Neutral Citation Number: [2018] EWHC 446 (Admin)

Case No: CO/5977/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/03/2018

Before:

THE HON. MRS JUSTICE NICOLA DAVIES DBE

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Between:

THE QUEEN (on the application of PAUL RUPERT LEWIN)	**Claimant**
- and -	
(1) THE FINANCIAL REPORTING COUNCIL LIMITED (2) THE CONDUCT COMMITTEE OF THE FINANCIAL REPORTING COUNCIL LIMITED (3) THE DISCIPLINARY TRIBUNAL (CONVENED UNDER THE FRC'S ACCOUNTANCY SCHEME) IN THE MATTER OF THE EXECUTIVE COUNSEL OF THE FRC AND (1) DELOITTE LLP AND (2) JOHN CLENNETT	**Defendants**
- and -	
(1) DELOITTE LLP (2) JOHN CLENNETT	**Interested Parties**

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- -

Mark Vinall (instructed by **Brown Rudnick LLP**) for the **Claimant**
Rupert Allen (instructed by **The Financial Reporting Council**) for the **Defendants**
Jamie Smith QC (instructed by **Clyde & Co LLP**) for the **Interested Parties**

Hearing date: 21 February 2018

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Judgment Approved

Mrs Justice Nicola Davies:

1. This is a claim for judicial review whereby the claimant challenges:

i) The decision of the second defendant ("the Committee") on behalf of the first defendant ("the FRC") to publish a report of the third defendant ("the Tribunal") setting out its findings in a disciplinary case brought by the FRC against the interested parties (an accountancy firm and a partner of the firm); and/or

ii) The Tribunal's report itself ("the Report").

2. The FRC regulates the work of accountants pursuant to the Accountancy Scheme ("the Scheme"). The Executive Counsel to the FRC brought a Formal Complaint against the interested parties under the Scheme. The complaint alleged "Misconduct" by the interested parties in relation to their statutory audit of the financial statements of a public company of which the claimant was a director. The Tribunal, chaired by a QC, was appointed pursuant to paragraph 9(2) of the Scheme to hear and determine the complaint. The 20-day public hearing took place in May, June and October 2016. The Tribunal produced a 141 page Report setting out its detailed findings. The Tribunal found the interested parties guilty of misconduct, it imposed fines and costs orders. It is the claimant's case that in the course of the Report it made unqualified findings of serious wrongdoings on the part of the claimant who was not subject to the FRC's jurisdiction, had no involvement in the proceedings, was not asked to give evidence, nor to make representations or participate in any way.

3. Paragraph 9(11)(i) of the Scheme provides "The Disciplinary Tribunal shall make a report, which shall be signed by its Chairman, setting out its decision and reasons and any related orders made pursuant to paragraphs 9(7), 9(8) and 9(9) and send it to the Conduct Committee." The Tribunal delivered its Report to the Committee on 24 October 2016. The Committee's functions in relation to publication of a report are set out in paragraph 9(11)(ii) and 9(13) of the Scheme rules as follows:

> "9(11)(ii). The Conduct Committee shall send a copy of the Disciplinary Tribunal's report to any Member or Member Firm concerned, the Executive Counsel and the relevant Participant …
>
> 9(13). The Conduct Committee shall publish the report or reports prepared by the Disciplinary Tribunal for the purposes of paragraph 9(11) as soon as practicable and in such manner as it thinks fit unless this would not, in the opinion of the Conduct Committee, be in the public interest."

4. The Committee decided on 27/28 October 2016 to publish the Report in full. On 3 November 2016 a lawyer at the FRC emailed the claimant in the following terms:

> "Pursuant to paragraph 9(13) of the Accountancy Scheme, the FRC's Conduct Committee has decided to publish [the Report]. As a matter of courtesy, you are being provided with a copy of the report in advance of publication on a strictly confidential basis. The report is due to be published on Tuesday 8 November 2016."

5. On 4 November 2016 solicitors acting on behalf of the claimant wrote to the FRC stating that the publication of the Report in its current form would be "improper, contrary to the interests of natural justice, infringe our client's rights protected by Articles 6 and 8 of the ECHR, including the right to a fair hearing and the right to

protect his reputation, and defamatory". The letter asked that the FRC delay publication and excise all passages in the Report which contained allegations of wrongdoing. The FRC agreed to delay publication of the Report in order to consider the representations of the claimant. On 9 November 2016 the FRC wrote to the claimant's solicitors stating that the outcome of the Tribunal hearing would be announced the next day and stated:

> "…The Tribunal report will NOT be published and no reference will be made in the press notice to your client at all. Those who have a copy of the Report have been forewarned that although the outcome will be published the detailed content of the Report remains confidential…"

6. On 10 November 2016 the findings of misconduct and the sanctions imposed were reported. A statement was made by Executive Counsel that the fine imposed upon the accountancy firm was the highest recorded by the FRC for misconduct on a firm. It was said to be a clear indication of the importance of higher standards being maintained in all audits and the seriousness of the failure to perform an adequate audit of these financial statements which led to misleading information about the profits and turnover at the company being made to the market.

7. On 17 November 2016 the FRC wrote to the claimant's solicitors stating that the Committee had decided to invite the Tribunal to consider the representations made on behalf of the claimant and one of the interested parties. To address the representations, the Chair of the Tribunal had made redactions to the Report. The letter, and a similar one to the interested parties, stated that the Report would be published in the redacted form on 21 November. The letter resulted in more representations being made by the claimant and the interested parties.

8. In a letter dated 22 November 2016 to the claimant's solicitors, the FRC addressed the matters which had been raised and stated, inter alia:

> "…it is in the public interest to publish the Report because the Report sets out the findings of a Tribunal in respect of a public interest matter under the Scheme following a public hearing of evidence with Adverse Findings being reached in respect of a major audit and accountancy firm and an audit engagement partner at that firm. The Committee must carry out its functions in a way that supports those regulated by the FRC to comply and grow and publishing the Report will serve as a deterrent to others to commit wrongdoing. The Committee is also required to ensure that its approach to its regulatory activities is transparent…
>
> Although the Tribunal Chairman has prepared a proposed redacted version of the Report, the Committee is not precluded from deciding that further or different redactions should be applied to those proposed by the Tribunal Chairman. Therefore, the Committee has considered whether any redacted version of the Report should be published, and if so, what form that might take, or whether the Report should be published in unredacted form. In reaching a decision in respect of the form the published Report should take, the Committee has had to

weigh up a number of competing considerations and representations made by interested parties.

The Committee has considered matters of fairness to those who did not give evidence before the Tribunal, and were not invited to comment on the Report prior to its finalisation and delivery to the Committee. These considerations have to be balanced against fairness to the respondents, who can reasonably expect that the Tribunal's decision be presented in full so that readers of the Report, including other members and member firms of the accountancy profession, can fully appreciate that Tribunal's findings, and its assessment of all the evidence including all relevant mitigating factors.

The Committee notes that some of the redactions in the proposed redacted Report prepared by the Tribunal Chairman concern evidence or submissions heard at a public hearing. For example, certain matters stated by witnesses in evidence have been redacted. The Committee does not consider that such redactions are justified because the evidence and submissions were heard in public without restriction or closed proceedings. Moreover, the issues raised in certain of the representations go to the findings of the Tribunal, not the assertions put forward in evidence or submissions.

On the other hand, there are certain aspects of the redactions that do not appear to go far enough if they had been solely designed to address the representations made; for example the last sentence of paragraph 45 would need to be redacted.

Moreover, there are certain paragraphs, in particular paragraph 417 and 450 that are very difficult to deal with in terms of redaction. The sense of these paragraphs is not clear with the redactions that have been suggested and it is hard to see how these paragraphs could otherwise be appropriately redacted to satisfy the objections that have been made regarding the content of the Report given that these paragraphs are central to explaining why the Tribunal found that the Respondents' Misconduct attracted less serious sanction that might otherwise have been the case.

The Committee has taken the view that the findings of the Tribunal should be published in full if the matters set out in the Report are to be presented in a fair and balanced way which accurately reflects the Tribunal's reasoning and findings. However, and bearing in mind that it has a discretion to determine the manner of publication, it thinks that measures can also be taken to make it clear that the Tribunal was appointed for a specific purpose, did not hear or invite evidence from directors/managers of Aero and did not invite comment from them on the content of the Report prior to providing it to the Committee.

The Committee's decision

> The Committee has decided to publish the Report in full, unredacted form. The Committee has decided that the Explanatory Memorandum at Annex 2 should be published alongside the Report."

9. The Explanatory Memorandum includes the following:

> "The Disciplinary Tribunal did not hear evidence from any director or member of management of Aero or AI during the course of the proceedings and nor were such individuals invited to provide any evidence. Additionally, the Disciplinary Tribunal did not invite or receive comment from such individuals in advance of its finalisation of the Report prior to delivering it to the Conduct Committee.
>
> The findings reached by the Disciplinary Tribunal do not amount to findings against any party other than the respondents to the proceedings, Deloitte LLP and Mr Clennett."

10. On 23 November 2016 the claimant's solicitors sent a letter before claim in judicial review proceedings to challenge the Committee's decision. The following day the FRC agreed that, if the claimant made an application for interim relief, the Report would not be published pending determination of that application. On 25 November 2016, having obtained an anonymity order from Lang J, the claimant commenced these proceedings and applied for interim relief. The FRC did not contest the application for interim relief, giving an undertaking of 30 November 2016 not to publish the Report until the determination of the claim for judicial review at the first instance. By consent the anonymity order was continued until trial. The claim form was subsequently amended and re-amended and the Tribunal was joined as an additional defendant by order of Sir Ross Cranston dated 20 March 2017. Permission to apply for judicial review was granted by Robin Purchas QC on 18 July 2017. On 8 February 2018 Mostyn J made an order that pursuant to CPR 39.2(3)(a) and (g) the hearing should be held in private, I continued that order for the duration of the hearing.

The Grounds of Challenge

11. Two Grounds are pursued:

    i) The Tribunal's decision to include in the Report unqualified findings about the claimant's conduct was unlawful as:

        a) Being unfair at common law; and/or

        b) It would result in a violation of both the substantive and procedural aspects of Article 8 of the ECHR;

    ii) The Committee's decision to publish the unredacted Report was unlawful as:

        a) Being unfair at common law; and/or

        b) It would result in a violation of both the substantive and procedural aspects of Article 8 of the ECHR.

The claimant's case

12. The Report contained explicit and unqualified criticism of the claimant by a regulatory tribunal in stating that he was guilty of serious wrongdoing. This is devastating for the reputation of this businessman. The claimant received no notice of the allegations, he was given no opportunity to respond to the substance of the criticisms. The harm to the claimant arises from a combination of the findings by the Tribunal and the decision to publish which will cause harm to the claimant and his reputation. Both decisions are independently unlawful.

13. The Tribunal owed a duty of fairness to the claimant to carry out a fair procedure sufficient to justify the specific findings of serious wrongdoing which they made in a judgment which they knew was likely to be public. They did nothing to involve the claimant, as such, they are in breach of their duty of fairness. The claimant relies upon the adverse findings as providing the basis for his contention that the Tribunal owed a duty to him to act fairly.

14. The Committee, in deciding to publish the Report, knew the circumstances in which the Tribunal's decision had been reached, they knew the content of the Report and the likely effect upon the claimant. In reaching a decision to publish they had to balance the competing interests of the public interest, the interest of the claimant and the interests of the interested parties. In deciding to publish the Committee struck the wrong balance.

15. Article 8 ECHR:

> "**Right to respect for private and family life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

16. Article 8 extends to the protection of reputation provided that "an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life" *Axel Springer v Germany* (2012) 55 EHRR 6 at [83], *Yeo v Times Newspapers Ltd* [2017] EMLR 1. Article 8 requires that a fair procedure be followed before taking measures which interfere with the article's rights: *Re W (A Child) (Care Proceedings: Non Party Appeal)* [2017] 1 WLR 2415 at [71-73].

17. A public or quasi-public body cannot lawfully publish definitive findings that a person has committed serious wrongdoing without giving that person a fair opportunity to make representations: in *Re Pergamon Press Ltd* [1971] Ch 388, Lord Denning MR, in respect of inspectors appointed under the Companies Act, stated:

> "They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They

> may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings… When they do make their report, the Board are bound to send a copy of it to the company; and the board may, in their discretion, publish it, if they think fit, to the public at large.
>
> Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly … before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him."

18. Of the duty to act fairly to persons who are not direct parties to the decision maker's decision, Glidewell LJ in *R v LAUTRO Ex p Ross* [1993] QB 17, [50] stated:

> "I accept that very frequently a decision made which directly affects one person or body will also affect, indirectly, a number of other persons or bodies, and that the law does not require the decision-making body to give an opportunity to every person who may be affected however remotely by its decision to make representations before the decision is reached. Such a principle would be unworkable in practice. On the other hand, it is my opinion that when a decision-making body is called upon to reach a decision which arises out of the relationship between two persons or firms, only one of whom is directly under the control of the decision-making body, and it is apparent that the decision will be likely to affect the second person adversely, then as a general proposition the decision-making body does owe some duty of fairness to that second person, which, in appropriate circumstances, may well include a duty to allow him to make representations before reaching the decision. This will particularly be the case when the adverse effect is upon the livelihood or the ability to earn of the second person or body."

19. In *Re W* (above) McFarlane LJ recognised that a judge can owe a duty of fairness to non-parties who do not give evidence. He referred to the approach that is required before criticising a witness who has not been called to give evidence as demonstrated by Munby J (as he then was) in *Re M (Adoption: International Adoption Trade)* [2003] 1 FLR 1111 where he stated at [112]:

> "I should make it clear that I did not finally decide to take these steps without having first given Jay Carter, her husband and Authority X an opportunity to make appropriate submissions. Copies of the draft judgment were sent to each of them inviting them to indicate whether:
>
> (i) they wished to make any submissions to me in relation to:
>
> (a) any of the findings I had made or the views I had expressed;
>
> (b) the proposed delivery of this judgment in public;

> (c) (in the case of Jay Carter) the proposal that the judgment should be sent to the Director of Public Prosecutions and the Attorney-General; and
>
> (ii) if so, whether they wished to make those submissions orally or in writing."

20. In *MRH Solicitors Ltd v Manchester County Court* [2015] EWHC 1795 (Admin) Nicol J giving the judgment of the Divisional Court on behalf of himself and Burnett LJ (as he then was) stated at [34-35]:

> "… in the absence of good reason a Judge ought to be extremely cautious before making conclusive findings of fraud unless the person concerned has at least had the opportunity to give evidence to rebut the allegations. This is a matter of elementary fairness. In Vogon International Ltd v the Serious Fraud Office [2004] EWCA Civ 104 at [29] May LJ (with whom Lord Phillips MR and Jonathan Parker LJ agreed) said,
>
> 'It is, I regret to say, elementary common fairness that neither parties to the litigation, their counsel nor judges should make serious imputations or findings in any litigation when the person concerned against whom such imputations or findings are made have not been given a proper opportunity of dealing with the imputations and defending themselves.'
>
> This is not only required because of fairness to the party affected but also to avoid the Court falling into error…"

21. In any judgment or Report the claimant submits that disclaimers can be given in respect of non-parties, as was done by Tugendhat J in *Rothschild v Associated Newspapers* [2012] EWHC 177 (QB). At [10] he stated:

> "It is important that I stress at the start of this judgment that neither Lord Mandelson, nor Mr Deripaska, nor any of the other persons mentioned above, are claimants in this action. The only persons mentioned who have given evidence, apart from Mr Rothschild himself, are …. Nothing in this judgment should be taken as a criticism by me of anyone who is not a party to the action. That would not be fair, because no one other than Mr Rothschild and ANL has been represented in court, or has made any representations to me about the matters in question."

Procedural unfairness

(i) Claim against the Tribunal

22. The claimant is not seeking the reopen the inquiry into the facts.

23. During the course of this hearing Mr Vinall clarified the case as put on behalf of the claimant. He accepts that there is no general right, in respect of any person who is the subject of allegations in regulatory proceedings, to be given rights of participation as that is unworkable. The claimant's case is directed at process, namely the way in which the Tribunal made and expressed its findings. The Tribunal had a choice; it

could make findings which were qualified but if it chose not to qualify those findings it had to give the person the subject of those findings rights in the process.

24. The claimant became aware that a FRC investigation was underway when he saw the FRC's announcement that a Formal Complaint had been delivered in relation to the audits (in the case of both interested parties), preparation and approval (in the case of the finance director) of the financial statements of the companies for the years ended 30 June 2006, 2007 and 2008. He was not aware of the contents of the Formal Complaint. He saw subsequent announcements by the FRC and related press reports. In 2015 he learnt that the finance director had settled with the FRC. In 2016 he knew that a hearing concerning both interested parties was underway. He was aware of the FRC's announcement of the settlement with the finance director which stated that the director had acted recklessly but not dishonestly or deliberately. That did not suggest to the claimant that there were any questions over his own conduct. He was not aware that any allegations had been made against him or any member of the company's senior management, save for the finance director, in connection with the matters being investigated. He saw no references to his own conduct in any of the FRC's announcements or any other publicly available material. He did not know that he would be the subject of such allegations. He states that it never crossed his mind to attend the hearing against the interested parties as an observer.

25. The claimant relies on the fact that the FRC's Executive Counsel's case was that the interested parties' failures were serious because they failed to prevent or detect serious wrongdoing by management. The interested parties' case was that they had been misled by management of the company. The claimant submits that neither side had any interest in challenging, questioning or qualifying the allegations against the claimant. The Tribunal's findings were untested by any meaningful adversarial process. The claimant initially contended that the wrongdoing of management was common ground during the Tribunal hearing, a stance from which he moved somewhat during the course of oral submissions before the court. It was accepted by both sides at the Tribunal hearing that the claimant had been dishonest as to the date of the Garuda transaction.

(ii) Claim against the Committee

26. Pursuant to paragraph 9(13) of the Scheme the Committee had a discretion as to the manner in which it published the Report, in particular how to redact it. The discretion is constrained by the requirements of common law fairness. The decision to publish the Report in an unredacted form, knowing: (a) it would damage the claimant's reputation and (b) that the claimant had not had the opportunity to make representations as to the substance was unfair and unlawful. It is the Committee's decision to publish the report which directly causes harm to the claimant. It is the Committee's responsibility to ensure that any interference with the claimant's Article 8 rights is justified and proportionate. The Committee had to work with the Report it was given, the Report could not be rewritten. If the Report was not, and could not be made, fit to publish, the Committee should have decided not to publish it. The claimant contends that having decided it was not satisfied with the Tribunal Chair's proposed redactions the Committee abandoned nuance and simply decided to publish the entire Report without making any attempt to make its own granular assessment of which parts of the Report should properly be published.

Article 8 ECHR

27. The attack on the reputation of the claimant is sufficiently serious to meet the Article 8 threshold. The adverse findings in relation to the claimant's conduct and character would have a severe effect on his professional reputation and carry the risk of adverse media and public attention. There is little or no public interest in publishing findings about the claimant's conduct which have been arrived at in a way which is unfair to him and doing nothing, save for the Explanatory Memorandum, to minimise the impact on the claimant. If redaction was difficult the Report should not have been published.

The proposed Explanatory Memorandum

28. The Memorandum is insufficient to cure the reputational damage which the claimant would suffer if the Report is published. Unlike the disclaimer identified above it does not form part of the Report and does not carry the imprimatur of the Tribunal. The Tribunal's findings may well attract qualified privilege. Section 15 and Schedule 1, paragraph 14(b) of the Defamation Act 1996 ("the 1996 Act") protects, by qualified privilege, fair and accurate reports of the findings of the Tribunal published in the public interest and subject to a right of reply. The problem with the Explanatory Memorandum is less the wording as the fact that its content is irreconcilable with the contents of the Report. The Tribunal made findings about the claimant's conduct and state of mind. A statement that its findings are about the claimant and not findings against the claimant is insufficient to change those findings.

29. The claimant recognises that no party has any interest in relitigating the question of whether the allegations of misconduct were well founded. He does not seek to reopen the original hearing still less to make submissions in respect of the findings made against him. The "target" of the claimant's challenge is the publication of the Report.

The first and second defendants' case

The Tribunal, the duty to act fairly

30. The duty has to be considered in the context of the proceedings, namely what does fairness require? In *Re Pergamon Press* (above) Sachs LJ at 403 stated:

> "In the application of the concept of fair play, there must be real flexibility, so that very different situations may be met without producing procedures unsuitable to the object in hand. That need for flexibility has been emphasised in a number of authoritative passages in the judgments cited to this court. ...
>
> It is only too easy to frame a precise set of rules which may appear impeccable on paper and which may yet unduly hamper, lengthen and indeed, perhaps even frustrate… the activities of those engaged in investigating or otherwise dealing with matters that fall within their proper sphere. In each case careful regard must be had to the scope of proceeding, the source of its jurisdiction … the way in which it normally falls to be conducted and its objective."

31. The context of the proceedings was as follows:

i) The Tribunal was convened for the sole purpose of determining the allegations of misconduct against the interested parties pursuant to the Scheme;

ii) The findings in relation to the claimant fell squarely within the four corners of the case and were the subject of detailed evidence and submissions at a public hearing;

iii) The claimant's conduct and its impact on any assessment of the interested parties' conduct were central issues on which the Tribunal needed to express its own view;

iv) The claimant is not himself subject to the jurisdiction of the Scheme;

v) The Scheme does not provide for notice to be given to non-parties against whom such allegations are made in disciplinary proceedings;

vi) The Report does not itself have any direct legal consequence for the claimant.

32. There is no power under the Scheme to join the claimant as a party to the proceedings nor to invite representations from him. The process pursuant to the Scheme was adversarial. The parties provided written pleaded cases, they called evidence and made submissions. The Tribunal had to resolve factual issues regarding the claimant's conduct in the context of the disputed cases of the FRC and interested parties. The Report of the Tribunal was produced for the limited purpose of resolving that dispute.

33. The most any duty of fairness could have required of the Tribunal is that notice of the proceedings and hearings be given to the public, paragraph 7(15) of the Scheme and Regulation 23(a) of the Accountancy Regulations. It is what happened in this case. The announcement of a settlement between the FRC and a co-director of the claimant provided information about the allegations that had been made against his co-director, such as to permit the claimant to understand that his involvement and conduct in relation to the Garuda transaction would, or was very likely to, be put in issue at the hearing of the allegations against the interested parties. The claimant would have been well aware of many of the facts and matters referred to in the Amended Formal Complaint, he was the author or recipient of key documents, present during key conversations and meetings relied upon as establishing the existence of the company's fraud.

34. The claimant was a senior officer of a public company, listed on the Alternative Investment Market. It had collapsed amidst reports of accounting irregularities, he knew that the company's audit procedures were being investigated in a public hearing by the independent regulator. The public notices gave the claimant a fair opportunity to make enquiries as to the nature of the misconduct or to attend the public hearing should he wish to do so. If the claimant contends he did not know what was happening it was because he took no steps to find out. A test of what is fair is objective, it does not permit the claimant to place his head in the sand.

35. It was the case of the interested parties in the proceedings before the Tribunal that the nature and the extent of the collusive fraud of the company and its directors excused their failure to uncover irregularities in the audit. The FRC accepted that in certain respects the claimant had acted dishonestly but did not accept that the nature and extent of the fraud excused the acts or omissions of the interested parties. It is clear from the detail of the Report and the extent of the fraud identified that, not only was the fraud the central issue in the case, it was an issue which the Tribunal considered in

detail, in evidence, in submissions and in its findings. The interested parties contended that this was a collusive fraud difficult to discover, particularly when credible senior management promulgate misleading material. Whether the interested parties had performed to the requisite standard required a detailed evaluation by the Tribunal of what was going on during the course of the audit.

36. No duty of fairness required the Tribunal to identify for the claimant the allegations that had been made about him or to invite the claimant to intervene or participate in the proceedings in the circumstances where: the claimant is not subject to the Scheme; there is no power under the Scheme for the Tribunal to join him as a party; the impact of the Report on him, if any, would be at most indirect and incidental.

37. As to the authorities in which the courts have recognised duties of fairness to non-parties, no case lays down a rule of general application and the facts of each are very different to the present case. Neither *Re W* (above) nor *MHL Solicitors* (above) concerned: findings in relation to non-parties that were essential for the resolution of the proceedings between the parties; professional disciplinary proceedings brought by a regulator in the public interest within the framework of a detailed regulatory scheme; allegations or findings which had been discussed at length at public hearings.

38. The authority of *LAUTRO* (above) is still further removed from the present case. LAUTRO carried out an investigation into the activities of a company ("W") which was the appointed representative for an insurance company pursuant to the Financial Services Act 1986. LAUTRO exercised its statutory powers of intervention to prohibit the insurance company from accepting any new business through W until its investigation had been completed. As a result the insurance company terminated its agency agreement with W. The key reasons for the Court's conclusion that W was entitled to make representations were that: (a) LAUTRO was obliged under its own rules to serve a copy of the relevant notice on W; and (b) LAUTRO's decision had the immediate effect of ending W's commercial relationship with the insurance company. The object of its investigation was the third party, there was an express duty under its own rules to serve a copy of the relevant notice on the third party.

39. There is no general rule that a tribunal or a judge owes a duty of fairness to third parties in adversarial proceedings even if such proceedings could adversely affect the non-party.

The decision of the Committee to publish the Report

40. The proceedings were in public. The recognition of the public interest in the public nature of the proceedings is incorporated into the Scheme at every stage of the proceedings. The Committee may, if it thinks it appropriate to do so, publish the fact of its decision to investigate (paragraph 7(4)). Paragraph 7(15) required the Committee to publish the outcome of the Executive Counsel's investigation as soon as practicable and in such manner as it sees fit, unless this would not, in the opinion of the Committee, be in the public interest. Any settlement agreements will be published by the Committee as soon as practicable and in such manner as it thinks fit unless this would not, in the opinion of the Committee, be in the public interest (paragraph 8(6)).

41. The Tribunal's report was in final form as at 3 November 2016, the Tribunal was, thus, functus officio. If there had been unfairness in the approach adopted by the Tribunal, which is not accepted, it was not open to the Committee to change the Report. The claimant had a fair opportunity to make representations to the Committee concerning publication of the Report, the considerations were properly considered

alongside the representations received from others by the Committee. The decision to publish the Report in full unredacted form with the Explanatory Memorandum was procedurally fair and appropriately balanced the competing interests. The Committee took full account of the fact that the claimant had not been invited to participate in the proceedings.

42. The claimant's interest in protecting his reputation is adequately protected by the law of defamation. In *Khuja v Times Newspapers Ltd* [2017] 3 WLR 351 at [21] Lord Sumption stated "The protection of reputation is the primary function of the law of defamation." A fair and accurate report of the findings of the Tribunal in the Report in the public interest would generally be protected by qualified privilege (section 15(1) and paragraph 14(b) of Schedule 1 of the 1996 Act). The qualified privilege defence is subject to a claimant's right to require that "a reasonable letter or statement by way of explanation or contradiction" be published "in a suitable manner" (section 15(2) of the 1996 Act).

43. The claimant's position is further protected by the Committee's proposal to publish the Explanatory Memorandum. Prior to this hearing the offer was made to publish the Memorandum alongside the Report. During the course of the hearing the offer was made that the Memorandum would be placed in the same electronic document as the Report itself. The public would be able to understand the relevance of the fact that the claimant had not been given the opportunity to participate in the proceedings before the Tribunal, there is no particular subtlety in this which would be lost on the public. The wording of the Explanatory Memorandum reflects requests made by the claimant to the FRC in his letter of 17 November 2016. The FRC is willing to consider any drafting changes which the claimant wishes to suggest.

44. If the claimant is unable to establish that he is entitled to relief as against the Tribunal in relation to the Report itself it is not realistically arguable that the FRC and the Committee acted unlawfully in deciding to publish the Report in accordance with paragraph 9(13) of the Scheme and the publication policy.

The claimant's Article 8 rights

45. The first and second defendants submit that the publication of the Report would not interfere with the claimant's Article 8 rights. The "touchstone of private life" is whether "in respect of the disclosed facts the person in question had a reasonable expectation of privacy": *Campbell v MGN* [2004] 2 AC 457 at [21]. In *Khuja* Lord Sumption JSC at [21] stated:

> "21. In *Campbell v MGN Ltd* [2004] 2 AC 457, the House of Lords expanded the scope of the equitable action for breach of confidence by absorbing into it the values underlying articles 8 and 10 of the European Convention on Human Rights, thus effectively recognising a qualified common law right of privacy. The Appellate Committee was divided on the availability of the right in the circumstances of that case, but was agreed that the right was in principle engaged if in respect of the disclosed facts the person in question had a reasonable expectation of privacy. The test was whether a reasonable person of ordinary sensibilities, if placed in the same situation as the subject of the disclosure, rather than the recipient, would find the disclosure offensive. The protection of reputation is the primary function of the law of defamation. But although

the ambit of the right of privacy is wider, it provides an alternative means of protecting reputation which is available even when the matters published are true."

46. The claimant did not have a reasonable expectation of privacy because the relevant parts of the Report concern his performance as a director of a public company, in particular in connection with a statutory audit of the company's financial statements. This is a public rather than a private matter. Further the claimant has no reasonable expectation of privacy in relation to matters discussed at a public hearing: *Khuja* (above) [34(1)].

47. Article 8 may protect a person against an attack on his reputation but only if it leads to a serious interference with his private life so as to undermine his personal integrity, no sufficient evidence exists to support such a level of interference.

48. Any interference with the claimant's Article 8 rights by the publication of the Report would be justified. Article 8 rights are not absolute and unqualified even if the publication of the Report will interfere with the claimant's Article 8 rights, the Article 10 rights of the public generally to receive information about the outcome of disciplinary proceedings in public and the Article 6, 8 and 10 rights of the interested parties point in favour of publication of the Report in full. In balancing the competing rights, relevant would be:

a) The prejudice to the interested parties which would result from not publishing the Report, publishing it with redactions or redrafting to remove references to the claimant and the Tribunal's criticisms of him. Such redactions or redrafting would not permit a fair and proper understanding of the findings made against the interested parties and their culpability;

b) There is a strong public interest in the Report being published in full given that it explains the reasons for the decisions of the Tribunal in a case of serious misconduct pursued by the FRC as a public interest regulator. The claimant's role was of central importance in the case before the Tribunal, its decision cannot properly be understood if the Report does not set out the view which the Tribunal formed as to the claimant's conduct or the details of the evidence and submissions on which that view was based;

c) Following publication of the Report in full the claimant will be able to explain or justify his conduct in public and refute the Tribunal's criticisms;

d) Any interference with the claimant's Article 8 rights would, at most, be incidental to the publication of a complete account of an important public matter, namely the evidence in support of and the Tribunal's reasons for its decision in the disciplinary proceedings brought by the FRC against the interested parties. It is clear that publication of the Report in unredacted form sufficiently contributes to a question of legitimate significant public interest to justify any interference with the claimant's Article 8 rights in *Re Guardian News and Media Ltd* [2010] 2 AC 697 at [50-73].

49. The evidence and submissions recorded by the Tribunal and its criticisms of the claimant in the Report go to a central issue in the case against the interested parties which have already been referred to in the course of public hearings. This is to be contrasted with *Re W* (above), upon which the claimant relies, in which the relevant hearings were in private, the allegations had not featured at all in the trial process.

50. In *Khuja* (above) the majority held that no injunction should be granted to prevent the reporting of serious allegations made against the applicant at a public hearing of a criminal trial even though he had never been charged with any criminal offence. At [34] Lord Sumption made clear that the "collateral impact" of the trial process on non-parties was "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".

51. The Report lists the parties to proceedings, and in paragraph 28 it lists the witnesses. It is clear from the Report that the claimant was not a party to the proceedings, he was not invited to give evidence, he did not participate in the proceedings. The significance of these facts is not difficult to understand. The Explanatory Memorandum clarifies the point that the Report was prepared without input from the claimant, that is a public statement of undisputed fact.

The interested parties' case

52. The interested parties accept the decision of the Committee to publish the Report, they regard the Explanatory Memorandum as sufficient, they will accept direct attachment of the Memorandum to the online link to the Report such that the Report and the Memorandum are contained in a single electronic document. They would accept the Memorandum being posted into a part of the Report.

53. Mr Smith QC provided a summary of the facts as found by the Tribunal concerning the collusive fraud of the company of which the claimant was a director, the financial statements which were the object of the Tribunal's investigation. The company sold aircraft parts. If it sold them for more than it paid, it made a profit. In the mid-2000s companies including Qantas and Garuda were selling significant amounts of stocks and thereafter were subcontracting their maintenance and stock supply function. As a result the company bought vast amounts of stock at a bargain price and would then resell. The first relevant transaction related to Garuda, known as the Garuda transaction. There were two elements to the transaction, the purchase of stock in bulk from Garuda and the immediate return of parts of the stock to Garuda's subsidiary GMF. The relevant transaction took place in 2006. As found by the Tribunal there were three elements to what were found to be the collusive fraud by the company and certain of its directors:

    i) The Garuda transaction: this involved the company including the revenue from this transaction in accounts for the year ending June 2006. The Tribunal found that the transaction did not take place before that date. The company deceived the auditors in seeking to persuade them that the transaction had taken place before June 2006 in order to boost the profits for the year.

    ii) The use of a "straight line discount" ("SLD"): this was a means of working out the individual cost of an item when the items had been purchased in bulk. It represented an estimate of costs. The Executive Counsel's case was that this was an inappropriate accounting technique as it did not recognise that some items sat on the shelf for a long time whereas others were sold more quickly which directly affected the profit to be made. The appropriate accounting

technique was the differentiated discount method ("DDM"). The audit team had been told, as was found by the Tribunal, that when the company considered and negotiated the bulk stock purchase the team could not assess the likely rate of movement of any stock item and therefore the SLD was the only way an estimate of price could be achieved. The Tribunal found that a lengthy spreadsheet existed containing information gathered by the staff of the company which did assess in advance the likely rate of movements of stock.

iii) The Tribunal found that the company had applied the accounting technique identified by the Executive Counsel as being appropriate, namely the DDM, but had done so in reverse. The result was that items which moved quickly were discounted more heavily, this meant that the company was deceitfully manipulating costs so as to increase their profit for fast moving items.

54. There were other criticisms made by the Tribunal but the collusive fraud was at the heart of the facts and of the fundamental disagreement between the Executive Counsel and the interested parties. The issue was whether any collusive fraud did or did not excuse failure by the interested parties to detect it. The first documents sent by the FRC to the interested parties identified the facts of the Draft Formal Complaint albeit they did not make allegations of dishonesty or fraud. From their first reply the position of the interested parties was that what was being alleged at the core of the proceedings was collusive fraud. Thereafter, throughout pre-hearing correspondence, pleaded statements, in evidence and submissions, the interested parties' case was that at the heart of the case and the audit was collusive fraud on the part of the company and its directors. At the hearing, save for the agreement as to the claimant's dishonesty in respect of the date of the Garuda transaction, everything was in dispute.

55. Before the court were two confidential statements from the interested parties. They detail the difficulty which has been experienced by reason of the limited reporting of the decision of the Tribunal, namely the finding of misconduct and the sanctions imposed. For the purpose of this judgment it is not necessary to elaborate on the detail contained in the statements suffice it to say that the inability on the part of the accounting firm and the individual to place in context the findings of misconduct has caused real professional difficulties and, in the case of the individual, personal difficulties.

Conclusion

56. The setting up and conduct of the Tribunal hearing was governed by the Accountancy Scheme. It was convened for one purpose, namely to investigate complaints of misconduct on the part of the interested parties in respect of statutory audits performed by them in respect of a public company of which the claimant was a director. The audits were for the years 2006, 2007 and 2008. The interested parties examined financial statements, documents and spoke to the claimant and others about what was known as the Garuda transaction and related activities.

57. From the first formal contact between the FRC and the interested parties, in which the FRC set out its Draft Formal Complaint against them, it was the stated position of the interested parties that on the part of the company and senior management there had been collusive fraud in respect of the Garuda transaction and related activities. At the hearing the Executive Counsel of the FRC did not dispute that the claimant had been dishonest as to the date of the Garuda transaction. Beyond that assertion, undisputed between the parties, were different cases as between the Executive Counsel and the interested parties as to what the interested parties could or should have known of the

collusive fraud. The Tribunal had to investigate the nature and extent of the fraud in order to determine whether there was any culpability on the part of either of the interested parties, the nature and extent of the same and, if there was a finding of misconduct, the appropriate sanction. The detail of the Report demonstrates that the Tribunal did precisely that, it was the only course which it could properly and fairly take. The claimant's conduct fell squarely within the four corners of the case to be investigated and, resulting from it, the Tribunal's findings of fact. Given the claimant's role within the company, in particular in respect of the Garuda transaction, it was wholly foreseeable that his acts or omissions would be the subject of evidence and submissions. His conduct and its impact on any assessment of the interested parties' conduct was an issue upon which the Tribunal was required to express a view.

58. The Tribunal had jurisdiction in respect of the interested parties and the finance director of the company. The claimant is not an accountant. He was not subject to the jurisdiction of the Scheme. He was not a party to the proceedings. The Scheme does not permit for notice to be given to a non-party.

59. The claimant was aware of the FRC proceedings. He knew that the Tribunal was investigating the 2006 to 2008 audits of the company of which he had been a director. He learnt that settlement had been achieved with his co-director. The public notice of that settlement stated:

> "The Financial Reporting Council (FRC) announces the outcome of the disciplinary case in connection with Mr. Hugh Bevan, former Finance Director of Aero Inventory plc, and a member of the ICAEW.
>
> A settlement agreed between the Executive Counsel to the FRC, Gareth Rees QC and Mr. Bevan has been approved by the FRC independent Tribunal. Mr Bevan has admitted that his conduct fell significantly short of the standards reasonably to be expected of him in that:
>
> - he breached the ICAEW's Fundamental Principles of Integrity and of Performance by including, within the financial statements for the financial year ended 30 June 2006, revenue and profit from the Garuda Transaction, being reckless as to whether the Garuda Transaction had taken place in that year;
>
> - he breached the Fundamental Principle of Performance by failing to report to Aero Inventory's board that if the Garuda Transaction should be included in the 2006 statements it should be reported as an exceptional item;
>
> - and he breached the Fundamental Principles of Performance and of Professional Competence and Due Care in that, in consequence of the application of the "straight line discount" to the stock acquired under certain bulk purchase contracts, the accounts did not show a true and fair view of the state of affairs of Aero Inventory as of 30 June 2006, 30 June 2007 and 30 June 2008.

> In reaching the Settlement Agreement, the Executive Counsel took account of the fact that Mr. Bevan's behaviour was not dishonest or deliberate, and that Mr. Bevan had cooperated with the FRC, had a good disciplinary record, and had demonstrated contrition.
>
> The parties agreed the following terms of settlement:
>
> - Exclusion from the profession for 3 years
> - A sum of £170,000 to be paid by Mr. Bevan as a contribution to the Executive Counsel's costs."

60. The claimant knew that he was involved in the Garuda transaction, he was the author and recipient of many documents relating to it, he had discussed the transaction and related activities with the auditors. The claimant must have known that his role as a director of the company could not escape scrutiny when what was being investigated was the Garuda transaction, related activities and the financial statements of the company, 2006 to 2008. He chose not to make enquiries nor to attend any part of the hearing. In my judgment a person in the position of the claimant, an experienced businessman, would reasonably have known that there could be comment or criticism of an act or omission on his part given his senior role within the company and his involvement in the Garuda transaction and related activities.

61. Mr Vinall's acceptance on behalf of the claimant that there is no general right to persons, the subject of allegations at a regulatory hearing, to be given rights of participation reflects the authorities and was properly made. The more nuanced issue is whether the Tribunal, consistent with its duty to act fairly, and knowing of the findings it was to make in respect of the claimant, should have permitted him the opportunity to see its draft findings and make representations in respect of them or should have entered a qualification in the Report that the claimant was not a party to the proceedings, had not given evidence and had been given no opportunity to comment on the findings.

62. The findings made in respect of the claimant were serious. There is nothing in the Scheme which appears to permit the sending of a draft Report, or a part of it, to a non-party in order to invite comments. This was the course taken by Munby J in *Re M* but, in my view, the Scheme does not allow for this. Given the constraints of the Scheme and the gravity of the findings as against the claimant I am of the view that fairness required that consideration should have been given by the Tribunal to including in the Report a disclaimer such as was done by Tugendhat J in *Rothschild v Associated Newspapers* (above). I do not know whether such consideration was given to this issue but no such disclaimer was contained in the Report. I accept that the Report identifies the parties and the witnesses. Consistent with its duty of fairness, I believe the Tribunal should have set out at the commencement or the conclusion of the Report a disclaimer stating that: (a) the claimant (and any other relevant person) was not a party to the proceedings and was not invited to provide evidence; (b) it would not be fair to treat any part of the Tribunal's findings as findings made against him/them as he/they were not represented at the Tribunal hearing and had made no representations about the matters in question.

63. On 24 October 2016 the Committee received the Report. It decided to publish the full Report. I regard it as significant that on 3 November 2016 the Committee sent a copy of the Report to the claimant, described as a "courtesy". In my view this indicates a

sensitivity on the part of the Committee as to the nature and seriousness of the Report's findings made against the claimant and the effect which the same could have upon him. The claimant immediately responded through solicitors. What then followed was an attempt by the Chair of the Tribunal to solve the issue by means of redactions within the Report. This was unlikely to be satisfactory to any party because the actions of the claimant and documentation which related to him, or of which he had knowledge, was an integral part of the evidence and was woven through the findings of the Committee.

64. The Committee was in a difficult position. The Report was in a final form, the Tribunal was functus officio. The Committee could not rewrite the Report nor change any parts of it. In reaching a decision to publish the Report the Committee had to consider the public interest, the interests of the claimant and those of the interested parties. For the reasons set out in paragraph 8 above it decided to publish the full Report.

65. Did the claimant have a reasonable expectation of privacy in respect of the facts and findings contained in the Report? The proceedings had been in public, no reporting restrictions were imposed. As identified in paragraph 40 above the public interest in the public nature of proceedings was recognised and built into the Scheme at every stage of those proceedings. During the course of this public hearing the claimant's conduct as a director of a public company, in particular with regard to a specific transaction and related activities, had been examined as it related to the statutory audit of the company's financial statements. Given the public nature of the scrutiny of this regulatory body as required by the Scheme I do not accept that the claimant, as a director of a public company, could have a reasonable expectation of privacy arising from these proceedings and the resultant Report.

66. Article 8 may protect a person against an attack on his reputation but only if it leads to a serious interference with his private life. The criticism of this claimant related to his professional role in a public company. In my view it did not represent the serious interference with his private life which is envisaged in *Axel* (above) such as to invoke the protection of Article 8.

67. The claimant's Article 8 rights are neither absolute nor unqualified. A balance had to be struck between his rights, the rights of the public generally and the interests of the interested parties. There is a strong public interest in the Report being published in full in a case of serious misconduct pursued by an independent regulatory body. The decision of the Tribunal could not properly be understood without reference to the role of the claimant. The findings of misconduct and the sanctions imposed upon the interested parties had been published by the FRC. The impact of that statement is likely to have been exacerbated by the unnecessary public comments of the Executive Counsel upon the level of fine imposed. I accept that these findings and the sanctions could not be fairly or properly understood in the absence of detail of the evidence and the factual findings of the Tribunal. I also accept that the absence of detail which would place in context the finding of misconduct has caused harm, professionally and on a personal level, to the interested parties.

68. I accept that publication of the full Report could cause reputational damage to the claimant. Following publication of the Report it will be open to the claimant to explain or justify his conduct so as to refute any criticisms made by the Tribunal. He can avail himself of the provisions of section 15 of the 1996 Act in respect of any reporting of the findings which provide him with a right to require the publication of a reasonable letter or statement. Further, an Explanatory Memorandum as part of the

electronic document containing the Report should be provided by the Committee. It should include the qualifications referred to in paragraph 62 above which should have been contained in the original Report. I allow the parties to agree the full terms of such a Memorandum failing which I will set them.

69. Paragraph 68 was included in the draft and embargoed copy of the judgement sent to the parties prior to hand down. The terms of the Explanatory Memorandum were agreed and are now set out in the Explanatory Memorandum contained in the Schedule to the Order of the Court in these proceedings.

70. In my judgment, any interference with the claimant's Article 8 rights would be justified by: (a) the public interest in publishing the full Report of an independent regulatory tribunal; and (b) the need to address the prejudice suffered by the interested parties as a result of the reporting only of the findings of misconduct and sanction. It follows that I do not find that publication of the full Report would be unfair or unlawful. Accordingly I dismiss the claimant's claim for judicial review.