محاكم
DIFC
COURTS

Claim No. CFI 006/2012

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammed Bin Rashid Al Maktoum,
Ruler of Dubai

ON APPEAL FROM THE FINANCIAL MARKETS TRIBUNAL (FMT11001 and 11002)
BEFORE JUSTICE SIR JOHN CHADWICK

BETWEEN

ARQAAM CAPITAL LIMITED

Appellant

and

DUBAI FINANCIAL SERVICES AUTHORITY

Respondent

Hearing:	**23 May 2012**
Counsel:	Lord Falconer of Thoroton with Mr James Abbott of Clifford Chance for the Appellant.
	Mr Charles Flint QC and Mr Tom Cleaver instructed by the Dubai Financial Services Authority for the Respondent.
Judgment:	**4 September 2012**

JUDGMENT

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1. This is an appeal to the Court of First Instance from a decision of a Hearing Panel of the Financial Markets Tribunal (Mr Stewart Boyd CBE QC (chairman), Mr Ali Malek QC and Mr David Stockwell), dated 11 January 2012, on applications for directions in proceedings brought by Dubai Financial Service Authority against Arqaam Capital Limited and Ernst & Young under Article 33 of the Regulatory Law 2004 (DIFC Law No.1 of 2004).

2. The directions given by the Hearing Panel pursuant to that decision included the following:

> "(1) Issue 1 (privacy and confidentiality). These proceedings shall be heard in public and no order is made for confidential treatment of information. The full text of this decision shall be published on the DFSA's website, but material disclosed in the proceedings will not be ... publicly available until this decision is published."
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> "(3) Issue 3 (disclosure to Arqaam: Schedule B). The applications for disclosure are dismissed."

It is those directions, and only those directions, that are the subject of this appeal.

3. The appeal is brought, pursuant to Article 28(1) of the DIFC Court Law 2004 (DIFC Law No.10 of 2004), with permission granted by this Court on 8 February 2012. Appeals lie from the Tribunal under Article 28(1) if, and only if, they relate to (a) a question of law, (b) an allegation of a miscarriage of justice, (c) an issue of procedural fairness or (d) a matter provide for in or under DIFC Law. In the present case, it is said on behalf of the appellant, Arqaam, that the Hearing Panel erred in law in deciding to give the directions which it did in relation to issues (1) and (3).

The circumstances leading to proceedings before the Financial Markets Tribunal

4. The circumstances leading to the proceedings before the Tribunal are not in dispute. They are summarised at paragraph 10 of the Hearing Panel's decision:

"(1) Arqaam is a financial services company incorporated in the DIFC. E&Y has been Arqaam's external auditor since 2007.

(2) In July 2007 Arqaam commissioned eight pieces of art by the Iranian artist Farhad Moshiri ("the Artworks") as an investment for a total purchase price of US$200,000.

(3) After its 30 June 2009 financial year end, Arqaam sought a valuation of the Artworks from Artspace LLC ("Artspace"). Artspace is a Dubai based gallery and art dealership. It provided a valuation on 23 August 2009, the total value of the eight Artworks was appraised to be US$2,450,000.

(4) In August and September 2009, Arqaam consulted its auditors ('E&Y') about how to reflect the increase in value of the Artworks in Arqaam's accounts for the year ended 30 June 2009.

(5) On 17 September 2009, Arqaam entered into two agreements with Alissar Co Limited ("Alissar"), a company incorporated in Syria, relating to the Artworks ("the Transactions").

(i) First, a sale agreement dated as of 29 June 2009, by which Arqaam sold the Artworks to Alissar for US$2,450,000; and

(ii) Second, a purchase agreement dated as of 30 June 2009, by which Arqaam repurchased the Artworks from Alissar for US$2,450,000. The gain in value of the Artworks is recorded in the accounts in the following manner:

(6) The statement of income states Arqaam's 'Other Income' as US$2,481,189. This includes a gain of US$2,250,000 on the disposal/revaluation of the Artworks.

(7) The statement of Cash Flows records an adjustment of US$2,250,000 within "Operating Activities" for the "Gain on disposal of assets". This reflects the gain on disposal/revaluation of the Artworks.

(8) The Statement of Cash Flows also records (i) US$2,450,000 within "Investment Activities" as "Proceeds from disposal of assets", and (ii) US$43,823,486 as "Additions to premises and equipment". This included the US$2,450,000 repurchase/revaluation of the Artworks.

(9) The Balance Sheet in the Assets category records under "Premises and Equipment" the figure of US$6,370,039. Note 10 to "Premises and Equipment" refers to the column "Fixtures and Fittings" and states "included herein are non-depreciating assets acquired during the year with a carrying value of US$2,452,971". This figure represents the repurchase/revaluation of the Artworks plus US$2,971 in costs of mounting the Artworks.

(10) Note 10 to "Premises and Equipment" under "Cost" included an item for "Additions during the year" of US$2,467,274. This included the cost of the repurchase/revaluation of the Artworks.

(11) The accounting policy for non-depreciating assets, including the Artworks, is identified under "Premises and Equipment" in Note 2.2 as: "Non-depreciating assets are kept at cost and are not being depreciated as the management considers these to have infinite useful life".

(12) The 2009 Accounts included an unqualified audit opinion from E&Y, in the following terms: '[in] our opinion the financial statements present fairly, in all material respects, the financial position of the Company as of 30 June 2009 and its financial performance and its cash flows for the period then ended in accordance with International Financial Reporting Standards'."

5. It is common ground that Arqaam is an Authorised Firm for the purposes of the DFSA Rulebook. Rule GEN 8.2.1 requires (so far as material in the present context) that an Authorised Firm must prepare and maintain all financial accounts and statements in accordance with the International Financial Reporting Standards (IFRS). The DFSA has taken the view that in treating the revaluation of the Artworks in the 2009 Accounts in way that it has, Arqaam has failed to comply with IFRS standards; and that, accordingly, has been in breach of that Rule. Article 33 of the Regulatory Law provides that "if it

appears reasonably likely to the Chief Executive or the DFSA Board of Directors that there has been a breach of ... any Rules ... the Chief Executive may ... by notice commence proceedings before the Financial Markets Tribunal in relation to such breach". These proceedings were commenced under Article 33 by Notices filed on 3 August 2011.

The relief sought in the proceedings

6. The relief sought by the DFSA against Arqaam in the proceedings before the Tribunal includes declarations that Arqaam has contravened Rule GEN 8.2.1, the imposition of a fine and an order that Arqaam restate the 2009 Accounts.

The applications for directions

7. Arqaam applied to the Hearing Panel for directions (inter alia) (i) that oral hearings (whether interim or final) in this matter be heard in private, pursuant to Article 34(3) of the Regulatory Law and Rules 15-18 of the Rules of Procedure of the Financial Markets Tribunal ("the FMT Rules") ("the privacy application") and (ii) that the DFSA make disclosure to Arqaam of the documents specified in Schedule B to a letter dated 10 October 2011 from Clifford Chance ("the disclosure application"). Those applications came before the Hearing Panel, sitting in London, for oral hearing on 12 December 2011. As I have said, both applications were, in effect, dismissed.

The privacy application

The relevant provisions of the Regulatory Law and the FMT Rules

8. Article 32(3) of the Regulatory Law provides that proceedings and decisions of the Financial Markets Tribunal shall be heard and given in public unless (a) the Financial Markets Tribunal hearing a matter orders otherwise or (b) the rules of procedure of the Financial Markets Tribunal provide otherwise. Article 34(3)(f) provides that the Tribunal may, for the purposes of any proceedings commenced under Article 33, on its own motion or that of any party to the proceedings, order a person not to publish or otherwise disclose any material disclosed by any person to the Tribunal.

9. Rule 15 of the FMT Rules reflects article 32(3) of the Regulatory Law. It is in these terms:

"Public Proceedings

15. All proceedings and decisions of the FMT shall be heard and given in public unless the Hearing Panel orders otherwise on its own initiative or the application of a party. No hearing shall be non-public where all parties request that the hearing be made public".

Rules 16 to 19 are comprised within the section headed "Confidential Treatment". Rule 16 is in these terms:

"Confidential Treatment

16. The Hearing Panel on its own initiative or on the application of a person may order that part or all of a proceeding is non-public and that information is to be treated confidentially and not disclosed publicly."

Rule 16 confers on the Hearing Panel two distinct powers: power to order a non-public hearing of "part or all of a proceeding" and power to order that "information is to be treated confidentially and not disclosed publicly". The power to order a non-public hearing may be seen as ancillary to Article 32(3) of the Law and to Rule 15. The power to order that information be treated confidentially reflects Article 34(3)(f) of the Law. Rules 17 to 19 are concerned with the confidential treatment of information rather than with non-public hearings:

"17. An application for confidential treatment shall state the grounds for objection to public disclosure and where applicable shall be accompanied by a sealed copy of the information for which confidential treatment is sought.

18. In determining an application for confidential treatment, the Hearing Panel shall consider, so far as practicable:

(a) whether the disclosure of information would in its opinion be contrary to the public interest;

(b) whether the disclosure of commercial information would or might, in its opinion, significantly harm the legitimate business interests of the undertaking to which it relates;

(c) whether the disclosure of information relating to the private affairs of an individual would, or might, in its opinion, significantly harm the person's interests: and

(d) the extent to which any such disclosure is necessary for the purpose of explaining the reasons for the decision.

19. Pending the determination of the application for confidential treatment, transcripts, non-final orders including an initial decision, if any, and other materials in connection with the application shall be for the confidential use only of the Registrar, the FMT, the applicant, and any other parties and counsel, and shall be made available to the public only in accordance with orders of the FMT."

The approach adopted by the Hearing Panel

10. The Hearing Panel set out the submissions advanced on behalf of the DFSA at paragraphs 41 to 48 of its written Decision. In particular, it noted the DFSA's reliance on passages in the decision of the Financial Services and Markets Tribunal (the "FSMT"), established in the United Kingdom under the Financial Services and Markets Act 2000, in *Eurolife Assurance Company Ltd v Financial Services Authority* (26 July 2002). In that case – and in its subsequent decision in *Sonaike v Financial Services Authority* (13 July 2005) – the FSMT refused applications for hearings to be in private. The FSMT reached a similar result in *Canada Inc and Peter Beck v Financial Services Authority* (21 July 2011).

11. At paragraphs 49 to 52 of its Decision the Hearing Panel summarised the two grounds – (1) significant harm and (2) protection of confidential information – under which arguments had been advanced on behalf of Arqaam; and, in particular, the factors under Rule 18 of the FMT Rules on which Arqaam relied in seeking confidential treatment for information and documents disclosed in the proceedings. At paragraph 54 the Panel recorded that Ernst & Young supported the applications by Arqaam for the proceedings to be heard in private and for the confidential treatment of material disclosed in the course of the proceedings.

12. At paragraphs 55 to 58 of its Decision the Hearing Panel directed itself as to the approach which it should adopt to the applications before it:

> "55 When considering whether or not to order that its proceedings shall not be heard in public, the starting point for the Hearing Panel is the presumption in favour of public proceedings contained in section 12(3) of the Regulatory Law. The Hearing Panel is given an unfettered discretion in this matter, and the Rules do not give any direct guidance as to how the discretion is to be exercised.
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> 56 Rule 16, which is set out above, does however set out guidelines for the exercise of the Hearing Panel's discretion in determining an application for confidential treatment. These give some indirect guidance as to matters which may be taken into account in deciding whether proceedings should be heard in public.
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> Public interest
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> 57 Rule 16(a) requires the Hearing Panel to have regard to whether the disclosure of information would be contrary to the public interest. This is only of relevance to the present application so far as concerns the publication of matters relating to the Complaints, which is no longer of relevance having regard to the Hearing Panel's decision that the Complaints have no relevance to the issues before the Hearing Panel.
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> 58 Rule 16(b) requires the Hearing Panel to have regard to whether the disclosure would or might significantly harm the legitimate business interests of the undertaking to which it relates. Arqaam was disposed to accept that significant harm carried with it the idea that the harm was disproportionate in the sense that it would or might be greater than any penalty which might be imposed, and would be out of proportion to the contravention which was alleged. The Hearing Panel accepts that this is a relevant consideration in this case."

It is common ground that the reference to section 12(3) of the Regulatory Law in paragraph 55 of the Decision should be read as a reference to article 32(3) of that Law; and that the references to Rules 16(a) and 16(b) in paragraphs 57 and 58 should be read references to Rules 18(a) and 18(b) of the FMT Rules. I think it is also common ground – and, if not, I would hold that it is plain from the context - that the reference to Rule 16 in paragraph 56 should be read as a reference to Rule 18.

13. The "Complaints", to which the Hearing Panel made reference in paragraph 57, were described at paragraph 84 of the Decision: they are "complaints made by Arqaam against a senior official of the DFSA in May 2010 and November 2010". As indicated at paragraph 57, the Hearing Panel ruled that the Complaints were irrelevant to the allegations which are the subject of the proceedings brought by the DFSA against Arqaam. The Panel reached that conclusion in the course of addressing the disclosure application; and it will be necessary to consider, in that context, whether it was correct to do so

14. Given the Hearing Panel's view that the question whether disclosure of information in this case would be contrary to the public interest would arise only in relation to disclosure of information in relation to the Complaints and its ruling that the Complaints were of no relevance in relation to the allegations which were the subject of the proceedings brought against Arqaam, the Panel did not find it necessary, in reaching its conclusion on the privacy application, to consider whether disclosure would be contrary to the public interest.

15. The Hearing Panel took the view, at paragraph 59 of its Decision, that the main thrust of Arqaam's case on significant harm was Arqaam's concern that the DFSA's Statement of Case was couched in terms which suggested (i) that Arqaam had intentionally and dishonestly manipulated its Financial Statements in order to create a misleading picture of the state of its financial affairs and (ii) that the valuation of the Artworks was erroneous. But, at the hearing before the Panel, counsel for the DFSA had stated (transcript, 12 December 2011, page 18, lines 5-7) that it was not its intention to make allegations to that effect. As counsel put it (ibid): "... there's no allegation of deceit or dishonesty in this claim. It all concerns proper accounting standards".

16. Following the hearing, the DFSA amended its Statement of Case to include statements that "for the avoidance of doubt" it was not alleged either that the valuation was not genuine (or that the gallery could not reasonably have valued the Artworks as it did) or that Arqaam had acted dishonestly in adopting the accounting treatment that it did. The Hearing Panel was satisfied that, with that clarification, the risk to Arqaam if the proceedings were heard in public was "not of significant or disproportionate harm".

17. The Panel went on to say this:

> "63 ... The only risk of harm that can be identified is, to use the language of Eurolife 'the prospect of unfairness or prejudice arising simply through knowledge of the action or decision taken by the [regulator].' That is not on its own the kind of risk which would justify [not] holding the proceedings in public.
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> 64 The Hearing Panel has also taken note of the fact that Arqaam's clients are mainly sophisticated financial organisations to whom the nature of the allegations will be readily intelligible without the risk that wider and more serious allegations against Arqaam will be understood as part of the DFSA's case. This factor also serves, in the opinion of the Hearing Panel, to diminish the risk of significant reputational harm to Arqaam if the proceedings are heard in public.
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> 65 The application for confidential treatment is a live issue only as regards the Financial Statements of Arqaam. These are no doubt available to any client who asks to see them in order to form a judgment as to Arqaam's financial standing and credit, although not generally available to the public. Inevitably they will form a central part of the enquiry during these proceedings, and the Hearing Panel is unable to accept the suggestion that it will be possible to explain its decision without reference to them and to the detailed figures referred to in the Statement of Case."

The grounds of appeal

18. The grounds advanced in support of the appeal from the decision on the privacy application, (as they appear in the Appeal Notice dated 25 January 2012) are these:

> "(1) The Hearing Panel erred in failing properly to articulate or apply the correct legal test when considering whether confidentiality should be ordered. Pursuant to FMT Rule 18, the Hearing Panel should have weighed the harm that will be caused to Arqaam's legitimate business interests if the proceedings are heard in public against the public interest in publicity. If Arqaam is likely to suffer disproportionate harm as a result of the hearings and documents being made in public, then the Hearing Panel should order such confidentiality as is required to protect Arqaam, as far as possible, from that disproportionate harm.
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> (2) The Hearing Panel failed to undertake any or adequate analysis of the harm which will be suffered by Arqaam if no order for confidentiality is made. In particular, the Panel failed entirely to consider the following undisputed evidence:
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> (i) that Arqaam is a young business which lacks the protection of a long-established reputation to counter the significant harm that will result from any publicity of these proceedings;
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> (ii) that Arqaam's clients are highly sensitive to reputational concerns and are therefore likely to end any engagement they may have with Arqaam immediately as a result of any publicity. Instead the Hearing Panel reached a contrary conclusion for which there was no foundation in the evidence.

(3) The Hearing Panel was plainly wrong to hold that all disclosed documents should become public immediately. For example, Ernst & Young's entire audit file (including detailed non-public information about Arqaam's financial position and business activities) and all documents in relation to Arqaam's complaints against the DFSA will be disclosed. This degree of disclosure is unnecessary and contrary to the interests of justice, because it requires publicity far beyond that which is necessary to ensure that justice is seen to be done.

(4) The Hearing Panel was plainly wrong to conclude that the Statement of Case, following its amendment, did not lend itself to inaccurate and harmful reporting and was not open to misinterpretation by lay or sophisticated readers, especially in circumstances where the DFSA's allegations involve complex and technical accounting issues. The Hearing Panel's decision that the amendment to the Statement of Case sufficiently addressed the potential dangers of misrepresentation is plainly wrong and inequitable."

These grounds were developed in the Skeleton Argument filed on behalf of the appellant and in oral submissions before the Court.

Ground (1)

19. In amplification of Ground (1), it was said the Hearing Panel erred in directing itself, at paragraph 55 of its decision, that, starting from a presumption in favour of public hearings, its discretion whether or not to order that part or all of the proceedings should not be heard in public was unfettered; and that the FMT Rules gave no direct guidance as to how that discretion should be exercised. In my view, there is no substance in that criticism. The Hearing Panel was plainly correct in its view that it required some good reason to depart from the principle, stated in the opening words of Rule 15, that hearings should be in public. It was plainly correct, also, to recognise that, subject to the proviso in the second sentence of Rule 15 that "no hearing shall be non-public where all parties request that the hearing be made public", it had a discretionary power to order that part or all of a hearing be non-public. That power is implicit in the first sentence of Rule 15 ("unless the Hearing Panel orders otherwise"); and is conferred, in terms, by Rule 16

("The Hearing Panel ... may order that part or all of a proceeding is non-public"). And the Hearing Panel was plainly correct to take the view that there is nothing in Rules 15 or 16 which gives guidance as to the circumstances in which that discretionary power should be exercised: other than that (i) there was a need to find good reason to depart from the principle stated in the opening words in the first sentence of Rule 15 and (ii) there was a need to observe the restriction imposed by the proviso in the second sentence of that Rule.

20. The Hearing Panel appreciated, correctly, that (as I have already pointed out) Rule 16 confers two distinct powers: first the power to order that part or all of a proceeding is non-public; and, second, the power to order "that information is treated confidentially and not disclosed publicly". It appreciated, also correctly, that the remaining Rules in the section headed "Confidential Treatment" (Rules 17, 18 and 19) are directed to the exercise of the second of those powers (the power to order that information is treated confidentially); and are not directed to the exercise of the first of the two powers (the power to order that part or all of a proceeding is non-public). For whatever reason, the FMT Rules do distinguish in this respect between the two powers conferred by Rule 16. In particular, Rule 18 of the FMT Rules, which sets out four factors which the Tribunal shall consider in determining an application for confidential treatment, has no direct application to an application for a non-public hearing. The Tribunal's statement, in paragraph 55 of its Decision, that "the Rules do not give any direct guidance as to how the discretion [in relation to the power to order a non-public hearing] is to be exercised" was a correct statement of the position.

21. But, of course, the Tribunal's self-direction as to the approach to be adopted did not stop at paragraph 55 of its Decision. It went to explain in paragraph 56 that Rule 18 did set out guidelines in relation to the exercise of its power to order confidential treatment. And it recognised that the factors set out in Rule 18 did give "some indirect guidance as to matters which may be taken into account in deciding whether proceedings should be heard in private". Again, that seems to me a correct statement of the position.

22. Accordingly, I reject the criticism that the Hearing Panel erred in failing properly to articulate the correct legal test when considering whether orders for non-public hearings and confidential treatment of information should be made. But, further, it is said that the Hearing Panel failed to apply that test: in that, pursuant to Rule 18, it should have

weighed the harm that would be caused to Arqaam's legitimate business interests if the proceedings were heard in public against the public interest in publicity. Again, I find no substance in that criticism. As I have explained, Rule 18 had no direct application to the question whether the hearings should be non-public. But, in reaching its conclusion to refuse an order for non-public hearings, the Hearing Panel did ask itself whether hearings in public would give rise to significant or disproportionate harm to Arqaam's legitimate business interests. At paragraph 63 of its Decision, the Panel concluded that public hearings would not have that effect. As the Hearing Panel put it: "the only risk of harm that can be identified is ... 'the prospect of unfairness or prejudice arising simply through knowledge of the action or decision taken by [the regulator]'". The Panel concluded that "that is not, on its own, the kind of risk which would justify not holding the proceedings in public".

Ground (2)

23. Ground (2) in the grounds of appeal may, I think, be seen (in part, at least) as providing particulars of the further criticism, under Ground (1), to which I have just referred. It is said, in effect, that the Hearing Panel could not apply the correct legal test – that, is to say, could not properly weigh the harm that would be caused to Arqaam's legitimate business interests if the proceedings were heard in public against the public interest in publicity – because it failed to undertake any or adequate analysis of what that harm would be. In particular, it is said that the Panel failed to give any consideration to undisputed evidence that:

    (1) Arqaam was a young start-up company that had only been in existence for a short time.

    (2) Arqaam's key competitors were companies with well-established reputation and in many cases a much longer history in the market; and that Arqaam's reputation was much more susceptible to damage from a one-off regulatory investigation than those firms with longer standing in the market.

    (3) Arqaam provides investment banking services, specialising in an emerging market which is considered relatively high risk. Building Arqaam's reputation and attracting new clients was a long, slow and expensive process. Clients were extremely

sensitive to information suggesting that their business partners might be under regulatory investigation and avoid being associated with other firms on that basis.

(4) Arqaam is presently under merger discussions with another financial service firm in the Middle East. Any publicity surrounding these proceedings would be highly prejudicial to those negotiations which were expected to take place over the next seven months or so.

(5) Research had shown that the stock-price impact of regulatory penalties, which might be used as a proxy for reputational effects was, on average, nine times larger than the financial penalties for misconduct affecting customers and investors.

Further, it was said, a leading reputational management firm had investigated Arqaam's circumstances and concluded that the consequences of publicity surrounding these proceedings would be likely to occur immediately, whether or not Arqaam is ultimately found to have done anything wrong.

24. The evidence relied upon includes (i) a Witness Statement dated 22 November 2011 made by Dennis David Wijsmuller, a Director and the Chief Operating Officer of Arqaam, and (ii) a Witness Statement dated 27 November 2011 made by Riad Meliti, a Director and the Chief Executive Officer of Arqaam. Those Witness Statements contain statements of fact which – in the circumstances that they were not contradicted - the Hearing Panel had no reason to reject, and did not reject; and statements of opinion and belief by persons who were, plainly, not independent of Arqaam and to which the Hearing Panel could give such weight as it thought appropriate.

25. Examples of the latter in Mr Wijsmuller's witness statement include the following:

(1) The statement (at paragraph 19) that "allowing details of the FMT Proceedings and/or decision, including confidential information, to be made public would lead to an immediate loss of confidence in Arqaam on the part of current and potential investors and is likely to cause irreparable damage to Arqaam's business".

(2) The statement (at paragraph 20) that "the relative youth of Arqaam means that the impact of any damage to its reputation caused by publicity surrounding the FMT Proceedings will be significantly increased" and that "The reputational damage arising from a one-off regulatory investigation ...would have significantly less impact on a firm with the history and standing of Goldman Sachs than on a start-up such as Arqaam".

(3) The statement (at paragraph 21) that "any damage to Arqaam's reputation caused by publicity will be greater, and the chances of Arqaam being able to recover from such damage reduced, because of the relatively small size of Arqaam's business".

(4) The statement (at paragraph 26) that "allegations relating to the preparation of Arqaam's financial statements would destroy its good reputation, even if those allegations were subsequently shown to be unfounded".

(5) The statement (at paragraph 30) that "Were Arqaam's reputation to be damaged by publication of the FMT Proceedings ... it would be a number of years before its reputation could begin to be repaired, if at all".

(6) The statement (at paragraph 31) that "any adverse publicity surrounding Arqaam's ability to prepare is financial statements would have a severely detrimental impact on Arqaam's ability to establish credit facilities".

(7) The statement (in paragraph 41) that substantial and irreparable harm to the business of Arqaam ... will be caused if the proceedings are conducted in public, or the decision of the FMT is published".

Mr Wijsmuller stated (at paragraph 19) that the views which he expressed were based upon "my professional experience, my knowledge and experience of Arqaam's business, and the marketplace in which Arqaam operates".

26. Mr Meliti's witness statement, also, contains statements of opinion and belief (to much the same effect as those expressed by Mr Wijsmuller). Examples include the following:

(1) The statements (in paragraph 16) that publication of the allegations made in these proceedings would be very damaging to Arqaam and cause an immediate loss of confidence in Arqaam; and, in particular, would be "likely to (i) cause a significant and immediate loss of clients to Arqaam and potentially destroy Arqaam's business; (ii) cause the termination of the present merger discussions with Arqaam or significantly affect the price at which any merger might take place; (iii) affect Arqaam's ability to borrow facilities and establish repo lines; and (iv) give Arqaam's competitors access to valuable information in relation to Arqaam and its business".

(2) The statement (at paragraph 24) that "the impact of any publicity in respect of the ongoing regulatory proceedings against Arqaam or in respect of the allegations made would be extremely damaging to (and potentially destroy) Arqaam's business, even if the allegations were subsequently disproven".

(3) The statement (at paragraph 25) that "Any reputational damage would take a long time to repair (if it can be repaired at all) and it is likely that Arqaam's business would be affected for many years to come, if not permanently."

The matters to which Mr Meliti referred under heads (ii), (iii) and (iv) in paragraph 16 are amplified in paragraphs 27, 28 and 29 to 32 of his witness statement. Mr Meliti stated (at paragraph 26) that the views which he had expressed "are based on my considerable experience of the market (both in London and in the DIFC) and my understanding of Arqaam's business, as well as on my knowledge of the impact that similar disclosures have had on other businesses". But he did not identify those "other businesses". Nor did he describe the "similar disclosures" with sufficient particularity to enable a useful comparison to be made with the present case.

27. Arqaam had relied, also, on a letter dated 26 October 2011 from Brunswick Gulf Ltd. The letter stated that Brunswick was an international corporate communications firm specialising in reputation management. It was written by a partner in that firm who, it was said, was Arqaam's external corporate communications advisor. He expressed the views that, "regardless of the outcome of the hearings Arqaam should be afforded the right to challenge the DFSA's allegations in the FMT without being subject to risk of damage to its reputation arising from the legal proceedings themselves" and that "It seems iniquitous for Arqaam to face the increased risk of reputational loss purely by virtue of

this being the FMT's first case to be heard". After stating that the case involved "complex technical issues in respect of IFRS, which is a highly-specialised area of accountancy, and revolves around the opinions of IFRS experts", he went on to say that "The complex nature of the case increases the risk of inaccurate reporting with ensuing reputational damage to Arqaam if the case is heard in public". And he expressed the opinion that "if the FMT proceedings are made public, Arqaam would inevitably suffer reputational loss which is likely to have a considerable detrimental effect on its business as a financial institution" and that "This would be the case irrespective of whether the FMT find for or against Arqaam in the proceedings".

28. It is submitted that, in failing to mention or discuss the matters set out in the preceding paragraphs, the Hearing Panel erred in law: in that it left out of account factors which it should have taken into account in the exercise of its discretion. Further, it is submitted, the Panel erred in law in taking into account the amendment of the DFSA's Statement of Case. In concluding that the only risk of harm to Arqaam was the prospect of unfairness and prejudice arising through knowledge of the action or decision taken by the regulator, it is said that the Panel failed to weigh evidence of other harm in reaching its decision.

29. In my view, there is no substance in the submission that the Hearing Panel failed to take account of the matters set out in the preceding paragraphs. The Panel referred (at paragraph 50(3) of its Decision) to the evidence of Mr Wijsmuller and Mr Meliti. In particular, it noted (ibid) that they had stated that "the reaction to a public hearing would be an immediate lack of confidence in Arqaam and all the Arqaam group companies" and that "The group is relatively small and in its early years of operation, so damage to any part of the group would impact unfairly on other parts". At paragraph 50(4) the Panel set out Arqaam's submissions that the significant harm which it would be suffer included: "(i) destruction of Arqaam's good reputation in the market place, including its reputation for adhering to the best international standards; (ii) destruction of Arqaam's business as clients will withdraw funds or close accounts or stop engaging with Arqaam; (iii) termination of current merger negotiations or a significant decrease in Arqaam's value in such discussions; (iv) removal of any perception of reliability in any figures quoted by Arqaam in relation to services such as brokerage, credit trading, treasury. Research, etc.; (v) Impaired credit facilities". At paragraph 50(5) the Panel recorded the submission that "Such harm would be disproportionate and unfair having regard to the technical nature of the contraventions alleged by the DFSA, the narrow range of disagreement

between the accounting expert, and the fact that the reputational damage would far exceed the amount of the fine sought by the DFSA".

30. In paragraph 58 of its Decision (in a passage which I have set out earlier in this judgment) the Hearing Panel accepted that significant harm – in the sense of harm which would or might be greater than any penalty which might be imposed and would be out of proportion to the contravention which was alleged – was a factor which it should take into account in deciding whether the hearings should be non-public. In reaching the conclusion (at paragraph 61) that the only risk of harm to Arqaam – if the proceedings were heard in public – which could be identified was "the prospect of unfairness or prejudice arising simply through knowledge of the action or decision taken by the [regulator]", the Panel must be taken to have had in mind the matters upon which Arqaam relied and which it had, itself, set out under paragraph 50 of its Decision. But, plainly, the Panel also had in mind that the context in which those matters had been advanced – and the context in which evidence had been filed in support of those matters – was Arqaam's concern that the DFSA's Statement of Case was couched in terms which suggested (i) that Arqaam had intentionally and dishonestly manipulated its Financial Statements in order to create a misleading picture of the state of its financial affairs and (ii) that the valuation of the Artworks was erroneous. That concern was, as the Panel observed at paragraph 59 of its Decision, the main thrust of Arqaam's case on significant harm.

31. In the course of the hearing (transcript, 12 December 2011, page 16, line 22 to page 17, line 2) – and at paragraph 60 of its Decision – the Hearing Panel had indicated that it had not understood the DFSA's case to include either of the two allegations just mentioned. Nor did leading counsel for Arqaam, himself, read the statement of case in that sense (transcript, 12 December 2011, page 18, lines 8-12). And counsel for the DFSA stated, unequivocally, that neither of those allegations were intended. But it was said on behalf of Arqaam that, nevertheless, the Statement of Case in its original form would or might lend itself to inaccurate and harmful reporting. The Hearing Panel recognised that concern (at paragraph 60); and, as I have said, invited the DFSA to amend its Statement of Case "to make it clear that neither of these allegations was part of the DFSA's case. Following the hearing an amendment was made which satisfied the Hearing Panel that Arqaam's expressed concerns had been met. It said this (at paragraph 62 of its Decision):

> "On the basis of the amended Statement of Case, the case against Arqaam can be seen as an allegation of a contravention of the applicable accounting rules which was either intentional or done without reasonable skill care and diligence but which was not dishonest, and the valuation of the Artworks is not challenged. The allegation that Arqaam acted intentionally does not carry with it any allegation of dishonesty: it is made because the accounting rule on which the DFSA relies depends on the accounting treatment which is applied having been applied with the intention of achieving a particular result."

It was that conclusion – or, as it was put by the Hearing Panel at paragraph 63 of its Decision, "in consequence of this clarification of the DFSA's case" – which led the Hearing Panel to hold (ibid) that "the risk of harm to Arqaam if the proceedings are held in public is not of significant or disproportionate harm".

32. The Panel's conclusion that Arqaam's concern that publication of the DFSA's Statement of Case would or might lend itself to inaccurate and harmful reporting – and so might lead sophisticated or lay readers to think that the DFSA was alleging dishonesty or was challenging the valuation of the Artworks – had been met by the amendment to that Statement of Case is challenged on this appeal, under Ground (4). It will be necessary to address that challenge later in this judgment. At this stage, it is sufficient to say that unless that challenge is made good – which, in my view and for the reasons which I set out in the course of addressing Ground (4), it is not – the challenge to the Hearing Panel's Decision under Ground (2) must be rejected. If the Panel were entitled to take the view that the case against Arqaam should properly be seen as an allegation of a contravention of the applicable accounting rules which was not dishonest – in that, in the context in which it is made, the allegation that Arqaam acted intentionally does not carry with it any allegation of dishonesty - and as containing no challenge to the valuation of the Artworks, the Panel did not need to address, point by point, the matters raised in the witness statements of Mr Wijsmuller and Mr Meliti and in the letter of 26 October from Brunswick Gulf Ltd. There was nothing in either of those witness statements which suggested that the maker had had experience or expertise in relation to the effect which knowledge of a difference of view between the DFSA, on the one hand, and Arqaam and Ernst & Young, on the other hand, as to the accounting treatment required by IFRSs in

relation to the transactions which (it is common ground) Arqaam chose to carry out in the present case would have on the reputation or business of Arqaam. In particular, it was impossible to determine from Mr Meliti's witness statement whether the unidentified cases to which he referred were cases in which the matter disclosed was solely a difference of view between the regulator and the body subject to regulation as to the proper accounting treatment in relation to the transactions which the body subject to regulation had chosen to carry out. Nor was there anything in the letter from Brunswick which addressed the effect of a public hearing of the allegations which the Hearing Panel understood it would be required to determine.

Ground (3)

33. As I have said, the Hearing Panel's direction in response to the privacy application was that the proceedings be heard in public and that no order be made for confidential treatment of information. The Panel directed, further, that the full text of its Decision should be published on the DFSA's website; but that material disclosed in the proceedings would not be publicly available until the Decision was published. It is said on behalf of Arqaam that the effect of those directions is that all disclosed documents, rather than "merely those that are deemed to be of particular relevance and/or which were referred to at the hearing", become public immediately in the absence of a stay of the Decision. That result, it is said, "is at odds with the general rule in English civil proceedings, where documents remain confidential unless and until referred to at trial".

34. It is said on behalf of the DFSA, correctly in my view, that the contention that all disclosed material will become public immediately in the absence of a stay of the Decision does not properly reflect the Hearing Panel's direction. At paragraph 67 of its Decision the Panel had indicated its intention to publish the Decision on the DFSA website, "but to give the parties advance notice of the date at which that will take place". Until publication of the Decision, the Registrar would be given instructions to inform members of the public who requested access to the disclosed material that it would not be publicly available until the Decision was published. The DFSA does not urge immediate publication of all material. At paragraph 45 of the Skeleton Argument filed on this appeal its preference is stated to be for "an arrangement analogous to that under Rules 6.11 to 6.16 of the DIFC Court Rules, under which statements of case and

judgments are available on request, but other documents are not, in both cases subject to orders to the contrary".

35. Arqaam points out that amongst the documentation disclosed in advance of the directions hearing was much that was clearly confidential; including the whole of Ernst & Young's audit file, which includes "detailed non-public information about [Arqaam's] financial position and business activities". That degree of disclosure, it is said, is unnecessary in the interests of justice: it goes beyond what it is necessary for an informed understanding of the Panel's decision: it goes beyond what is necessary in order for the public to see that justice has been done.

36. As I have said, the Hearing Panel took the view (expressed at paragraph 65 of its Decision) that the application for confidential treatment was a live issue only as regards the Financial Statements of Arqaam; that those Financial Statements would "no doubt" be available to any client who asked to see them; that they would, inevitably, form a central part of the enquiry during the proceedings; and that it could not accept that it would be possible to explain its decision without reference to the Financial Statements and to the detailed figures referred to in the DFSA's Statement of Case. But there is force, as it seems to me, in the criticism, made under Ground (3), that the Panel did not ask itself whether public disclosure of all disclosed material in advance of the public hearing – and, in particular, disclosure of confidential material which, in the event, was not referred to at the hearing – goes beyond what is necessary to ensure that justice is seen to be done.

37. I am satisfied that, in failing to address that question, the Hearing Panel erred in law. Rule 18 of the FMT Rules required the Panel to ask itself whether Arqaam would, or might, suffer harm to its legitimate business interests by the disclosure of confidential information as to its financial position and business activities in advance of a public hearing; and, if so, whether (and to what extent) disclosure of that information in advance of a public hearing was necessary. If the Hearing Panel had addressed that question, it would, as it seems to me, have concluded that it was not necessary – in order that justice be seen to be done – that information beyond that set out in the DFSA's Statement of Case (and, so far as material, in the statements filed by Arqaam and by Ernst & Young in response to that Statement of Case) be made public in advance of the trial hearing. Whether, following that hearing, further disclosed

information needs to made public is a matter for further consideration by the Panel in the light of the material which is deployed at the hearing and is relevant to an understanding of its decision.

38. Accordingly, I would allow the appeal in relation to the confidential treatment of disclosed material to the extent which I have indicated.

Ground (4)

39. The fourth ground of appeal is that the Hearing Panel's conclusion that the DFSA's Statement of Case, after amendment, did not "lend itself to inaccurate and harmful reporting and was not open to misinterpretation by lay or sophisticated readers, especially in circumstances where the DFSA's allegations involve complex or technical accounting issues" – and that the amendment "sufficient addressed the potential dangers of misrepresentation" – was "plainly wrong". That, as I understand the challenge under Ground (4), is a contention that, as a matter of law, it was not open to the Hearing Panel, properly directing itself, to reach that conclusion on the material before it. I reject that contention. In my view it has not been shown that, in reaching the conclusion that it did in relation to the DFSA's Amended Statement of Case, the Panel erred in law.

40. The allegations made by the DFSA in relation to the valuation of the Artworks are found at paragraphs 7 to 9A of its Amended Statement of Case:

> "7. In July 2007, Arqaam commissioned eight pieces of art ('the Artworks') from an Iranian artist through a Swiss-based art gallery. The Artworks were completed and delivered to Arqaam in October 2008. A total of USD 200,000 was paid by Arqaam for the Artworks, USD 50,000 in July 2007 and USD 150,000 in October 2008.
>
> 8. In August 2009, Arqaam sought a valuation of the Artworks from an art gallery in the DIFC ('the Gallery'). The approach was made to a member of the Gallery's staff (Maliha Al Tabari) who was a personal friend of the senior Arqaam staff member who arranged for the valuation to be provided (Riad Meliti). The Gallery was not in the business of art valuation, and neither it nor its staff held any form of

licence or professional qualification in relation to the valuation of art. It provided only informal valuations when requested.

9. The Gallery provided a valuation of the Artworks at $2,450,000 (the Valuation). The Valuation consisted of a single A4 page which did not contain any particulars of the methodology which had been used or the assumptions which had been adopted. The Gallery provided the Valuation informally and on the understanding that it was for insurance purposes only. Neither it nor its staff were aware that it would be used for any other purposes such as accounting or auditing. No fee was charged for the valuation.

9A In the circumstances, the Valuation was not of a kind that could properly be relied upon for accounting or audit purposes ... for the avoidance of doubt, it is not alleged that the Valuation was not genuine or that the Gallery could not reasonably have estimated the Artworks as it did."

The amendment made following the directions hearing before the Hearing Panel was to add the second sentence of paragraph 9A.

41. Arqaam filed an Answer to the Amended Statement of Case; and, on 26 April 2012, the DFSA filed a Reply to that Answer. The Answer challenges some of the statements of fact in the Amended Statement of Case. In so far as the facts in relation to the valuation remain in issue in the light of the Reply, it will be for the Hearing Panel to determine whether it is necessary to determine that issue and, if so, to do so. In substance, however, the issue between the parties is whether, as put at paragraph 9A of the Amended Statement of Case, "the Valuation ...could properly be relied upon for accounting or audit purposes"; or (so far as material in the present context) whether, as put at paragraph 18(b) of the DFSA's Reply, "Arqaam had [any] proper basis for estimating fair value [of the Artworks] at USD 2,450,000, whether in reliance on the Valuation or otherwise". For my part, I can see no reason why the Hearing Panel should not have taken the view that the Amended Statement of Case identified the issue in relation to the Valuation in terms which were unambiguous, which did not lend

themselves to inaccurate and harmful reporting and which were not open to misinterpretation by lay or sophisticated readers.

42. The allegations of fact made by the DFSA in relation to the treatment of the Artworks in Arqaam's financial statements for the year ended 30 June 2009 are found at paragraphs 10 to 15 of the Amended Statement of Case. It is, I think, sufficient, in the present context, to note the allegations in paragraphs 11and 12:

> "11. In around mid-September 2009, Arqaam arranged for and executed two agreements ('the September Agreements') with a healthcare company based in Syria ('the Syrian Company'). Those agreements were:
>
> (a) A sale agreement dated 29 June 2009, in which Arqaam purported to sell the Artworks to the Syrian Company for USD 2,450,000;
>
> (b) A purchase agreement dated 30 June 2009, in which Arqaam purported to repurchase the Artworks from the Syrian Company, also for USD 2,450,000.
>
> 12. The September Agreements were of no economic substance.
>
> (a) The transaction was circular in effect. The two agreements were arranged as back-to-back agreements, so that neither agreement was intended to have any independent effect. Neither Arqaam nor the Syrian Company had any intention of transferring property or risk under the transaction.
>
> (b) No funds were exchanged and the Artworks did not leave Arqaam's possession at any time.
>
> (c) The transactions were not agreed on 29 [June] and 30 [June], within the 2009 accounting year, but in September 2009, after that year had ended.

(d) The transaction was effected by Arqaam solely for the purpose of retrospectively generating an accounting treatment for the Artworks for the purposes of the 2009 Accounts.

[As pleaded, the dates in paragraph 12(c) are 29 July and 30 July; but it is clear from the context that the intention was to allege that the transactions were not agreed on 29 June and 30 June respectively]

43. The allegations in paragraphs 11 and 12(a), (b) and (c) of the Amended Statement of Case are not in issue: see paragraphs 26, 27 and 28 of the Answer. It is said (at paragraph 28 of the Answer) that "It has always been clear that the sale and purchase transaction was a transaction of no economic substance" and that "Arqaam did not need to rely on the transaction to account for its Artworks". The issue is whether Arqaam entered into the September Agreements "solely for the purpose of retrospectively generating an accounting treatment of the Artworks for the purposes of the 2009 Accounts"; or for some other purpose. Again, I can see no reason why the Hearing Panel should not have taken the view that the Amended Statement of Case identified the facts in relation to the September Agreements – and the issue arising from those facts – in terms which were unambiguous, which did not lend themselves to inaccurate and harmful reporting and which were not open to misinterpretation by lay or sophisticated readers: a fortiori in the circumstances that those facts are not in dispute.

44. At paragraph 15 of the Amended Statement of Case it is alleged that "The 2009 Accounts were prepared so as to reflect the sale and repurchase of the Artworks at a price of USD 2,450,000 in the year ending 2009". Particulars of the matters relied upon in support of that allegation – taken from the DFSA's Expert Reports – are then set out. The allegation is denied at paragraph 32 of the Answer; although it is admitted that the entries on which the DFSA relies – under Statement of Income, Statement of Cash Flows and in the Balance Sheet – were, in fact, made. It is said that "The 2009 Accounts were prepared so as to reflect the increase in value of the Artworks to USD 2.45 million in the year ending 30 June 2009". That suggests that it will be Arqaam's case that the 2009 Accounts took no account of the September Agreements. In those circumstances it is clear that there will be an issue at trial whether the entries in the 2009 Accounts on which the DFSA relies were prepared on the basis that they reflected the September

Agreements; or whether the September Agreements were treated as having no relevance to those entries. That will be an issue for the Hearing Panel to resolve after a trial. But the issue itself is identified in terms which are unambiguous and easy to understand. There was no reason why the Hearing Panel should not have taken the view that there was little or no scope for inaccurate reporting in relation to that issue; or that the issue was open to misinterpretation by lay or sophisticated readers. Arqaam cannot be heard to complain of the potential for harm consequent upon accurate reporting of an issue which is central to the proceedings which have been brought against it by the DFSA.

45. At paragraph 26 of the Amended Statement of Case it is alleged that the 2009 Accounts did not comply with the relevant International Financial Reporting Standards and associated International Accounting Standards (IASs). The breaches of the IFRS alleged are summarised under three heads: (a) contravention of IAS 1.15 and IAS 1.8, in that the treatment of the September Agreements reflected their legal form and not their substance and economic reality; (b) contravention of IAS 7, in that the Statement of Cash Flows records a cash inflow and outflow of USD 2,450,000 from the September Agreements notwithstanding that no actual cash or cash-equivalent transactions took place; (c) contravention of IAS 16, in that the Artworks were purchased for USD 200,000 and that their purported acquisition at USD 2,452,971 had been a transaction of no economic substance. It is said, at paragraph 26(d), that the effect of those contraventions was to overstate Arqaam's operating income by 42% and to understate Arqaam's loss for the year by 21%.

46. Paragraph 26(e) is in these terms:

> "26(e) This treatment of the Artworks was intentionally created (within the meaning of IAS 8.41) in order to enable Arqaam to show that it had made a gain and that it owned assets that had a cost of USD 2,450,000 when in fact it did not, so that any misstatement in the accounts was material . . . For the avoidance of doubt, it is not alleged that Arqaam acted dishonestly in adopting this accounting treatment."

The parenthesis "(within the meaning of IAS 8.41)" in the first sentence of that paragraph, and the second sentence, were added by amendment. The purpose and effect of that amendment was to emphasise that the allegation that the treatment of the Artworks in the 2009 Accounts was "intentionally created" in order to show that Arqaam had made a gain and that it owned assets that had a cost of USD 2,450,000 was not to be taken as an allegation of a dishonest intention to mislead. IAS 8.41 provides that financial statements do not comply with IFRSs if they contain either material errors or immaterial errors "made intentionally to achieve a particular presentation of an entity's financial position, financial performance or cash flows". The relevant distinction is between the treatment of a transaction which is intentional – in the sense that the accounts were prepared with the intention that, in relation to that transaction, they should show what they do show – and a treatment which is unintentional – in the sense that it was not intended that the accounts should show what they do, in fact show. A treatment which is intentional but erroneous, in the sense just described, is not necessarily dishonest: the person preparing the accounts in the form intended may have an honest belief that the accounts in that form are not misleading. The second sentence of paragraph 26(e) makes it clear that the DFSA accepts that the present case is one in which Arqaam intended that the 2009 accounts should show what they did; but had an honest belief that that accounts in that form were not misleading.

47. At paragraph 28(a) of the Amended Statement of Case it is alleged that "by virtue of the above" Arqaam contravened Rule (GEN) 8.2.1. In my view it is clear that the DFSA's case, in relation to the accounting treatment which has been set out in the earlier paragraphs of the Statement of Case, is that that treatment was adopted with the intention of achieving a particular presentation of Arqaam's financial position; that that treatment was not permitted by the relevant IFRSs and IASs, and that, accordingly – notwithstanding Arqaam's honest belief that the presentation of Arqaam's financial position in the manner achieved was not misleading - there was a breach of the Rule. I reject the submission that it was not open to the Hearing Panel to conclude that there was little or no scope for inaccurate reporting of the case which the DFSA is seeking to establish in these proceedings; or that that case was open to misinterpretation by lay or sophisticated readers.

48. Whether or not the DFSA will establish at trial the case which it seeks to make is, of course, as both the lay and the sophisticated reader would appreciate, a question for the Hearing Panel to determine in due course. For the present, the question is whether the Hearing Panel erred in law in concluding that Arqaam was not at risk of significant or disproportionate harm if the proceedings were heard in public. In my view that was a conclusion which the Panel was entitled to reach on the material before it; including the material to which I have referred under Ground (2). I have explained why I am satisfied that the Hearing Panel was entitled to take the view that the Amended Statement of Case does not lend itself to inaccurate and harmful reporting; but it is pertinent to keep in mind, also, that at a public hearing (at which Arqaam would be represented) the Amended Statement of Case would not be read in isolation. It would be read and understood with the benefit of whatever explanation of the issues counsel for the parties thought it appropriate to give. In so far as he thought that there was risk that a reporter (or any other member of the public) present at the hearing might fail to understand the issues which were before the Hearing Panel, counsel for Arqaam would have the opportunity to emphasise that the allegations which are said to have given rise to concern were no part of the case against his client.

The disclosure application

The Hearing Panel's decision

49. The application was for an order for the disclosure to Arqaam of the documents specified in Schedule B to a letter of Clifford Chance dated 10 October 2011. As The Hearing Panel explained (at paragraphs 84 and 85 of its Decision) the Schedule B documents comprised six categories of documents relating to two complaints (the Complaints) made by Arqaam against a senior official of the DFSA in May and November 2010. It was said on behalf of Arqaam that disclosure of those documents was relevant "to establish (i) the DFSA's motives in bringing these proceedings ... and (ii) whether the grounds for commencing the investigation and the FMT proceedings arose out of Arqaam's complaints".

50. The Hearing Panel declined to make the order sought for the reasons which it set out at paragraphs 86 to 88 of its Decision:

"86. The Hearing Panel is, however, unable to accept that the motives of the DFSA in bringing these proceedings are in any way relevant to the correctness or otherwise of the allegations made against Arqaam. Whether or not those allegations are made good at the hearing on the merits will be entirely unaffected by any consideration of whether or not the allegations were made for a proper or improper motive.

87. Arqaam considers that the Complaints raise serious conflict of interest issues within the DFSA and whether due process was followed by the DFSA. As to that ground of relevance the Hearing Panel accepts the submission of the DFSA that these proceedings are not for judicial review of the decision of the DFSA to launch an investigation or to commence these proceedings. Questions of conflict of interest and due process in regard to investigations and the commencement of proceedings before the FMT are outside the jurisdiction [of] the FMT, which for present purposes has jurisdiction only "to hear and determine proceedings which are commenced under Article 33 of the Regulatory Law and relate to an alleged breach of the Law or of the Rules or of any other legislation administered by the DFSA: Regulatory Law section 32(1)(a).

88. Arqaam also maintains that it has a counterclaim against the DFSA for damages substantially exceeding the amount claimed by the DFSA. Here also, the Hearing Panel accepts the submission on behalf of the DFSA that any such claim lies outside the jurisdiction of the FMT."

The ground of appeal

51. Arqaam appeals from the Hearing Panel's refusal to order disclosure of the Schedule B documents on the ground that the Panel erred in concluding that the DFSA's motives in bringing the proceedings are irrelevant to the issues in these proceedings. It is said, in the grounds of appeal endorsed on the Appeal Notice that:

> "If the DFSA's motive in bringing these proceedings is, as Arqaam contends, a response to Arqaam's complaining about the DFSA's conduct, that is relevant for the following reasons (i) the proceedings against Arqaam should be stayed or dismissed, and (ii) motive is relevant to assessing whether the DFSA validly exercised its judgment in considering whether Arqaam has breached the relevant regulations."

52. In the submissions made in the Skeleton Argument filed on its behalf on this appeal – and in oral submissions made at the hearing of the appeal – Arqaam accepted that a challenge by way of judicial review to the DFSA's decision to commence an investigation into the treatment of the Artworks in Arqaam's 2009 Accounts - or to the decision of the Chief Executive to commence proceedings under article 33 of the Regulatory Law – should be brought (if at all) in the DIFC Courts: a challenge by way of judicial review was not within the jurisdiction of the FMT under the Regulatory Law. It accepted, also, that the FMT had no jurisdiction to entertain a counterclaim for damages in proceedings commenced under article 33. But it is said, first (at paragraph 79 of the Skeleton Argument), that the DFSA's conduct and motives "will be relevant in the Hearing Panel's assessment whether to accord weight to judgment issues in [the DFSA's] determination that the relevant regulations have been breached; and, second (at paragraph 80), that the Tribunal has - and, in the circumstances of this case, should exercise – an inherent jurisdiction to stay proceedings in order to prevent an abuse of process".

53. In my view there is no substance in the first of those points. It is important to keep in mind the relevant provisions of the Regulatory Law. Article 36(g) empowers the Chief Executive of the DFSA "to investigate or cause to be investigated matters capable of being investigated under any legislation administered by the DFSA and, where appropriate, commence proceedings before the Financial Markets Tribunal ...". Article 33 provides that "If it appears reasonably likely to the Chief Executive or the DFSA Board of Directors that there has been a breach of the Law or of any Rules ... the Chief Executive may ... commence proceedings before the Financial Markets Tribunal in relation to such breach". Article 32(1)(a) confers on the FMT jurisdiction to hear and determine proceedings which are commenced under Article 33 and which relate to an alleged breach of any provision of the Law or of the Rules ...". Article 34(3) provides that the FMT may, for the purposes of any proceedings commenced under Article 33 (inter

alia) " ... (a) receive and consider any material by way of oral evidence, written statements or documents ...". Article 34(4) sets out the powers which the FMT may exercise "At the conclusion of any proceedings commenced under Article 33 in which an alleged breach is proven to the satisfaction of the Financial Markets Tribunal ...". Article 32(4) provides that proceedings before the Financial Markets Tribunal shall be determined on a balance of probabilities. The proceedings are, in no sense, a review of a judgment reached by the DFSA or by its Chief Executive that a breach has been committed. Their judgment is limited to the question whether "it appears reasonably likely ... that there has been a breach of ... any Rules". That is not the issue before the Hearing Panel: it is concerned to determine whether, on the balance of probabilities, "an alleged breach is proven to [its] satisfaction". In determining that question it makes findings of fact (on the basis of evidence) and, in the light of those findings of fact, makes a determination, as a matter of law, whether there has been a breach of the Rules. The Hearing Panel is not concerned to "accord weight to judgment issues in [the DFSA's] determination that the relevant regulations have been breached". Its own determination is independent of any views which the DFSA may have reached.

54. Nor, in my view, is there substance in the second point. It can be said that Article 34(3)(g) of the Regulatory Law gives the FMT power to "stay the proceedings on such grounds and on such terms and conditions as it considers appropriate having regard to the interests of justice"; and I would accept that it would be open to the FMT to stay proceedings commenced under Article 33 of the Regulatory Law in order to prevent an abuse of process and that that power could be exercised in a case where the Hearing Panel's "sense of justice and propriety" was offended by the circumstances in which the proceedings had been brought. But the decision in *Bennett v Horseferry Road* Magistrates' Court [1994] 1 AC 42; [1993] 3 All E R 138, on which Arqaam seeks to rely by analogy, was reached on facts which are very far removed from those in the present case; and, importantly, provides no authority for the proposition that is open to a Tribunal exercising regulatory powers conferred by statute to conduct satellite proceedings in order to determine whether it is offended by the motives of the regulatory authority in bringing the proceedings which (prima facie) are properly before it. In my view the Hearing Panel was correct in its view that, if Arqaam wished to challenge the DFSA's decision to commence proceedings – on the grounds that that decision was flawed on

the grounds of improper motive – that forum for that challenge was the DIFC Courts. It was not a challenge which the Hearing Panel itself should entertain.

Conclusion

55. For those reasons I dismiss the appeal from the Hearing Panel's decision that no order should be made for non-public hearings; and I dismiss the appeal from the Hearing Panel's decision to refuse to order disclosure to Arqaam of the Schedule B documents. I allow the appeal from the Hearing Panels' decision to make no order for the confidential treatment of disclosed material to the extent that I have indicated: that is to say, I direct that information beyond that set out in the DFSA's Statement of Case, in the Answer filed by Arqaam, in the Answer (or other pleading) (if any) filed by Ernst & Young and in the Reply filed by the DFSA should not be made public in advance of the trial hearing.

56. The effect of the order made by the Hearing Panel, as I have indicated, is that its Decision, and the disclosed material, is not to be made public until (after notice to the parties) it so directs. This judgment, and any transcript of the appeal proceedings before this Court, may be made available to the public when (but not before) the Decision of the Hearing Panel is published.

Issued by:
Amna Al Owais
Deputy Registrar
Date of Issue: 4 September 2012
At: 11am