[2018] UKUT 414 (TCC)

Reference number: FS/2018/052

FINANCIAL SERVICES - financial penalty - Applicant contending that action time-barred - whether to direct hearing of preliminary issue on question of limitation - FSMA 2000 s 66 (4) & (5) - Trib Proc (UT) Rules 2008 2 (2)&5(3)(e)

Decision notice - publication - whether Upper Tribunal should prohibit publication on grounds that there was a significant likelihood of prejudice to the Applicant, his family and others if publication took place - FSMA 2000 s 391- Trib Proc (UT) Rules 2008 14(1) and Sch 3 para 3(3)

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

MOHAMMAD ATAUR PRODHAN	**Applicant**
- and -	
THE FINANCIAL CONDUCT AUTHORITY	**The Authority**

TRIBUNAL: Judge Timothy Herrington

Sitting in private at The Royal Courts of Justice, Strand, London WC2 on 30 October 2018

Jason Mansell, Counsel, instructed by Eversheds Sutherland (International) LLP, Solicitors, for the Applicant

Simon Pritchard, Counsel, instructed by the Financial Conduct Authority, for the Authority

DECISION

Introduction

1. On 11 June 2018 the Applicant, ("Mr Prodhan") made a reference to the Upper Tribunal of a Decision Notice issued by the Authority on 16 May 2018 (the "Decision Notice").

2. Mr Prodhan has applied for a direction pursuant to Rule 5 (3) (e) of The Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Rules") that the issue raised by Mr Prodhan in these proceedings that the Authority is precluded from taking action against him pursuant to s 66 of the Financial Services and Markets Act 2000 ("FSMA") because the proceedings are time-barred be heard as a preliminary issue. I refer in this decision to this application as the "Preliminary Issue Application".

3. Mr Prodhan has also applied for a direction pursuant to paragraph 3 (3) of Schedule 3 to the Rules that the register of references maintained by the Upper Tribunal (the "Register") contain no particulars of Mr Prodhan's reference in respect of the Decision Notice. Mr Prodhan has also applied for a direction pursuant to Rule 14 (1) of the Rules to prohibit publication by the Authority of the Decision Notice. Mr Prodhan requests that such directions remain in force until the final hearing of his reference or, in the alternative, until the issue of whether these proceedings are time-barred has been determined. I refer in this decision to these applications together as the "Privacy Applications".

4. Between April 2012 and May 2015 Mr Prodhan was the Chief Executive Officer ("CEO") of Sonali Bank (UK) Limited ("SBUK"), the UK subsidiary of Sonali Bank Limited, a bank incorporated in Bangladesh. Mr Prodhan was approved by the Authority to hold the CF 1 (Director) and CF 3 (Chief Executive) significant-influence controlled functions at SBUK and the Authority considers that he was made the senior manager responsible for the establishment and maintenance of effective anti-money laundering systems and controls.

5. On 12 October 2016 the Authority gave SBUK a Final Notice, imposing a financial penalty of £3,250,600 and a restriction in respect of accepting deposits for failings in relation to anti-money laundering systems and controls. That Final Notice found that, among other breaches, SBUK breached Principle 3 of the Authority's Principles for Businesses, which requires that a firm take reasonable steps to ensure that it has organised its affairs responsibly and effectively, with adequate risk management systems.

6. As a result of the above, as found in the Decision Notice, the Authority considers that Mr Prodhan breached Statement of Principle 6 of the Authority's Statements of Principle for Approved Persons by failing to exercise due skill, care and diligence in managing the business of the firm for which he was responsible and that he was knowingly concerned in SBUK's breach of Principle 3. The Authority

therefore decided to impose a financial penalty on Mr Prodhan in the amount of £76,400 pursuant to s 66 FSMA.

7. Mr Prodhan denies that he has committed the acts of misconduct referred to in the Decision Notice. He also contends that the Authority's allegations are time-barred in any event as a consequence of which the Decision Notice should not have been issued and these proceedings would not be before the Upper Tribunal.

Issues to be determined

8. Mr Prodhan submits that the Preliminary Issue Application should be granted for the following reasons:

(1) The limitation issue requires the determination of one factual question, namely when did the Authority know of Mr Prodhan's alleged misconduct or when did it have information in its possession from which the misconduct could reasonably be inferred? ;

(2) Therefore, the evidence as to limitation can be readily compartmentalised and segregated. Moreover, the issue of limitation can be determined relatively quickly over 2 to 3 days and if established it is a "knockout blow" and a complete legal bar to the proceedings; and

(3) Hearing the preliminary issue may avoid the need for a full hearing, which is currently estimated to take up to 3 weeks and would necessitate Mr Prodhan travelling to the UK for at least a 3 week period. Moreover, the cost of preparing for the hearing will be considerable involving numerous visits by the Applicant's advisers to Bangladesh or of Mr Prodhan to London.

9. In response the Authority contends:

(1) It would be artificial to separate the factual evidence relevant to the limitation issue from the evidence of misconduct. Before considering what the Authority knew at the relevant time, the Tribunal will have to give detailed and careful consideration as to the nature of the allegations against the Applicant;

(2) The limitation issue is not a simple question of law which can be determined on the basis of agreed facts but instead will necessitate a complex factual enquiry which is better carried out after consideration of all the relevant evidence;

(3) It is likely that the hearing of the preliminary issue could take 5 to 6 days, not the 2 to 3 day estimate given by the Applicant;

(4) Consequently, a preliminary hearing risks delaying the final outcome of the case and increasing costs; and

(5) It is not necessary for Mr Prodhan to attend the whole of the substantive hearing of the reference.

10. Mr Prodhan contends that the Privacy Applications should be granted for the following reasons:

(1) If he is successful on the Preliminary Issue Application, it would only be necessary to grant privacy for a limited period of time and there is no pressing need for publicity at present;

(2) He is extremely concerned that his good reputation in the Bangladeshi financial services industry will be destroyed if the Decision Notice is publicised at this stage;

(3) If the Decision Notice was to be published, there is a significant likelihood that any public criticism of him by the Authority would make his current position as CEO of a leading Bangladeshi state owned commercial bank (Rupali Bank) untenable, even though there has been no final determination of his culpability;

(4) Publication of the Decision Notice would generate a large amount of adverse publicity in Bangladesh and it is highly likely that the Decision Notice will be misreported in the Bangladeshi press who would not appreciate the fact that the findings made by the Authority in the Decision Notice are not final pending the determination of his reference;

(5) If his position with Rupali Bank became untenable as a result of the publicity, he would struggle to gain a similar level of employment due to his age and he needs to earn an income to continue to support his family; and

(6) Consequently, publication of the Decision Notice and disclosing his name in case details on the Register would cause him and his family, as well as Rupali Bank and its shareholders, significant prejudice.

11. In response the Authority contends:

(1) There is no scope for a "halfway house" because the presumption in favour of publication is one that operates from the time the notice is given and there is no scope for delaying publication pending a substantive hearing;

(2) The alleged risk of misreporting of the Decision Notice is mere speculation and in any event any published notice will have a clear statement at its head noting that the decision has been referred to the Tribunal and that it is subject to the Tribunal's decision. Furthermore, the Applicant is likely to have an opportunity to respond to any reporting;

(3) The concerns that the Applicant has expressed regarding prejudice to his reputation if the Decision Notice is published is not cogent evidence of serious damage and speculation as to subsequent damage to reputation does not present a reason for not publishing a decision notice;

(4) The impact of publication on Rupali Bank or its shareholders or any other third party is not a relevant consideration; and

(5) The evidence that Mr Prodhan has produced suggesting that his employment is at stake is speculative and uncertain and even if such a risk exists does it not displace the strong presumption in favour of publication.

Relevant Law

Preliminary issue

12. In these proceedings, the Authority is asking the Tribunal to direct the Authority to exercise the power contained in s 66 FSMA to impose a financial penalty upon Mr Prodhan. Section 66 FSMA provides that the Authority may take action to impose a penalty on an individual of such amount as it considers appropriate where it appears to the Authority that the individual is "guilty of misconduct" and it is satisfied that it is appropriate in all the circumstances to take action.

13. Misconduct includes failure, while an approved person, to comply with a Statement of Principle issued under s 64 FSMA and also includes having been knowingly concerned in a contravention of a relevant requirement by an authorised person: see s 66A FSMA. In this case, the Authority contends that Mr Prodhan has acted in breach of Statements of Principle 6 of the Statement of Principles referred to above and was also knowingly concerned in SBUK's breach of Principle 3.

14. Therefore, if having heard the evidence the Tribunal considers that Mr Prodhan breached any of the requirements mentioned at [13] above, it can direct that a financial penalty be imposed upon Mr Prodhan in respect of such failure pursuant to s 66 FSMA, provided Mr Prodhan was issued with a Warning Notice within 3 years from the first day on which the Authority knew of Mr Prodhan's misconduct in that regard: see s 66 (4) FSMA. "Knowledge" for this purpose includes having information from which the misconduct can reasonably be inferred: see s 66 (5) FSMA.

15. In his Reply to the Authority's Statement of Case filed in these proceedings, Mr Prodhan contends that the Authority did not issue its Warning Notice within the 3 year period referred to at [14] above and consequently Mr Prodhan contends that these proceedings are time-barred. That is the issue which Mr Prodhan seeks to have determined as a preliminary issue. I have power to make a direction that the matter be determined as a preliminary issue; that power is set out explicitly in Rule 5 (3) (e) of the Rules.

16. I was referred to a number of authorities from the courts on the issue as to when it is appropriate to direct a preliminary issue, in particular *SCA Packaging Limited v Boyle* [2009] UKHL 37 and *Steele v Steele* [2001] C.P. Rep. 106.

17. The approach to be taken specifically in the Upper Tribunal was summarised in its decision in *Lord Wrottesley v HMRC* [2015] UKUT 0637 (TCC). In that decision, the Tribunal reviewed the authorities, including those mentioned at [16] above, observing at [14] that in exercising its power under Rule 5 (3) (e) the Tribunal must seek to give effect to the overriding objective set out in Rule 2 of the Rules to deal

with cases fairly and justly. This includes dealing with a case in ways which are proportionate to its importance, complexity and the parties' costs and resources, and avoiding delay so far as compatible with proper consideration of the issues.

18. Having reviewed the authorities, the Tribunal summarised at [28] the key principles to be considered when considering an application for a matter to be determined as a preliminary issue as follows:

> (1) The matter should be approached on the basis that the power to deal with matters separately at a preliminary hearing should be exercised with caution and used sparingly.
>
> (2) The power should only be exercised where there is a "succinct, knockout point" which will dispose of the case or an aspect of the case. In this context an aspect of the case would normally mean a separate issue rather than a point which is a step in the analysis in arriving at a conclusion on a single issue. In addition, if there is a risk that determination of the preliminary issue may prove to be irrelevant then the point is unlikely to be a "knockout" one.
>
> (3) An aspect of the requirement that the point must be a succinct one is that it must be capable of being decided after a relatively short hearing (as compared to the rest of the case) and without significant delay. This is unlikely if (a) the issue cannot be entirely divorced from the evidence and submissions relevant to the rest of the case, or (b) if a substantial body of evidence will require to be considered. This point explains why preliminary questions will usually be points of law. The tribunal should be particularly cautious on matters of mixed fact and law.
>
> (4) Regard should be had to whether there is any risk that determination of the preliminary issue could hinder the tribunal in arriving at a just result at a subsequent hearing of the remainder of the case. This is clearly more likely if the issues overlap in some way- (3)(a) above.
>
> (5) Account should be taken of any potential for overall delay, making allowance for the possibility of a separate appeal on the preliminary issue.
>
> (6) The possibility that determination of the preliminary issue may result in there being no need for a further hearing should be considered.
>
> (7) Consideration should be given to whether determination of the preliminary issue would significantly cut down the cost and time required for pre-trial preparation or for the trial itself, or whether it could in fact increase costs overall.
>
> (8) The tribunal should at all times have in mind the overall objective of the tribunal rules, namely to enable the tribunal to deal with cases fairly and justly.

19. I shall therefore determine whether to grant the Preliminary Issue Application by applying the principles set out at [18] above.

Privacy

20. I set out the relevant statutory provisions in the Annex to this decision, namely the relevant provisions of s 391 FSMA, Rule 14 of the Rules and paragraph 3 (3) of Schedule 3 to the Rules. These provisions were analysed at [16] to [28] of the decision of this Tribunal in *Arch Financial Products LLP and others v FSA* [2012] FS/2012/20 ("*Arch*") and the effect of them can be summarised as follows:

> (1) Section 391 gives rise to a presumption that publicity will be the norm and this is equally the case with decision notices as it is with final notices although regard has to be paid to the fact that a decision notice that is being challenged in the Upper Tribunal is necessarily provisional: see paragraph 45 of *Arch*;
>
> (2) The exercise of the power to prohibit publication under Rule 14(1), and by analogy the exercise of the power under paragraph 3(3) of Schedule 3 to the Rules is a matter of judicial discretion to be considered against the context of this presumption; and
>
> (3) The discretion should be exercised taking into account all relevant factors ignoring irrelevant factors and giving effect to the overriding objective in Rule 2 of the Rules that requires the Tribunal to deal with cases fairly and justly. This involves carrying out a balancing exercise between those factors that tend towards publication and those that would tend against.

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

> "36. It was common ground that the principles established in *Arch v Financial Conduct Authority (*2012) FS/2012/20 and *Angela Burns v Financial Conduct Authority* [2015] UKUT 0601 TCC were applicable to the Privacy Applications. As correctly summarised by Mr Herberg in his skeleton argument these provide:
>
> > (1) The open justice principle is to be applied such that the starting point is a presumption in favour of publication in accordance with the strong presumption in favour of open justice generally;
> >
> > (2) The onus is on the applicant to demonstrate a real need for privacy by showing unfairness;
> >
> > (3) In order to tip the scales heavily weighted in favour of publication the applicant must produce cogent evidence of how unfairness may arise and

how it could suffer a disproportionate level of damage if publication were not prohibited; and

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

37. It is clear that if publication would result in the destruction of a firm's business then it would be unfair to publish a decision notice. The Tribunal said this at [89] to [90] of *Angela Burns*:

"89. I accept that cogent evidence of destruction of or severe damage to a person's livelihood is capable of amounting to disproportionate damage such that it would be unfair not to prohibit publication of a Decision Notice. Although I should be careful not to approve specifically the criteria that the Authority sets out in its recent consultation paper on publishing information about Warning Notices at a time when that paper is still open for comment, it appears to me that by including paragraph 2.17 of that paper the Authority accepts that a disproportionate loss of income or livelihood would mean that it would be unfair to publish. In my view damage of that kind is of a different and more serious kind than damage of reputation alone.

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

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

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

23. The nature of the dispute, including questions as to whether the Applicant has been treated fairly in comparison with others, or penalised too harshly, are matters to be considered by the Tribunal when it hears the substantive reference and are not

matters that can bear upon the question of publication: see *Ford and others v FCA* [2015] UKUT 0220 (TCC) at [50] ("*Ford")*.

24. There is no scope for making an order which delays publication until the date of commencement of the substantive hearing. As the Tribunal said at [64] of *Ford*, there is no scope for such a "half-way house", the presumption in favour of publication of a decision notice is one that operates from the time the notice is given, subject to the power of the Authority and the Tribunal to determine that it should not be. That is not to say that a reasonable period may not be given to an applicant to prepare for anticipated media interest: see *Ford* at [65].

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

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

> "50…..Mr Stanley submits that the public who read the Decision Notices will not understand the difference between an allegation of a lack of integrity based on recklessness which is being made and an allegation of dishonesty, which is not being made. He submits that it is likely that there will be an unreasonable body of investors, fuelled by high emotions as a result of what has happened to the Arch cru funds, who will fail to appreciate that the decisions are provisional and will assume that the Applicants are guilty of what is alleged.
>
> 51. The protection to which the Applicants are entitled in this situation is the right to have the allegations tested in this Tribunal which will in due course deliver a decision in public which will refute unfounded allegations. In addition the Decision Notices themselves set out in detail a summary of the representations that the Applicants made to the RDC which goes some way to explaining their side of the case. No doubt the media will be interested in hearing from the Applicants why they believe the allegations are unfounded."

27. Mr Pritchard submitted that unfairness to persons to whom the notice is not addressed is irrelevant, relying on the wording in s 391 (6) (a) FSMA which refers to publication being "unfair to the person with respect to whom the action was taken (or was proposed to be taken)." However, as Mr Mansell submitted, s 391 (6) (b) prohibits publication where the Authority is of the opinion that it would be "prejudicial to the interests of consumers". He relies on this provision for his submission that publication would be prejudicial to third parties such as Mr Prodhan's current employer (Rupali Bank) and that entity's shareholders.

28. There are two difficulties with Mr Mansell's submission on this point. First, s391 (11) FSMA applies the definition of "consumers" contained in s 425A FSMA in this context. In broad terms, that provision defines a "consumer" as being a person who uses or has used or may use the services provided by "authorised persons in

carrying on regulated activities" which therefore confines the definition to persons dealing with entities authorised by the Authority to carry on those activities. I had no evidence as to whether Rupali Bank or its shareholders fell into that category. Secondly, in circumstances where it is contended that a third party who fell within the definition of "consumer" would be prejudiced by publication in my view it would be necessary for cogent and compelling evidence to be adduced from such third party as to the expected position and that evidence is lacking in this case.

29. On that basis, I have not taken into account the question as to whether publication would be prejudicial to consumers.

30. I will now deal with each of the applications in turn.

The Preliminary Issue Application

Relevant Facts

31. In considering this issue, it is helpful to summarise the Authority's case against Mr Prodhan, as set out in its Statement of Case. Paragraph 15 of that document summarises what the Authority considers Mr Prodhan's duties as CEO of SBUK to have included, as taken from SBUK's documentation, as follows:

> (1) ensuring the proper establishment and maintenance of effective anti-money laundering systems and controls;
>
> (2) developing processes and structures to ensure that all associated risks to the shareholders' investment were identified, documented, compared with approved risk appetite and that appropriate steps were taken to mitigate those risks;
>
> (3) reporting to the board on the adequacy and suitability of the anti-money laundering systems and controls;
>
> (4) ensuring that the board was provided with sufficient information to enable the directors to manage SBUK's financial crime risks and to comply with the rules set out in the part of the Authority's Handbook entitled Senior Management Arrangements, Systems and Controls;
>
> (5) developing and maintaining an effective framework of internal controls over risks in relation to all business activities;
>
> (6) providing management information that was accurate and ensuring that anti-money laundering systems and controls in place were robust;
>
> (7) ensuring that a commitment to regulatory compliance existed within SBUK and that employees adhered to this duty of compliance;
>
> (8) setting SBUK's values, culture and standards and ensuring that its obligations to its stakeholders and others were understood and met; and
>
> (9) ensuring that SBUK's business complied with all the necessary regulatory requirements.

32. Paragraph 22 of the Authority's Statement of Case sets out seven actions which the Authority considers that Mr Prodhan should have undertaken in carrying out his role of ensuring the establishment and maintenance of effective anti-money laundering systems and controls at SBUK as follows:

(1) ensured that he was sufficiently informed about the risks affecting SBUK's business, in particular those relating to anti-money laundering;

(2) considered and assessed the measures in place to mitigate these risks and whether they were working effectively;

(3) taken reasonable steps to ensure that the importance of robust anti-money laundering systems and controls was clearly and unambiguously articulated and understood throughout SBUK;

(4) considered anti-money laundering risks when making decisions regarding resourcing, including resourcing of the Money Laundering Reporting Officer (MLRO) Department, the appointment or dismissal of key personnel and before taking on new business;

(5) ensured that reports to the board were complete and accurate and informed the board appropriately of the anti-money laundering risks;

(6) devoted appropriate oversight and line management support to the MLRO; and

(7) provided appropriate challenge to reports of the MLRO.

33. The Statement of Case then sets out in some detail contentions by the Authority as to why the Authority considers that Mr Prodhan failed in a number of respects to undertake adequately the tasks summarised at [32] above and otherwise failed to comply with his duties as summarised at [31] above. It concludes at paragraph 66 of the Statement of Case that these failings amounted to a breach of Statement of Principle 6 in that Mr Prodhan failed to appreciate the need to give sufficient focus to regulatory compliance and to take reasonable steps to ensure the adequacy of SBUK's AML systems and controls. In particular, the Authority contends that he failed:

(1) to take anti-money laundering risks into account sufficiently when planning SBUK's strategic direction and when making the decision to expand the business of SBUK to Money Service Businesses;

(2) to take reasonable steps to ensure that a culture of compliance towards regulatory responsibilities existed throughout SBUK;

(3) to take reasonable steps to ensure that the MLRO function was adequately resourced in a timely way;

(4) to take reasonable steps to ensure that SBUK's branches were subject to appropriate management oversight with clear reporting lines and that anti-money laundering issues were considered as part of the line management process;

(5) to investigate or request an explanation for continuously low levels of suspicious activity report submissions;

(6) to adequately discharge his responsibility to report to the board with respect to the operation of anti-money laundering systems and controls;

(7) to provide adequate challenge to the MLRO's assertions that anti-money laundering controls were effective; and

(8) to take reasonable steps in a timely fashion to address serious concerns expressed by internal auditors about significant failings in the governance processes or to implement recommendations of the internal auditors.

34. At paragraph 67 of the Statement of Case the Authority sets out the basis on which it considers that Mr Prodhan was knowingly concerned in SBUK's breach of Principle 3. In essence, the Authority contends that a number of SBUK's failings resulted from a failure on the part of Mr Prodhan to address various issues arising in the business for which he had responsibility according to the duties summarised at [31] above despite being aware of the issues concerned.

35. As regards limitation, the Authority contends at paragraph 69 of the Statement of Case that such information as was available to it as regards Mr Prodhan's alleged misconduct prior to the date three years before the Warning Notice was given to Mr Prodhan was insufficient to allow it to know of the misconduct or reasonably to infer it. The Warning Notice was given to Mr Prodhan on 27 April 2017; on that basis time started to run on 27 April 2014 so that if the Authority had information from which it knew of the relevant misconduct, or from which such misconduct could be reasonably inferred, prior to 27 April 2014 the proceedings will be time-barred.

36. In his Reply to the Authority's Statement of Case, Mr Prodhan contends that in all the circumstances and for the detailed reasons set out in his Reply, he took reasonable steps to discharge his oversight obligation, given his role, personal circumstances and experience. He emphasises that as CEO, he was not required to design, create or implement controls personally, there was no obligation on him to do the job of an appropriately appointed delegate of his and he was not required to ensure that the business had compliant systems and controls. He sets out in some detail how he sought to discharge his oversight responsibility towards SBUK's anti-money laundering controls. He refutes in some detail all the specific failings attributed to him in the Authority's Statement of Case. The Reply concludes by stating that the allegations that Mr Prodhan breached Statement of Principle 6 by failing to appreciate the need to give sufficient focus to regulatory compliance and to take reasonable steps to ensure the adequacy of SBUK's anti-money laundering systems and controls as particularised and that Mr Prodhan was knowingly concerned, such that he should be personally culpable, in SBUK's breach of Principle 3 as particularised are denied. Mr Prodhan contends that he has not committed an act of misconduct as alleged or at all.

37. As regards limitation, Mr Prodhan contends that the Authority is required to prove that its allegations are in time. He says for the reasons previously set out by him in his written representations to the Authority's Regulatory Decisions Committee (RDC), including the information obtained by the Authority both prior to, during and after the visit made by the Authority to SBUK in January 2014 up to 27 April 2014, the Authority's allegations are time-barred. He requests that the Authority pleads its

case as to limitation in detail, given the material disclosed within the list of documents accompanying its Statement of Case.

38. It is apparent from a review of the Authority's list of documents filed with its Statement of Case that there is a large amount of material which will form the evidence in this case, particularly in relation to the period after the Authority's visit to SBUK on 28 and 29 January 2014.

39. I have not seen any of this material, save for a letter dated 28 February 2014 from the Authority to Mr Prodhan which sets out the findings of the Authority's visit to SBUK in January 2014 and a draft dated 10 March 2014 of a notice to be given to SBUK by the Authority requiring SBUK to appoint a skilled person under s 166 FSMA to assess the adequacy and effectiveness of SBUK's anti-money laundering and financial sanctions systems and controls and produce recommendations to address any identified weaknesses.

40. The letter dated 28 February 2014 records the Authority's findings of significant failings in SBUK's systems and controls in relation to high money laundering risk situations and sanctions compliance and that immediate action was necessary to mitigate the identified risks. The letter expressed concern that the Authority's findings indicates that "the leadership of the business" has not taken its anti-money laundering responsibilities seriously or devoted adequate focus and resource to ensure the risks to its business are mitigated. The Appendix to the letter, which sets out more detail as regards the findings, refers among other things to there being insufficient senior management oversight and ownership of money laundering and sanctions risks.

41. The draft requirement notice dated 10 March 2014 records that SBUK discussed the findings in the 28 February 2014 letter with the Authority on 6 March 2014 and agreed to implement immediate measures to contain the risks and to be subjected to a s 166 review.

42. It became apparent from Mr Mansell's submissions that Mr Prodhan will seek to rely on these and other documents, some of which are the subject of additional disclosure requests to the Authority, in support of Mr Prodhan's contention that the action against him is time-barred. In particular, Mr Prodhan may be relying on the generalised statements in the 28 February 2014 letter as to the failures of leadership and senior management oversight as indicating knowledge on the part of the Authority of alleged misconduct on the part of Mr Prodhan or as information from which such knowledge may be inferred. I was told that in particular, Mr Prodhan is seeking disclosure of material relating to the decision to refer Mr Prodhan to the Authority's Enforcement and Market Oversight Division ("Enforcement") for investigation and when that referral occurred.

Discussion

43. Mr Prodhan's case for a separate hearing on the question of limitation as a preliminary issue, as developed by Mr Mansell in his submissions, can be summarised as follows:

(1) The issue of limitation requires the determination of one factual question, namely when did the Authority know of Mr Prodhan's alleged misconduct or when did the Authority have information in its possession from which the misconduct could reasonably be inferred?

(2) That factual question can be separated from the determination of the entirely different and separate factual questions as to whether Mr Prodhan breached Statement of Principle 6 or was knowingly concerned in SBUK's breach of Principle 3 such that he is personally culpable;

(3) The facts to be determined are narrow and confined to the Authority's knowledge; a small number of internal documents from the Authority will establish the position and whilst limited cross examination of the Authority's witnesses may be required Mr Prodhan's attendance would not be necessary;

(4) Consequently, the evidence as to limitation can be readily compartmentalised and segregated, the issue of limitation can be determined relatively quickly over 2 to 3 days and if established is a "knockout blow" and a complete legal bar to the proceedings;

(5) If the application for a preliminary issue is not granted, Mr Prodhan will have to prepare the reference for a full hearing at considerable expense and involving numerous visits by his advisers to Bangladesh or of Mr Prodhan to London; and

(6) The substantive hearing is currently estimated to take up to three weeks, necessitating Mr Prodhan's travel to the UK for that period.

44. It is clear that the dispute between the parties as to whether it is appropriate to direct a preliminary issue hearing is centred on the question as to the extent to which it will be necessary for the Tribunal to review considerable amounts of evidence and make detailed findings of fact in order to determine the limitation issue and whether it is possible to divorce that evidence from the main body of evidence required to determine the liability issue. That difference between the parties arises because it is apparent that they have a different view as to what evidence is sufficient to support the contention that the Authority had knowledge of misconduct or information from which such knowledge may be reasonably inferred.

45. Mr Prodhan's view, as summarised in the written representations he made to the RDC, is that the breaches alleged against Mr Prodhan constitute a single continuing course of misconduct rather than a series of separate breaches. Therefore, Mr Prodhan contends, if the Authority knew of some of the alleged failings or had information from which some of those failings could be reasonably inferred more than 3 years prior to the date of issue of the Warning Notice, the Authority is prevented from

imposing any sanctions under s 66 FSMA. On that basis, Mr Prodhan contends, for example as he did before the RDC, that the Authority had knowledge of his misconduct simply from the correspondence relating to the January 2014 visit, including attendance notes of interviews, internal memoranda and the Authority's letter of 28 February 2014 (and in particular the references made to the failings of the "leadership of the business" and senior management oversight) even though not all of the particularised items of misconduct alleged in the Authority's Statement of Case may have become apparent until further investigations had been made.

46. That contention is based on an interpretation of s 66 (4) and (5) with which the Authority disagrees. The Authority contends that the test of knowledge must be applied to the particular allegations of misconduct which are pleaded by the Authority in its Statement of Case. Thus in this case, the Authority contends, the extent of the Authority's knowledge at any particular time must be applied to each of the allegations set out in its pleaded case on which it relies to substantiate a charge of misconduct.

47. As set out at [32] and [33] above, there are a considerable number of alleged failings on the part of Mr Prodhan which the Authority contends amount to a breach of Statement of Principle 6 and/or being knowingly concerned in a breach by SBUK of Principle 3. On the Authority's interpretation of s 66 (4) and (5), what the Authority knew in relation to each of those matters and when it knew it would have to be determined before the limitation issue could be determined. That approach therefore assumes that action could be taken against Mr Prodhan under s 66 in respect of those allegations which were found not to be time-barred even if there were some allegations that were time-barred. In that regard the Authority relies on the decision of this Tribunal in *Andrew Jeffery v FCA* FS/2010/0039 where the Tribunal said at [334] that the reference in s 66 (4) to "the misconduct" clearly refers to the particular misconduct in respect of which action is to be taken against a particular person, and not to conduct of a similar nature in respect of which information may have been obtained earlier. That approach was followed by this Tribunal in the recent decision of *Alistair Rae Burns v FCA* [2018] UKUT 0246 (TCC).

48. Against that background, I now proceed to apply the principles identified at [18] above to the facts of this case.

Will a preliminary hearing dispose of the case or an aspect of it?

49. This question must be answered in the affirmative. If the limitation issue is determined in Mr Prodhan's favour it would dispose of the reference.

Is it a discrete issue in evidential terms?

50. It is clear that in this case the limitation issue will involve mixed questions of fact and law, the question of law being the one summarised at [45] to [47] above. If the Authority is right in its interpretation of the relevant law, then clearly the factual evidence relevant to the limitation issue cannot be divorced entirely from the evidence and submissions relevant to the rest of the case. As Mr Pritchard submitted, in that

situation before considering what the Authority knew at the relevant time, the Tribunal would have to give detailed and careful consideration as to the nature of the allegations against Mr Prodhan and the Tribunal would be in a better position to determine the limitation issue after it has considered all of the relevant evidence, including that going to Mr Prodhan's alleged misconduct.

51. However, if Mr Prodhan is correct in his interpretation of the law, then it may be possible for the matter to be determined on a limited number of documents as Mr Mansell suggested, particularly if there is a focus on the Authority's own internal documents which are discrete pieces of evidence that stand alone from the large body of evidence relevant to the detailed allegations being made by the Authority. It is, however, difficult to make any further judgment on that issue at this stage, as the process of disclosure is still ongoing, so it is not clear what documents Mr Prodhan would in fact be relying upon.

Would a substantial body of evidence have to be considered?

52. It is undoubtedly the case that a substantial body of evidence would have to be considered if the Authority is correct in its interpretation of the law and in essence would require a review of all of the key evidence on which the Authority relies in support of its allegations against Mr Prodhan. As Mr Pritchard submitted, those allegations are based primarily on contentions that Mr Prodhan omitted to take certain steps. It is necessarily more problematic to establish misconduct by omission rather than the taking of positive steps and consequently more difficult to establish the point at which the Authority became aware that Mr Prodhan was failing to take particular steps that it considers Mr Prodhan should have taken in order to comply with his regulatory obligations.

53. As I have previously indicated, if Mr Mansell is correct in his submissions on the law, then the body of evidence will be much less extensive.

54. This issue leads into the question as to whether the matter could be determined after a relatively short hearing as opposed to the rest of the case. Even on the basis of Mr Mansell's submissions, a hearing of 2 to 3 days would be necessary, which I consider to be at the high end of what may reasonably be regarded as a short hearing, and the Authority, unsurprisingly, estimates a hearing of twice that length which, in the context of an overall hearing estimate of 3 weeks is a very long period. Being able to bring on such a lengthy hearing within a reasonable period of time is likely to be more problematic and would undoubtedly cause delay to the hearing of the substantive reference. On that basis, the limitation issue could not be regarded as a succinct point relative to the rest of the case.

Impact on timing

55. It is clear from what has been said above that holding a preliminary hearing does involve the risk of some delay to the main hearing (and bearing in mind the dispute between the parties as to the correct interpretation of the law the possibility of an appeal against the preliminary decision cannot be discounted) but of course the

determination of the issue in Mr Prodhan's favour would dispose of the reference much more swiftly than would otherwise be the case. This point is therefore relatively neutral in this case.

Costs

56. I have considerable sympathy with what Mr Mansell said about minimising costs, bearing in mind the fact that Mr Prodhan is now resident again in Bangladesh. Undoubtedly, there will be a significant saving in costs were a preliminary issue to be heard and determined in his favour. However, if he is unsuccessful, then it seems to me that there is significant risk of duplication if substantial amounts of evidence which were considered at the preliminary issue hearing were then considered again at the liability hearing and I consider that is likely to be the case, depending on how the question of law on the preliminary issue is determined. It is therefore not necessarily the case that the length of the substantive hearing will be shortened as a result of the hearing of the preliminary issue. I am not convinced that in any event it would be necessary for Mr Prodhan to attend for the whole of the three-week hearing; as Mr Prichard observed, a timetable could be set which enabled Mr Prodhan to give his evidence at a predetermined time. It also appears to me that the need for there to be frequent trips between Bangladesh and London to prepare for the hearing could be minimised by the use of technology.

Conclusion on the Preliminary Issue Application

57. I have concluded that the balancing exercise comes out in favour of refusing to direct a preliminary hearing on the limitation issue. The authorities indicate that the power should be used sparingly, particularly as regards an issue of mixed fact and law, which is the case here. The fact that there is a dispute on the correct interpretation of the law which would have to be fully argued at the hearing, means that the amount of evidence that would have to be examined could be very substantial and could not be divorced from the evidence that will be necessary at the substantive hearing. Because that question of law falls to be determined, it is impossible to say at this stage that the amount of evidence that would need to be examined would not be substantial. It seems to me that Mr Mansell's submissions are all predicated on the basis that the interpretation of s 66 that he contends for is the correct one.

58. This factor alone is sufficient to outweigh all the other factors that point in favour of directing a preliminary hearing, namely the potential for the reference to be disposed of through the determination of the preliminary issue, and the potential saving of costs. Having in mind the overriding objective, in my view the potential but uncertain advantage of saving costs and avoiding delay that may result from the hearing of a preliminary issue are not compatible with the proper consideration of the issues in this particular case and accordingly it would not be fair and just to direct the hearing of a preliminary issue on the question of limitation in this case.

The Privacy Applications

Relevant Facts

59. In order to support the Privacy Applications, Mr Prodhan filed three short witness statements, the contents of which I can summarise as follows.

60. First, there was a statement from Mr Prodhan himself. In that statement, Mr Prodhan described his long banking career and in particular, his current position as CEO of Rupali Bank, which he has held since 28 August 2016 with the approval of Bangladesh Bank (the Central Bank of Bangladesh) and the Ministry of Finance of the Bangladesh Government. Mr Prodhan's evidence was that Rupali Bank is the fourth largest state-owned commercial bank in Bangladesh, operating through 563 local branches and with over 5000 employees. It is a public limited company that is listed on the Dhaka and Chittagong Stock Exchanges.

61. Mr Prodhan's evidence is that he is extremely concerned that what he says is a good reputation in the Bangladeshi financial services industry, built up over many years and cemented with his recent work at Rupali Bank, will be destroyed unless the Privacy Applications are granted. He considers that there is a significant likelihood that any public criticism of him by the Authority would make his position as CEO of Rupali Bank untenable. He anticipates that publication of the Decision Notice would generate a large amount of adverse publicity in Bangladesh, both for him personally and also for Rupali Bank.

62. Mr Prodhan considers it highly likely that notwithstanding the fact that the Decision Notice is not a final determination of the matter, which will rest with the Upper Tribunal, the Bangladeshi press, which is not familiar with UK financial services regulations and less tightly regulated than the UK press, will not understand the position and will not appreciate the fact that the findings made by the Authority in the Decision Notice are not final and have no legal effect until a Final Notice is issued.

63. Mr Prodhan's concerns regarding the Bangladeshi press are based on the fact that he has been a victim in the past of inaccurate press commentary relating to his tenure as CEO of SBUK. In particular, two leading Bangladeshi newspapers mistakenly reported that SBUK was subject to the "highest level of corruption" while he was the bank's CEO. Mr Prodhan is concerned that the press will similarly misreport the Decision Notice so as to maximise the sensationalist effect of their reporting.

64. Mr Prodhan considers that there is a significant likelihood that public criticism of Rupali Bank's senior management would lead to a fall in share price, impacting negatively on investors and given that he is the CEO of the bank, this risk is even

more acute. If that risk was realised, he considers his position as CEO would become untenable and he would struggle to gain a similar level of employment if he was to lose his current role and be unable to support his family.

65. He concluded his evidence by stating that unless the Privacy Applications were granted, he and his family, as well as Rupali Bank and its shareholders, would suffer "significant prejudice" as detailed above.

66. Secondly, there was a witness statement from Mr Monzur Hossain, the Chairman of the Board of Directors of Rupali Bank. Mr Hossain says that he is "genuinely fearful" for Rupali Bank if the Privacy Applications are not granted. He believes that there is a "significant likelihood" that if the applications are not granted, there will be significant public criticism in Bangladesh of Mr Prodhan and Rupali Bank for employing Mr Prodhan as CEO which would make Mr Prodhan's position as CEO untenable, leaving Rupali Bank with little option but to replace him. Mr Hossain makes it clear that Rupali Bank wishes Mr Prodhan to remain as CEO for the foreseeable future. Mr Hossain agrees with Mr Prodhan regarding the likelihood of misreporting of the matter in the Bangladeshi press and the likely effect on the Rupali Bank share price and impact on investors if there were public criticism of its senior management, particularly its CEO.

67. Finally, there was a witness statement from Mr Shitangshu Kumar Sur Chowdhury, a former Deputy Governor of Bangladesh Bank, the Central Bank of Bangladesh. Mr Chowdhury speaks of Mr Prodhan's impressive leadership of Rupali Bank. He supports what Mr Prodhan and Mr Hossain say regarding the effect of the reporting of the Decision Notice in the Bangladeshi press on the reputations of both Mr Prodhan and Rupali Bank with the result that Mr Prodhan's position as CEO of Rupali Bank would become untenable. He also says that this would result in a fall in the bank's share price and impact negatively on its investors.

68. I was also referred to some of the comments made in the Bangladeshi Press regarding SBUK. There was an article in a publication called New Age, published on 21 May 2017 which contained the following statement:

> "The SBUK witnessed the highest level of irregularities and corruption when Ataur Rahman Prodhan was its chief executive officer between April 11, 2012 and May 8, 2015.
>
> The government later appointed Ataur as the managing director of state-owned Rupali Bank.
>
> UK's Financial Conduct Authority also fined Ataur £10,000 in October 2016 due to his failure in complying with the money laundering prevention rules.
>
> Ataur appealed to the FCA to withdraw the penalty.
>
> Approached by New Age, Ataur said that the FCA was yet to settle his appeal."

69. Clearly, there are some inaccuracies in that report, but in essence the report reveals that Mr Prodhan was at the time under investigation by the Authority in

relation to alleged failures to comply with anti-money laundering procedures and Mr Prodhan himself commented to the press by disclosing that he was still contesting the matter with the Authority. Those basic facts are of course true and were so at the time of the report.

Discussion

70. Against that factual background, I can now turn to the balancing exercise and in the light of the parties' submissions consider whether the factors put forward by Mr Prodhan outweigh the strong presumption, as established by the authorities, that the Decision Notice should be published, and details of his reference should be put on the Register. As discussed above, Mr Prodhan needs to satisfy me that the factors put forward provide cogent evidence of how unfairness might arise from publication and how he could suffer a disproportionate level of damage.

71. Mr Mansell submits that the evidence shows that publication of the Decision Notice would be prejudicial to:

(1) Mr Prodhan and his family;

(2) the interests of Mr Prodhan's employer, Rupali Bank;

(3) the interests of Rupali Bank's employees;

(4) the interests of Rupali Bank's shareholders and therefore consumers.

72. Mr Mansell submits that the evidence provided in the witness statements is cogent evidence as to a significant likelihood of prejudice that Mr Prodhan, his family and others are likely to suffer were the Privacy Applications not to be granted.

73. In my view only limited weight may be placed upon the witness statements that have been provided. Mr Prodhan decided not to make himself or the other witnesses available for cross examination.

74. In any event, even taking the evidence at face value, it does not in my view provide cogent and compelling evidence of how unfairness might arise from publication and how Mr Prodhan would suffer a disproportionate level of damage.

75. Mr Prodhan's primary concern appears to be his reputation in the Bangladeshi financial services industry. The authorities demonstrate that damage to reputation is not sufficient in itself and does not amount to anything out of the ordinary that would be expected to arise in this kind of situation, that is where Mr Prodhan is in the public eye in Bangladesh because of the previous difficulties with SBUK which have already been reported and his position as the CEO of Rupali Bank. The protection for Mr Prodhan will be provided by a decision by this Tribunal which will refute any unfounded allegations.

76. Indeed, as the press report from the New Age publication reveals, the matter is already in the public domain to a degree and it is therefore unclear what significant further damage to Mr Prodhan's reputation could arise in circumstances where what might be reported following the issue of the Decision Notice does not reveal much

more information than is already in the public domain. According to the terms of that report, the market already believes that Mr Prodhan has been made the subject of regulatory proceedings in the United Kingdom.

77. For those reasons, I am sceptical about Mr Prodhan's claims, and those of the other two witnesses, that his position as CEO of Rupali Bank would become untenable were there to be publicity concerning the Decision Notice in the Bangladeshi press. The revelations made in May 2017 occurred following Mr Prodhan's appointment as CEO of Rupali Bank and did not make his position untenable then. There is no evidence that at that time there was criticism of Mr Hossain for having employed Mr Prodhan at Rupali Bank. It appears that Rupali Bank and its senior management had full knowledge of the Authority's investigation but nevertheless decided Mr Prodhan was suitable to hold the position of CEO. It is difficult to see why that position should change simply because of the publication of the Decision Notice. That is a matter on which Mr Prodhan's other two witnesses might have been able to shed further light had they been able to give oral evidence to the Tribunal. I would also have been able to explore with those witnesses how any potential damage to Rupali Bank could have been minimised by robust statements to the press of their own to the effect that they continue to have full confidence in Mr Prodhan, as it appears they still do, and are confident that the allegations will be successfully contested. Also, it is not clear why even if there was adverse publicity, Mr Prodhan's dismissal would be the inevitable consequence. There may, for instance, be scope for him to step back from his duties pending the resolution of the matter.

78. Therefore, I am not satisfied that there is cogent and compelling evidence that Mr Prodhan and his family will suffer disproportionate damage as a result of being dismissed from his position. I am not satisfied that it is likely that such an event will arise.

79. As far as the potential for misreporting is concerned, as the passage from *Arch* quoted at [26] above makes clear, the protection afforded to Mr Prodhan is for the Authority's allegations to be tested in this Tribunal. There is also scope for Rupali Bank and Mr Prodhan to conduct a press campaign of their own.

80. For the reasons set out at [28] above, I cannot in this particular case take into account any potential prejudice to Rupali Bank or its employees or shareholders.

81. Mr Mansell had linked the Privacy Applications to the Preliminary Issue Application, in that if the latter was granted, then the case for privacy was stronger in that it could be granted only for a limited period of time. The passage from *Ford* referred to at [24] indicates that there is no scope for such a "half-way house". In any event, the issue does not arise because I have dismissed the Preliminary Issue Application.

Conclusions on the Privacy Applications

82. I therefore conclude that the Privacy Applications must be dismissed. The Authority has indicated that it will ensure that any publicity given to the Decision Notice will make it clear that the decision is provisional. I therefore direct that any press release issued by the Authority in connection with the publication of the Decision Notice must state prominently at its beginning that Mr Prodhan has referred the matter to the Upper Tribunal where each party will present their respective cases and the Tribunal will then determine what (if any) is the appropriate action for the Authority to take and remit the matter to the Authority with such directions as the Tribunal considers appropriate for giving effect to its determination. In referring to the findings made in the Decision Notice, rather than give any suggestion of finality, those findings must be prefaced with a statement to the effect that they reflect the Authority's belief as to what occurred and how the behaviour in question is to be characterised.

83. In view of my comments about how Mr Prodhan and Rupali Bank may minimise the risk of inaccurate reporting, it is appropriate that there should be a period of 21 days from the date of the release of this Decision before publication of the Decision Notice so that they can adequately prepare for the consequences of publication and I so direct.

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

Disposition

85. Both the Preliminary Issue Application and the Privacy Applications are dismissed.

JUDGE TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE

RELEASE DATE: 12 November 2018

ANNEX

RELEVANT STATUTORY PROVISIONS

Section 391 Financial Services and Markets Act 2000

(1) ….

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

(2)(3) …

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

(5) …

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

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

(b) prejudicial to the interests of consumers, or

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

…

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

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

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

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

(a) …

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

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

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

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

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