IN THE FINANCIAL MARKETS TRIBUNAL **Refs. FMT11001 and FMT11002**

B E T W E E N :

DUBAI FINANCIAL SERVICES AUTHORITY

Applicant

And

(1)ARQAAM CAPITAL LIMITED
(2)ERNST & YOUNG

Respondents

DECISION ON APPLICATION FOR DIRECTIONS

INTRODUCTION

1. A number of applications are made in relation to these proceedings that have been commenced by the Dubai Financial Services Authority ("DFSA") against Arqaam Capital Limited ("Arqaam") and Ernst & Young ("E&Y).

2. Arqaam is an investment bank incorporated in the Dubai International Financial Centre ("DIFC"). It was registered as a company on 29 March 2007 and received a Category 2 licence to carry on financial services on 23 May 2007. Arqaam are represented in these proceedings by Clifford Chance LLP.

3. E&Y acted as external auditors to Arqaam and prepared an audit report dated 5 October 2009 which included the financial statements of Arqaam for the year ended 30 June 2009. They are represented by Trowers & Hamlins LLP.

4. The parties exchanged written submissions in accordance with directions from the panel constituted as set out in paragraph 24 below ("the Hearing Panel") . An oral hearing took place on Monday 12 December 2011. The Hearing Panel heard oral submissions from Charles Flint QC on behalf of the DFSA; Lord Falconer QC on behalf of Arqaam and Ms Anneliese Day on behalf of E&Y.

5. This hearing was in private in view of Arqaam's application for confidentiality. A transcript was taken so that if it was determined that the application for confidentiality was refused, it could be made available to the public.

THE APPLICATIONS

6. Arqaam has applied to the Hearing Panel, pursuant to Rules 42, 43 and 50 of the Rules of Procedure of the Financial Markets Tribunal ("the FMT Rules") that the following directions for the future conduct of the proceedings be given:

(1) an order that the DFSA make disclosure to Arqaam and E&Y of the documents specified in Schedule A to Clifford Chance's letter dated 10 October 2011, within 28 days of the making of the order;

(2) an order that the DFSA make disclosure to Arqaam and, if deemed appropriate, E&Y of the documents specified in Schedule B to Clifford Chance's letter of 10 October 2011, within 28 days of the making of the order;

(3) an order pursuant to FMT Rule 85 that the time for the filing of Arqaam's Answer, in accordance with Rule 29 of the FMT Rules, be extended until 31 January 2012 or, if later, two months from the date of disclosure by the DFSA of all documents required to be disclosed by it under sub-paragraphs (1) and (2) above;

(4) that provision be made for the further conduct of the proceedings including:

(a) fixing the date for the filing of the Reply by the DFSA;

(b) fixing the date for a meeting of the parties' respective experts;

(c) fixing the date for the oral hearing;

(5) an order that the oral hearing of all interim and final hearings of this matter be heard in private, pursuant to Article 32(3)(a) of the DIFC Regulatory Law, and the FMT Rules 15-18, that all decisions of the FMT be given in private, and that all information relating to any hearings be treated confidentially;

(6) an order pursuant to Article 34(3) of the DIFC Regulatory Law and FMT Rule 43(k) that the DFSA pay Arqaam's costs of this application; and

(7) such further orders as may be necessary to ensure a just, expeditious and economical disposal of these proceedings.

7. E&Y has applied for -

(1) An order for disclosure of the totality of the documents the DFSA has collated in the course of the investigation giving rise to these proceedings against it and Arqaam.

(2) An order that the oral hearing of all interim and final hearings of this matter be heard in private, pursuant to Article 32(3)(a) of the DIFC Regulatory Law, and the FMT Rules 15-18, that all decisions of the FMT be given in private, and that all information relating to any hearings be treated confidentially.

(3) Appropriate directions for the management of the proceedings going forward, for example an order that the two sets of proceedings be case managed and heard together and that documents disclosed to one part be provided to all parties.

(4) An order that the DFSA pay E&Y's costs of the directions hearing.

(5) An order setting a new date for the filing of its Answer.

8. The hearing of these applications took place in London. Rule 64 of the FMT Rules provides "Subject to Rule 58, every oral hearing on the merits of an appeal or any other proceeding shall take place in the DIFC in the presence of all the members of the Hearing Panel". It seemed to us that the hearing needed to take place as soon as possible. In view of the commitments of members of the Panel, the fact that most of the legal representatives of the parties would be in London, and the fact that this hearing was going to take place in private (in view of the confidentiality application considered below), it was decided with the agreement of the parties that this hearing should take place in London.

FACTUAL BACKGROUND

9. The factual background to these proceedings is set out in the DFSA's Statement of Case and in Arqaam's Submissions served on 4 December 2011.

10. The factual background can be summarised as follows:

(1) Arqaam is a financial services company incorporated in the DIFC. E&Y has been Arqaam's external auditor since 2007.

(2) In July 2007 Arqaam commissioned 8 pieces of art by the Iranian artist Farhad Moshiri ("the Artworks") as an investment for a total purchase price of US$200,000.

(3) After its 30 June 2009 financial year end, Arqaam sought a valuation of the Artworks from Artspace LLC ("Artspace"). Artspace is a Dubai based gallery and art dealership. It provided a valuation on 23 August 2009, the total value of the 8 Artworks was appraised to be US$2,450,000.

(4) In August and September 2009, Arqaam consulted its auditors, E&Y, about how to reflect the increase in value of the Artworks in Arqaam's accounts for the year ended 30 June 2009.

(5) On 17 September 2009, Arqaam entered into 2 agreements with Alissar Co Limited ("Alissar"), a company incorporated in Syria, relating to the Artworks ("the Transactions").

i. First, a sale agreement dated as of 29 June 2009, by which Arqaam sold the Artworks to Alissar for US $2,450,000; and

ii. Second, a purchase agreement dated as of 30 June 2009, by which Arqaam repurchased the Artworks from Alissar for US $2,450,000. The gain in value of the Artworks is recorded in the Accounts in the following manner:

(6) The Statement of Income states Arqaam's "*Other Income*" as US$2,481,189. This includes a gain of US$2,250,000 on the disposal/revaluation of the Artworks.

(7) The Statement of Cash Flows records an adjustment of US$2,250,000 within "*Operating Activities*" for the "*Gain on disposal of assets*". This reflects the gain on disposal/revaluation of the Artworks.

(8) The Statement of Cash Flows also records (I) US$2,450,000 within "*Investment Activities*" as "*Proceeds from disposal of assets*", and (ii) US$3,823,486 as

"*Additions to premises and equipment*". This included the US$2,450,000 repurchase/revaluation of the Artworks.

(9) The Balance Sheet in the Assets category records under "*Premises and Equipment*" the figure of US$6,370,039. Note 10 to "*Premises and Equipment*" refers to the column "*Fixtures and Fittings*" and states "*included herein are non-depreciating assets acquired during the year with a carrying value of US$2,452,971*". This figure represents the repurchase/revaluation of the Artworks plus US$2,971 in costs of mounting the Artworks.

(10) Note 10 to "Premises *and Equipment*" under "*Cost*" included an item for "*Additions during the year*" of US$2,467,474. This included the cost of the repurchase/revaluation of the Artworks.

(11) The accounting policy for non-depreciating assets, including the Artworks, is identified under "*Premises and Equipment*" in Note 2.2 as: "*Non-depreciating assets are kept at cost and are not being depreciated as the management considers these to have infinite useful life*".

(12) The 2009 Accounts included an unqualified audit opinion from E&Y, in the following terms: "*[i]n our opinion the financial statements present fairly, in all material respects, the financial position of the Company as of 30 June 2009 and its financial performance and its cash flows for the period then ended in accordance with International Financial Reporting Standards*".

11. The DFSA alleges that the treatment of the artworks in the 2009 accounts did not comply with accounting standards and that there have therefore been breaches of the Regulatory Law (DIFC Law No 1 of 2004). It relies on a report from Dr Christopher Nobes dated 16 August 2011 concerning the conduct of both Arqaam and E&Y. It also relies on reports of the Association of Chartered Certified Accountants ("ACCA") dated 3 August 2011 and written by Sha Ali Khan dealing with the conduct of Arqaam and E&Y.

12. In summary, the DFSA alleges that Arqaam has breached Rules 4.2.2 and 8.2.1(1) of the General Module ("**GEN**") of the DFSA Rulebook. Rule 4.2.2 requires an Authorised Firm to "*act with due skill, care and diligence*" in conducting its business activities. Rule 8.2.1 provides that an Authorised Firm must "*prepare and maintain all financial accounts and statements in accordance with the International Financial Reporting Standards (IFRS)".*

13. The breaches alleged include that the 2009 Accounts did not comply with IFRS because:

(1) In breach of IAS 1.15 and IAS 8, the treatment of the Artworks Transactions reflects their legal form rather than their substance and economic reality;

(2) In breach of IAS 7, the Statement of Cash Flow records a cash inflow and outflow of US$2,450,000 from the Artworks Transaction, notwithstanding that there was no cash movement;

(3) In contravention of IAS 16, the accounts record the Artworks at a cost of US$2,452,971 when in fact the Artworks were purchased for US$200,000, and their purported acquisition at US$2,452,971 was a transaction of no economic substance;

(4) The effect of these contraventions was to overstate Arqaam's operating income by 42% and to understate Arqaam's loss for the year by 21%;

(5) The treatment of the Artworks was intentionally created to enable Arqaam to show that it had made a gain and owned assets that had a cost of US$2.45 million when in fact it did not.

14. The DFSA seeks the following relief (in summary):

(1) Declarations that Arqaam has committed a contravention of Rules 8.2.1(1) and 4.2.2 of GEN;

(2) Imposition of a fine on Arqaam in the amount of $75,000 or such other amount as the Hearing Panel considers right;

(3) An order that Arqaam restate the 2009 accounts;

(4) Declarations that E&Y has committed a contravention of Rule 8.9.1(b) of GEN and Articles 101((1)(c), 101 (1)(d) and 101(2) of the 2004 Law;

(5) Imposition of a fine on E&Y in the amount of $75,000 or such other amount as the Hearing Panel considers right; and

(6) Costs of the proceedings.

15. The DFSA's allegations are disputed. A summary of Arqaam's position is as follows:

(1) Arqaam has done nothing wrong. It has acted in good faith, in accordance with the advice of its accountants and auditors, E&Y, in preparing its accounts. In consultation with E&Y, Arqaam agreed and then applied an accounting treatment that most accurately reflected the increase in value of the Artworks.

(2) Arqaam has acted in good faith with the DFSA in the course of its Investigation. Arqaam has provided all documents requested by the DFSA, both before and after commencement of the Investigation, as well as detailed explanations of the accounting approach undertaken, and has offered that the DFSA meet with experts on several occasions.

(3) Arqaam has prepared its 2009 Accounts in accordance with the IFRS. The 2009 Accounts reflect accurately, in all material respects, the financial position of Arqaam as at 30 June 2009 and its financial performance and cash flows for the relevant period in accordance with IFRS.

(4) In support of its position, Arqaam will rely on the fact that E&Y gave an unqualified audit opinion on its 2009 Accounts, and will submit expert opinions from leading accounting professionals who specialise in the technical interpretation and application of IFRS.

(5) The alleged breaches of accountancy standards are technical in their nature and no user of the 2009 Accounts was misled. Having regard to the circumstances in which these allegations arise (including that the 2009 Accounts and the accounting for the Artwork was audited by E&Y), and the damage to Arqaam's reputation which can be done by the bringing of these proceedings, any finding of breach would be wholly disproportionate.

16. E&Y also denies the allegations made against it and has produced an opinion from Grant Thornton to support their defence to the allegations. The opinion states that the "bed and breakfast deal" did not have any impact on the financial position of the company as of 30 June 2009 or its financial year then ended. They express the opinion that "certain disclosures could have been improved in Arqaam Capital's financial statements for the year ended 30 June 2009".

17. For the purpose of disposing of these allegations it is not necessary to go into the merits of the DFSA's arguments or the proposed defences. It seems to us that the issues to be determined by the Hearing Panel will centre around the following:

    (1) The facts surrounding the Artworks Transactions, the preparation of Arqaam's 2009 Accounts, and the audit of Arqaam's 2009 Accounts;

    (2) The relevant accounting standards applicable to Arqaam's 2009 Accounts;

    (3) Whether the accounting treatment of the Artworks in Arqaam's 2009 Accounts complied with the relevant accounting standards; and

    (4) Whether there has been any breach of the applicable DFSA rules and regulations.

PROCEDURAL HISTORY

18. The DFSA commenced its investigation on 23 June 2010. Between July and September 2010 it obtained documentation from Artspace, E&Y and Arqaam and between September and November 2010 interviewed witnesses.

19. Notices of Administrative Fine, under Article 90 of the Regulatory Law, were served on Arqaam and E&Y on 20 March 2011.

20. E&Y filed a Notice of Objection on 16 May 2011, as did Arqaam on 29 May 2011.

21. Proceedings against both parties were commenced under Article 33 of the Regulatory Law by Reference Notices filed on 3 August 2011.

22. The DFSA filed Statements of Case in accordance with Rule 27 of the FMT Rules on 18 August 2011.

23. By Rule 28 of the FMT Rules, the Respondents were required to file an Answer within 28 days of the date of the Statement of Case, namely 15 September 2011.

24. On 23 August 2011 the parties were notified that pursuant to Rule 10 of the FMT Rules, the President of the Tribunal had appointed Stewart Boyd CBE QC, Ali Malek QC and Mr David Stockwell to the Hearing Panel in these proceedings with Mr Boyd as Chairman.

25. On 24 August 2011, the DFSA agreed to an extension of the deadline until 15 November 2011.

26. On 4 September 2011, Arqaam's solicitors requested disclosure of various documents or categories of documents "...missing from the supporting

documents, which are relevant and material to the issues in the proceedings and are required to enable Arqaam to respond to the DFSA's Statement of Case".

27. The DFSA replied on 11 September 2011 contending that its obligation under the Rules was only to disclose documents on which it relies, but agreeing to provide some of the documents requested in order "*...to expedite this matter...*". It further stated: "*When we receive your client's answer to our Statement of Case we will be able to determine relevance of any requests for further disclosure.*"

28. On 25 September 2011, Arqaam's solicitors wrote disputing the DFSA's approach to disclosure. It stated:

(1) "*In our view it would be absurd, and contrary to the principles of natural justice, if a party was only required to disclose those documents on which it relied in their Statement of Case*": paragraph 3.

(2) It "*would also be absurd, and contrary to the principles of natural justice*", for the relevance of requests for further disclosure to be determined after service of the Answer: paragraph 5.

29. The DFSA set out its position in response to Arqaam's renewed requests on 4 October 2011, as follows:

(1) First, it contended that there did not appear to be any dispute of primary fact to which the documents might conceivably be relevant. Arqaam was invited to identify any factual element of the Statement of Case with which it disagreed.

(2) Second, it stated "..the *extensive requests for disclosure of documents are beginning to appear vexatious, and we are having difficulty understanding how the cost incurred by them can be justified".*

(3) Finally, the DFSA responded in relation to the Schedule B documents.

30. On 10 October 2011, Arqaam wrote to the Hearing Panel requesting the present hearing, and to the DFSA (1) restating its requests for disclosure, and (2) requesting consent that the proceedings should be private and confidential.

31. The DFSA replied on 20 October 2011 noting that Arqaam had identified no factual disagreement, and saying: "*We are not seeking to take an unreasonable position in these proceedings. We hope our willingness to satisfy your previous requests has demonstrated as much. We simply cannot see, and you have not explained, why your client requires any further documents in order to plead its case.*" In relation to the request for privacy and confidentiality, it noted that "*cogent evidence of necessity will be required*"; without ruling out that it might accede to the request if a cogent case were made, it noted that none had been.

32. Also on 20 October 2011, E&Y's solicitors wrote to the Hearing Panel in support of Arqaam's applications, and contended that the DFSA should be ordered to disclose, prior to the closure of pleadings, "*the totality of the documents it has collated in the course of the investigation giving rise to these proceedings and to the proceedings relating to Arqaam*". The letter also indicated that E&Y supported Arqaam's application in relation to confidentiality.

33. The DFSA replied to E&Y on 3 November 2011, providing it with the additional documents which it had provided to Arqaam and asking it to identify (a) any area of factual dispute to which documents might conceivably be relevant, and (b) any good reason why Arqaam's request for privacy and confidentiality should be granted.

34. On 9 November 2011, the Hearing Panel extended the time for service of the Answers in both proceedings until further order.

35. E&Y, in its response of 20 November 2011, repeated its contention that *"...the DFSA should disclose the totality of the documents it has collated in the course of its investigation which has led to the reference....".* It enclosed a schedule of documents, the disclosure of which it required ("the E&Y Schedule Documents"), and gave notice of its intention to make an application. As to confidentiality, it stated *"We remain supportive of Arqaam's position in this regard but see this as a matter for the Tribunal and will be happy to be bound by whatever the Tribunal decides is appropriate. We are not positively seeking any order in relation to this issue"*

36. Following the hearing on 12 December 2011 -

(1) The DFSA served an Amended Statement of Case on 15 December 2011.

(2) On 20 December 2011 the DFSA wrote to the Hearing Panel confirming that they had conducted a full file review and could confirm that the DFSA Enforcement Department had no further factual material beyond that of which the Respondents were already aware. They had conducted a wider search of other departments to ascertain what information the rest of the DFSA might hold in relation to the issues in these proceedings, and whether or not relevant to any issue likely to arise in these proceedings. In consequence of this search they disclosed eighteen categories of documents in the hands of the Supervision Department which were obtained in the course of its ordinary regulatory supervision of Arqaam.

(3) On 20 December 2011 Arqaam sent to the Hearing Panel further written submissions reiterating the submissions made earlier in writing and at the hearing and commenting on the amended Statement of Case.

SUMMARY OF ISSUES

37. The following issues arise for our consideration:

(1) Whether an order should be made under Rule 16 of the FMT Rules, in relation to the Arqaam proceedings, that all oral hearings be held in private, that all decisions be given in private, and that all information relating to any hearings be treated confidentially ("Issue 1");

(2) Whether an order should be made under Rule 42 and 43(I) of the FMT Rules that the DFSA disclose to Arqaam the documents listed in Schedule A to Arqaam's letter to the Hearing Panel of 10 October 2011 ("the Schedule A Documents"), which are said to relate to issues between the parties ("Issue 2");

(3) Whether such an order should be made that the DFSA disclose to Arqaam the documents listed in Schedule B to that letter ("the Schedule B Documents"). (At the request of Arqaam references to the Schedule B issue were redacted from documents disclosed to Ernst & Young). ("Issue 3");

(4) Whether an order should be made that the DFSA disclose to E&Y the totality of the documents it has collated in the course of the investigation which has led to the proceedings both against Arqaam and against E&Y, including the documents it identifies in its Schedule ("the E&Y Schedule Documents") ("Issue 4");

(5) Whether the time for service of the Respondents' Answers, originally due on 15 September 2011, should be further extended to 31 January 2012 or two months from the date of disclosure of the Schedule A and Schedule B Documents (as requested by Arqaam), or to some other date (as requested by E&Y) ("Issue 5");

(6) What general directions should be given at this time ("Issue 6");

(7) What order should be made as to the costs of the directions hearing (Issue 7").

ISSUE 1: PRIVACY AND CONFIDENTIALITY

Procedural Framework

38. Article 32(3) of the Regulatory Law (DIFC Law No 1 of 2004) provides that "*Proceedings and decisions of the Financial Markets Tribunal shall be heard and given in public unless (a) the Financial Markets Tribunal hearing a matter orders otherwise, or (b) the rules of procedure of the Financial Markets Tribunal provide otherwise.*"

39. Article 34(3)(f) provides that the Hearing Panel may, for the purposes of proceedings commenced under Article 33, "*order a person not to publish or otherwise disclose any material disclosed by any person to the Financial Markets Tribunal*".

40. Rules 15-18 of the FMT Rules provide as follows:

Public Proceedings

15. 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 on the application of a party. No hearing shall be non-public where all parties request that the hearing be made public.
Confidential Treatment

16. 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.

17. 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.

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.*

The DFSA's Argument

41. The DFSA relied upon the well known statement of Lord Shaw held in Scott v Scott [1913] AC 417 at 477: "*Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity.*"

42. The DFSA also referred to the financial services regulation under the UK Financial Services and Markets Act 2000.

43. Rule 17 of the Financial Services and Markets Tribunal rules provided that the Hearing Panel could order a private hearing if satisfied that (1) it was "*necessary*" in light of various public interest considerations including "*any unfairness to the applicant or prejudice to the interests of consumers that might result from a hearing in public*", and (2) a private hearing would not "*prejudice the interests of justice*". It also gave the Hearing Panel a further discretionary power, having ordered a private hearing, to direct that information about the proceedings should not be made public.

44. The DFSA relied upon three authorities.

(1) In Eurolife Assurance Company Ltd v Financial Services Authority (26 July 2002), the Tribunal refused an application for a private hearing.

i. At [32], it commented that the reputational risk arising from a public hearing "*might*" give rise to unfairness "*if, for example, the reputational damage occurring during the progress of the hearing might be such as to destroy the applicant's business*." However, "*Prejudice is not necessarily unfair*", and the Tribunal must "*consider the circumstances of each particular case*" in order to "*make a judgment whether reputational risk gives rise to unfairness or not*".

ii. At [35] it commented: "*The applicant will need to produce cogent evidence of how the unfairness or prejudice may arise*." "The Tribunal is unlikely to be influenced by a 'ritualistic assertion' of unfairness or prejudice."

iii. At [37] it made clear that the decision "*is not concerned with the prospect of unfairness or prejudice arising simply through knowledge of the action or decision taken by the [regulator]. In many cases the existence of the proceedings will already be a matter of public knowledge, prior to the hearing taking place. After the hearing the Tribunal's decision will normally be made public. The inquiry under rule 17(3) is confined specifically to the unfairness or prejudice that might result from the holding of the hearing in public…. [T]he concern is likely to be with the effect of publication of allegations or evidence during the hearing itself and in the period up to the publication of the Tribunal's decision. Such concerns may arise because press reporting may not always succeed in being accurate, or because during the hearing the allegations are more prominently reported than the applicant's answers to them, or because a decision by the Tribunal in the applicant's favour after the conclusion of the hearing may not in practice be sufficient to undo the damage done by the publicising of the allegations. There may also be concerns over other matters, such as unnecessary public disclosure of commercially sensitive or other confidential information*."

(2) In Sonaike v FSA (13 July 2005), the Tribunal refused another such application, holding that it was not sufficient that publication of details of the reference "*would embarrass [the regulated person] and might cause clients and others to ask him questions he would rather not answer.*" "*[T]hat will always be the consequence of the inclusion in the register of details of a reference…. Mere embarrassment falls far short of satisfying the criteria set out in the rule. In our view an applicant for such a direction must establish something out of the ordinary if he is to succeed*."

(3) In Canada Inc and Peter Beck v Financial Services Authority (21 July 2011), the Upper Tribunal applied the terms of the new rule, which gave the Tribunal a general discretion to "*make an order prohibiting the disclosure or publication of specified documents or information relating to the proceedings*". At paragraph [14], it held that the same principles apply as in the cases above:

> "There is an overall public interest in openness of proceedings and this is consistent with the principle enshrined in Article 6(1) ECHR. There is a strong presumption to be found in the provisions of the FSMA and the rules of the Tribunal that references will be dealt with in public; consequently the onus must lie with an applicant to demonstrate the need for privacy. I refer to paragraph 21 of the Upper Tribunal's decision in *Karpe and Others*. Moreover, the embarrassment to a party that could result from the publicity and might draw that party's clients and others to ask questions that he would rather not answer does not amount to unfairness: see *Sonaike*. Finally, and of particular relevance to the issues here, an applicant seeking to demonstrate potential unfairness to him from publication (or a public hearing) will have to provide cogent evidence of how that unfairness may arise and of how he could suffer a disproportionate level of damage. See paragraphs 35 and 47 of the *Eurolife Assurance* decision."

45. The DFSA pointed out that in the above cases, the application for proceedings to be held in private or information to be kept confidential was refused.

46. As to the Hearing Panel's discretion -

(1) The DFSA asserted that Article 32(3) of the Regulatory Law, and Rule 15 of the FMT Rules of Procedure, both establish a presumption that proceedings and decisions of the Tribunal shall be heard and given in public.

(2) It argued that there is a burden on the party seeking privacy to put forward a cogent case that privacy is necessary and in the interests of justice.

(3) In relation to the confidential treatment of information, the DFSA argued the Hearing Panel must further take into account the issues enumerated at Rule 18 of the FMT Rules; in particular, it must consider whether the disclosure of commercial information would or might "*significantly harm [Arqaam's] legitimate business interests*".

47. The DFSA asserted that the central thrust of Arqaam's application for privacy and confidentiality appears in its letter of 10 October 2011 to the DFSA, in which it says: "*These proceedings are, potentially, extremely damaging to Arqaam's standing in the market place. A reputation for integrity and trustworthiness is critical to their business.*"

48. The DFSA contended:

(1) Arqaam has failed to overcome the presumption in favour of the proceedings being public and contends there should be no order as to confidentiality

(2) The alleged harm relied upon by Arqaam is of the type which was specifically identified in *Eurolife* at [37] as irrelevant to a decision of this sort. If harm materialises, it will be attributable purely to the allegations of regulatory breach, and will stand and fall with those allegations.

(3) If Arqaam is found to have committed those breaches, any reputational damage will have been justified; if it is not, it will have been vindicated.

(4) There is no good reason to believe that the mere bringing of the proceedings will cause independent reputational damage that would endure beyond a finding that Arqaam did nothing wrong.

(5) If Arqaam were right, and the reputational damage which might be caused merely by the fact that allegations are made was capable of justifying private proceedings and confidentiality orders, all or practically all proceedings before the Tribunal would be private and confidential. In light of the presumption in Article 32(3) of the Regulatory Law, Rule 15 of the FMT Rules of Procedure, and common law, that cannot be correct. The application should therefore be dismissed.

Arqaam's Argument

49. Arqaam in their Submission identified three grounds for the application for the proceedings to be heard in private and for confidential treatment of material disclosed in the proceedings:

(1) The hearing of the FMT Proceedings in public and the publication of any decisions of the FMT, would cause significant harm to Arqaam and lead to damage to Arqaam that is wholly disproportionate;

(2) Disclosure of sensitive commercial and confidential information, including financial statements and accounts of Arqaam which do not have to be publicly disclosed because Arqaam is a private company, would significantly harm the legitimate business interests of Arqaam;

(3) Privacy is appropriate because Arqaam has justifiable concerns as to the DFSA's motives in bringing these proceedings, and whether these proceedings arose out of another confidential matter between Arqaam and the DFSA (i.e. the Complaints), rather than as a result of the DFSA's investigation.

50. A short summary of Arqaam's argument on each of these grounds is a follows.

Ground 1: significant harm.

(1) Arqaam considers that the allegations in the Statement of Case are very serious. In particular it is alleged that the treatment of the Artworks was "intentionally created in order to enable Arqaam to show that it had made a gain and owned assets that had a cost of US$2,45 million when in fact it did not". At worst these allegations imply that Arqaam's financial records are misleading and that Arqaam intentionally manipulates its financial statements.

(2) Arqaam is concerned about the publication of these allegations and the supporting evidence which may be reported out of context, or inaccurately or without giving equal prominence to Arqaam's answer.

(3) In support of its argument of significant harm, Arqaam adduced witness statements from Riad Meliti and Dennis Wijsmuller who stated that the reaction to a public hearing would be an immediate lack of confidence in Arqaam and all the Arqaam group companies. The group is relatively small and in its early years of operation, so damage to any part of the group would impact unfairly on other parts.

(4) Significant harm that would be suffered includes:

i. Destruction of Arqaam's good reputation in the market place, including its reputation for adhering to the best international standards.

ii. Destruction of Arqaam's business as clients will withdraw funds or close accounts or stop engaging with Arqaam.

iii. Termination of current merger negotiations or a significant decrease in Arqaam's value in such discussions.

iv. Removal of any perception of reliability in any figures quoted by Arqaam in relation to services such as brokerage, credit trading, treasury, research, etc.

v. Impaired credit facilities.

(5) Such harm would be disproportionate and unfair having regard to the technical nature of the contraventions alleged by the DFSA, the narrow range of disagreement between the accounting experts, and the fact that the reputational damage would far exceed the amount of the fine sought by the DFSA.

Ground 2: protection of confidential information

51. Arqaam sought confidential treatment for all information and documents disclosed in any hearing, including Arqaam's Financial Statements, documents relating to the Complaints and documents and information relating to the DFSA's investigation.

52. Arqaam submitted that confidential treatment was appropriate considering the factors listed in Rule 18:

(1) Rule 18(a). Disclosure of confidential complaints by an authorised firm against the DFSA would be against the public interest.

(2) Rule 18 (b). Disclosure of commercial information would or might significantly harm the legitimate business interests of Arqaam.

(3) Rule 18(d). Disclosure is not necessary for the purpose of explaining the reasons for the Hearing Panel's decision, since the Hearing Panel can refer in generic terms to the accounting treatment of the Artworks rather than by reference to the figures in the Financial Statements.

Ground 3: concern as to The DFSA's motives

53. The relevance or otherwise to these proceedings of the motives of the DFSA is considered below under Issue 3, where the Hearing Panel concludes that the issue of what motives the DFSA may have had in conducting an investigation and commencing these proceedings is irrelevant to any issue which the Hearing Panel has jurisdiction to decide in these proceedings. The Hearing Panel sees no need here to set out the grounds for Arqaam's concern as to the motives of the DFSA. These matters will not be the subject of evidence or enquiry during the proceedings, including the hearing on the merits.

E&Y's position

54. E&Y supported the applications by Arqaam for the proceedings to be heard in private and for confidential treatment of material disclosed in the course of the proceedings.

Discussion

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

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

Public interest

57. Rule 18(a) requires the Hearing Panel to have regard to whether the disclosure of information would be contrary to the public interest. This is only of relevance to the present application so far as concerns the publication of matters relating to the Complaints, which is no longer of relevance having regard to the Hearing Panel's decision that the Complaints have no relevance to the issues before the Hearing Panel.

Significant harm

58. Rule 18(b) requires the Hearing Panel to have regard to whether the disclosure would or might significantly harm the legitimate business interests of the undertaking to which it relates. Arqaam was disposed to accept that significant harm carried with it the idea that the harm must be disproportionate in the sense that it would or might be greater than any penalty which might be imposed, and would be out of proportion to the contravention which was alleged. The Hearing Panel accepts that this is a relevant consideration in this case.

59. The main thrust of Arqaam's case on significant harm was that the Statement of Case was couched in terms which suggested two criticisms of Arqaam which were not distinctly alleged:

(1) That Arqaam had intentionally and dishonestly manipulated its Financial Statements in order to create a misleading picture of the state of its financial affairs.

(2) That the valuation of the Artworks was erroneous.

60. The Hearing Panel, when reading the Statement of Case in preparation for the hearing did not understand either of these two criticisms to be part of the DFSA's case, and counsel for the DFSA confirmed at the hearing that this was indeed so. Despite this, Arqaam voiced concerns that the Statement of Case lent itself to inaccurate and harmful reporting if it was made publicly available in its present from. The Hearing Panel accordingly invited the DFSA to amend its Statement of Case to make it clear that neither of these allegations was part of the DFSA's case. After the hearing a draft amended Statement of Case was submitted which contained the following passages:-

(1) "In the circumstances the Valuation was not of a kind which could properly be relied on to establish fair value for accounting or audit purposes ... For the avoidance of doubt, it is not alleged that the Valuation was not genuine or that the gallery could not reasonably have valued the Artworks as it did."

(2) "This treatment of the Artworks was intentionally created (within the meaning of IAS 8.41) in order to enable Arqaam to show that it had made a gain and that it owned assets that had a cost of USD 2,450,000, when in fact it did not, so that any misstatement in the accounts was material. ... For the avoidance of doubt, it is not alleged that Arqaam acted dishonestly in adopting this accounting treatment."

61. The Hearing Panel takes the view, despite continuing criticisms of the amended Statement of Case by Arqaam, that these amended passages deal fully and properly with the criticisms made of the Statement of Case. We deal below with Arqaam's criticism that the Statement of Case remains open to misinterpretation by lay readers.

62. On the basis of the amended Statement of Case, the case against Arqaam can be seen as an allegation of a contravention of the applicable accounting rules which was either intentional or done without reasonable skill care and diligence, but was not dishonest, and that the valuation of the Artworks is not challenged. The allegation that Arqaam acted intentionally does not carry with it any allegation of dishonesty: it is made because the accounting rule on which the DFSA relies depends on the accounting treatment which is applied having been applied with the intention of achieving a particular result.

63. In consequence of this clarification of the DFSA's case the Hearing Panel finds that the risk of harm to Arqaam if the proceedings are heard in public is not of significant or disproportionate harm. The only risk of harm that can be identified is, to use the language of *Eurolife* "the prospect of unfairness or prejudice arising simply through knowledge of the action or decision taken by the [regulator]". That is not on its own the kind of risk which would justify holding the proceedings in public.

64. The Hearing Panel has also taken note of the fact that Arqaam's clients are mainly sophisticated financial organisations to whom the nature of the allegations will be readily intelligible without the risk that wider and more serious allegations against Arqaam will be understood as being part of the DFSA's case. This factor also serves, in the opinion of the Hearing Panel, to diminish the risk of significant reputational harm to Arqaam if the proceedings are heard in public.

65. The application for confidential treatment is a live issue only as regards the Financial Statements of Arqaam. These are no doubt available to any client who asks to see them in order to form a judgement as to Arqaam's financial standing and credit, although not generally available to the public. Inevitably they will form a central part of the enquiry during these proceedings, and the Hearing Panel is unable to accept the suggestion that it will be possible to explain its decision without reference to them and to the detailed figures referred to in the Statement of Case.

66. The Hearing Panel's decision on this aspect of the applications is, for these reasons, that the proceedings shall be heard in public and that no order will be made that the proceedings and any material disclosed in the proceedings shall not be disclosed publicly. This decision applies equally to the present applications and to the hearing held to determine them, which was initially held in private.

67. It is the intention of the Hearing Panel to publish this decision on the DFSA's website, but to give the parties advance notice of the date at which that will take place. Until then the Registrar will be instructed to say to any member of the public who requests access to material disclosed in the proceedings that it will not be publicly available until this decision is published.

ISSUE 2: DISCLOSURE TO ARQAAM (SCHEDULE A)

Matters of principle

68. Arqaam applied for disclosure of the documents listed in its Schedule A. The application essentially encompasses a number of documents which are said to be relevant to these proceedings.

69. Arqaam has given two reasons for that request, in its letter to the DFSA of 10 October 2011.

    (1) First, that Rule 27(b) – "*the applicant shall…file…a statement of case which shall…list and attach the documents and witness statements on which the applicant relies*" – should be construed as requiring the DFSA to provide "*all the material seen by [its] experts in reaching their conclusions, and all the material obtained by the DFSA during their regulatory investigation and in relation to Arqaam's complaints*".

    (2) Second that justice requires that Arqaam should see all material in the DFSA's possession before having to set out its case.

70. E&Y, in a letter from its solicitors of 20 October 2011, expresses the view that "*the DFSA should be ordered to disclose the totality of the documents it has collated in the course of the investigation giving rise to these proceedings and to the proceedings relating to Arqaam. This is including but not limited to the DFSA's instructions to its expert witnesses not just their resultant reports and, particularly given the weight attached to witness evidence by the DFSA, the evidence of <u>all</u> the witnesses the DFSA has interviewed and not just some.*" In a subsequent letter of 20 November 2011, it confirmed that it considered its 20 October 2011 letter to be an application to the Hearing Panel for such disclosure.

71. The DFSA opposed these applications on the basis that:

    (1) It has disclosed all documents on which it relies in support of its case;

    (2) It has also disclosed all documents which have been shown to the experts for the purpose of compiling their reports, and those reports properly set out the instructions on the basis of which the experts prepared their reports;

(3) It has also disclosed all those documents obtained in the course of its investigation which may be relevant to the issues in these proceedings; it has not disclosed other documents, including interview transcripts, which are not relevant to the issues in these proceedings;

(4) The Respondents have failed to identify what are the disputed issues of fact to which any further classes of documents sought could be relevant;

(5) The investigation carried out by the DFSA was not confined to an investigation of Arqaam's accounts; so it does not follow that every document obtained in the course of the investigation could be of relevance to the issues in these proceedings.

72. Arqaam's first point raises a matter of construction. The question is what is meant by "relies" in Rule 27(b) of the FMT Rules. We think that the rule means what it says: the DFSA is only required to list and attach the documents which it relies on. It is not required to list and attach any other documents.

73. We agree with the DFSA that this conclusion is reinforced by the consequence of Arqaam's case if correct. If an obligation to produce documents on which a person "relies" encompassed an obligation to produce all documents which that person had obtained or seen at any point in the course of deciding to bring proceedings, the Hearing Panel's power to order further disclosure would be all but meaningless, as everything of any conceivable relevance would have been disclosed.

74. There is no warrant for such a broad construction. The Respondent can always apply for disclosure. It can also amend its case to take account of any material disclosed.

75. The second argument is one of discretion. The Hearing Panel has a discretion to order disclosure :

(1) Rule 43(i) of the FMT Rules provides that *"the Hearing Panel may give such directions for the disclosure between, or the production by, the parties of documents or classes of documents, including electronic records and communications"*.

(2) Rule 42 of the FMT Rules further provides as follows: *"The Hearing Panel may at any time after the commencement of proceedings, on the request of a party....give such directions as it thinks fit to enable the parties to prepare for the hearing and for the conduct of the proceedings....to ensure the just, expeditious and economical determination of the proceedings"*.

76. These are very broad powers that can be exercised at any time after the commencement of the proceedings. Having said that we would not expect a party to apply for disclosure before the issues between the parties can be identified with some precision. We see force in the DFSA's argument that disclosure should have been sought after statements of case have been filed. In most cases it will be rare for a Respondent to obtain an order for disclosure before it has filed its statement of case. Arqaam argued that the fact that the Respondent was required to serve with its Answer the documents and witness statements on which it relied imposed a particular burden which justified an application for disclosure before filing its Answer. We are unable to accept this. Whether or not the evidence is filed with the Answer, positive allegations of fact in the Answer ought to be based on the evidence and not on

speculation. The need to file the evidence merely accelerates the time at which the evidence must be brought forward. Several internationally used arbitration rules contain a similar requirement that evidence must be filed with the statement of case and the answer, and applications for disclosure under such rules are routinely postponed until after the service of written pleadings and evidence.

77. However since the parties are before the Hearing Panel, we think it right to consider whether disclosure is appropriate in order to ensure "the just, expeditious and economical determination of the proceedings" (Rule 42 of the FMT Rules). The objectives of justice, expedition and economy, as has often been observed, do not always point in the same direction and a proper exercise of discretion is not infrequently a matter of striking a balance between them. But even when they are in conflict, it must be rare for them to lead to an order for disclosure of material which is not relevant and material to the issues of fact between the parties on the substantive issues in the case. In almost every case relevance and materiality must be the starting point for any consideration of the discretion whether or not to order disclosure.

78. At the hearing, counsel for Arqaam invoked the practice in criminal proceedings of disclosing all the material in the possession of the prosecution arising out of the investigation of the case, regardless of relevance in the sense of that expression in civil proceedings. These are not however criminal proceedings, as counsel for Arqaam acknowledged, and he made it clear that he was not relying on the words in *Cie Financiere du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, 63: " … a document can properly be said to contain information which may enable the party … either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of those two consequences …". In truth these proceedings are neither criminal nor civil in character, and the label to be attached to them does not lead to any answer other than what is to be found in the Rules.

The specific requests for disclosure

79. We turn therefore to the threshold questions of relevance and materiality. The DFSA raised the question of relevance in its letter to Arqaam of 4 October 2011 in the following terms:

"As we currently understand it, there are three matters which fall to be determined by the Hearing Panel.

The facts and circumstances surrounding the treatment of the Artworks in Arqaam's 2009 Accounts;

Whether that treatment complied with accounting standards;

Whether, as a result, there has been a regulatory breach.

The first issue is not, to the best of our knowledge, the subject of any dispute of primary fact; the basis on which the company and the auditors decided that the accounting treatment of the artworks was appropriate is apparent from the documents. The second issue is a matter for expert evidence; the third is a matter of law.

We therefore cannot understand why the documents referred to in your extensive disclosure requests are relevant to any issue in the proceedings, or in any event why you require that they be provided at this stage.

Paragraphs 7 to 12 of the Statement of Case set out the facts and circumstances of the relevant transactions. If there is any dispute as those facts and circumstances you should identify precisely what that dispute of fact is, and why it is necessary to have further disclosure, at this stage, in order for the Tribunal fairly to resolve the issues."

80. Arqaam's response of 10 October 2011 did not identify any such dispute of primary fact; its case, as characterised in that letter, was that "*there was no breach of the relevant standards*" because "*Arqaam's 2009 accounts and the accounting treatment of the artwork therein are in all material aspects in accordance with IFRS*" and "*having regard to the circumstances of the alleged breach…and the damage to Arqaam's reputation which can be done by the bringing of these proceedings, any finding of breach would be wholly disproportionate*."

81. The same question was put to E&Y by a letter dated 3 November 2011. Again, no factual dispute has been identified.

82. We see no reason to differ from DFSA's statement of the issues of fact in its letter of 4 October 2011, although we must return later to the question whether the Statement of Case is capable of being read as suggesting matters which have not been explicitly pleaded.

83. At the hearing, counsel for Arqaam said that only the following categories of document remained in dispute (references are to the item numbers in Schedule A attached to Clifford Chance's letter of 10 October):

    (1) *Items 1 and 14: agreements with expert witnesses.* Arqaam sought disclosure of the agreements between the DFSA and its two experts. The DFSA has disclosed the terms of reference given to the experts, but Arqaam maintains that it is also entitled to see the terms on which the experts were retained, including the fees agreed with them, and that it was obviously relevant and fair that Arqaam should see them. We disagree: there are no grounds in this case for suspecting that the opinions of the experts have been influenced by existence or the amount of their fees or by the terms on which they were retained, or that those terms were in any other way relevant to their opinions or to their independence and impartiality.

    (2) *Items 4, 10, 21 and 23: DFSA Notices to Produce Documents served on Artspace, E&Y or any other party to produce documents to the DFSA, Notices Requiring Attendance to Answer Questions served on persons interviewed by the DFSA*. The DFSA submitted that these Notices could not have any relevance to any issues in these proceedings: they were simply requests for documents and information and did not themselves contain any primary material or evidence. We agree.

    (3) *Items 5 and 11: documentation and information produced by Artspace and by E&Y in response to the DFSA Notices to Produce Documents/information*; *and Item 12: all other documents , information and interview transcripts obtained by the DFSA in relation to the DFSA's investigation of Arqaam and E&Y.* The DFSA stated by its counsel at the hearing that it has produced all such documents in its possession, and confirmed this by letter to the Hearing Panel dated 20 December 2011. These heads of disclosure no longer arise for decision. Arqaam maintains that some of the documents attached to the letter of 20 December 2011 had not previously been disclosed to E&Y, and that this cast doubt on the adequacy of the DFSA's disclosure. However the letter of 20 December 2011 disclosed these documents to E&Y as well as to Arqaam. The Hearing Panel considers that the DFSA has gone to considerable lengths to meet Arqaam's requests for disclosure, and that Arqaam and E&Y have now had full and proper disclosure of all that they have requested and are entitled to. The Hearing Panel considers for these reasons that no further order for disclosure should be made.

(4) *Item 13: internal correspondence, memoranda, minutes of meeting, file notes, diary and journal entries produced by the DFSA during the course of its investigation into Arqaam and E&Y.* Arqaam maintains that it is entitled to these documents in their entirety. For the reasons given under (3) above, the Hearing Panel considers that no further order for disclosure should be made.

(5) *Item 22: recordings of interviews carried out by the DFSA.* By the time of the hearing all but one of the recordings had been disclosed. The remaining recording was of the interview with Nick Groene, as to which the DFSA stated in its letter of 11 September 2011 that "the main focus of the interview was in relation to the investigation of another matter therefore it is not relevant to the proceedings before the FMT". At the hearing counsel for the DFSA told us that he was asked one question about the matter now before the FMT and was unable to answer it. This can be and should be dealt with by disclosure of the transcript of his evidence, redacted to exclude questions and answers which do not relate to matters not before the FMT.

(6) *Item 24: emails sent or received by April Dator in connection with the valuation of the Artworks in 2010.* For the reasons given under (3) above, the Hearing Panel considers that no further order for disclosure should be made.

ISSUE 3: DISCLOSURE TO ARQAAM (SCHEDULE B)

84. The Schedule B documents relate to two complaints made by Arqaam against a senior official of the DFSA in May 2010 and November 2010 "the Complaints".

85. It is unnecessary to set out in this decision the history of the complaints. It is sufficient to record that it is Arqaam's case that "it is likely that the DFSA decided to bring these FMT proceedings against Arqaam in response to the Complaints." Schedule B consists of a single request for disclosure of six categories of documents relating to the Complaints, as to which Arqaam say that "disclosure of these documents is … relevant to establish (i) the DFSA's motives in bringing these proceedings before the DFSA and (ii) whether the grounds for commencing the investigation and the FMT proceedings arose out of Arqaam's complaints."

86. The Hearing Panel is however unable to accept that the motives of the DFSA in bringing these proceedings are in any way relevant to the correctness or otherwise of the allegations made against Arqaam. Whether or not those allegations are made good at the hearing on the merits will be entirely unaffected by any consideration of whether or not the allegations were made for a proper or improper motive.

87. Arqaam considers that the Complaints raise serious conflict of interest issues within the DFSA and whether due process was followed by the DFSA. As to that ground of relevance the Hearing Panel accepts the submission of the DFSA that these proceedings are not for judicial review of the decision by the DFSA to launch an investigation or to commence these proceedings. Questions of conflict of interest and due process in regard to investigations and the commencement of proceedings before the FMT are outside the jurisdiction on the FMT, which for present purposes has jurisdiction only "to hear and determine proceedings which are commenced under Article 33 of the Regulatory Law and relate to an alleged breach of the Law or of the Rules or of any other legislation administered by the DFSA" Regulatory Law section 32(1)(a).

88. Arqaam also maintains that it has a counterclaim against the DFSA for damages substantially exceeding the amount claimed by the DFSA. Here also, the Hearing

Panel accepts the submission on behalf of the DFSA that any such claim lies outside the jurisdiction of the FMT.

89. The Hearing Panel therefore declines to order disclosure of the Schedule B documents.

ISSUE 4: DISCLOSURE TO E&Y

90. E&Y made its own application for disclosure to it of particular categories of documents in a separate schedule

91. At the hearing it became clear that E&Y's applications mirrored those of Arqaam, and that their main ground of complaint was that the DFSA had not disclosed to E&Y all the documents that it had disclosed to Arqaam. At the hearing counsel for the DFSA accepted that what was disclosed to one party should be disclosed to the other. That makes it unnecessary to rule on that submission.

92. E&Y's specific requests for disclosure are addressed and decided under Issue 3. The categories are there described by reference to the Items in Arqaam's Schedule A, but they cover all the categories of materials sought by E&Y in its own schedule.

ISSUE 5: TIME FOR SERVICE OF THE ANSWERS

93. Arqaam, in its letter to the FMT of 10 October 2011, requested an extension of time for the service of its Answer until 31 January 2012 "*or, if later, two months from the date of disclosure by the DFSA of all documents required to be disclosed by it*". E&Y, in its own letter of 20 October 2011, indicated that it would "*ask for an appropriate extension of time for filing its Answer after the provision of... disclosure*".

94. The initial period in which the Respondents were required to file an Answer was 28 days. The DFSA agreed to an extension , giving the Respondents until 15 November 2011.

95. The DFSA opposes any further extension and seeks a direction that the Respondents be directed to serve their Answers (together with all documents on which they rely, in accordance with Rule 28 of the FMT Rules) within 7 days.

96. Given the very limited nature of the disclosure ordered by the Hearing Panel and considering that the preparation of the Answers ought by this time to be well under way, the Hearing Panel is prepared to extend the time for Arqaam and E&Y to serve their Answers no further than 27 January 2012, which takes into account the extended holiday between now and then.

ISSUE 6: GENERAL DIRECTIONS

97. The DFSA offered no objection to the proceedings being joined and heard together. The Hearing Panel so directs. In consequence of that direction copies of all correspondence and documents passing between any of the parties to the present proceedings shall be supplied to all parties simultaneously.

98. The Hearing Panel will communicate with the parties in order to set a date for the hearing on the merits in Dubai

ISSUE 7: COSTS

99. The costs of these applications are reserved.

DIRECTIONS

100. The Hearing Panel directs as follows:

(1) Issue 1(privacy and confidentiality). These proceedings shall be heard in public and no order is made for confidential treatment of information. The full text of this decision shall be published on the DFSA's website, but material disclosed in the proceedings will not be publicly available until this decision is published.

(2) Issue 2 (disclosure to Arqaam: Schedule A). The applications for disclosure are dismissed, except that the DFSA shall disclose to Arqaam and to E&Y the transcript of the evidence of Nick Groene, redacted to exclude questions and answers which do not relate to matters not before the FMT.

(3) Issue 3 (disclosure to Arqaam: Schedule B). The applications for disclosure are dismissed.

(4) Issue 4 (disclosure to E&Y): The applications for disclosure are dismissed, except that the DFSA shall disclose to Arqaam and to E&Y the transcript of the evidence of Nick Groene, redacted to exclude questions and answers which do not relate to matters not before the FMT.

(5) Issue 5 (time for service of the Answers). The time for Arqaam and E&Y to serve their Answers is extended to 27 January 2011.

(6) Issue 6 (general directions). These proceedings shall be joined and heard together. Documents passing between any of the parties to the joined proceedings shall be supplied to all parties simultaneously. The Hearing Panel will communicate with the parties in order to set a date for the hearing on the merits in Dubai.

(7) The costs of these applications are reserved.

Signed by the Chairman on behalf of the Hearing Panel

Dated this 11th day of January 2012

Re-signed with agreed typographical corrections

28th July 2012