IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

AL RAMZ CAPITAL LLC

Claimant/Appellant

and

DUBAI FINANCIAL SERVICES AUTHORITY

Defendant/Respondent

ORDER WITH REASONS OF H.E. DEPUTY CHIEF JUSTICE ALI AL MADHANI

UPON the Claimant's Part 8 Claim Form dated 14 November 2024 seeking permission to appeal the Privacy Decision made by the Financial Markets Tribunal ("FMT") following the issue of a Decision Notice regarding breaches made by the Applicant, under case number FMT 24022, dated 4 October 2024 (the "Permission to Appeal Application")

AND UPON the Claimant's request for an oral hearing pursuant to Rule 44.17 of the Rules of the DIFC Courts (the "RDC") (the "Request for Oral Hearing")

AND UPON the Claimant's request for a further stay under Article 33 of the Court Law (DIFC Law No. 10 of 2004) of the orders within paragraph 77 of the Privacy Decision (the "Request for Further Stay")

AND UPON the Respondent's submissions on the court file dated the 4 December 2024

IT IS HEREBY ORDERED THAT:

1. The Request for Oral Hearing is denied.

2. The Permission to Appeal Application is denied.

3. The Request for Further Stay is denied.

4. Costs shall be paid on the standard basis, to be assessed by the Registrar if not agreed by the parties.

Issued By:
Delvin Sumo
Assistant Registrar
Date of issue: 23 January 2025
At: 4pm

SCHEDULE OF REASONS

1. This application is brought by the Claimant (hence, "Applicant" or "Appellant") seeking permission to appeal the Privacy Decision made by the Financial Markets Tribunal ("FMT") following the issue of a Decision Notice regarding breaches made by the Applicant, under case number FMT 24022, dated 4 October 2024 (the "Permission to Appeal Application").

2. The Permission to Appeal Application is brought pursuant to Article 33 of the Regulatory Law (DIFC Law No. 1 of 2004) ("Regulatory Law") which reads:

> "Appeal from a decision of the FMT
>
> (1) A party to a reference or other proceeding may, with the permission of the FMT or the Court, appeal a decision of the FMT to the Court only on a point of law."

3. The Applicants submit four grounds of appeal on the basis that the FMT made a series of errors in law. The Respondent fully deny the grounds as the Privacy Decision is purely discretionary, the FMT already provided a heavily detailed reasons for rejecting the appeal of the decision on 30 October 2024, and no legitimate error in law has been identified.

4. Additionally, the Applicant submits nine grounds to seek an oral hearing (the "Request for Oral Hearing"). pursuant to the Rule 44.17 of the Rules of the DIFC Courts ("RDC"), which reads:

> "The appellant may request that the application for permission to appeal be considered at an oral hearing, supported by grounds as to why it would be in the interests of justice to do so."

This part of the overall Permission to Appeal Application will be dealt with first.

5. Last, the Applicant submits a request for further stay under Article 33 of the Court Law (DIFC Law No. 10 of 2004) of the orders within paragraph 77 of the Privacy Decision (the "Request for Further Stay"). Article 33 reads as follows:

"Stay of proceedings and suspension of orders

The DIFC Court may, if it considers it appropriate:

(a) stay any decision, order or proceeding;

(b) join any party to an action or proceeding;

(c) suspend the operation of an injunction or other order; or

(d) make any other order."

To summarise paragraph 77 of the Privacy Decision, the orders are that:

(a) The reference shall be heard in public;

(b) The relevant information regarding the Decision Notice shall be published on the DFSA's website.

Background and Preceding History

6. The Appellant is a financial institution providing a broad range of financial services, including asset management, corporate finance and brokerage services, incorporated in onshore UAE. It is also a Recognised Member of the DIFC pursuant to Article 37(3)(b) of the Markets Law under Nasdaq Dubai membership and regulated by the Emirates Securities and Commodities Authority.

7. On 13 June 2024, the Dubai Financial Services Authority ("DFSA") issued a Decision Notice stating that:

(a) On 28 and 29 April 2022, a client of the Appellant placed buy and sell orders ("Trades") for Securities which were immediately executed by the Appellant on the same day.

(b) The Trades were "wash trades" which caused a spike in the price of the Securities, which was inconsistent with the downward trend previously logged.

(c) The Trades therefore created a false appearance of trading activity contrary to Article 54(a) of the Markets Law. For reference, Article 54(a) reads:

"Fraud and market manipulation

A person shall not, in the DIFC or elsewhere, by any means, directly or indirectly, engage or participate in any act, practice or course of conduct relating to Investments or Crypto Tokens that the person knows or reasonably ought to know:

(a) results in or contributes to, or may result in or contribute to, a false or misleading impression as to the supply of, demand for or price of one or more Investments or Crypto Tokens."

(d) On 29 April 2022, Nasdaq Dubai commenced a regulatory investigation regarding the Trades, which resulted in an identification of a number of issues in the Appellant's AML/KYC procedures, Compliance Procedures, Trading Controls and Regulatory Findings.

(e) On 8 September 2022, Nasdaq Dubai submitted a Suspicious Transaction and Order Report to the DFSA concerning the Trades. The Appellant had reasonable grounds to suspect that the Trades may constitute a market abuse and so had an obligation to notify the DFSA, which they failed to do.

(f) The DFSA determined the Appellant's failure to report a serious contravention of section 3.4.5(1) of the Recognition Module in the DFSA Rulebook and imposed a fine of USD 25,000.

8. On 15 July 2024, the Applicant referred the matter to the FMT under Article 29 of the Regulatory Law, alongside a request for the corresponding hearing to be in private and to prohibit publication of the Decision Notice under Articles 31(6) and 29(5) of the Regulatory Law (the "Privacy Application").

9. On or around 12 August 2024, the DFSA filed its Statement of Case which relied on the Decision Notice, and included the following:

(a) The Applicant had reasonable grounds to suspect market abuse and failed to notify the DFSA of the Trades at any material time.

(b) The Applicant should have been particularly concerned to identify suspected market abuse and report it given that it understood the meaning of market abuse and had been previously subject to three separate regulatory actions concerning market abuse.

(c) As a Recognised Member, the Applicant should have known the serious adverse effects of wash trades.

(d) The Applicant failed to fully cooperate with Nasdaq Dubai during its investigation.

(e) The Applicant had no good reason for the contravention.

(f) The Applicant has not reached any agreement with the DFSA to secure any settlement discount to the financial penalty amount.

10. On 2 October 2024, the Applicant strongly denied the DFSA's investigative findings on the basis that:

(a) As a Recognised Member, it did not have an obligation to configure its market surveillance programme to detect wash trades.

(b) There was no reasonable basis for determining that the Trades constituted market abuse.

11. On 4 October 2024, the FMT dismissed the Privacy Application for the following reasons:

(a) Evidence of serious harm to the Applicant does not outweigh the strong presumption that the Decision Notice should be publicly heard and published.

(b) The Applicant would not suffer disproportionate damage upon publication as a reasonable reader would be left with the clear impression that the regulatory breach was minor.

(c) No other considerations applied in relation to granting the private hearing.

(d) The alternative proposal to delay publication of the Decision Notice is rejected as there is a mandatory term that creates a strong presumption in favour of timely publication, and the Applicant's proposal did not meet the threshold of exceptional circumstances to delay.

(e) There was no need to consider the question of proportionality.

12. The Applicant issued three grounds for permission to appeal the Privacy Decision to the FMT. The grounds were:

(a) The Tribunal erred in law by holding the presumption in favour of the principle of regulatory transparency is as strong as the presumption in the courts of common law jurisdictions for open justice.

(b) The Tribunal erred in law by considering the irrelevant considerations that regulatory transparency equated to open justice.

(c) The Tribunal erred in law in applying an exceptional circumstances test for the delay of publication to mitigate the worst effects of publicity. Lawful exercise of discretion would have granted delayed publication.

13. On 30 October 2024, the permission to appeal the Privacy Decision was refused on the papers for the following reasons, as summarised:

(a) The essential reasoning for applying the strong presumption in favour of regulatory transparency is that such principle is present in the Regulatory Law and the Tribunal's rules of procedure - the principle of open justice does not apply to the Tribunal. There was no error of law.

(b) The Tribunal made no finding that the presumption of transparency equated to open justice. Only the Regulatory Law and rules of procedure were considered. There is no arguable error of law.

(c) Granting privacy is a matter of discretion of the Tribunal. The Tribunal indicted circumstances where it may consider granting delay, but ultimately decided that it was not appropriate on the facts. The Tribunal acted within the scope of their discretion, and so there was no error of law.

Application for an Oral Hearing

14. The Applicant submits nine grounds for the consideration of an oral hearing pursuant to RDC 44.17. As the grounds are all interlinked and cover a similar basis, the general reason for seeking an oral hearing can be summarised as that the issues are of real importance to the Applicant, the issues are complex, the Applicant will suffer disproportionate prejudice if not heard, there is no assumption against an oral hearing, and the Court has not had the benefit of hearing oral submissions.

15. The guidance that the RDC provides is simply that granting an oral hearing should be in the interest of justice. This is a discretionary and subjective concept that encompasses the overriding objective and whether the court is satisfied that the decision to grant an oral hearing clearly needs to be made.

16. Of the nine grounds submitted, there is no explanation or authority to guide the Court that granting the Request for Oral Hearing would be beneficial to the parties or the Court, except for superficial statements of importance and prejudice. There is little to persuade that any decision excluding determination on the papers would be in the interests of justice. I am satisfied that, with the Applicant's skeleton argument, the Respondent's submissions and the additional 36 statements of case/exhibits, enough material is before me to determine the matter on the papers. Therefore, there would be no benefit to an oral hearing.

17. The Request for an Oral Hearing is denied.

Grounds of Appeal for the FMT Decision

18. It is my usual practice to separate the discussion of each ground of appeal into distinct sub-paragraphs to address the named issue and supply itemised reasons to accept or reject the ground. However, I feel no need to do so here.

19. The only acceptable reason for appeal is that the FMT made some error of law, as per Article 33 of the Regulatory Law and the precedent dictated in *KPMG LLP & Navalkar v DFSA* [2022] DIFC CFI 008 [32-34] ("KPMG"), which is the leading case in this context.

20. All grounds relate to appealing the Privacy Decision, but none of them highlight a legitimate (or even reasonably founded) error in law or sought relief. The Applicant contests the FMT's application of various thresholds, a misuse of its discretionary power, and its assessment of the 2024 Decision Notice. In my view, these issues are foundedon a misinterpretation of KPMG, misapplication of the Regulatory Law or a misunderstanding of the Privacy Decision.

21. The test to grant privacy contains two limbs: whether there is serious harm to the defaulting party, and a consideration of proportionality to the general public interest of the DIFC. What amounts to "serious harm" inflicted by a public hearing and whether it would be "proportionate" to make a public hearing/publication order, as well as the general power of the FMT in making such a decision, is defined in KPMG at paragraphs 134 and 136 of the judgment:

> "[134] Although it has the power to make rules under Article 31(6) the FMT is not authorized to fetter its general discretion by a priori non-statutory principles. Those set out in *Al Masah* recognise a base presumption in favour of open hearings which reflects the public policy of the statute. They also set out a methodology governing the approach to the exercise of the discretion to order a private hearing and to order non-publication of Decision Notices. They cannot and do not impose a legal constraint on the FMT's exercise of its discretion.
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> .
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> [136] To be clear, the Regulatory Law leaves it to the FMT to determine the circumstance in which it will order a private hearing. It leaves it to the FMT to determine whether there should be any threshold and, if so, how high that threshold should be set. It leaves it to the FMT to determine whether private hearings will be restricted to a very small minority of cases."

22. The "Al Masah" principles referenced are at paragraph 130 of the judgement in *Al Masah Capital Ltd v DFSA [2020],* which reads:

> "The issue that needs to be considered in relation to each of the Applications is whether they have produced cogent evidence of how unfairness will arise and how they could suffer a disproportionate level of damage if publication were not prohibited"

23. The Applicant's first ground is that the FMT applied an evaluative "balancing exercise" with the "serious harm" threshold instead of at the "proportionality" stage, therefore applying the *Al Masah* approach rather than the Article 29(8) Regulatory Law approach, which amounts to an error of law.

24. Foremost, it is absolutely clear that the *Al Masah* principles are approved in KPMG. Therefore, the standard set that the FMT is expected to follow is a presumption in favour of public hearings to the benefit of the essence of transparency in the Regulatory Law, and the FMT have sole discretion to determine the circumstances of ordering a private hearing, including setting the threshold to grant one.

25. A "very small minority of cases" makes it clear that the general standard to grant a private hearing and non-publication of a decision notice is understood to be an exceptional standard. The FMT retain the discretion to determine what is exceptional.

26. Therefore, the ground that the FMT erroneously applied a balancing exercise to one threshold while disregarding the other is plainly wrong. The FMT must uphold the spirit of the Regulatory Law, which involves a presumption in favour of transparency, in all aspects of its decision making. This includes the serious harm threshold.

27. Further, the DFSA (which includes the FMT) are required to "foster and maintain fairness, transparency and efficiency" and exercise its "powers" and perform its "functions in a transparent manner" pursuant to Article 8 of the Dubai Law (No. 10 of 2004), as referenced in KPMG at paragraphs 10 and 11. This only emphases the manner in which the FMT are required to conduct their function; there is no restriction as to when and how these principles are intended to apply.

28. The Article 8 principles read together with Articles 29(5), (8) and 31(6) of the Regulatory Law demonstrate a high standard automatically set for the strong presumption in favour of regulatory transparency. KPMG at paragraphs 60, 76 and 118 dictate that a "departure from an open justice model should be exceptional". These provisions invalidate the Applicant's ground that the FMT was wrong to conclude a "very strong presumption" and set an impossible standard to combat the publication.

29. Articles 29(5) and 31(6) in the Regulatory Law state that decisions "must" be published unless prejudicial to the interests of the DIFC or the FMT prevents publication and hearings "shall be heard and given in public".

30. Article 29(8) gives guidance to when the FMT may make an order prohibiting publication, providing that they must be satisfied that the publication causes serious harm, and it is proportionate to make such an order.

31. The referenced articles are explicit in stating a strong presumption for publication, with any alternative being at the sole discretion of the FMT.

32. The statute contains a two-limb test to prohibit publication; both limbs must be satisfied. As the serious harm limb failed, the FMT reasonably disregarded any assessment of the second limb as the argument against publication already collapsed. In my view, this would not be an error of law. If one out of two limbs are missing, then the submission does not satisfy the legal conditions.

33. Another ground from the Applicant is that the FMT wrongly equated the concept and weight of the open justice principle with the transparency principle, as the open justice principle does not apply to the FMT and does not establish the existence of a very strong presumption in favour of publication. I find this ground to be moot. At paragraph 43 of the Privacy Decision, the FMT agreed that it did not apply but nonetheless made no difference:

> "We therefore conclude that on the basis of this authority, in deciding how to exercise our discretion the starting point for the FMT is that there is a very strong presumption in favour of the principle of transparency, as reflected in Article 31(6) of the regulatory law and Rule 16 of the FMT rules. That principle is as strong as the presumption in the courts of common law jurisdictions, such as the UKUT, in favour of open justice. **The fact that the principle of open justice does not apply to the FMT therefore makes no difference in practice."**

[emphasis added].

Further, at paragraphs 60-70 which summarized the FMT's approach, no reference to the open justice principle was made.

34. In my view, the FMT did not act in excess of the statutory standard set nor did it disproportionately inflate the threshold through discretionary abuse. Departure from the standard must be exceptional, and the FMT did not determine that these circumstances were exceptional. Therefore, the law has been followed; there was no error in law.

35. Finally, the Applicant complains that the FMT miscategorized the 2024 Decision Notice, which I can only assume is a ground bred from misunderstanding. The FMT described the breach as "relatively minor" at paragraph 62 of the Privacy Notice, which the Applicant insists wrongly affected the FMT's decision against granting privacy.

36. The relativity is in comparison with a prior Decision Notice from 2018, which encompassed a violation concerning dishonesty and deception. Compared to this, failure to report the Trades is a minor offence - this thread of comparison is clear through paragraphs 61 to 65 of the Privacy Decision. The comparison influenced the fine amount only. There is no error of law pursuant to the construction of the 2024 Decision Notice, as the characterization was commentary on the relative scope of seriousness in comparison with previous violations.

37. Generally, no error of law has been highlighted in the Applicant's submissions, and so it would be impossible to reach the threshold set by Article 33 of the Regulatory Law as quoted prior.

38. It is important to note that the grounds brought by the Applicant are essentially the same as the grounds brought in KPMG, just fewer in number. There were two sets of appeal grounds in KPMG that largely overlapped and only half of them are directly linked to the grounds presented in this case, so I will summarise the linked grounds only:

(a) The FMT applied the wrong threshold test for granting a private hearing;

(b) The FMT erred in law for refusing a private hearing even when unfairness was shown;

(c) The FMT applied the wrong test for serious harm; and

(d) The FMT applied the wrong test on unfairness.

39. The present case brought nothing new. All 15 grounds presented in KPMG (the overlapped grounds are still considered separate) failed to show errors of law, and at least four of those grounds are essentially copied here. There is no doubt then, that the outcome would be the same.

40. Further, no ground explicitly states the type of relief sought if granted appeal - whether that be financial recompense or declaration. In my view, there is no purpose of appeal unless relief can be applied in addition to the grounds meeting the relevant threshold. The issue lies with the privacy rather than the outcome, but still the Applicant fails to highlight how the Court could or would go about to remedy this.

41. A public hearing and subsequent publication of the Decision Notice is at discretion of the FMT. It is the FMT's role to protect the public interest of the DIFC by maintaining honesty and integrity through transparency. There have been no exceptional circumstances in this case that would compel the FMT to prohibit publication or keep the dispute private, and so the FMT has not made an erroneous decision in law.

42. Nonetheless, the reasons for denying the privacy application were well covered in the FMT Permission to Appeal Decision on 30 October 2024. Irrespective of whether the reasoning was right or wrong, there is no error of law as per the Regulatory Law or the guidance in KPMG as the decision is within the boundaries of its discretion. This was a doomed expedition by the Applicant.

Alternative Compelling Reason

43. The Applicant submits three points to encompass an alternative overarching submission concerning public interest in favour of granting the Permission to Appeal Application.

44. In summary, the points raised are that: the issues are of real importance regarding the correct application o the transparency and open justice principles to the FMT; there are limited precedents on these issues with KPMG being the last case; and this appeal affords the Court an opportunity to revisit KPMG.

45. First, the FMT did apply the correct approach or test to the application of the transparency principle. As the open justice principle was not used in making a determination in the Privacy Decision, there is no reason to address it, nor does it relate to any legitimate error of law that would trigger the jurisdiction of this Court and be discussed at appellate level.

46. Next, the Applicant provides no substantive reason to revisit KPMG. The precedent set in KPMG has been firmly on the side of the Respondent, and no ambiguous or openended questions have been brought on these facts that KPMG did not answer. Permitting appeal would not add any landmark reasoning to FMT privacy related precedent.

47. These submissions do not meet the threshold set by RDC 44.19; I find nothing here to be compelling enough to permit the Permission to Appeal Application. This ground is rejected.

Grounds for the Request for Further Stay

48. As the Application is to be rejected, it reasonably follows that the grounds for the Request for Further Stay request is also rejected.

Conclusion

49. As I found no compelling reason to grant the Request for an Oral Hearing, the Permission to Appeal Application is determined on the papers.

50. The grounds of appeal and alternative submission fail to meet the threshold set by RDC 44.19, and so the Permission to Appeal Application has been rejected.

51. As the Permission to Appeal Application has been denied, it is reasonable to deny the Request for Further Stay.

52. Costs shall be paid on the standard basis, to be assessed by the Registrar if not agreed by the parties.