action could be taken in respect of it, as it was before.

61. I also note, from the papers before me, that on receipt of the Decision Notices in November 2014 both Mr Owen and Mr Johnson made representations to the Authority to the effect that their private addresses should not be included in the published version of the Decision Notice. The Authority has agreed to that course in relation to each of the applicants. That, it seems to me, is the proportionate response to the risks identified by the applicants in this case.

62. In all the circumstances, and subject to certain directions I shall make, I do not consider that there is a substantial likelihood of disproportionate damage to any of the applicants from the publication of the Decision Notices and the registration of their references. Whilst it is certainly likely that there will be renewed press and public interest, that is in the nature of the public interest in open justice which the principles established by the authorities go to preserve and protect. That will inevitably bring further pressure on the applicants, and the increased stress on them and their families can be readily appreciated. But it is a natural concomitant of a system of open justice.

63. I conclude therefore that the factors identified by Mr Ford, Mr Johnson and Mr Owen are insufficient to outweigh the public interest in open justice in this case, and that in the exercise of my discretion I should not make any order prohibiting

publication of the Decision Notices or any direction that their references should not be included in the Register.

64. It follows that the applications of each of Mr Ford, Mr Johnson and Mr Owen must be refused. Mr Ford submitted that a more appropriate order would be to permit publication only at the date of commencement of the substantive hearing. I disagree. I concur with Mr George when he submitted that there was no scope for such a "half-way house"; the presumption in favour of publication of the Decision Notice is one that operates from the time the notice is given, subject to the power of the Authority and the Tribunal to determine that it should not be.

65. On the other hand, it would not be in the interests of justice if publication were simply to follow immediately from the date of release of this decision. Some reasonable period should be given to the applicants, firstly to consider whether they wish to apply for permission to appeal against this decision to the Court of Appeal, which they must do within 14 days from the date of release of the decision (UT Rules, Rule 44(3D)), and secondly to prepare for the anticipated renewed media interest. Following representations of the parties, their having seen this decision in draft, I have decided that a period of 21 days is appropriate.

66. It is important that upon publication of a decision notice in a case where the decision has been referred to the Tribunal that the reader is not given the false impression that the conclusions reached by the Authority are accepted or are otherwise the last word on the matters in question. As the Tribunal in *Arch* and *Burns* stated, adequate steps must be taken by the Authority when publicising the decision notice to ensure that it is made clear that the decision is provisional in the light of the fact that it is being challenged in this Tribunal. I understand from Mr George that this is standard practice.

67. Nonetheless, my direction will state that any press release issued by the Authority must state prominently at its beginning that Mr Ford, Mr Johnson and Mr Owen has each referred the matter to the Upper Tribunal where each party will present their respective cases and the Tribunal will then determine, in the case of the decision to impose a penalty, what (if any) is the appropriate action for the Authority to take, and remit the matter to the Authority with such directions as the Tribunal considers appropriate for giving effect to its determination, and in relation to the prohibition order, whether to dismiss the reference or remit it to the Authority with a direction to reconsider and reach a decision in accordance with the findings of the Tribunal. Likewise, in referring to the findings made, rather than give any suggestion of finality, the direction will require that those findings should be prefaced with a statement to the effect that they reflect the Authority's belief as to what occurred and how the behaviour in question is to be characterised. The dismissal of the applicants' publicity applications will be conditional on compliance with those requirements.

68. Finally, Mr Ford expressed concern at the prospect of the Decision Notice in his case being published at a time when he remained under an obligation to keep all matters related to the case private and confidential. He was concerned that he could not defend his position in the media.

69. In that regard, the prohibition, under s 391(1A) FSMA, against publication of the notice or any details concerning it will cease to apply on the publication of the notice. The restrictions on disclosure of confidential information under s 348 FSMA, within the meaning of that section, will continue to apply to all parties.

Decision

70. For the reasons I have given, the applications of Mr Ford, Mr Johnson and Mr Owen are dismissed upon the terms of the directions I shall issue at the same time as the release of this decision.

ROGER BERNER
UPPER TRIBUNAL JUDGE

RELEASE DATE: 2 May 2015