[2021] UKUT 83 (TCC)

Reference number: UT/2020/000210

FINANCIAL SERVICES - Decision notice - publication - whether the Upper Tribunal should prohibit publication on grounds that there was a significant likelihood of severe damage to the Applicant's livelihood if publication took place - FSMA 2000 s 391- Trib Proc (UT) Rules 2008 14(1) and Sch 3 para 3(3)

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

JON FRENSHAM **Applicant**

- and -

THE FINANCIAL CONDUCT AUTHORITY **The Authority**

TRIBUNAL: Judge Timothy Herrington

Hearing conducted in private via Microsoft Teams on 10 February 2021

Emmanuel Sheppard, Counsel, instructed by Signature Litigation LLP, Solicitors, for the Applicant

Sarah Clarke QC, instructed by the Financial Conduct Authority, for the Authority

DECISION

Introduction

1. On 26 October 2020 the Applicant, ("Mr Frensham") made a reference to the Upper Tribunal of a Decision Notice issued by the Authority on 1 October 2020 (the "Decision Notice").

2. Mr Frensham has applied for a direction pursuant to paragraph 3 (3) of Schedule 3 to the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Rules") that the register of references maintained by the Upper Tribunal (the "Register") contain no particulars of his reference. Mr Frensham has also applied for a direction pursuant to Rule 14 (1) of the Rules to prohibit publication by the Authority of the Decision Notice and any other information relating to the proceedings pending the outcome of the substantive hearing of his reference. I refer in this decision to these applications together as the "Privacy Applications".

3. Mr Frensham has been a financial adviser and an approved person since 2001. He is the sole director of a small authorised financial advice firm, ("the Firm") which advises on pensions, mortgages and investments.

4. On 10 March 2017, he was convicted by a jury under section 1(1) of the Criminal Attempts Act 1981 for attempting to meet a child under the age of 16, following acts of sexual grooming contrary to section 15 of the Sexual Offences Act 2003. On 27 March 2017, he was sentenced to 22 months' imprisonment, suspended for 18 months with a 60 day rehabilitation requirement. He was made the subject of an indefinite Sexual Harm Protection Order and added to the sex offenders register until 2027.

5. Pursuant to the Decision Notice the Authority decided to withdraw Mr Frensham's current approval and make an order prohibiting him from performing any function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm. The basis for the Decision Notice was the Authority's view that he was not a fit and proper person to perform a function in relation to any regulated activity due to the conduct for which he received his conviction.

6. Mr Frensham contends that the conduct for which he was convicted is not sufficiently relevant to his fitness and propriety to perform a regulated function. Through his reference Mr Frensham seeks a finding by the Tribunal to that effect and for the matter to be remitted to the Authority for it to reconsider its decision.

Issues to be determined

7. Mr Frensham contends that the Privacy Applications should be granted for the following reasons:

(1) Mr Frensham expects around 1 in 3 clients to leave the Firm were the Decision Notice to be published. That estimate is based on the fact that the Firm

lost approximately that proportion of clients (30/93) following Mr Frensham's conviction in 2017. Currently the majority of the Firm's clients are not aware of the conviction. There is significant likelihood of this pattern repeating and the same proportion of clients leaving the Firm after publication of the Decision Notice.

(2) Publication would not only renew the publicity surrounding Mr Frensham's conviction but also publicise the possibility of Mr Frensham's approval being removed as a result of it. That would, for the first time, draw an explicit link between the conviction and Mr Frensham's integrity for the purposes of his professional activities. That means it is likely that there will be fresh media interest particularly from specialist financial and legal journals likely to be read by the Firm's clients.

(3) Mr Frensham's subjective view from nearly two decades of experience in the industry of how his clients will react is that the consequences would be more severe this time around because of the focus on the possibility of a loss of authorisation.

(4) Mr Frensham's financial position is such that a sudden loss of 1 in 3 clients would have a severe impact on his financial position and that of the Firm. There is a significant likelihood of Mr Frensham struggling to meet his daily expenditure as a result.

(5) Whilst there is significant information concerning Mr Frensham's conviction in the public domain there is nothing to indicate that Mr Frensham is subject to regulatory proceedings. Mr Frensham has changed his name since his conviction and that of the Firm so that there is nothing publicly linking Jon Frensham to the conviction.

(6) Publication will have a significant impact on Mr Frensham's rehabilitation process. The opportunity for Mr Frensham to rebuild his life with a new name after conviction is an important part of his personal rehabilitation.

(7) Mr Frensham has provided cogent evidence of severe damage to livelihood which amounts to disproportionate damage such that it would be unfair not to prohibit publication of the Decision Notice.

8. In response the Authority contends:

(1) The evidence provided by Mr Frensham is not sufficiently cogent to tip the scales heavily weighted in favour of publication and thereby discharge the burden on him to demonstrate how unfairness may arise and that there is a significant likelihood of a disproportionate (severe) level of damage if publication were not prohibited.

(2) There is insufficient evidence of severe financial impact. The approximately 60 clients who stayed with Mr Frensham and the Firm following his conviction, presumably did so in the full knowledge of his criminal offending and prison sentence. This must be so given the media coverage of the criminal case, the fact that Mr Frensham had to employ a locum to run the Firm whilst he was in prison, and the fact that he subsequently changed his name and the name

of his Firm. These clients are therefore plainly loyal and likely to be of longstanding.

(3) Mr Frensham's statement that the fact of the Decision Notice would cause his existing clients to move elsewhere, is unsupported by any evidence. As the published Decision Notice would state, the proposed action outlined in the Decision Notice will have no effect pending the determination of the case by the Upper Tribunal. Given this, it is unlikely that Mr Frensham's existing clients would consider that a Prohibition Order was either imminent or a foregone conclusion.

(4) Mr Frensham has attracted new clients since his conviction despite it being easy through basic internet searches for any potential client to make the connection between Jon Frensham and the name under which he was convicted.

(5) It is clear from the Firm's published accounts and the latest Income Statement filed with the Authority for 2020, that its turnover has been stable in 2018, 2019 and 2020 despite Mr Frensham's conviction in March 2017. It had significant retained reserves and low overheads and administrative expenses, which could be further reduced if necessary. Consequently, the Firm has the ability to absorb the loss of some clients (in the event that that occurs). A possible reduction in profitability does not equate to cogent evidence of a significant likelihood of severe damage to, or destruction of, livelihood.

(6) The factors relating to personal impact and reputation are insufficient to amount to cogent evidence of unfairness.

Relevant Law

9. The relevant principles to be applied in deciding whether to grant privacy in response to applications of this kind were most recently summarised in my decision in *Prodhan v FCA* [2018] UKUT 0414 (TCC) at [20] to [26] and approved in *Foley v FCA* [2020] UKUT 0169 (TCC) as follows:

> "20. I set out the relevant statutory provisions in the Annex to this decision, namely the relevant provisions of s 391 FSMA, Rule 14 of the Rules and paragraph 3 (3) of Schedule 3 to the Rules. These provisions were analysed at [16] to [28] of the decision of this Tribunal in *Arch Financial Products LLP and others v FSA* [2012] FS/2012/20 ("*Arch*") and the effect of them can be summarised as follows:
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> > (1) Section 391 gives rise to a presumption that publicity will be the norm and this is equally the case with decision notices as it is with final notices although regard has to be paid to the fact that a decision notice that is being challenged in the Upper Tribunal is necessarily provisional: see paragraph 45 of *Arch*;
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> > (2) The exercise of the power to prohibit publication under Rule 14(1), and by analogy the exercise of the power under paragraph 3(3) of Schedule 3 to the Rules is a matter of judicial discretion to be considered against the context of this presumption; and
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> > (3) The discretion should be exercised taking into account all relevant factors ignoring irrelevant factors and giving effect to the overriding objective in Rule 2 of the Rules that requires the Tribunal to deal with

cases fairly and justly. This involves carrying out a balancing exercise between those factors that tend towards publication and those that would tend against.

21. There was no dispute between the parties as to what is the proper approach of this Tribunal when carrying out the balancing exercise referred to above when considering privacy applications. That approach is now well established, and the relevant principles were summarised by this Tribunal in *PDHL Limited v The Financial Conduct Authority* [2016] UKUT 0129 (TCC) at [36] and [37] of its decision as follows:

> "36. It was common ground that the principles established in *Arch v Financial Conduct Authority (*2012) FS/2012/20 and *Angela Burns v Financial Conduct Authority* [2015] UKUT 0601 TCC were applicable to the Privacy Applications. As correctly summarised by Mr Herberg in his skeleton argument these provide:
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> > (1) The open justice principle is to be applied such that the starting point is a presumption in favour of publication in accordance with the strong presumption in favour of open justice generally;
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> > (2) The onus is on the applicant to demonstrate a real need for privacy by showing unfairness;
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> > (3) In order to tip the scales heavily weighted in favour of publication the applicant must produce cogent evidence of how unfairness may arise and how it could suffer a disproportionate level of damage if publication were not prohibited; and
> >
> > (4) a ritualistic assertion of unfairness is unlikely to be sufficient. The embarrassment to an applicant that could result from publicity, and that it might draw the applicant's clients and others to ask questions which the applicant would rather not answer does not amount to unfairness.
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> 37. It is clear that if publication would result in the destruction of a firm's business then it would be unfair to publish a decision notice. The Tribunal said this at [89] to [90] of *Angela Burns*:
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> > "89. I accept that cogent evidence of destruction of or severe damage to a person's livelihood is capable of amounting to disproportionate damage such that it would be unfair not to prohibit publication of a Decision Notice. Although I should be careful not to approve specifically the criteria that the Authority sets out in its recent consultation paper on publishing information about Warning Notices at a time when that paper is still open for comment, it appears to me that by including paragraph 2.17 of that paper the Authority accepts that a disproportionate loss of income or livelihood would mean that it would be unfair to publish. In my view damage of that kind is of a different and more serious kind than damage of reputation alone.

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

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

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

23. The nature of the dispute, including questions as to whether the Applicant has been treated fairly in comparison with others, or penalised too harshly, are matters to be considered by the Tribunal when it hears the substantive reference and are not matters that can bear upon the question of publication: see *Ford and others v FCA* [2015] UKUT 0220 (TCC) at [50] ("*Ford")*.

…

25.The fact that some information concerning the subject matter of a reference is already in the public domain is a factor which tends in favour of publication: see *Ford* at [54] and *Arch* at [53].

26.As Mr Pritchard observed, the protection afforded to an applicant who is concerned that readers of the decision notice might not understand its provisional nature when the matter has been referred to the Tribunal or the nature of the findings made by the Authority in the notice is to refer the matter to the Tribunal. This issue was dealt with by the Tribunal at [50] to [51] of *Arch* as follows:

> "50…. Mr Stanley submits that the public who read the Decision Notices will not understand the difference between an allegation of a lack of integrity based on recklessness which is being made and an allegation of dishonesty, which is not being made. He submits that it is likely that there will be an unreasonable body of investors, fuelled by high emotions as a result of what has happened to the Arch cru funds, who will fail to appreciate that the decisions are provisional and will assume that the Applicants are guilty of what is alleged.

> 51. The protection to which the Applicants are entitled in this situation is the right to have the allegations tested in this Tribunal which will in due course deliver a decision in public which will refute unfounded allegations. In addition the Decision Notices themselves set out in detail a summary of the representations that the Applicants made to the RDC which goes some way to explaining their side of the case. No doubt the media will be interested in hearing from the Applicants why they believe the allegations are unfounded."

9. The relevant statutory provisions referred to in the passages set out above are contained in the Annex to this Decision.

Evidence

10. In order to support the Privacy Applications, Mr Frensham filed a witness statement in which he set out the reasons why he believed publication of the Decision Notice and the entry of his reference on to the Register would create a significant likelihood of severe harm to his livelihood. It is Mr Frensham's belief that publication would have a deleterious financial impact, disrupt the process of his rehabilitation, and do damage to his reputation and personal life. He believes that would arise from the prospect of him losing his authorisation and the likely fresh publicity surrounding his conviction.

11. Mr Frensham was cross-examined on his witness statement by Ms Clarke. My assessment is that Mr Frensham was genuine in his belief that publication of the Decision Notice would have a serious impact on the Firm's financial position and therefore his own livelihood and that publication would undo the efforts he had made to rebuild his life following his conviction by changing his name and that of the Firm. However, in his witness statement Mr Frensham had been economical with the facts as regards his pension fund and he did not provide a convincing explanation as to why he had not produced his bank statements to verify his personal expenditure.

12. The Authority filed evidence in the form of a witness statement from Ms Anna Couzens, a Manager in the Retail and Regulatory Investigations sub-division of the Authority's Enforcement and Market Oversight Division ("Enforcement"). Ms Couzens responded to Mr Frensham's witness statement and exhibited evidence provided to the Authority's Regulatory Decisions Committee ("RDC") of clients of the Firm who stated that they were aware of Mr Frensham's conviction and either continue to instruct or subsequently instructed the Firm. By reference to the Firm's financial information, Ms Couzens set out her reasons why she considered that the Firm has a considerable profit margin with which it could absorb a potential loss of customers.

13. Ms Couzens also provides evidence which she says refutes Mr Frensham's contentions that his new name is not linked with his conviction on Google searches.

14. Mr Sheppard did not wish to cross examine Ms Couzens and accordingly her evidence was not challenged. In those circumstances, I have accepted the statements as to primary facts contained in her evidence. Mr Sheppard challenged certain aspects of

Ms Couzens's evaluation of the financial position of the Firm and the inferences she drew from the Google searches that she undertook.

15. Both witnesses exhibited a number of documents to their witness statements which I have taken into account when making my findings of fact.

Findings of Fact

16. From the documents I saw, and the evidence I heard, I make the following findings of fact.

17. Mr Frensham has been a financial adviser and approved person since 2001. He is the sole director of the Firm, which is a small firm with permission granted under Part 4A of the Financial Services and Markets Act 2000 ("FSMA") to advise on pensions, mortgages and investments.

18. Mr Frensham owns 80% of the share capital of the Firm, the remainder being held by his ex-wife. Mr Frensham's ex-wife also works part-time in the business, but Mr Frensham is the Firm's sole approved person.

19. Mr Frensham's conviction attracted considerable publicity at the time in both the local and national press. The articles concerned are still available for view on the Internet.

20. Following his conviction, as he was fully entitled to do, Mr Frensham changed his name by Statutory Declaration as well as the name of the Firm. However, if the Firm's details are searched at Companies House, the Firm's previous name will be revealed. Likewise, a search of the Authority's register of firms and approved persons will reveal Mr Frensham's previous name, under which he was convicted.

21. Ms Couzens's screenshot of the first page of a Google search of "Jon Frensham", Mr Frensham's new professional name, showed ten results. The first four of those entries and the last five disclosed only details of Mr Frensham and the Firm under the new names, but the fifth result is an article in the Sun newspaper, published at the time of Mr Frensham's conviction, referring to him under his previous name as well as the Firm under its previous name. That article gave full details of his offence and contained two pictures of Mr Frensham.

22. Although Mr Sheppard submitted that if a Google Search of "Jon Frensham" was undertaken there would be no connection between that name and the conviction, there can be no doubt that anyone who opened the link to that article and read it would immediately realise that subject of the article was Mr Frensham. Bearing in mind the article's juxtaposition with the other search results relating to Mr Frensham in my view it is more likely than not that any person interested in finding more about Mr Frensham on the Internet, such as an existing or potential client, would open the link to that article. Indeed, that is demonstrated from the evidence contained in a witness statement from someone who became a client of the Firm after Mr Frensham's conviction, which was before the RDC during the Authority's regulatory proceedings against Mr Frensham. That client conducted what he described as "some very basis internet research" to check

Mr Frensham's qualifications and stated that he came across media reports concerning his conviction under his previous name. The client said that "There was a lot of information online about the case, including photographs, so I knew it was the same person."

23. I therefore find that Mr Frensham's efforts to break the link between his new name and his conviction are only likely to be successful to a limited extent.

24. It is clear that a considerable number of Mr Frensham's clients become aware of his conviction shortly after it became public. It was common ground that the adverse publicity around the conviction led to the loss of about 30 clients from a total of 93.

25. Mr Frensham did not as a matter of policy volunteer his conviction to existing or future clients. He was, however, open about it if asked. As he said to the RDC, where existing clients raised the issue, he would offer to introduce them to an alternative adviser. Five of the clients he spoke to did leave but seven decided to continue to instruct him. It is therefore clear that of the 30 clients who decided to leave because of the conviction, the majority of them chose to do so having discovered the facts without engaging with Mr Frensham on the issue. Likewise, the majority of clients who chose to stay did so without discussing the matter with Mr Frensham.

26. As at the date of the hearing of the Privacy Applications, Mr Frensham estimated that the Firm had more or less 60 remaining clients. His evidence was that since his conviction he had been successful in attracting three or four new clients per year but a number had left. The Firm's client base is quite elderly so two clients have recently sadly died and two others have withdrawn their investments for reasons unrelated to Mr Frensham's conviction. The client base is therefore stable, but not growing to any significant extent.

27. On the basis that potential clients are likely to investigate Mr Frensham's background and probably find out about the conviction it will undoubtedly be the case that a number of potential clients will decide not to proceed because of the conviction whilst, as the evidence shows, some potential clients will proceed despite knowing about the conviction. I accept that the publication of the Decision Notice is likely to act as a further deterrence for new clients joining the Firm, but that is likely to be because of the possibility that the Firm will lose its authorisation because of the action taken by the Authority, not necessarily simply because of the facts of the conviction itself.

28. The question which it is very difficult to answer with any degree of certainty is what effect the publication of the Decision Notice would have on the existing client base. Mr Sheppard submitted that currently the majority of the Firm's clients are not aware of the conviction. He therefore submitted that as the Firm lost 30 clients following Mr Frensham's conviction there is a significant likelihood of this pattern repeating and the same proportion of clients, that is approximately 20 out of the current client base of approximately 60, leaving the Firm after publication of the Decision Notice. Mr Sheppard submitted that publication would not only renew the publicity surrounding Mr Frensham's conviction but also publicise the possibility of Mr Frensham's approval being removed, thus, for the first time, drawing an explicit link

between the conviction and Mr Frensham's integrity for the purposes of his professional activities. That, he submitted, meant that the consequences in terms of loss of clients could be more severe than was the case following the conviction.

29. I do not accept that the evidence demonstrates that the majority of the remaining clients (that is over 30) are unaware of the conviction. In my view, it is just as likely that the clients who chose to stay knew about the conviction than that they were not aware of it. We know that most clients chose not to engage with Mr Frensham on the subject, whether or not they chose to leave. In my view, it is more likely than not that a large number of the remaining clients are aware of the conviction given the widespread publicity at the time that it occurred, the fact that a number of clients are likely to have carried out their own investigations as to why the Firm and Mr Frensham changed their names and also why the business was being run by a locum during the period that Mr Frensham was remanded in custody pending his trial.

30. It is also in my view reasonable to assume that those clients who have remained continue to do so because they are loyal to Mr Frensham and have confidence in his abilities as a financial adviser. Although Mr Sheppard suggested that all clients, including those who knew about the conviction, would reassess their position in the light of the publication of the Decision Notice, in my view it is more likely than not that most of those clients would "sit tight" pending the outcome of the reference, bearing in mind the fact that any publication would be accompanied by statements to the effect that the decision was provisional and subject to review in the Tribunal as well as the fact that they have stayed loyal to Mr Frensham in the past.

31. Therefore, whilst it is likely that there will be some clients who decide to leave the Firm as a result of publication, I do not think that the evidence and the other relevant circumstances indicate that it is more likely than not that figure concerned will be as high as 20. That figure must be regarded as a worst-case scenario and that it is likely that client losses will be smaller than that, although it is impossible to predict with any certainty what the figure will be.

32. I will, however, approach the evidence of the likely financial impact on publication on the basis that a significant number of clients, possibly as high as 20, might leave as a result of publication.

33. It should also be borne in mind that there is no evidence to support the assumption that lies behind Mr Frensham's contentions regarding the financial impact of publication, namely that publication would have an immediate financial impact on the Firm. Mr Frensham indicated that he would typically only perform services for his clients once a year by reviewing their portfolio and presumably invoicing them shortly thereafter. If clients were to leave, the financial impact would be felt gradually over a period after publication rather than all at once.

34. The evidence regarding the Firm's financial position shows a stable position over the three financial years following the conviction, which is consistent with the findings as to the stability of the client base since that time. By reference to the Firm's financial statements for the years ended 31 December 2018 and 31 December 2019 and the

Firm's Income Statement for the nine month period to 30 September 2020 as filed with the Authority, the position can be summarised as follows.

35. Turnover for the year ended 31 December 2018 was £104,292 and £102,830 for the year ended 31 December 2019. For the nine-month period ended 30 September 2020 gross commission and brokerage was £77,000. Profit for the year ended 31 December 2018 was £61,531 and for the year ended 31 December 2019 £42,615. Capital and reserves at 31 December 2018 were £21,653 and at 31 December 2019 £25,268. £20,000 of those reserves had to be earmarked as regulatory capital. Dividends of £67,000 were paid in 2018 and £39,000 in 2019. Mr Frensham received 80% of those dividend payments, the remaining 20% being received by his ex-wife. In addition to his dividend payments, Mr Frensham also received directors remuneration of £11,857 in 2018 and £12,235 in 2019. He also benefited from payments into his personal pension of £6,000 in 2019 and rent of £3,600 in that year for the use of office space within his residence.

36. Total administrative expenses were £44,672 in 2019, a significant increase on the figure of £25,178 for 2018. The increases can be explained as follows. First, the pension and rent payments referred to above were made for the first time in 2019. Secondly, Mr Frensham's ex-wife became an employee in 2019, with a salary of £9,448 paid to her. There were also increased computer running costs, which will be a recurring item, and a significant increase in advertising costs from £131 to £2,015, which Mr Frensham confirmed did not necessarily have to be a recurring item.

37. Total expenditure for the nine-month period ended 30 September 2020 was shown as £46,000, giving a result of a profit of £36,000, of which £32,000 was distributed as dividends.

38. Mr Frensham therefore received income and benefits from the Firm in the form of a mixture of salary, dividends and pension contributions.

39. In terms of his monthly living expenses, Mr Sheppard summarised the position in his skeleton argument as follows:

Dividend Tax	c. £170 (c. £2,000 pa)
National Insurance	c. £26 (c. £314 pa)
Mortgage payment	£1,325

Service charges	£175
General expenditure	£1,500
TOTAL	**£3,196**

40. Of the two larger items, the mortgage payment of £1,324.64 per month was evidenced by a statement from Mr Frensham's lender. There was no evidence, however, to support Mr Frensham's assertion that he had other expenses of £1,500 per month. He was asked by Ms Clarke why he had not provided bank statements or credit card statements which would give an indication of his monthly expenditure. Mr Frensham's answer was that not all his expenses came up on a regular basis so that bank statements would not assist in that regard. Mr Frensham said that £1,500 a month was not an unreasonable figure and although he could have provided his bank statements, he did not believe it would help the position.

41. As regards his credit cards, Mr Frensham provided the latest statements from his two credit cards, one from Sainsbury's Bank showing a debit balance of £6,845.63 and one from Santander showing a debit balance of £4,038.01. Both statements showed that the last payment made was the required minimum payment. Mr Frensham said that both credit cards had been taken out during 2020 in order to meet two specific work-related liabilities and they were not being used for his day-to-day expenses and Mr Frensham did not think it was necessary to provide the earlier statements. However, we have no evidence of those assertions in the form of previous credit card statements.

42. I did not find Mr Frensham's explanations as to why previous bank and credit card statements had not been provided to be convincing. Although of course some items of expenditure would not recur on a monthly basis, if statements, say for a whole period of 12 months were provided, it would be easy to establish what was the average monthly expenditure. In the absence of such evidence, it is difficult to ascertain what items of expenditure were necessarily of a discretionary nature.

43. Ms Clarke challenged Mr Frensham's statement in his witness statement that he had no savings. Mr Frensham said that he had received some capital as a result of the sale of the matrimonial home upon his divorce and that he had put the sum received, some £77,000, into purchasing his current property and spent his remaining savings refurbishing the property. Ms Clarke questioned why Mr Frensham had not provided an audit trail showing the transactions concerned which would have supported his assertion that he had no savings. Mr Frensham's response was that he regarded it as sufficient to provide evidence of the current position rather than what had happened in the past.

44. Again, I find that explanation unconvincing. A statement by a professional person some years standing that he had no savings is a statement that should be supported and could readily be supported by documentary evidence.

45. More seriously, Mr Frensham had not disclosed that he currently has a pension fund worth some £250,000. That became apparent when Ms Clarke asked Mr Frensham to explain the item of £6,000 in respect of staff pension costs in the Firm's schedule of

administrative expenses for 2019 forming part of its accounts for that year. As mentioned above, that was a payment into Mr Frensham's pension scheme.

46. Mr Frensham was asked to explain why he had not previously referred to his pension scheme. He answered that he did not see its relevance because it was not a benefit that could materially make a difference to the situation. When pressed as to whether it could be regarded as savings, he answered that it was "savings in a pension". Again, I do not find that explanation convincing. I would have expected Mr Frensham to have disclosed the details of his pension scheme when referring to the question of savings in his witness statement.

47. In answer to a question from the Tribunal, Mr Frensham confirmed that as he was over 55 years of age it would be open to him to draw down the whole of his pension. In particular, he confirmed that it would be open to him to draw out a tax-free lump sum, representing 25% of the value of the fund without prejudicing his ability to make further contributions to the scheme in the future. Indeed, he confirmed that he had previously drawn a relatively small amount out of the scheme.

48. Mr Frensham has a further significant liability, namely a help to buy loan secured on his property in an amount of some £75,000. However, in the short to medium term there are no servicing costs in relation to that loan because interest does not become payable on it for another 3 years.

Discussion

49. Against that factual background, I can now turn to the balancing exercise and in the light of the parties' submissions consider whether the factors put forward by Mr Frensham outweigh the strong presumption, as established by the authorities, that the Decision Notice should be published, and details of his reference should be put on the Register.

50. Mr Sheppard accepted that in this case the most important factor is the prospect that publication would harm Mr Frensham's livelihood. Whilst he also submitted that in the specific circumstances of this case, the impact of publication on Mr Frensham's rehabilitation process was a further relevant factor I did not take him to submit that this additional factor was sufficient on its own to justify the granting of the Privacy Applications. I therefore proceed on the basis that if I do find that the case on severe harm to Mr Frensham's livelihood is made out then the additional factor may operate to strengthen the case for privacy.

51. Therefore, the key question in this case, on which the case for the Privacy Applications will stand or fall, is whether the evidence put forward by Mr Frensham establishes a significant likelihood of damage or destruction to his livelihood were the Privacy Applications to be refused. As the authorities demonstrate, cogent evidence of destruction of or severe damage to a person's livelihood is capable of amounting to disproportionate damage such that it would be unfair not to prohibit publication of a Decision Notice. In order to tip the scales heavily weighted in favour of publication

the applicant must produce cogent evidence of how unfairness may arise and how he could suffer a disproportionate level of damage if publication were not prohibited.

52. I accept, as Mr Sheppard submitted, that to show severe damage it is not necessary to show either the destruction of Mr Frensham's livelihood or that he will be reduced to penury. Mr Sheppard submits that "severe damage" is a broad term that encompasses an impact that would require a significant change in the financial circumstances of Mr Frensham. In this case Mr Sheppard relies on the evidence demonstrating that in this case there is a significant likelihood that, without a prohibition on publication, Mr Frensham would struggle to meet his daily expenses. I shall deal with that submission having considered the evidence on which Mr Frensham relies.

53. Mr Sheppard set out what he submitted were two likely scenarios as to the financial impact on Firm A were, as he submitted was likely to be the case, 1/3 of the Firm's clients were to leave as a result of publication. Mr Sheppard set out those scenarios by reference to the position as set out in the 2019 Accounts of the Firm.

54. As regards the first scenario, assuming 1/3 of the Firm's clients left and the revenue fell proportionally from approximately £102,000 to approximately £68,000, then, after 2019's administrative costs and costs of sale (of £5,544 + £44,672), the profit before taxation would be approximately £19,000. After corporation tax of approximately 19%, the profit after tax would be approximately £15,400 (pre-dividend, after salary). Even excluding the usual 20% dividend to Firm A's other employee, Mr Frensham's ex-wife, this would leave a maximum personal income (salary and dividend) for the Applicant of £15,400 + £12,120 (salary) = £27,520 ("Scenario A Estimated Income")

55. The second scenario assumed that the Firm reduced its business overheads by making his ex-wife redundant, as occurred in 2018 after financial difficulties in 2017. Under that scenario, a 1/3 reduction in income would leave the Firm with a pre-tax profit of £39,520 (i.e. £68,000 – £28,480). After corporation tax of approximately 19% this would leave a pre dividend profit of approximately £32,000. Assuming a dividend of approximately £25,000 this would leave a personal income for Mr Frensham of approximately £25,000 + £12,120 (salary) = approximately £37,120 ("Scenario B Estimated Income").

56. Scenario A Estimated Income would provide Mr Frensham with £27,520 per annum, or £2,293 per month, which was insufficient for his current expenditure of £3,196 per month, as set out at [39] above. Scenario B Estimated Income would provide Mr Frensham with approximately £37,120 per annum or approximately £3,093 per month, which was also insufficient for his current monthly expenditure.

57. Mr Sheppard submitted that even if Mr Frensham were to pay himself a larger dividend in the second scenario, by say £5,000, he would still receive approximately £42,000 per annum or approximately £3,500 p.m. which is barely sufficient to cover £3,196 p.m. expenses and in light of existing £11,000 credit card debts would place Mr Frensham in a precarious financial position.

58. In my view, Mr Frensham has not provided cogent and compelling evidence of how he would suffer a disproportionate level of damage for the following reasons.

59. First, at its highest Mr Frensham's case is that he would struggle to meet his daily expenses were publication to occur. However, the deficit that he identifies is very small and clearly can be addressed in the short term as Mr Frensham accepted in his evidence. In particular, there is no suggestion that the business could not continue to operate in the short term satisfactorily without the Firm employing Mr Frensham's ex-wife, regrettable though that might be, the advertising budget could be cut and other economies made. That, as Ms Clarke submitted, might be awkward and unpleasant but would not be impossible.

60. Secondly, I am only concerned with the impact of publication in the short term, that is the position between now and the determination of Mr Frensham's reference. It is to be assumed that if Mr Frensham is successful on his reference to the extent that the Authority decides not to press its case any further then Mr Frensham will be able to rebuild the business and attract more clients, a process which necessarily will be on hold until the reference has been determined.

61. I accept Mr Frensham's assessment that there would be a progressive destruction of the business if new clients were not attracted. However, Mr Frensham accepted that it would be a gradual decline rather than the business suffering severe harm immediately. Mr Frensham accepted that he could reduce the costs in the short term and could accept the loss of a few clients over that period. Furthermore, if there were short-term difficulties, then Mr Frensham is in a position to draw upon his pension without long-term adverse consequences, undesirable though that maybe in the long term. As I have found, even if some withdrawal of the tax free lump sum were made, it would be open to Mr Frensham to replenish the fund with further contributions if matters improve.

62. As I have said, it is accepted that long-term the Firm will need to attract new clients to prosper and that some clients will inevitably be lost if publication occurs. However, the issue must be looked at from the perspective of whether the short term harm that may well arise can be addressed if the reference is successful. There is no cogent or compelling evidence that in the event of a successful reference the decline cannot be addressed. If that were not the case, Mr Frensham would not be pursuing the reference.

63. I accept that because Mr Frensham's reference is not a disciplinary reference, if he is successful on the reference that is not necessarily the end of the matter and it may therefore be difficult to predict how short the period will be between the determination of the Tribunal proceedings and the ultimate decision. On non-disciplinary references the Tribunal's powers are limited to remitting the matter to the Authority for it to reconsider its decision. However, it appears from Mr Frensham's reference notice that the question to be determined is a pure question of law, namely whether it is lawful for the Authority to take into account behaviour of the kind for which Mr Frensham was convicted in assessing his fitness and properness, on the basis that the behaviour concerned was not related to the performance of his regulated functions. If the Tribunal

is with Mr Frensham on that point it is difficult to see how the Authority could continue to pursue the matter.

64. Thirdly, the evidence that Mr Frensham has adduced to support what he says is the worst-case scenario is in any event not cogent and compelling.

65. I have already explained that I am not satisfied that as many as 1/3 of the Firm's existing clients will leave following publication and any that do leave are unlikely all to leave at once.

66. Furthermore, Mr Frensham has not provided cogent and compelling evidence to support his assertions regarding his expenses. Indeed, a large part of his expenses are not supported by any evidence at all. Mr Frensham has not provided evidence as to what happened to his savings or evidence to support what he says about his pension.

67. Therefore, in conclusion as regards the likely financial impact on the Firm and Mr Frensham's own livelihood were publication to occur, in my view the Firm has in the short term the ability to withstand the loss of further clients - which are likely to amount to less than 20 in total - and the resulting reduction in profitability, without severe damage.

68. In my view the likely financial consequences of publication are not sufficient to satisfy me that the effect of publication will give rise to a significant likelihood of damage to Mr Frensham's livelihood which is so severe that it is out of proportion to the public interest in the principle of open justice that will be served by permitting publication of the Decision Notice and including particulars of the reference on the Register. There is likely to be some damage in the short term but, in my view, there is no cogent and compelling evidence that enables Mr Frensham to surmount the very high hurdle he faces in successfully establishing that it would be unfair to permit publication in this case.

69. That conclusion is sufficient to determine the Privacy Applications. It is therefore not strictly necessary for me to consider the other factors which Mr Frensham relied on. I will, however, briefly deal with the question of the potential effect of publication on Mr Frensham's rehabilitation.

70. It follows from my findings as to the limited extent to which Mr Frensham has been able to break the link between his new name and his conviction bearing in mind what continues to be in the public domain regarding the conviction and his past identity that this is not a factor to which I would have been able accord significant weight in the balancing exercise in any event.

71. **Conclusions**

72. I therefore conclude that the Privacy Applications must be dismissed. The Authority has indicated that it will ensure that any publicity given to the Decision Notice will make it clear that the decision is provisional. I therefore direct that any press

release issued by the Authority in connection with the publication of the Decision Notice must state prominently at its beginning that Mr Frensham has referred the matter to the Upper Tribunal where each party will present their respective cases and the Tribunal will then determine what (if any) is the appropriate action for the Authority to take and remit the matter to the Authority with such directions as the Tribunal considers appropriate for giving effect to its determination. In referring to the findings made in the Decision Notice, rather than give any suggestion of finality, those findings must be prefaced with a statement to the effect that they reflect the Authority's belief as to what occurred and how the behaviour in question is to be characterised.

73. Mr Frensham may find it helpful to discuss the situation with all or some of his clients and therefore it is appropriate that there should be a period of 21 days from the date of the release of this Decision before publication of the Decision Notice and I so direct.

74. Finally, this Decision will be published on the Tribunal's website, but only after the Decision Notice itself has been published and the Authority is therefore directed to inform the Tribunal when publication has occurred.

75. I should also make reference to the fact that because of the Financial Services Lawyers Association's admirable pro bono scheme Mr Frensham has had the benefit of pro bono legal advice from Mr Sheppard and his instructing solicitors, Signature Litigation LLP. This has also been of considerable assistance to the Tribunal and I am grateful to Mr Sheppard and his instructing solicitors. The fact that Mr Frensham's application has been unsuccessful is no reflection on their efforts.

Disposition

76. The Privacy Applications are dismissed.

JUDGE TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE
RELEASE DATE: 24 February 2021

ANNEX

RELEVANT STATUTORY PROVISIONS

Section 391 Financial Services and Markets Act 2000

(1) ….

(1A) A person to whom a decision notice is given or copied may not publish the notice or any details concerning it unless the regulator giving the notice has published the notice or those details.

(2)(3) …

(4) The regulator giving a decision or final notice must publish such information about the matter to which the notice relates as it considers appropriate;

(5) …

(6) The [Authority] may not publish information under this section if, in its opinion, publication of the information would be-

(a) unfair to the person with respect to whom the action was taken (or was proposed to be taken),

(b) prejudicial to the interests of consumers, or

(c) detrimental to the stability of the UK financial system.

…

(11) Section 425A (meaning of "consumers") applies for the purposes of this section.

Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

(1) The Upper Tribunal may make an Order prohibiting the disclosure or publication of:

(a) specified documents or information relating to the proceedings; or

(a) …

(2) The Upper Tribunal may give a direction prohibiting the disclosure of a document or information to a person if:

(a) the Upper Tribunal is satisfied that such disclosure will be likely to cause that person or some other person serious harm; and

(b) the Upper Tribunal is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction.

Paragraph 3(3) of Schedule 3 to the Tribunal Procedure (Upper Tribunal) Rules 2008

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