



Reference number: FS/2020/003

FINANCIAL SERVICES - Decision notice - publication - whether Upper Tribunal should prohibit publication on grounds that there was a significant likelihood of prejudice to the Applicant if publication took place - FSMA 2000 s 391- Trib Proc (UT) Rules 2008 14(1) and Sch 3 para 3(3)

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

CONOR FOLEY

Applicant

- and -

THE FINANCIAL CONDUCT AUTHORITY

**The
Authority**

TRIBUNAL: Judge Timothy Herrington

Hearing conducted in private via Skype for Business on 22 May 2020

Tim Aron, Counsel, instructed by Herbert Smith Freehills LLP, Solicitors, for the Applicant

Martin Watts, Counsel, instructed by the Financial Conduct Authority, for the Authority

DECISION

Introduction

5 1. On 2 March 2020 the Applicant, (“Mr Foley”) made a reference to the Upper Tribunal of a Decision Notice issued by the Authority on 14 January 2020 (the “Decision Notice”).

2. Mr Foley has applied for a direction pursuant to paragraph 3 (3) of Schedule 3 to the Tribunal Procedure (Upper Tribunal) Rules 2008 (the “Rules”) that the register of references maintained by the Upper Tribunal (the “Register”) contain no particulars of his reference. Mr Foley has also applied for a direction pursuant to Rule 14 (1) of the Rules to prohibit publication by the Authority of the Decision Notice and any other information relating to the proceedings pending the outcome of the substantive hearing of his reference. I refer in this decision to these applications together as the “Privacy Applications”.

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3. Mr Foley is the former Chief Executive Officer (“CEO”) of WorldSpreads Limited (“WSL”), a financial spread-betting company, and WorldSpreads Group Ltd (“WSG”), WSL’s holding company, which was quoted on the Alternative Investment Market (“AIM”). Mr Foley held significant influence functions (CF 1, CF 3) and was the largest shareholder of WSG, owning approximately 20% of the shares in the company.

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4. WSG floated on AIM in August 2007. In the Decision Notice the Authority decided that Mr Foley committed market abuse through his involvement in the making of materially misleading statements to the market in formal documentation WSG prepared for the purpose of the AIM flotation. The Authority also decided in the Decision Notice that Mr Foley effected transactions between 2010 and 2012 which gave a false or misleading impression to the market as to the demand for WSG shares. The Authority decided to impose a financial penalty of £658,900 on Mr Foley pursuant to s 123 (1) of the Financial Services and Markets Act 2000 (“FSMA”). In addition, because the Authority had characterised Mr Foley’s behaviour as being dishonest, it decided to make an order pursuant to s 56 FSMA prohibiting Mr Foley from performing any function in relation to any regulated activities carried on by an authorised or exempt person, or exempt professional firm.

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5. Mr Foley denies that he has committed market abuse as found by the Authority in the Decision Notice and seeks a finding by the Tribunal to that effect through his reference.

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Issues to be determined

6. Mr Foley contends that the Privacy Applications should be granted for the following reasons:

(1) He is now pursuing a career in academia, combining studying for a PhD at Trinity College Dublin with employment as a part-time lecturer without security of tenure and hoping to secure a faculty position at Trinity College on completion of his PhD.

5 (2) Publication of the Decision Notice and the particulars of his reference would be unfair to him as he is certain that Trinity College would not renew his teaching role. Given the serious nature of the allegations of market abuse, it is very likely this would have a detrimental impact on his future prospects in academia, in the medium to long term.

10 (3) Termination of his employment would result in severe financial hardship because his emoluments from Trinity College of approximately €14,000 per annum are his sole source of income and he has no significant other liquid assets.

15 (4) Termination of his employment would also mean that he would be unable to complete his PhD as a loss of his employment income would lead him to be unable to afford his academic fees. Alternative employment would be very difficult because of the consequences of the Covid 19 pandemic.

20 (5) It would be an obvious and natural step for Trinity College not to renew his teaching role in light of the allegations, because the standing and reputation of Trinity College and the Business School to which Mr Foley is attached, are jealously guarded. It is inconceivable that a Business School would put itself in a position of employing a tutor who had regulatory findings of the kind made against him.

25 (6) A significant period of time has elapsed since the alleged wrongful conduct took place, he no longer works in a regulated industry and has no intention to do so in the future. This has been exacerbated by the length of time that the Authority has taken to investigate and make a decision in respect of Mr Foley. Consequently, there would be no potential threat to consumers if the Notice were not published.

30 (7) The Authority's single stated reason for publication is the absence of evidence of unfairness to Mr Foley in case of publication and it follows that the Authority has in effect fallen back upon the open justice presumption, claiming an absence of evidence that publication will cause unfairness.

35 (8) In summary, publication of the DN at this stage would be unfair and disproportionate given the obvious and immediate damage it would do to Mr Foley's livelihood and job prospects in academia, in circumstances where Mr Foley has not worked in financial services since 2012 and has no intention to return to it, and where the alleged misconduct (which is strongly denied and is the subject of the reference to the Tribunal) took place in 2007 and 2010 to
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7. In response the Authority contends:

(1) Whilst accepting that the substance of the allegations against Mr Foley occurred some years ago, this does not mean that it would be unfair to Mr Foley

to publish the Decision Notice, or indeed, mean that it is not in the public interest to do so. The strong presumption in favour of open justice, based on such principles as the transparency of decision-making, is not diminished by the fact that an investigation has taken several years to progress.

5 (2) It is not a relevant factor that Mr Foley is no longer employed in the regulated sector and that there is an absence of regulatory risk. The Decision Notice concerns Mr Foley’s conduct while performing his role as the CEO of a regulated firm and the presumption of open justice should apply in relation to that Decision Notice.

10 (3) The assertions made by Mr Foley in his witness statements concerning his financial circumstances are unsupported by any exhibited financial documentation despite the ease with which complete bank account statements and other accounting records could have been exhibited. Consequently, there is no evidence to support his assertion that he has debts equating to €1,183,000.

15 (4) There is no cogent evidence of real unfairness causing a disproportionate amount of damage, which would lead the arguments in favour of privacy to prevail over the public interest of open justice. This is simply a case of Mr Foley trying to protect himself from the embarrassment that would follow publication.

20 (5) The presence of some information concerning the situation in the public domain is a relevant factor weighing in favour of publication. Following press comment regarding the collapse of WSG, Mr Foley has been proactive in managing the public narrative around his role and in relation to a High Court action taken by WSG’s administrators to recover monies from him.

25 (6) The Tribunal should not take Mr Foley’s prognostications of disaster at face value. None of Mr Foley’s assertions as to the steps that Trinity College might take if the Decision Notice was published and the effects of such action upon his ability to complete his PhD and pursue an academic career are backed up by any evidence, let alone any cogent or compelling evidence.

30 (7) The evidence shows that Trinity College maintains a staff disciplinary policy which has a stated objective to ensure consistent and fair treatment for all staff and to ensure compliance with natural justice.

Relevant Law

8. The relevant principles to be applied in deciding whether to grant privacy in response to applications of this kind were most recently summarised in my decision in *Prodhan v FCA* [2018] UKUT 0414 at [20] to [26] which, so far as relevant, I set out as follows:

40 “20. I set out the relevant statutory provisions in the Annex to this decision, namely the relevant provisions of s 391 FSMA, Rule 14 of the Rules and paragraph 3 (3) of Schedule 3 to the Rules. These provisions were analysed at [16] to [28] of the decision of this Tribunal in *Arch Financial Products LLP and others v FSA* [2012] FS/2012/20 (“*Arch*”) and the effect of them can be summarised as follows:

5 (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 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

10 (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
15 publication and those that would tend against.

21. There was no dispute between the parties as to what is the proper approach of this Tribunal when carrying out the balancing exercise referred to above when considering privacy applications. That approach is now well established, and the relevant principles were summarised by this Tribunal in *PDHL Limited v The Financial Conduct Authority* [2016] UKUT 0129 (TCC) at [36] and [37] of its
20 decision as follows:

“36. 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* [2015] UKUT 0601 TCC were
25 applicable to the Privacy Applications. As correctly summarised by Mr Herberg in his skeleton argument these provide:

(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
30 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
35 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.
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37. 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*:
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"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.

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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."

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22. In addition, as Mr Pritchard submitted, the authorities demonstrate that the risk of damage to reputation is unlikely to be sufficient to justify a prohibition on publication: see for example *Eurolife Assurance Company Limited v FSA* (26 July 2002, Case 001) at [47] and *R (Todner) v Legal Aid Board* [1999] QB 966 at [8] where it was said:

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

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23. The nature of the dispute, including questions as to whether the Applicant has been treated fairly in comparison with others, or penalised too harshly, are matters to be considered by the Tribunal when it hears the substantive reference and are not matters that can bear upon the question of publication: see *Ford and others v FCA* [2015] UKUT 0220 (TCC) at [50] ("*Ford*").

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24. The fact that some information concerning the subject matter of a reference is already in the public domain is a factor which tends in favour of publication: see *Ford* at [54] and *Arch* at [53].

25. As Mr Pritchard observed, the protection afforded to an applicant who is concerned that readers of the decision notice might not understand its provisional nature when the matter has been referred to the Tribunal or the nature of the findings made by the Authority in the notice is to refer the matter to the Tribunal. This issue was dealt with by the Tribunal at [50] to [51] of *Arch* as follows:

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

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51. The protection to which the Applicants are entitled in this situation is the right to have the allegations tested in this Tribunal which will in due course deliver a decision in public which will refute unfounded allegations. In addition the Decision Notices themselves set out in detail a summary of the representations that the Applicants made to the RDC which goes some way to explaining their side of the case. No doubt the media will be interested in hearing from the Applicants why they believe the allegations are unfounded.”

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9. The relevant statutory provisions referred to in the passages set out above are contained in the Annex to this Decision.

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Evidence

10. In order to support the Privacy Applications, Mr Foley filed three short witness statements in which he described his career since he left WSG in 2012, resulting in him deciding to pursue academic studies and a career in lecturing at Trinity College Dublin. Mr Foley also set out some evidence regarding his current financial circumstances and why he considered that if the Decision Notice and other particulars of his reference were published, he would lose his position at Trinity College, be unable to find alternative employment and would thereby suffer severe financial hardship. He also provided some evidence as to the prevalence of temporary employment in the academic sector in Ireland.

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11. Mr Foley was cross-examined on his witness statements by Mr Watts. My assessment was that he genuinely believed that if the Decision Notice were published his temporary engagement with Trinity College would not be renewed. The Authority criticised Mr Foley for not providing up-to-date evidence of his financial circumstances. It would have been helpful had he done so, but I have accepted the oral evidence he gave on his financial circumstances as far as it was relevant to the issues arising in respect of the Privacy Applications. I have therefore not drawn any adverse inferences from the failure to provide any more comprehensive and up-to-date information.

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12. The Authority filed evidence in the form of a witness statement from Ms Elaine Stapleton, an Associate in the Wholesale division of the Authority's Enforcement and Market Oversight Division ("Enforcement"). Ms Stapleton's witness statement set out the results of the number of internet searches that Ms Stapleton had carried out using Google. Ms Stapleton said that the purpose of the searches was to identify materials published and currently available on the internet where Mr Foley, or others, have commented on his association with WSG and the circumstances concerning its collapse in March 2012, and relevant material relating to Trinity College Dublin. Ms Stapleton's evidence exhibited links to various articles and websites in that regard.

13. Ms Stapleton also commented on Mr Foley's evidence, as contained in his witness statements and previously provided to the Authority's decision-maker, the Regulatory Decisions Committee ("RDC"), regarding his financial circumstances.

14. Ms Stapleton's evidence was not challenged, and I have therefore accepted it. Ms Stapleton provided some detail orally as to the conduct of the Authority's investigation against Mr Foley in response to my questions.

Findings of Fact

15. From the documents I saw, and the evidence I heard, I make the following findings of fact.

16. Mr Foley resigned from his positions at WSL and WSG on 14 March 2012, just before both entities entered into formal insolvency. It was at this time that the Authority began its investigation into his activities at WSL and WSG.

17. In May 2012 Mr Foley moved to Ireland and lives with his father in a house which he (Mr Foley) owns. According to Mr Foley, this house is currently valued at €800,000 and that there is a charge over the house which secures a debt of €100,000 to his father. Mr Foley says that his debts currently amount to €1,183,000 which exceeds the total estimated value of his assets. He says that these are comprised of the amount of his mortgage, an unsecured loan of €498,000, €64,000 owed to HMRC, €12,000 in respect of a bank overdraft and €9,000 owed to his father under a short-term borrowing arrangement. Mr Foley says that he does not have to make monthly repayments on any of these debts other than his mortgage because at the present time he cannot afford their repayment. He says that he cannot sell the house as he and his father would have nowhere else to live if he sold it. He says that his other assets amount to a car valued at €2,500, a Rolex watch valued at €2,500 and €9,000 which is held in his current account. Mr Foley is unmarried and has no children or other dependents. The most up-to-date bank statements that Mr Foley has provided, covering the period from 1 May 2019 to 25 November 2019 show payments in respect of his mortgage. Mr Foley has agreed for the time being an informal arrangement whereby he pays the lender €1,460 a month when he can afford it, although the statement shows that these are not regular monthly payments. For example, there was a payment in respect of four months in June 2019, for one month in July 2019 and then for two months at the end of August 2019.

18. Following his return to Ireland, between 2012 and 2015 Mr Foley undertook some short term, freelance business development assignments in the areas of digital marketing. In 2015 he decided to pursue a career in academia. In 2016 he commenced the PhD programme at Trinity College, which is due to complete in September this year. He undertook a PhD in order to obtain access to positions in academic teaching. He also secured a position in 2017 as a tutor at the Business School, which is in effect a part-time and fixed term position that ends at the end of each teaching module unless he is invited to teach again. Mr Foley has no security of tenure under his current employment terms. He is paid €7,000 for each taught module, giving him a total income of €14,000 per annum, €6,000 which goes to pay his own PhD academic fees.

19. Mr Foley says that this is presently his sole source of income and the amount he is paid by Trinity College has reduced from the sum of €23,911 which his tax return shows he was paid in 2019, the explanation for the reduction being that he is no longer acting as a supervisor of students studying for Masters degrees. This assertion is supported by a letter from a firm which is assisting him with debt resolution matters which states that Mr Foley's income from his teaching fees is his only source of income. Mr Foley's tax returns show a declared income of €46,657 for the tax year ended 31 December 2017 and €44,506 for the tax year ended 31 December 2018.

20. The Authority does not accept at face value Mr Foley's evidence as to his current financial position and income.

21. Ms Stapleton says that throughout the regulatory investigation and the subsequent regulatory proceedings, he has not provided adequate or verifiable evidence of his financial circumstances, as determined by the Regulatory Decisions Committee which rejected his submissions of serious financial hardship.

22. I accept that Mr Foley's current financial position is precarious. His only income is his tutoring fees of €14,000 for the current academic year, which is insufficient to cover even what he has currently agreed to pay his lender in respect of his mortgage, let alone his PhD fees as well. It would appear he relies upon the goodwill of his father to make ad hoc informal loans as and when other resources are not available, although Mr Foley says that matters have now reached the point where he cannot expect that to continue. Although, as I have said, the material Mr Foley has provided is not as up-to-date as it might be, no evidence was produced that suggests that Mr Foley has any other significant assets or income or that he is overstating his liabilities.

23. In his evidence, Mr Foley drew attention to an article written by two Irish academics which drew attention to the prevalence in Irish third-tier teaching institutions of "low paid temporary employment work which comes without security, proper remuneration or benefits and renders invisible the precarious workers whose labour the University relies on to function." I accept that this evidence confirms the precarious circumstances of Mr Foley's employment at Trinity College. Regardless of whether or not his current engagement would be renewed in the light of publication of the Decision Notice, there is no job security in the current arrangements.

24. Nevertheless, Mr Foley expects that his existing contracts, under which he teaches an undergraduate module and a digital business model module on Trinity College's MSc programme, would be renewed in July 2020, as they have been for each of the past two years. Mr Foley explained that decisions as to whether to take on temporary lecturers such as himself were taken at departmental level very informally without the involvement of Trinity College's senior hierarchy and that the decision to renew his engagement would be taken in the same informal manner.

25. When Mr Foley completes his PhD later this year it is his intention to pursue a full-time career in academia, hopefully at Trinity College. He says that a faculty position at Trinity College requires the completion of a PhD.

26. Mr Foley says that he is certain that if the Decision Notice were published, Trinity College would not renew his teaching role for the academic year 2020/2021, or thereafter. He also says, given the serious nature of the allegations of market abuse contained in the Decision Notice, it is very likely that this would have a detrimental impact on his future prospects in academia, in the medium to long term. Furthermore, he says, the Decision Notice would be read and understood by academics and students at Trinity College, and the wider academic community, as a "black mark" against his reputation and character.

27. Mr Foley says that if his employment were terminated, he would suffer severe financial hardship because his teaching fees from Trinity College are his sole source of income and he has no other employment opportunities, particularly in the light of the current Covid 19 pandemic. He says he would therefore be unable to pay his PhD fees and thereby complete his PhD with the result that he would not be able to secure an academic position. Furthermore, he says that with 3 ½ years of research data complete, the quality and relevance of the data may atrophy if the PhD is temporarily abandoned.

28. Mr Foley is due to complete his PhD by the end of September this year. He still has €3,000 of the fees due for the current academic year to pay, which will need to be paid by the end of August. It would appear from his latest bank statement that he has the resources to do so. It is therefore the case that fees for the next academic year, a maximum of €6,000, would only become payable if his PhD was not accepted when first submitted. Mr Foley's evidence was that it was unlikely the University will not accept his thesis without requiring the making of either minor or major corrections and that there would also be an oral examination in the next academic year. He therefore anticipates that most, if not all of the fees payable in respect of the next academic year would in fact become payable. He did, however, accept that the University was being lenient in not insisting on prompt payment of fees in the current environment. He also accepted that his lender was being flexible as regards his mortgage payments.

29. Mr Foley says that it would be an obvious and natural step for Trinity College simply not to renew his teaching role if they knew of the allegations, because the standing and reputation of Trinity College and the Business School, are jealously guarded. He says it is inconceivable that a Business School would put itself in a

position of employing a tutor who had regulatory findings of the kind described in the Decision Notice made against him. Mr Foley confirmed that he was not aware of any precedent where a tutor had either not had his contract renewed or had been dismissed as a result of publication of allegations of a similar nature to those being made against him by the Authority. He does not believe that Trinity College would be willing to accept his side of the story as regards the allegations made at this stage in the proceedings. In his view it was not unreasonable to expect Trinity College only to reappoint people who did not have ongoing problems which were in the public domain.

30. Ms Stapleton's internet searches reveals some press comment immediately following the announcement of the insolvency of WSG. In particular, an article from Citywire dated 19 March 2012 reported fears of claims on the Financial Services Compensation Scheme following the failure of the Group, as a result of a shortfall of client money and the discovery of accounting irregularities. On the same day, in a further article Citywire reported that the administration of WSG followed the discovery of accounting irregularities which the company became aware of during the course of 16 March 2012 and that the day before the news broke Mr Foley, the firm's chief executive, had stepped down. Also, on 19 March 2012, the Authority published similar information regarding the events which had led to the administration of WSG.

31. 20 October 2014 the Irish Independent, an Irish daily newspaper, reported that a judgment been obtained against Mr Foley in the High Court in London on a claim made against him by WSL for the repayment of £309,000 paid to him by various employees of WSL. The High Court was reported as having said that Mr Foley had put forward arguments against the claim which were "totally devoid of merit or common sense" as well as being "intellectually challenging" and "wildly improbable". The court is reported as having said that Mr Foley had put forward pleas that were "frankly unreal".

32. Mr Foley put out his own media statement in January 2016 which he said in the statement was made in order to give "a more balanced and accurate perspective of newspaper articles" which had appeared about him. In essence, Mr Foley referred to the problems about the financial irregularities as having arisen in the finance function in Dublin and that the Chief Financial Officer in Dublin had admitted the fraud and the magnitude of it. Mr Foley stated that he was not himself being investigated for any matter in relation to the collapse of the company. Mr Foley also commented on the High Court judgment, stating that the basis of the judgment against him was that the amount owed to WSL, a UK company, could not be set off against monies owed to him by WSG an Irish company. Mr Foley went on to say that the reader could have been left with the impression that he received money to which he was not entitled but the opposite was the case because he was owed an even greater amount from the Irish company than he owed the UK company. He finished by stating that no action was being taken against him by the UK insolvency service for the collapse of WSL following their investigation into the matter.

33. On 4 January 2019, the Irish Times, another daily Irish newspaper, revisited the collapse of WSG whilst reporting on the fact that the winding up of the Group had

5 been completed. It reported the affair as being “one of the most egregious financial
scandals in Irish corporate history” and referred to the financial irregularities as being
caused by the finance director who had been subsequently disciplined by both the
Chartered Accountants’ professional body in Ireland and the Authority. The article
referred to the fact that Mr Foley had always claimed he knew nothing about the
financial irregularities and that Mr Foley was now involved with an executive
networking agency he founded and co-owned.

10 34. The Authority has also downloaded certain material from Trinity College’s
website. A short profile of Mr Foley appears describing his current role at the
Business School.

15 35. The Authority has also downloaded from Trinity College’s website a document
entitled “Staff Disciplinary Procedure.” The procedures appear to be in fairly standard
form, stating that an employee will be advised of the nature of the complaint against
him and be given the opportunity to state his case before a decision is made. The
procedure says that an employee will have the right to a fair and impartial
determination of the issues being investigated, taking into account the allegations or
complaints themselves, the response of the employee concerned to them, and any
representations made. The procedure states that no employee will be dismissed for a
first breach of discipline except in the case of serious misconduct when the penalty
20 may be immediate dismissal and that the employee would have the right of appeal
against any disciplinary penalty imposed.

36. Finally, the Authority has downloaded a short document entitled “About Trinity
College Dublin”, describing Trinity College as providing a liberal environment where
independence of thought is highly valued.

25 **Discussion**

30 37. Against that factual background, I can now turn to the balancing exercise and in
the light of the parties’ submissions consider whether the factors put forward by Mr
Foley outweigh the strong presumption, as established by the authorities, that the
Decision Notice should be published, and details of his reference should be put on the
Register.

35 38. As Mr Aron accepted in his submissions, in this case the key question for the
Tribunal is whether the evidence put forward by Mr Foley establishes a significant
likelihood of damage or destruction to his livelihood were the Privacy Applications
refused. If Mr Foley satisfies me on that point, then he would have suffered a
disproportionate level of damage as a result. I would then have to consider whether
the unfairness that would thereby arise from publication is so severe that it is out of
proportion to the public interest in open justice, taking into account all the other
relevant factors present in this case.

40 39. Mr Aron submits that the evidence provided by Mr Foley is cogent evidence as
to a significant likelihood of prejudice that Mr Foley is likely to suffer were the

Privacy Applications not to be granted. His submissions can be summarised as follows:

5 (1) Mr Foley has been open and transparent with the Authority about his financial situation and the evidence he has provided demonstrates that he only has liquid assets of €9,000 against current debts of €1,183,000.

(2) In the present academic year, Mr Foley's sole source of income is his teaching fees which are €14,000 out of which he funds his PhD fees. In the absence of publication, he anticipates the Business Faculty renewing his teaching role for the next academic year.

10 (3) However, Mr Foley does not enjoy rights as an employee of Trinity College and enjoys no security of tenure and it is in the gift of the Business School whether or not is offered a contract to teach in the next academic year.

(4) If the Decision Notice is published, Trinity College could, and very likely would, simply elect not to offer Mr Foley any teaching roles next year.

15 (5) This is because, Trinity College is the most prestigious university in Ireland and guards its reputation jealously. It would not tolerate employing someone who the FCA has decided committed market abuse and is dishonest.

20 (6) Although it is accepted that what Mr Foley says is uncorroborated, corroboration cannot be obtained because it would defeat the purpose of the Privacy Applications and in the circumstances, it is hard to imagine what further evidence Mr Foley could be expected to have presented.

25 (7) If the Decision Notice is published, and Mr Foley is right about how Trinity College would react to its contents, not only would this bring an end to his employment, causing serious financial hardship but it would jeopardise completion of the PhD and his prospects of obtaining alternative employment to pay his way and complete his PhD are seriously diminished in times of the Covid-19 pandemic.

30 (8) Publication of the Decision Notice would have a serious detrimental impact on Mr Foley's plans to forge a career as an academic and potentially devastating academic career, long-term.

35 (9) Whilst in time, Mr Foley may be exonerated through a favourable decision from the Tribunal on his reference, immediate publication of the essentially one-sided Decision Notice and the fact of the FCA's decision that Mr Foley engaged in dishonest market abuse, would place a considerable "black mark" against Mr Foley's name from which his reputation might not fully recover.

40 (10) If the Tribunal believes Mr Foley and judges his evidence to be cogent, it should exercise its judicial discretion in favour of non-publication. This is especially so, given the Authority does not specifically rely upon any of the factors in favour of publication.

40. In my view, Mr Foley has not provided cogent and compelling evidence of how unfairness might arise from publication and how Mr Foley would suffer a disproportionate level of damage for the following reasons.

41. Mr Watts submitted that Mr Foley's concerns about publication related solely to protecting his reputation and protecting him from embarrassment. He refers to the media statement that Mr Foley put out in 2016 in support of that submission. In my view Mr Foley's concerns go wider than that. I accept that he has a genuinely held belief that his existing arrangements with Trinity College will not be renewed if the Decision Notice is published. I view his media statement in 2016 as simply his desire to give his side of the story in relation to the collapse of WSG and the subsequent legal proceedings.

42. It is right that I should give due weight to Mr Foley's own assessment as to the likelihood of his arrangements with Trinity College not being renewed but I cannot give that assessment the very strong, almost conclusive weight for which Mr Aron contends. I must take account of the fact that Mr Foley's assessment is necessarily subjective. I must consider his assessment objectively and assess its plausibility in the light of all the evidence before me and then determine the extent to which it is likely that Trinity College will not renew the existing arrangements.

43. Mr Foley is unable to support his subjective belief by reference to any third party or other objective evidence. Mr Aron submits that Mr Foley's evidence cannot be corroborated but I do not accept that. Enquiries could have been made as to whether there had been circumstances in which persons in a similar position to Mr Foley had been the subject of published concerns about their behaviour and had not had their contracts renewed as a consequence. In any event, such objective evidence that is available leads me to conclude that there is no significant likelihood that Mr Foley's contract would not be renewed because of the publication of the Decision Notice. In that regard:

(1) The decision by Trinity College to engage or not to engage someone in Mr Foley's position is, on Mr Foley's evidence, taken at a low level informally within the Business Department. The decision as to whether or not to re-engage Mr Foley is therefore not likely to involve consideration of reputational issues as regards Trinity College as a whole or be referred higher up within the organisation that purpose.

(2) With due respect to Mr Foley, due to his low status and profile within Trinity College and the manner in which he is employed, the fact that his contract would be renewed against a background of the unresolved allegations in the Decision Notice is unlikely to have any material effect on Trinity College's reputation.

(3) That position is reinforced by the fact that Mr Foley was taken on against the background of there having been considerable public and media interest in the circumstances of him leaving WSG with various issues to be resolved and there had been considerable adverse comment arising out of the High Court action referred to above. Mr Foley accepted that these matters would have been

known at Trinity College at the time. Trinity College would also have seen Mr Foley's own media statement which sought to put his side of the story.

5 (4) Mr Foley will have the opportunity again once the Decision Notice is published to put forward his side of the story, both publicly and to Trinity College before his contract comes up for renewal.

10 (5) It would be disappointing if, having heard of Mr Foley's determination to clear his name through the Tribunal proceedings, Trinity College as a fair-minded employer would not allow the status quo to continue pending the determination of the Tribunal reference by recognising the provisional nature of the Decision Notice, assuming in the absence of publication it would otherwise have re-engaged Mr Foley. In my view it is likely that when it is explained, Trinity College would recognise that the Decision Notice is effectively
15 superseded by the Tribunal proceedings and the Tribunal has to assess all the facts and circumstances afresh and determine what is the appropriate action to take in the light of its findings. The proceedings are not an appeal against a definitive finding, and it would be expected that Trinity College, one of whose stated values is to provide a liberal environment, would recognise that position and let the legal proceedings take their course

20 (6) That position is reinforced by the fact that Trinity College's disciplinary procedure shows a commitment to fairness in dealing with employees, although I accept that the procedure does not apply to the question of whether Mr Foley's contract should be renewed.

25 44. However, assuming Mr Foley's contract is not renewed as a result of publication of the Decision Notice, which for the reasons I have set out I do not regard as having a significant likelihood of occurring, I am not satisfied that as a consequence Mr Foley's hopes of completing his PhD and thereby being able to pursue an academic career would come to an end. He currently has some resources at which he can pay the outstanding fees for the current academic year. How much he has to pay for next year is uncertain, as discussed above.

30 45. Mr Foley said in his evidence that Trinity College is being lenient as regards payment of outstanding fees in the current situation. Mr Foley's income from Trinity College is in any event insufficient to cover his mortgage, his PhD fees and his living expenses and that position has persisted for some time. Mr Foley seems to be resourceful in dealing with these challenges as and when they arise, and I see no
35 reason to suggest that he would not be able to do so again. There is no evidence that the mortgage lender would be minded to seek to repossess his house in the current climate and make Mr Foley and his father homeless. The mortgage lender appears to have been very flexible in accepting that Mr Foley will make mortgage payments as and when he has the resources to do so.

40 46. Therefore, I am not satisfied that there is cogent and compelling evidence that Mr Foley will suffer disproportionate damage if his position with Trinity College were not to be renewed in July. I am not satisfied that it is likely that such an event will arise.

47. That conclusion is sufficient to determine the Privacy Application. It is therefore not strictly necessary for me to consider the other factors which Mr Aron submitted tend to favour non-publication, namely the significant elapse of time since the alleged wrongful conduct took place, the fact that Mr Foley no longer works in the financial services industry and the length of time that the Authority has taken to conclude its investigation. I will, however, make the following brief observations.

48. I agree with Mr Watts that none of these matters are significant factors that tend in favour of non-publication and none of them diminishes the strong presumption in favour of open justice and transparency of decision-making in a case of this kind. There is a clear public interest in understanding better the circumstances surrounding the failure of WSG in 2012. I do, however, accept that it is regrettable that the Authority's investigation has taken so long to resolve.

49. **Conclusions**

50. I therefore conclude that the Privacy Applications must be dismissed. The Authority has indicated that it will ensure that any publicity given to the Decision Notice will make it clear that the decision is provisional. I therefore direct that any press release issued by the Authority in connection with the publication of the Decision Notice must state prominently at its beginning that Mr Foley has referred the matter to the Upper Tribunal where each party will present their respective cases and the Tribunal will then determine 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. In referring to the findings made in the Decision Notice, rather than give any suggestion of finality, those findings must 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.

51. In order for Mr Foley to have the opportunity of discussing the matter with Trinity College before publication, it is appropriate that there should be a period of 21 days from the date of the release of this Decision before publication of the Decision Notice and I so direct.

52. Finally, this Decision will be published on the Tribunal's website, but only after the Decision Notice itself has been published and the Authority is therefore directed to inform the Tribunal when publication has occurred.

53. I should also make reference to the fact that because of the Financial Services Lawyers Association's admirable pro bono scheme Mr Foley has had the benefit of pro bono legal advice from Mr Aron and his instructing solicitors, Herbert Smith Freehills. This has also been of considerable assistance to the Tribunal and I am grateful to Mr Aron and his instructing solicitors. The fact that Mr Foley's application has been unsuccessful is no reflection on their efforts.

40 **Disposition**

54. The Privacy Applications are dismissed.

JUDGE TIMOTHY HERRINGTON

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UPPER TRIBUNAL JUDGE

RELEASE DATE: 2 June 2020

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ANNEX

5

RELEVANT STATUTORY PROVISIONS

Section 391 Financial Services and Markets Act 2000

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(1)

(1A) A person to whom a decision notice is given or copied may not publish the notice or any details concerning it unless the regulator giving the notice has published the notice or those details.

(2)(3) ...

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

(5) ...

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(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.

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...

(11) Section 425A (meaning of “consumers”) applies for the purposes of this section.

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

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(1) The Upper Tribunal may make an Order prohibiting the disclosure or publication of:

(a) specified documents or information relating to the proceedings; or

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(a) ...

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

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

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

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

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

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