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UT (Tax & Chancery) Case Number: UT/2022/000156

Upper Tribunal
(Tax and Chancery Chamber)

By remote video hearing

FINANCIAL SERVICES – Decision Notice cancelling applicant's permission to carry out regulated activities – Decision Notice referred to Tribunal – applications to prohibit publication of the Decision Notice and for the Tribunal's Register not to contain particulars of reference – applications dismissed

Heard on 22 March 2023
Judgment given on: 20 April 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE ANNE REDSTON

Between

KINGSBRIDGE CAPITAL ADVISORS LIMITED

Applicant

and

THE FINANCIAL CONDUCT AUTHORITY

Respondent

Representation:

For the Appellant: Dr Mathias Gerhard Hink, Director of the Applicant

For the Respondent: Mr Simon Jones of Counsel, instructed by the Financial Conduct Authority

DECISION

INTRODUCTION

1. Kingsbridge Capital Advisors Limited ("KCA") is an investment adviser in the field of private equity. Dr Hink is a director of KCA, and works closely with Dr Albert Wahl, who is also a specialist in private equity investment.

2. On 14 November 2022, the Financial Conduct Authority ("the Authority") gave KCA a Decision Notice setting out the Authority's decision to cancel KCA's permission to carry on regulated activities under Part 4A of the Financial Services and Markets Act 2000 ("FSMA").

3. On 28 December 2022, KCA referred the Authority's decision to the Tribunal ("the Reference"). A hearing of the Reference will take place at a future date. As well as the Reference, KCA also made the following Privacy Applications:

(1) that publication of the Decision Notice be prohibited pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules"); and

(2) that the Register maintained by the Tribunal pursuant to paragraph 3 of Schedule 3 to the Rules not include particulars of the Reference.

4. The hearing of the Privacy Applications was in private under Rule 37(2) of the Rules, as a public hearing would have undermined the purpose of making the Applications.

5. Both parties made a single submission covering both Privacy Applications, and I also considered them both together.

6. Having taken into account all relevant factors, I refuse the Privacy Applications. In summary this was because KCA did not provide "cogent evidence" that publication would cause it to suffer "disproportionate" damage, or that it would otherwise be "unfair" to publish the Decision Notice and/or to include details of the Reference on the Register.

THE EVIDENCE

7. The evidence consisted of documents, some of which were redacted, together with oral evidence from Dr Hink.

Redactions and anonymity application

8. As explained below, KCA has a single potential investor, an individual based in the Middle East ("the Investor"). In providing documents to support the Privacy Applications, Dr Hink redacted any references to the name of the Investor, on the basis that this was "highly sensitive confidential and commercial information". Dr Hink also applied for the Investor's name to be excluded from this judgment (the "anonymity application"), saying that the Privacy Applications would be "pointless" if the name appeared.

9. The Tribunal was unaware of the Investor's name until part way through the proceedings, when it was disclosed by way of late evidence included in a text message which Dr Hink was unable to redact.

10. On behalf of the Authority, Mr Jones did not object to the redactions in the documents or to the Investor's name being excluded from this judgment. He said that the Investor was not a party to the Privacy Applications, and he agreed with Dr Hink that neither the redactions nor the anonymity application would breach the principle of open justice.

11. I considered the relevant case law, as helpfully summarised by Birss J in *Unwired Planet International v Huawei (No 2)* [2017] EWHC 3083 (Pat) at [23]-[24]. The starting point is that material should not be redacted, but privacy applications nevertheless "regularly involve redactions due to the nature of the proceedings". There are also cases where "some sensitive

information can be redacted without seriously undermining the public's understanding of the reasons". I agreed with the parties that both those principles were applicable here, and the Investor has therefore not been named in this judgment.

The documents

12. The Authority provided a bundle of documents ("the Bundle"), which included:

(1) correspondence between the parties, and between the parties and the Tribunal, including the Decision Notice and the Reference;

(2) two Asset Management Agreements dated 31 March 2019 between Dr Wahl and the Investor;

(3) an engagement letter between KCA and Macfarlanes LLP ("Macfarlanes") dated 31 January 2020;

(4) a draft "structure paper" prepared by Macfarlanes which had been provided to KCA before 31 December 2020. This was marked "privileged", but Dr Hink confirmed at the inception of the proceedings that privilege had been waived;

(5) an invoice from Macfarlanes to KCA dated 22 February 2021;

(6) certificates of incorporation for two LLPs, KCA Managing LLP and KCA GP LLP, and various Gazette Notices for those LLPs; and

(7) a receipt from the Authority to KCA dated 16 March 2023.

13. Dr Hink also provided the Tribunal and Mr Jones in the course of the proceedings with an unsigned "invoice for settlement management fee" dated 21 February 2023, and two undated text message exchanges, one between the Investor and Dr Wahl ("the Investor's text message") and one in German between Dr Wahl and Dr Hink.

14. Mr Jones did not object to either the "invoice for settlement management fee" or the Investor's text message being taken into account as evidence in these proceedings, but did object to the inclusion of the text from Dr Wahl, because Mr Jones did not read German.

15. I agree that it is not in the interests of justice to admit into evidence an untranslated text message provided at the very last moment which the Authority's representative was unable to read. As a result, I have not taken the text message between Dr Wahl and Dr Hink into account.

Witness evidence

16. KCA's submissions for the hearing, and its "Statement of Case" for the substantive proceedings on the Reference, both contained some witness evidence from Dr Hink. In addition, I allowed him to give limited oral evidence during the hearing by way of response to questions from the Tribunal; Mr Jones then cross-examined Dr Hink on his evidence. I was satisfied that this was in the interests of justice, bearing in mind (a) the Tribunal's obligation to give effect to the overriding objective by avoiding unnecessary formality and seeking flexibility in the proceedings, and (b) that Dr Hink had not had the benefit of legal advice. I was also satisfied that the Authority would not be prejudiced by the Tribunal taking that course of action, given Mr Jones's overall familiarity with the matter.

FINDINGS OF FACT

17. On the basis of the evidence summarised above, I make some limited findings of fact. I have tried to be careful only to make findings which are directly relevant to the Privacy Applications, and not to make definitive findings on disputed matters which will be explored in more detail on the hearing of the Reference. I have also proceeded on the basis that what Dr Hink said about certain aspects of KCA's business is correct. That is without prejudice to the

position that may be established after full consideration of all the evidence following the hearing of the Reference.

KCA and the Investor

18. KCA was incorporated in 2002 and acts as investment adviser to only a single client at a time. It operates in co-ordination with Dr Wahl, who is a specialist in private equity investment. Since 13 March 2003, KCA has been regulated by the Authority under Part 4A of FSMA.

19. On 31 August 2019, Dr Wahl signed two asset management agreements with the Investor. One stated that the Investor would allocate $1,280,000,000 (one billion, two hundred and eighty million US dollars) for Dr Wahl and KCA to manage; the other was identical, other than that it referred to an investment of CHF 1,620,000,000 (one billion, six hundred and twenty million Swiss francs). In reliance on Dr Hink's evidence at the hearing, I find that these were two separate investment amounts, and not the same sum expressed in different currencies.

20. The agreements included this paragraph:

> "Dr Wahl directs his activity into selected private equity, venture capital, real estate or money market activity at his discretion, targeting to achieve a plan investment performance of approx. 6-7% pa as a minimum with a target of approx. 20% p.a on the investment amount net of management fees and other fees."

21. Under the agreements, the Investor agreed to pay 25% of the investment amount as a "one-off investment management fee", plus a 25% profit participation.

22. At some subsequent point after the conclusion of those agreements:

(1) the Investor decided to invest $650m of the US dollar amount elsewhere;

(2) the Investor informed Dr Wahl that consideration was being given to using another significant part of the investment amount(s) for another purpose; and

(3) the management fee was renegotiated to a one-off sum of $50m payable in four instalments.

23. On 21 February 2023, KCA sent a letter to the Investor confirming the amended management fee. As at the date of this hearing, no sum had been paid by the Investor to Dr Wahl or to KCA, either as an investment amount, or as a management fee.

The structure plan

24. Under the terms of the asset management agreement, Dr Wahl was "at his discretion [to] build an appropriate legal investment structure and engage with investment advisers where necessary".

25. On 31 January 2020, KCA engaged Macfarlanes to design an investment structure. Macfarlanes' draft structure plan was provided to KCA before 31 December 2020. It stated that the investments made by the Fund "will ultimately be managed by KCA".

26. The copy of the draft structure plan supplied to the Tribunal contained numerous open issues, including multiple bracketed references to information which remained to be confirmed. Dr Hink accepted that that "everything had come to a standstill" and that the structure plan had neither been finalised nor implemented.

27. The draft structure plan envisaged the setting up of a limited partnership called Kingsbridge Capital Limited Partnership to act as the "Fund" for the investment amounts. In addition:

(1) the Fund's general partner was to be KCA GP LLP, of which KCA and Dr Hink were to be the partners. This LLP was created, but was subsequently struck off on 20 July 2021 and dissolved on 27 July 2021; and

(2) the Fund's limited partner was to be KCA Managing LLP, which was to be owned as to 99.9% by KCA; this LLP was also created, but was struck off on 20 July 2021 and dissolved on 27 July 2021.

28. The draft structure plan also included the following text, in which the abbreviation "IMA" meant "an agreement pursuant to which the Host Manager will be appointed to provide investment management services to the Fund", and the "Host Manager" was an as yet unnamed "third party host manager".

> "Upon inception of the structure, KCA will not hold sufficient regulatory permissions to act as Investment Manager for the Fund. Until such time as KCA is authorised by the Financial Conduct Authority ('FCA') with the requisite regulatory permissions, GP LLP will enter into the IMA under which the Host Manager will be appointed to provide investment management services…Once KCA is authorised by the FCA to act as an Investment Manager, the arrangements described above will be modified such that Host Manager falls out of the picture in respect of the UK structure."

The fees

29. KCA was due to submit regulatory returns to the Authority by 29 January 2019 and by 12 February 2019, but failed to do so. As a result of those failures, KCA was required to pay the Authority two administrative fees, each of £250. On 15 March 2019, the Authority issued KCA with two invoices for £250, both of which were due for payment by 14 April 2019. Payment was not made by that date.

30. KCA similarly failed to file regulatory returns with the Authority by 25 April 2019, 9 August 2019, 28 October 2019 and 12 February 2020. The Authority issued KCA with invoices for a further £2,191.42. By the date of the Decision Notice, the unpaid fees totalled £2,691.42 (comprising administrative fees for non-submission of multiple regulatory returns as well as further periodic fees and levies).

31. Beginning on 6 February 2020, the Authority sent multiple letters and emails to KCA, highlighting its failures to pay; the Authority also made numerous telephone calls and left messages. Finally, on 14 February 2022, the Authority warned KCA that in the absence of payment, it would take steps to cancel KCA's Part 4A permission. Dr Hink asked for an extension, which was granted, but KCA did not pay by that extended time limit.

32. On 14 November 2022, the Authority issued the Decision Notice, on the basis that KCA:

(1) had failed to pay the fees as required by the rules of the Authority;

(2) had failed to respond to the Authority's repeated requests, and so had failed to be "open and co-operative" in its dealings with the Authority;

(3) had failed to satisfy the Authority that it was ready, willing and organised to comply with the requirements and standards of the regulatory system;

(4) had therefore failed to satisfy the Authority that its business was being managed in such a way as to ensure that its affairs will be conducted in a sound and prudent manner or that it was a fit and proper person having regard to all the circumstances; and

(5) was therefore failing to satisfy the suitability Threshold Condition in relation to its permitted regulated activities.

33. On 28 November 2022, KCA made the Reference and the Privacy Applications. On 16 March 2023, KCA paid the outstanding fees to the Authority.

THE LAW

34. I first set out the relevant provisions of FSMA, followed by the relevant Rules and a summary of the principles established by previous Tribunal decisions.

FSMA s 391

35. FSMA s 391 includes the following:

> "(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) …
>
> (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) …
>
> (6) The FCA 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…"

The Rules

36. Rule 3(3) of 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."

37. Rule 14 provides, so far as relevant:

> "(1) The Upper Tribunal may make an order prohibiting the disclosure or publication of—
>
> (a) specified documents or information relating to the proceedings; or
>
> (b) …
>
> (2) The Upper Tribunal may give a direction prohibiting the disclosure of a document or information to a person if—
>
> (a) the Upper Tribunal is satisfied that such disclosure would 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.

The relevant principles

38. The relevant principles have been considered and applied in a succession of cases, including: *Frensham v FCA* [2021] UKUT 0083 (TCC) ("*Frensham*"); *Prodhan v FCA* [2018] UKUT 0414 (TCC) ("*Prodhan*"); *Foley v FCA* [2020] UKUT 0169 (TCC) ("*Foley*"); *PDHL*

Ltd v FCA [2016] UKUT 0129 (TCC) ("*Foley*"); *Angela Burns v FCA* [2015] 5 UKUT 0601 ("*Burns*") and *Arch Financial Products LLP and others v FSA* [FS/2012/20] ("*Arch*").

39. Mr Jones's submission helpfully summarised those established principles, and I set out that summary below, albeit with a slight amendment to points (8) and (9). His case references are to the more recent Tribunal decisions, although many of the cited passages repeat points made in earlier judgments, in particular in *Arch* and *Burns*.

40. The summary is as follows:

(1) FSMA s 391 gives rise to a presumption that both Decision Notices and Final Notices will be published, albeit there must be regard to the fact that a Decision Notice under challenge in the Upper Tribunal is necessarily provisional (*Prodhan* at §20(1)).

(2) The exercise of the power to prohibit publication is a "matter of judicial discretion to be considered against this presumption" (*Prodhan* at §20(2)).

(3) The exercise of this discretion involves a balancing exercise of all relevant factors and giving effect to the overriding objective of dealing with cases fairly and justly (*Prodhan* at §20(3)).

(4) 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 (*PDHL* at §36(1)).

(5) The onus is on the applicant to demonstrate a real need for privacy by showing unfairness (*PDHL* at §36(2)).

(6) 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 (*PDHL* at §36(3)).

(7) 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 (*PDHL* at §36(4)).

(8) If it is established by cogent evidence that publication of a Decision Notice would result in the destruction of, or severe damage to, a person's livelihood, it would be unfair to publish that Notice.

(9) A "possibility" of severe damage or destruction is not enough; there must be a "significant likelihood" of such damage or destruction occurring. An applicant is not required to show that damage or destruction is an inevitable consequence (*PDHL* at §37).

(10) A risk of damage to reputation in unlikely to be sufficient to justify a prohibition on publication (*Prodhan* at §22).

DAMAGE TO KCA'S BUSINESS?

41. I first set out Dr Hink's submissions, and then those of Mr Jones.

Submissions by Dr Hink

42. Dr Hink submitted that if the Privacy Applications were refused, damage to KCA's business was "almost certain", for the following reasons:

(1) KCA only had a single investor at any one time, so its position was different from that of others who had made privacy applications. Mr Frensham, for example, had around 60 clients and expected to lose around one-third of those clients were the decision

notice in his case to be published, see *Frensham* at [7]. In contrast, KCA was likely to lose its only client.

(2) The Investor's *raison d'être* in using KCA was the fact that it was regulated by the Authority.

(3) If the Decision Notice were to be published, the Investor "will react negatively to any problems with their investment team" and would distance itself from "any connection"; in short, the Investor was likely to "walk away".

(4) Dr Wahl "will also react negatively", and will distance himself from KCA so as to safeguard his agreement with the Investor and the related "lucrative remuneration".

(5) There was "a high likelihood" that Dr Wahl would rebuild the investment structure "from scratch", probably basing it in Germany.

(6) As a result, KCA would not receive the £50m already invoiced as the amended investment management fee, and would also not receive other fees from the Investor in the future.

(7) As a result of the foregoing, refusal of the Privacy Applications "could lead very concretely to substantial damage".

Mr Jones' submissions

43. Mr Jones submitted that KCA had failed to provide cogent evidence that there would be a significant likelihood of severe damage to its business, for the following reasons:

(1) There was no supporting evidence for Dr Hink's statement that the Investor considered KCA's status as an entity regulated by the Authority to be important. In particular:

(a) there is no reference to the Authority's regulation in the asset management agreements;

(b) there was also no evidence from Dr Wahl that KCA's current regulatory status was a key factor; and

(c) KCA's regulatory status was unlikely to be "the sole criterion" for the Investor deciding to use KCA, given that the investment amounts were for "billions of pounds".

(2) Mr Jones added that Dr Hink's reliance on the draft structure plan was misplaced, because:

(a) it has not been implemented;

(b) the LLPs have been dissolved;

(c) the Investor has already reduced the original investment amount by $650m, and another significant alternative investment is in prospect; and

(d) even were the draft structure plan to be implemented, it did not depend on KCA's current regulatory permission. Instead, as set out in the passage cited at §28 above, KCA does not "hold sufficient regulatory permissions to act as Investment Manager for the Fund", and Macfarlanes had therefore included a "Host Manager" in the plan.

The Tribunal's view

44. As is clear from the principles set out at §40, when deciding whether or not to allow the Privacy Applications, the scales are heavily weighted in favour of publication, and the burden

is on KCA to produce cogent evidence of how it could suffer a disproportionate level of damage if publication were not prohibited.

45. The only evidence before the Tribunal on this issue was given by Dr Hink. He said the Investor's *raison d'être* for using KCA was the fact that it was regulated by the Authority, and that were the Decision Notice to be published, the Investor was likely to "walk away" and not pay the £50m which KCA had invoiced. However, as Mr Jones pointed out, Dr Hink provided no documents in support, and there was also no witness statement from any other person, not even from Dr Wahl.

46. Mr Jones also said that it would be surprising if the Investor's key reason for deciding to entrust KCA with well over $2bn was that the company was regulated by the Authority. Consideration of the asset management agreements shows he was right to be sceptical. These refer to *Dr Wahl* directing "his activity" into selected investments "at his discretion", with a minimum target return of 20% per annum net of all fees. The reasonable inference from these management agreements is therefore that the investment amounts are to be made available because the Investor trusts Dr Wahl's investment skills, not because KCA is regulated under Part 4A.

47. The structure plan also does not provide any sort of reliable evidence that KCA's current regulatory status is of critical importance to the Investor, because:

(1) it was only ever in draft form;

(2) it is over three years old;

(3) it has never been implemented;

(4) there is no evidence that the Investor has even seen the plan, let alone approved it;

(5) two key LLPs have already been dissolved; and

(6) KCA's Part 4A permission was in any event inadequate for it to be the Investment Manager for the Fund, and a Host Manager was to be introduced for that purpose, at least initially.

48. Dr Hink also sought to distinguish KCA's position from that of Mr Frensham, because it has only a single client. However, the difficulty he faces is that he has failed to provide cogent evidence that the single Investor will "walk away", were the Decision Notice to be published.

49. KCA has therefore fallen well short of the evidential requirements necessary to demonstrate that publication of the Decision Notice would be significantly likely to cause KCA to suffer disproportionate damage.

OTHER GROUNDS

50. Dr Hink put forward two other grounds as to why the Privacy Applications should be allowed.

No prejudice to consumers?

51. Dr Hink referred to FSMA s 391(6)(b), set out at §35 of this judgment. He said there was no good reason to publish the Decision Notice, because KCA's failure to pay the fees was not "prejudicial to the interests of consumers".

52. As Mr Jones correctly pointed out, this submission misunderstands the statutory provision. FSMA s 391(6)(b) does not say that Decision Notices will only be published if the *behaviour in question* is "prejudicial to the interests of consumers". Instead, it prevents the Authority from publishing a Decision Notice if *publication* would be "prejudicial to the

interests of consumers". This ground is therefore not a relevant factor in the context of the balancing exercise which I am required to carry out.

Unfairness?

53. Dr Hink also submitted that the Authority had acted in an unfair and disproportionate manner by deciding to cancel KCA's Part 4A permission as the result of a simple failure to pay fees, and that publishing the Decision Notice would compound that unfairness. He added that various factors had not been considered, or had not been given sufficient weight, including KCA's previous history of compliance and Dr Hink's own track record.

54. Mr Jones responded by pointing to the extended period of time over which the fees were unpaid, adding that Dr Hink was focusing on only part of the reasons why the permission had been cancelled. The Authority had a list of other reasons for issuing the Decision Notice, see §32 above.

The Tribunal's view

55. Whether the Authority acted disproportionately in deciding to cancel KCA's Part 4A permission is a matter for the substantive hearing of the Reference. None of the factors considered in earlier privacy decisions (see §39 above) relate to the applicant's likelihood of success in the Reference proceedings, and this is plainly the correct approach. Taking into account the merits of the substantive case would require the Tribunal to conduct a "mini-trial" of the issues without the normal procedural and evidential requirements which will apply to the Reference hearing. I find that the substantive merits of the Reference are not relevant matters for the purposes of the Privacy Applications.

56. I recognise, of course, that as the Decision Notice is under challenge it is thus provisional, and I return to this below.

OVERALL CONCLUSION AND NEXT STEPS

57. In exercising my discretion I must carry out a balancing exercise. The starting point is the strong presumption in favour of open justice generally, and thus in favour of publication. There is nothing of sufficient weight on the other side of the scales to displace that presumption in this case. Essentially, KCA failed to demonstrate a "real need for privacy" by providing cogent evidence that publication would cause it to suffer disproportionate damage. The Privacy Applications are therefore refused.

58. As is normal practice in such cases, the Authority is to ensure that any publicity given to the Decision Notice makes it clear that the decision is provisional, and any press release issued by the Authority in connection with the publication of the Decision Notice must state prominently at its beginning that:

(1) KCA has referred the matter to the Tribunal, and the Decision Notice is therefore provisional;

(2) at the Tribunal hearing each party will present their respective cases, and the Tribunal will then determine whether the Authority acted appropriately. Having done so, the Tribunal will remit the matter to the Authority with such directions as it considers appropriate to give effect to its determination; and

(3) although it is not in dispute that KCA failed to pay the fees, any reference to other findings made in the Decision Notice must be prefaced with a statement to the effect that they reflect the Authority's view as to how the behaviour in question is to be characterised.

59. I recognise that KCA may find it helpful to discuss the situation with Dr Wahl and/or the Investor. I therefore direct that that there should be a period of 7 days from the date of the release of this Decision before publication of the Decision Notice.

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

ANNE REDSTON
UPPER TRIBUNAL JUDGE

RELEASE DATE: 20 April 2023