[2017] UKUT 0210 (TCC)

Appeal number: FS/2016/008

FINANCIAL SERVICES–preliminary hearing- third party rights-s 393 Financial Services and Markets Act 2000-whether statement in Decision Notice relating to third party assumed to be correct should be amended or removed-no-privacy-whether Tribunal should prohibit publication of Decision Notice-no-whether Tribunal should direct that register should contain no particulars of the reference and that hearings relating to the reference be held in private- no-Tribunal Procedure (UT) Rules 2008 14 (1), 37 and Schedule 3 para 3 (3)

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

ONE INSURANCE LIMITED **Applicant**

- and -

THE FINANCIAL CONDUCT AUTHORITY **The Authority**

TRIBUNAL: Judge Timothy Herrington

Sitting in private at The Royal Courts of Justice, Strand, London WC2 on 10 March 2017

Leigh-Ann Mulcahy QC and Clare Dixon, Counsel, for the Applicant

Paul Stanley QC, Counsel, instructed by the Financial Conduct Authority, for the Authority

DECISION

Introduction

1. This decision relates to various preliminary issues directed to be heard by the Tribunal in respect of a reference (the "Reference") made by One Insurance Limited ("OIL") on 11 July 2016 pursuant to s 393(9) of the Financial Services and Markets Act 2000 ("FSMA"). The basis of the Reference is that OIL is identified in the separate decision notices (the "Decision Notices") given by the Authority to One Call Insurance Services Limited ("One Call") and John Radford ("Mr Radford") respectively on 13 June 2016 and that the Decision Notices contain statements that are prejudicial to OIL.

2. In the Decision Notice given to One Call ("the One Call Decision Notice") the Authority decided that One Call had failed to arrange adequate protection for its client money. One Call is an insurance intermediary but failed to appreciate that monies which it received from customers in respect of premiums payable under certain insurance policies were client monies. In respect of those failings, the Authority decided to impose a financial penalty of £684,000 on One Call and restricted it for a period from charging renewal fees to its customers. The following statement was made at paragraph 2.5 of the One Call Decision Notice:

> "It appears that One Call inadvertently used sums from the Client Money Bank Account to finance its own working capital requirements, make payments to directors and, indirectly, to capitalise a connected company, One Insurance Limited ("OIL") (no allegation of wrongdoing is made against OIL)."

3. At paragraph 7.9 of the One Call Decision Notice the Authority stated that a copy of the Decision Notice was being given to OIL "as a third-party identified in the reasons above and to whom in the opinion of the Authority the matter is prejudicial."

4. In the Decision Notice given to Mr Radford ("the Radford Decision Notice") the Authority decided that Mr Radford, who was responsible for client money at One Call, had failed to ensure that One Call protected client money in accordance with the relevant regulatory requirements. In respect of those failings, the Authority decided to impose on Mr Radford a financial penalty of £468,600 and to make an order pursuant to s 56 FSMA prohibiting him from having any responsibility for client money in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm.

5. A statement referring to OIL in identical terms to that made at paragraph 2.5 of the One Call Decision Notice was made at paragraph 2.4 of the Radford Decision Notice.

6. A statement in identical terms to that made at paragraph 7.9 of the One Call Decision Notice was made at paragraph 7.9 of the Radford Decision Notice.

7. OIL complains that the statements referred to at [2] and [5] above (and similar statements repeated elsewhere in the Decision Notices) are prejudicial to it and that the Authority should be directed to rewrite the Decision Notices so as to exclude mention of OIL by name or any characteristics by which it may be identified or, alternatively, to remove its name.

8. OIL has applied for directions (the "Privacy Directions") that the publication of the Decision Notices be prohibited pending determination of the Reference, that the register of references maintained by the Upper Tribunal not include particulars of the Reference and that the hearing of the Reference take place in private.

9. The Authority contends that on the assumption that the statements contained in the Decision Notices relating to OIL are factually correct, s 393 FSMA does not confer power on the Tribunal to direct that the Decision Notices be rewritten in those circumstances. The Authority contends that the Tribunal's power extends only to the substance of the opinions expressed in the Decision Notices concerning OIL. Alternatively, the Authority contends that even if the Tribunal could so direct, it would in all the circumstances of this case be inappropriate to do so. The Authority contends that the fact that money from a client account was improperly (but inadvertently) used to capitalise a related company which provided insurance is a relevant factor properly included in the Decision Notices. The relationship between OIL and One Call would be known to those likely to read the Decision Notices so that any such reader informed of the fact that the money had been used to capitalise a related company which provided insurance would in any event identify OIL.

10. The Authority opposes OIL's application for the Privacy Directions.

11. On 27 September 2016 the Tribunal directed the hearing to determine four questions as follows:

> (1) whether, pursuant to paragraph 3 (3) of Schedule 3 to The Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Rules"), the register should contain no particulars of the Reference;
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> (2) whether, pursuant to Rules 5 (3) and/or 14 of the Rules, the Authority should not publish the Decision Notices pending the Tribunal's decision on the Reference;
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> (3) whether, pursuant to Rule 37 of the Rules, hearings relating to the Reference should be held in private; and
>
> (4) whether, (i) the Tribunal has jurisdiction to direct that OIL's name should not be included in the Decision Notices (ii) on the assumption that the facts set out in the Decision Notices are correctly stated therein, the Tribunal should so direct.

12. Save for question (4) (i) set out above, I have determined these questions in favour of the Authority for the reasons set out below.

Evidence and findings of fact

13. In support of the Reference, the Applicant filed a witness statement from Mr Tom Pace, Director and Chairman of the Board of OIL. Aside from dealing with the background to the Decision Notices, Mr Pace deals with the relationship between One Call and OIL. He also set out what he believes to be the prejudice to OIL that will result if it is identified and named in the Decision Notices. Mr Pace's evidence was unchallenged and accordingly, I have accepted it, insofar as it relates to the questions which are the subject of this decision. Mr Pace gives further evidence as to whether the statements in the Decision Notices to the effect that OIL was in fact capitalised by monies which came out of One Call's client money account are in fact accurate, but I do not deal with that evidence for the purposes of this decision.

14. The Authority relies on a witness statement from Ms Rachel West, a solicitor and manager in the Enforcement and Market Oversight Division of the Authority. Ms West gives evidence as to the publicly available and accessible information describing the relationship between the Applicant and One Call (and by extension Mr Radford) and her belief that the nature of these relationships is in the public domain. Ms West's evidence was unchallenged and accordingly I have accepted it.

15. In addition, I was provided with copies of OIL's representations as third party on the Warning Notices given to One Call and Mr Radford and the Authority's response to those representations.

16. I was also provided with a copy of the Authority's Statement of Case filed in respect of the Reference and the Applicant's Reply.

17. From the evidence before me, I make the following findings of fact.

18. Mr Stanley provided in his skeleton argument a helpful summary of the circumstances that led to the issue of the Decision Notices. I did not take Ms Mulcahy to take issue with it and I am happy to adopt it with some amendment as set out at [19] to [23] below.

19. The Decision Notices were given by the Authority after an agreed settlement with the subjects, and consequently the decisions to which the notices relate were given by the Authority's Settlement Decision Makers (the "SDMs").

20. One Call was an insurance intermediary, dealing mostly in household and motor insurance. Customers would buy insurance through One Call's website. But One Call did not itself underwrite the policies. It collected premiums from its customers and then (after deducting its own brokerage) forwarded them to the insurers by whom the policies were written. For this limited purpose, One Call was permitted to hold client money. But the client money was to be held subject to the Authority's Client Assets Sourcebook, and the client money rules that it contains.

21. Unfortunately, as One Call and Mr Radford, its Chief Executive, have accepted – and OIL does not dispute – One Call made a mistake. It began to offer multi-year policies, under which clients had the option to renew for up to two years after expiry

of the initial policy period at a fixed price. Because of the way these policies worked, One Call received the premium for years two and three up-front, from the customer (or, in practice, from a finance company); but if the customer decided not to renew for years two or three, money would be repayable. Under the client money rules, One Call should have kept those sums separate and in a trust account, but in fact it did not do so. There were other deficiencies in the way that One Call monitored and accounted for client money.

22. It is not suggested, and the Decision Notices do not find, that this breach of the rules was deliberate, although it was alleged (and Mr Radford has accepted) that Mr Radford acted without adequate care and skill.

23. OIL does not dispute the substance of the criticisms set out above. The Applicant's objection is to the fact that it is identified in the Decision Notices as having been the recipient of part of the money that was incorrectly removed from client accounts, as described below.

24. OIL is a company incorporated in Malta. Its entire share capital has at all relevant times been owned by a holding company incorporated in Malta, that holding company being controlled by Mr Radford, who has also owned substantially all the shares in One Call, so that One Call and OIL have been under the indirect common ownership of Mr Radford.

25. The Warning Notices given by the Authority to One Call and Mr Radford respectively contained a statement that the insurance policies referred to at [21] above were "…sold by One Call and were predominantly written by a connected company, OIL. OIL is based in Malta and passports into the UK…".

26. As demonstrated by Ms West's evidence, the nature of the relationship between One Call and OIL is in the public domain. OIL's own website states that its products can be accessed through the website of its "broker partner One Call Insurance Services Limited, who compare car insurance quotes for customers across the UK" and then gives the website address. One Call's information booklets in relation to home insurance and vehicle insurance published on its website disclose that One Call may place business with other companies that are part of the One Call Group, that directors of One Call may hold directorships in OIL "which is controlled by the CEO of [One Call]" and that One Call may place business with OIL.

27. Paragraph 2.5 of the Warning Notice issued to One Call and paragraph 2.4 of the Warning Notice issued to Mr Radford contained the following statement:

> "… It appears that One Call inadvertently used sums from the Client Money Bank Account to finance its own working capital requirements, make payments to directors and, indirectly, to capitalise a connected company, One Insurance Limited."

28. Paragraph 4. 29 of the Warning Notice issued to One Call and paragraph 4.31 of the Warning Notice issued to Mr Radford contained the following statement:

> "… From 2010, One Call frequently withdrew sums of money, which included client money, from the Client Money Bank Account…. These withdrawals included a substantial amount of client money that One Call was not entitled to. These monies appear to the Authority to have been used inadvertently to fund…. indirectly, the ongoing capital to a connected company, OIL".

29. Both Warning Notices contained the following statement:

> "A copy of this Warning Notice is being given to OIL as a third party identified in the reasons above and to whom in the opinion of the Authority the matter is prejudicial. OIL has similar rights of representation and access to material in relation to the matter which identifies it".

30. Accordingly, as well as being sent to One Call and Mr Radford, the Warning Notices were sent to OIL on the basis that because the Authority considered that the notices identified OIL and the reasons for the action contained in the notices were prejudicial to it, pursuant to s 393 FSMA, OIL had the right to make representations on the notices.

31. On 5 May 2016, OIL made representations in response to the Warning Notices to the SDMs. As Mr Stanley submitted, the essence of those submissions was not that the Warning Notices were wrong in any respect, but that it was unnecessary and unfair to identify OIL by name. OIL therefore asked the SDMs to remove the references to OIL set out in the Warning Notices.

32. On 3 June 2016, the Authority's investigation team provided, in the form of a memorandum addressed to the SDMs, its response to OIL's representations. The investigation team expressed the view that the relationship between OIL and One Call, where OIL had been established as One Call's captive insurer in order to allow One Call to retain customers by offering them insurance at a lower rate than its competitors, may have given One Call a competitive advantage and that One Call's mishandling of client money therefore gave One Call access to funds over and above those which it could have accessed from its client account had it complied with the Client Money Rules. In the investigation team's view, this potentially gave One Call a competitive advantage over competitors who complied with the Client Money Rules and did not use client money in this way. The investigation team's view was that highlighting the potential competitive advantage that One Call may have obtained as a result of its misconduct was key to the strength of the Authority's regulatory message.

33. The investigation team therefore stated in its response that it considered that the need to name OIL in order to meet the Authority's regulatory objectives outweighed the prejudice that OIL may suffer. It therefore recommended that OIL remain a named party in the statutory notices. However, it went on to say, that it was open to the SDMs to decide not to name OIL, but instead to refer to OIL as a connected party which One Call capitalised using client money and that removing OIL's name may address OIL's concerns about any prejudice that it may suffer, while allowing the Authority to retain its regulatory message.

34. On 13 June 2016 the Decision Notices were given to One Call and Mr Radford respectively. The Decision Notices contain the same wording as in the Warning Notices set out at [25] and [27] to [29] above, save that the additional wording "(no allegation of wrongdoing is made against OIL)" was added at the end of the text from the Warning Notices set out at [27] and [28] above.

35. On the same day, the Authority wrote to OIL enclosing copies of the Decision Notices. In its letter, the Authority stated that it considered that OIL should be granted third party rights in accordance with s 393 FSMA in respect of the Decision Notices because, in its opinion, the reasons for the action contained in the Decision Notices relate to a matter that identifies OIL and is prejudicial to it. It went on to say that the Authority considered that, given the inclusion of the additional wording referred to at [34] above to make it clear that there is no allegation of wrongdoing against OIL "such prejudice to OIL, if any arises, from its being named in the Decision Notices is likely to be limited." The letter then referred to OIL's right to refer the "decision, in so far as it relates to the matters which identify and prejudice OIL in the Decision Notices, to the Tribunal".

36. On 11 July 2016 OIL referred the matter to the Tribunal. In his witness statement, Mr Pace stated that notwithstanding the additional wording included in the Decision Notices, there was continuing prejudice to OIL. The prejudice to OIL, in Mr Pace's view, was that, despite being an independent entity against whom no wrongdoing is alleged, it risks being tainted by association with the admitted conduct of One Call and/or Mr Radford. Despite the additional wording, there is still the risk of misunderstanding or misinformation emanating to third parties. Those third parties, Mr Pace contends, include, not just commercial entities such as reinsurers but also current or potential policyholders and the press and public. As a result, in Mr Pace's view, there is a real risk to OIL's commercial reputation by reason of the fact that the Decision Notices identify and name OIL and link it to the admitted conduct of One Call and/or Mr Radford. I accept Mr Pace's evidence as being an expression of his view of the likelihood of an ongoing risk to OIL's commercial reputation.

37. I was told that there has been one recent development. On or about 6 February 2017 the Malta Financial Services Authority published a notice on its website to the effect that it has requested Mr Radford, on regulatory grounds, to resign from all executive roles within OIL.

The Law and the jurisdiction of the Tribunal

Interpretation of section 393 FSMA

38. Section 393 FSMA, so far as relevant, provides as follows:

> "(1) If any of the reasons contained in a warning notice to which this section applies relates to a matter which—
> (a) identifies a person ("the third party") other than the person to whom the notice is given, and
> (b) in the opinion of the regulator giving the notice, is prejudicial to the third party,

a copy of the notice must be given to the third party.
(2) Subsection (1) does not require a copy to be given to the third party if the regulator giving the notice —
(a) has given him a separate warning notice in relation to the same matter; or
(b) gives him such a notice at the same time as it gives the warning notice which identifies him.
(3) The notice copied to a third party under subsection (1) must specify a reasonable period (which may not be less than 14 days) within which he may make representations to the regulator giving the notice.
(4) If any of the reasons contained in a decision notice to which this section applies relates to a matter which—
(a) identifies a person ("the third party") other than the person to whom the decision notice is given, and
(b) in the opinion of the regulator giving the notice, is prejudicial to the third party, a copy of the notice must be given to the third party.
(5) If the decision notice was preceded by a warning notice, a copy of the decision notice must (unless it has been given under subsection (4)) be given to each person to whom the warning notice was copied.
(6) Subsection (4) does not require a copy to be given to the third party if the regulator giving the notice —
(a) has given him a separate decision notice in relation to the same matter; or
(b) gives him such a notice at the same time as it gives the decision notice which identifies him.
(7) Neither subsection (1) nor subsection (4) requires a copy of a notice to be given to a third party if the regulator giving the notice considers it impracticable to do so.
(8) Subsections (9) to (11) apply if the person to whom a decision notice is given has a right to refer the matter to the Tribunal.
(9) A person to whom a copy of the notice is given under this section may refer to the Tribunal—
(a) the decision in question, so far as it is based on a reason of the kind mentioned in subsection (4); or
(b) any opinion expressed by the regulator giving the notice in relation to him.
(10) The copy must be accompanied by an indication of the third party's right to make a reference under subsection (9) and of the procedure on such a reference.
(11) A person who alleges that a copy of the notice should have been given to him, but was not, may refer to the Tribunal the alleged failure and—
(a) the decision in question, so far as it is based on a reason of the kind mentioned in subsection (4); or
(b) any opinion expressed by the regulator giving the notice in relation to him.

…."

39. The wording of some of the provisions of s 393 is somewhat opaque and interpreting them has been problematic in a number of cases previously before the Tribunal. That is also the position in the current case.

40. In the recent judgment of the Supreme Court in *Financial Conduct Authority v Macris* [2017] UK SC 19, which dealt with the interpretation of s 393(1)(a), Lord Neuberger observed at [19]:

> "Section 393 (1) (a) is a good example of Parliament enacting a provision whose general purpose is clear, but, because there can be more than one reasonable view as to the provision's scope, the resolution of that issue has effectively been assigned to the courts. I do not say this by way of complaint. In some cases, Parliament may consider that it is better for the legislature to lay down a rule in fairly unspecific terms in a statute, and then leave it to the courts to determine the precise extent and reach of the rule by reference to specific sets of facts. This appears to be such a case."

41. In my view this passage is equally apposite to the remaining provisions of s 393 and this decision should be regarded as one made by reference to the specific facts of this case.

42. As this Tribunal held in the first instance decision in *Macris* [2014] All ER (D) 196 (Apr) at [35], the true purpose of s 393 is to give the parties whom the Authority is proposing to criticise the opportunity to answer those criticisms before they are published. The Tribunal relied on the following passage at [38] of Sir Philip Watts v FSA (FIN/2004/0024):

> "Because the warning and decision notice procedure created by FSMA is capable of prejudicing parties other than the direct recipients of the notices, the purpose of sections 393 FSMA is to provide certain rights to third parties as defined in the section. As was pointed out to us, there are parallels in common law procedures, arising for example in the case of Department of Trade and Industry investigations under the Companies Acts. *In re Pergamon Press Ltd* [1971] 1 Ch 388, it was held that DTI inspectors are under a duty to act fairly, and to give anyone whom they propose to condemn or criticise in their report a fair opportunity to answer what is alleged against them. Whatever the precise effect is s.393(4) may be, sections 393-4 are plainly intended to deal with the same kind of situation."

43. Consequently, Mr Stanley submits that the purpose of s 393 is to ensure the fair treatment of the reputation of third parties by the Authority so that if a notice does not express any opinion about the wrongdoing of a third party, then there is no jurisdiction for the Tribunal to exercise. He submits that, on the assumption that the statements in the Decision Notices of which OIL complains in this case are correct, then there is no allegation of wrongdoing on the part of OIL. In fact, the allegation is that OIL has not engaged in any wrongdoing so no opinion is expressed in the Decision Notices which falls within the scope of the provision. I return to these submissions later.

44. This is the first time that the Tribunal has had to interpret the provisions that relate to the substance of a reference, all previous cases before it having dealt with the preliminary question as to whether the person seeking to make a third party reference has been identified in the notice.

45. In this case, it has been common ground from the time that the Warning Notices were given to One Call and Mr Radford that OIL has been identified in both the Warning Notices and the Decision Notices. That must follow from the fact that it is named in all the relevant notices. The Authority has also taken the view that one or more of the "reasons contained" in the notices are "prejudicial" to OIL.

46. Accordingly, in compliance with s 393 (1) and (3) OIL was given copies of the Warning Notices and the right to make representations on them.

47. Mr Stanley submits that because s 393(9) gives a person to whom a copy of a decision notice is given pursuant to the requirements of either s 393 (4) or s 394 (5) the right to refer the matter to the Tribunal, the right of reference arises even in circumstances where the decision notice concerned does not contain any material which is prejudicial to the third party concerned. He therefore submits that the provisions contemplate that there could be a reference in circumstances where there is in effect nothing for the Tribunal to determine on the reference in terms of making any directions for the revision of the terms of the notice.

48. It is clear that s 393 (4) and (5) deal with a number of different situations.

49. The obligation to give a copy of a decision notice to a third party pursuant to Section 393 (4) could arise in circumstances where the warning notice was previously copied to the third party pursuant to s 393 (1) because it contained material which in the opinion of the Authority was prejudicial to the third party and the decision notice following the representations made still contained prejudicial material. It seems that the obligation could also arise in circumstances where the warning notice contained no prejudicial material and therefore was not copied to the third party but additional material was included in the decision notice which in the opinion of the Authority was prejudicial. In both of those cases, the fact that the Authority was of the opinion that the notice concerned identified the third party and contained prejudicial material triggers the obligation to give a copy of the decision notice to the third party and the right of reference to the Tribunal.

50. The obligation to give a copy of a decision notice to a third party pursuant to s 393 (5) appears to me, because of the inclusion of the words in parentheses in the provision, to arise only in a situation where the third party was given a copy of a warning notice pursuant to s 393 (1) and, following representations, the Authority amends the notice to the extent that in its opinion the subsequent decision notice does not contain any prejudicial material. In order to make sense of subsection (5), it is necessary to construe the provision as if the words "given pursuant to subsection (1)" were to be found in the provision after the words "warning notice".

51. It makes sense in that situation that there should be a right of reference in order that the third party can challenge the Authority's opinion to the effect that the notice does not contain prejudicial material. Therefore, Mr Stanley is right in his submission that there could be a reference of a notice that does not contain prejudicial material. That, however, in my view would normally only arise in circumstances where a copy of the notice was given to the third party pursuant to s 393 (5) and whether or not the

notice did contain prejudicial material in effect would only be established after the reference has been heard.

52. In this case, having considered OIL's representations, the Authority considered that the amended Decision Notices contained one or more "reasons" prejudicial to OIL, notwithstanding the addition of the wording referred to at [34] above. That follows from the inclusion of the wording referred to at [35] above in the Decision Notices. In those circumstances, it appears the starting point for the Tribunal is that the Decision Notice does contain prejudicial material. It seems to me that it would be irrational on the part of the Authority to include in the Decision Notice, as it has done in this case, a statement to the effect that the notice does contain prejudicial material and then plead to the contrary in its Statement of Case. If the Authority was of the opinion that the Decision Notice, as amended from the terms of the Warning Notice did not contain prejudicial material, then the correct course would have been not to have included the wording referred to at [34] above.

53. Mr Stanley submitted, correctly in my view, that the third party has a narrower right of reference in respect of the notice than the subject of the notice. It seems to me that the effect of s 393 (8) is that the third party's right to make a reference applies only if the subject of the decision notice has a right to refer "the matter" to the Tribunal. In this context, "the matter" means the underlying subject matter of the notice, and not just the decision itself. However, the third party's right to make a reference applies even, as in this case, where the subject of the notice himself does not make a reference.

54. Section 393 (9) limits the matters over which the Tribunal has jurisdiction on a third party reference made following the giving to the third party of a notice pursuant to s 393 (4) or (5).

55. Again, in agreement with Mr Stanley's submissions on this point, s 393 (9) (a) applies where the decision to impose a sanction on the subject of the notice is based upon a reason which is prejudicial to the third party. Thus, for example, if an act or omission on the part of the subject of the notice which has given rise to the decision to impose a sanction on it is based upon wrongdoing by the third party, and the third party denies that he has done anything wrong he would clearly have a right of reference under this provision.

56. In those circumstances, the matters concerning the third party are fundamental to the decision in the notice and that decision would be undermined were the Tribunal to come to the conclusion, having heard the reference, that the third party had not been guilty of any wrongdoing.

57. Section 393 (9) (b) therefore gives rise to a right of reference in respect of other matters contained in the reasons in the notice which relate to the third party, in so far as they can be said to be an "opinion" expressed by the Authority in relation to the third party.

58. As referred to at [43] above, Mr Stanley submits that an opinion expressed in a notice which makes no criticism of the third party is not an opinion which falls within the scope of s 393(9) (b). That, in his submission, is consistent with the purpose of s 393 which is to ensure fair treatment of the reputation of third parties by the Authority.

59. However, it seems to me that in a case, such as this one, where a notice has been given to a third party pursuant to s 393 (4), Mr Stanley's interpretation would create an inconsistency between the requirement of "prejudice" in s 393(4) that needs to be satisfied before it is necessary to give the notice to the third party in the first place and what is an "opinion" which is capable of being referred under s 393 (9). In my view, the two provisions must be read together so that the reasons contained in a decision notice should not be regarded as being "prejudicial" in relation to a situation that does not fall within s 393 (9) (a) unless those reasons contain an opinion in relation to the third party which is prejudicial to him. Therefore, if a copy of a notice is served by the Authority on the third party pursuant to s 393 (4), because it has taken the view that it does contain prejudicial material, it should be taken, in a case where the relevant jurisdiction is that provided for in s 393 (9)(b), that the notice does contain an opinion relating to the third party which is prejudicial to it.

60. In that regard, in my view "opinion" as used in s 393(9) must not be given a narrow interpretation and must be regarded as including not only the opinion expressed in the relevant notice but also any statement of fact (or alleged fact) on which that opinion is based. Clearly, if the Authority expresses an opinion regarding the third party which is based upon a particular finding of fact that it makes in the decision notice and the third party disputes that finding of fact it must be able to refer the factual question as well as the opinion expressed by the Authority in relation to it. Similarly, if the notice contains what purports to be a finding of fact with no opinion being expressed on it, but that statement in itself could be said to be critical of the behaviour of the third party, then that statement must be capable in itself of being referred. Thus, in this case, had the Authority not amended the original wording in the Warning Notices, it seems to me that OIL would have the right to make a reference based on the statement of alleged fact in the Decision Notices that it had been indirectly capitalised through the receipt of sums from One Call's client bank account, notwithstanding the lack of any expression on the part of the Authority of any opinion as to whether OIL had been guilty of any wrongdoing.

Powers of the Tribunal in determining a reference made under s 393 (9) FSMA

61. If the reference does relate to matters which can be referred pursuant to s 393 (9), on determining the reference, the question arises as to the extent of the powers of the Tribunal to give directions to the Authority on determination of the reference. There is a dispute in this case between the parties as to the extent of the powers of the Tribunal to direct a rewriting of the notice on determining a reference. In that context, it is necessary to consider the relevant provisions of s 133 FSMA which set out the powers of the Tribunal in determining a reference, including a reference made under s 393.

62. Section 133(4) to (7) FSMA now provide as follows:

> "(4) The Tribunal may consider any evidence relating to the subject-matter of the reference,… whether or not it was available to the decision-maker at the material time.
>
> (5) In the case of a disciplinary reference or a reference under section 393(11), the Tribunal-
>
> (a) must determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter, and
>
> (b) on determining the reference, must remit the matter to the decision-maker with such directions (if any) as the Tribunal consider appropriate for giving effect to its determination.
>
> (6) In any other case, the Tribunal must determine the reference…. by either-
>
> (a) dismissing it; or
>
> (b) remitting the matter to the decision-maker with a direction to reconsider and reach a decision in accordance with the findings of the Tribunal.
>
> (6A) The findings mentioned in subsection (6) (b) are limiting to findings as to-
>
> (a) issues of fact or law;
>
> (b) the matters to be, or not to be, taken into account in making the decision; and
>
> (c) the procedural or other steps to be taken in connection with the making of the decision.
>
> (7) The decision-maker must act in accordance with the determination of, and any direction given by, the Tribunal."

63. As is apparent from the wording of s 133(5), where a reference was made under s 393 (11), that is in circumstances where the alleged third party makes a reference on the grounds that the decision notice in question does identify him and does contain material prejudicial to him, notwithstanding the fact that the Authority has not taken the same view and has therefore not given him a copy of the relevant statutory notice, then the Tribunal has a full merits jurisdiction, as it does with disciplinary references (broadly speaking those which impose a financial penalty or reprimand). In determining such a reference, if the Tribunal were to find that, for example, the notice does contain opinions relating to the third party which are prejudicial to him, then it appears to me that there are no restrictions in s133(5) as to what may be contained in the Tribunal's directions, other than the fact that they must be consistent with what the Authority has power to do and what is "appropriate action" in all the circumstances. In my view, there is nothing in s 133 (5) which would prevent a Tribunal directing the Authority to rewrite a notice so as to remove a prejudicial opinion relating to the third party or to amend it.

64. However, it does not appear to me that the Tribunal is bound to direct a rewriting of the notice, or that it should be amended at all, even if it finds that it contains opinions which are prejudicial to the third party. It may take the view that, although there is some prejudice to the third party, the regulatory message that the Authority is intending to convey to its wider audience, and in particular the rest of the regulated community, outweighs this prejudice and therefore on balance it should make no directions as to the amendment of the notice. In that situation the Tribunal may in its decision make findings as to the relevant facts and matters which were relied on in the notice and, in particular, the extent to which the third party has in the Tribunal's view been guilty of any wrongdoing, but conclude that its findings do not merit any changes to the terms of the notice.

65. On the face of it, a reference made pursuant to s 393 (9) is not a disciplinary reference and therefore, by default, the powers of the Tribunal in determining that reference are limited to those provided for in s 133(6). It is difficult, however, at first sight to see the logic for this different treatment. It is not immediately apparent why Parliament was content to entrust the Tribunal with exercising discretion as to whether it was appropriate to amend a notice, having carried out the balancing exercise referred to at [64] above, in a case where the third party was given a copy of the notice in accordance with s 393 (9), but not where there was a failure to do so.

66. It may be that the answer to this is that in a situation where s 393 (9) applies, the Authority will have already carried out that balancing exercise by concluding that notwithstanding the fact that the decision contains material which is in its opinion prejudicial to the third party, it considers that including the prejudicial material is necessary in the context of the regulatory message which the notice seeks to convey. In those circumstances, the intention may have been that the Tribunal's powers should be limited to making findings of fact and law and then remitting the matter to the Authority for it to determine what is the appropriate action to take in the light of those findings.

67. In his submissions, Mr Stanley expressed the view that there appeared to be a lacuna because it was not explicit whether a reference under s 393 (9) is "disciplinary" or "supervisory." He therefore submitted that the question depended on the power being exercised in the notice itself, so that if the decision in the notice would give rise to a disciplinary reference on the part of the subject of the notice (as it did in this case in relation to the One Call Decision Notice which sought to impose a financial penalty) then the third party reference should also be treated as if it were a disciplinary reference, giving the Tribunal power to make directions pursuant to s 133 (5). In a case where the notice would give rise to a non-disciplinary reference on the part of the subject of the notice, as would have been the situation in this case had Mr Radford referred the decision to make him subject to a prohibition order pursuant to s 56 FSMA, Mr Stanley submitted that the position was that the third party reference should also be treated as a non-disciplinary reference with the result that the Tribunal's powers were limited as provided for in section 133 (6).

68. However, aside from the fact that to arrive at Mr Stanley's interpretation it is necessary to do considerable violence to the wording of s 133 (5), in my view Mr

Stanley's position lacks logic as well. If, for example, a decision notice seeks to prohibit an individual performing functions for an authorised person on the basis that he has acted in accordance with improper instructions given by a third party, and the third party contends that it did not give improper instructions, why should the third party's reference be treated as a non-disciplinary reference when, if the situation was that the Authority decided to impose a financial penalty on the individual instead of making a prohibition order, it would be treated as a disciplinary reference? As far as the third party is concerned, there is no difference in the two situations; in both cases he is seeking the Tribunal to assess the evidence and determine whether the finding of wrongdoing against him is correct or not. Therefore, why should in one case the Tribunal have the power to direct the Authority to amend the notice if the allegations turn out to be incorrect, but in the other case it only has the power to ask the Authority to reconsider its decision?

69. In her skeleton argument, Ms Mulcahy appeared to accept that the Tribunal's powers were limited to those provided for in s 133 (6).

70. In the light of Mr Stanley's position, the matter was not fully argued before me. Because of my conclusions in this decision for reasons which will become apparent later, the point is not material for this decision, but it may be relevant in relation to the determination of the substantive reference. I will therefore not come to a concluded decision on this point pending further argument on the substantive reference.

71. I can therefore conclude on the jurisdiction issue that where a copy of a decision notice is given to a third party pursuant to s 393 (4) and the third party makes a reference pursuant to s 393 (9), there are three jurisdictional questions for the Tribunal as follows:

(1) whether what has been referred is the decision contained in the Decision Notice, that is the decision to impose a financial penalty or take other regulatory action against the subject of the notice, on the basis that such decision is based on a reason for the action contained in the notice which is prejudicial to the third party: see s 393 (9) (a);

(2) whether additionally or alternatively to the question referred to at (1) above there is an "opinion" expressed by the Authority in the notice in relation to the third party which is prejudicial to him; and

(3) if either or both questions (1) and (2) above is answered in the positive, whether the Tribunal has the jurisdiction to take the action requested by the third party in its reference notice.

Privacy

72. Rule 14 of the Rules so far as relevant 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)…

(1) The Upper Tribunal may give a direction prohibiting the disclosure of a document or information to a person if:

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

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

73. OIL seeks a direction under Rule 14 to prohibit publication of the Decision Notice pursuant to s 391 FSMA pending determination of the Reference.

74. Paragraph 3(3) of Schedule 3 to the Rules 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."

75. OIL seeks a direction under this rule that the register shall not contain particulars of the Reference.

76. It was common ground that the principles established in *Arch v Financial Conduct Authority (*2012) FS/2012/20 and *Angela Burns v Financial Conduct Authority* (2012) FS/2012/24 were applicable to the application for the Privacy Directions. These can be summarised as follows:

(1) The open justice principle is to be applied such that the starting point is a presumption in favour of publication in accordance with the strong presumption in favour of open justice generally;

(2) The onus is on the applicant to demonstrate a real need for privacy by showing unfairness;

(3) In order to tip the scales heavily weighted in favour of publication the applicant must produce cogent evidence of how unfairness may arise and how it could suffer a disproportionate level of damage if publication were not prohibited; and

(4) a ritualistic assertion of unfairness is unlikely to be sufficient. The embarrassment to an applicant that could result from publicity, and that it might draw the applicant's clients and others to ask questions which the applicant would rather not answer does not amount to unfairness.

77. It is clear that if publication would result in the destruction of a firm's business then it would be unfair to publish a decision notice. The Tribunal said this at [89] to [90] of *Angela Burns*:

"89. I accept that cogent evidence of destruction of or severe damage to a person's livelihood is capable of amounting to disproportionate damage such that it would be unfair not to prohibit publication of a Decision Notice. Although I should be careful not to approve specifically the criteria that the Authority sets out in its recent consultation paper on publishing information about Warning Notices at a time when that paper is still open for comment, it appears to me that by including paragraph 2.17 of that paper the Authority accepts that a disproportionate loss of income or livelihood would mean that it would be unfair to publish. In my view damage of that kind is of a different and more serious kind than damage of reputation alone.

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

78. The discretionary nature of the Tribunal's jurisdiction in relation to privacy applications is expressly recognised in *Arch* and *Burns*. The exercise of powers under the Rules is subject to Rule 2 of the Rules, 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.

79. In this case, OIL contends that in circumstances where the remedy it seeks is the removal of its name from the Decision Notices, it would defeat the purpose of its reference if privacy were not granted and that it would suffer a disproportionate level of damage if publication were not prohibited, relying on Mr Pace's evidence.

Issues to be determined

80. In essence there are three issues that fall to be determined by this decision:

(1) Whether the Tribunal has jurisdiction to grant the relief that OIL seeks in its reference. I will approach that issue by dealing with the three jurisdictional questions set out at [71] above;

(2) If it is determined that the Tribunal has jurisdiction, whether it is appropriate to exercise it on the assumption that the statements of which OIL complains are factually correct; and

(3) Whether it is appropriate to make the Privacy Directions pending determination of the substantive reference.

81. In relation to privacy, Mr Stanley accepted that if the Tribunal decided that the appropriate course was to remove the reference to OIL in the Decision Notices

regardless of the facts then it was appropriate that the matter should remain private; in those circumstances the entire reference would have been determined in private. Consequently, the appropriate course is to determine the first two issues identified above before turning to the application for the Privacy Directions.

Discussion

Jurisdiction

82. In the light of the analysis set out at [48] to [60] above, I can deal with this issue briefly.

83. I turn first to the question as to whether OIL has referred the decision contained in the Decision Notice, pursuant to s 393 (9) (a).

84. Ms Mulcahy submits that as the only reasons mentioned in s 393 (4) are reasons relating to prejudicial identification, it follows that if there is such an identification then the third party is permitted to refer the decision concerned to the Tribunal.

85. I reject that submission because it does not take account of the additional hurdle that the third party must surmount in order to found a reference, namely the restrictions on what may be referred contained in s 393 (9). Applying the analysis of s 393 (9) (a) set out at [55] and [56] above, in this case it is clear that none of the reasons for the decision to take action against One Call or Mr Radford in the respective Decision Notices are based upon allegations of wrongdoing against OIL or any other matter which is prejudicial to OIL. In those circumstances, OIL has no right to refer the decision to take action against either One Call or Mr Radford and it does not appear to me that it has sought to do so in its reference notice.

86. I turn next to the question as to whether the requirements of s 393 (9) (b) have been met in this case.

87. In its Statement of Case the Authority contends that the Tribunal has no jurisdiction to hear the Reference on the basis that the statements referred to at [34] above are not "opinions" expressed "in relation to" OIL with a consequence that they are not opinions that OIL is entitled to refer pursuant to s 393(9). The Authority also contends that the opinions do not relate to anything done allegedly done by OIL and/or are not prejudicial to OIL.

88. This pleading creates the inconsistency between the provisions of s 393 (4) and s 393 (9) referred to at [59] above.

89. It follows from the analysis set out at [59] above that, if the Authority was not of the view that the Decision Notices contained opinions relating to anything done or allegedly done by OIL they should not have concluded that the notices contained reasons which were prejudicial to OIL. In those circumstances, copies of the Decision Notices would have been given to OIL pursuant to s 393(5) and if OIL considered that the Decision Notices did contain opinions which were prejudicial to it, it would refer the matter pursuant to s 393 (9). In those circumstances, the role of the Tribunal

would be to consider whether the Decision Notices contained opinions expressed by the Authority in relation to OIL, and if so whether they were prejudicial. The Tribunal would then consider the appropriate course to take on determining those issues in accordance with the powers contained in s 133 FSMA, as discussed below.

90. Therefore, in the particular circumstances of this case, I must proceed on the basis that the starting point for the Tribunal on the Reference is that it has jurisdiction to consider what is the appropriate action to take on the basis that the reasons in the Decision Notices contain opinions which in the opinion of the Authority are prejudicial to OIL.

91. Thus, in the circumstances of the current reference, the relevant statement of fact contained in the Decision Notices is that OIL was inadvertently capitalised through the receipt of payments from One Call's client account. The relevant opinion is that no allegation of wrongdoing is made against OIL. Both the facts and the opinions contained in the notice must be read together so as to determine whether the notice contains material prejudicial to the third party.

92. It is therefore to be assumed that the Authority persuaded itself that the reasons in the notice were prejudicial to OIL notwithstanding the statement that the Authority made no allegation of wrongdoing against OIL were prejudicial to it because the publication of the statements concerned could affect OIL's reputation, possibly to the extent referred to by Mr Pace in his witness statement, as set out at [36] above.

93. In my view, when ss 393 (4) and (9) are read together and not construed narrowly, as the analysis set out at [59] and [60] concludes, prejudice of that order is capable of founding a reference pursuant to s 393 (9) (b), even if the statements concerned are factually correct. Consequently, and in view of the statement made by the Authority in the Decision Notices that the notices do contain material prejudicial to OIL, the Tribunal should proceed to consider the reference on that basis. Indeed, in its letter of 13 June 2016, referred to at [35] above, the Authority implicitly accepted that there was prejudice through its statement that any prejudice was likely to be limited.

94. I turn next to the question as to whether the Tribunal has the jurisdiction to take the action requested by OIL in its reference notice, namely either to exclude the mention of OIL by name or any characteristics by which it may be identified or to remove its name, in circumstances where it is assumed that the relevant statements are factually correct.

95. Mr Stanley submitted that the Tribunal's jurisdiction is not as wide as OIL suggests because s 393 does not envisage that the Tribunal will rewrite decision notices; it permits the Tribunal to consider opinions relating to a third party and to correct them as to their substance or because of some procedural error. Mr Stanley submits that if the opinion that is expressed is legally and factually correct and reached by a proper procedure there is nothing for the Tribunal to do.

96. The difficulty with these submissions is that they are dependent upon Mr Stanley's earlier submissions that the Decision Notices do not contain any material which is prejudicial to OIL. As I previously said, if the Authority was of that view they should not have given OIL copies of the notices pursuant to s 393 (4) and I have concluded that statements in a notice can be prejudicial to a third party even if they are factually correct.

97. I have also concluded, at [63] above, that there is nothing in s 133(5) which would prevent a Tribunal directing the Authority to rewrite a notice so as to remove a prejudicial opinion relating to the third party or to amend it and again, I see nothing in the section that suggests that such a power is not capable of being exercised even where the statements concerned are factually correct. The Tribunal will have to consider whether to exercise its discretion to give directions to the Authority, taking into account all the relevant circumstances.

98. If the relevant power is that to be found in s 133 (6), then if the Tribunal decided not to dismiss the reference, and having made the relevant findings of fact and law it would have the power to remit the matter to the Authority with a direction for the Authority to reconsider its decision.

99. I therefore conclude that the Tribunal has the jurisdiction to consider OIL's reference in this case.

Exercise of the jurisdiction in this case

100. I shall consider this question first on the basis that the Tribunal's powers are those set out in s 133 (5) FSMA.

101. Put starkly, the choice before the Tribunal is as follows. The Decision Notices contain opinions to the effect that OIL was the innocent recipient of client money from One Call's client money account. The Tribunal has to consider whether it is appropriate to direct that those statements should either be deleted or modified in circumstances where the Authority contends that any prejudice that OIL may suffer as a result of those statements is outweighed by the Authority's opinion that the statements concerned are relevant to its message as to the seriousness of what has happened because of the fact that OIL having received these monies may have given rise to a possible competitive advantage.

102. Ms Mulcahy says that OIL's submissions on this issue are rooted in the statutory requirement on the Authority to act proportionately, and in particular the requirements of s 3B (1) (b) FSMA that the Authority have regard to the principle that a burden or restriction which is imposed on a person should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden, a principle which is reflected in the Authority's Enforcement Guide; that states that the Authority will seek to exercise its enforcement powers in a manner that is proportionate.

103. Ms Mulcahy submits no evidence has been adduced by the Authority as to what benefits are gained by naming and identifying OIL and how those (unstated) benefits

are proportionate given the prejudice to OIL which is evidenced by Mr Pace's witness statement and acknowledged by the Authority, by dint of OIL being identified as a third party.

104. As far as the evidence is concerned, I am not satisfied that there would be material prejudice to OIL on the basis of what Mr Pace says in his witness statement. The statements in the Decision Notices are drafted clearly and the unequivocal impression that any reasonable person reading the notices will come away with from having read the statements is that OIL has inadvertently and innocently been capitalised as a result of its receipt of the client monies. It is also clear from the Decision Notices that by the date of their issue all the client money concerned had been repaid in full. The risk of being tainted by association cannot of course be excluded, but it is only a risk and it is one that cannot be quantified. I cannot accept that there is a risk of misunderstanding on the part of reasonable persons reading the Decision Notices as to what has happened and therefore cannot accept that the statements in themselves would give rise to a real risk to OIL's commercial reputation. As Mr Stanley submitted, that risk is more likely to arise because of the association with Mr Radford and the actions taken against him by both the Authority and, more recently, the Maltese authorities.

105. In my view, as Mr Stanley submitted, the information as to how the client money was used is highly relevant to the conclusions that the Decision Notices reach. The fact that it might have given rise to a competitive advantage is an important factor to note in order to assess the seriousness of the breaches concerned. It seems to me that that is an appropriate regulatory message for the Authority to seek to make through the medium of the Decision Notices.

106. In those circumstances, in my view the balancing exercise comes clearly out in favour of leaving the Decision Notices as drafted, on the basis that the facts as stated are correct. The Authority sought to address the concerns raised by OIL in its representations on the Warning Notices by making it clear that there was no allegation of wrongdoing against OIL. In my view that was an appropriate and proportionate response to the representations and therefore there is no basis for arguing that the inclusion of the statements is, in all the circumstances, disproportionate.

107. In any event, any of the solutions proposed by OIL are likely to give rise to difficulties.

108. There is no suggestion that the Authority should make no statement at all to the effect that a third party had been capitalised through receipt of client money. In order that there should be no language by which OIL could be identified, it would be necessary simply to refer to the fact that another entity had been so capitalised. That in itself may set hares running, in particular it might invite unfair speculation as to whether any of the other underwriters with whom One Call dealt may have obtained a competitive advantage.

109. If the statements were amended to read that an (unnamed) connected company of One Call had been capitalised, then on the basis of Ms West's evidence, there

would be little difficulty in readers of the Decision Notices working out that the connected party was in fact OIL. Such an amendment would therefore serve no useful purpose.

110. I therefore conclude that on the assumption that the relevant power is that contained in s 133 (5) FSMA, it would not be appropriate to exercise those powers so as to direct the Authority to amend the Decision Notices in the circumstances of this case, on the assumption that the relevant facts are correct. Had the relevant powers been those contained in s 133 (6) FSMA I would have directed that the Reference be dismissed.

Privacy Directions

111. Ms Mulcahy submits that it would defeat the purpose of the Reference if privacy were not granted until the Reference has been determined. On the basis that the substantive hearing of the Reference could be brought on very quickly, the Tribunal was only being asked to "hold the ring" for a short period of time. As Mr Pace's evidence demonstrated, there would be a disproportionate level of damage if publication were not prohibited. Ms Mulcahy also submits that the scales are not weighted as heavily in favour of publication in cases where the applicant is not a person who has been accused of any wrongdoing.

112. I reject these submissions. I see no reason why the principle of open justice and the heavy weighting in favour of publication should be modified simply because there is no allegation of wrongdoing against the applicant. There is nothing in the authorities to suggest that that should be the case.

113. As I have found, Mr Pace's evidence does not demonstrate that there would be disproportionate damage to OIL's reputation if the Decision Notices were published. Mr Pace contends that publication could lead to damage to OIL's reputation. In my view, all the evidence demonstrates is that there may be some embarrassment to OIL and it may have to explain the situation in more detail to those who may be concerned, such as its banks, but the authorities demonstrate that embarrassment is not sufficient to found a claim for privacy. In short, there is no cogent and compelling evidence that OIL will suffer disproportionate damage if the Decision Notices are published.

114. OIL will have the protection of the right to have the statements of fact in the Decision Notices tested in this Tribunal which will in due course deliver a decision in public which, if the statements turn out to be incorrect and the Decision Notices are modified as a result, will be sufficient to dispel any lingering suggestion of damage to OIL's commercial reputation. In my view, the fact that publication may only be delayed for a relatively short period of time should not be given any significant weight in circumstances where by virtue of the statutory scheme the scales are weighted heavily in favour of publication.

115. I therefore dismiss the application for the Privacy Directions. However, in response to Ms Mulcahy's request that I should do so in the event that I dismissed the application for the Privacy Directions I make the following directions:

(1) In order that OIL may prepare the ground for publication and in order to minimise the impact of publication, publication of the Decision Notices and entry of the particulars of the reference on the Register shall take place not earlier than 21 days after the date of release of this decision;

(2) The Authority shall take adequate steps when publicising the Decision Notices to ensure that it is clear that the decisions are provisional (so far as they refer to OIL) in the light of the challenge being made in this Tribunal by OIL as third party. In particular, any press release issued by the Authority should state prominently at its beginning that OIL has made a reference to the Tribunal as third party in relation to certain statements in the Decision Notices where each party will present their case and the Tribunal will then determine the appropriate action to take, which may or may not result in amendments to the Decision Notices; and

(3) In referring to the findings made in the Decision Notices, rather than give any suggestion of finality they should be prefaced with a statement to the effect that, so far as they refer to OIL, they reflect the Authority's belief as to what occurred.

116. The dismissal of the application for the Privacy Directions is therefore conditional upon compliance with these directions. Each party has liberty to apply for any amendment to those directions.

Further Directions

117. In the light of the conclusions in this decision, the parties are invited to submit draft directions for the Tribunal's approval leading to the hearing of the substantive reference.

JUDGE TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE

RELEASE DATE: 26 May 2017