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UT (Tax & Chancery) Case Number: **UT-2024-000010**

Upper Tribunal (Tax and Chancery Chamber)
Financial Services

FINANCIAL SERVICES – PRIVACY APPLICATIONS – Section 391 FSMA - Rule 14 and Para 3, Schedule 3 to the Tribunal Procedure (Upper Tribunal) Rules 2008 – effect of publication of Decision Notice and details of reference on the register on the Applicant's mental health

Heard on 5 November 2024
Hearing venue: The Rolls Building
London EC4A 1NL

Judgment given on 11 December 2024

Before

JUDGE RUPERT JONES

Between

HEATHER DUNNE

Applicant

and

FINANCIAL CONDUCT AUTHORITY

The Authority

Representation:

For the Appellant: Douglas Cherry, Fladgate LLP Solicitors

For the Respondent: Simon Pritchard, counsel instructed by the Financial Conduct Authority

DECISION

Introduction

1. The Applicant, Heather Dunne, makes two privacy applications and one case management application:

   (1) The first privacy application was contained within her Reference Notice dated 30 January 2024 and made pursuant to para.3(3) of Sch.3 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Procedure Rules") seeking a direction that her reference not appear on the Upper Tribunal's register.

   (2) The second privacy application was made by letter dated 25 March 2024, pursuant to Rule 14 of the Procedure Rules for directions that there be no publication by the Financial Conduct Authority ("the Authority") or any other party on its behalf or instruction of, about or connected with the Decision Notices issued by the Authority to her and Mr Richard Fenech ("the Applicants") dated 2 January 2024 except to the extent necessary to progress their references which have been joined and are currently before the Upper Tribunal ("UT" or "Tribunal").

   The two privacy applications dated 30 January and 25 March 2024 are hereafter referred to as the "Privacy Applications".

   (3) The case management application sought two directions pursuant to Rule 14 of the Procedure Rules: i) that the Privacy Applications not be provided to Mr Fenech or his legal representatives; and ii) the materials provided by the Applicant in support of the Privacy Applications not be provided to Mr Fenech or his legal representatives.

2. As for the case management application, this was granted by way of the directions issued by the Tribunal on 17 September 2024 which further directed that the Privacy Applications be heard in private pursuant to Rule 37 of the Procedure Rules and without notice to Mr Fenech.

3. At a hearing in private on 5 November 2024, the Tribunal considered the Applicant's Privacy Applications which were opposed by the Authority. No oral evidence was called or heard. Mr Cherry of Fladgate Solicitors appeared for the Applicant and Mr Pritchard of counsel appeared for the Authority. I am very grateful to them both for the quality of their written and oral submissions.

The Law

4. Section 391 of the Financial Services and Markets Act 2000 ("FSMA") provides relevantly as regards the publication of Decision Notices (excluding provisions in relation to Warning Notices, Supervisory Notices, Notices of Discontinuance and decisions of the Prudential Regulation Authority):

> 391 Publication.
> …
> (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.
> …

(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.
…
(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.
…
(7) Information is to be published under this section in such manner as the regulator considers appropriate.
…

5. Paragraph 3 of Schedule 3 to the Procedure Rules provides relevantly:

Register of references and decisions
3.—(1) The Upper Tribunal must keep a register of references and decisions in financial services cases and wholesale energy cases.
(2) The register must be open to inspection by any person without charge and at all reasonable hours.
(3) The Upper Tribunal may direct that the register is not to include particulars of a reference if it is satisfied that it is necessary to do so having regard in particular to—
(a) any unfairness to the applicant or, except as regards a reference in respect of a decision of the Prudential Regulation Authority, any prejudice to the interests of consumers that might otherwise result;
(b) as regards a reference in respect of a decision of the Financial Conduct Authority, any detriment to the stability of the UK financial system;
(c) as regards a reference in respect of a decision of the Prudential Regulation Authority, any prejudice to the safety and soundness of persons authorised by it, or where section 2C of the 2000 Act applies, any prejudice to securing the appropriate degree of protection for policy holders; or
(d) as regards a reference under the 2013 Regulations or the 2013 (NI) Regulations any detriment to the stability of the wholesale energy market as defined in those Regulations.
(4) Upon receiving a reference notice, the Upper Tribunal must—
(a) subject to any direction given under sub-paragraph (3), enter particulars of the reference in the register; and
(b) notify the parties either that it has done so or that it will not include particulars in the register, as the case may be.
…

6. Rule 14 of the Procedure Rules provides relevantly:

Use of documents and information
14.—(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) any matter likely to lead members of the public to identify any person whom the Upper Tribunal considers should not be identified.
(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.

(3) If a party ("the first party") considers that the Upper Tribunal should give a direction under paragraph (2) prohibiting the disclosure of a document or information to another party ("the second party"), the first party must—
(a) exclude the relevant document or information from any documents that will be provided to the second party; and
(b) provide to the Upper Tribunal the excluded document or information, and the reason for its exclusion, so that the Upper Tribunal may decide whether the document or information should be disclosed to the second party or should be the subject of a direction under paragraph (2).
...
(5) If the Upper Tribunal gives a direction under paragraph (2) which prevents disclosure to a party who has appointed a representative, the Upper Tribunal may give a direction that the documents or information be disclosed to that representative if the Upper Tribunal is satisfied that—
(a) disclosure to the representative would be in the interests of the party; and
(b) the representative will act in accordance with paragraph (6).
(6) Documents or information disclosed to a representative in accordance with a direction under paragraph (5) must not be disclosed either directly or indirectly to any other person without the Upper Tribunal's consent.
(7) Unless the Upper Tribunal gives a direction to the contrary, information about mental health cases and the names of any persons concerned in such cases must not be made public.
(8) The Upper Tribunal may, on its own initiative or on the application of a party, give a direction that certain documents or information must or may be disclosed to the Upper Tribunal on the basis that the Upper Tribunal will not disclose such documents or information to other persons, or specified other persons.
…
(9) A party making an application for a direction under paragraph (8) may withhold the relevant documents or information from other parties until the Upper Tribunal has granted or refused the application.
…
(11) The Upper Tribunal must conduct proceedings and record its decision and reasons appropriately so as not to undermine the effect of an order made under paragraph (1), a direction given under paragraph (2) or (8) or the duty imposed by paragraph (10).

7. In terms of the applicable law governing the Privacy Applications, the principles are set out in a number of cases such as *Prodhan v FCA* [2018] UKUT 0414 (TCC) at [21]-[26], *PDHL v FCA* [2016] UKUT 0129 (TCC) at [36]-[37] and *Kingsbridge Capital Advisers Limited v FCA* [2023] UKUT 00103 (TCC) at [40]. By way of summary:

a. By s.391 of FSMA, there is 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 UT is necessarily provisional.

b. The exercise of the power to prohibit disclosure or publication under Rule 14(1) of the Procedure Rules, and by analogy the exercise of the power under para.3(3) of Sch.3 to the Rules, is a matter of judicial discretion to be considered against the context of this presumption.

c. The discretion should be exercised taking into account all relevant factors, ignoring irrelevant factors, and giving effect to the overriding objective in Rule 2, which requires the UT to deal with cases fairly and justly. The exercise of this discretion involves carrying out a balancing exercise between those factors that tend towards publication and those that would tend against.

d. The principle of open justice is applied such that the starting point is a presumption in favour of publication.

e. The burden is on the applicant to show a real need for privacy by demonstrating unfairness.

f. To discharge this burden, 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.

g. A "ritualistic assertion" of unfairness is unlikely to be sufficient. Embarrassment to an applicant from publicity or that it may draw the applicant's clients and others to ask questions that the applicant would prefer not to answer does not qualify as unfairness.

h. 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.

i. 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.

j. A risk or damage to reputation is unlikely to be sufficient to justify a prohibition on publication.

k. 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.

The Privacy Applications

8. There are four interrelated grounds in support of the Privacy Applications:

   a. Publication of the Decision Notices will have an adverse impact on the Applicant's health (see [35] - [49] of the 25 March Application);

   b. Publication of the Decision Notices would cause reputational destruction to the Applicant (see [16] - [23] of the 25 March Application);

   c. Publication of the Decision Notices is not appropriate and there is an absence of urgency or consumer protection imperative (see [24] - [30] of the 25 March Application); and

   d. Publication of the Decision Notices would reveal irrelevant personal information about the Applicant's financial circumstances (see [31] - [34] of the 25 March Application).

9. The Privacy Applications each rely on overlapping grounds as set out above.

Submissions and evidence on behalf of the Applicant

10. Mr Cherry accepted that the impact on the Applicant's health is the primary ground relied upon in support of the Privacy Applications. Each of the other grounds is related to and intertwined to some degree with this primary ground and provides an illustration of additional

factors which he submitted aggravate the principal mental health ground sustaining the Privacy Applications. He further accepted that the other three grounds were not freestanding but supplemented and strengthened the mental health ground.

Adverse Impact on the Applicant's Mental Health - evidence and submissions

11. Mr Cherry made extensive written and oral submissions in support of the Privacy Applications, concentrating upon the effect on the Applicant's mental health of publication of the reference or Decision Notice.

12. Mr Cherry argued that the Applicant had provided cogent written evidence of the impact of publication of the reference and Decision Notice on her mental health.

13. This evidence is said to be from three sources: (1) Dr [S], the Applicant's General Practitioner (a Doctor); (2) [] the Applicant's counsellor (who is a member of the British Association for Counselling and Psychotherapy and holds a Masters' Degree in Counselling); and (3) the Applicant herself.

14. He relied upon the decision in *Darren Anthony Reynolds v FCA* [2023] UKUT 234 (TCC) (*Reynolds*) which makes clear at [20] that it is incumbent on the Applicant to produce cogent evidence that there is significant likelihood of harm which makes publication unfair. In this case, he says there is such evidence. The notion of significance in this context confirms that it must not be fanciful or merely possible, but something tangible and real to the Applicant, which is supported by evidence, from any source and of any type capable of being considered against the burden of proof carried by the Applicant. The "significance" here relates to the likelihood of harm occurring and not a measure of the extent of the harm itself.

15. Mr Cherry argued that insofar as the application in *Reynolds* related to the mental health of the applicant there, it is clear there was a dearth of evidence. At [49] of the Decision the UT observed that:

> "Turning to the issues of the impact of the publication of the Decision Notice on the mental health of Mr Reynolds and his son, Mr Reynolds has produced no medical evidence in support of his account of his or his son's mental state. Even if Mr Reynolds or his son suffered from mental health issues, that is not a reason not to publish the Decision Notice. Their mental health issues would only be relevant if it could be shown that there was a real risk that publishing the Decision Notice would have an adverse impact on their health and Mr Reynolds produced no evidence to suggest that this is the case."

16. He submitted that, unlike in *Reynolds*, the Applicant has produced medical and other related evidence in support of her contention that publication of the Decision Notices would have an adverse effect on her mental health.

Dr [S]

17. He contended that Dr [S] had provided medical evidence twice in support of the Privacy Applications. The first element is the letter at (B/22). The date of this letter is 19 April 2024. That letter confirms that during the time of preparation for the Privacy Applications, the Applicant had a telephone consultation, which confirms that she was currently medicated in

respect of her mental health, which had assisted in improving her mood. That letter records that the Applicant's medication had been recently increased. It also confirmed that the Applicant was not eligible for a psychiatric referral on the NHS.

18. Mr Cherry suggested that the second letter from Dr [S] provided further medical evidence (B/23). The date of that letter is 16 May 2024. This letter provides medical evidence of the Applicant's mental health history. It confirms that in June 2017, the Applicant was prescribed antidepressant medication to assist with her mood. That date coincided with the visit to her premises and the start of the Authority's investigation into the Applicant's conduct. He argued that this was no coincidence and the Authority's investigation caused the deterioration in the Applicant's mental health.

19. He argued that the second letter confirms that in March 2020, during COVID and during the ongoing FCA investigation into her conduct, the Applicant had the dosage of her antidepressant medication doubled. The second letter also confirms that in February 2021, during a medication review, the then dosage of her medication was helping to manage her mood, alongside online cognitive behavioural therapy the Applicant had been receiving. He submitted that this is clear evidence of the ongoing mental health issues the Applicant had experienced.

20. Mr Cherry contended that the second letter also confirms that in January 2024, the Applicant reported having a deterioration in her mood over the preceding few months, and so her antidepressant medication had been increased a further 50% from the previous dose. The period of mood deterioration experienced and reported by the Applicant to her doctor coincided with the issuance of the warning notice and the Regulatory Decisions Committee ("RDC") hearing process and pending issuance of the Decision Notices.

21. He relied on the fact that Applicant is medicated through an antidepressant [medication], and a copy of the prescription for that medication dated 10 January 2024 is found in the bundle (B/19). That prescription confirms the current prescribed dosage of [the medication] as items 2 and 3 on that prescription with a combined dosage [] per day. These dosages and medications and their purposes and effect are corroborated in the letter from Dr S (B/23).

The Applicant's written evidence

22. Mr Cherry submitted that there is cogent medical evidence of there being a detrimental impact on the Applicant in respect of the investigation into her conduct and the regulatory processes she is subject to. This is evidenced further by the Applicant herself directly in her Personal Statement in support of the 25 March Application (B/21), where the Applicant states at [17]:

> "This process has crushed my spirit and aggravated my depression to the point where I had had thoughts of suicide and felt so despondent that I felt I could not cope with living with all this hanging over me. Those thoughts recently reoccurred shortly before the Decision Notice was issued, and it was only with the assistance and intervention by my Counsellor [] and my doctor in increasing my dosage of my anti-depressant medication that I was able to bring myself back from maybe ending my life."

23. He argued that this is cogent evidence of two critical matters. The first is that the Applicant's depression has been aggravated historically because of the "process" of the investigation by the Authority. The second is that her mental health significantly worsened at or around the time of the Decision Notice being issued, to the point that the Applicant was considering suicide. He relied on further evidence as to the detrimental impact on the Applicant's mental health resulting from the Authority's investigation and findings provided by the Applicant at [18] in her Personal Statement:

> "The thought of the world being told by the FCA in a Decision Notice that I am not to be trusted, and that I am thoroughly incompetent, before I have had the chance to try and clear my name in the Upper Tribunal sends me into a spiral of anxiety and despair. I have felt like an after-thought for several years while the FCA did its investigations and then, without ever mentioning it beforehand, the FCA blindsided me at the annotated warning notice phase of its investigation accusing me of lacking integrity".

24. Mr Cherry submitted that this is evidence that the publication of the Decision Notice will have a detrimental impact on the mental health of the Applicant. She describes a spiral of anxiety and fear about such a prospect, having already described having suicidal thoughts about the Decision Notice itself being issued.

25. The Applicant describes the impact of publication further at [19] of her Personal Statement where she says: "The Decision Notice subsequently reduced the level of criticism I face, but it is still devastating to me to have the threat of the Notice being published to the world." He argued that this is clear evidence, corroborated by the evidence from Dr [S] as to the anti-depressant medication the Applicant is prescribed, of a significant likelihood of harm making the publication of the Decision Notice unfair to the Applicant in terms set out in *Reynolds*.

26. Mr Cherry noted that the Authority is critical of a perceived lack of necessary medical evidence in support of the Privacy Applications and that it has consistently referred to a need for psychiatric evidence. Whilst it is acknowledged such evidence may be useful and probative in some cases where applications such as the present have been made, it is not mandated. The Procedure Rules do not require it, and the authorities do not specify such need. Despite this, the Applicant has made efforts to obtain a referral and that has been refused by Dr [S] as evidenced in the letters from the doctor on 19 April 2024 (B/22):

> "We discussed that you have been under investigation formally and you were advised to get a formal psychiatric assessment with regards to your mental health. Unfortunately you do not fulfil the criteria for me to refer you to a psychiatrist on the NHS. If you need a formal assessment, then this will need to be done privately. You requested a letter stating the same. If there was any situation in your mental health or if you have any further enquiries, please do not hesitate to contact the surgery. Many thanks."

27. He noted that the Authority is critical of the lack of reasons as to why the Applicant did not fulfil the criteria for the GP to refer her to a psychiatrist on the NHS. However he contended that such criticism is ill-founded and irrelevant; the fact is that Applicant could not obtain such evidence. In any event there is ample evidence before the court to satisfy the tests set out in the authorities and as summarised in *PDHL*.

[] The Applicant's counsellor

28. Mr Cherry submitted that in addition to the medical evidence provided by Dr S, the Applicant also entirely properly and permissibly relies upon the evidence of her counsellor, []. The letter dated 7 October 2023 (B/18) describes the scope of work the counsellor had done with the Applicant and confirms that the counsellor has known the Applicant since July 2021 as her counsellor and therapist. [The Applicant's counsellor] states at [2] that:

> "A large percentage of the work we have undertaken during those last two years, has been to do with teaching her [the Applicant] coping mechanisms, and giving her space to talk, so she is able to work through the emotions she is experiencing surrounding the case brought against her by the Financial Conduct Authority (FCA) and Regulatory Decisions Committee (RDC)."

29. He argued that this is cogent evidence that the Applicant sought independent professional intervention and assistance to assist her in coping with the Authority's processes she was subjected to. Paragraphs 5 and 6 of this letter go on to describe the counsellor's "suspicion" that the Applicant is highly likely to be autistic. It stresses that such a formal diagnosis was not made by her and would need to be made by a psychiatrist. The Applicant does however rely upon the results of the "NovoPsych" autism spectrum disorder ("ASD") screening product used by her counsellor and described at [6] of the letter, as evidence that in addition to her depression, she returned a score which is highly likely to indicate that she is also autistic. In this regard [the Applicant's counsellor] refers to the statement that:

> "The scale for the Autism Spectrum Quotient screening runs from 0 – 50 and the point above which someone is considered likely to have ASD is 29. Heather's score came up as 40 therefore, this indicates that she is highly likely to have Autism Spectrum Disorder."

30. It is accepted that this is not evidence from a medically qualified psychiatrist, but it remains evidence of the makeup of the Applicant and her mental health. The continued passage in this letter [para 8] evidences that the Applicant has difficulty expressing her emotions:

> "If I ask Heather how she 'feels' she will often respond with what she 'thinks'. It is usual for us to explore together how she feels during our sessions because she does not know how to vocalise it. In fact, Heather has had difficulty on multiple occasions being able to voice what emotions she feels other than "I've been crying loads".

31. Mr Cherry contended that this was evidence of the likelihood of the Applicant having ASD. In the same section of the letter [para 10], the counsellor observes of the Applicant that:

> "Heather has absolutely no self-esteem and has regularly commented on the belief that "people would be better off without her" or "people wouldn't notice if she wasn't there"; she feels like she is constantly judged negatively and believes that most people in the world would think she was "weird"."

32. He argues that this further evidences and echoes a persistent theme of poor self-image and reflects the feelings of suicide articulated by the Applicant herself in her Personal Statement.

33. Mr Cherry also relies on a second letter from the Applicant's counsellor (B/20) which provides further evidence by way of implication, of the likely impact of publication of the Decision Notices on the Applicant's mental health. At [5] the counsellor confirms that:

> "My experience, whilst working with Heather, is that the more the case has dragged on, the worse her mental health has got. Once the Financial Conduct Authority brought their part of

> their proceedings to an end, I was able to assist Heather in starting to increase her mental wellbeing. However, once the Regulatory Decisions Committee took off with their part of the proceedings, Heather's mental wellbeing decreased further still and it was all I have been able to do, to stop her from having a complete nervous breakdown."

34. At [6] of this letter the counsellor confirms the impact of the highly likely fact that the Applicant is also autistic, and the impact of relevant traits because of that fact. Mr Cherry argued that this clearly demonstrates a disposition, beyond the ordinary, for the Applicant to suffer significant mental and related physical health impacts resulting from her thinking about the matters currently before the UT:

> "Heather's genetic make-up being that of someone on the autistic spectrum, means that she gets a hyperfocus, where she can focus on nothing but the proceedings, going over and over everything increasing her stress levels and leaving her unable to sleep for weeks at a time."

35. He submitted that the letter provides a reasoned, rational, professional opinion that the publication of the Decision Notices would have a serious negative impact on the Applicant. At [9] and [10]:

> "From the time I have spent with Heather, it is my opinion that her conviction would be extreme concern that people reading a publication of the Decision Notice or any details of the case taken against her, would be led to the belief that she had not followed due process. Heather is so close to a breakdown, I truly believe that it would not take much more to tip her over the edge and without any exaggeration, I do not feel confident that I would be able to keep her safe should these details be published before she has the chance to clear her name."

36. Mr Cherry contended that the above passage occurs following a professional counsellor / therapist relationship of around 3 years prior to this hearing, and during which the principal theme, cause and aggravator to the Applicant's depression and ASD characteristics has been and remains the Authority's action and Decision Notices.

37. Mr Chery concluded by submitting that in combination, the medical evidence from both Dr [S] and [the Applicant's counsellor] is valid, cogent and corroborative of the very clear unequivocal statements of the impact publication of the Decision Notices would have on the Applicant as set out in her own evidence. It is a clear and reasonable inference that the entirety of the Authority investigation process was the initial cause of the Applicant requiring medication (in 2017) and then at various 'pinch points' of the investigation and its statutory notice process components, significantly increased dosages and low mood, culminating in suicidal thoughts and imminent mental breakdown regarding the production and/or publication of the Decision Notices. This has culminated in the current phase of matters, with the Applicant summarising the position herself in her Personal Statement (B/21) at [24]:

> "I am very worried that even with the marvellous support I have, from my legal team, [counsellor], my family, and friends, which have enabled me to survive thus far, being publicly denounced, before I get that chance, as lacking integrity and being incompetent and not fit to be authorised may be just too much to bear."

Submissions on behalf of the Authority

38. Mr Pritchard made submissions opposing the application, many of which I have adopted in the discussion section below.

Discussion and analysis

Mental health

The threshold and burden

39. The Tribunal is highly conscious of and sensitive to the nature of the issues raised by the Applicant in relation to her mental health. The Tribunal accepts that the Applicant has in the past and continues to this day to suffer from some level of mental illness, being anxiety and depression. Nonetheless, while the Tribunal expresses its sympathy for the Applicant experiencing depression or anxiety and symptoms of "stress and low mood", these do not overcome the presumption in favour of publication of the Decision Notices and inclusion of the reference on the register. This is for the reasons set out below.

40. The Tribunal is required to decide whether the starting point of the principle of open justice and the presumption of publication of Decision Notices enshrined in section 391 FSMA should apply. The primary issue for the Tribunal to decide is whether publication of the Decision Notices and the details of the reference on the register would cause the Applicant a significant likelihood of unfairness. This would include by causing her a significant likelihood or a substantial risk of psychological harm or damage such as significant harm to her mental or even physical health. A "possibility" of such damage or harm is not enough; there must be a "significant likelihood" of such damage or harm occurring.

41. Likewise, there must be a causal connection or link between the publication and the risk of harm – it is not enough that the investigation conducted by the Authority or the proceedings or hearing of the reference in themselves are demonstrated to have caused or be causing psychological or physical harm or damage to the Applicant (and it is sadly common that a certain level of non-clinical anxiety may be experienced by any litigant or witness connected to any litigation).

42. The burden is on the Applicant in the Privacy Applications to show a real need for privacy by demonstrating unfairness that may be caused by publication of the relevant information concerning her case (publication of the Decision Notices and inclusion of the reference on the register). To discharge this burden, the Applicant must produce "cogent evidence of how unfairness may arise and how she could suffer a disproportionate level of damage" if publication were not prohibited. The need for "cogent" evidence is an important threshold that must be met before the presumption in favour of open justice, underpinned in this context by statute, can be reversed.

The evidence

43. The Applicant relies on (i) her own personal statement [HB/21/286]; (ii) two letters from her counsellor, [] [HB/18/278] and [HB/20/284]; (iii) a copy of a prescription for antidepressant medication [HB/19/283]; (iv) a letter obtained from her General Practitioner (dated 19 April 2024, "the First GP Letter") [HB/22/300]; and (v) a further letter from her GP (dated 16 May 2024, "the Second GP Letter") [HB/23/301].

44. There was no oral evidence from any of the Applicant's witnesses and the Tribunal gave the Applicant a reasonable opportunity to give evidence or call the authors of the written evidence at the hearing. The Tribunal has also previously offered to put in place any reasonable adjustments to accommodate the Applicant's health at any hearing when attending, participating or giving evidence. There is no suggestion to date that the Applicant is unfit to participate in proceedings or unfit to give evidence (either in the Privacy Applications or the substantive hearing of the reference).

45. The Applicant attended the hearing on 5 November 2024 as a party, rather than as witness, and the Tribunal ensured that breaks in proceedings were taken when appropriate. While the Authority did not invite the Tribunal to draw any adverse inferences from the absence of the Applicant giving evidence, it is right to record that less weight may be given to written evidence if it has not been tested in cross examination. It is a matter the Tribunal has taken into account and it does give less weight to the Applicant's written statement where it has not been tested in cross examination.

46. I am satisfied that the evidence relied upon by the Applicant falls short of providing "cogent evidence that there is significant likelihood of harm which makes publication unfair" (*Darren Antony Reynolds v FCA* [2023] UKUT 234 (TCC) at [20]). The documents are not cogent evidence "that publishing the Decision Notice would be likely to result in anything happening which could be considered to result in publishing the Decision Notice being unfair" to her (*Reynolds* at [53]). In short, the Applicant has not demonstrated that publication of the Decision Notices nor the details of the reference on the register would create any substantial likelihood or significant risk of psychological or physical harm to the Applicant herself.

Procedural history relating to the provision of the mental health evidence

47. The Applicant has been afforded a number of opportunities to adduce cogent evidence relating to the effect of publication of the relevant information on her mental health by the Tribunal. The Tribunal has granted more than one extension of time to do so since the issue of privacy was first raised in January 2024. In the Authority's letter to the Applicant's legal representatives dated 28 February 2024, the Authority noted that "given the significance of the matters relied on in support of the Applicant's application, and the need to ensure that the Tribunal has the most cogent evidence available to it in order to determine the same, evidence as to the impact of publication on the Applicant's mental health should be sought from a qualified medical professional, which in this situation we consider ought to be a psychiatrist" [HB/38/368]. The Authority then proposed that the Applicant be afforded additional time to obtain and submit such evidence, and by the Tribunal's directions dated 8 March 2024 [HB/4/133], she was afforded until 25 March 2024 to do so.

48. On that date, the Applicant submitted her privacy application pursuant to Rule 14 of the Procedure Rules [HB/6/143], together with a personal statement she had prepared [HB/21/286], which annexed two letters from her counsellor [] (who is not medically qualified) [HB/18/278] and [HB/20/284], both of which had previously been appended to the

Applicant's FTC3 (Reference Notice), and a copy of her antidepressant prescription [HB/19/283].

49. The Authority's 11 April 2024 letter again reiterated that the Applicant had "not provided any evidence from a psychiatrist or other qualified medical professional in support of her Privacy Applications" ([HB/41/399] at [9]). The Authority invited the Applicant to adduce such evidence in order to allow for "proper assessment of the very serious issues she has raised regarding her mental health" (at [10]), and agreed to a six-week extension, to 31 May 2024, in order to allow the Applicant to do so [HB/8/201]. During that and a further two-month extension to 31 July 2024 [HB/13/254], the Applicant adduced the First and Second GP Letters [HB/22/300] and [HB/23/301], which are discussed below.

50. In its previous directions, the Tribunal observed that the evidence obtained by the Applicant, which at that time consisted of the two letters from the Applicant's counsellor which she had appended to her FTC3, was insufficient. The Tribunal's observations were as follows:

    a. In its revised directions concerning the Applicant's privacy applications (dated 8 March 2024), the Tribunal ordered that the Applicant be required to adduce "evidence from an appropriately qualified medical professional" [HB/4/133].

    b. In its directions concerning the joining of the reference proceedings of both the Applicant and Mr Fenech (dated 11 March 2024), the Tribunal clarified its position concerning the evidence then adduced by the Applicant (that is, the two letters from her counsellor), observing at [27] that it was "not satisfied at this stage that any expert medical evidence has been provided that supports the assertion that the Applicant's health would be seriously prejudiced by joinder" [HB/5/141].

51. The Applicant has had more than a reasonable opportunity to provide medically qualified or expert evidence in support of her application but has not filed any evidence from any such professional (a psychiatrist or psychologist). While it is right that this is not determinative of her application and she is not required to file such evidence, the Tribunal places less weight on the evidence filed from her GP, her counsellor and herself. This is for the reasons set out below.

The GP's letters

52. As for the GP Letters, whilst the Applicant's GP is a qualified medical professional and therefore might be able to comment on the Applicant's mental health, the evidence relied upon falls short of providing a basis for privacy. The First GP Letter states only that the Applicant was "currently on medications" and "accessing counselling" [HB/22/300]. It did not set out any evidence of a connection between the Authority's investigation (or publication of the Decision Notices) and harm to the Applicant's mental health. The Second GP Letter does not advance matters, it merely states that: (i) the Applicant initially presented with symptoms of "stress and low mood" in June 2017, for which she was prescribed an antidepressant; and (ii) in March 2020 and again in January 2024, the antidepressant dose was increased [HB/23/301]. This is not cogent evidence justifying privacy.

53. Further, the Second GP Letter does not record any reasons (whether as communicated by the Applicant to her GP or at all) for the Applicant's "symptoms of stress and low mood", nor for the increased doses of prescribed antidepressant. It is therefore not evidence of any link between the Applicant's antidepressant use and the Authority's investigation or the present proceedings let alone the effect of publication of the relevant information.

The letters from the Applicant's counsellor []

54. [The Applicant's counsellor] provided her qualifications and experience in her first letter dated 7 October 2023 in which she stated:

> "I am a Counsellor and Psychotherapist []. I am a Registered Member of the British Association of Counsellors & Psychotherapists (BACP), qualified with a level 7/Masters Degree in Counselling. []..."

55. She is a counsellor, but not a qualified medical professional such as a medical doctor, psychiatrist or clinical psychologist. In any event, [her] letters do not claim to be medical or expert reports and they are not in the required form – for example they include no statement of truth or statement of understanding of an expert's obligations and duties to the Tribunal etc.

56. Instead, [the Applicant's counsellor] refers to her first letter dated 7 October 2023 as being a "character reference" [HB/17/282] as it had been prepared for and relied upon in relation to the proceedings before the RDC of the Authority. Her second letter dated 26 January 2024 is signed off as a "Character Witness Regarding … Heather Dunne" [HB/20/285]. In summary, these are not expert reports let alone from a qualified medical practitioner, clinical psychologist or psychiatrist. The Tribunal also takes into account that [the Applicant's counsellor] was not called to give oral evidence nor sign a witness statement and therefore places less weight on her written evidence.

57. In her letters, [the Applicant's counsellor] also gives detail of her interactions with the Applicant in her capacity both as a therapist but also seemingly as a friend (e.g. recounting a time when [the counsellor] had dislocated her shoulder and the Applicant offered to collect groceries on her behalf [HB/18/278]). She states: "In some ways, I am saddened by the fact I am Heather's counsellor because it means our relationship must always remain ethical and will come to an end in due course, when in actuality Heather has the character I would look for in a friend." [The Applicant's counsellor] then expresses her "belief" in the second letter (seemingly without having considered any of the evidence in this case) that the Authority's substantive case is wrong and the Applicant "would have followed the rules at the point in which she was providing the advice" [HB/20/284]. The contents of the letters undermine the independence or objectivity of the facts and opinions contained described in the letters.

58. In terms of commenting on medical matters, the closest [the Applicant's counsellor] comes is to say that she 'screened' the Applicant for ASD but that this was "not a diagnosis" and if the Applicant wanted a diagnosis then "she would be able to take the screening to her doctor

to get a referral to a psychiatrist, where formal testing would be carried out" [HB/18/279]. It seems that no referral has been made. Despite [the Applicant's counsellor] accepting she is not qualified to make any diagnosis in respect of ASD, she goes on to make statements in her letters such as:

> "In more recent months of our counselling relationship, knowing that some of her nephews have been diagnosed with Autism Spectrum Disorder (ASD) I felt able to suggest to Heather that I believe it is highly likely that she may be Autistic too. I said to her that obviously, this can only be diagnosed by a psychiatrist. Therefore, I am not giving her a diagnosis, simply a suspicion based upon the number of clients I have worked with over the years who have been on the Autistic Spectrum.
> …
> I decided to include my belief that it is highly likely that she has Autism Spectrum Disorder into this character witness statement.
> …
> Heather's genetic make-up being that of someone on the autistic spectrum, means that she gets a hyperfocus, where she can focus on nothing but the proceedings, going over and over everything increasing her stress levels and leaving her unable to sleep for weeks at a time."

59. [The Applicant's counsellor] does make direct comment in the second letter regarding the effect of publication on the Applicant's mental health and that she believes that "[f]rom the time I have spent with Heather, it is my opinion that her conviction would be extreme concern that people reading a publication of the Decision Notice or any details of the case taken against her, would be led to the belief that she had not followed due process" and that "I do not feel confident that I would be able to keep her safe should these details be published before she has had the chance to clear her name" [HB/20/285].

60. Whilst these comments or opinions suggest a serious potential impact on the Applicant of publication, the Tribunal is not satisfied that they are cogent evidence or establish a substantial risk or any likelihood of harm. This is for all the reasons set out above which undermine her evidence including that [the Applicant's counsellor] is not a qualified medical professional whose opinion, to the extent it can be admitted at all, should carry significant weight. With due respect to [the Applicant's counsellor], a counsellor's primary role in the treatment of mental health conditions is not to "keep [the Applicant] safe"; that role primarily belongs to qualified medical professionals. In addition, there is no consideration given to the information on the allegations about the Applicant that is already in the public domain and the effect this has previously had upon her – this is addressed below.

61. For the reasons set out above, the Tribunal admits [the Applicant's counsellor's] letters in evidence, pursuant to Rules 2 and 15 of the Rules, to the extent they provide hearsay evidence of primary fact – such as what the Applicant has said and how she has behaved. However, the Tribunal places little weight on any opinions expressed by [the Applicant's counsellor] as to the extent of mental illness that the Applicant is suffering and the potential effect of publication. The Tribunal is not satisfied that the letters provide reliable, let alone cogent evidence that publication will cause a significant likelihood or substantial risk of psychological harm to the Applicant.

The Applicant's personal statement

62. The Applicant's personal statement refers to her suffering from periods of low mood and depression throughout her life, this includes in relation to events wholly unrelated to the Authority's investigation or these proceedings, such as the COVID-19 lockdown [][HB/21/287]. See for example [5]: "Throughout my life I have struggled at times with depression and anxiety" and [9]: "COVID and the lockdowns were a dark time for me". The Tribunal accepts this evidence that she has previously suffered and continues to suffer from these conditions or illnesses.

63. Whilst the Applicant has said that she is not eligible for an NHS referral to a psychiatrist, there is no explanation for this in the GP correspondence, or anywhere else. The Applicant has also stated that she cannot afford a private psychiatric assessment, but she has not provided copies of the quotes that she has apparently received for the psychiatric services, nor has she adduced any evidence of her financial situation to explain why those services are unaffordable. The Applicant requested [HB/45/407], and was granted [HB/16/270], a further opportunity to adduce evidence to the Tribunal regarding her inability to obtain a private psychiatric assessment, however, has not adduced any such evidence. The Applicant has had over 9 months since first raising the ground either to provide expert or medical evidence in support of her mental illness and the impact of publication or evidence as to why she cannot obtain this.

64. In relation to her ability to fund a psychiatric assessment, it is noted that the Second GP Letter says that the Applicant has "been accessing therapy sessions privately" (presumably at her own expense), but does not explain why she might be unable (for unspecified financial reasons) to obtain a private psychiatric assessment [HB/23/301].

65. In the circumstances, the Applicant's financial situation does not reasonably justify the lack of medical or expert evidence (such as from a psychiatrist or clinical psychologist) in support of the Privacy Applications (and the Tribunal is not satisfied that her financial circumstances reverse the presumption in favour of publication). As set out above, while the lack of supporting evidence from an expert is not determinative of the Privacy Applications it reduces the cogency of the evidence provided on this ground.

66. The Tribunal accepts that the Applicant has given some evidence of the effect upon her mental health of publication:

> "17. This process has crushed my spirit and aggravated my depression to the point where I have had thoughts of suicide and felt so despondent that I felt I could not cope with living with all this hanging over me. These thoughts recently reoccurred shortly before the Decision Notice was issued, and it was only with the assistance and intervention by my Counsellor [] and my doctor in increasing the dosage of my anti-depressant medication that I was able to bring myself back from the brink of maybe ending my life.
>
> 18. My work has been a source of pride, and it has really helped me to try and focus on more positive things. To be labelled as someone who lacks integrity pains me immensely and causes me to question my existence and purpose in life. The thought of the world being told by the

> FCA in a Decision Notice that I am not to be trusted, and that I am thoroughly incompetent, before I have had the chance to try and clear my name in the Upper Tribunal sends me into a spiral of anxiety and despair. I have felt like an after-thought for several years while the FCA did its investigations and then, without ever mentioning it beforehand, the FCA blindsided me at the annotated warning notice phase of its investigation accusing me of lacking integrity.
>
> 19. The Decision Notice subsequently reduced the level of criticism I face, but it is still devastating to me to have the threat of the Notice being published to the world.
>
> 20. The FCA has suggested I should see a psychiatrist and obtain a medical diagnosis of some sort if I am to ask for the non-publication of the notice. It is not that easy; I cannot afford to do that privately and the process in the NHS is lengthy. I can confirm that whatever diagnosis I may or may not have, that the dread I feel about the notion of public criticism on matters I know to be incorrect, before I have the chance to demonstrate my innocence, is real and consuming me. It is an overwhelming sense of despair that I cannot be sure that I will be able to manage if the Decision Notices are published.
> …
> 23.While I do not plan to do anything detrimental, I am unable to control that. I was close to the edge last November which was due to the ongoing extensions and deferral of the final decision. I have many more months of anxiety and stress to face during the court and trial process, which I hope and believe will finally enable me to clear my name.
>
> 24. I am very worried that even with the marvellous support I have, from my legal team, [counsellor], my family, and friends, which have enabled me to survive thus far, being publicly denounced, before I get that chance, as lacking integrity and being incompetent and not fit to be authorised may be just too much to bear."

67. The question is what weight to give this evidence in the absence of it being adopted in oral evidence on oath and tested in cross examination.

68. The Tribunal repeats its sympathy towards the Applicant. However, it is not satisfied that this is cogent evidence relating to psychological harm flowing from publication. The Applicant's statement and evidence primarily refers to the impact upon her of the past investigation by the Authority and existing reference proceedings rather than that any additional impact of publication. To the extent the evidence directly relates to publication ([18] and [24]), it is purely the Applicant's belief and is not accompanied by any expert evidence in support, despite the Applicant being given more than reasonable opportunity to serve this and there not being a reasonable explanation for its absence.

69. While the Tribunal accepts that this is the Applicant's genuine belief, it is not satisfied it is cogent evidence and concludes that it does not establish a significant likelihood of harm caused by publication of the relevant information. In so far as the Authority's Decision Notice and the Applicant's belief that publication would cause her harm or that the allegations are unfair and causing her stress, depression and anxiety, the Tribunal notes that the Applicant has received professional and personal support for several years and has continued access to this. The level of anxiety and depression has been previously and properly managed for several years.

70. Further, the non-publication of the Decision Notices without more would not of themselves provide the Applicant with total relief or complete reassurance that the allegations against her would not be published to the world. Even if these Privacy Applications were granted, she would further need to persuade the Tribunal that the reference proceedings as now joined with Mr Fenech's, including the substantive hearing of the references, should be held in private pursuant to Rule 37 or subject to any other anonymity or non-disclosure orders under Rule 14. The practical consequences of how the hearing of joined references could be managed where one party benefited from anonymity and another did not do not need to be considered given this decision.

71. The fundamental remedy that the Tribunal can grant to the Applicant for the anxiety caused by the allegations made by the Authority contained in the Decision Notice is to give the Applicant the opportunity to challenge all of the allegations in the Decision Notice within a fair hearing of her reference.

72. The Tribunal is not satisfied that this ground is made out. When the Decision Notice is published it will also make clear that the Applicant disputes the matters contained within it and it will contain the representations she made to the Authority denying the allegations. The publication of the reference on the register will also make it apparent that the allegations are challenged or disputed.

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

73. The Tribunal further takes into account the fact that there is already information concerning the subject matter of the Applicant's reference which is already in the public domain and this is a factor which tends in favour of publication in its own right.

74. Furthermore, the Applicant must have been aware of some of such publications or at least that the publication was pending as she has previously engaged with some reporters and is quoted as responding to them in some of the articles published, even if she did not read the articles or know for sure that they had been published. She has given quotes to at least one reporter which she must reasonably have believed might end up in the public domain. Those quotes are consistent with her case – she denies any wrongdoing or misconduct.

75. This however undermines the further suggestion that publication of the Decision Notices or relevant information would be likely to cause the Applicant significant psychological harm. Even if the nature of what has previously been published is qualitatively different from that contained in the Decision Notice, there is no reliable evidence that the previous publicity surrounding allegations similar to those in the Decision Notice and her knowledge that the allegations have been or may be published has caused the Applicant additional psychological harm beyond the effect of the Authority's investigation upon her. This undermines the argument that that publication of the Decision Notices and relevant information would be likely to psychologically harm her.

76. Information concerning the allegations against the Applicant which are made by the Authority in the Decision Notice have already appeared in publications as well-known as the Financial Times and Citywire. Those publications refer to allegations or statements that:

a. The Applicant's case was an example of "alarm bells about the quality of advice", with the Financial Times on 26 October 2017 referring to the Applicant's website having described the market as "lucrative" and saying '"we look for a reason to transfer, rather than a reason not to". The company says this statement had been removed from its website' [HB/29/318].

b. The Applicant has made statements to the press about the Authority's intervention at her firm (see for example 'Citywire' dated 18 September 2018 which attributes various statements to the Applicant [HB/30/321]):

"The largest creditors for Heather Dunne Consulting will be the company's professional indemnity insurer (which will receive a refund from the policy cancellation), its accountant and two external loans which Dunne has personal guarantees on.
'I personally am not walking away from any debt, I am taking a significant amount of debt on,' she said.
…
The pension transfer outsourcing business HD IFA was an appointed representative of Financial Solutions Midhurst Limited until June of this year.
Dunne said in March 2018, the FCA gave HD IFA permissions to start trading again. However prior to her starting the pension transfer business again, Dunne's principal Financial Solutions Midhurst Limited de-registered it in June.
This means HD IFA is now trying to find another principal or go directly authorised with the regulator. Currently its status on the FCA register says: 'This is an AR that is no longer an agent of an authorised firm.'
Dunne said she is also considering putting the sole trader HD IFA into cessation.
According to Dunne HD IFA is currently facing 10 claims over one advice firm which it did DB transfer advice for in 2012. This adviser, which has since closed down, was putting clients into unregulated investments, she said, after HD IFA provided the DB transfer advice.
'The nearest we came to non-regulated [investments] was that adviser,' she said. 'To me that was their advice and not mine.'
The outcome of these claims remains uncertain however Dunne indicated she will not walk away from any liabilities."

c. In 2019 she was also contacted for comment, which she declined to make, in relation to an article published by Professional Adviser [HB/26/347]:

"Heather Dunne IFA stopped carrying out pension transfer business in July 2017 following scrutiny from the Financial Conduct Authority over defined benefit (DB) transfers. The following year, it was announced that Dunne would re-enter the market as Heather Dunne Consulting.
However, in September 2018, that firm entered liquidation after its principal restricted pension transfer permissions. FSML, meanwhile, has filed for voluntary liquidation, according to Companies House.
Professional Adviser has contacted Heather Dunne IFA, Heather Dunne Consulting and FSML for comment."

d. The Authority had ordered the Applicant's firm to stop providing advice on pension transfers (see for example 'PA Advisor' article dated 7 July 2017, containing a quote from Mr Fenech [HB/25/306] and 'Citywire' article dated 20 July 2017: "New Model Adviser previously revealed that … Chichester-based Financial Solutions Midhurst (a principal of Heather Dunne IFA) have agreed to suspend DB transfer advice work…" [HB/26/310]).

e. The Financial Ombudsman Service ("FOS") have upheld complaints about advice given by the Applicant's firm (see Citywire article dated 16 November 2021 which noted that "The 13 recently upheld FOS complaints relate to advice given by specialist pensions firm Heather Dunne IFA (HDIFA)" [HB/34/362]).

f. The Applicant's advice was also criticised in a published FOS decision, dated 6 September 2019 [HB/31/323]. In that decision, the FOS decided that if the Applicant had advised correctly, she "ought to have unequivocally advised against" the relevant pension transfer (see also a second example at [HB/31/326]).

77. For the reasons set out above, the Tribunal is not satisfied that the Applicant's evidence in support of the Privacy Applications is cogent nor has she demonstrated that publication of the relevant information would cause a significant likelihood or substantial risk of harm to her. Nonetheless, the Tribunal will continue to keep under review the impact of proceedings upon her mental health and will continue to offer reasonable adjustments so as to ensure she is fairly able to participate in proceedings. It will also reconsider or review any decision taken to date in light of any change of circumstances or later cogent evidence provided.

The Remaining grounds for the Privacy Applications

78. The Tribunal's finding, that cogent evidence has not been provided to demonstrate that publication of the relevant information would cause a significant likelihood or substantial risk of harm to the Applicant, applies not simply to the primary ground relating to psychological harm and mental illness but to each of the four grounds when considered either in isolation or cumulatively.

79. The Tribunal considers the remaining three grounds for the Privacy Applications below.

Publication of the Decision Notices would cause reputational destruction to the Applicant

Applicant's submissions

80. Mr Cherry argued that publication of the Decision Notices would have a detrimental impact on the reputation of the Applicant. He acknowledged that there is some inevitable reputational damage to be associated with any litigation. As per *Eurolife Assurance Company Limited v FSA* (26 July 2022, Case 001) at [47]) and *R. (Todner) v Legal Aid Board* [1999] QB 966 (at [8]):

"…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".

81. He submitted that this litigation is however marked by the circumstances referred to in interparty correspondence and in the Personal Statement of the Applicant which demonstrate characteristics to this litigation which impact the Applicant in an adverse manner. The prospect of reputational destruction of the Applicant is particularly significant in the context

of her mental health issues and the characteristics of ASD that she displays and are outlined earlier in argument and evidence.

82. Mr Cherry relied on the fact that the Applicant was, on the Authority's own case, not under investigation until September 2021. Despite that fact she was subjected repeatedly to the investigatory powers of the Authority between 2017 and September 2021 and responded to multiple Information Requirements imposed on her and was not kept up to date by the Authority, ostensibly, as she was not under investigation. The focus of those interactions with the Authority was on her conduct and the work she carried out as an appointed representative. While the Authority denies this, it was clearly investigating her conduct throughout the period, including appointing Grant Thornton to conduct file reviews of her files, all before the Authority claims it was investigating the Applicant.

83. Mr Cherry suggested that the Applicant describes how she took significant pride in her work and has described the impact on her of the Authority's 'non-investigation' of her. In her Personal Statement (B/21) at [14 and 15]:

> "Please bear in mind that throughout this period I was effectively a witness in the investigation into FSML. I had suffered a period of voluntary suspension and then been theoretically reinstated in 2018. The FCA refused requests for any explanation or update on the basis I was not under investigation. This total lack of clarity caused immense additional stress to me which worsened my anxiety and depression. This all took a significant toll on me – my work and the pride I took in it for many years had been taken away, without explanation or update from the FCA. I lost my business and companies as a result of not being able to secure regulated work in my field while the FCA investigated FSML. I was in a state of limbo and unable to influence the outcome or even to have any meaningful idea of what was happening at the FCA while my life was on hold for years on end.."

84. The Applicant goes on to describe the significance of her work to her in her personal statement at [18]:

> "My work has been a source of pride to date, and it has really helped me to try and focus on more positive things. To be labelled as someone who lacks integrity pains me immensely and causes me to question my existence and purpose in life. The thought of the world being told by the FCA in a Decision Notice that I am not to be trusted, and that I am thoroughly incompetent, before I have had the chance to try and clear my name in the Upper Tribunal sends me into a spiral of anxiety and despair. I have felt like an afterthought for several years while the FCA did its investigations …"

85. Mr Cherry submitted that the Decision Notice makes the most serious of allegations about the character and competence of the Applicant. It alleges integrity failings and a severe lack of competence on the part of the Applicant in a detailed manner. In such circumstances, it is inevitable that serious reputational harm will be visited on the Applicant by publishing the Decision Notices. It is clear from the Applicant's evidence and that of her medical and psychological professionals, that the Applicant is very concerned with her work and has hyperfocus issues which exacerbate her perception of such criticism. It is also clear, given the clear evidence before the UT, that such publication of such criticisms would have an adverse effect on the Applicant's mental health.

86. He contended that in the context of this matter therefore, whilst the impact of reputational destruction alone may not be seen as sufficient reason not to publish the Decision Notice, in combination with other factors, particularly the mental health situation of the Applicant, the balancing exercise is in this case, in favour of not publishing the Decision Notice.

Discussion and analysis

87. The Applicant argued that there should be privacy because the publication of the Decision Notices would "destroy" her reputation (with slightly different formulations of the same point used elsewhere in her representations). In support of this argument, the Applicant refers to the allegation that she lacked competence in "combination with" the integrity allegation.

88. I reject this ground in isolation or as an additional factor weighing against publication for the reasons submitted by Mr Pritchard on behalf of the Authority.

89. The concern about the Applicant's reputation is not a cogent ground in support of the Privacy Applications.

90. The Applicant's worry about her reputation is unsupported by cogent evidence (indeed, there is no supportive evidence at all). Mere assertions as to the possibility of reputational harm are insufficient to displace the presumption in favour of publication and 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.

91. The only matter cited in support of her reputation argument is the seriousness of the findings outlined in the Decision Notices. However, that is not relevant to any consideration of unfairness. The findings outlined in the Decision Notices are substantive issues that will be addressed in due course before the Tribunal. The Applicant has the right to challenge those findings, a right which she has exercised. If the Tribunal finds in her favour, the Applicant will receive a decision or judgment vindicating her position. Further, if the Applicant's Decision Notice is published, it will make clear on its face that the findings therein are subject to challenge. It will also contain a summary of the Applicant's representations denying the allegations.

92. It is also relevant to the Applicant's concerns about her reputation that there is already a lot of information in the public domain referring to criticisms of the advice the Applicant gave. This is explained above.

93. In the circumstances, it is apparent that the Applicant's alleged lack of competence or misconduct is already in the public domain and therefore her reputation will have already been impacted by such matters. Indeed, per *Prodhan* at [25], "[t]he 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".

94. The Applicant's representations do not begin to explain why the publication of the Decision Notices will have a greater impact on her reputation than the materials already in the public

domain, or why that reputational impact means that there is a significant likelihood of severe damage. It is also worth noting that the Applicant's business, HDIFA, is no longer in operation so publication will not cause additional financial or reputational damage to her business.

Publication of the Decision Notices is not appropriate and there is an absence of urgency or consumer protection imperative

The Applicant's arguments

95. Mr Cherry submitted that there is little 'ordinary' about the Authority's conduct from the perspective of the Applicant. The Applicant's conduct was under investigation by the Authority from the initial supervisory visit to her premises in 2017. The Authority persists in its refusal to acknowledge that it was investigating the Applicant's conduct prior to it informing her that she was under investigation by it in September 2021. The Authority took seven years to investigate the conduct of the Applicant, four of which occurred before it notified her she was being investigated and then three years once it did.

96. He argued that during the investigation there have been various other procedural irregularities raised by the Applicant's legal representatives with the Authority, including matters of particular concern to the current applications and the context of whether publication of the Decision Notices would promote public understanding or create confusion. In this regard the Applicant refers to the Authority's recent correspondence relating to the issue of the Grant Thornton File Review team members, on which the entirety of the file review process relies, and which feeds the allegations of incompetence against the Applicant. The related failings of the Authority in respect of its approach to disclosure of materials relating to Dr Purdon and the significance of Dr Purdon's part in the investigation is also relevant and leads to the serious possibility of unsafe outcomes being presented in the Decision Notices.

97. In relation the Grant Thornton review, Mr Cherry contended that the Authority has provided no update on the issue of conflict checks to the Applicant. This is significant because there is currently no evidence that the basic requirements of ensuring that the Grant Thornton file reviewers were conflict-free nor that the conflict checks were ever done, as the Authority has asserted is the case. In the absence of such checks being evidenced, this calls into question the veracity of the evidence generated because of any file reviews undertaken by Grant Thornton. This point is raised not to be argued or determined in this forum at this time, but as an example of the conduct of the Authority during its investigations and dealings with the Applicant, which exacerbate the mental health impact visited upon her by the Authority.

98. In addition to this aspect, he submitted that it is evident that the Applicant is convinced of the correctness of her position that the file review process itself was significantly flawed. A key aspect of this belief relates to the view that incorrect criteria were applied in the DBAAT file review process, including requirements that were not in place at the time the Applicant was preparing the advice which is the subject of the file reviews, and which form the basis of a significant proportion of the matters outlined in the Decision Notices.

99. Mr Cherry accepted that the ultimate finding on that issue is one for the substantive hearing in due course, although the Applicant's belief in the flawed process is relevant to the Privacy Applications. This is so because it is a contributing factor to the matters described in the Applicant's Personal Statement (B/21) at [14, 15, and 18] relating to the pride in her work as discussed earlier. This is then connected to the characteristics of the Applicant, in terms of her anxiety, depression and ASD personality traits also discussed earlier. In combination, these issues contribute to her evidence of an adverse mental health impact flowing from publication of the Decision Notices.

100. He argued that a connected issue then is the involvement of Dr Purdon. The Authority only revealed the existence of Dr Purdon as part of the RDC process. The Authority (despite being in correspondence with Dr Purdon in the months leading up to the RDC Meetings) gave last-second disclosure relating to Dr Purdon on the eve of the Applicant's RDC meeting. When disclosure was given, it was incomplete and there were exchanges of correspondence between the Authority and the Applicant's legal representatives on this topic.

101. Mr Cherry contended that there is a risk of real unfairness to the Applicant by publishing the Decision Notices that goes beyond the mere assertion of disagreement with the findings. At present, the Authority cannot demonstrate that its belief as to the conflict-free nature of the reviews is anything other than a mere assertion that this is the case. The public upon reading the Decision Notices will know that the facts are disputed, but they will not know that there are fundamental issues that go to the very core of the substance of the allegations and whether the Authority has discharged its functions fairly. This makes the publication of the Decision Notices inappropriate. These facts sustain the argument that they are "cogent evidence of how unfairness may arise and how [the Applicant] would suffer a disproportionate level of damage" if publication were not prohibited.

102. He argued that the disproportionality here is linked to the mental health of the Applicant, in that she knows that these irregularities exist and the strident criticisms of her reached as the result of an apparently flawed process, where those flaws were known and apparent to the Authority had it looked sooner, but where these flaws are unable to be effectively communicated to the public in the event the Decision Notices are published.

Discussion and Analysis

103. This ground is also rejected.

104. It is accepted by all parties that there is a strong presumption in favour of publication of the Decision Notices. The Applicant accepts that she is highly critical of many of the factual foundations leading to the conclusions which are presented by the Authority in its Decision Notice. It is accepted that in the ordinary course those would be matters for consideration and disposition at the substantive hearing of the reference in due course. A summary of the nature and reasons for her denials and dispute of the allegations will be apparent from her representations as recorded in the Decision Notice.

105. There is a statutory presumption that decision notices will be published. That presumption advances the public interest in transparency and open justice. In considering whether a decision notice should be published, the Authority does not need to also demonstrate that there are additional public interests at play, such as increasing consumer knowledge or consumer protection. There is a public interest in promoting transparency in the UK financial services sector: if a person wishes to participate in the industry then they must accept this. The starting point is therefore that public interest lies in disclosing the Decision Notices and the open justice principle should apply. As such, the fact that the allegations concern matters that took place between April 2015 and June 2017 and that the Applicant has not carried out any regulated financial services activities since 2018 are not relevant to any consideration of alleged unfairness arising from publication of the Decision Notices.

106. The Applicant contends that there can be no "urgency or currency" in the publication of the Decision Notice where the Authority had been investigating the Applicant for several years prior to the Decision Notice being issued. This is also not relevant. The strong presumption in favour of open justice is not displaced by the lack of urgency or contemporary significance of a decision notice. In any event, the reason that the Decision Notice was not published when made (in early 2024) was because the Applicant made the Privacy Applications.

Publication of the Decision Notices would reveal irrelevant personal information about the Applicant's financial circumstances

The Applicant's submissions

107. Mr Cherry submitted that the Decision Notice relating to the Applicant reveals that she is in parlous financial circumstances insofar it has a reduced penalty on the grounds that she would suffer serious financial hardship if the financial penalty was larger. The proposed financial penalty is assessed as a level 4 seriousness matter in the Decision Notice. This indicates that the Authority considers the findings in its notice to be very serious.

108. As with the above submissions, that determination is premised on the outcome of the Grant Thornton file review process and the input and calculations of Dr Purdon which is based on that Grant Thornton file review process. For the reasons above this is an unsafe observation to be published in the Applicant's Decision Notice and one which will not be apparent from a broad observation that the findings in the notice are preliminary and subject to challenge.

Discussion and Analysis

109. The Tribunal finally rejects this ground.

110. The Applicant complains that if the Decision Notice is published then information about her financial position will be disclosed. This is not a basis for privacy. Embarrassment, which can be an inherent feature of litigation of this nature, does not give rise to unfairness (see *PDHL* at [36(4)]). In any event, the discussion of the Applicant's financial circumstances

is an inevitable component of the Decision Notice given to her since she invited the Authority to consider her financial circumstances when assessing the appropriate level of sanction. It is not realistic for her to now seek to rely upon the inclusion of those same financial circumstances as a reason for prohibiting publication of the Decision Notice.

111. Further, the discussion of her financial circumstances in the Decision Notice is very limited and reveals very little about her financial position – see para 6.3.3:

> Serious Financial Hardship
> 6.33. Pursuant to DEPP 6.5D.1G, the Authority will consider reducing the amount of a penalty if an individual produces verifiable evidence that payment of the penalty would cause them serious financial hardship. Ms Dunne has produced verifiable evidence to the Authority that payment of a penalty of £494,917 (i.e. the total of the Step 1 figure of £399,817 plus the Step 5 figure of £95,100) would cause her serious financial hardship. The Authority considers it appropriate to reduce the Step 5 figure to £0 for serious financial hardship, but does not consider it appropriate to allow Ms Dunne to retain the financial benefit that she derived directly from her breach (DEPP 6.5D.2G(7)(a)). Therefore, the Authority does not consider it appropriate to reduce the Step 1 figure of £399,817.

112. Finally, there is some reference to the Applicant's financial circumstances already in the public domain. The Citywire press reporting in relation to the Applicant's firm refers to adverse financial matters affecting the firm (and the Applicant is quoted in relation to the same: "I personally am not walking away from any debt, I am taking a significant amount of debt on" [HB/30/321]).

Conclusion and disposition

113. The Privacy Applications are dismissed for the reasons set out above.

114. A draft of this decision was circulated to the parties on 26 November 2024 in advance of publication. This was not simply for suggested corrections but also for proposed redactions in relation to any private matters relating to the Applicant's health which are not required to be published in order for the Tribunal's reasoning to be understood. The Tribunal has accepted the proposed redactions for the reasons given in the written submissions on behalf of the Applicant dated 6 December 2024 and made orders under Rule 14 that the information redacted not be published. The redactions appear in square closed brackets [] in the redacted published decision with an unredacted version provided to the parties.

115. Further, the Tribunal is prepared to consider any application by the Applicant to stay the effect of this decision on publication pending any application for permission to appeal.

JUDGE RUPERT JONES

RELEASE DATE: 11 December 2024