Cases: FMT 21015 and 21018

IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE
FINANCIAL MARKETS TRIBUNAL (FMT)

BETWEEN

(1) WAQAR HASSAN SIDDIQUE

(2) ARIF NAQVI

Applicants

And

THE DUBAI FINANCIAL SERVICES AUTHORITY

Respondent

DECISION

Before:

His Honour David Mackie QC (President)

Ali Malek QC

Patrick D Storey

INTRODUCTION

1. These two sets of applications in different cases are considered together because the facts and issues in each are interlinked. As both Applicants sought a hearing of the applications this was arranged to take place on 5 December 2021. On 30 November, Mr Siddique indicated that for costs and personal reasons he was content for the issues to be decided without a hearing, on the material before the FMT. On 2 December Mr Naqvi indicated likewise. So, the applications have been decided without a hearing. If the Applicants had not requested a hearing in the first place, these matters would have been resolved much sooner. No date for the hearing of the main case has yet been set in either case.

2. Both applications seek orders that the hearings of these cases should be in private and that the Decision Notices (identified below) should not be published at this stage. The legal position with such applications was recently set out by the FMT in the case of KPMG LLP and Milind Navalkar v DFSA (Case FMT 21016) on 14 December 2021. The relevant text was sent to the parties in this case some days before the cancelled hearing and is set out at Annex A below. No party has questioned the accuracy of this statement of the legal position, the dispute is about its application to the facts.

3. **The relevant tests**. Annex A makes clear that, before ordering that there be no publication of the Decision Notices, we must be satisfied first that publication is likely to cause serious harm and secondly that it is proportionate to restrain publication "*having regard to the principle that the DFSA should exercise its powers as transparently as possible and that proceedings of the FMT should generally be in public*". Before we can order hearings in private, the applicant must show a real need for privacy in the sense described in Annex A.

MR SIDDIQUE

4. **Background**. On 14 June 2021, the Applicant, Mr Siddique, received a Decision Notice ("the Siddique DN") recording that the DFSA had found that he had been knowingly concerned in contraventions by Abraaj Capital Limited ("ACLD"), a firm previously authorised by the DFSA, for breaching its Capital Resource requirements which resulted in ACLD producing false or misleading PIB Returns; and by Abraaj Investment Management Limited ("AIML"), a non-DFSA authorised firm, for engaging in conduct that was misleading or deceptive or likely to mislead or deceive Limited Partners ("LPs") over the misuse of Abraaj Funds' monies. The Siddique DN further found that Mr Siddique failed to act with integrity when carrying out his role as a Licensed Function holder at ACLD,

contrary to the DFSA's Principles for Authorised Individuals in DFSA Rulebook General Module ("GEN") Section 4.4, Principle 1 (Integrity).

5. The Siddique DN imposed on Mr Siddique a financial penalty of USD 1,150,000; a prohibition order, prohibiting him from holding office in, or being an employee of, any Authorised Person, DNFBP, Reporting Entity or Domestic Fund; and a restriction preventing him from performing any function in connection with the provision of Financial Services in or from the DIFC.

6. Mr Siddique referred the Siddique DN to the FMT ("the Reference") by filing a Notice of Appeal and Grounds of Appeal on 13 July 2021. The DFSA filed an Answer on 10 August 2021 and the Applicant filed a Reply on 13 September 2021.

7. Mr Siddique has applied for the following:

   - A stay of the financial penalty imposed by the Siddique DN, pending the outcome of the Reference;

   - An order prohibiting publication of the Siddique DN, pending the outcome of the Reference;

   - An order preventing any information being entered onto the Register, or published until the outcome of this case, which may indicate that the DFSA has taken enforcement action against Mr Siddique, directing the DFSA not to take any steps to publish the Restriction / Prohibition / financial penalty on the Register until the outcome of this case is known.

   - An order that any hearing be heard in private; and

   - Costs.

8. The DFSA has confirmed that it will not seek to enforce payment of the fine until the outcome of the Reference to the FMT or enter anything on the DFSA's Public Register, pending the outcome of these applications. It was also accepted that the hearing of these applications would be private. Costs do not yet arise for decision so the two issues on this application are whether the Siddique DN should be published now and whether the main hearing should be held in private. The same issues arise in the applications of Mr Naqvi which we consider below.

9. Essentially, Mr Siddique contends that the Siddique DN contains a number of factual findings and conclusions which are highly prejudicial to him. The release of this information into the public domain, prior to the matter being decided by the FMT, would cause irremediable prejudice to him in two respects. First, he is subject to parallel criminal proceedings in the United States ("US"), there are charges pending against him in the Southern District of New York, and his defence in those proceedings would be harmed if the Siddique DN were made public. Secondly, publication would cause Mr Siddique stress and anxiety and aggravate his existing medical conditions.

10. **Mr Siddique's evidence**. The documents in support of the applications include a medical report from Dr Leon Van Huyssteen and a legal opinion from Mr Orlando E. Vidal, Partner at Norton Rose Fulbright (Middle East) LLP.

11. **US criminal proceedings**. Mr Vidal says that "*On May 23, 2019, Mr. Siddique and five other defendants were charged in a superseding indictment returned by a federal grand jury in the Southern District of New York with multiple counts stemming from their employment at the Abraaj Group ("Abraaj"), once the world's largest private equity firm focused on emerging markets with a reported USD $13 billion in assets.*" He describes action against Mr Naqvi, one of those defendants. He says that Mr Siddique lives in Pakistan and that no proceedings for extradition appear to have begun.

12. Mr Vidal says that both publication of the Siddique DN and the FMT hearing being held in public could cause "*significant harm*" to the Applicant. He says that US prosecutors could seek a further superseding indictment against Mr Siddique, or seek to introduce at trial the Siddique DN and other evidence introduced at the hearing. He says that there would be a serious risk that Mr Siddique would be severely prejudiced in his defence of the charges. He says that similar information already publicly available would not necessarily render the evidence admissible, absent the publication of the Siddique DN and the public FMT hearing. He mentions, among other things, the potential loss of the privilege against self-incrimination and the potential admission of the Siddique DN in a criminal trial. He develops each point in detail and cites authorities before concluding, going a little way beyond the usual scope of expert evidence, that "*the FMT should agree to keep the Decision Notice and its hearing on the matter private*". In a recent letter, Mr Siddique's lawyers point out that the DFSA has not replied to Mr Vidal with equivalent evidence.

13. The DFSA responded to the application on 27 September with submissions and witness statements from two of its staff, Ms Mary Keenan who deals with publicity and Mr Patrick

Meaney with how the DFSA cooperates internationally with prosecutors and others over alleged financial misconduct.

14. **Publicity**. Ms Keenan produces a large amount of material to show that there is already much information in the public domain regarding Mr Siddique's connection to Abraaj and to the circumstances around it that have generated so much media interest and concern. For example, there has been publicity of Mr Siddique's family ties with Mr Naqvi as his brother-in-law, his role at Abraaj as Managing partner, Head of Risk and Compliance and Chief Operating Officer, him being part of Mr Naqvi's "inner circle" and facing legal charges of fraud and conspiracy along with other Abraaj senior executives according to an indictment issued by US authorities. There has been publicity about communications between Mr Siddique and Mr Naqvi regarding unjustified "uplifts" in valuations of companies owned by Abraaj Group, allegedly intended to mislead investors by portraying a positive image of the group's financial situation. Ms Keenan points to publications regarding Mr Naqvi which also refer to Mr Siddique. A book, *'Icarus, The Life and Death of the Abraaj Group*' by Bryan Brivati, published on 20 July 2021, describes Mr Siddique's involvement in an allegedly controversial Karachi Electric transaction on behalf of Abraaj Group and his role as Chairman of the Board of Karachi Electric. Another book, *'The Key Man: The True Story of How the Global Elite was Duped by a Capitalist Fairy Tale',* by Simon Clark and Will Louch, two journalists from the Wall Street Journal, published on 6 July 2021, refers to Mr Siddique's role in supervising the Abraaj Group Finance function, described as a "*secretive treasury department*", to communications between Mr Siddique and other Abraaj Group senior executives indicating his knowledge of severe cash shortfalls within the group and to other similarly controversial allegations. There is also information in the public domain regarding Mr Siddique's role as an Abraaj Group senior management executive, including the entry of the DFSA's public register confirming Mr Siddique's status as an Authorised Individual. She shows that Mr Siddique's profile on public websites also indicates his ties with Abraaj.

15. Mr Meaney's evidence demonstrates that in practice some of Mr Vidal's concerns would not arise. The DFSA's response otherwise relies more on submissions about facts not much in dispute. It says the issue is not whether there is an overlap of issues, but whether transparency of the Tribunal proceedings would give rise to a real risk of serious prejudice that may lead to injustice in the criminal case. The risk of self-incrimination is nonexistent in reality. There is no evidence that the DFSA's opinions would be admissible at any US trial, and the possibility that a US jury would be prejudiced by action taken by the DFSA seems completely remote from reality. Further, Mr Siddique has not explained how knowledge of the Siddique DN and this Tribunal's proceedings, even if it were to result in evidence being

deployed in the criminal trial, would be unjust. He has the protection of the US court's procedures, before a judge who will be astute to ensure the fairness of the US trial. He effectively says that it would suit him if the US prosecution should proceed in ignorance of the findings made in the Siddique DN. But the question is whether it would be unjust for the US prosecutors to have access to the Siddique DN and knowledge of the proceedings in this court. That is quite a different matter. Justice in a criminal case does not consist of acquittal: it consists of the acquittal of the innocent, and the conviction of the guilty.

16. As we see it, both limbs of this application, and the effect of publication and of a hearing of this reference, need to be seen against the background of the very extensive publicity surrounding the events in issue. The charges against Mr Siddique are very serious but he remains in Pakistan with no sign of the US case becoming active or extradition being sought. The case before the FMT will end within months and the Siddique DN and, to an extent, the proceedings (in which it is unclear whether Mr Siddique will give evidence - he did not do so before the DFSA or on this application) will be overtaken by our own decision. Suggestions about the course the US case might take are entirely speculative and the hypothetical risks have hypothetical solutions and answers in the submissions of the DFSA and in Mr Meaney's evidence. It would be impracticable, unjust and absurd for the DFSA to attempt to construct a picture of what would happen at this trial, decide what it would be fair or unfair to allow in as evidence and then trim publication and the hearing of this case.

17. The case put forward depends on speculation not real risk. It confuses the interests of justice with the distinct, but entirely proper, aim of Mr Siddique's lawyers to secure his acquittal. It is not our role to help them or the US prosecutors secure their competing objectives by interfering with the proper performance of our task and the ordinary course of events.

18. We have responded to the arguments put forward but there is a short answer to this aspect of the application which applies both to publication and to privacy. If the US trial proceeds, there will be a judge who, unlike us, will be fully equipped in qualifications and experience. She or he will have full and current information and will determine what material, if any, generated by the DFSA it is fair and just to put before a jury. As we mention below in relation to Mr Naqvi, Justice Sir Jeremy Cooke has expressed a similar view in the DIFC Court (before indicating that it is a matter for us or the DFSA) (Order with Reasons of Justice Sir Jeremy Cooke in Case CFI-065-2021, issued on 27 July 2021 - see also that of 5 August):

> "*So far as concerns the effects of publicity of the Regulatory Proceedings, there is no evidence before the Court that press coverage, which would inevitably follow on the publication of a Final Decision by the DFSA, would have a serious effect in swaying*

public opinion in the US or the jury, who will doubtless receive instructions from the trial judge about proceeding only on the basis of the evidence before the court…"

19. That appears to leave only the possibility (which we can safely disregard) that, if there is ever a contested trial, a member of the jury in New York has read the Siddique DN and the transcript of the hearing but not our final decision, nor seen any of the mass of publicity about the matters in issue and has also decided to disregard the judge's instructions.

20. **Medical grounds**. Dr Huyssteen describes the OCD and depression conditions affecting his patient and concludes: "*I have no doubt that the publication of the Notice, would have a catastrophic impact on his wellbeing. Not only is it likely to worsen his existing and on-going OCD symptoms but I am also certain that it would trigger a further depressive episode, thereby putting Mr Siddique at great risk. Clinically, there is no question of the severity of his illness and I would therefore respectfully request that the DFSA reconsiders their position of intent to publish the Notice.*"

21. The only evidence we have of the doctor's knowledge of the background is his understanding that his patient is "*facing serious allegations and that the DFSA are imminently planning to publish their Decision Notice*". The DFSA pointed out that since the doctor is aware of the existence of the Siddique DN, it appears that receipt of it had no effect on Mr Siddique's health. The DFSA's submissions were made on 27 September. There was no response from the Applicant's lawyers other than to point out, correctly, that there is no medical evidence from the DFSA.

22. The doctor's report omits to consider the important context of the proposed publication of the Siddique DN. It is, in this respect, unusually thin for a report in litigation. Mr Siddique is in Pakistan, not Dubai. He has already had to deal with the Siddique DN and has referred the matter to the FMT. He has faced and continues to face a mass of critical publicity about his alleged role. He also has to deal with very serious criminal allegations in the US. As a matter of common human experience, it seems to us very improbable that, in this context, the publication of the Siddique DN, accompanied by a qualifying press release, would be likely to have the consequences suggested. We do not doubt the integrity and medical expertise of the doctor, but the adequacy of the material upon which he has based his conclusions. Further, the medical factor, even it had been substantiated, would only have been one of the considerations relevant to the tests we have to apply.

23. We are not satisfied on either of the two grounds for Mr Siddique's application, considered separately or taken together, that publication is likely to cause serious harm or that it would be proportionate to restrain publication "*having regard to the principle that the DFSA should*

exercise its powers as transparently as possible and that proceedings of the FMT should generally be in public." Neither are we satisfied that he can show a real need for privacy in the sense described in Annex A so as to justify hearings not being in public.

MR NAQVI

24. **Background.** On 8 August 2021, the DFSA gave the Applicant, Mr Naqvi, a Decision Notice ("the Naqvi DN") in which it found that the Applicant was knowingly concerned in contraventions by AIML, the non-DFSA authorised firm, for carrying out unauthorised Financial Service activities in or from the DIFC and for engaging in conduct that was misleading or deceptive or likely to mislead or deceive LPs over the misuse of Abraaj Funds' monies. The DFSA imposed on Mr Naqvi a financial penalty of USD 135,566,183; a prohibition order, prohibiting him from holding office in, or being an employee of, any Authorised Person, DNFBP, Reporting Entity or Domestic Fund; and a restriction preventing him from performing any function in connection with the provision of Financial Services in or from the DIFC. Mr Naqvi referred the Naqvi DN to the FMT on 7 September 2021 ("the Reference"). The DFSA filed an Answer to the Reference on 4 October 2021 and there has been no Reply. Mr Naqvi has made similar applications to those of Mr Siddique and these too now amount to seeking orders that the Naqvi DN not be published and that the hearing of his case be in private.

25. **Evidence.** On 27 October 2021, the Applicant submitted documents including representations, an Order with Reasons of Justice Sir Jeremy Cooke dated 27 July in DIFC Courts case number CFI-065-2021and a witness statement of Mr Stuart Walker, a partner at Afridi & Angell, which in turn relies on an earlier statement from Mr Robert Allen, a partner in the US firm of Kirkland & Ellis, and other materials put before the DIFC Court in applications referred to below. The DFSA filed submissions in response, supported by a further witness statement of Ms Keenan, dated 4 November 2021.

26. Mr Walker says that on 2 April 2019, a grand jury sitting in the Southern District of New York returned an indictment charging Mr Naqvi with three different counts related to alleged wire and securities fraud. On 23 May 2019, a grand jury returned a superseding indictment, expanding these charges to include 16 counts of violations. Mr Naqvi was arrested in London on 10 April 2019, pursuant to a provisional arrest request made by the US to the UK. Mr Naqvi is currently contesting the extradition proceedings in the UK. It is apparently accepted that the 16 counts set out in the superseding indictment, which would be the subject of the

US criminal proceedings, substantially overlap with the purported contraventions listed in the Naqvi DN.

27. Mr Walker submits that, if Mr Naqvi were to defend himself in the FMT, there is a very real risk that he would prejudice himself in the US Proceedings. Anything that Mr Naqvi says in connection with a DFSA investigation (any testimony, and even submissions made on Mr Naqvi's behalf) to the FMT would most likely be used against Mr Naqvi by the US Prosecutor in the trial stage of the US Proceedings. It is claimed that Mr Naqvi would need to choose between defending himself in the US criminal proceedings or against the DFSA's regulatory proceedings. Given the serious repercussions of criminal proceedings, Mr Naqvi would be advised to focus on his defence in the criminal proceedings in the US and not jeopardise his defence (which is yet to be formulated based on the case of the state) by contesting the Naqvi DN.

28. He also submits that Mr Naqvi's right under the Fifth Amendment of the US Constitution to avoid self-incrimination would be jeopardised if he were to provide evidence to the FMT. The publication of a decision notice has the potential to create adverse publicity around Mr Naqvi, as the decision of a regulator confirming the misconduct highlighted in the superseding indictment. This could potentially influence the thinking of the jury that will decide on the charges, which could affect Mr Naqvi's right to a fair trial. It would not be possible to reverse or otherwise remedy this damage, even if Mr Naqvi were ultimately to succeed before the FMT. It is also claimed that publication of the Naqvi DN has the "*potential*" to create adverse publicity around the Applicant which "*could potentially influence*" the thinking of the jury. Mr Naqvi stands to suffer serious and irreversible harm if the Privacy Application was not granted. As such, the test in article 29(8) is satisfied.

29. The DFSA responds to each of the points relied on by Mr Naqvi, along the lines set out in relation to Mr Siddique. In addition, it points to the facts that "*The existence of the Regulatory proceedings against* [Mr Naqvi] *will, as the DFSA says come as no surprise to anyone, the surprise would be if there were none*" (Order with Reasons of Justice Sir Jeremy Cooke in Case CFI-060-2021, issued on 5 August 2021), that overlapping issues with the US case do not create a risk of injustice where, as here, the approaches are quite different and expresses well founded scepticism about whether Mr Naqvi really intends to give evidence in this case before the FMT.

30. **Publicity**. Ms Keenan produces material showing a very large amount of information in the public domain regarding the Applicant's connection to Abraaj and the misconduct he is accused of. She cites items about Mr Naqvi facing criminal charges related to the collapse

of Abraaj and allegations of fraud and racketeering, money laundering, bribery, concealing shortfalls in Abraaj Funds and falsifying financial records. There is much material relating to his arrest at London Heathrow Airport in April 2019 and the later proceedings. She cites the books mentioned above and other material including publicity about his application for judicial review. She cites a legal outlet mentioning the absence of any decision notice about Mr Naqvi on the DFSA website. The DFSA says that the publication of the Naqvi DN will be a drop in the bucket given all this publicity and that, without it, a false picture of inactivity on its behalf will be created.

31. **Judicial Review claim**. Submissions filed on behalf of Mr Naqvi refer to Mr Naqvi's application for judicial review to the DIFC Court which Justice Sir Jeremy Cooke refused, but does not mention the unsuccessful application for the judicial review proceedings to be private. Mr Naqvi's lawyers submit that the judge's decision is not a precedent for various reasons including that, while their client did not participate in the DFSA process, he will in the case before the FMT. They point out that the judge states that "*there is unlikely to be any new material generated by the Regulatory Proceedings which is not already in the hands of the DFSA or the US authorities, being documents contemporaneous to the time of the alleged misdoing"*. They say that Mr Naqvi intends to provide evidence before the FMT. As such, new evidence would be generated which is not within the possession of the US authorities and is likely to be shared and used against Mr Naqvi if the Privacy Application is not granted.

32. Mr Naqvi did not 'substantially participate' in the proceedings before the DFSA and has not given evidence on this application. We have not been told what that new material will be - despite the application being in private- or how it will assist Mr Naqvi in the case before us, yet harm him should it be used in the US prosecution. More fundamentally, the trial judge in the US will be just as well equipped to ensure fairness with regard to this potential material as any other.

33. As we see it the relevance of the Justice's decisions lie not in suggested precedent but in the reinforcement of what seems to us to be the fundamental point that the fairness of the US proceedings will be determined and ensured by the trial judge in those proceedings.

34. Other observations of Justice Sir Jeremy Cooke are also pertinent:

> "*I do not consider that the interests of justice require this matter to be decided in private nor that any part of the record which is ordinarily available to the public should be denied it. Publicity would not defeat the object of the hearing/determination of the Judicial Review application ("JR") and there is nothing inherently confidential about the way in which the Abraaj Group was run*"

"*In July 2019 action was taken against Abraaj Capital Ltd and Abraj Investment Management Limited with consequent publicity .... nothing in the JR application appears to me to present a risk to a fair trial in the USA. Allegations are made against Mr Naqvi personally, but he has chosen not to engage with them. He has not given any evidence himself but relied on solicitors' witness statements only. The existence of the Regulatory proceedings against him will, as the DFSA, says, come as no surprise to anyone. The surprise would be if there were none, given the demise of the Abraaj Group*".

35. The position of Mr Naqvi's case is more advanced and the allegations are more serious than those against Mr Siddique, but the considerations set out at paragraphs 16 to 19 above apply equally to his case. We are not satisfied that publication is likely to cause serious harm or that it would be proportionate to restrain publication "*having regard to the principle that the DFSA should exercise its powers as transparently as possible and that proceedings of the FMT should generally be in public.*" Neither are we satisfied that Mr Naqvi can show a real need for privacy in the sense described in Annex A so as to justify hearings not being in public.

CONCLUSION

36. Both applications by both the parties are refused.

37. These two cases will be heard together and the parties are requested to seek to agree directions leading to a hearing of all issues and to report to us on progress within 28 days.

38. The Hearing Panel directs as follows:

    38.1 All hearings in these proceedings shall be in public.

    38.2 There is a stay of the Siddique and Naqvi Decision Notices (but only in respect of the financial sanctions).

    38.3 The witness statements and the skeleton arguments filed for the hearing be treated confidentially, not to be made available to the public without further order of the FMT.

38.4 Relevant details about the References be recorded in the "pending matters" table on the FMT section of the DFSA's website, but not before the Decision Notices are released to the public.

38.5 The DFSA is at liberty to release the Decision Notices to the public 21 days after this decision (subject to any appropriate redaction of confidential or sensitive information or to protect third parties). Before the Decision Notices are released, the text of any DFSA press release relating to the Decision Notices should be shared with the Applicants no less than 48 hours before the proposed publication.

38.6 This decision shall be published on the DFSA website (redacted to remove references to confidential information) but not before the Decision Notices are released to the public.

39. Costs are reserved.

Signed by the President on behalf of the Hearing Panel

His Honour David Mackie QC

3 January 2022

ANNEX A

E. PRIVACY APPLICATION: HEARING

Legislative and Regulatory Framework

1. Article 31(6) of the Regulatory Law provides:

> "*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.*"

2. It is common ground that this is not a case where the "*rules of procedure provide otherwise*".

3. The Regulatory Law sets out the DFSA's statutory objectives shortly before this section on Proceedings in the FMT. The Regulatory Law lists those objectives in Article 8(3) as follows

> "*(a) to foster and maintain fairness, transparency and efficiency in the financial services industry (namely, the financial services and related activities carried on) in the DIFC;*
>
> *(b) to foster and maintain confidence in the financial services industry in the DIFC;*
>
> *(c) to foster and maintain the financial stability of the financial services industry in the DIFC, including the reduction of systemic risk;*
>
> *(d) 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;*
>
> *(e) to protect direct and indirect users and prospective users of the financial services industry in the DIFC;*
>
> *(f) to promote public understanding of the regulation of the financial services industry in the DIFC.*"

4. Rule 16 of the FMT Rules of Procedure ("the FMT Rules**"**) provides:

> "*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.*"

5. Rule 19 of the FMT Rules has been held to have an indirect application to the issue of public hearings, even though its direct application is to the issue of confidential treatment of specific information (see: *Arqaam Capital Limited v Dubai Financial Services Authority* (4 September 2012) (at paragraph [18]):

> "*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.*"

6. These provisions give the FMT a broad discretion to order that hearings should take place in private.

Case Law

7. The approach to privacy applications is that set out in the FMT's decision dated 16 January 2020 in the ***Al Masah*** case (FMT 19007).

8. At paragraph 99 of that decision, the FMT stated the test to be applied on an application for a hearing in private as one first set out in ***Arqaam***, which requires the FMT to "*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*".

9. Paragraph 130 of *Al Masah* summarises the applicable principles:

> "*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."

10. The Hearing Panel sees no need to revisit the principles stated in *Al Masah*. However, it makes four points.

11. First, *Al Masah* at paragraph 119 (by reference to the UKUT decision of *Burns (UKUT, 1 May 2013))*, establishes that privacy or confidentiality may be justified if the applicant can demonstrate a "*significant likelihood*" of "*severe damage or destruction of livelihood*" (as opposed to a '*possibility*' of such damage or destruction, or a significant likelihood of loss of reputation).

12. Secondly, [the] Reply objects to the DFSA's submission that there is a "*strong presumption*" in favour of public hearings. It appears to the Tribunal that what matters is how the statutory presumption is to be applied. It is all about the importance of open justice. As the FMT said in *Bhandari*, the presumption in favour of public hearings can only be departed from for "*good reason*" (at [16]). The presumption reflects the importance that hearings should be in public.

13. Thirdly, as to the need for "*cogent*" evidence, which *Al Masah* identified in [130(i)], this means that factual disputes are not resolved on the basis of bare assertion. It cannot be speculative evidence. The evidence must be evaluated and tested against the likely probabilities and contemporary documents.

14. Finally, in *Al Masah* at [159] it was held: *"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*".

15. At [160] it held on the facts of that case that there is "*no sufficient factual basis for contending*" that public hearings would result in, or risk resulting in, "*the destruction of businesses and careers*". (It is because of this that it is necessary, when publication takes place, it is made clear that the findings in the Decision Notices "*are provisional and capable of challenge before the FMT*", and that "*Readers of the Decision Notices will appreciate this*.")

F. PRIVACY APPLICATION: WHETHER TO PUBLISH THE DECISION NOTICES

Legislative and Regulatory Framework

16. As regards publication, Article 29 of the Regulatory Law, as amended with effect from February 2020, provides in relevant part:

> "*(5) If a person refers a decision to the FMT, the DFSA must publish such information about the decision as it considers appropriate unless:*
>
> *(a) in the DFSA's opinion, publication of such information would be prejudicial to the interests of the DIFC; or*
>
> *(b) the FMT has made an order under Article 31(5) preventing such publication.*
>
> *(6) Information about a decision referred to in paragraph (5):*
>
> *(a) must be published as soon as practicable after the referral of the decision to the FMT;*
>
> *(b) may be published in such manner as the DFSA considers appropriate; and*

(c) must include a statement that the person has exercised their right to refer the matter to the FMT and the decision is subject to review.

(7) Nothing in paragraph (5) limits the DFSA's power under Article 116 to publish information or statements about a decision or matter in other circumstances.

(8) The FMT may make an order referred to in paragraph (5)(b) prohibiting publication of information only if it is satisfied that:

(a) such publication would be likely to cause serious harm to the person to whom the decision relates or to some other person; and

(b) it is proportionate to make such an order, having regard to the principle that the DFSA should exercise its powers as transparently as possible and that proceedings of the FMT should generally be in public."

17. Accordingly, Article 29(8) imposes a two-stage approach. The first stage is whether the FMT is satisfied that publication would be likely to cause serious harm to the person to whom the decision relates or to some other person. The second stage is whether publication is proportionate having regard to "*the principle that the DFSA should exercise its powers as transparently as possible*". Both stages must be considered […].

18. The decision in *Al Masah* on publication arose under a different statutory framework. At the time of that decision, there was no express obligation on the DFSA to publish information about decisions referred to the DFSA, such as there now is in Article 29(5) of the Regulatory Law. At the time that *Al Masah* was decided, the DFSA had a general discretion under Article 116(2) of the Regulatory Law which provides that 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*".

19. As pointed out in *Bhandari* at [21]:

> "*The amended version of Article 29 is now similar to the provision applicable in the UK (see Al-Masah at §105). The main difference is that the English provision permits the FCA not to publish information about a decision if it considers that publication would be unfair to the person in respect of whom the action is taken; the amended Article 29 contains no such exception…*".

20. And at [32] of *Bhandari*:

> "*Following the amendment of Article 29 we agree with Mr Cleaver that the question of non-publication should in general be approached in the same way as the question of privacy and confidentiality. Under Article 29 the DFSA has a discretion as to the appropriate information it publishes about a matter referred to the FMT. The Tribunal is not in a position to say that publication of the Decision Notice itself is irrational or otherwise outside the scope of that discretion. Under Article 29 the Tribunal only has power to make an order prohibiting publication if such publication would be likely to cause serious harm to the person to whom the decision relates or to some other person and it would be proportionate given the requirements of transparency. Under Article 31 the applicant has a heavy burden to provide cogent evidence that disproportionate unfairness would be created without an order.*"