IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE **Case: FMT 21014**

FINANCIAL MARKETS TRIBUNAL

BETWEEN

GILLES ROLLET

Applicant

and

THE DUBAI FINANCIAL SERVICES AUTHORITY

Respondent

Tribunal **Mr Ali Al Hashimi**
His Honour David Mackie QC
Mr Patrick Storey

Decision on Application by Applicant

24 June 2021

1. This is the outcome of an Application by the Applicant ('Mr Rollet') for orders in effect that the DFSA not publish the Decision Notice and that the hearing of this case be in private. The Tribunal's decision is unanimous.

Background

2. On 29 December 2020, the DFSA's Decision Making Committee ('DMC') gave the Applicant a Decision Notice in which it found he had contravened legislation administered by the DFSA. The DFSA imposed on the Applicant a financial penalty of USD 175,000, a prohibition order, pursuant to Article 90(2)(g) of the Regulatory Law 2004 prohibiting him from holding office in, or being an employee of various entities, and a restriction, pursuant to Article 59(1), preventing him from performing any function in connection with the provision of Financial Services in or from the DIFC. The prohibition and restriction took effect from the date of the Decision Notice and the Applicant was given 60 days to pay the financial penalty.

3. On 28 January 2021, the Applicant referred the Decision Notice to the FMT by filing a Notice of Appeal and Grounds of Appeal ('the Reference'). He also made an application ('the Application') for an order that the hearing of the Application be in private, that the DFSA not publish the Decision Notice and that the hearing of the Reference be in private.

4. On 25 February, the DFSA filed its Answer to the Reply, opposing the Application and inviting the FMT to determine it without a hearing. On 25 March the Applicant filed his Reply agreeing that the Application be dealt with on the papers. On 26 March, we agreed to decide the Application in writing without a hearing and, in the absence of an agreement between the parties, directed a timetable for this.

5. On 3 May, the Applicant filed written submissions and four witness statements from himself (with two exhibits), his wife Ms Claudia Hetzke (with two exhibits), Mr Rafael Blanco, an independent director of Blue Ocean International Bank LLC ('BOIB'); and Mr Marc-Antoine Tschopp, a member

of the Mauritian Conduct Committee of the Young President's Organization ('YPO').

6. On 17 May, the DFSA made submissions in response accompanied by a witness statement from Ms Fiona Paddon, Senior Legal Counsel at the DFSA, with four exhibits. On 2 June, the Applicant filed submissions in Reply with further witness statements from himself and from Ms Beth Ann Lopez.

7. As, at the request of the parties, there has been no hearing of the Application we permitted them to suggest corrections to the draft Decision of the kind usual in the English High Court and also to make brief submissions on any matter of real significance that the absence of oral submissions has caused us to overlook. We are grateful for the submissions from Saima Hanif QC, Stuart Walker and Sulakshana Senanayake for the Applicant and the DFSA Legal Department for the Authority.

The relevant Rules.

8. The Application is made under Paragraph 33 of the Financial Markets Tribunal Rules of Procedure ('the Rules') in which the Applicant seeks an order pursuant to Rule 34(b).

9. The relevant parts of Rules 16 and 17 state:

"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.

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."

10. 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"*.

11. Article 29 of the Regulatory Law 2004 includes this:

"… (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."

12. Article 31(5) provides that in hearing and determining a reference, the FMT may, inter alia: *"… (h) order a person not to publish or otherwise disclose any material disclosed by any person to the FMT; (i) where the proceeding is a reference, stay the decision of the DFSA to which the reference relates and any related steps proposed to be taken by the DFSA until the FMT has determined the reference; and (j) exercise such other powers or make such other orders as the FMT considers necessary for or ancillary to the conduct of the proceeding or the performance of its function…"*

13. Article 62, entitled "Public Registers" states: *"… (3) The DFSA shall publish and maintain registers of: (a) all persons in relation to whom action has been taken under Article 58(1); (b) all persons in relation to whom action has been taken under Article 59; and (c) all persons who have been prohibited under Article 90(2)(g) … indicating whether any such action is of past effect or current, in such manner as may be prescribed in the Rules."*

The Case Law

14. It is common ground that the legal test to be applied is that set out in our decision in Al Masah Capital Ltd and ors v DFSA(FMT 19007) which had

regard to Arqaam Capital Limited v DFSA, DIFC Court Judgment (CFI 006/2012) and was followed in Ashish Bhandari v DFSA (FMT 20013). We have regard to the entirety of these decisions but it is sufficient to quote the summary in Paragraph 130 relied on by the parties:

"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."

15. It is important to bear in mind that the primary consideration is of course the wording of the Rules themselves and that we are exercising a discretion in these matters.

The evidence.

16. We have regard to all the evidence not simply to what seem to us to be its main features referred to below.

17. Mr Rollet states in his witness statement that he lives in Mauritius with his wife and young child in a house bought with a loan to his company Atihana Limited from Bank One Limited which the couple have guaranteed. He is concerned that if the Decision Notice is published the Bank will treat this as a 'material adverse change', call in the loan and render him and his family homeless. The bank is unaware of the Decision Notice but when it became aware in June 2020 of Mr Rollet's connection with La Tresorerie's ('LT') Decision Notice it expressed concern. He exhibits the loan agreement and an opinion from Dentons, Mauritius lawyers about its potential legal effect. Ms Hetzke gives evidence to the same effect and emphasises the prejudice that their young child would suffer if the couple had to sell their home and move.

18. Mr Rollet believes that he would lose his position as the Chairman of the Young Presidents' Organization (a body of worldwide renown) in Mauritius if the Decision Notice were published as he would have to resign or face an internal investigation. Mr Tschopp who is former Chairman of YPO in Mauritius and Geneva and still a member of its Mauritian Conduct Committee gives evidence supporting this concern, explaining the significance of the organisation worldwide and expressing his belief that publication would damage the YPO itself.

19. Mr Rollet is a director of Docosan, a health care company in Vietnam. He says that the 70% shareholder in the company has told him that he would have to resign if the Decision Notice were published and that even if he were successful in this case the damage would be done as the vacant position would have been

filled. He also says that the immediate effect on his finances would prevent him meeting the commitments he has to his church, an orphanage and other local charities.

20. Mr Rollet is also concerned about the effect of any publication on two business interests. He fears publication will harm his key business, BOIB, which is licensed in the USA and based in Puerto Rico. He is concerned that *"it is highly likely that the authorities in Puerto Rico would take action to suspend or cancel the banking licence of BOIB if they became aware of it"*, that the nine employees of BOIB would all lose their jobs if the licence were revoked and that the publication of the Decision Notice would directly affect the trust placed on the bank by its customers and *"could lead to a sudden mass withdrawal of capital, possibly leading to an immediate liquidation of the bank, and would affect the liquidity of the bank, thereby directly affecting its customers"*. The main authority that concerns him is the Office of the Commissioner of Financial Institutions in Puerto Rico ('OCFI') which is aware of the Decision Notice and will take action if it becomes public. Mr Rollet's concerns are supported by a witness statement from Mr Rafael Blanco, an independent director of BOIB and a former OCFI Commissioner. Mr Blanco says that public disclosure of the Decision Notice *"will almost certainly cause OCFI to immediately suspend BOIB's license to operate, without the benefit of a hearing"*. Mr Blanco goes on to claim that publication of the Decision Notice would be damaging to his own reputation on the basis that his connection to the Applicant through BOIB is generally known in the Puerto Rican market.

21. Mr Rollet also gives evidence that he owns the entirety of ExpAM , a regulated Registered Investment Adviser based in Miami, USA which could be *"forced to shut down should the Decision Notice be made public"* with the single employee losing his or her job.

DFSA's response to the evidence.

22. The DFSA suggests that the loan document is not a mortgage, that there is doubt about the financial position of Atihana and no evidence that the suggested effect of publication of the Decision Notice will materialise. The DFSA identifies confusion about the length of time the family have actually been living in the property and suggests that the legal opinion does not advance the matter. There is a gap between arguing that publication of the Decision Notice constitutes a material adverse change and demonstrating a real risk that the bank would take action to demand repayment of the loan and succeed. The material falls a long way short of providing *"cogent evidence"* to demonstrate a *"significant likelihood"* (a test which the Applicant submits is not relevant) of unfairness occurring, as required by the FMT's decision in Al Masah.

23. The DFSA suggests that the claims relating to YPO are improbable. It has been public knowledge since at least April 2020 that Mr Rollet was SEO of LT which had been the subject of critical regulatory findings. It is improbable that a reputable organisation would be content for its President not to be obliged to disclose their existence and to be permitted to continue in office despite the findings against him but only provided that the matter did not become public. The DFSA dismisses the suggestion that a large international organisation such as YPO would be damaged simply because one of its members has regulatory decisions against him published.

24. The DFSA points to the absence of evidence about Mr Rollet's claim that he would have to resign from Docosan and suggests that it is improbable that at this stage a Vietnamese private healthcare company would have any reason to require his resignation. It suggests that no weight can be placed on Mr Rollet's assertion about charities suffering as a result of the suggested financial consequences of publication given the lack of detail disclosed.

25. The DFSA points out that while BOIB has the word bank in its name its website explains that in fact it provides *"high quality and responsive private banking*

services for private clients, institutions and independent asset managers". It is therefore unlikely that there would be sudden withdrawals from what appears to be a manager of investments not a taker of deposits. The DFSA also points out that it is improbable that OCFI will take action if the Decision Notice is published since Mr Rollet has already disclosed the matter to it. It points to the improbability of a regulator not taking action over a matter reported to it except where it is made public. There seems no basis for Mr Blanco's assertion that public disclosure of the Decision Notice *"will almost certainly cause OCFI to immediately suspend BOIB's license to operate, without the benefit of a hearing"*. The DFSA contends that Mr Blanco's claim that publication of the Decision Notice would be damaging to his own reputation is improbable and irrelevant.

26. The DFSA has obtained details, exhibited to Ms Paddon's statement, about a firm by the name of 'EXPAM CAPITAL'. Its registration status is recorded on the USA Securities Exchange Commission ('SEC') Investment Adviser Public Disclosure website as "terminated" as at 22 February 2021. As such, it appears that ExpAM is not currently registered nor is it currently filing reports with the SEC or any state. It says that the Applicant's assertion that the firm will be *"forced to shut down should the Decision Notice be made public"* is therefore not understood. The DFSA also points to other materials on the SEC website which emphasise the importance the latter attaches to information about matters such as those contained in the Decision Notice. It submits that it would not be appropriate for the FMT to make an order prohibiting publication of the Decision Notice on the basis that it contains information about the Applicant that other regulators would wish to know about.

Reply Evidence of the Applicant.

27. Mr Rollet filed a second witness statement in which he explains and resolves some suggested inconsistencies about his home, when he started to live there and the bona fides of the transaction. We accept what he says about that. He also provides a further legal opinion from Dentons Mauritius which supports

his concerns about the publication of the Decision Notice being seen as a material adverse change enabling the bank to demand repayment of the loan. That opinion expresses the view that where 'material adverse change' (an expression widely used in common law jurisdictions) is not defined in the loan agreement its meaning is then in the discretion of the lender. This is a startling proposition for which no authority is cited. In most jurisdictions the meaning will be determined by a court interpreting the expression in the context of the contract as a whole or applying similar approaches to construction. We are prepared to accept however that there is a risk that a bank might take that position. The opinion also states, which we accept, that it is not uncommon in Mauritius for the banks to exploit technical defaults to increase fees or to impose refinancing on onerous terms. This does not quite amount to what Mr Rollet claims is a *"significant likelihood that the Bank would take steps to demand payment from me and my wife if the Decision Notice was published, which would also lead to the loss of my residence."*

28. As to YPO Mr Rollet points out and we accept that it is unlikely that there would have been much if any publicity about him in respect of the LT decision and this issue would need to be seen in the context of his many other business activities. He says that in Mauritius YPO has only 45 members and publication would damage his effort to recruit others to the organisation.

29. Mr Rollet exhibits material from BOIB's auditors BDO confirming that *"the Bank is authorized to provide custody services"* and that BOIB is a Bank. Accordingly, the DFSA's position that BOIB is not a deposit-taking institution is incorrect and *"[t]herefore, the scenarios described in my earlier witness statement and that of Mr Blanco are entirely feasible"*. He says that the DFSA is also incorrect to say that BOIB is an asset manager. As a bank, BOIB cannot perform asset management functions in Puerto Rico. He says that there is no one in a better position to appraise the likely reaction of OCFI than Mr Blanco, one of its former commissioners. In contrast the DFSA has produced no evidence of its own.

30. Mr Rollet says nothing in reply to the DFSA's evidence about ExpAM. His lawyers are equally silent in their Reply submission.

31. Ms Beth Ann Lopez is the CEO and majority shareholder of Docosan, a healthcare company based in Vietnam which primarily offers booking of healthcare services through an app. Docosan is apparently a successful start-up seeking to improve healthcare in Vietnam for the benefit of the people. Docosan has, she says, benefited from the guidance and experience of Mr Rollet who would have to step down as a member of the board to reduce the harm if the Decision Notice was published. There would still be harm caused to Docosan and associated parties even if Mr Rollet were to step down from the board if the Decision Notice was published.

Submissions of the Applicant.

32. Mr Rollet submits that he has satisfied the test outlined in Al Masah, in that he has provided *"cogent evidence"* that both he and other third parties (namely his wife and child) "could" suffer disproportionate harm (i.e. harm that is above and beyond damage to his reputation) if the Decision Notice is published. It is clear from the evidence that publication of the Decision Notice would cause Mr Rollet and other third parties (principally his wife and daughter) harm, namely the loss of their home; this self-evidently constitutes *"serious harm"* within Article 29(8)(a), and also constitutes "significant" harm consistent with Rule 19 of the FMT Rules. Applying the balancing test in Arqaam also requires consideration of the fact that a hearing has now been listed for 31 October 2021, in which case the delay in the public being informed about this matter is for a short period only. The current status quo should be continued for a further modest period. With regard to non-publication of the information regarding the Prohibition and Restriction imposed on the Applicant, this relief is necessary because otherwise, it would bring into the public domain the very matters which non-publication of the Decision Notice is designed to protect. It would therefore defeat the very purpose of the application for non-publication.

Submissions of the DFSA

33. The DFSA submits that the evidence provided is no more than speculative and falls far short of the standard required to rebut the presumption in favour of publication. The DFSA therefore submits that, based on incomplete information and a series of speculative scenarios posited in the guise of legal advice, the Applicant rather relies on a vague possibility concerning his property to persuade the FMT that publication of the Decision Notice should be prohibited. In reality, such publication will not materially affect the Applicant in the way proposed. The Applicant has fallen a long way short of providing *"cogent evidence"* to demonstrate a *"significant likelihood"* of unfairness occurring, as required by the FMT's decision in Al Masah. The FMT held in Al- Masah that it will be a *"rare case"* where the FMT can conclude that third party interests justify a private hearing (and, by extension, non-publication of a Decision Notice), where the third party has not adduced its own cogent evidence. The DFSA submits this is not one of those 'rare' cases and the potential unfairness alleged by the Applicant is insufficient to defeat the public interest in open justice and justify non-publication of the Decision Notice.

Decision of the Tribunal.

34. We have regard to the submissions of the parties about the right approach but are primarily concerned with evaluating the evidence and the issues in the light of the wording of Articles 29, 31 and 62, relevant to the publication of the Decision Notice and Rules 16, 17 and 19 to the hearing.

35. We have some reservations about the evidence.

36. There is little recognition in the evidence or the opinions of the lawyers that the Decision Notice would be anything other than an unconditional statement of the imposition of a penalty. In fact, as the lawyers know from Al Masah, that Notice would contain a prominent statement that the process was not over and

that the recipient had referred the decision to this Tribunal which was due to resolve it in a few months' time.

37. The evidence about Mr Rollet's home addresses the legal theory and broad risk that the bank may take action. It does not engage with the legal and commercial realities facing a bank at this point with such a large loan. Apart from the legal risk of being wrong about material adverse change, any bank would need to consider the possibility that the Notice could be cancelled by the Tribunal quite early in the enforcement process. We do accept that there is some but not a great risk here.

38. The claims about YPO are unconvincing and carry little weight when placed against the other relevant considerations. The claims about charities are unsubstantiated and speculative as are those of damage to the reputations of the other witnesses.

39. We take the weight of evidence about BOIB seriously given the views of Mr Blanco despite the fact that it seems improbable, as the DFSA points out, that a regulator would take action over a matter it had already decided not to pursue once it was made public. Further, if the matter is already known to OCFI there would seem no reason why the Applicant could not have got confirmation of his concerns from that body itself.

40. The Applicant's silence in the face of what the DFSA says about ExpAM is concerning.

41. The evidence of Ms Lopez is surprising but clear and we accept it.

42. While the overall effect of the evidence does not alone convince us that publication should be postponed, we bear in mind that the case has been diligently pursued by the Applicant and the full hearing will take place on 31 October. In striking a balance we have regard to the fact that any disadvantage to the DFSA will be for a brief period. In those circumstances we consider it

appropriate to postpone publication, and any related steps, for the short period before the start of the hearing.

43. There is however in the evidence no basis for hearing this case in private. The evidence becomes very thin when considered as at the start of a hearing when the Applicant will be presenting his case. Furthermore when brought into balance against the other considerations explained in Arqaam and Al Masah there is no basis for ordering the rare step of a private hearing.

44. The Applicant is free to renew his application for a private hearing but only on the basis of developments occurring after this Decision. We do not deal with some minor legal issues raised in the submissions as consideration of them is not necessary for our Decision. As the application has been brought and resisted in good faith there will be no orders for costs.

45. We invite the DFSA to draft an order for the parties to discuss and agree, substantially along the lines of that in Al Masah.