Article written by Shail Patel on 21st March 2018.

R v The FRC [2018] EWHC 446: No Third Party Rights in the FRC?

Shail Patel considers this High Court decision in which the Court found that an individual (C) did not have the right to be heard at an FRC Tribunal hearing, nor a right to redaction of findings against him prior to publication of the Report.

The Issue

A Tribunal appointed under the Accountancy Scheme determined complaints against the respondents ("the Accountants"), finding them guilty of serious misconduct and imposing a fine. The conduct concerned the audit of a company of which C was a director. The Tribunal's decision made explicit and unqualified criticisms of C in stating that he was guilty of serious wrongdoing. C did not attend or participate in the Tribunal hearing. The Tribunal's Report was published by the Conduct Committee of the FRC without redaction.

C brought judicial review proceedings claiming that the Tribunal was wrong to make the findings it did without a fair process which involved him. He also sought to review the Committee's decision to publish the un-redacted report.

The Decision

The Court dismissed the judicial review. Its reasoning was:-

1. The purpose of the Accountancy Scheme was to investigate complaints against accountants. However to do so it had to investigate the nature and extent of the collusive fraud which the Accountants had relied upon. The Tribunal did exactly that.
2. The Tribunal had jurisdiction over the Accountants but did not have any jurisdiction against C; nor was he a party to proceedings. The Scheme did not permit for notice to be given to non-party of Tribunal Proceedings.
3. In any event the Tribunal proceedings in this case were publicised, and moreover, C knew that the proceedings were ongoing. He was also aware of his involvement in the transactions which the Tribunal was investigating. He chose note to make enquiries nor to attend any part of the hearing.
4. The more nuanced issue was whether C should have been permitted to comment on the Tribunal's Report in draft. He should not; that was not provided for in the Scheme. Instead the Tribunal should have set out an Explanatory Memorandum (see below).
5. C, as a director of a public company did not have a reasonable expectation of privacy arising from the proceedings or the resultant Report. The public interest in the public nature of proceedings was recognised and built into the Scheme at every stage of the proceedings. The nature of its scrutiny was necessarily public.

6. There was a strong public interest in the Report being published in full. It could not be properly understood in a limited form. There was a need to counterbalance C's Article 8 rights with the public interest in publishing in full and the prejudice to the Accountants if only the misconduct were reported.

The Explanatory Memorandum

The Memorandum which was ultimately published can be found **here**.

The key wording presented in red type is:

The Tribunal has not made, and should not be taken to have made, any findings against any individual or entity other than [the Accountants] (including any individual director and/or member of management at Aero and/or AI). It would not be fair to treat any part of the Tribunal's findings, including any part(s) of the Tribunal Report, as constituting or evidencing findings against anyone other than [the Accounts].

Comment

It has long been clear that the Accountancy Scheme does not confer express rights on third parties; the question up for grabs was whether the common law and ECHR plugged that gap. The answer appears to be no – at least in this case.

However that leaves a question in respect of other cases; will the Tribunal always be "safe" not to expressly notify third parties of proceedings in which they might be criticised? What about when there is no reason to think those individuals are even aware of the proceedings (e.g. they have moved abroad)? The answer is unclear because the Judge carefully confined her reasons to the facts of the case. The weight to be given to each reason is not obvious.

Similarly, what about cases where references to the third party can be excised from the report without doing prejudice to the respondents or to the principles of open justice in respect of them? Again, it might in such a case be prudent for the Tribunal or Committee to consider redaction prior to publication.

Two final points. Firstly, there is an interesting contrast to be made with the rather different approach under FSMA; see my article on that **here**. The issue of "Maxwellisation" (third party consultation) has been a particularly hot topic since the release of the un-Maxwellised s.166 report into the RBS Global Restructuring Group.

Secondly the Judge made a thinly veiled criticism of the Executive Counsel's response to the Report, which it might be thought, will be taken on board in future:-

The findings of misconduct and the sanctions imposed upon the [Accountants] had been published by the FRC. The impact of that statement is likely to have been exacerbated by the unnecessary public comments of the Executive Counsel upon the level of fine imposed.

Jamie Smith QC acted for the Interested Parties, both during the underlying disciplinary proceedings and for the purposes of the judicial review.