IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE Case: FMT 19007

FINANCIAL MARKETS TRIBUNAL (FMT)

BETWEEN:

AL MASAH CAPITAL LIMITED

AL MASAH CAPITAL MANAGEMENT LIMITED

SHAILESH KUMAR DASH

NRUPADITYA SINGHDEO

DON LIM JUNG CHIAT

Applicants

-and-

THE DUBAI FINANCIAL SERVICES AUTHORITY (DFSA)

Respondent

DECISION ON PRIVACY APPLICATION

Before:

His Honour David Mackie CBE QC (President)

Patrick D Storey

Ali Malek QC

16 January 2020

The Applications and Procedural Background

1. On 26 September 2019 Mr Charles Flint QC on behalf of the Dubai Financial Services Authority ("the DFSA") issued five Decision Notices each dated 25 September 2019 ("the Decision Notices") against Al Masah Capital Limited ("Al Masah Cayman"), Al Masah Capital Management Limited ("Al Masah DIFC"), Mr Shailesh Kumar Dash ("Mr Dash"), Mr Nrupaditya Singhdeo ("Mr Singhdeo") and Mr Don Lim Jung Chiat ("Mr Lim") (collectively, "the Applicants"). The Applicants are represented in these proceedings by KBH Kaanuun.

2. Pursuant to Articles 29 and 90(5) of the DIFC Regulatory Law No 1 of 2004 ("the Regulatory Law") and Rules 24-26 of the Rules of Procedure of the Financial Markets Tribunal ("the FMT Rules"), the Applicants exercised their right to refer the matter (by way of reference notices) to the Financial Markets Tribunal ("the FMT") by FMT form 1 Notices of Appeal dated 27 October 2019.

3. By application notices dated 24 October 2019 ("the Privacy Applications") the Applicants sought a number of orders (pursuant to Article 31(6) of the Regulatory Law and Rules 16 to 20 of the FMT Rules).

4. These included orders that:

   a. Oral hearings (whether interim or final) be heard in private;

   b. Information about the reference shall be for the confidential use only of the Registrar, the FMT, the Applicants and any other parties, as well as Counsel and shall not be available to the public until further order of the FMT;

   c. The DFSA shall not publish the Decision Notices or the fact that the Applicants have exercised their respective rights of referral to the FMT.

5. The Applicants also sought orders relating to consolidation and a stay.

6. These have been disposed of as follows:

   a. Consolidation. Pursuant to Article 31(4) of the Regulatory Law, on 28 October 2019, the FMT President made a direction for the FMT to consolidate the references into a single consolidated proceeding. The FMT Registrar wrote to the parties on 29 October 2019 to confirm the registration as a single consolidated proceeding. An issue remains as to whether the Applicants should pay a single fee of US$5,000 on the basis that the five references have been consolidated.

   b. Stay. The DFSA agree to stay of the financial penalties. The Applicants have not sought to stay the prohibitions. The Hearing Panel makes an order that the imposition of financial penalties on the Applicants be stayed pending determination of the references.

7. On 4 November 2019 the Applicants filed evidence in support on the Privacy Applications. The evidence consisted of witness statements each dated 4 November 2019 from Mr Lim, Mr Saikat Kumar ("Mr Kumar") on behalf of Al Masah DIFC, Mr Dash, Mr Najjad Zeenni ("Mr Zeenni") on behalf of Al Masah Cayman and Mr Singhdeo.

8. On 12 November 2019 the DFSA served its Response to the Privacy Applications. It relied on a witness statement dated 12 November 2019 from Mr Matthew Hammond ("Mr Hammond"), a Senior Manager at the DFSA's Enforcement Division and lead investigator in charge of the investigation which resulted in the DFSA's actions against the Applicants.

9. On 14 November 2019 the FMT Registrar, Mr Robert Stephen, notified the parties that pursuant to Rule 11 of the FMT Rules, the President had appointed His Honour David Mackie CBE QC, Mr Al Malek QC and Mr Patrick D Storey to be the Hearing Panel in these proceedings with His Honour David Mackie CBE QC presiding.

10. A reply witness statement dated 27 November 2019 from Mr Singhdeo was served on behalf of all the Applicants in response to Mr Hammond's witness statement and the DFSA' written submissions dated 12 November 2019.

11. The DSFA oppose the Privacy Applications. It contends in summary:

    a. Unless it becomes appropriate in relation to a discrete, private issue that the FMT decides is appropriate to be dealt with in public, all hearings in this matter should be in public;

    b. Appropriate information about the references should be published. This includes entering details about the references in the "pending matters" table of the FMT of the DFSA's website; and

    c. It is entitled to publish appropriate information about the Decision Notices, including publication of the Decision Notices themselves.

12. On 27 November 2019 the Applicants served Written Submissions in response. In their submissions, the Applicants requested an oral hearing of the Privacy Applications. This was granted by the FMT President on 30 November 2019.

13. A Skeleton Argument was served by the DFSA on 16 December 2019 pursuant to the permission of the Hearing Panel given on 5 December 2019 if any of the parties wished to make further written submissions. By email dated 17 December 2019 KBH Kaanuun confirmed on behalf of the Applicants that they did not intend to rely on further written submissions in advance of the hearing.

14. Rule 63 of the FMT Rules provides: "*Subject to Rule 55, every oral hearing on the merits of a Proceeding shall take place in the DIFC in the presence of the all the member of the Hearing Panel*".

15. The Hearing Panel decided and both parties agreed that the Privacy Applications should be heard in London. This was for a number of reasons: (1) the urgency of the matter; (2) the hearing was to take place in private (because of the nature of the Privacy Applications); and

(3) many of the parties' legal representatives (as well as the Hearing Panel members) are based in London.

16. The hearing took place in the IRDC in London on 18 December 2019. At the hearing, the Applicants were represented by Jonathan Crow QC, Andrew Rose and Mr DK Singh of KBH Kaanuun. The DFSA was represented by Sarah Clarke QC, Adam Temple and James Lake (Associate Director, DFSA Legal Department) by video conference with Dubai. A transcript was taken of the hearing.

Issues

17. The issues the Hearing Panel are required to determine are these:

    a. Whether the Reference proceedings should be in private.

    b. Whether the DFSA should publish the Decision Notices, any information about the Decision Notices, or the fact that the Applicants have made the References.

    c. Whether the individual Applicants should pay a filing fee of US$5,000.

    d. Costs.

The Background Facts

18. The Hearing Panel does not make any findings in relation to the merits of the application to review the Decision Notices. In particular, nothing that is said below is a finding of fact. Clearly there are substantial disputes between the DFSA and the Applicants. However it is necessary to set out the background to the investigation and the results of the investigation. It is also necessary to refer to the evidence of the Applicants and why they consider publication and a public hearing will cause them harm.

    <u>The Investigation</u>

19. The background to the investigation is set out in the witness statement of Mr Hammond. The investigation formally commenced on 5 November 2015 following a whistle-blower complaint by a former employee of Al Najah Education Limited ("Al Najah") which is said to be an Investment Company within one of the four collective investment funds. Initially the investigation only concerned Mr Dash and Mr Singhdeo. On 12 April 2016 it was extended to Al Masah Cayman and Al Masah DIFC.

20. Mr Hammond explains that in early November 2015 the DFSA became aware that allegations against the Applicants (including allegations similar to those made by the whistle-blower had been published on public whistle-blower websites. In para 37 of his statement, he gives two examples of articles appearing on websites in late 2015.

21. On 15 November 2015, officers from the DFSA Enforcement and Supervision Teams, together with forensic support from Deloitte who had been engaged by the DFSA attended at two addresses in the DIFC occupied by Al Masah DIFC and Al Masah Cayman. A notice pursuant to Article 80(a), (b), (c) and (e) of the Regulatory Law 2004 was served on Al Masah

DIFC at the time of this inspection which was unannounced. Mr Hammond states that this inspection "*was precipitated by the fact that such allegations against the Applicants were already in the public domain*" (para 35). The reference to "*such allegations*" are to allegations similar to the facts set out in the Decision Notices.

22. On 16 March 2017 the First Investigation Report was produced. This was the result of interviews and a review of documents coming from a number of sources including regulators in the United Arab Emirates, the United Kingdom and the Cayman Islands. In June 2017 the Applicants provided to the DFSA, in four volumes, their responses to the First Investigation Report.

23. The Final Investigation Report was produced on 30 September 2018.

24. On 1 October 2018 Enforcement referred the Final Investigation Report and recommendations to the DFSA's Decision Making Committee ("DMC").

25. On 12 February 2019, the DMC gave each of the Applicants a preliminary notice setting out the findings and action the DFSA was proposing to take.

26. On 20 June 2019 the Applicants made written representations in response to the preliminary notices.

27. On 16 and 17 September 2019 the Applicants made oral representations to the DMC.

The Decision Notices

28. On 26 September 2019 the DMC decided to take action against the Applicants and issued the Decision Notices that have since been referred to the FMT on 27 October 2019

29. In broad terms the DFSA has found that the Applicants have engaged in misleading and deceptive conduct by deliberately concealing the payment of certain fees paid by investors with respect to arrangements which amounted to an unauthorised Collective Investment Fund that the Applicants were all involved in promoting in or from the DIFC. In particular, the Applicants made misleading statements in marketing materials in relation to fees and provided prospective investors with financial statements that had been falsified.

30. A convenient summary of the contraventions and sanctions imposed by the DFSA is set out in Appendix A of its Answer dated 24 November 2019. It is set out below.

a. Al Masah Cayman

Financial penalty of US$3,000,000 pursuant to Article 90 of the Regulatory Law for:

- Making misleading or deceptive statements as to fees in documents relating to Offers of Units in Funds managed by Al Masah Cayman, contrary to Articles 56(1)(a) and (b) and 56(2) of CIL and (after 21 August 2014) Article 41B(1) of the Regulatory Law;

- Making Financial Promotions in or from the DIFC, other than as provided by the Rules, as it was not an Authorised Person or other Person referred to in GEN Rule

3.4.1(1) to (3) and the communications did not meet the requirements to be an "exempt Financial Promotion" under GEN Rule 3.4.1(4), contrary to Article 41A(1) of the Regulatory Law;

- Offering Units of Funds to prospective Unitholders in contravention of Article 50(1)(b) of CIL, on the basis that Al Masah Cayman was not a fund Manager as defined by Article 20(4), as it was not authorised to act as Fund Manager of the Funds offered, nor otherwise authorised to make an Offer of Funds; and

- Carrying on Financial Services in the DIFC, that is Managing a Collective Investment Fund and Arranging Deals in Investments, when it was not an Authorised Firm with a Licence authorising it to carry on those activities, contrary to Article 41(1) of the Regulatory Law.

b. Al Masah DIFC

Financial penalty of US$1,500,000 pursuant to Article 90(2)(a) of the Regulatory Law for:

- Making misleading or deceptive statements as to fees in documents relating to Offers of Units in funds managed by Al Masah Cayman, contrary to Article 56(2) of CIL, and (after 21 August 2014) Article 41B(1) of the Regulatory Law; and

- When communicating Marketing Materials and Subscription Forms to investors, failing to take reasonable steps to ensure that the information contained in those documents as to fees was clear, fair and not misleading, contrary to COB Rule 3.2.1 and GEN Rule 4.2.6.

c. Mr Dash

Financial penalty of US$225,000 pursuant to Article 90(2)(a) of the Regulatory Law and a prohibition from holding office in or being an employee of any Authorised Person, DNFBP, Reporting Entity or Domestic Fund, pursuant to Article 90(2)(g) of the Regulatory Law for:

- Being knowingly concerned in the contraventions by Al Masa DIFC and Al Masah Cayman and thus, under Article 86(1) of the Regulatory Law, he committed contraventions of legislation administered by the DFSA; and

- In his capacity as an Authorised Individual, failing to observe high standards of integrity and fair dealing in carrying out his Licensed Function in breach of GEN Rule 4.4.1 (Principle 1 of the Principles of Authorised Individuals).

d. Mr Singhdeo

Financial penalty of US$150,000 pursuant to Article 90(2)(a) of the Regulatory Law and a prohibition from holding office in or being an employee of any Authorised Person, DNFBP, Reporting Entity or Domestic Fund, pursuant to Article 90(2)(g) of the Regulatory Law for:

- Being knowingly concerned in the contraventions by Al Masah DIFC and Al Masah Cayman and thus, under Article 86(1) of the Regulatory Law, he committed contraventions of legislation administered by the DFSA;

- Contravening Article 41B of the Regulatory Law in counselling and procuring or being knowingly involved in the alteration of a bank statement to conceal the payment of Placement Fees, from, or the source of funds transferred into, a bank account of Al Najah Education Limited (ANEL); and

- In his capacity as an Authorised Individual, failing to observe high standards of integrity and fair dealing in carrying out his Licensed Function in breach of GEN Rule 4.4.1 (Principle 1 of the Principles of Authorised Individuals).

e. Mr Lim

Financial penalty of US$150,000 pursuant to Article 90(2) of the Regulatory Law and a prohibition from holding office in or being an employee of any Authorised Person, DNFBP, Reporting Entity or Domestic Fund, pursuant to Article 90(2)(g) of the Regulatory Law for:

- Being knowingly concerned in the contraventions by Al Masah DIFC and Al Masah Cayman and thus, under Article 86(1) of the Regulatory Law, he committed contraventions of legislation administered by the DFSA; and

- Contravening Article 41B of the Regulatory Law in counselling and procuring or being knowingly involved in the alteration of a bank statement to conceal payment of Placement Fees, from, or the source of funds transferred into, a bank account of Al Najah Education Limited (ANEL).

Applicants' Evidence

31. The Applicants contend that the DFSA findings in the Decision Notices are in many respects flawed and the decisions are unjustified.

32. The Applicants' witness statements in support of the Privacy Applications are similar in content. The Hearing Panel will first summarise the evidence filed in support of the corporate applicants before looking at the evidence of the individual applicants.

Al Masah DIFC

33. Mr Kumar is the Senior Executive Officer of Al Masah DIFC. His evidence can be summarised as follows. Al Masah DIFC was incorporated in the DIFC on 9 August 2010 with registration number 0955 and was licensed by the DFSA on 19 August 2010. It was authorised by the DFSA to carry on Financial Services in or from the DIFC, including Arranging Deals in Investment and Managing Collective Investment Funds. It is a company limited by shares under the DIFC Companies Law No 3 of 2006 ("the Companies Law"). Al Masah Cayman owns 100% of the issued share capital of Al Masah DIFC.

34. Al Masah DIFC's primary business activities were and are to identify and evaluate investment opportunities for Al Masah Cayman and to advise Al Masah Cayman.

35. Al Masah Cayman's primary business activities are independent advisory services and asset management. It entered into management agreements for the management of four

Investment Companies, Avivo Group ("Avivo"), Al Najah, Gulf Pinnacle Logistics Limited ("Gulf") and Diamond Lifestyle Limited ("Diamond"). The Investment Companies have wholly owned subsidiaries (called Operational Companies) which carry on day to day operational activities for their parent Investment Company.

36. The Investment Companies are separate legal entities and were clients of Al Masah Cayman. Al Masah Cayman provided management services to the Investment Companies and the function of raising capital for the Investment Companies was contracted out to Al Masah DIFC.

37. As summarised above, in its Decision Notice, the DFSA found that Al Masah had committed several contraventions and should pay a fine of US$1,500,000. The DFSA has not taken any action prohibiting Al Masah DIFC from conducting business in the DIFC. The central theme of the Decision Notice are findings that "*Al Masah DIFC deliberately concealed the payment of certain fees from [prospective] e investors, in particular by making misleading statements in marketing material in relation to fee and by providing prospective investors with financial statements which had been falsified*" (Kumar, para 22)].

38. Mr Kumar explains in evidence at paras 26- 32 of his witness statement that the DFSA has found that Al Masah DIFC has deliberately misled prospective investors. It explains that if these allegations become public before the FMT has determined the Al Masah DIFC Reference, "…*Al Masah DIFC's reputation in the market will be fatally undermined. It would inevitably affect not only the reputation of the Al Masah DIFC but will also affect the reputation of the Investment and Operational Companies, which are not the subject matter of any investigation, insofar as they have no direct nexus to the DFSA or the DIFC*" (Kumar, para 27). He goes on to explain that there were rumours about the investigation which he identifies (Kumar, para 28). The consequences of the rumours are set out (Kumar, para 29).

39. At para 31 he says:

"*If the DFSA publishes the Decision Notice or even the fact that the Al Masah DIFC Reference has been made (and matters related to it) then it is likely that the threats made by the banks to close the bank accounts will be borne out and the bank accounts of Al Masah Cayman and Al Masah DIFC will be closed. This will have a severe impact on the business as a going concern*".

Al Masah Cayman

40. Mr Zeenni is the Chairman of the Board of Directors of Al Masah Cayman. Al Masah Cayman is the parent of Al Masah DIFC. Mr Zeenni's evidence is to the following effect.

41. Al Masah Cayman's primary business activities are independent advisory services and asset management. It entered into management agreements for the management of four Investment Companies, Avivo, Al Najah, Gulf and Diamond.

42. Al Masah Cayman has been a successful private equity business with a reputable presence in the business community. It was on a successful growth trajectory and brought significant levels of investment to the Investment Companies and as a consequence to the Operational Companies in the United Arab Emirates.

43. The findings in the Decision Notice against Al Masah Cayman include serious allegations. The central allegation is that it deliberately misled prospective investors.

44. If these findings become public before the FMT has determined the Al Masah Cayman Reference, "*its reputation in the market will be fatally undermined*" (Zeenni, para 25). The findings would affect not only Al Masah Cayman's reputation but also the reputation of the Investment and Operational Companies who are not subject to any investigation "insofar as they have no direct nexus to the DFSA or the DIFC" (Zeenni, para 25). He states "*As such, the reputational damage will have potentially serious and far-reaching consequences. In addition to the likely impact on the companies' trading activities, about 400 shareholders and approximately 3,000 employees would also be adversely impacted. Making these allegations public will cause investor panic….*" (Zeenni, para 25).

45. Mr Zeenni, like Mr Kumar, gives examples of rumours that circulated in the market during the investigation to the effect that there had been a DFSA "raid" and whether investments were safe; that a law firm in the DIFC was aware of the DFSA' presence at the offices of Al Masah DIFC; that the DFSA had reached out to E&Y, the auditor of the Operational Companies as a result of which the Operational Companies have known of the investigation and that third parties outside the jurisdiction of the DIFC have been approached by the DFSA. Mr Zeenni contends that the effect of these rumours has resulted in loss of management fees, difficulties in raising capital, loss of placement agency to Al Najah and Avivo, shareholders have wanted to sell shares in Al Masah Cayman (particularly Mr Sadek Al Sewedy and also UK Paints, At Last Sportswears and Al Hail Holdings); revenue is substantially down and banks have threatened to close the bank accounts of Al Masah Cayman and Al Masah DIFC. Mr Zeenni considers if rumours cause all these difficulties to the business, publication of the details of the DIFA's findings will be even greater in their effect.

46. Mr Zeenni contends that any reputational damage to Al Masah is also likely to cause reputational damage to those associated with it including its major shareholders; its Board of Directors; the Investment and Operational Companies.

47. He concludes his evidence by saying "*the panic and detriment caused to investor confidence could be so severe to cause its business to close its operations*" (Zeenni, para 31(c)).

48. The evidence from the individual applicants can be summarised as follows.

Mr Dash

49. He describes himself as having led financial services companies such as Al Masah Cayman which was established in 2010. He is the CEO of Al Masah Cayman. This company has raised over US$1 billion and established itself as one of the fastest growing alternative investment management and advisory firms in the MENA and SE Asia region (Dash, para 7). He has received several awards that show his achievements and abilities (Dash, para 11).

50. Mr Dash says that he fully cooperated with the investigation. The Decision Notice affecting him finds several contraventions and, in addition to a fine, includes a prohibition from

holding office in or being employed by an Authorised Person, DNFBP, reporting Entity or Domestic Fund pursuant to Article 90(2)(g) of the Regulatory Law. The central theme of the findings is that he was involved in the deliberate concealment of the payment of certain fees from prospective investors.

51. He points out that he sits on the board of various companies which have approximately 400 shareholders and 3000 employees. He considers that if the findings in the Decision Notice become public before the FMT has determined the Dash Reference his reputation will be fatally damaged. He says that it would be unfair and disproportionate to those businesses to be affected by the allegations against him. If the privacy application is not allowed "it may lead to job losses as well as shareholder loss in those related and unrelated companies. It may also impact banking relations of those companies potentially leading to closure of their bank accounts (Dash, para 26).

52. Mr Dash contends that investors will be harmed who trusted in his proven track record. He goes on to refer to the same rumours covered in the evidence of Mr Zeenni (Dash, para 28).

Mr Lim

53. The Decision Notice in relation to Mr Lim records that at all material times he was an executive director of Al Masah Cayman and on the board of directors of each of the Investment Companies.

54. Mr Lim has received the same prohibition as Mr Dash and has also been fined. Like Mr Dash the central theme of the findings by the DFSA is that he was involved in the deliberate concealment of the payment of certain fees from prospective investors (Lim, para 14).

55. Mr Lim's concern is that if the prohibition on the basis that he is not a fit and proper person to be employed in the financial services industry in the DIFC becomes public before the FMT's determination, his "*reputation will be fatally undermined*" (Lim, para 19). He goes on to say that it "*is likely to have several consequences, for example, I could suffer a loss of employment and employment opportunities. The banks may also withdraw credit and it may also have an impact on the operation of my bank accounts*" (Lim, para 20).

Mr Singhdeo

56. He is a director of Al Najah, Avivo , and Gulf. He is also the General Manager of different operating companies in the United Arab Emirates and the DED license of each of the different entities has his name as its General Manager.

57. In his statement (Singhdeo, para 11) he refers to the Decision Notice affecting him and points out that the central theme of the findings was that he was involved in the deliberate concealment of the payment of certain fees from prospective investors and the forgery of a bank statement.

58. He refers to the Decision Notice and the fine that has been imposed on him. In addition he is prohibited on the basis that he is not a fit and proper person to be employed in the financial services industry in the DIFC.

59. His evidence is to the effect that should the findings be made public before the FMT has determined his Reference his reputation "*will be fatally undermined*". He goes on to say that he "*could suffer a loss of employment and employment opportunities. The banks may withdraw credit. It may also have an impact on the operation of my bank accounts. It may also impact the banking relations of some of the operating business, where I am the General Manager of the business. There is a real possibility that the banks may withdraw credit lines to these entities*" (Singhdeo, para 17).

DFSA's Responsive Evidence

60. Mr Hammond on behalf of the DFSA responds to a number of the allegations by the Applicants.

61. As to the Applicants' concerns regarding reputational damage, he refers to the unannounced inspection of the Al Masah DIFC offices being precipitated by the fact that allegations against the Applicants were already in the public domain. He also refers to allegations, including ones similar to those made by the whistle-blower, appearing on at least two websites in late 2015. The publication of those allegations was acknowledged by the Applicants' legal advisors in their letter to the DFSA dated 30 November 2015.

62. As to publicity concerns, Mr Hammond stated that there is no requirement that investigations carried out by the DFSA be conducted in private. However, as a matter of practice and policy, investigations are frequently conducted in private. This is to avoid the risk of loss of evidence and not because of any obligation of confidentiality owed to the targets of those investigations. He recognises that it is often necessary to inform others, for example investors and witnesses, in order to gather relevant evidence for the purposes of an investigation.

63. He refers to correspondence with the law firm Stephenson Harwood. He points that that the DFSA was not provided with any evidence that information had been "leaked" to the unnamed law firm referred to. Enforcement staff who met with EY were directed to keep discussions confidential.

64. Since the investigation began, the DFSA has contacted many third parties not based in the DIFC in connection with this matter. This included, but was not limited to:

    a. Other Regulators.

    b. Current and former employees of the Applicants.

    c. Selected investors in the collective investment funds.

    d. The Dubai Police.

    e. Consultancy firms providing forensic support to the investigation.

f. Investment Companies in the Al Masah group.

65. Mr Hammond states that enforcement initially took the decision not to interview investors in the collective investment funds. However, that decision had to be revisited following the interview with Mr Dash on 29 September 2016.

66. During the interview, Mr Dash said words to the effect that the investors in the Investment Companies were made aware of the placement fees charged by Al Masah Cayman. This was either by way of being told by a member of the Al Masah Placement Team, by reading the Articles of Association of the Investment Company or by virtue of their positions on the boards of Al Masah Cayman.

67. This required Enforcement to change its position on interviewing investors, it was considered necessary for the DFSA to investigate the truth of Mr Dash's statements in interview.

68. With one exception, the investors chosen were interviewed under Notices issued under Article 80 of the Regulatory Law 2004 and were subject to confidentiality directions. The exception, an individual who was both an investor in the Funds, and a Referral Agent was interviewed on a voluntary basis, having given the DFSA an undertaking as to confidentiality in terms similar to the standard confidentiality direction contained in the usual Article 80 Notices to attend interview.

69. Mr Hammond asserts that he is unable to comment on the reasons for Al Masah Capital's failure to raise capital. Al Masah Cayman was not directed to stop using Al Masah DIFC for this purpose.

70. Mr Hammond says that he does not know whether it is true as Mr Zeenni claims that Al Masah Cayman is no longer the sole Placement Agent for Al Najah and Avivo.

71. The FMT has considered the other aspects of his evidence commenting on what is said by Mr Zeenni. Mr Hammond states that DFSA has not been presented with any evidence to support the claim made by Mr Zeenni regarding the threatened closure of accounts and he cannot comment on what he says and it is a commercial decision for the banks involved.

Second Witness Statement of Mr Singhdeo

72. The purpose of this witness statement is to provide the FMT with further particulars of the risks to the Investment Companies, Operational Companies and underlying businesses which he considers will arise if publicity is given to the DFSA findings before the FMT has determined the Applicants' appeals.

73. The companies that he considers include Al Najah and Horizon Education (SG) Pte Ltd. Al Najah has a banking relationship with HSBC Bank Middle East Limited. Mr Singhdeo points to provisions in facility documentation that would allow the bank to vary or cancel its facility which has approximately US$7.3m outstanding if publicity was given to the DFSA findings. A similar position is said to exist in relation to subsidiaries of Al Najah.

74. He also refers to Avivo Group and Alchemist Healthcare LLC. Avivo Group is an Investment Company and Alchemist its Operational Company. He explains his concern that publicity is likely to have a negative effect on the prospects of these companies of being able to sell part of the business to pay down debt. He refers to the need of Avivo Group to repay convertible debt held by DB Infrastructure Group II BSC. Avivo Group has entered into an agreement to sell parts of its business. The identity of the purchaser is not given due to confidentiality obligations. Mr Singhdeo contends that if privacy is not maintained this "may severely impact the sale and at worst the purchaser may withdraw its offer" (para 12(d)). If DB Infrastructure Group II BSC is not repaid, it is said that this will affect facilities with National Bank of Fujairah Group PJSC and also Kuwait International Bank.

75. Mr Singhdeo (Singhdeo (2), para 14 ff) refers to the Operational Company in the logistics sector, Gulf. He says that publicity relating to the Applicants is likely to have a negative effect on its businesses.

Legislative and Regulatory Framework

76. The Hearing Panel outlines the legislative and regulatory framework that is relevant to the Privacy Applications.

77. With reference to Article 8(3) of the Regulatory Law, the DFSA has statutory objectives including:

    a. to foster and maintain fairness, transparency and efficiency in the financial services industry in the DIFC;

    b. to foster and maintain confidence in the financial services industry in the DIFC;

    c. to prevent, detect and restrain conduct that causes or may cause damage to the reputation of the DIFC or the financial services industry in the DIFC through appropriate means including the imposition of sanctions;

    d. to protect direct and indirect users and prospective users of the financial services industry in the DIFC; and

    e. to promote public understanding of the regulation of the financial services industry in the DIFC.

78. Article 31(6) of the Regulatory Law provides that "*proceedings and decisions of the FMT shall be heard and given in public unless the FMT orders otherwise, or its rules of procedure provide otherwise*".

79. FMT Rule 16 reflects Article 31(6) of the Regulatory Law and provides that "*all proceedings and decisions of the FMT shall be heard and given in public unless the Hearing Panel orders otherwise on its own initiative or the application of a party. No hearing shall be non-public where all parties request that the hearing be made public*".

80. FMT Rule 19 provides that:

"*… in determining an application for confidential treatment, the Hearing Panel shall consider, so far as practicable:*

(a) whether the disclosure of information would in its opinion be contrary to the public interest;

(b) whether the disclosure of commercial information would or might, in its opinion, significantly harm the legitimate business interests of the undertaking to which it relates;

(c) whether the disclosure of information relating to the private affairs of an individual would, or might, in its opinion, significantly harm the person's interests: and

(d) the extent to which any such disclosure is necessary for the purpose of explaining the reasons for the decision".

81. DSFA's power to publish information including Decision Notices is contained in Art 116(2) of the Regulatory Law 2004. That article provides:

"*The DFSA may publish in such form and manner as it regards appropriate information and statements relating to decisions of the DFSA and of the Court, censures, and any other matters which the DFSA considers relevant to the conduct of affairs in the DIFC.*"

82. The Applicants point out that Art 116(2) of the Regulatory Law confers a discretion. This is in contrast to the position in England where the FCA has a statutory duty to publish information about its decisions, subject to specific and limited exceptions (see: section 391, FSMA 2000).

83. The DFSA policy on publication is set out in para 5-17-8 to 5-17-11 of the Regulatory Policy and Process (RPP) Sourcebook (February 2017 Edition).

84. RPP 5-17-8 provides that:

"*The DFSA expects to publish information about the commencement or hearing of proceedings before the FMT or court, unless otherwise ordered by the FMT or court.*"

85. RPP 5-17-9 to 5-17-11 provide as follows:

"*5-17-9 The DFSA will generally make public any decision made by the DMC [sc Decision Making Committee] and will do so in a timely manner after any relevant period to institute a referral of the decision to the FMT has expired or appeal process has come to an end.*

5-17-10 In circumstances where the DFSA considers it expedient to publish at an earlier stage, the publication will refer to the right of review which the affected Person has and the time limit for that review. The DFSA would consider it necessary to publish at this early stage where to do so enables it to achieve its objectives or it is in the public interest to do so.

5-17-11 If the affected Person exercises its right of referral, then the DFSA will publish that fact unless otherwise ordered. When the referral has been heard and determined, the DFSA expects to publish the

decision (subject only to the FMT – see 5-17-12) which would include the publication of any notice of decision."

86. On 8 July 2019 the DFSA published consultation paper number 126 entitled "DFSA Decision Making Processes".

87. Its current practice is stated as follows (at paras 44-45:

"*44. The current policy also provides that if the affected person exercises their right of referral, then the DFSA will publish that fact unless otherwise ordered. In cases so far we have provided only very limited information about matters before the FMT. Currently, we publish the following details about pending matters:*

a. FMT reference number;

b. Date of referral;

c. Applicant's name;

d. Respondent (i.e. the DFSA);

e. if appropriate, the hearing type (e.g., case management conference, substantive hearing, closing submissions); and

f. the date and time of any hearing.

This information is published in a table on the FMT section of the DFSA's website.

45. We do not currently publish details of the decision that has been referred to the FMT or the Decision Notice itself."

88. In its Written Submissions at paras 29-30, the Applicants argue as follows:

"*29. As a consequence of this policy and practice, persons in the position of the Applicants have a legitimate expectation that the DFSA will publish at most the very limited information described in the passage from the CP quoted, unless there is some good reason to publish further information arising from the circumstances of the particular case. This is a legitimate expectation which arises from the policy and practice of the DFSA, as described above, and which is not mirrored in the English regime.*

30. If an applicant is dissatisfied with a decision of the DFSA to publish information, and asks the FMT to make an order restraining publication, the FMT is entitled to consider the question of publication afresh and in doing so must itself (as part of the DFSA, under Article 26, Regulatory Law) act in accordance with the policy and practice of the DFSA. In effect, the FMT is entitled to substitute its own view of how DFSA policy and practice apply and make orders achieving what it considers to be the correct outcome".

89. The Consultation Paper goes on to state a proposal to change its policy. At para 45 it states, "*there are very good reasons for publishing information about decisions (which could include the Decision Notice itself) even if they are subject to review by the FMT*".

90. These reasons are listed as follows:

a. ***Promoting more timely transparency of DFSA decisions.*** *Consistent with the guiding principle in Article 8(4) of the Law, publication of information about decisions shows that the DFSA exercises its powers and performs its functions in a transparent manner.*

b. ***Demonstrating the DFSA is taking action.*** *Significant delay between the time misconduct occurs and an announcement of regulatory action in respect of that misconduct (as may be the case if publicity comes at the end of the FMT process) potentially diminishes the deterrent effect of that action.*

c. ***Promoting confidence in the DIFC financial services industry****. Significant delay to regulatory outcomes also potentially undermines public confidence in the integrity of the financial services offered in or from the DIFC. Allowing earlier transparency about regulatory proceedings helps the financial services industry and consumers understand the types of behaviour the DFSA considers unacceptable at an earlier stage and should encourage more compliant behaviour.*

d. ***Helping people understand what the proceedings relate to****. Given that proceedings in the FMT must generally be heard in public, the publication of information about a decision that is the subject of the proceedings will greatly assist anyone attending those proceedings in understanding what they are about. While it might be obvious to any members of the public attending an FMT hearing that the subject is challenging a DFSA decision, it is unlikely to be clear what that decision was. Publishing information about the decision will remove that uncertainty.*

e. ***Giving the DFSA greater flexibility to comment publicly****. Publishing information about a decision will mean that otherwise confidential information will no longer be subject to the restrictions on disclosure provided by Article 38 of the Law. This will give the DFSA greater flexibility to comment on the case. This could be beneficial in a situation where the DFSA receives questions, for example, from the media, and we would otherwise be restricted in what we could say about the matter.*

f. ***Bringing consistency with the stage of publicity in other actions****. Publicity at the decision stage also aligns DFSA outcomes with the stage at which publicity is given in civil and criminal cases; and*

g. ***Bringing consistency with the approach by other regulators****. Publishing information about decisions subject to review would bring the DFSA into line with the approach taken by other regulators such as the UK FCA and Australia's ASIC.*

91. The Consultation Paper makes the point at par 46 at "*The DFSA recognises that if would not be appropriate to publish detailed information about a decision that has been referred to the FMT if the FMT decided that because the subsequent proceedings should be heard in private, it should issue an order preventing publication*". The Hearing Panel agrees with this approach: the decision whether the hearing will be in public or in private will be highly relevant if not determinative on the issue of what information should be published in advance of the hearing.

92. The relevant legislative provisions were considered in the appeal from Justice Sir John Chadwick in *Arqaam Capital Limited v Dubai Financial Services Authority* (4 September 2012) ("*Arqaam*"). In that case there was appeal from the decision of the Hearing Panel which had decided (inter alia) that the proceedings in that case shall be heard in public.

93. The Appellant's argued that the Hearing Panel misdirected itself in law. Justice Sir John Chadwick held that there was no misdirection.

94. The *Arqaam* decision is important because it considers the presumption in favour of public hearing and its effect.

95. The Hearing Panel (at first instance) said this at paras 55:

"*When considering whether or not to order that its proceedings shall not be heard in public, the starting point for the Hearing Panel is the presumption in favour of public proceedings contained in section 32(3) of the Regulatory Law [now Article 31(6)]. The Hearing Panel is given an unfettered discretion in this matter, and the Rules do not give any direct guidance as to how the discretion is to be exercised*".

96. It continued at para 56 in these terms:

"*Rule 18 [now Rule 19] ..does however set out guidelines for the exercise of the Hearing Panel's discretion in determining an application for confidential treatment. These give some indirect guidance as to matters which may be taken into account in deciding whether proceedings should be heard in private*".

97. Justice Sir John Chadwick rejected the argument that the Hearing Panel erred in failing properly to articulate the correct legal test when considering whether orders for non-public hearings and confidential treatment of information should be given. He held: (references to numbers in square brackets are to his judgment):

a. There was presumption in favour of public hearings [19].

b. The discretion whether or not to order that part of the proceedings should not be heard in public was unfettered [19].

c. The FMT Rules gave no direct guidance as to how the discretion should be exercised [19].

d. It required some good reason to depart from the principle that hearing should be in public [19].

e. FMT Rule 16 contains distinct powers: first the power to order that part or all the proceedings is non-public, and secondly, the power to order "*that information is treated confidentially and not disclosed publicly*". The remaining Rules in the section headed "Confidential Treatment" Rules 18,19 and 20 are not directed to the first of the powers (the power to order that part or all of the proceeding is non-public) but the second (the power to order that information is treated confidentially). Rule 19 which sets out four factors which the Hearing Panel shall consider in determining an application for confidential treatment "*has no direct application to an application for a non-public hearing*" [20].

f. The Hearing Panel was correct to say that the factors in Rule 19 gave "*some indirect guidance as to the matters which may be taken into account in deciding whether proceedings should be heard in private*" [21].

g. At para 22 he rejected the submission that the Hearing Panel failed to apply the correct legal test. The Appellant argued that pursuant to Rule 19 "*it should have weighed the harm that would be caused to Arqaam's legitimate business interests if the proceedings were heard in public against the public interest in publicity*". He stressed that Rule 19 did not have direct application to the question of whether the hearing should be non-public. But it has an indirect application.

98. In its Written Submissions at para 36(a), the Applicants state:

"*The Applicants are content to proceed on the basis that the correct approach can be derived from Arqaam (as set out by Justice Sir John Chadwick at [18]-[22]), insofar as it recognises that an applicant will rebut the presumption that FMT proceedings will be public if he can satisfy the FMT that he would or might suffer significant harm as a result of publicity*".

99. The Hearing Panel confirms that this is the test it applies in this case. This test was referred to at [23] when Justice Sir John Chadwick referred to ground 2 of the appeal and said: "It is said, in effect, that the Hearing Panel could not apply the correct legal test- that is to say, could not properly weigh the harm that would be caused to Arqaam's legitimate business interests if the proceedings were heard in public against public interest in publicity- because it failed to undertake any or any adequate analysis of what that harm would be…"(emphasis added).

100. Apart from identifying the legal test to be applied, *Arqaam* is also relevant on how the balancing of interests is to be conducted. In *Arqaam* the Hearing Panel referred to a number of English decisions relied on by the DFSA (see para 44) including *Eurolife Assurance Company Ltd v FSA* (26 July 2002), *Sonaike v FSA* (11 July 2005) and *Canada Inc and Peter Beck v FSA* (13 July 2011). Justice Sir John Chadwick referred to this at [10].

101. As the DFSA points out in its Skeleton Argument at para 12, the cases cited by the Hearing Panel in *Arqaam* at para 44 support a number of propositions:

a. *The circumstances of the particular case must be considered (para 44(1)(i)).*

b. *Prejudice is not necessarily unfair (or by extension "significant") (§44(1)(i)).*

c. *The Applicant is required to provide cogent evidence of how unfairness or prejudice (or significant harm) arises. Ritualistic assertion of unfairness or prejudice (significant harm) will not suffice (§44(1)(ii)).*

d. *The tribunal is not concerned with the prospect of unfairness or prejudice arising simply through knowledge of the action or decision taken by the Regulator (§44(1)(iii)).*

e. *The inquiry is confined specifically to the unfairness or prejudice (significant harm) that might result from the holding of the hearing in public (§44(1)(iii)).*

f. *An applicant must establish something out of the ordinary if he is to succeed – it is not sufficient that publication of details of the reference (and by extension – a public hearing) – would embarrass the applicant and cause clients and others to ask him questions he would rather not answer (§44(2)).*

102. The DFSA submitted in these proceedings that the Regulatory Law and the FMT Rules are consistent with the approach established by the UK Financial Conduct Authority ("FCA") and the UK Upper Tribunal ("UKUT").

103. The Applicants in their Written Submissions (at para 37) say English decisions need to be "treated with some caution" given the differences between the DIFC and English regimes. However they go on to say that they "*usefully illustrate some of the considerations which may be taken into account when questions of publicity of regulatory proceedings need to be considered*". The Hearing Panel is content to consider the English decisions on the basis suggested by the Applicants.

104. Before considering the English decisions, it is necessary to consider the legislative background to them. The FCA's current approach to publishing information about decision notices came about following changes to Section 391 of the Financial Services and Markets Act 2000 ("FSMA") in October 2010.

105. Section 391 of FSMA requires (so far as is material) that:

"*…(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".

106. The DFSA points out that although the DFSA's power in Article 116(2) of the Regulatory Law is a discretionary and not a mandatory one, it contends the two provisions are drafted in similarly broad terms.

107. Reference should also be made to Rule 14 Use of documents and information of the Tribunal Procedure (Upper Tribunal) Rules 2008/2696:

(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.

108. Paragraph 3(3) of the Schedule 3 to the Tribunal Procedure (Upper Tribunal) Rules 2008 provides:

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

109. The DSFA relied upon the following decisions:

a. *Arch Financial* Products *LLP and others v FSA* [2015] UKUT 0013 (TCC) ("*Arch Financial*")

b. *Angela Burns v FCA (formerly FSA)* UKUT, 1 May 2013, FS/2012/24 ("*Burns*")

c. *Ford, Owen & Johnson v FCA* [2015] UKUT 0220 (TCC) ("*Ford*")

d. *PDHL Limited v The Financial Conduct Authority* [2016] UKUT 0129 (TCC) ("*PDHL*")

e. *Prodhan v FCA* [*2018*] UKUK 0414 (TCC) ("*Prodhan*")

110. As pointed out above, the Applicants suggested caution in applying these decisions. However it seems to the Hearing Panel that the DIFC and English regimes are similar in that they affirm the principle of open justice and accordingly the presumption is that hearings will be public. There is also a common approach in that they both recognise that there will be exceptions to publicity particularly where there is a risk of irreparable harm to the applicants.

111. The Hearing Panel briefly considers the cases relied upon by the DFSA to the extent they give some guidance on the approach to be adopted.

Arch Financial

112. In *Arch Financial*, the applicants argued (at para 13) that, if their references were ultimately successful, they will have been irreparably harmed or prejudiced by the publication, adversely affecting their lives and those of their families, and in related civil proceedings.

113. The UKUT applied a balancing exercise and considered whether the presumption that decision notices should be published could be outweighed by the applicants' contentions that there was "*cogent evidence of how unfairness might arise from publication and how they could suffer a disproportionate level of damage*" (para 46).

114. The UKUT held at para 51:

"*The protection to which the Applicants are entitled in this situation is the right to have the allegations tested in this Tribunal which will in due course deliver a decision in public which will refute unfounded allegations. In addition, the Decision Notices themselves set out in detail a summary of the representations that the Applicants made to the* [FSA's Regulatory Decisions Committee] *which goes some way to explaining*

their side of the case. No doubt the media will be interested in hearing from the Applicants why they believe the allegations are unfounded."

115. The UKUT referred to significant relevant information already in the public domain, particularly in the media, which may lead to speculation adverse to the applicants and their reputation.

116. In light of this the UKUT found that "*In the circumstances it may be of benefit if the Decision Notices were published and the Applicants were then free to explain their position and give greater clarity to the situation*" (para 54).

117. The UKUT gave detailed directions as to the circumstances in which the Authority should publish the decision notices (at para 63):

"*I therefore conclude that both the Applications must be dismissed. I should however, express my concern that it is important that adequate steps are taken when publicising the Decision Notices to ensure that it is clear that the decisions are provisional in the light of the fact that they are being challenged in the Upper Tribunal. I am concerned that some of the benefits expressed by the FSA to flow from the fact of publication, such as the need to establish a deterrent effect could be said to be predicated on the basis that the findings are a fait accompli. … In particular any press release issued by the FSA should state prominently at its beginning that the Applicants have referred the matter to the Upper Tribunal where each will present their case and the Tribunal will then determine the appropriate action to take, which may be to uphold, vary or cancel the FSA's decision….. ... Likewise in referring to the findings made, rather than give any suggestion of finality they should be prefaced with a statement to the effect that they reflect the FSA's belief as to what occurred and how the behavior concerned is to be characterised.*"

Burns

118. In *Burns*, the applicant contended among other things that the publication of the decision notice would destroy her entire livelihood. She argued "*if the [privacy applications] were not granted her livelihood would be destroyed and this destruction would be irreversible even if she was successful on her reference. This result would be profoundly unfair and if privacy was not granted in this case it was difficult to see when it would ever be*" (para 8).

119. The UKUT found that, if established, a disproportionate loss of income or livelihood is of a different and more serious kind than damage of reputation alone. The test to apply is whether there is cogent evidence establishing that there is a significant likelihood of such damage or destruction occurring. See para 89-90:

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

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

120. In the case of *Burns*, there was no information currently in the public domain that would indicate she was subject to regulatory proceedings. The UKUT found that, had that been the case, it would have been a factor tending in favour of publication (para 91).

121. In applying the same balancing exercise it applied in *Arch*, the UKUT found that, while there was a significant possibility of loss of income if the Decision Notice were published (though there was also a significant possibility that she would lose that income in any event), she had other assets to fall back on during that time and, if her reference was successful, there was a reasonable prospect of her being considered for further work. This was not considered sufficient to prevent publication. The UKUT noted "*the heavy burden on her to satisfy me that the evidence shows that the impact of publication on Ms Burns is so severe that it outweighs the strong presumption that publication should be permitted*" (para 114).

122. The UKUT again set out (at para 116) similar directions as it did in *Arch Financial* regarding the form or content of the FCA's publication regarding the Decision Notice.

Ford

123. In *Ford,* the applicants contended that publicity would cause them reputational harm and that their circumstances were exceptional (para 26). One of the applicants (Mr Ford) argued that the unprecedented size of the financial penalty would "*give rise to the prejudicial assumption that he must be guilty of a serious regulatory breach*" (para 33).

124. The UKUT dealt with the question of what had to be exceptional. At para 50, it stated:

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

125. On the issue of irreparable reputational harm, the UKUT stated at para 55:

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

126. At paras 62-63 the UKUT concluded:

"*62. In all the circumstances, and subject to certain directions I shall make, I do not consider that there is a substantial likelihood of disproportionate damage to any of the applicants from the publication of the Decision*

Notices and the registration of their 35 references. Whilst it is certainly likely that there will be renewed press and public interest, that is in the nature of the public interest in open justice which the principles established by the authorities go to preserve and protect. That will inevitably bring further pressure on the applicants, and the increased stress on them and their families can be readily appreciated. But it is a natural concomitant of a system of open justice.

63. I conclude therefore that the factors identified by Mr Ford, Mr Johnson and Mr Owen are insufficient to outweigh the public interest in open justice in this case, and that in the exercise of my discretion I should not make any order prohibiting publication of the Decision Notices or any direction that their references should not be included in the Register".

127. The UKUT set out similar requirements from *Arch Financial* and *Burns* relating to the form or manner in which the FCA could publish the decision notices (paras 66-68).

PDHL

128. In PDHL the UKUT gave a convenient statement of the applicable law in privacy applications. It stated at paras 36 -37 as follows:

"*36. It was common ground that the principles established in Arch v Financial Conduct Authority (2012) FS/2012/20 and Angela Burns v Financial Conduct Authority [2015] UKUT 0601 TCC were applicable to the Privacy Applications. As correctly summarised by Mr Herberg in his skeleton argument these provide:*

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

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

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

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

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

Prodhan

129. In *Prodhan* the UKUT referred to the decisions in *Arch Financial* and *PDHL*. It added the following remarks (at para 22):

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

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

130. Taking into account the legislative and regulatory framework in Dubai and the decisions referred to above, the approach the Hearing Panel takes in relation to the Privacy Applications can be summarised as follows.

a. Hearings are to be in public unless an order for privacy is made. This is reflected in the statutory presumption contained in Article 31(6) of the Regulatory Law and Rule 16 of the FMT Rules.

b. There are important public policy considerations as to why hearings should not be private. See: *R (Guardian News and Media Limited) v City of Westminster Magistrates Court* [2012] EWCA Civ 420 at [1-4] per Toulson LJ.

c. It is important that the FMT's procedures are transparent so that there must be public scrutiny of its actions.

d. The onus is on the Applicants to demonstrate a real need for privacy by showing unfairness.

e. It applies the legal test referred to in Arqaam. This requires the Hearing Panel to weigh the harm that would be caused to Applicants legitimate interests (business and personal) if the proceedings were heard in public against the public interest in publicity. In particular, the Hearing Panel has a discretion that entitles it to take into account the matters in Rule 19 of the FMT Rules. The two categories that are relevant in the current proceedings are: (1) disclosure of commercial information would or might significantly harm the legitimate business interests of the undertaking to which it relates and (2) whether the disclosure of information relating to the private affairs of an individual would, or might, significantly harm the person's interests.

f. Decision Notices are provisional subject to the references to the FMT.

g. The Applicants are entitled to have the findings and allegations of the DFSA in the Decision Notices tested in the FMT. The FMT will deliver a decision in public which will refute unfounded findings and allegations.

h. Where information is already in the public domain which may lead to speculation adverse to the Applicants and their reputation, it may be of benefit if the Decision Notices were published and the Applicants are able to respond in order to add clarity.

i. It is required to consider the evidence before it. There is a requirement of cogent evidence which indicates that the FMT has to conduct an evaluative exercise rather than merely relying on bare assertions, speculation or a "ritualistic assertion of unfairness".

j. The issue that needs to be considered in relation to each of the Applicants is whether they have produced cogent evidence of how unfairness will arise and how they could suffer a disproportionate level of damage if publication were not prohibited.

k. A disproportionate loss of income or livelihood would mean that it would be unfair to publish. Risk of damage to reputation is unlikely to be sufficient.

l. If Decision Notices are published before the Hearing Panel has determined the references in respect of them, steps can and should be taken to mitigate any potential unfairness to the Applicants. The precise steps to be taken will depend on the particular case.

m. Usually the Hearing Panel will direct that any press release issued by the DFSA in connection with the publication of the Decision Notices must state prominently at its beginning that the Applicants have referred the matter to Hearing Panel where they will present their respective cases. The press release will also state that the Hearing Panel will then determine what (if any) is the appropriate action for the DFSA to take and remit the matter to the DFSA with such directions as the Hearing Panel considers appropriate for giving effect to its determination. In referring to the findings made in the Decision Notices, rather than give any suggestion of finality, those findings must be prefaced with a statement to the effect that they reflect the DFSA's belief as to what occurred and how the behaviour in question is to be characterised.

The Arguments

DSFA's Arguments

131. The DSFA position in summary is as follows**.**

a. The principle of open justices provides what it describes as "strong presumption" that the DFSA should be allowed to publish the Decision Notices and for the fact of the Applicants' reference to be published (along with details of any upcoming hearing). It also follows from this that there should be public hearings.

b. The witness evidence of the Applicants shows nothing beyond vague concerns about reputation and possible adverse commercial consequences which are an insufficient basis to prevent publication or to require private hearings. There is no reason to consider that there will be prejudice to investors in the funds.

c. The evidence shows that it is already in the public domain that Al Masah Cayman and Al Masah DIFC are under investigation. This militates in favour of publication.

d. It is possible by the use of warnings to deal with concerns that the proposed publication will cause any significant, disproportionate or irreparable harm to the Applicants. The financial services market will understand that the DFSA findings in the Decision Notices can be overturned by the FMT and are therefore provisional in nature.

132. Article 116(2) confers a discretion on the DSFA to publish information about the Decision Notices in such form and matter as the DFSA regards as appropriate. The DFSA contends that this is in line with the policy in RPP 5-17-10. In support of this submission, it relies on the following matters. These matters are also relied upon in support of the argument that hearing should be in public.

133. First, the DFSA contends that its proposed publication would provide immediate transparency of the DFSA's decisions notwithstanding that the Decision Notices have been referred to the FMT. It argues that this is consistent with the guiding principle in Article 8(4)(g) of the Regulatory Law that the DFSA shall exercise its powers and perform its functions in a transparent manner.

134. Secondly, it contends broad characterisation of the alleged misconduct described by the Applicants in their witness statements is not materially in dispute. The DFSA has found that the Applicants have each engaged in misleading and deceptive conduct by deliberately concealing the payment of certain fees paid by investors with respect to arrangements which amounted to an unauthorised Collective Investment Fund that the Applicants were all involved in promoting in or from the DIFC. In particular, the Applicants made misleading statements in marketing materials in relation to fees and provided prospective investors with financial statements that had been falsified.

135. Thirdly, the DFSA points out that the Applicants' case is that that there was no concealment, because they say that investors knew or must be taken to have known that placement fees would be paid. They also suggested that the level of placement fees paid to Al Masah Cayman would not be material to the decision-making of prospective investors. They contend that their Marketing Materials were clear, fair and not misleading.

136. The DFSA argues that this undermines suggestions from the Applicants that there would be any significant loss of confidence if the Decision Notices were published. On the contrary the investors would not be surprised, assuming the Applicants are correct and this would give rise to no concern because the investors would conclude there was no concealment.

137. Fourthly, the DFSA considers that Marketing Materials were misleading and therefore publication should take place as soon as possible of information about the DFSA's action is in the public interest. Many investors invested on the basis of promotional materials which concealed the fact that placement fees representing up to 10% of each investment would be paid to Al Masah Cayman. The DFSA considers that publication of the Decision Notices would aid transparency, in allowing those investors to understand what happened within their investments and reassure them that the DFSA has taken appropriate action.

138. Fifthly, on the issue of whether the investments amounted to Collective Investment Funds rather than merely shares in companies, the DFSA contends that there is no reason to conclude that investors will be particularly concerned by this legal conclusion. Whichever way the arrangements are analysed, investors were investing in Investment Companies, which then purchased various 'assets'. The legal classification of the investment as

amounting to a Collective Investment Fund does not affect the value of the underlying assets.

139. Sixthly, the DFSA disputes the evidence in Mr Kumar's witness statement which alleges at para 27 that the reputation of the Investment and Operational Companies will be affected. The DFSA contends that to the extent the concern relates to the payment of placement fees, this replicates the issues above and adds nothing. If it is suggested that consumers will be harmed, this is not accepted.

140. The DFSA gives the example of the Education Fund. Investors purchased shares in Al Najah (a Cayman Island company); their monies were passed to Al Najah Education LLC (in the UAE); that company bought various nurseries and educational institutions. Investors do not have the ability to redeem their investments, though in theory they might be able to sell their shares in Al Najah. The value of those investments ought not to be affected by publicity, because the value of the investments lies in the assets purchased. The nurseries and educational institutions continue to operate. The profitability or value of those institutions will not be affected in any way by publicity in relation to the way in which the Applicants promoted the investments in the first place.

141. The DFSA also explains that the Al Masah companies have no ongoing role in managing the Investment Companies. The management role for those investments has now passed from Al Masah Cayman to Regulus Capital Limited ("Regulus") (see: Mr Hammond's witness statement at paras 56-60).

142. Seventhly, the DFSA points out that Mr Singhdeo and Mr Lim are also accused of misleading and deceptive conduct in that they counselled or procured or were knowingly involved in the alteration of a bank statement to conceal the payment of placement fees, from, or the source of funds transferred into, a bank account of one of the Investment Companies in this matter.

143. The DFSA does not consider that there is any good reason for these alterations and considers that transparency is therefore essential. The nature and seriousness of the conduct is significant and also increases the need to send a general deterrent message sooner rather than later.

144. Eighthly, the DFSA submits that it is in the public interest to publish the Decision Notices to support the protective actions that have been taken against the individual Applicants, i.e. the Prohibitions, which they have not applied to stay. The DFSA has concluded that the individuals are not fit and proper to work in financial services in the DIFC and it is therefore proper for this to be published so interested parties can be informed of the DFSA's conclusions.

145. It points out that the prohibitions are protective, as well as punitive, measures and publicity support the DFSA's objective in Article 8(3)(e) of the Regulatory Law to protect direct and indirect users and prospective users of the financial services industry in the DIFC by putting them on notice that the DFSA has taken this action against the Applicants.

146. Messrs. Dash, Singhdeo and Lim continue to work in financial services. They now are employed by Regulus. In July 2016, Regulus took over from Al Masah Cayman as the Manager of the Investment Companies in the arrangements that are the subject of this reference. Regulus is, in effect, a 'phoenix' of Al Masah Cayman and the Board of Regulus comprises the same individuals that formed the Board of Al Masah Cayman. Mr Dash is recorded on the Regulus website as the founder, Board Member and a member of Regulus' management team. Mr Singhdeo is described as a "partner" and a member of Regulus' management team. Mr Lim is recorded as an Executive Director and a member of Regulus' management team.

147. The DFSA argues that given that the Applicants continue to be involved in financial services and the connections between Regulus and Al Masah Cayman, members of the public who engage with the financial services industry are entitled to know what the DFSA has currently found against the Applicants while also making it clear that those findings are being challenged and subject to independent review by the FMT.

The Applicants' Arguments

148. The Applicants' position can be summarised as follows.

a. The policy and practice of the DFSA in relation to publicity, is relevant to the exercise by the FMT of its power under Article 31(6), Regulatory Law, and Rule 16 of the FMT Rules to hear proceedings in private. That is because the policy and practice of the DFSA affects the weight which should be given to any principles of "open justice", and to the question of when those principles are engaged.

b. In the DIFC, there is a degree of tension between two provisions in the Regulatory Law. On the one hand, the DFSA is given a discretion to publish decision notices under Article 116(2). On the other hand, the FMT is given a power to hear proceedings in private under Article 31(6). In any given case, this tension will accordingly need to be resolved (i) consistently with the primary legislation, (ii) in accordance with the DFSA's published policy and practice and (iii) by reference to the particular circumstances of the case in hand.

c. There is a presumption in favour of public hearings before the FMT. But it is a presumption that can be easily rebutted by reference to (i) the risk that public hearings in the FMT would defeat the purpose underlying the stated policy of the DFSA only to publish decision notices after a reference has been determined; (ii) the fact that any such public hearings would accordingly infringe the Applicants' legitimate expectation that there would not be any substantive publicity before their References have been determined; and (iii) the serious and irreparable harm that would be caused by such publicity, not just to the Applicants but also to a large number of third parties who are not the subject of regulatory action.

d. The Applicants will rebut the presumption that FMT proceedings will be public if they can satisfy the FMT that they would or might suffer significant harm as a result of publicity.

e. The Applicants dispute the proposition that the presumption will only be rebutted if an applicant can satisfy the FMT of significant harm to himself. The Applicants submit that the risk of significant harm to third parties is also relevant.

f. The FMT should maintain confidentiality pending determination of the References in order to minimise the risk of unjust and disproportionate damage to the Applicants' reputation and the inevitable consequential damage to Al Masah Cayman's and Al Masah DIFC's stakeholders and related parties.

149. The Applicants' written submissions (and oral arguments) expanded on arguments set out above.

150. First, as to publication of the Decision Notices, the Applicants have set out the existing policy and practice of the DFSA(see paras 29-30 of the Applicants' written submissions quoted in para 88 above).

151. Secondly, the Applicants dispute the matters relied upon by the DFSA and say there is no good reason for it to depart from its standard policy.

152. The Applicants respond to the following paragraphs from the DFSA's written submissions.

a. DFSA para 2.45 "….allowing *investors to understand what happened to their investments, and reassure them that the DFSA has taken appropriate action.*" The Applicants contend that this not a good reason for departing from the normal policy of the DFSA. The DFSA has investigated for several years without considering it necessary to inform investors. That the regulatory process has reached its next stage does not make information more necessary. The DFSA does not point to any specific risks to investors if these matters for the moment do not receive publicity.

b. DFSA para 2.52 "*the nature and seriousness of the conduct* [i.e. the alleged alteration of a bank statement] *is significant and also increases the need to send a general deterrent message sooner rather than later.*" The Applicants argue that if the DFSA is correct in its findings, there was misconduct several years ago. That does not tell one anything about the need for a deterrent for such conduct years later.

c. DFSA para 2.54 "…*to protect direct and indirect users of the financial services industry in the DIFC by putting them on notice that the DFSA has taken this action* [i.e. the prohibitions] *against the Applicants*". The Applicants submit that the protection is the prohibition. No additional protection is given by publicity.

d. DFSA para 2.55 "*Given that the Applicants continue to be involved in the financial services industry and the connections between Regulus and Al Masah Cayman, members of the public….are entitled to know what the DFSA has currently found against the Applicants*". This is said by the Applicants to be not a good argument for two reasons. First, it is not specific to this case – it will be a very rare case where those subject to action by the DFSA are not engaged in financial services. Second, and more importantly, it is factor which tends against publicity not in favour, given that publishing allegations which the FMT does not uphold may unfairly end careers.

153. Thirdly, the Applicants rely on the evidence filed in support of the Privacy Applications. They contend it shows the following:

a. The Applicants enjoy good reputations in the market. Any publicity will materially damage their respective reputations and this gives rise to serious harm.

b. The Applicants have cooperated with the DFSA in their investigations.

c. The DFSA took nearly 4 years between the commencement of the investigation and the issue of the Decision Notices and) in all that time it never sought to suspend any authorisations or take any other interim steps against the Applicants.

d. There is evidence that some allegations which feature in the Decision Notices could be found on the internet in 2015 and there is some evidence that the existence of the DFSA investigation was also in the public domain in 2015 but there is no evidence that either the material on the internet or the information about the DFSA investigation gained wide attention.

e. The findings in the Decision Notice include serious findings by the DFSA. The seriousness of the findings is reflected in the action taken including the level of fines.

f. If the findings become public before the FMT has determined the Applicants' References, the Applicants' respective reputations in the market will be fatally undermined.

g. Not only will the Applicants' reputations be affected, it will also affect the reputation of the Investment and Operational Companies which are not the subject matter of any investigation.

h. The harm that is likely to be caused both to the Applicants and to third parties is disproportionate. The penalties which the DFSA considers it appropriate to impose do not have as their object causing any of the Applicants to cease business altogether, or to diminish the value of the investments of the shareholders in the corporate Applicants, least of all to harm the underlying businesses of the Operating Companies: It is likely that the publication of the Decision Notices and/or the public hearing on the proceedings in the FMT will produce those results and the regulatory proceedings will have produced a result which is more harmful than the DFSA intends.

Discussion

Hearings: in public or in private

154. The Hearing Panel considers the first issue that arises is whether hearings in these proceedings should be in private or in public. As has been stated above (at para 91), if the decision is hearings should be in private (particularly the merits hearing), this will mean that there should be no publicity about the content of the Decision Notices in advance of the Hearing Panel's determination of the references. The relevant legal principles have been summarised above.

155. The Hearing Panel has concluded that the proceedings should be in public for the following reasons.

156. First, the starting point is the presumption that proceedings should be in public. This is the effect of Article 31(6) of the Regulatory Law. The burden of proof is on the Applicants to show good reason for proceedings in private. They have failed to do so.

157. Secondly, the Hearing Panel has a discretion to sit in private. The manner in which this discretion is to be exercised has been considered above. It is a very broad discussion. But it requires weighing the harm that would or might be caused to the Applicants' legitimate business interests or personal circumstances against the public interest in publicity.

158. The critical question here is a factual one of whether the Applicants have adduced cogent evidence of how unfairness or prejudice or significant harm will or might arise. The Hearing Panel is not satisfied that this cogent evidence exists.

159. The Hearing Panel has summarised the evidence above. There is little doubt that publicity will be unwelcome and questions will be raised. The Hearing Panel accepts that there is a real possibility of reputational damage to the Applicants. However these are features of open justice. It involves consequences that cannot be avoided.

160. The Hearing Panel considers that there is no sufficient factual basis for contending that there will be the serious adverse consequences asserted by the Applicants involving (or risking) the destruction of businesses and careers if there are public hearings. This is because:

    a. The Decision Notices set out in detail the responses of the Applicants. As far as banks and sponsors are concerned these are sophisticated players who will be able to make up their own mind of how they wish to proceed. The Hearing Panel accepts that the banks have the ability to end banking arrangements if they wish. But it does not follow that they will do so. Where it is thought that there is a risk of a bank acting this way it will be up to the Applicants or those acting for the bank's customers to allay concerns.

    b. The Hearing Panel considers that investors are in the same position as banks and sponsors. They can make up their own minds as to what they want to do with their investments. It will be up the Applicants to deal with concerns and to ensure that decisions are made on a proper basis.

    c. It is clear that the findings in the Decision Notices are provisional and capable of challenge before the FMT. It is for the Hearing Panel to determine the references and it will refute unfounded findings or allegations by the DFSA. Readers of the Decision Notices will appreciate this.

161. Thirdly, the Hearing Panel is not satisfied that it can be said that the DFSA's investigations are in the public domain and this is a reason why hearings of the references should be in public. There is some evidence referred to above that there has been some publicity. It is also clear that a limited number of investors have been interviewed by the DFSA and that the DFSA contacted a number of third parties. But the Hearing Panel had concluded that

public hearings (and publicity) are not justified on this basis but it takes into account that the limited publicity about the investigations has not caused any serious adverse consequences.

162. Fourthly, the Hearing Panel accepts that it is entitled to take into account the interests of parties' who are not the Applicants' on the issue of whether hearings should be in private. In what is a broad discretion, the Hearing Panel considers that third party interests are potentially relevant. But it will be a rare case where a Hearing Panel can conclude third party interests justify a private hearing where the third party has not adduced its own cogent evidence. In the present proceedings there is no such cogent evidence. The Hearing Panel has taken note of the evidence concerning third parties but it is insufficient to defeat the public interest in open justice.

Publication

163. The first issue to consider is whether the Applicants are correct to contend that there is a legitimate expectation of non-publication of the Decision Notices (see: para 88 above). Article 116(2) of the Regulatory Law is set out in broad terms (see para 81 above). The Hearing Panel has set out above (at para 83) the DFSA's general policy on publicity of enforcement actions at RPP paras 5-17-9 60 5-17-11. The DFSA accepts that RPP paras 5-17-9 and 5-17-11 state that publication will generally take place after any appeal process has come to an end.

164. As to the legal test to be applied. Both parties referred to *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607; [2002] 1WLR 237 ("*Bibi*") where Schiemann LJ (giving the judgment of the Court) stated at [19]:

"*19. In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do*".

165. There is a discretion to publish. RPP 5-17-10 states that circumstances may exist where the DFSA considers it expedient to publish. That paragraph states that the DFSA would consider it necessary to publish where to do so enables it to achieve its objectives or is in the public interest. The Decision Notices themselves specifically draw the Applicants' attention to these provisions.

166. RPP 1-2-1 is also relevant. It states that "*RPP contains policy and process information which is indicative and non-binding*". RPP 1-2-2 further states that:

"*RPP is not an exhaustive source of the DFSA's policy on the exercise of its statutory powers and discretions. To the extent that it sets out how the DFSA may act in certain circumstances, the information in RPP does not bind the DFSA and nor does it necessarily create a legitimate expectation for Persons who might reasonably seek to rely upon it. RPP should not be relied upon as a safe harbour by any Person.*"

167. The Hearing Panel has decided that the merits hearing will take place in public. Since the subject matter of hearing concerns the matters covered in the Decision Notices, the Hearing Panel considers that the Decision Notices should be released to the public when the hearing commences. This is because the public is unlikely to be able to follow the proceedings without the Decision Notices; the written and oral submissions are likely to refer to the Decision Notices and it is likely that there will be repeated references to the Decision Notices during the hearing particularly where the Applicants will be contending that they should be set aside and the DFSA will be contending that they should be affirmed.

168. The Hearing Panel gives liberty to the Applicants to apply at the commencement of the merits hearing for an order that the Decision Notices are not published. This liberty is given in case there are any developments after this decision which make it necessary for the Decision Notices to remain non-public.

169. Since the Decision Notices will become public when the merits hearing commences, the issue arises as to whether they should be published now.

170. The Hearing Panel considers that the DFSA should follow its existing policy of non-disclosure of Decision Notices. It has reached this conclusion for the following reasons.

171. First, the Hearing Panel does not consider that publication in advance of the merits hearing is necessary to enable the DFSA to achieve its objectives or because it is in the public interest.

172. The circumstances of the investigation have been set out above. It has taken place over several years. During the period of the investigations and the issue of the Decision Notices, the DFSA never sought to suspend any of the authorisations or taken any regulatory steps against the Applicants. There is no stay of the non-financial sanctions and so the prohibitions referred to above are in force.

173. Secondly, the Hearing Panel considers that it is important that the DFSA follows its stated policy unless compelling reasons are established for not following it. There may be reasons for changing the policy and bringing it in line with the procedure followed by the FCA in England, but the DFSA needs to change its policy explicitly. This has not happened.

174. The Hearing Panel is not satisfied on the material before it that any reason has been shown, let alone, a compelling reason for allowing the DFSA to deviate from its stated and published policy. The fact that the DFSA can point to a recent example in early October 2019 where its policy has not been followed provides no basis for departing from its policy.

175. Consistent with DFSA's current policy, it is entitled to put the information referred to in para 87 on its website. The Hearing Panel does not consider that the Applicants have established any good reason as to why part of the policy should not be followed. This information does not cause the Applicants any prejudice.

176. Thirdly, as the Hearing Panel made clear during the hearing, it considers that it is the public interest for the merits hearing to take place as soon as possible. On this basis publication of the Decision Notices is not going to be delayed for long. This is a relevant factor to take into account in deciding that publication now of the Decision Notices is inappropriate.

177. When the Decision Notices are released, they should be accompanied by information that deals with their status and ensures that they are not misconstrued.

178. Finally, the Hearing Panel considers that the Applicants have established a legitimate interest in non-publication of the Decision Notices certainly up until the time when the merits hearing commences. It is not necessary to consider the other requirements in *Bibi*. There is a sufficient basis for non-publication on the material before it.

179. This decision will be published on the FMT's website, but only after the Decision Notices have been published. The DFSA is to notify the FMT President of its intention to publish.

Filing fees

180. The issue here is whether each Applicant is required to pay a filing fee (US$5,000) as a result of consolidation.

181. Rule 4.2.1 of the Fees Module of the DFSA Rulebook (FER) provides "*A fee of $5,000 must be paid to the DFSA before a reference to the FMT is considered filed with the FMT*".

182. The FMT President has a power under Rule 4.2.2 to waive all or part of the $5,000 fee if the person commencing the reference is an individual "…*and if, in the circumstances, the president considers it equitable to do so*".

183. The Applicants accept in their Written Submissions (at para 47) that the President can only waive in relation to individuals and not companies. The Applicants go on to say: "*The question is whether it would be equitable to do so. The Applicants submit that it would not be because the individuals' references do not give rise to any factual issues that would not in any event need to be covered in references to the companies, and add only a handful of legal issues, and therefore the limited additional resource that will be required of the FMT due to the involvement of the individuals does not justify the very substantial fees (US$ 5000 each)*".

184. The Hearing Panel finds as follows:

    a. Each of the Applicants filed a single reference. It follows that each Applicant was required to pay the prescribed fee.

    b. The purpose of the fee is to cover the costs of handling the reference. These costs are likely to substantial and well in excess of all the filing fees that have been paid.

    c. There is no suggestion any of the Applicants are unable to pay filing fees or that payment would cause financial hardship. In fact they have all been paid.

    d. The Applicants' submission that the individuals' references do not give rise to any additional factual issues that would not in any event be covered by the companies and "*only a handful of legal issues*" overlooks the fact that the allegations relating to the falsification of the bank statement relate only to two of the individuals – Mr Singhdeo and Mr Lim. The presence of the three individuals in the hearing will add to its length

since it is expected that they will participate in the usual way by giving evidence and supporting their respective challenges to the Decision Notices.

185. In the above circumstances, the FMT President declines to waive the fees in relation to the references filed by individuals.

Costs

186. This is an interim application. Article 31(9) of the Regulatory Law provides that "*at the conclusion of a proceeding, the FMT may also make an order requiring the party to the proceedings to pay a specified amount, being all or part of the cost of the proceedings, including those of any party*". Article 28(b)(i) defines "*proceeding*" as "*a reference*".

187. Rules 71-76 of the FMT Rules set out the procedure to be followed when an application for costs is made.

188. This is case where neither the DFSA nor the Applicants can be described as the winning party.

189. The Hearing Panel considers that costs should be dealt with at the end of the merits hearing and the appropriate costs order is therefore costs in the reference.

DIRECTIONS

190. The Hearing Panel directs as follows:

a. The merits hearing shall be in public. All hearings before the merits hearing shall be private (unless the Hearing Panel otherwise directs).

b. There is a stay of the Decision Notices (but only in respect of the financial sanctions).

c. The DFSA is a liberty to release the Decision Notices to the public at the commencement of the merits hearing. Before the Decision Notices are released the text of any press release relating to the Decision Notices should be agreed by the Applicants or (failing agreement) by the Hearing Panel.

d. The Applicants are at liberty at the commencement of the merits hearing to seek an order that publication of the Decision Notices is further stayed and relying on developments taking place after this ruling. If the Applicants seek a stay, they should notify the Hearing Panel and the DFSA of its intention to seek a stay 14 days before the merits hearing is scheduled to commence and give full reasons for seeking the stay (accompanied by any additional evidence relied upon).

e. The DFSA is entitled within 14 days of this decision to place on its website the following information in relation to each reference:

The FMT reference number;

Date of referral;

Applicant's names;

Respondent (i.e. the DFSA);

If appropriate, the hearing type (e.g., case management conference, substantive hearing, closing submissions); and -the date and time of any hearing.

f. Each of the Applicants is required to pay the Filing Fee and the FMT President declines to waive any Filing Fee.

g. This decision shall be published on the DFSA website but not before the Decisions Notices are released to the public.

h. The transcript of this hearing is private.

i. Costs in the reference.

Signed by the President on behalf of the Hearing Panel

His Honour David Mackie CBE QC

16 January 2020