Neutral Citation: **[2022] UKUT 308 (TCC)**

UT (Tax & Chancery) Case Number: UT-2022-000065

Upper Tribunal
(Tax and Chancery Chamber)

Decided on the papers

PROCEDURE – Decision Notice issued by the Financial Conduct Authority – hearing in public to decide Appellant's application to suspend effect of the Decision Notice – judgment handed down – subsequent application for delay to publication on the Tribunal's website and the National Archives – held, decision already "public" because handed down – whether the Tribunal should nevertheless delay publication – open justice – interlocutory nature of judgment – previous Tribunal case law distinguished in part – evidence of damage considered – application refused

Decided on the papers

Judgment given on 18 November 2022

Before

DEPUTY UPPER TRIBUNAL JUDGE ANNE REDSTON

Between

MONEYBRAIN LIMITED
(PRIVACY APPLICATION)

Applicant

and

THE FINANCIAL CONDUCT AUTHORITY

Respondent

Representation:

For the Applicant: Withers LLP, instructed by the Applicant, with further submissions from Mr Jason Mansell of Counsel, instructed by Withers LLP

For the Respondent: Mr Adam Temple of Counsel, instructed by the Financial Conduct Authority

DECISION

INTRODUCTION AND SUMMARY

1. On 22 September 2022, I handed down my judgment in *Moneybrain v the Financial Conduct Authority* [2022] UKUT 00257 (TCC) ("the Judgment"). A few hours later, before the Judgment had been published on the Tribunal website or on the National Archives site, Moneybrain Limited ("Moneybrain") made an application for publication of the Judgment be delayed ("the Privacy Application").

2. I refused the Privacy Application because:

   (1) as the Judgment had been handed down to the parties in final form, it was already in the public domain;

   (2) the hearing had been in public; and

   (3) having carried out a balancing exercise, taking into account all relevant factors, it was not in the interest of justice to delay publishing the Judgment.

3. As a result, the Judgment has been published at the same time as this decision, along with a third decision refusing Moneybrain's recusal application, see *Moneybrain (Recusal Application) v the Financial Conduct Authority* [2022] UKUT 00269 (TCC).

Summary

4. Moneybrain had created a type of cryptocurrency known as BiPS Tokens ("Tokens"). On 29 June 2020, Moneybrain applied to the Financial Conduct Authority ("the Authority") for registration as a cryptoasset exchange provider and a custodian wallet provider pursuant to Regulation 57 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ("the MLRs").

5. On 30 May 2022, the Authority refused Moneybrain's application by way of a decision notice ("the Decision Notice") because it decided Moneybrain had deliberately and recklessly published on its websites misleading marketing and promotional material relating to the Tokens, and so lacked probity, and that in consequence Moneybrain was not a "fit and proper person" within the meaning of Regulation 58A of the MLRs. At the same time and for the same reasons, the Authority decided that the Decision Notice was to have immediate effect.

6. On 24 June 2022, Moneybrain made a reference to the Tribunal ("the Reference") by way of an appeal against the Decision Notice. In the Reference, Moneybrain also applied for a direction that the effect of the Decision Notice be suspended pending the determination of the Reference ("the Suspension Application"). In other words, Moneybrain applied to be allowed to continue carrying out crypto-asset activities as if the Decision Notice had not been made, pending the outcome of the hearing of the Reference.

7. A hearing of the Suspension Application took place before me on 23 August 2022. No application was made for that hearing to be in private. Rule 5(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Tribunal Rules") provides that when hearing a suspension application, the Tribunal must decide whether the public (consumers, investors or otherwise) will be protected if the applicant were to be allowed to resume operations pending the hearing of its reference. Having considered the evidence and submissions and applied the relevant law, I refused the Suspension Application, and drafted the Judgment.

8. On 22 September 2022, I emailed the Judgment to the Tribunal clerk with instructions to issue it to the parties and arrange for it to be published on the Tribunal website and on the National Archives website. The Tribunal clerk issued the Judgment to the parties.

9. Before the Judgment had been published on the Tribunal website or the National Archives website, Moneybrain made the Privacy Application, which included the following submissions:

(1) the Judgment decided a interim issue, and the main dispute between the parties remained to be heard and decided;

(2) although the Judgment had been handed down, no information about the dispute or the Judgment had been more widely disseminated;

(3) the Judgment would publicise the Authority's decision that Moneybrain lacked probity ahead of the hearing of the Reference, at which Moneybrain would have the opportunity to challenge the Decision Notice; and

(4) that publicity may threaten its business and other linked businesses and it would thus be unfair if the Tribunal published the Judgment.

10. Having considered the case law, I decided the Judgment had become "public" when it had been handed down to the parties. It was therefore too late for the Tribunal to direct that the Judgment could not be disclosed or otherwise published. In addition, as the hearing itself had been in public, any person could apply for a copy of the transcript, and/or for copies of material referred to in that hearing, including the Decision Notice.

11. I went on to consider whether I should nevertheless direct that the Judgment not be published by this Tribunal until after the Reference had been heard and determined. Having considered and balanced numerous factors, I decided as follows:

(1) The following factors weighed heavily in favour of publication:

(a) The Judgment was already public and the hearing had been in public.

(b) The principle of open justice and the related case law, including *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2010] EWCA Civ 65 ("*Mohamed*") in which Lord Judge said that open justice "enables information to become available to the public" and Lord Neuberger added that "all parts of a judgment should be publicly available, unless there is a very powerful reason to the contrary".

(2) The main factor in favour of allowing the Privacy Application and delaying publication was that the Judgment was an interlocutory decision, so there has not yet been an opportunity for Moneybrain to refute what it considers to be unfounded allegations; that will only happen at the hearing of the Reference.

(3) Moneybrain's position was also distinguishable from almost all privacy cases previously decided by this Tribunal; these concerned decision notices issued under the Financial Services and Markets Act 2000 ("FSMA"). Section 391 of that Act provides that those decision notices "must" be published the Authority, and this statutory presumption in favour of publication underpins the approach taken by the Tribunal when deciding whether to grant a privacy application. In contrast, the Decision Notice was issued under the MLRs, and at the time of its issuance, the MLRs did not allow the Authority to publish decision notices.

(4) Moneybrain's position is instead similar to that of Mr Salih in *Salih v Pensions Regulator* [2018] UKUT 338 (TCC) ("*Salih*"). The Pension Regulator ("the Regulator") had issued Mr Salih with a determination under the Pensions Act 2004, but a statutory bar prevented the Regulator publishing the determination while the related reference remained to be decided by the Tribunal; the wider public was also unaware

the determination had been issued. Mr Salih had applied for the hearing of his reference to be in private. Although the Tribunal refused that application, it also delayed publication of the related determination until his reference had been heard and decided. In other words, Mr Salih achieved exactly the result Moneybrain is seeking.

(5) However, I decided that Moneybrain's position was distinguishable from that of Mr Salih, because the issue decided by the Tribunal in *Salih* was whether to hold the reference hearing in private. In contrast, the issue decided by the Judgment was whether consumers would be prejudiced if the Suspension Application were to be granted, and the Judgment thus directly engaged the position of the wider public.

(6) Nevertheless, I gave some weight to the following:

(a) where recipients of FSMA decision notices have applied to he Tribunal for their notices to remain private until after the hearing of the related references, and the Tribunal refused those applications, it has done so on condition that the Authority adds "prominent" warnings to the decision notice before publication: these state that the decision notices are provisional and reflect "the FCA's belief";

(b) the Tribunal has consistently directed that the publication of judgments refusing privacy applications are to be delayed until after the publication of the related decision notices; but

(c) the Judgment would be published without a related decision notice, and it is not prefaced by explicit warnings of a similar nature. That is because Tribunal judgments and decision notices have different purposes. In addition, it is in any event not possible to add warnings to the Judgment, as it has already been handed down in final form.

(7) I then considered whether publication of the Judgment would damage Moneybrain and related businesses. This Tribunal has consistently found that such submissions must be supported by "cogent evidence" of a "significant likelihood" that publicity would cause "disproportionate" damage. Although that case law was developed in the context of FSMA-related applications, I decided that the same approach applied here. As a result, Moneybrain needed to provide cogent evidence that publication of the Judgment would cause it disproportionate damage, and it failed to do so. This was a significant factor against allowing the Privacy Application.

(8) Delaying publication of the Judgment would also delay publication of the separate decision refusing the Recusal Application, which also refers to the content of the Decision Notice and to many paragraphs of the Judgment. Delaying publication of that decision also runs counter to the principle of open justice.

12. Taking into account the foregoing, together with other more minor points considered in the main body of this decision and summarised at §175, I concluded that the factors against allowing the Privacy Application outweighed those in Moneybrain's favour. The Judgment is therefore to be published, subject only to the exercise by Moneybrain of its appeal rights, see §177.

THE BACKGROUND

13. As set out in the summary above, on 30 May 2022 the Authority issued the Decision Notice refusing Moneybrain's application to be registered as a cryptoasset exchange provider and a custodian wallet provider pursuant to Regulation 57 of the MLRs. The Decision Notice was issued because the Authority had decided Moneybrain had deliberately and recklessly published on its websites misleading marketing and promotional material relating to the

Tokens, and so lacked probity, and in consequence was not a "fit and proper person" within the meaning of Regulation 58A of the MLRs.

14. On 8 June 2022, the Authority received an email from Mr Farr, Moneybrain's adviser, citing the following passage from the Authority's website:

> "The FCA may publish such information about the matter to which a decision notice or final notice relates as it considers appropriate. If you refer a decision notice to the Upper Tribunal, the facts and matters in the notice may be made public before your reference to the tribunal is concluded. You can object to early publication in relation to the decision notice and you will be provided with details about how to do this when you are given the notice."

15. Mr Farr asked the Authority how Moneybrain could object to publication of the Decision Notice. The Authority responded on 8 June 2022, saying:

> "The MLRs do not currently give the FCA the power to publish a decision notice setting out the FCA's decision to refuse a firm's application for registration as a cryptoasset business. Accordingly, the [Authority's] understanding is that the decision notice given to Moneybrain will not be published."

16. On 24 June 2022, Moneybrain made the Reference, which included the Suspension Application. In its Reference Notice, Moneybrain recorded that the Authority had "informed the firm to seek professional advice" but added that "at this time the firm does not have a legal representative engaged".

17. A hearing of the Suspension Application took place before me on 23 August 2022, by video. No application had been made for the hearing to be held in private. Prior notice of the hearing was published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings.

18. On 13 September 2022, the Tribunal clerk at my direction emailed a draft of the Judgment to the parties on a confidential basis, to allow them the opportunity to notify the Tribunal of any clerical mistakes or errors arising from an accidental slip or omission. The parties were required to respond by 16 September 2022.

19. Mr Farr replied the same day, applying in the following terms for an extension of time:

> "The Authority made a secondary disclosure yesterday of 20 further documents, which the Applicant has not yet received which have a potential to material errors or omissions; and the Applicant Director suffered a family bereavement last night, to which he is responsible for making the funeral arrangements."

20. At my direction, the Tribunal clerk responded as follows:

> "The application from the Applicant dated 13 September 2022 for an extension of time has been passed to Judge Redston. She reminds the Applicant that only clerical mistakes or errors arising from an accidental slip or accidental omission in the draft decision on the Suspension Application can be submitted for consideration; this does not include making fresh submissions relating to new documents which were not before the Tribunal at the time of the hearing.
>
> In view of the family bereavement, Judge Redston has agreed to a short extension until 21 September for the parties to provide any suggestions for corrections. This extension applies to both parties."

21. The further disclosure of documents by the Authority to Moneybrain took place on 16 September 2022.

22. On 21 September 2022 at 13.40, the Authority provided the Tribunal with a list of four minor typographical errors in the Judgment. On the same day at 15.10, Withers LLP ("Withers") informed the Tribunal that it had been newly instructed by Moneybrain, and made the following application ("the Extension Application"):

> "Whilst our client has a number of observations on the draft judgment, we also wish to make detailed representations as to the timing of publication of the interlocutory decision as well.
>
> In addition, the position has been further complicated by disclosure by the Authority last Friday 16 September (after the draft judgment was handed down for comment) of material which has the potential at least to impact upon the decision made following the hearing.
>
> We are currently considering carefully the appropriate response to each of these issues and at the same time urgently familiarising ourselves with the underlying facts and matters.
>
> In the circumstances we respectfully request a further adjournment until close of business this Friday 23 September to write more substantively in respect of all the issues now identified."

23. In the evening of 21 September 2022, I drafted an interlocutory judgment refusing the Extension Application, which included the following points:

(1) The Judgment set out the outcome of the hearing in which both parties participated. The text was circulated in draft only to allow typographical and similar mistakes to be identified.

(2) The Suspension Application was decided by the Judgment, and it was too late for the parties to make additional submissions on new evidence which was not before the Tribunal at the time of that hearing. Any such new evidence and submissions could be put forward at the hearing of the Reference.

(3) The Judgment had been amended to incorporate the corrections put forward by the Authority.

(4) As Moneybrain had not identified any clerical errors or omissions in the Judgment by the deadline (which had already been extended following Moneybrain's earlier application), I was releasing it for publication.

24. On Thursday 22 September 2022, the following events took place:

(1) In an email timed at 8.54 I directed the Tribunal clerk to issue the judgment refusing the Extension Application.

(2) By a second email timed at 8.55 I directed that she issue and publish the Judgment, and also make arrangements for the hearing of the Reference to be expedited.

(3) At 10.54, the judgment refusing the Extension Application was emailed to the parties.

(4) The Tribunal clerk applied for and received a Neutral Citation Number, and at 12.05, emailed the Judgment to the parties.

(5) At 15.13 Withers filed the Privacy Application. I spoke to the Tribunal clerk by phone, established that the Judgment had not yet been published on the Tribunal

website or sent to the National Archives, and directed that she delay publication pending my consideration of the Privacy Application.

25. I considered the Privacy Application over the weekend and on Monday 26 September 2022 directed that if the Authority wished to respond it was to do so as soon as possible, and by no later than 4pm on 30 September 2022.

26. On 30 September 2022:

(1) at 12.25, Withers filed and served the Recusal Application, by which Moneybrain applied for me to recuse myself from deciding the Privacy Application and from future involvement with the case;

(2) at 15.49, the Authority filed and served its Response to the Privacy Application;

(3) at 16.14, Withers filed further submissions in relation to the Privacy Application ("the Further Submissions"), together with an unsigned witness statement from Mr Lee Birkett, Moneybrain's owner and sole director; a signed witness statement was filed and served at 16.36.

27. My decision refusing the Recusal Application was issued to the parties on 7 October 2022. After the issuance of that decision, but on the same day, I decided it was in the interests of justice to allow each party to file a submission ("the Additional Submission") in relation to the Privacy Application, responding to new points raised by the other party in the submissions they had made on 30 September 2022, and also that they provide:

(1) submissions on any case law authorities which have considered the principles to be applied in relation to delaying publication of a judgment, in contrast to not publishing the judgment; and

(2) any case law, legislation, guidance or commentary as to the principles the Authority is required to follow when publishing decision notices of the sort issued to Moneybrain, together with any related submissions as to whether those principles are relevant to the Privacy Application.

28. The parties' Additional Submissions were received on 18 October 2022; Moneybrain confirmed at the same time that it would not be appealing my decision refusing the Recusal Application.

THE GROUNDS, THE WITNESS EVIDENCE AND THE AUTHORITY'S POSITION

29. The Privacy Application, as supplemented by the Further and Additional Submissions, and by Mr Birkett's evidence, was made on the grounds summarised below and set out more fully in the later passages of this decision.

(1) The Authority cannot publish the Judgment and "thus the findings made by the Authority are not currently in published form and that will remain the case up to the point a Final Notice is issued". If the Tribunal were to publish the Judgment, it would undermine this "statutory bar".

(2) The Tribunal does not invariably publish its interlocutory judgments, including those decided pending a reference.

(3) It would be unfair to publish the Judgment because "the impact of public findings that it lacks probity are potentially very serious and may even pose an existential threat" to Moneybrain and to businesses linked to Mr Birkett.

(4) The Judgment includes findings of fact which "might suggest that the Tribunal has already found that the Applicant lacks probity" and "findings which have, at the very least, established a case to answer that the Applicant lacks probity".

(5) The Suspension Application was heard on the basis of limited documents prepared by the Authority and did not include the documents subsequently disclosed; the evidence given at the hearing was also limited.

(6) The precedent value of the Judgment is limited.

(7) Any delay is limited, as the Tribunal has directed that a hearing of the Reference be expedited.

(8) The Decision Notice was not the result of a disciplinary or regulatory enquiry initiated by the Authority.

(9) Taking into account all relevant factors, it is not in the interests of justice for the Judgment to be published until after the hearing of the Reference and the issuance of the related judgment; the same applies to the Tribunal's judgment refusing the Recusal Application.

30. The Authority opposed the Privacy Application, for the reasons set out later in this decision.

ISSUE ONE: WHETHER THE JUDGMENT ALREADY IN THE PUBLIC DOMAIN

31. Under this heading I consider whether the handing down of the Judgment meant that it was already in the public domain, together with the consequences which follow from the hearing having been in public.

THE HANDING DOWN

32. As is clear from the above summary of the background facts, the final Judgment was issued to the parties by email on 22 September 2022 at 12.05. The Privacy Application was not received until 15.13 of the same day, and it asked that "publication should…not occur until after disposal of the substantive appeal". The Further Submissions similarly asked that "publication should properly be delayed pending conclusion of the appeal".

33. On behalf of the Authority, Mr Temple submitted that once a judgment has been "handed down" to the parties, it is a public document and the parties are "free to act on it, to discuss it or to publicise it". He relied on *AG v Crosland* [2021] UKSC 58 ("*Crosland 2*"), a case which follows two earlier Supreme Court judgments, *R (Friends of the Earth and Plan B Earth v Heathrow Airport Ltd* [2020] UKSC 52 ("*FoE*") and *AG v Crosland* [2021] UKSC 15 ("*Crosland*"), all of which refer to Supreme Court Rules. Mr Temple also relied on *R (Counsel General for Wales) v BEIS* [2022] EWCA Civ 181 ("*CGW*"), which referred to the Civil Procedure Rules ("the CPR").

34. I first set out the procedural rules which underpin those judgments, and then consider the cases themselves and how they are relevant to Moneybrain's position.

The procedural rules

35. Rule 28 of the Supreme Court Rules provides that "a judgment may be (a) delivered in open court; or (b) if the Court so directs, promulgated by the Registrar". PD6.8 of those Rules states that "judgments are given on a day notified in advance"; that copies of judgments may released in advance to the parties' lawyers to check for corrections, and that "authorised members of the media may on occasion be given a printed copy of the judgment in advance by the Court's communication team" with the proviso that such advance copies are "not for publication [or] broadcast…before judgment has been delivered".

36. The CPR at paragraph 2.4 of PD40E provides that a court may provide a copy of a judgment in draft to the parties in confidence, provided that "neither the draft judgment nor its substance is disclosed to any other person or used in the public domain" and that "no action is taken (other than internally) in response to the draft judgment, before the judgment is handed down".

The case law

37. The second claimant in *FoE,* Plan B Earth ("Plan B") was represented by Mr Crosland, an unregistered barrister. The Supreme Court issued an embargoed copy of the draft judgment to Mr Crosland and others in confidence, in accordance with PD6.8 referred to above. Mr Crosland deliberately disclosed the outcome of the appeal to the Press Association and by posting on Plan B's Twitter account. The Attorney General applied to commit Mr Crosland for contempt. The Supreme Court agreed he had committed criminal contempt and decided he should be fined, see *Crosland.* In the course of its judgment, the Court said at [25]:

> "…the Attorney General has correctly referred to the powerful public interest in the court's being able to circulate draft judgments confidentially among the parties prior to their being handed down in complex and important cases so that typographical mistakes and other errors can be addressed and a final definitive version of the judgment can be handed down, so that the parties can prepare submissions on consequential matters and so that the parties can prepare themselves for the consequences of the judgment becoming public. These are matters of importance to the administration of justice."

38. Mr Crosland appealed the fine and the related costs. The Supreme Court in *Crosland 2* at [58] confirmed that Mr Crosland had acted in contempt, because he had provided information about the draft judgment "in advance of the hand down" and "in the hours before the judgment was handed down". The Court also said at [60] that the judgment "was due to be handed down the following day, and that Mr Crosland would then be free to publicise all of his criticisms of its reasoning and his concerns about its consequences". There is a similar statement at [73].

39. The issue in *CGW* was that the parties had been provided with a draft judgment for corrections in accordance with PD40E and the related Practice Guidance. However, the chambers of the barristers acting for one of the parties had published information about the judgment on its website, on LinkedIn and on Twitter, because a staff member thought "the date of hand-down was a day earlier than it actually was". Vos LJ, giving the only judgment with which Davies and Dingemans LJJ both agreed, criticised the barristers, saying at [26] that drafting press releases to publicise a set of chambers fell outside the terms under which the draft judgment had been made available, but that it "would be different if a corporate party wished to issue a press release immediately on hand down to explain to the public what had occurred in the judgment". He added at [29] that the purpose of issuing a judgment in draft includes allowing the parties "to prepare themselves for the publication of the judgment".

The Tribunal's view

40. Although the Tribunal Rules do not contain specific provisions on the handing down or publication of judgments, in practice the Tribunal follows the same approach as the courts, circulating draft judgments after a hearing to the parties in confidence so they can check for typographical and similar errors. There is thus no basis for distinguishing the Tribunal's position from that of the courts.

41. I agree with Mr Temple that it is clear from the above case law that once a "final definitive version" of a judgment has been "handed down", it has entered the public domain. I note in particular:

(1) The Supreme Court said in *Crosland* that once a "final definitive version of the judgment" is handed down, the "parties can prepare themselves for the consequences of the judgment becoming public".

(2) In *Crosland 2,* the Supreme Court confirmed that Mr Crosland was guilty of contempt because he had provided information about the draft judgment "in advance of the hand down" and "in the hours before the judgment was handed down", but said that after hand down "Mr Crosland would then be free to publicise all of his criticisms of its reasoning and his concerns about its consequences".

(3) In *CGW,* the barristers had breached the embargo by publishing information about the judgment because the relevant staff member thought "the date of hand-down was a day earlier than it actually was". This carries the obvious inference that the judgment was public after hand down.

(4) That inference is confirmed by Vos LJ's statement that a corporate party could have used the draft judgment so as to prepare a press release to be issued "immediately on hand down to explain to the public what had occurred in the judgment".

42. The "public" status of a judgment is thus not dependent on whether a party, or the court, has published the judgment on its website or elsewhere. Instead, once a judgment has been handed down to the parties in final form, with no conditions as to confidentiality, it is a public document and can be shared or otherwise publicised.

43. In the context of Moneybrain, it follows that the Judgment became public when it was emailed to the parties at 12.05 on 22 September 2022, and so was already in the public domain when the Privacy Application was made. As the Judgment is already public, the parties are free to publicise it, and the Tribunal would be required to provide a copy to any person on request.

HEARING HELD IN PUBLIC

44. I next considered the consequences of the hearing itself having been in public.

The Rule and the case law

45. Rule 37 of the Tribunal Rules is headed "Public and private hearings", and it begins:

> "(1) Subject to the following paragraphs, all hearings must be held in public.
>
> (2) The Upper Tribunal may give a direction that a hearing, or part of it, is to be held in private.
>
> (2ZA) Without prejudice to paragraph (2), the Upper Tribunal may direct that a hearing, or part of it, is to be held in private if—
>
> > (a) the Upper Tribunal directs that the proceedings are to be conducted wholly or partly as video proceedings or audio proceedings;
> >
> > (b) it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing;
> >
> > (c) a media representative is not able to access the proceedings remotely while they are taking place; and

> (d) such a direction is necessary to secure the proper administration of justice."

46. In *Banerjee v HMRC* [2000] EWHC 1229 (Ch) ("*Banerjee*"), the Appellant, Dr Banerjee, had not applied in advance of the hearing for her case to be in private. Henderson J (as he then was) circulated his judgment in draft, and Dr Banerjee applied for it to be anonymised. Henderson J refused her application for a number of reasons, one of which was set out at [38]:

> "The preponderance of English authority supports the view that once material has been read or referred to in open court, it enters the public domain. It seems to me that there is a need for a clear and simple rule on this point, which reflects the principle of open justice, and which can be overridden, if at all, only in exceptional circumstances where the interests of justice so require."

47. Henderson J added that the CPR allowed any member of the public to obtain a transcript of the hearing on payment of a fee, just as that person could have attended the hearing and made notes. He concluded by saying "the touchstone, in my view, is whether the hearing in question is held in public, not whether it is in fact attended by any member of the public".

48. Although the CPR does not apply to the Tribunal, the same approach is followed, and any person can apply to the Tribunal for a transcript of a hearing which has been heard in public.

49. In *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013] QB 618 ("*Guardian News*") the Court of Appeal carefully analysed the law on access to documents referred to during the proceedings. It concluded that "the default position should be that access should be permitted on the open justice principle" and this extended not only "to the parties' written submissions and arguments, but also to the documents which have been placed before the court and referred to during the hearing". That approach was endorsed by the Supreme Court in *Dring v Cape Intermediate Holdings Ltd* [2019] UKSC 38 ("*Dring*"), but that Court added at [45]:

> "…although the court has the power to allow access, the applicant has no right to be granted it (save to the extent that the rules grant such a right). It is for the person seeking access to explain why he seeks it and how granting him access will advance the open justice principle."

50. The Court went on to say that the open justice principle must be balanced by the possible harm which disclosure may cause "to the maintenance of an effective judicial process or to the legitimate interests of others", adding that the practicality and proportionality of granting access were also relevant considerations.

51. It is clear from the above that:

(1) if a hearing is in public, any person can apply for a transcript (*Banerjee,* applying the CPR; the same approach is taken by the Tribunal);

(2) once material has been read or referred to in open court, it enters the public domain (*Banerjee*);

(3) any person can apply for copies of that material (*Guardian, Dring*); and

(4) in deciding whether to grant the application, the open justice principle applies, subject to the factors referred to in *Dring.*

Application to Moneybrain

52. Moneybrain made no application under Rule 37(2) for the hearing of the Suspension Application to be in private. Although Rule 37(2ZA) allows video hearings to be in private, but no direction to that effect was given. Instead, prior notice of the hearing was published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join remotely in order to observe the proceedings. Although no member of the public or the media made such an application, that makes no difference: as Henderson J said in *Banerjee,* "the touchstone…is whether the hearing in question is held in public, not whether it is in fact attended by any member of the public". It follows that any member of the public can apply for a transcript of the Suspension Application hearing, and can also apply to see the documents referred to in that hearing.

CONCLUSION ON ISSUE 1

53. It follows from the above that:

(1) the Judgment entered the public domain when it was handed down to the parties; it can therefore be copied and distributed, and any person could apply to the Tribunal for a copy; and

(2) as the hearing was in public, any person may apply for a copy of the transcript of the hearing, and/or to obtain copies of documents referred to in the hearing, including the Decision Notice.

ISSUE 2: WHETHER THE TRIBUNAL SHOULD PUBLISH THE JUDGMENT

54. Mr Mansell submitted that:

(1) the Tribunal should not publish the Judgment, because to do so would undermine a "statutory bar" preventing the publication of the Decision Notice by the Authority; but

(2) if that submission were to be rejected, the Tribunal should nevertheless exercise its case management discretion and decide to delay publication,

55. Mr Temple disagreed with both those submissions. I first consider the "statutory bar" issue and then the exercise of my case management discretion.

THE "STATUTORY BAR"

56. The Decision Notice was issued on 30 May 2022. At that time the MLRs contained no provision allowing the Authority to publish decision notices refusing registration. With effect from 11 August 2022, Regulation 59 of the MLRs was amended to include the following provisions:

> "(6) where
>
> (a) the registering authority decides not to register an applicant, the authority may, if it considers it proportionate to do so, publish such information about that decision as the authority considers appropriate;
>
> (b) …
>
> (7) Where the supervisory authority publishes information under paragraph (6) and the person whose registration is refused…refers the matter to the Upper Tribunal, the supervisory authority must, without delay, publish information about the status of the appeal and its outcome in the same manner as that in which the information was published under paragraph (6)."

57. Mr Mansell submitted that that these amendments "cannot have retrospective effect" and thus the Decision Notice "cannot be published". Mr Temple said that the Authority

reserved its position on whether it was now permitted to publish decision notices issued before 11 August 2022, but nevertheless confirmed that the Authority would not publish the Decision Notice.

58. As far as the Tribunal is aware, Moneybrain itself has not published the Judgment or made details of the Decision Notice known to any persons, other than to Mr Farr and its legal advisers. Some limited information is already in the public domain by virtue of Schedule 3 paragraph 3 of the Tribunal Rules. This is entitled "Register of references and decisions", and includes the following provisions:

> "(1) The Upper Tribunal must keep a register of references and decisions in financial services cases….
>
> (2) The register must be open to inspection by any person without charge and at all reasonable hours.
>
> (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—
>
> > (a) any unfairness to the applicant or…any prejudice to the interests of consumers that might otherwise result;
> >
> > (b) as regards a reference in respect of a decision of the Financial Conduct Authority, any detriment to the stability of the UK financial system;…"

59. Moneybrain did not make an application under Schedule 3, paragraph 3(3) for details of the Reference to be excluded from the Tribunal register, and it therefore includes Moneybrain's name and the fact that it has made a reference to the Tribunal following the issuance of a decision notice by the Authority, but it contains no details of the content of the Decision Notice.

If the Judgment were to be published

60. Although (a) the Judgment is already in the public domain as the result of being handed down, and (b) the hearing was in public, it is nevertheless clear from the foregoing that the only persons currently aware of the Decision Notice are the parties themselves, their advisers, and the Tribunal.

61. That position would change if the Judgment were to be published on the Tribunal website, the National Archives site and other legal websites, because the Judgment opens by recording that the Authority refused Moneybrain's application for registration under the MLRs, and continues:

> "The Authority issued the Decision Notice because it decided Moneybrain had deliberately and recklessly published on its websites misleading marketing and promotional material relating to the Tokens, and so was not a "fit and proper person" within the meaning of Regulation 58A of the MLRs."

62. Mr Mansell submitted that, as a result, publication of the Judgment:

> "would undermine the statutory restriction on publication in force at the date the Decision Notice was issued, since by necessity it makes reference to the matters contained within it."

63. I reject that submission for the following reasons:

(1) The provision amending the MLRs is not expressed to apply only to decision notices issued from 11 August 2022. It simply states that the Authority "may, if it

considers it proportionate to do so, publish such information about that decision [to refuse registration] as the authority considers appropriate". It is thus plainly arguable that the Authority could publish the Decision Notice issued to Moneybrain should it decide to do so, and that there is no "statutory restriction on publication".

(2) Even if the amendment were to apply only to decision notices issued on or after 11 August 2022, that would only prevent publication of the Decision Notice by the Authority. There is no statutory restriction on the publication of a related judgment by the Tribunal.

(3) If Mr Mansell were to be right that a Tribunal could not publish any judgment which referred to an MLR decision notice issued before 11 August 2022, that would not only prevent the publication of judgments deciding suspension applications and other interim matters, but also of final substantive judgments following Tribunal references. Such an outcome would be a significant and entirely unjustifiable interference with the fundamental principle of open justice, see further §66 below.

(4) Moreover, two such judgments have already been published. *Gidiplus v FCA* [2022] UKUT 00043 (TCC) ("*Gidiplus*") and *Vladimir Consulting Limited v FCA* [2022] UKUT 00168 ("*Vladimir Consulting*") both decided suspension applications made following MLR decision notices issued before 11 August 2022.

64. Having rejected Mr Mansell's submission on the existence and effect of a statutory restriction on publication, I move on to considering the Tribunal's case management discretion.

CASE MANAGEMENT DISCRETION

65. Both parties agreed that as the Judgment has not yet been published by the Tribunal on its website or issued to the National Archives (or to other legal websites), the Tribunal has a case management discretion as to whether to delay publication, and that the starting point was the principle of open justice.

THE PRINCIPLE OF OPEN JUSTICE

66. It was common ground that, as Mr Mansell put it, "the general principle is that justice is to be administered by the courts in public so as to be open to public scrutiny". In *Dring* at [2], the Supreme Court approved the following passage from Toulson LJ's judgment in *Guardian News*:

> "Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? It is an age old question. *Quis custodiet ipsos custodes*—who will guard the guards themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse."

67. The Supreme Court also held as follows:

> "42. The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the way in which courts decide cases—to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly…
>
> 43. But the second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and

> why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases…"

68. In *Mohamed*, the issue in dispute was whether certain passages should be redacted from a judgment before publication on grounds of national security. Lord Judge said at [41]:

> "where litigation has taken place and judgment given, any disapplication of the principle of open justice must be rigidly contained, and even within the small number of permissible exceptions, it should be rare indeed for the court to order that any part of the reasoning in the judgment which has led it to its conclusion should be redacted. As a matter of principle it is an order to be made only in extreme circumstances."

69. Lord Neuberger added at [176]:

> "…the court should administer justice in public, which means that all parts of a judgment should be publicly available, unless there is a very powerful reason to the contrary. This principle is so important not merely because it helps to ensure that judges do not, and do not appear to, abuse their positions, but also because it enables information to become available to the public. What goes on in the courts, like what goes on in Parliament or in local authority meetings or in public inquiries, is inherently of legitimate interest, indeed of real importance, to the public. Of course, many cases, debates, and discussions in those forums are of little general significance or interest, but it is not for the judges or lawyers to pick and choose between what is and what is not of general interest or importance (save where, as in the present instance, it is a factor to be placed in the balance, in a case where it is said that it is in the public interest to have the hearing in private or to redact material from a judgment)."

70. Lord Neuberger re-emphasised this at [184], saying that "in any case where a judgment is being given, there is a significant public interest in the whole judgment being published".

71. In *A v BBC* [2014] UKSC 25, Lord Reed, giving the judgment of the Court, said at [23]:

> '…it is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy."

72. However, he accepted that there were situations in which an exception should be made, saying at [41]:

> "Whether a departure from the principle of open justice was justified in any particular case would depend on the facts of that case…the court has to carry out a balancing exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the information in question in advancing that purpose and, conversely, any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others."

73. In Mr Temple's submission, it is clear from the principles set out above that courts and tribunals should "always strive to achieve open justice to the full extent possible" and that where, as here, the hearing was in public "a closed or redacted judgment is not appropriate". He added that as the Privacy Application had been made after the Judgment had been handed down following a public hearing, the outcome of the Tribunal's exercise of its case management discretion was a foregone conclusion: Moneybrain's application, he said, amounted to "trying to put the genie back in the bottle".

74. Mr Mansell's position was that a short-term and temporary exception to the open justice principle should be granted, for reasons which are discussed in the remaining parts of this judgment.

75. I agree with Mr Mansell that when a party has applied for privacy on the basis that an exception to the open justice principle applies, the Tribunal should conduct a balancing exercise. It is clear from the case law considered above that in doing so particular weight must be given to the following:

(1) the fact that the Judgment is already in the public domain;

(2) the fact that the hearing was in public; and

(3) the principle that "all parts of a judgment should be publicly available, unless there is a very powerful reason to the contrary".

76. However, none of those factors is necessarily determinative, so the outcome is not a foregone conclusion.

77. Both parties made extensive submissions as to what should be taken into account when conducting the balancing exercise, and I consider each of them below.

INTERLOCUTORY DECISIONS

78. Mr Mansell said that as the Judgment was an "interlocutory" decision, it should not be published until after Moneybrain had challenged the Decision Notice at the hearing of the Reference.

Whether the Judgment was an "interlocutory" decision

79. I first considered the meaning of an "interlocutory" decision. The Oxford English Dictionary defines it as a judgment "pronounced during the course of an action; not finally decisive of a case or suit". Jowett's Dictionary of English Law similarly says that "a proceeding or application is interlocutory when it is peripheral to the main hearing determining the outcome of the case, whether before or after judgment", and that the concept includes interim injunctions and applications for disclosure. It goes on to note that since the introduction of the CPR, the term "interlocutory" has largely been replaced by "interim".

80. I therefore agree with Mr Mansell that an application to suspend a decision notice pending the hearing of a reference is "interlocutory" in the sense that it does not decide the substantive issue in dispute, namely whether to uphold or set aside the Decision Notice.

The approach to be taken to interlocutory judgments

81. Mr Temple submitted that the open justice principle applied equally to interlocutory judgments as to final judgments. He referred to *Hodgson v Imperial Tobacco* [1998] 1 WLR 1056 in which Lord Woolf MR said at 1071, in relation to hearings conducted in chambers rather than in a courtroom:

> "It remains a principle of the greatest importance that, unless there are compelling reasons for doing otherwise, which will not exist in the generality of cases, there should be public access to hearings in chambers and information available as to what occurred at such hearings."

82. I agree with Mr Temple that the open justice principle applies to all judgments and there is no exception for interlocutory judgments. However, in the oft-cited passage from *R (Todner) v Legal Aid Board* [1999] QB 966, Lord Woolf said at [8] that those who initiate proceedings which are conducted in public have in general (my emphasis):

> "…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."

83. Where, as here, a person has received a decision notice, and applied for the effect of that notice to be suspended, that person has not yet had an opportunity to refute what it considers to be "unfounded allegations"; that will only happen at the hearing of the related reference.

84. In consequence, although the open justice principle plainly applies to interlocutory judgments, I agree with Mr Mansell that a limited restriction, such as a delay to publication or temporary anonymisation, pending determination of the substantive issue, may be in the interests of justice.

Applications for decisions to be kept private

85. Both parties referred to the substantial body of case law on privacy applications in this Tribunal. Almost all of these were made in the context of decision notices issued by the Authority under FSMA. I first set out the case law and then summarise the relevant principles, see §104.

Eurolife

86. The earliest authority is *Eurolife Assurance Company Limited v FSA* ("*Eurolife*") (26 July 2002, Case 001) ("*Eurolife*"). The Financial Services Authority ("the FSA"), the predecessor to the Authority, had issued Eurolife with a decision notice under FSMA s 53(4) withdrawing its authorisation to conduct new insurance business, and Eurolife had made a reference to the Financial Services and Markets Tribunal ("the FSMT" or "the Tribunal"), the predecessor to this Tribunal.

87. Eurolife also applied under Rule 17(3) of the FSMT Rules 2001 for the hearing of its reference to be in private. That Rule allowed the Tribunal to direct a private hearing, if having had regard to "any unfairness to the applicant or prejudice to the interests of consumers that might result from a hearing in public" it was "satisfied that a hearing in private would not prejudice the interests of justice".

88. In *Eurolife,* the Tribunal first considered the "unfairness" and "prejudice" provisions of Rule 17(3), and then said at [43]:

> "It seems to us that, if the unfairness or prejudice condition is satisfied, in practice this will tend to have the effect that the interests of justice condition will also be satisfied. If the unfairness or prejudice condition is fulfilled, the interests of justice in the particular case are likely to be better served by the holding of the hearing in private. Nevertheless, the Tribunal must keep in mind the important public interest in open justice, which goes beyond the considerations arising from the circumstances of the particular case under review, and before making a rule 17 direction the Tribunal must in every case be satisfied also that the interests of justice in this more general sense will not be prejudiced."

89. In considering whether it was unfair to Eurolife to hold the hearing in public, the Tribunal said at [32]:

> "It may well be that in the ordinary run of cases reputational risk will not in itself constitute unfairness, but we do not go so far as to say that reputational risk can never give rise to unfairness to the applicant. It might be unfair if, for example, the reputational damage occurring during the progress of the hearing might be such as to destroy the applicant's business. The suffering of

disproportionate damage would be unfair. It is necessary to consider the circumstances of each particular case."

90. The Tribunal also said that:

> "The Tribunal is unlikely to be influenced by a 'ritualistic assertion' of unfairness or prejudice...The applicant will need to produce cogent evidence of how the unfairness or prejudice may arise. However, the expression 'might result' recognises the inherent difficulty of assessing in advance the likelihood of unfairness or prejudice. The applicant is not required to demonstrate on a balance of probabilities that unfairness or prejudice would result. The Tribunal will consider the evidence presented and weigh the degree of risk."

91. Subsequent Tribunals deciding privacy applications have adopted and followed those principles. In addition, they have also taken into account a change to FSMA, as explained below.

The change to FSMA

92. Until 2010, FSMA prevented the FSA and then the FCA from publishing its decision notices. This changed with the Financial Services Act 2010, which amended FSMA s 391 so that it included the following provisions:

> "(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 FCA 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."

93. As is clear from s 391(4), the Authority now has an obligation to publish notices issued under FSMA, unless the conditions in subsection (6) are satisfied.

Subsequent judgments in FSMA-related privacy applications

94. In *Arch Financial Products LLP and others v FSA* [FS/2012/20] ("*Arch*"), the applicants had asked the Tribunal to bar the Authority from publishing their decision notices, and had also applied for the Tribunal's register of references to be amended to remove the applicants' names.

95. Although the detailed provisions in the FSMT Rules referring to "unfairness" and "prejudice" considered in *Eurolife* are not replicated in Rule 37 of the Tribunal Rules, similar restrictions applied to the publication of decision notices by the Authority, because FSMA s 391(6) prevented the publication of a decision notice if it would be "unfair" to the applicant and/or "prejudicial to the interests of consumers" to do so.

96. The Tribunal (Judge Herrington) referred at [20] to the fact that FSMA s 391 had been amended by the Financial Services Act 2010, and said that this:

> "[20] …gives rise to a presumption that publication will be the norm in that Section 391(4) states that the FSA "**must** publish such information about the matter to which a decision notice or final notice relates as it considers appropriate" (emphasis added)…
>
> [21] Section 391(6), which provides an exception to the general provision in Section 391(4), applies in identical terms to both decision notices and final notices. It provides no additional factors….
>
> [22] It must therefore be assumed that Parliament did not intend that any additional criteria should be applied because it was extending the power to publish to decision notices, knowing, as it is presumed it did, that a decision notice remained open to challenge in the Tribunal in a way that a final notice did not. This statutory framework therefore does not give rise to the presumption that a different approach is dictated by the fact that the decision notice itself is…provisional if challenged in the Tribunal. Parliament has now decided that the fact that proceedings are pending in the Tribunal should no longer be a bar to publishing the decision notice, subject to the exercise by the FSA of its discretion not to publish in Section 391(6) and the exercise by this Tribunal of its discretion under Rule 14.
>
> [25] I am however not concerned directly with the basis on which the FSA has taken the decision to publish the Decision Notices…The Tribunal must make its own decision based on the relevant factors to be considered in the context of an application under Rule 14 but it should do so against the background of a statutory framework that clearly gives rise to a presumption that the FSA will in normal circumstances publish decision notices in the same manner as it publishes final notices, subject to the terms of the policy that it has adopted in that regard."

97. In deciding whether to publish the decision notice, and whether to exclude the reference from the Tribunal's register under Schedule 3 paragraph 3(3) of the Rules, Judge Herrington considered *Eurolife* and the wider case law on open justice and found as follows:

(1) a "ritualistic assertion" of unfairness or prejudice is unlikely to be sufficient, see [34] of the judgment;

(2) the risk of damage to reputation will not of itself normally be unfair; it is the suffering of disproportionate damage that could be unfair; a high level of public interest does not, in itself, take matters out of the ordinary run of the mill cases where publication can have a detrimental effect on reputation, see [36] and [49];

(3) there was already significant information in the public domain concerning the issue in question, see [53]; and

(4) the embarrassment to a party that could result from the publicity and might draw that party's clients and others to ask questions that the party would rather not answer does not amount to unfairness, see [41].

98. Judge Herrington then said

> "[44] Therefore, in carrying out the balancing exercise that I referred to in paragraph 27, it starts with the scales heavily weighted in favour of publication with the burden on the Applicants to produce cogent evidence of how unfairness may arise and how they could suffer a disproportionate level of damage if publication were not prohibited.

> [45] This starting point is also influenced in this case by the statutory scheme for publication set out in Section 391 of FSMA. The fact that it treats decision notices and final notices on the same footing is a matter that again weighs in favour of publication although I do accept that regard has to be paid to the fact that a decision notice that is being challenged in the Upper Tribunal is necessarily provisional…"

99. He went on to dismiss the applications, but ended his judgment by saying at [63]:

> "I should however, express my concern that it is important that adequate steps are taken when publicising the Decision Notices to ensure that it is clear that the decisions are provisional in the light of the fact that they are being challenged in the Upper Tribunal…any press release issued by the FSA should state prominently at its beginning that the Applicants have referred the matter to the Upper Tribunal where each will present their case and the Tribunal will then determine the appropriate action to take, which may be to uphold, vary or cancel the FSA's decision. I understand this formulation to have been used in previous cases of publication. Likewise in referring to the findings made, rather than give any suggestion of finality they should be prefaced with a statement to the effect that they reflect the FSA's belief as to what occurred and how the behaviour concerned is to be characterised. The dismissal of the Applications is therefore conditional upon compliance with these principles."

100. In *Angela Burns v FCA* [2015] 5 UKUT 0601 ("*Burns*"), which also concerned a privacy application in the context of FSMA and Schedule 3(3), Judge Herrington again considered the issue of damage, saying:

> "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…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."

101. The principles established in *Arch* and *Burns* have been consistently followed and applied in subsequent cases, see for example *PDHL v FCA* [2016] UKUT 0129 (TCC) ("*PDHL*").

102. In *Prodhan v FCA* [2018] UKUT 00414 (TCC) ("*Prodhan*"), Judge Herrington dismissed the privacy application, but said at [84] that his judgment would only be published on the Tribunal's website after the decision notice had been published, and directed that the Authority inform the Tribunal when this had happened, see [84]. The same approach has been taken in subsequent cases.

103. Judge Herrington added that Mr Prodhan's concerns about possible misreporting could be mitigated if he and his employer were "to conduct a press campaign of their own". To allow them "adequately [to] prepare for the consequences of publication", he directed that the decision notice and the judgment were not to be published for a further 21 days, see [79] and [83] of that judgment. A similar approach was taken in *Foley v FCA* [2020] UKUT 169 (TCC), to give Mr Foley time to discuss the situation with his employer, and in *Frensham v FCA* [2021] UKUT ("*Frensham*"), to allow Mr Frensham time to explain the position to his clients.

Summary of the relevant principles

104. The principles established by the FSMA-related case law which are arguably relevant to Moneybrain's position are as follows:

(1) In deciding whether to bar the Authority from publishing a decision notice pending the Tribunal's judgment on the related reference, the scales are "heavily weighted" in favour of publication, because FSMA s 391 gives rise to a presumption that publication by the Authority will be the normal position.

(2) In considering whether s 391 should be disapplied because publication would be "unfair" to an applicant, a "ritualistic assertion" of unfairness is insufficient, instead "cogent evidence" of "disproportionate" damage is required.

(3) A decision notice that is being challenged in the Upper Tribunal is necessarily provisional and that is also a relevant factor, see [22] and [45] of *Arch* cited above.

(4) The Tribunal has consistently made its dismissal of privacy applications conditional on the Authority agreeing to "take adequate steps to ensure that it is clear that the decisions are provisional". Those steps include the following:

(a) any press release should state prominently at its beginning that the Applicants have referred the matter to the Upper Tribunal where each will present their case and the Tribunal will then determine the appropriate action to take, which may be to uphold, vary or cancel the FCA's decision; and

(b) any reference to the Authority's findings should be prefaced with a statement to the effect that they reflect the FCA's belief as to what occurred and how the behaviour concerned is to be characterised, rather than giving any suggestion of finality.

(5) The Tribunal has also consistently directed that judgments refusing privacy applications should only be published after Authority has published the related decision notice.

(6) A further period of delay may also be given to allow the applicant to prepare for the consequences of publication.

Application to Moneybrain

105. As already noted at §54, at the time the Decision Notice was issued, the MLRs contained no power for the Authority to publish decision notices refusing applications for registration. Although Regulation 59 was amended with effect from 11 August 2022, the Authority has confirmed that it will not publish the Decision Notice.

106. There are thus the following differences between Moneybrain's situation and the position of those who made privacy applications related to decision notices issued under FSMA:

(1) There is no presumption that the Authority "must publish" the Decision Notice. Instead:

(a) it is arguable that the Authority has no power to publish the Decision Notice;

(b) even if that is wrong (see §63(1)), Regulation 59(6) provides only that the Authority "may" publish MLR decision notices, it does not say they "must" be published; and

(c) the Authority has confirmed it will not publish the Decision Notice.

(2) If the Authority were to publish the Decision Notice, it would also be required by Regulation 59(7) to "publish information about the status of [Moneybrain's] appeal…in the same manner as that in which the information [about the Decision Notice] was published".

(3) Had the Decision Notice been published, it is reasonable to assume that the Authority would have followed the approach taken in FSMA cases, namely to preface it with "prominent" warnings that the decision was provisional and reflected the FCA's belief.

(4) If information about the Decision Notice reaches the wider public via publication of the Judgment by the Tribunal, it will not be prefaced with "prominent" warnings to the reader that the Decision Notice was provisional or that it reflected "the FCA's belief". That is because:

(a) the purpose of the hearing was to decide whether or not the Decision Notice made "findings capable of demonstrating that Moneybrain failed to meet the conditions for registration as a cryptoasset business" and if so, whether "allowing the Suspension Application would prejudice the interests of persons intended to be protected by the Decision Notice", see [15]-[16] of the Judgment. In contrast, the Authority publishes information about a decision notices so its existence and content will become public knowledge.

(b) It would be inappropriate for the Judgment to prefaced by a warning similar to that which the Authority adds to published decision notices, because the Judgment and the Decision Notice have different purposes.

(c) Even if that were not the position, the Judgment has already been handed down in final form, so it is not possible to amend it so as to include any sort of warning.

107. In summary, the presumption in favour of publication does not apply to the Decision Notice, and the statutory context in which the Tribunal must exercise its discretion on publication is different from that which applies to FSMA-related applications. Moreover, in FSMA cases, the Tribunal's interlocutory decision on privacy is not published before the related decision notice, and those notices are prefaced by "prominent" caveats. Because the Decision Notice is not being published, there are no related warnings as to its provisional nature.

Salih

108. I went on to consider *Salih.* Although not cited by either party, it has a number of striking similarities with Moneybrain's position. A determination had been issued by the Pension Regulator ("the Regulator") under the Pensions Act 2004, prohibiting Mr Salih from being a pension trustee. Section 66 of that Act requires the Regulator to maintain a register of prohibited persons, access to which can only be disclosed as follows:

(1) Section 67(2) allows the Regulator to comply with a request by any person as to whether a particular person appears on the register. Judge Herrington noted at [40] of *Salih* that this allowed "those who have responsibility for appointing trustees of occupational pension schemes…to ensure that they do not appoint somebody who is prohibited from acting as such".

(2) Section 67(3) provides that the Regulator "may" publish a summary of the register containing limited information, including the names of prohibited persons and the extent of the related prohibition. However, s 67(6) provides that a person is not to be identified in that summary if (a) the related determination has been referred to the

Tribunal, and (b) the reference could result in the prohibition being revoked or otherwise overturned.

109. Mr Salih referred the determination to the Tribunal, and he also made the following applications:

(1) that the effect of the determination be suspended;

(2) that the Tribunal register maintained under Schedule 3(3) of the Rules contain no details of his reference; and

(3) that the Regulator be constrained from publishing the determination pending the outcome of the hearing of his reference.

110. Judge Herrington dismissed the suspension application because there was no power under the relevant statutory provisions for the Tribunal to suspend the effect of a determination made by the Regulator.

111. The second issue is considered later in this decision, see §124(7). In relation to the third issue, Judge Herrington said at [23] that as the result of s 67(6), "no particulars regarding Mr Salih's prohibition will be contained in the summary register, which is generally published by the Regulator, pending the determination of his reference". He went on to say at [39] that although the Regulator had power to publish the determination issued to Mr Salih:

> "it was not at present generally its practice to publish a Determination Notice in relation to a matter which has been referred to the Tribunal, pending the determination of the reference and currently had no plans to do so in this case."

112. He recognised that that, as a result of s 67(3), the Regulator would have to provide information about the determination if it received a specific request for information about Mr Salih, but that as the Regulator was not publishing the determination and it could not be included on the summary of the register, then (my emphasis):

> "It is therefore unlikely in practice, **absent the publication of this decision**, that the fact of Mr Salih's prohibition order will generate much publicity."

113. I infer from this passage that there had been no wider publicity given to Mr Salih's determination. Judge Herrington went on to say that although he was dismissing Mr Salih's privacy application:

> "[44] …I do not consider it necessary that there should at this stage be further publicity regarding the prohibition order beyond what is already in the public domain and what might legitimately become known through the rights that currently exist for persons to obtain knowledge of the prohibition order and the fact of this reference, particularly as it was the Regulator who requested me to provide detailed reasons for my decision to dismiss Mr Salih's applications.
>
> 45. I am therefore directing that this decision should not be published on the Tribunal's website until this reference has been finally determined. I therefore direct that it remains confidential to the parties and their advisers in the meantime, although either party has liberty to apply to vary that direction. For example, if the Regulator can demonstrate a good reason for doing so in advance of the determination of Mr Salih's reference I would be prepared to give consideration to the publication of this decision in an anonymized form."

Application to Moneybrain

114. There are a number of useful parallels between *Salih* and Moneybrain's case:

(1) The statutory provisions which applied in *Salih* did not contain a presumption that the Regulator "must" publish the decision notice, but only that it "may" publish a summary of the related information, and publication was not permitted when the decision was the subject of a reference to the Tribunal. In Moneybrain's case there is similarly no presumption that the Authority must publish the Decision Notice (and it may even be legally barred from doing so), and the Authority has confirmed the Decision Notice will not be published.

(2) Information about the Regulator's determination would be available to third parties under s 67(2) if they asked for it, and information about Moneybrain's Decision Notice would be available to third parties if they asked the Tribunal for a copy of the Judgment, and may also be available if they asked for a transcript of the Suspension Application hearing, or for other documents relating to that hearing. Thus, in both cases, a third party could apply for information about the decision.

(3) The fact that the Regulator was not publishing the determination issued to Mr Salih, coupled with the lack of any wider publicity, meant that it was "unlikely in practice, absent the publication of this decision, that the fact of Mr Salih's prohibition order will generate much publicity"; this mirrors Moneybrain's position.

(4) It appears from *Salih* (see [44]) that the decision refusing the privacy application had been handed down orally at the end of the hearing, and that the Regulator then asked for a written judgment. The hand-down therefore predated Judge Herrington decision to delay publication. This is similar to the position in Moneybrain's case, as the Judgment was handed down before the Privacy Application was made.

115. Although Judge Herrington dismissed Mr Salih's privacy applications, he went on to direct that the privacy decision "should not be published on the Tribunal's website until this reference has been finally determined", and that if the Regulator objected, he would be consider publishing the decision "in an anonymized form". Although he did not give reasons for this part of his judgment, I infer that he decided it was not in the interests of justice for information about the determination issued to Mr Salih to reach the wider public via the publication of his interlocutory decision. This is exactly the outcome Moneybrain is seeking by the Privacy Application.

116. There is, however, a key point of distinction between the two cases. Although both Mr Salih and Moneybrain made suspension applications, Judge Herrington dismissed Mr Salih's application essentially because he had no power to consider it, and so the *ratio* of his decision concerns only the privacy issues. In contrast, the sole focus of the Judgment is Moneybrain's Suspension Application, which the Tribunal plainly had power to decide. Under Rule 5(5), the Tribunal can only allow a suspension application if "satisfied" that doing so:

> "would not prejudice –
>
> (a) the interests of any persons (whether consumers, investors or otherwise) intended to be protected by that notice;
>
> (b) the smooth operation or integrity of any market intended to be protected by that notice; or
>
> (c) the stability of the financial system of the United Kingdom."

117. Thus, a Tribunal hearing a suspension application must decide whether the public (consumers, investors or otherwise) will be protected if the applicant were to be allowed to resume operations in the UK pending the hearing of its reference. The key issue for determination thus focuses on the protection of the wider public.

Conclusion on the "interlocutory" point

118. From the above review of the case law and consideration of the related submissions, I conclude as follows:

(1) The Judgment was "interlocutory" because it did not decide the substantive issue in dispute, namely whether to uphold or set aside the Decision Notice; that will only be decided at the hearing of the Reference.

(2) The open justice principle is fundamental to the UK legal system of justice and vital to the rule of law. That principle applies to interlocutory judgments, but because the substantive issue remains to be decided, a court or tribunal may nevertheless apply temporary restrictions on publication pending the hearing of that substantive issue.

(3) In considering privacy applications relating to FSMA decision notices, the Tribunal has consistently held that the scales are "heavily weighted" in favour of publication, because FSMA s 391 gives rise to a presumption that the decision notice will be published. However, the Tribunal has also made its refusal of privacy applications conditional upon the Authority adding a "prominent" warning to the decision notice, which must state that the decision notice is provisional; that it reflects "the FCA's belief as to what occurred" and that the final position remains to be determined by the Tribunal. No such warnings are or can be included on the Judgment, which is already final.

(4) The case of *Salih* engaged different statutory provisions, which prevented publication of the determination until after the final outcome of Mr Salih's reference. In addition, although third parties could apply for information about Mr Salih, no such requests had been made, and there had been no wider publicity. As a result, the public was only likely to find out about the determination if the Tribunal published its interlocutory judgment. On all those points, Mr Salih's position was essentially the same as Moneybrain's, and the Tribunal in *Salih* decided to delay publication of its judgment until after the substantive reference had been determined.

(5) However, the issue in *Salih* was whether the hearing of the reference be in private, whereas the issue decided by the Judgment was whether consumers would be protected if Moneybrain were to be allowed to resume operations pending the hearing of its reference, and the Judgment thus directly engaged the position of the wider public.

119. The interlocutory nature of the Judgment thus gives rise to points both for and against allowing the Privacy Application. I next considered whether refusing to delay publication of the Judgment would damage Moneybrain.

WHETHER PUBLICATION WOULD DAMAGE MONEYBRAIN

120. It was Moneybrain's case that refusing the Privacy Application would cause damage to its own business and to related businesses. I first consider the relevant principles and then the position in Moneybrain's case.

The principles

121. As noted at §78ff, the Tribunal in *Eurolife* had considered whether it would be unfair to hold the hearing in public. It held that the Tribunal was unlikely to be influenced by a "ritualistic assertion" of unfairness; instead an applicant would have to produce "cogent evidence" of how the unfairness may arise. That approach was adopted and applied in *Arch* and further developed in *Burns*; the same principles have also been followed in subsequent cases, such as *PDHL.*

122. In *Eurolife,* the requirement to consider "unfairness" came from Rule 17(3) of the FSMT Rules, while *Arch* was decided against the background of the statutory framework given by FSMA s 391, which prevents the Authority from publishing information about a decision notice if publication would be "unfair" to the person in question.

123. In considering Moneybrain's position, I noted that:

(1) Rule 17(3) has been replaced by Rule 37 of the Tribunal Rules, and that Rule does not specify "unfairness" as a relevant factor when deciding whether or not to hold a private hearing;

(2) the Decision Notice was not issued under FSMA but under the MLRs;

(3) even as amended, Regulation 59 of the MLRs does not refer to "unfairness" but only to the need for the Authority to act proportionately.

124. Given those differences, I went on to consider whether the principles summarised in *Eurolife, Arch* and *Burns* applied to Moneybrain, and decided that they did, for the following reasons:

(1) Although Rule 37 does not specify that "unfairness" must be considered in deciding whether or not to hold a hearing in private, Rule 2(1) provides that "the overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly", and Rule 2(3) reads:.

> "The Upper Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction."

(2) In deciding whether it would be in the interests of justice to hold a private hearing, it is self-evident that one of the factors the Tribunal must take into account is whether it would be "unfair" to the applicant to hold the hearing in public.

(3) In *Eurolife* at [43], the Tribunal similarly identified the overlap between unfairness and the interests of justice, saying that:

> "It seems to us that, if the unfairness or prejudice condition is satisfied, in practice this will tend to have the effect that the interests of justice condition will also be satisfied. If the unfairness or prejudice condition is fulfilled, the interests of justice in the particular case are likely to be better served by the holding of the hearing in private."

(4) That Tribunal went on to say that, in addition to "considerations arising from the circumstances of the particular case under review", it was also necessary to ensure that "the important public interest in open justice" in the wider sense "will not be prejudiced".

(5) The case law on open justice cited earlier in this decision establishes that the threshold for imposing a restriction is very high: see in particular the *dicta* of Lords Neuberger and Judge in *Mohamed* that "all parts of a judgment should be publicly available, unless there is a very powerful reason to the contrary" and that "where litigation has taken place and judgment given, any disapplication of the principle of open justice must be rigidly contained".

(6) The principles identified in *Eurolife, Arch* and *Burns* that a person who is applying for a private hearing must provide "cogent evidence" sufficient to establish a

"significant likelihood" of damage are all consistent with that very high threshold. I therefore find that they apply to non-FSMA cases in the same way as to FSMA cases.

(7) That this is right can also be seen from *Salih.* Although that determination was not issued under FSMA, Judge Herrington adopted the same approach when deciding whether to accept Mr Salih's evidence that he would suffer "irreparable damage" were there to be further publicity; he went on to refuse Mr Salih's application that his determination be excluded from the Tribunal register.

125. In assessing the facts, evidence and submissions made by Moneybrain about the damage which it states would be caused if the Privacy Application were not allowed, I therefore apply the same principles as in previous Tribunal decisions; see §101.

Facts, evidence and submissions

126. Mr Birkett's witness statement opened by setting out the following background facts. None of these were challenged by the Authority and I have taken them to be correct.

(1) As well as being the owner and sole director of Moneybrain, Mr Birkett also has senior management roles at three other companies regulated by the Authority. Taken together these four firms have an annual turnover in excess of £800,000, over 550 customers and 16 employees. Mr Birkett is also the director of other non-regulated entities. His associations with these companies are a matter of public record.

(2) These businesses form a "group structure" which has "attracted considerable investment from a variety of sources" and has "ambitious plans for growth".

127. As explained at §13, Moneybrain had created the Tokens, which were a type of cryptocurrency, and had described them on its websites as "asset backed" and as having "a stable underlying value" which was "firmly based" on assets held by a company linked to Moneybrain via Mr Birkett; the websites also stated that the Tokens "benefitted from compound interest". The basis for the Decision Notice was that the Authority had decided these (and other) statements to be misleading, and that Moneybrain lacked probity because it had deliberately and recklessly published those statements.

128. At the Suspension Hearing, a key part of Moneybrain's case was that its customers and potential customers were not misled by the statements on its websites, because the correct factual and legal position was clearly set out in a "Know Your Asset" document which was downloadable from Moneybrain's website, see [77] and [50ff] of the Judgment.

129. Mr Birkett's evidence in support of the Privacy Application included the following passages (where "MBL" is Moneybrain):

> "…I am confident that when all the evidence is laid bare before the Tribunal, the truth will be established that MBL has been the victim of an inappropriate pre-determined general FCA strategy conceived months before the Decision Notice was issued by the Authority and designed to more generally, inappropriately restrict the number of FCA registered crypto asset firms under the MLRs.
>
> Further, I am confident that examination of all the evidence at the substantive hearing will establish that rather than a proper merits-based decision the probity allegation, upon which the Authority eventually landed, is nothing more than a convenient hook upon which the Authority is now trying to retrofit a decision made long before to refuse MBL registration."

130. However, Mr Birkett also said that if the Judgment were to be published:

> "…I believe that customers and employees of MBL or the other companies with which I am associated will simply conclude that all companies with which MBL is connected lack probity."

131. He added:

> "I am in no doubt that a finding that MBL lacks probity potentially poses an existential threat to not only its business, but to the business of the other firms with which MBL is (through me) connected.
>
> …a finding that MBL lacks probity brings with it a significant risk that other companies with which I am connected will be adversely affected by way of collateral damage and their viability may also be threatened. The contamination risk in relation to an adverse finding of probity is even more acute where a firm is operating in the regulated sector and my associations with other companies are a matter of public record…the potential damage that would be caused to MBL and other companies with which I am associated is significant and very real."

132. On behalf of the Authority, Mr Temple emphasised that Mr Birkett had referred only to the "potential" for damage, and submitted that this fell far short of the "significant likelihood" of harm referred in *Burns*; moreover Mr Birkett had failed to provide any evidence of "any credible causative link between publication of the Suspension Judgment on the Tribunal website and his vague references to damage".

Discussion

133. Moneybrain's position is that if the Judgment were to be published, the Authority's decision that Moneybrain lacked probity would become widely known, and this would cause damage to its own business and to connected businesses.

134. The only evidence in support was that given by Mr Birkett. I agree with Mr Temple that this falls far short of the "cogent evidence" required to establish "a significant likelihood" of damage or destruction. Instead, his statements that publication of the Judgment "potentially poses an existential threat" to Moneybrain and connected companies who "may be threatened" and so suffer "potential damage" are, instead, mere assertions as to possibilities and probabilities without any particularisation.

135. There is a further difficulty. Mr Birkett said that if customers and employees know about the Decision Notice, they will "simply conclude that all companies with which MBL is connected lack probity". However, these unspecified customers and employees must be assumed to act reasonably. They would therefore take into account, not only the Authority's reasons for issuing the Decision Notice, but also Moneybrain's position that it is "confident that when all the evidence is laid bare before the Tribunal, the truth will be established" and that it will be able to show "the probity allegation" to be unfounded, in that customers were not misled by the material on its websites. In other words, reasonable and informed customers and employees would not jump to the conclusion that Moneybrain and other companies with which Mr Birkett is associated lack probity, simply as the result of the publication of the Judgment. Instead, those customers and employees would also consider the counter-arguments and evidence put forward by Moneybrain.

136. Moneybrain thus failed to demonstrate that refusal of the Privacy Application would cause it (or any related business) disproportionate damage.

WHETHER THE JUDGMENT MADE INAPPROPRIATE FINDINGS

137. Moneybrain submitted that the Judgment exceeded the proper scope of the matters to be decided in a suspension application, and its publication should be delayed for that reason.

This submission was made both in relation to findings of fact, and in relation to other findings. Mr Temple said that there was no basis for any of these submissions.

Findings of fact?

138. The Privacy Application said:

> "The judgment as issued gives a clear impression that findings of fact had been made at the suspension application which are in fact live issues in the final determination of the appeal. This is unfortunate, as these findings of fact go beyond the findings that were necessary and appropriate and might suggest that the Tribunal has already found that the Applicant lacks probity, rather than the proper finding that there is a case to answer."

139. I reject that submission for the following reasons:

(1) As stated at [25] of the Judgment, I made only "limited findings" of fact based on the evidence provided; those findings were those "directly relevant to the Suspension Application", and did not include "definitive findings on disputed matters which will be explored in more detail on the hearing of the Reference", and they were made "without prejudice to the position that may be established after full consideration of all the evidence following the hearing of the Reference".

(2) No example of any findings of fact which went "beyond the findings that were necessary and appropriate" was identified in the Privacy Application or in either the Further or Additional Submissions made on Moneybrain's behalf.

Other findings?

140. The Further Submission said that the Judgment:

> "makes findings which have, at the very least, established a case to answer that the Applicant lacks probity (and in certain respects could be taken to suggest findings beyond that assessment)."

141. Although no such findings are identified, Mr Mansell made a similar submission in the Recusal Application, which specified three passages from paragraphs [70], [75] and [88] of the Judgment. In the decision refusing the Recusal Application I considered each of those passages. Reference should be made to that decision for a full analysis, but in summary:

(1) Paragraph [70] says nothing about probity; it instead relates to Moneybrain's submission about the powers of the Authority.

(2) Paragraph [75] is part of the summary of the arguments put by Mr Temple on behalf of the Authority; it is not a statement of the Tribunal's view.

(3) Paragraph [88] relates to the task which the Tribunal is directed by Rule 5(5) to perform, namely to decide whether Moneybrain had shown that the interests of consumers would be protected if the Suspension Application were granted. I decided that issue in favour of the Authority. In so doing I made no finding which went beyond the proper scope of a Tribunal deciding a Suspension Application; instead I made a necessary finding required under the Rules.

142. I therefore reject Moneybrain's submission that the Judgment should not be published because its findings go beyond those which properly fall to be decided following the hearing of a suspension application.

PUBLIC INTEREST IN KNOWING ABOUT THE DECISION NOTICE?

143. Mr Temple said it was "objectionable" for Moneybrain to resist the publication of the Judgment, because:

(1) on 1 April 2022, Mr Birkett had stated publicly that Moneybrain meets "all the criteria" for registration with the Authority; and

(2) although Moneybrain is no longer operating in the UK, it continues to offer and trade in Tokens from a connected company based in Jersey, Moneybrain Global Limited ("MGL"), and that company's website contains a "project document" stating that Moneybrain's application to the Authority is "pending registration".

144. In response, Mr Mansell said:

(1) Mr Birkett had made the statement in April 2022, which was before the issuance of the Decision Notice; and

(2) the quotation from the project document is taken from a timeline, which states Moneybrain's registration was "pending" as at Quarter 1 2021, and this was correct at that time.

145. Mr Temple also submitted that publication of the Judgment will "allow the public to see the true position". Mr Mansell responded by saying that even if Moneybrain and MGL were giving an incorrect impression as to the registration position (which was not accepted), it was no part of the Tribunal's role to counterbalance those allegedly incorrect statements.

146. I agree with Mr Mansell that the principle of open justice does not extend to the Tribunal publishing a judgment in order to correct an alleged erroneous, outdated or incomplete impression given to the general public by one party as to its status in relation to the other party. If the Authority wishes to correct the impression given by MGL as to Moneybrain's registration status, that is a matter it must resolve for itself.

147. The fact that the Judgment may "allow the public to see the true position" is therefore not a relevant factor when deciding whether or not to delay its publication.

PRECEDENT VALUE?

148. Mr Mansell submitted that the Judgment should not be published because its "precedent value" is "limited", especially as the legal principles applicable to suspension applications have recently been set out and applied in *Vladimir Consulting*.

149. Mr Temple disagreed. He referred to [69] of the Judgment where the Tribunal held that in deciding whether a person lacks probity, all relevant matters must be considered, and that this was consistent both with *Frensham* and with the Report issued by Dame Elizabeth Gloster into the Authority's regulation of London Capital and Finance plc. Mr Temple said these were points which "other parties, and other judges, may well find…of assistance".

150. I accept, of course, that some of the principles addressed in the Judgment are also present in *Gidiplus* and *Vladimir Consulting*. However, in addition to the points identified by Mr Temple, the Judgment also:

(1) considered the meaning of the terms "deliberate" and "reckless" in the context of the "fit and proper" test and "probity", see [78]; and

(2) decided that in applying Rule 5(5), a balancing exercise is necessary only where a Tribunal is satisfied that granting a suspension application would not prejudice the interests of consumers, and in so doing clarified the guidance previously given in *Sussex Independent Financial Advisers Limited v FCA* [2019] UKUT 228 (TCC) at [15].

151. The Tribunal's practice is also relevant. Although routine interlocutory decisions which concern only the conduct of proceedings (such as adjournments and extensions of time) are not published, the Tribunal does not divide other decisions into those which a judge considers

to have precedent value (which are published) and the rest. In taking that approach, the Tribunal is acting in accordance with Lord Neuberger's *dictum* in *Mohamed*, that judges should not "pick and choose between what is and what is not of general interest or importance", see the citation at §69 above.

152. Moneybrain's submission that one factor in favour of allowing the Privacy Application is that the Judgment has no precedent value is therefore rejected, both (a) because the Judgment has some precedent value, and also (b) because it is not the practice of this Tribunal to select for publication only those decisions which have precedent value, and that practice is consistent with *Mohamed.*

OTHER POINTS

153. I deal briefly with a number of other points made in the submissions.

The decision refusing the Recusal Application

154. Withers filed and served the Recusal Application on 30 September 2022. It began by explaining its purpose:

> "It is an application that the Learned Judge should recuse herself from making any further judgments, orders or directions in respect of the above reference on the grounds of 'apparent bias' and that all subsequent proceedings, orders and/or directions, including but not limited to, the issue of publication should be determined before a differently constituted Tribunal."

155. My decision refusing the Recusal Application necessarily refers to the content of the Decision Notice and to many paragraphs of the Judgment. If the Privacy Application were to be allowed and publication of the Judgment delayed, the decision refusing the Recusal Application would also have to be delayed.

156. In his Further Submissions, Mr Temple said that "the idea that suggestions of apparent bias can be raised, but the resultant judgment rejecting those suggestions be kept private, even on a temporary basis, is anathema to open justice". I agree that the consequential delay to the publication of the decision refusing the Recusal Application is a further factor in favour of refusing the Privacy Application.

Lack of representation?

157. The Privacy Application seeks to rely on the fact that Moneybrain was not professionally represented at the hearing of its Suspension Application. I place no weight on that factor for following reasons:

(1) In *Barton v Wright Hassell LLP* [2018] UKSC 12 at [18], Lord Sumption said that rules and procedures apply equally to represented and unrepresented parties, and the fact that a party is unrepresented can at most have a limited effect in increasing the weight to be given to some other, directly relevant, factor. Moneybrain has not identified any such relevant factor.

(2) Moneybrain has also not identified any disadvantage which flowed from it being represented at the hearing by Mr Birkett with assistance given by Mr Farr, rather than by a solicitor or barrister.

(3) Moneybrain acknowledged when making the Reference (see §16) that the Authority had "informed the firm to seek professional advice", but Moneybrain had not done so.

Evidence and submissions at the hearing of the Suspension Application

158. The Privacy Application also included the submission that a factor in favour of delaying publication of the Judgment was that it had been issued "on the basis of a bundle of documents selected by the Authority for the purposes of the hearing and the oral representations of the parties". That submission was amended, albeit not explicitly, in the Further Submissions, which say that the Judgment was issued "on the basis of limited documents prepared by the Authority for the purposes of the application and the oral and written representations of the parties".

159. Although the Bundle was put together by the Authority, it contained over three hundred pages provided by Moneybrain. In addition, Mr Birkett provided a skeleton argument in advance of the hearing, and he also had the opportunity to give oral evidence, see [18] of the Judgment.

160. I do not accept that either the contents of the Bundle or the nature or extent of Mr Birkett's evidence and/or submissions are relevant factors when deciding whether to allow or refuse the Privacy Application.

The extra documents

161. On 16 September 2022, in response to an application for disclosure, the Authority provided Moneybrain with further documents, see §21. Those documents were thus not available to Moneybrain at the time of the hearing.

162. The Privacy Application said that a factor in favour of delaying publication of the Judgment was that these new documents "raise issues as to whether the justifications advanced by the Authority to support the refusal of registration will ultimately be borne out". Mr Birkett said in his witness statement that these extra documents "would have been (and will be) highly relevant to the Tribunal's assessment of probity". Although that is a submission and not evidence, Mr Mansell made a similar point, albeit more obliquely.

163. Mr Temple responded by saying that the Authority does not accept (a) that these extra documents make any difference to its decision as to Moneybrain's lack of probity, or (b) that they provide a reason why publication of the Judgment should be delayed.

164. I agree with Mr Temple that is not in the interests of justice to delay issuing the Judgment on the basis that one party is now seeking to rely on documents which were not before the Tribunal at the time of the hearing, especially as the parties disagree as to their significance.

Supersession by the final judgment

165. Mr Mansell also submitted that there was no need to publish the Judgment because "any findings as to probity in the interlocutory judgment will in any event be superseded by the final decision". In my view:

(1) this is, in terms, a submission that the Judgment should not be published because it is interim in nature. I have already given detailed consideration to the interlocutory status of the Judgment, see §78ff;

(2) there no findings as to Moneybrain's probity in the Judgment, see §137ff; and

(3) although there is an overlap between the matters considered at the hearing of the Suspension Application, and those which will be before the Tribunal at the hearing of the Reference, the legal issues are not identical. When hearing the Suspension Application, the issue was whether I could be satisfied that the interests of consumers would be protected were Moneybrain to be allowed to resume operations pending the hearing of the Reference. The issue before the Tribunal at the hearing of the Reference

will be whether to uphold or set aside the Decision Notice. In that sense, the *ratio* of the Judgment will not be displaced by the decision on the Reference.

Not a regulatory or disciplinary Decision Notice?

166. One of the grounds for the Privacy Application was that:

> "This is not a disciplinary case, but an application for registration under the MLRs 2017. The matter has therefore only come to the attention of the Tribunal through the desire of the Applicant to be registered, not as result of a regulatory inquiry. This is an important distinction."

167. Moneybrain's application for registration under the MLRs was plainly not the result of its "desire" to be registered. Instead, from 10 January 2020 cryptoasset providers and custodian wallet providers were required to be registered with the Authority under the MLRs, and it was common ground at the hearing of the Suspension Application that those provisions applied to Moneybrain, see §5ff of the Judgment.

168. The Privacy Application did not explain why the fact that the Decision Notice refused registration under MLRs, rather than being a different type of decision notice, was relevant to the publication of the Judgment, and I find that it is not.

Other regulated businesses

169. Mr Mansell submitted that a further factor was that Moneybrain is regulated by the Authority in relation to its credit-broking activities, and continues to be so regulated. He did not explain the basis for that submission and I find that it is not a relevant factor.

Period of delay

170. Finally, Moneybrain submitted that the period of delay was likely to be relatively short because the Tribunal had directed that the hearing of the Reference be expedited. The parties are aware that the earliest date that hearing will take place is the last week of April 2023. The Tribunal's recent experience is that it takes around two months to issue a decision following the hearing of a reference.

171. Thus, if the Privacy Application were to be allowed, the total delay between the handing down of the Judgment on 22 September 2022 and its publication is likely to be around nine months, of which some two months have been absorbed by responding to the Recusal Application and the Privacy Application. Mr Temple said that "the longer the delay, the more significant the derogation from open justice", and I agree. I find that a delay of nine months (now seven months) does not provide a good reason for allowing the Privacy Application, but is instead a reason for publishing the Judgment.

WEIGHING AND BALANCING THE FACTORS

172. The factors against allowing the Privacy Application are as follows:

(1) Publication is consistent with open justice, which lies at the heart of our legal system and which is vital to the rule of law.

(2) The hearing was in public, and any person can ask the Tribunal for a copy of the Judgment, for documents referred to at the hearing and/or for a transcript. Publication of the Judgment is consistent with the public nature of the related hearing.

(3) The Judgment has been handed down to the parties, and so is already in the public domain. This is a thus a case where, as Lord Judge said in *Mohamed,* "litigation has taken place and judgment given", and as a result "any disapplication of the principle of open justice must be rigidly contained". In similar vein, Lord Neuberger said that "all

parts of a judgment should be publicly available, unless there is a very powerful reason to the contrary".

(4) Although Moneybrain's position has significant parallels with that of the applicant in *Salih,* where the Tribunal delayed publication of the judgment until after the determination of the reference, the issue in *Salih* was whether the main hearing would be in private. In contrast, the issue decided by the Judgment was whether consumers would be prejudiced if Moneybrain were to be allowed to continue to operate in the UK pending resolution of the Reference, and thus directly engaged the position of the wider public.

(5) Moneybrain failed to provide cogent evidence that publication of the Judgment would cause it (or linked businesses) disproportionate damage.

(6) It is the Tribunal's normal practice to publish all judgments other than routine interlocutory decisions on matters such as extensions of time and adjournments. That approach to publication avoids the danger of judges deciding to "pick and choose between what is and what is not of general interest or importance", see *Mohamed* at §69.

(7) The Judgment and the decision refusing the Recusal Application both have some precedent value. If the Privacy Application were to be allowed, the delay between the handing down of the Judgment and its publication would be around nine months, albeit now reduced to some seven months because of the time required to consider and decide Moneybrain's applications. During that period, the general public would be unaware of the Judgment; they would also be unaware of the decision refusing the Recusal Application.

173. The factors in favour of allowing the Privacy Application are as follows:

(1) The Judgment is an interlocutory decision, and it will only be at the hearing of the Reference that the Tribunal will decide whether Moneybrain has refuted what it considers to be the "unfounded allegations" contained within the Decision Notice.

(2) In FSMA cases, the Tribunal's interlocutory decision is published after the related decision notice; the latter is prefaced by with "prominent" warnings that the decision notice was provisional and reflected "the FCA's belief". There are no similar warnings on the Judgment, which has a different purpose and is already in final form.

(3) Moneybrain's position can be distinguished from case law relating to privacy applications following decision notices issued under the FSMA; it is instead similar to that of the applicant in *Salih.* The Tribunal delayed publication of the interlocutory judgment in *Salih* pending the issuance of the decision on the reference. However, as noted above, there is an important difference between *Salih* and Moneybrain's case.

174. Having carefully considered all of the above, I decided that the factors against allowing the Privacy Application outweighed those in Moneybrain's favour.

175. For completeness I add that the following points do not affect the outcome:

(1) Contrary to Moneybrain's submissions, the Judgment contained no findings as to whether Moneybrain had acted without probity.

(2) None of the following are relevant considerations:

(a) Moneybrain's public statements as to its registration status.

(b) Moneybrain’s lack of legal representation at the hearing of the Suspension Application.

(c) The nature or extent of the evidence or submissions provided by Moneybrain at the Substantive hearing.

(d) The later documents disclosed by the Authority after that hearing.

(e) The fact that the Decision Notice was issued in relation to Moneybrain’s MLR registration rather than as the result of a regulatory investigation.

(f) The continuing existence of Moneybrain’s other regulated businesses.

CONCLUSION AND APPEAL RIGHTS

176. For the reasons set out above, the Privacy Application is refused.

177. This decision is however to remain confidential to the parties for the period during which it may be subject to an application for permission to appeal and until any such application and/or appeal is determined. At the same time as it publishes this decision, the Tribunal will also publish the Judgment and *Moneybrain (Recusal Application) v the Financial Conduct Authority* [2022] UKUT 00269 (TCC).

178. That delay to publication will give Moneybrain time to prepare to put its own view into the public domain either before or at the same time as publication, see *Prodhan* referred to at §103.

ANNE REDSTON
UPPER TRIBUNAL JUDGE

Release Date 18 November 2022