IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE

FINANCIAL MARKETS TRIBUNAL **Case: FMT 20013**

BETWEEN

ASHISH BHANDARI

Applicant

And

THE DUBAI FINANCIAL SERVICES AUTHORITY ("DFSA")

Respondent

DECISION

Mr Ali Al Aidarous

His Honour David Mackie QC

Mr Bankim Thanki QC

18 January 2021

1. This Decision follows an online Case Management Conference on 6 January 2021. It records with reasons the matters decided at the end of the Conference and the reasoned decision the Tribunal has reached on the outstanding matter of publication.

2. On 17 September 2020, the DFSA issued a Decision Notice against the Applicant, Mr Bhandari, setting out the DFSA's decision to impose a financial penalty of USD165,000 and a restriction preventing him from performing any function in connection with the provision of Financial Services within the DIFC. Mr Bhandari referred the matter to the FMT and, on 18 October, filed Grounds of Appeal, an Application Notice and his first witness statement. The DFSA served an Answer on 15 November 2020. Mr Bhandari served a Reply on 13 December.

3. The Decision Notice records that the Decision Making Committee ("DMC") found that Mr Bhandari had (a) arranged for a referral commission to be paid by ABN to a BVI company of which he and his wife were the directors, and of which he was (or was in any event recorded as) the ultimate beneficial owner, without disclosing those facts to ABN, and (b) ABN failed to take proper steps to verify the identity and ownership of the BVI company in accordance with its AML obligations, instead simply accepting Mr Bhandari's assertions, which he must have known were inaccurate. Accordingly, ABN failed to discharge its AML obligations, and Mr Bhandari was knowingly concerned in that failure. The DMC also found that in compulsory interviews conducted pursuant to Article 80 on 12-13 December 2017 Mr Bhandari deliberately provided false information about the extent of his knowledge of and dealings with the BVI company. He then failed, without reasonable excuse, to comply with compulsory notices issued under Article 80 on 14 December 2017 and 24 January 2018 requiring him to produce information and documents to the DFSA.

4. Mr Bhandari essentially denies all the allegations against him, although he accepts that he did to a small degree for a limited time knowingly provide false information to the DFSA (but denies that the DFSA was misled).

5. The Conference discussed case management and also the requests in the Application Notice which were;

- The listing of a trial of a preliminary issue by reference to the construction and application of Article 63 of the Regulatory Law.

- An order for disclosure of material relevant to the DFSA's awareness of issues that now form the basis for the Decision Notice.

- A stay of publication of the restriction on the DFSA register.

- An order prohibiting the publication of the Decision Notice.

- An order that any hearing of these applications be heard in private.

6. The Tribunal was greatly assisted by able skeleton arguments and oral submissions from Mr Temple and Mr Cleaver.

7. We agreed to hear these matters in private because to do otherwise would have defeated in advance Mr Bhandari's application to prohibit publication. A stay of the financial penalty was not opposed but the DFSA declined a stay of the restriction.

Preliminary Issue.

8. The Applicant sought an order pursuant to Rules 4, 7, 41, 46 of the Financial Markets Tribunal Rules of Procedure for the trial of a preliminary issue, on the questions of:

    - The proper construction of Article 63 of the Regulatory Law (i.e. whether a three year limitation applies from the date on which the DFSA became aware of the acts or omissions giving rise to the powers exercised within the Decision Notice).

    - Whether the DFSA had the relevant awareness more than three years before 24 November 2019 being the date of the Preliminary Notice, in respect of some allegations in the Decision Notice

9. The positions of the parties are detailed in the skeleton arguments. Essentially Mr Temple argued that while the difficulties in deciding preliminary issues were well known this case was different. The question of construction did not require evidence and if found in his client's favour would reduce the scope of the main hearing. The question of awareness was important because criticisms by the DMC potentially removed by this

preliminary point were serious and their publication would be unfairly prejudicial. Mr Cleaver argued that preliminary points would save no material time or costs and would risk significant duplication.

10. The Tribunal, while recognising that both sides had tenable positions, considered that the construction issue would in practice achieve little except perhaps, as Mr Temple contended in reply, in limiting disclosure (which could be achieved by other means). The 'awareness' issue would involve substantial amounts of evidence from witnesses who might end up giving evidence twice. The authorities show that the default position should be generally to decline to order preliminary issues save in cases where relatively narrow issues can have a decisive impact on the whole case or an important aspect of it. The Tribunal was not persuaded that the issues identified had sufficient practical utility in this sense. Given also the experience of members of the Tribunal of how frequently well-intentioned trials of preliminary points not only fail to achieve their purpose but elongate proceedings, and the special practical difficulties of the present time, we declined to order them in this case.

Disclosure.

11. There is disagreement between the parties about the extent of digital disclosure required. The Tribunal does not have the knowledge at this stage of the case to make useful detailed decisions about this. The Tribunal is broadly sympathetic to the requests for disclosure set out in Paragraph 31 of Mr Temple's skeleton argument but cannot yet evaluate the practical implications of this for the DFSA. On the question of confidentiality, we share the view of Clyde and Co, Mr Bhandari's solicitors, that material can safely be disclosed to them but not their client where that is strictly necessary. We urge the parties to reach a sensible agreement but if they cannot then we will resolve the disputes of detail but are very likely to make immediate costs orders against a party taking an unreasonable position.

Publication.

12. Mr Bhandari applies for prohibitions on the publication of the Decision Notice and any reference to the restriction against him in the DFSA register and that the matters contained within the Decision Notice be treated as confidential. The DFSA responds that there are clear statutory presumptions

in favour of hearings taking place in public and in favour of information about a decision being published when the decision is referred to the Tribunal. Such presumptions can only be displaced for good reason: *Al-Masah v DFSA* (FMT 19007, 16 January 2020). The only reason advanced in this case is that the DMC has made findings which, if made public, might damage Mr Bhandari's reputation. That is insufficient.

13. Mr Temple contends that the DFSA appears to be misreading the law which instead requires it to publish such information as the DFSA considers appropriate. There is nothing in the DFSA's rules to suggest a general policy of publishing Decision Notices. The language of the Decision Notice issued to Mr Bhandari points in the opposite direction: that there will be no publication until the conclusion of this Reference. Publication should be prohibited due to the likelihood of serious harm to third parties (who have not been consulted prior to publication, contrary to the DFSA's rules) and to Mr Bhandari.

14. **The law-public proceedings.** 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*." By Article 31(5) (h) the Tribunal may "*order a person not to publish or otherwise disclose any material disclosed by any person to the FMT*".

15. Rules 16-19 of the FMT Rules of Procedure provide:

"*Public proceedings*

16. 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.

Confidential Treatment

17. The Hearing Panel on its own initiative or on the application of a person may order that part or all of a proceeding is non-public and that information is to be treated confidentially and not disclosed publicly.

18. An application for confidential treatment shall state the grounds for objection to public disclosure and where applicable shall be accompanied by a sealed copy of the information for which confidential treatment is sought.

19. 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."

16. These provisions were considered by the Tribunal in *Al-Masah v DFSA* (16 January 2020), drawing on other cases including the decision of the DIFC Court in *Arqaam Capital Limited v DFSA* (4 September 2012). As the Tribunal saw it the Regulatory Law creates a presumption in favour of public hearings, which can only be departed from for good reason.

17. Although Rule 19 concerns confidential treatment rather than the question whether or not a hearing should be public, it has 'indirect application' to that question and the same factors are likely to be relevant. As the FMT in *Al-Masah* puts it in §101:

"*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))".

18. Some UK cases, and in particular *Burns v FCA* (UKUT, 1 May 2013, FS/2012/24), establish that privacy or confidentiality may be justified if the applicant can demonstrate a "*significant likelihood*" of "*severe damage or destruction of livelihood*" *but there is* a "*heavy burden*" on the applicant) and "*cogent evidence*" is required. As *Al-Masah* puts it at §130(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*".

19. In *Al-Masah* itself, the Tribunal concluded that the hearings should be in public. At §159 it 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*." At §160 it held 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*". In particular, it noted that it was 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.*"

20. **Law –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. […]

(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."

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, instead leaving that question to the Tribunal.

22. The DFSA submits that in view of those amendments, the question of non-publication should in general be approached in the same way as the question of privacy and confidentiality. Many of the cases relied upon in *Al-Masah* and *Arqaam* in relation to the latter question in fact related to the publication of decision notices under the English statutory regime. The main potential difference between the question of privacy/confidentiality and the question of non-publication arises from the fact that Article 62(3) separately requires the DFSA to publish and maintain a register of all persons in relation to whom action has been taken under Articles 58(1) or 59. Article 59 is the power to restrict a person from performing functions in connection with the provision of Financial Services in or from the DIFC on 'fit and proper' grounds, exercised in this case. The DFSA says that there is therefore a statutory obligation to record that such a restriction has been imposed on Mr Bhandari.

23. Mr Bhandari points to differences between the DIFC and the UK which should shape the context in which these provisions are applied. The DMC is a less independent body than the RDC in the UK. Further potential loss of employment within the DIFC is also potential loss of a visa to live in Dubai.

24. **Application of the law in this case**. Mr Temple argues that the wording of the Decision Notice creates a legitimate expectation that it will not be published until this case is over. Paragraph 8.14 states that the decision will be made public after '*the appeal process has come to an end*'. Paragraph 8.15 states that the DFSA will, in the meantime, publish information about the hearing or commencement of proceedings. Such information includes details about the references in the 'pending matters' table of the FMT on the DFSA's website. The reader of the Decision Notice is given no indication that the DFSA intends to publish the Decision Notice before the appeal process has ended. Mr Temple argues that the correspondence since this case started aggravates the position. On reading the Decision Notice Mr Bhandari had a legitimate expectation that its provisions would be observed. Mr Bhandari would be content if the DFSA maintained the position as set out in the Decision Notice. He accepts that hearings will be listed on the FMT section of the DFSA's website, and it is his position that making the decision public, and any publication of the Decision Notice, should await the conclusion of this case.

25. Mr Temple also argues that the fact that there are unresolved limitation issues means that additional unfairness may be caused by publication. If the limitation argument prevails, and the Decision Notice is published now publicity will have been given to points which should not have been made at all.

26. Mr Temple points to passages in the Decision Notice which he suggests are in effect allegations of serious misconduct which are completely denied. These will give rise to particular harm if disclosed before the Tribunal has considered them. Further the very size of the fine suggests to an informed reader that Mr Bhandari has been found to have committed serious contraventions. Unlike *Al-Masah* this is not a case where there has already been some publicity which needs to be set in context.

27. Mr Bhandari explains that his reputation is key to his credibility as a professional, and that damage to his reputation will impact on his ability to

work. He says that it is *'possible'* that damage will be done to his business interests throughout the world and his employment put at serious risk. He also says that there is "*the very real risk of being arrested and questioned by the Dubai Police. If I am charged and found guilty of this offence, in addition to the criminal sanctions that may be imposed on me, my visa will be withdrawn and my family and I will have to return to India*."

28. He says that relying on the press to provide fair coverage of the Decision Notice, even with disclaimers, provides insufficient protection. He exhibits to his witness statement publicity given to the *Al-Masah* decision which make no reference to the decision being challenged.

29. Mr Bhandari also submits that publication will or may prejudice the positions of third parties. When asked who these might be the response was the bank. This does not seem to us to carry any weight particularly where there has been no representation about this from the bank.

30. Mr Cleaver responds that the evidence of damage to employment and business interests by publicity is very thin and well within the ordinary range of consequence to be expected in most cases. He also points to the fact that Mr Bhandari has admitted a degree of fault although the extent of that is disputed.

31. As to the wording of the Decision Notice Mr Cleaver said this at the hearing:

"*It is an error in the decision notice that it refers to*

the old version, but all that the Decision Notice is

doing is seeking to explain the effect of a provision of

the RPP Sourcebook. ..it is expressly summarising the effect

of RPP and it is doing so incorrectly, but that cannot

be a statement of intent …The passage in the

Decision Notice which suggests otherwise cannot displace

that legal requirement on the DFSA."

32. **Publicity – Decision**. 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.

33. As we see it the matters relied upon by Mr Bhandari do not reach the high threshold of either requirement. We recognise the obvious difficulty of seeking evidence from an employer of what might happen in the event of publication but what has been, and it seems could have been, put forward in this case is no more than would be reasonably expected in cases of this kind and does not approach the requirements the Tribunal set out in *Al- Masah* or those of the now amended Article 29. The matters which Mr Bhandari relies on are highly speculative. We do not agree, for the reasons given by Mr Cleaver, that limitation defences are in a different category for this purpose than others.

34. It follows that this application fails as regards the publication on the DFSA register and the information that the DFSA considers to be appropriate to publish under Article 29. As we see it, however, fairness requires that any press release or similar announcement by the DFSA should not only follow the requirements of Article 29 (6) (c) and mention that this case has been referred to the Tribunal but point out that the process will not be complete until after we have conducted a full reconsideration of the issues.

35. We do not accept the submission that in law any legitimate expectation which the Tribunal should enforce was created by the erroneous wording of the Decision Notice. We do not consider that the statements in the Decision Notice to which we have referred were sufficiently clear, unambiguous and without qualification to meet the test for the creation of a legitimate

expectation in law, particularly viewed against the regulatory and legal background explained by Mr Cleaver. However, we find it hard to overlook as a matter of fairness that when he received the Decision Notice Mr Bhandari was told in terms "*the DFSA will generally make public any decision made by the DMC and will do so in a timely manner after any relevant period to refer a matter to the FMT has expired or the appeal process has come to an end.*" While he might have realised that this was an error if he had ploughed through the regulations referred to, the thrust of this message was a tolerably clear one. He was later informed of the error although there seems to have been some confusion about what the DFSA did intend to publish. This must have been unnecessarily stressful to Mr Bhandari at a time when he was having to face the consequences of the Decision Notice itself.

36. We all make mistakes from time to time and we do not attach blame to whoever was responsible. Good regulation does however require particular care to be given to the preparation of documents like the Decision Notice which are of critical importance, particularly to the recipients. Further such mistakes may create the impression that if one thing is wrong, others may be too. As we read the relevant Articles we do not have the power, once we have reached the conclusions that we have, to order the DFSA to honour the statement made in 8.14. We do however encourage it to do so and, if it later wishes to publish the Decision Notice, raise the matter at the hearing.

37. We reserve the costs of this application and invite the parties to agree an Order giving effect to our decisions.

Mr Ali Al Aidarous

His Honour David Mackie QC

Mr Bankim Thanki QC

18 January 2021.