Neutral citation: **[2023] UKUT 234 (TCC)**

UT (Tax & Chancery) Case Number: UT/2023/000050

Upper Tribunal
(Tax and Chancery Chamber)

By remote video hearing

FINANCIAL SERVICES — Decision Notice prohibiting the Appellant from performing any function in relation to any regulated activity and imposing a substantial financial penalty – Decision Notice referred to Tribunal so far as financial penalty is concerned – application to prohibit publication of the Decision Notice and for the Tribunal's Register not to contain particulars of the reference – application refused – application to amend reference to include the scope of the prohibition unopposed and allowed

Heard on: 4 September 2023
Judgment date: 20 September 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE MARK BALDWIN

Between

DARREN ANTONY REYNOLDS

Appellant

and

THE FINANCIAL CONDUCT AUTHORITY

The Authority

Representation:

The Appellant in person

For the Authority: Miss Eleanor Campbell, of counsel, instructed by the Financial Conduct Authority

DECISION

Introduction

1. Mr Reynolds has referred to the Tribunal a Decision Notice dated 2 May 2023 (the "Decision Notice"), by which the Authority concluded that Mr Reynolds lacks honesty and integrity and is therefore not a fit and proper person to perform functions in relation to any regulated activity. In light of those findings the Authority decided to:

> (1) make an order prohibiting Mr Reynolds from performing any function in relation to any regulated activities carried on by any authorised or exempt persons or exempt professional firm pursuant to section 56 of the Financial Services and Markets Act 2000 (the "Act") ("the Prohibition"); and
>
> (2) impose on Mr Reynolds a penalty of £2,212,316 pursuant to section 66 of the Act (the "Penalty").

2. This hearing is concerned with Mr Reynolds' application for:

> (1) a direction under rule 14(1) and (2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Rules") that there be no publication of the Decision Notice pending the outcome of the substantive hearing of this reference; and
>
> (2) a direction pursuant to paragraph 3 of Schedule 3 to the Rules that the register is not to include particulars of the reference.
>
> (the "Privacy Application")

3. The scope of Mr Reynolds' reference was not clear and, in the course of correspondence, it was indicated to the Tribunal that he accepted the Prohibition and only wished to challenge the Penalty. In the course of the hearing it became clear that, whilst Mr Reynolds did not dispute the Authority's findings and its conclusion that he lacked honesty and integrity, he did wish to challenge aspects of the scope of the Prohibition. As noted, the Prohibition prevents him performing any function in relation to any regulated activity and this has made it very difficult for Mr Reynolds to find employment. Mr Reynolds made it clear that he does not take issue with the Prohibition so far as it relates to regulated roles where financial advice on investments or pensions is concerned, but he wishes to refer the Prohibition so far as it appears to prevent him working in any capacity in any business which involves an element of regulated activity. The example he gave is of a residential property business which was prepared to offer him a job unrelated to financial services, but could not do so because its activities include "providing a credit agreement to a private rental client to cover the repayment of arrears of rent". All of this is making it very difficult for Mr Reynolds to find employment. Indeed, he told the Tribunal that he is currently out of work and receiving universal credit. The Authority indicated that it did not object to Mr Reynolds being given permission to amend the reference to include this limited aspect of the scope of the Prohibition.

4. As a result of the Authority's understanding of Mr Reynolds' position, that his reference relates only to the Penalty and not to the Prohibition, the Authority had prepared and proposed to issue and publish a Final Notice in respect of the Prohibition. Whilst the Privacy Application does not seek an order preventing the Authority from publishing a Prohibition Final Notice, the Authority has so far refrained from issuing or publishing that Final Notice. The Authority indicated that, were Mr Reynolds to seek an order preventing publication of the Prohibition Final Notice, in addition to the

Decision Notice, the Authority would oppose it for the same reasons as the Privacy Application itself.

Background

5. The events which are the subject of the Authority's findings in the Decision Notice took place between 12 March 2015 and 5 February 2018 (the "Relevant Period"). At that time Mr Reynolds was an approved person at Active Wealth (UK) Limited ("Active Wealth"), a small financial advice firm. Active Wealth was authorised by the Authority with permission to conduct regulated activities, including advising on pension transfers.

6. The aspect of Mr Reynolds's misconduct which has generated significant interest is his advice in relation to members of the British Steel Pension Scheme ("BSPS"). The relevant background is well known, In summary, as at 30 June 2017 BSPS had approximately 125,000 members and £15 billion of assets. In March 2017 however, BSPS was closed to future accruals, meaning no new members could join it, and existing members could no longer build up their benefits. In the Autumn of 2017, existing members were required to choose between certain options offered by BSPS. The decision was not straightforward, and it was particularly important that any advice they received was balanced and fair.

7. During the Relevant Period Active Wealth advised 153 customers who were members of BSPS to transfer their British Steel pension to an alternative pension arrangement, usually a SIPP.

8. The Authority concluded in the Decision Notice that during the Relevant Period Mr Reynolds advised the vast majority of those customers to invest in investments for which Active Wealth received prohibited commission. Mr Reynolds arranged for commission to be paid to him - and other employees of Active Wealth - via two separate companies, in an attempt to conceal those payments from, amongst others, the Authority.

9. The Authority further concluded that in order to procure that Active Wealth customers invested in investments for which he received commission, and in order to maximise the amount of prohibited commission which he received, Mr Reynolds dishonestly:

(1) advised Active Wealth customers to invest in an investment portfolio created by Greyfriars Asset Management LLP ("Greyfriars") referred to as "P6", consisting of mini-bonds, knowing that it was not suitable for those customers;

(2) falsified P6 Application Forms in order to create the false impression to Greyfriars that P6 was suitable for Active Wealth's customers when it was not;

(3) advised and persuaded customers to transfer out of BSPS when he knew it was not in their best interests;

(4) wrote suitability reports to create the false impression that he had provided suitable advice; and

(5) failed to disclose adequately or at all the existence of exit fees to customers and misled some of those customers about the existence of the exit fees.

10. Mr Reynolds also dishonestly misled the Authority and the Insolvency Service during the Relevant Period and thereafter, including during their respective investigations, in order to conceal the prohibited commission payments from them. After the end of the Relevant Period he recklessly

allowed the destruction of his Active Wealth email account, which contained evidence relevant to the Authority's investigation.

11. None of the matters set out above are challenged by Mr Reynolds in his reference.

The Law

12. Section 391 of the Act includes the following:

> "(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…"

13. The Authority is, therefore, obliged to publish such information in such manner as it considers appropriate, in relation to both the Decision Notice and the Prohibition Final Notice, unless it considers that to do so would be unfair to Mr Reynolds.

14. Schedule 3 to the Rules makes provision for procedure in financial services and wholesale energy cases. Paragraph 3 of Schedule 3 provides that the Tribunal must keep a register of references, which is to be open to inspection. Paragraph 3(3) of Schedule 3 provides:

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

15. Whilst a decision by the Authority to publish a decision notice or a final notice is not a matter which can, in itself, be referred to the Tribunal, the Tribunal has jurisdiction to prohibit such publication pursuant to Rule 14 of the Rules (on "Use of documents and information"), which provides:

> "(1) The Upper Tribunal may make an order prohibiting the disclosure or publication of—
>
> (a) specified documents or information relating to the proceedings; or
>
> (b) …

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

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

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

16. The principles to be applied in deciding whether to direct that a reference is not to be included in the register or to prohibit disclosure of a decision notice have been discussed in a number of cases, which are helpfully summarised by Judge Redston in *Kingsbridge Capital Advisers Limited v FCA*, [2023] UKUT 00103 (TCC) at §40:

"(1) FSMA s 391 gives rise to a presumption that both Decision Notices and Final Notices will be published, albeit there must be regard to the fact that a Decision Notice under challenge in the Upper Tribunal is necessarily provisional (*Prodhan v FCA* [2018] UKUT 0414 (TCC) ("Prodhan") at §20(1)).

(2) The exercise of the power to prohibit publication is a "matter of judicial discretion to be considered against this presumption" (Prodhan at §20(2)).

(3) The exercise of this discretion involves a balancing exercise of all relevant factors and giving effect to the overriding objective of dealing with cases fairly and justly (Prodhan at §20(3)).

(4) The open justice principle is to be applied such that the starting point is a presumption in favour of publication in accordance with the strong presumption in favour of open justice generally (PDHL at §36(1)).

(5) The onus is on the applicant to demonstrate a real need for privacy by showing unfairness (*PDHL Ltd v FCA [2016] UKUT 0129* (TCC) ("PDHL") at §36(2)).

(6) In order to tip the scales heavily weighted in favour of publication the applicant must produce cogent evidence of how unfairness may arise and how it could suffer a disproportionate level of damage if publication were not prohibited (PDHL at §36(3)).

(7) A ritualistic assertion of unfairness is unlikely to be sufficient. The embarrassment to an applicant that could result from publicity, and that it might draw the applicant's clients and others to ask questions which the applicant would rather not answer, does not amount to unfairness (*PDHL* at §36(4)).

(8) If it is established by cogent evidence that publication of a Decision Notice would result in the destruction of, or severe damage to, a person's livelihood, it would be unfair to publish that Notice.

(9) A "possibility" of severe damage or destruction is not enough; there must be a "significant likelihood" of such damage or destruction occurring. An applicant is not required to show that damage or destruction is an inevitable consequence (PDHL at §37).

(10) A risk of damage to reputation is unlikely to be sufficient to justify a prohibition on publication (*Prodhan* at §22)."

17. The particular feature of this case is that Mr Reynolds makes the Privacy Application on the basis that publication of the Decision Notice and the particulars of the reference would pose "danger to my family and myself". None of the cases where these principles have been discussed concerned a suggested threat of physical harm to the applicant or their family. In that light we turned, at Miss Campbell's suggestion, to consider the approach taken by the courts where it is suggested that a person's right to life under Article 2 of the European Convention on Human Rights ("ECHR") might be infringed by the publicity of court proceedings. The approach to be adopted here was summarised by Dame Victoria Sharp P in *RXG v Ministry of Justice*, [2019] EWHC 2026 (QB), as follows (at §35):

> "(i) Restrictions upon freedom of expression must be (a) in accordance with the law; (b) justifiable as necessary to satisfy a strong and pressing social need, convincingly demonstrated, to protect the rights of others; and (c) proportionate to the legitimate aim pursued.
>
> (ii) The strong and pressing social needs which may justify a restriction upon freedom of expression, in principle, include: (a) the right to life and prohibition of torture under articles 2 and 3; and (b) the right to a private and family life under article 8
>
> (iii) The threshold at which article 2 and/or 3 is engaged has been described variously as: "the real possibility of serious physical harm and possible death"; "a continuing danger of serious physical and psychological harm to the applicant"; an "extremely serious risk of physical harm".
>
> (iv) In *Venables v News Group Newspapers Ltd* [2001] Fam 430 (paras 87—89) Dame Elizabeth Butler-Sloss P considered that … the test is not a balance of probabilities but rather that the evidence must "demonstrate convincingly the seriousness of the risk" and raise a real possibility of significant harm: a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm.
>
> (v) Where an applicant demonstrates, by cogent evidence, that there is a real and immediate risk of serious physical harm or death, then there is no question of that risk being balanced against the article 10 interests.
>
> (vi) In cases where articles 2 and 3 are not engaged and the conflict is between the article 8 and article 10 rights, neither right has precedence over the other. What is necessary is an intense focus on the comparative importance of the rights being claimed in the individual case. The justifications for interfering with or restricting each right must be taken into account and a proportionality test must be applied.
>
> (vii) The rights guaranteed by articles 2 and 3 are unqualified. Where the evidence demonstrates that there is a real and immediate risk of serious harm or death this cannot be balanced against any article 10 right, no matter how weighty. …
>
> (viii) However, where evidence of a threat to a person's physical safety does not reach the standard that engages articles 2 and/or 3, then the evidence as to risk of harm will usually fall to be considered in the assessment of the person's article 8 rights and balanced against the engaged article 10 rights. Whilst the level of threat may not be sufficient to engage articles 2 or 3, living in fear of such an attack may very well engage the article 8 rights of the person concerned."

18. Where articles 2 and 3 of the ECHR are concerned, there is no balancing act to be performed; the rights are absolute. Where the level of threat does not engage those articles, but does engage article

8, the Tribunal will need to balance the individual's right to the protection of their private life against the article 10 rights to freedom of expression (to receive and impart information without interference). Here the interest in open justice weighs heavily against privacy or anonymity. In *Khuja v Times Newspapers Ltd*, [2017] UKSC 49, the claimant sought an injunction preventing the publication of information referred to in open court likely to lead to his identification as a person who had been arrested (and subsequently released without charge) during a criminal investigation into child abuse. The Supreme Court held the order sought should be refused. Lord Sumption observed at §34(2):

> "[T]he impact on PNM's family life of what was said about him at the trial is no different in kind from the impact of many disagreeable statements which may be made about individuals at a high profile criminal trial. A defendant at such a trial may be acquitted, possibly on an issue of admissibility, after bruising disclosures have been made about him at the trial. Within the limits of professional propriety, a witness may have his integrity attacked in cross-examination. He may be accused by other witnesses of lying or even of having committed the offence himself. All of these matters may be exposed in public under the cloak of the absolute immunity of counsel and witnesses from civil liability, and reported under the protection of the absolute privilege from liability for defamation for fair, accurate and contemporaneous publication. The immunity and the privilege reflect the law's conviction that the collateral impact that this process has on those affected is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public."

19. Like the courts, this Tribunal is required, pursuant to Section 6(1) of the Human Rights Act 1998 "not to act in a way which is incompatible with a Convention right". It follows that the Tribunal should interpret the Rules allowing privacy in cases before it in a way which gives effect to Convention rights. The Authority submits, and I agree, that, where a privacy application is made on grounds which engage an applicant's rights under the ECHR, the factors relevant to whether publication of a decision notice would cause unfairness to the applicant, within the meaning of Rule 14(1), must include whether any of the applicant's ECHR rights are engaged.

The Authority's Submissions

20. For the Authority Miss Campbell stresses that, in order to succeed in his privacy application, Mr Reynolds must produce cogent evidence to demonstrate that it would be unfair for the Decision Notice to be published in advance of the hearing before the Tribunal or for his reference to be included in the public register. This is against a starting point that both the general principle of open justice and the particular provisions of the Act all point in favour of publication. Not only must he produce cogent evidence, but it must be cogent evidence that there is significant likelihood of harm which makes publication unfair.

21. Looking first at the factors which point in favour of publication, Miss Campbell draws the Tribunal's attention to the existence of significant public interest in Mr Reynolds and his activities. There has, of course, been significant reporting over the years in relation to the position of individuals who were persuaded to move their pensions out of BSPS and the advice that they received. As well as this continuing level of general interest, Miss Campbell pointed to a number of reports over the years into the activities of Mr Reynolds and Active Wealth. There is public interest generally, and particularly on the part of those who were affected by Active Wealth's advice and recommendations, in knowing what the outcome of the Authority's investigation into Active Wealth was and the penalties and outcomes they proposed.

22. Linked to that, Miss Campbell pointed to a number of press and other comments looking at the Authority's actions in relation to Mr Reynolds. It is important to make clear to the public and those

who have commented on these issues that the Authority has carried out a significant and detailed investigation into Active Wealth and also in showing what its decisions and proposed outcomes were.

23. A number of other public bodies have already published their conclusions in relation to the BSPS transfer arrangements generally and included comments on Active Wealth/Mr Reynolds.

24. In January 2018 the House of Commons Work and Pensions Select Committee published a report which referred to Active Wealth and the role of the Authority in investigating the wider transfer arrangements.

25. The Financial Services Compensation Scheme has made a decision to compensate a number of Active Wealth clients.

26. In June 2021 the Insolvency Service brought proceedings to disqualify Mr Reynolds as a director in the High Court. His (very significant) disqualification was picked up in the newspapers. Comments at the time, including from Mr Rush (to whom we will return), suggested that now was time for the Authority to take some action.

27. The Secretary of State applied to wind up one of the companies Mr Reynolds used. This is reported as *Secretary of State for Business, Energy and Industrial Strategies v Celtic Consultancy & Enterprises Limited*, [2021] EWHC 1240 (Ch). The decision of Judge Cawson QC makes a number of comments about Mr Reynolds and Active Wealth. It also sets out some of the dealings between Mr Reynolds and the Authority in the course of their investigation. The judge identified a number of areas of concern around the way in which the company was operated. He concluded that those operating the company lacked honesty, integrity and transparency and that it was in the public interest for the company to be wound up.

28. Given all the other public bodies which had expressed conclusions about the BSPS pension transfer arrangements and Mr Reynolds/Active Wealth in particular, Miss Campbell submits that the Authority should be able to publish their Decision Notice so that the public are no longer in the dark about what the Authority had concluded. A failure to publish the Decision Notice might suggest that the Authority had not concluded their investigation at all and might undermine public confidence in the Authority.

29. There is, Miss Campbell submits, a significant public interest, aside from the general interest in transparency in proceedings, in this Decision Notice being published in the light of all the other commentary around the issues it relates to.

30. Turning to Mr Reynolds' grounds for opposing the publication of the Decision Notice, his first ground was to suggest that it raised or increased the possibility of a physical attack on him or his family (his former wife still lives in what was their matrimonial home). Some years ago this property was the registered office of Active Wealth, although it has not been for some time and the company was dissolved in 2019. Even so, there is no basis for Mr Reynolds' view that his family would be targeted if a Decision Notice was published. There is no evidence of a significant risk of harm to Mr Reynolds or his family. Even at the time of high publicity around BSPS (in 2017/18) there was no suggestion of physical threat to Mr Reynolds or his family. None of the reports (including press and blog coverage) over the following years have resulted in any actual threats at all. Mr Reynolds exhibited a WhatsApp message, from someone who wrote "U stitched me but it's not over. I've found out where u live so what goes round comes round. No matter what you say yor a conman". The message (the date of which was not apparent) is accompanied by two photographs, one of which

would seem to be Mr Reynolds' family home at the time. Although this message may well have been unpleasant for Mr Reynolds, the author did not follow through on his threat.

31. Similarly, when Mr Reynolds was invited to a meeting of the House of Commons Work and Pensions Select Committee, Mr Rush had posted a tweet saying "I love the idea of client feedback in the Palace of Westminster car park" and this had led to Mr Rush's invitation to appear before the Select Committee being withdrawn. Mr Rush described this as a "jokey comment" and accepted the decision of the Select Committee. More generally, Mr Reynolds says that he has been targeted by Mr Rush via social media and he has encouraged former clients to inflict physical harm on him (Mr Rush is an IFA who has campaigned on behalf of members of BSPS who were given inappropriate pension transfer advice). Miss Campbell says that the Authority does not accept that Mr Rush's tweet was intended to encourage an attack on Mr Reynolds; it was, as Mr Rush put it, a joke. In any event, this is nearly six years ago and there has been no suggestion that Mr Reynolds has actually been attacked by anyone in that period.

32. Turning to Mr Reynolds' second ground to support his Privacy Application, the alleged impact on his and his son's mental health, Miss Campbell argues that he would need to show that there is a serious risk here and that this is linked to publication of the Decision Notice. Miss Campbell points out that Mr Reynolds has produced no medical evidence in support of his account of his son's mental state. Even if Mr Reynolds or his son suffered from mental health issues, that is not a reason not to publish the Decision Notice. Indeed, in Miss Campbell's view publishing the Decision Notice may help them by bringing about some finality.

33. In closing, Miss Campbell drew the Tribunal's attention to the notices that the Authority proposed to publish. The Decision Notice would, as is the normal case, be endorsed to say that the Penalty Decision had been referred to the Tribunal.

34. As far as the Prohibition Final Notice is concerned, the Authority's original proposal had been to publish that. The Decision Notice and the Prohibition Final Notice are different, in particular the Prohibition Final Notice does not refer to certain issues such as the alleged transfer by Mr Reynolds of his family home into a trust in order to defeat creditors. Given the Authority's willingness to allow Mr Reynolds to amend his reference to refer the scope of the Prohibition to the Tribunal and assuming that the Tribunal gave him permission to do this, Miss Campbell confirmed that the Authority would not be proceeding to issue and publicise the Prohibition Final Notice at this stage.

Mr Reynolds' Submissions

35. Mr Reynolds complained of the disproportionate focus on him and Active Wealth by both Mr Rush and the Authority. In an early email to the Tribunal he described himself as "a scapegoat, in particular to deflect some of the attention and criticism that was directed at the FCA in connection with" BSPS. Mr Reynolds says that Mr Rush and his clients have attacked him and brought legal challenges which resulted in the destruction of his business and his marriage. He complained that the Authority asked Mr Rush to chair a meeting of affected individuals and has supported the "lies and attacks of Mr Alistair Rush and his associates". He says that everything Mr Rush is doing is with a view to his personal gain, "to line his pockets, with no qualms about how this is achieved". One example he gives is of Mr Rush establishing a claims management firm.

36. Mr Reynolds accepts that a large proportion of the contents of the Decision Notice relate to matters already in the public domain, but says that he has not had an opportunity to defend himself. For example, in relation to the proceedings brought by the Insolvency Service, he simply could not afford the legal fees required to defend himself.

37. A significant number of the points raised by Mr Reynolds in his skeleton argument go to the substance of his reference, and therefore are not matters for me except to the extent they illustrate one of Mr Reynolds' core concerns, that the statements made about him are unfair and paint him in a particularly bad light. In his words "the structure and rhetoric used by the Authority within the Notice is overly aggressive and inflammatory, further adding to the risks of violence as expressed above".

38. He says that broadcasters turned up at his house when the BSPS "scandal" first broke and this had a big impact on him at the time and led to his marriage breakdown. He says that his former wife's anxiety has not subsided since he moved out.

39. His eldest son has alcohol and drug issues and these started, Mr Reynolds submits, after a Channel Four documentary which featured adverse comment about Mr Reynolds. His son had been confronted outside the family home. Mr Reynolds considers that his son's difficulties started at this point.

40. Mr Reynolds himself has been at very low points over recent years. He says that he never expected the level of adverse criticism and challenge that he has encountered.

41. After the hearing, Mr Reynolds wrote to the Tribunal and explained that he had failed to point out in the hearing that, in November 2017, Mr Rush was contacted by someone pretending to be a British Steel worker advised by Active Wealth. Mr Reynolds described Mr Rush's language on that call as "foul, coercive, threatening towards me and inciting violence towards me". He offered to provide the contact details of this person if asked by the Tribunal.

42. In answer to a question from the Tribunal during the hearing, however, Mr Reynolds conceded that he had never actually been physically threatened. Someone approached him in Celtic Manor (which is somewhere in Wales) but this was the only time he had come face to face with someone making a threat. Even then, the individual voiced his threats and then did nothing about them.

43. Mr Reynolds submits that the fairest outcome would be for the Decision Notice not to be published until the final decision of this Tribunal, which will take into account Mr Reynolds' submissions on the various allegations made against him.

Discussion

44. In order to succeed in his challenge on the basis that publication of the Decision Notice would pose a danger to himself and his family which engages his absolute (articles 2 or 3) ECHR rights, Mr Reynolds must show that publication of the Decision Notice would create a real possibility of serious physical harm and possible death, a continuing danger of serious physical and psychological harm or extremely serious risk of physical harm (using the phrases from *RXG*). To succeed he must "demonstrate convincingly the seriousness of the risk" and that there is a real possibility of significant harm that cannot sensibly be ignored.

45. The Authority does not dispute, and I entirely accept, that there has, been a level of unpleasant commentary on social media about Mr Reynolds and Active Wealth. I do not doubt for a moment Mr Reynolds' statement that he has been at very low points over recent years and that he never expected the level of adverse criticism and challenge that he has encountered. I am sure that the last few years have been very unpleasant for him. But, the Celtic Manor incident apart, there has never been any serious threat of physical harm made to him and that one single threat did not lead to anything. The incident in November 2017 about which Mr Reynolds wrote to the Tribunal has not resulted in any attack on Mr Reynolds or any other violent acts that Mr Reynolds could point to.

46. There have been plenty of occasions over recent years when adverse findings in relation to Mr Reynolds/Active Wealth have been published (and in many cases picked up on in newspapers and on social media) and none of these appear to have given rise to any material level of threat and certainly not any actual incidents of physical violence.

47. I accept that Mr Reynolds feels that Mr Rush is running a campaign against him, but there is no evidence that anything Mr Rush has said over the years has led to any violent attack on Mr Reynolds or his family. This is because there have not been any such attacks. If Mr Reynolds' account of the telephone conversation with Mr Rush in November 2017 is correct, nothing came of Mr Rush's alleged incitement to violence.

48. To conclude, Mr Reynolds has failed to "demonstrate convincingly the seriousness of the risk" and that there is a real possibility of significant harm that cannot sensibly be ignored. He has not produced any particular evidence to show that there is any physical threat to him or his family at all, still that less the publication of the Disclosure Notice would create or increase the level of risk.

49. Turning to the issue of the impact of the publication of the Decision Notice on the mental health of Mr Reynolds and his son, Mr Reynolds has produced no medical evidence in support of his account of his or his son's mental state. Even if Mr Reynolds or his son suffered from mental health issues, that is not a reason not to publish the Decision Notice. Their mental health issues would only be relevant if it could be shown that there was a real risk that publishing the Decision Notice would have an adverse impact on their health and Mr Reynolds has produced no evidence to suggest that this is the case. I am not sure that I would go as far as Miss Campbell, in suggesting that publishing the Decision Notice may help Mr Reynolds and his son, but I do hold that there is nothing before me to indicate that publishing the Decision Notice would harm their health.

50. It is also difficult to see how Mr Reynolds' article 8 rights are engaged here either. Publication of the Decision Notice may occasion further adverse comment about Mr Reynolds and Active Wealth, but it is hard to see how (given what has happened over recent years) this would create a real threat or anxiety which would impact on his right to private life. Even if his article 8 rights were engaged, there would need to be a careful balancing act between those rights on the one hand and the article 10 right to freedom of expression linked to the "open justice" principle. The starting point, even before one comes to the particular provisions of the Act, is that proceedings are to take place in the open and to be freely reported. Disagreeable statements which may result about Mr Reynolds (and possibly his family) are, in Lord Sumption's words, a "collateral impact" which "is part of the price to be paid for open justice". Similarly, if Mr Rush is right that the Authority have exaggerated their case against him and this will cause him to be viewed in a particularly bad light, that too is one of the inevitable risks of litigation of which Lord Sumption spoke. Mr Reynolds has not produced any cogent evidence which might suggest that there is a real, significant risk of serious harm to his (or anyone else's) right to a private life which tips the scales against these proceedings taking place fully in the open.

51. Looking at the decisions on the provisions of the Act and the Rules without the ECHR overlay, it is clear that Mr Reynolds has not demonstrated a real need for privacy, that it would be unfair to him to publish the Decision Notice and include his case in the Tribunal's register. Beyond the possibility of the publication of the Decision Notice reigniting adverse criticism (which he has weathered for the last few years), he has not shown how publishing the Decision Notice would be likely to have any impact on him at all, let alone lead to him suffering a disproportionate level of damage. His business has already been closed down and there is no suggestion of the publication of the Decision Notice causing the destruction of or severe damage to his livelihood. Mr Reynolds is unemployed and living on universal credit without the Decision Notice having been published. Publication of the Decision

Notice will have no economic impact on Mr Reynolds. I have discussed the grounds of the Privacy Application relating to the risk physical harm to him and his family and his son's and his mental health above.

52. Finally, we should bear in mind that Mr Reynolds accepts the Authority's conclusion that he lacks honesty and integrity and is not a fit and proper person to carry on functions in relation to a regulated activity. This is not a case where the person seeking privacy disputes the core conclusions or proposed actions of the Authority. Mr Reynolds does not challenge the Prohibition so far as it relates to core regulated activities, and seeks to refer the Prohibition only so far as what one might describe as its effect "on the margins" is concerned. These admissions by Mr Reynolds are a very powerful factor in favour of publication and, given that he accepts the essence of the Decision Notice (even if he takes issue with particular assertions), they weigh heavily against him when it comes to deciding whether publishing the Decision Notice is unfair.

53. In short, Mr Reynolds has not demonstrated that publication of the Decision Notice would create any real (let alone substantial or significant) risk of economic, physical or psychological harm to Mr Reynolds himself or any members of his family. He has not pointed to any evidence (still less any cogent evidence) which suggests that publishing the Decision Notice would be likely to result in anything happening which could be considered to result in publishing the Decision Notice being unfair to him.

Disposition

54. In conclusion, for the reasons set out above:

(1) Mr Reynolds' Privacy Application is refused.

(2) I give permission for Mr Reynolds to amend his reference to include the breadth of the Prohibition. For the avoidance of doubt, this does not extend to any change to the extent of any challenge being made to the factual findings of the Authority in its Decision Notice. He may amend his reference to refer the question of the application of the Prohibition to what one might describe as "marginal" activities (for example, activities which are not themselves regulated functions when they are carried out for a business which is regulated but outside the scope of any regulated activity it carries on) but that is all.

DEPUTY UPPER TRIBUNAL JUDGE MARK BALDWIN

RELEASE DATE: 21 September 2023