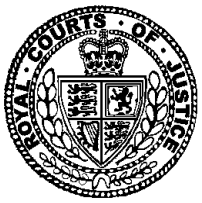

Neutral Citation Number: [2018] EWHC 1662 (Admin)

Case No: CO/2328/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 June 2018

Before :

THE HONOURABLE MR JUSTICE NICKLIN

- -

Between :

TAVETA INVESTMENTS LIMITED	**Claimant**
- and -	
(1) THE FINANCIAL REPORTING COUNCIL **(2) THE CONDUCT COMMITTEE OF THE FINANCIAL REPORTING COUNCIL** **(3) THE EXECUTIVE COUNSEL OF THE FINANCIAL REPORTING COUNCIL**	**Defendants**
- and -	
(1) PRICEWATERHOUSECOOPERS LLP **(2) STEPHEN JOHN DENISON**	**Interested Parties**

- -

Andrew Green QC and Iain Steele (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Claimant**
Charles Béar QC and Nicholas Medcroft (instructed by **Financial Reporting Council General Counsel**) for the **Defendants**
Julian Randall of **Taylor Wessing LLP** for the **First Interested Party**
The Second Interested Party did not attend and was not represented

Hearing date: 21 June 2018

- -

Approved Judgment

Mr Justice Nicklin :

1. These are proceedings for judicial review brought by the Claimant against the Defendants. Permission to bring a judicial review claim has not yet been granted. This judgment deals with a discrete, but important, issue regarding interim relief pending the determination of the application for permission (and, if granted, the claim itself).

The parties

The Financial Reporting Council

2. The Financial Reporting Council ("FRC") is an independent regulator with a range of responsibilities. It is responsible for setting the UK Governance and Stewardship Codes and UK standards for accounting and actuarial work and is the UK competent authority for statutory audit, setting audit and ethical standards, and monitoring and enforcing the quality of audit. The FRC is the investigative and disciplinary body for accountants and actuaries in the UK. It carries out these functions under its Accountancy Scheme ("the Scheme").

3. The FRC's responsibilities derive from a number of sources. Some are designated by statutory instrument, some delegated by statutory instrument to the FRC or its Conduct Committee by the Secretary of State, some are voluntarily undertaken, and some are based on contractual arrangements. Some of the latter contractual arrangements are underpinned by statutory requirements on other bodies or institutions, such as with the accountancy bodies.

4. The FRC is overseen by a board comprising non-executive and executive directors. The FRC board is supported by various committees including the Conduct Committee.

Taveta Investments Limited

5. The Claimant ("Taveta") together with its subsidiary companies, including Arcadia Group Limited ("Arcadia"), comprise the Taveta Group. Arcadia owns UK high-street brands including *Topshop*, *Topman* and *Miss Selfridge*. A further subsidiary of Taveta, Taveta Investments (No.2) Limited ("Taveta 2"), used to own the BHS group until its sale in 2015.

The FRC Investigation

6. On 27 June 2016, the FRC announced that it had begun an investigation under the Scheme into alleged misconduct by PricewaterhouseCoopers ("PwC") and one of its accountants, Stephen Denison, the Interested Parties, in relation to the audit and financial statements of BHS Limited for the year ending 30 August 2014. At that time, BHS Limited was part of the Taveta group.

7. Following completion of that investigation, and as was widely reported from 12 June 2018, the FRC has imposed sanctions on the Interested Parties. PwC and Mr Denison had admitted misconduct in multiple areas of the BHS audit and accepted the imposition of fines and other sanctions, as follows:

    i) PwC was fined £10m, severely reprimanded and was made subject to certain conditions regarding its practice for the next three years;

ii) Mr Denison was fined £500,000, severely reprimanded, banned from performing any audit work for 15 years and undertook to remove his name from the register of statutory auditors for 15 years.

8. The fines were reduced by 35% (to £6.5m and £325,000 respectively) as a result of 'early settlement' (i.e. a discount for an acceptance of responsibility for the misconduct alleged).

The Settlement Agreement and the Particulars of fact and acts of misconduct

9. To effect this resolution, the FRC and the Interested Parties entered a settlement agreement dated 31 May 2018 ("the Settlement Agreement"). As part of this, particulars of fact and acts of misconduct were agreed by the parties ("the Particulars"). The Particulars were set out in a 38-page document annexed to the Settlement Agreement. They contain the "facts" as agreed between the FRC and the Interested Parties in relation to the investigation. The Settlement Agreement also sets out the nature and seriousness of the misconduct and the basis on which the sanctions had been determined.

10. The Settlement Agreement was concluded in accordance with provisions in the Scheme governing settlement of proceedings. In summary, where terms of settlement are agreed between parties, the FRC's Executive Counsel (the Third Defendant) is required to deliver the proposed settlement to the FRC's Conduct Committee (the Second Defendant) and the Committee is required to appoint an independent panel member to approve the proposed settlement. Once approved, the Conduct Committee is required, by paragraph 8(6) of the Scheme, to publish the Settlement Agreement "*as soon as practicable*" and in such manner as it thinks fit "*unless this would not, in the opinion of the Conduct Committee, be in the public interest*".

11. The FRC has a Publication Policy (last published in February 2018) ("the Publication Policy"). In summary, the FRC will publish decisions made pursuant to the Scheme in accordance with the relevant publication requirements. The Conduct Committee of the FRC is required to consider whether to publish, amongst other things, settlement agreements. The decision to publish is to be taken on its own merits and on a case-by-case basis. In relation to publication of settlement agreements, the Committee can defer or delay publication if it considers that, at the relevant point in time, other public interest factors outweigh the presumption that publication is in the public interest. Under the heading, "*Timing and Manner of Publication*" the Publication Policy provides as follows:

> 27 The identity of third parties will usually be anonymised in any announcements and/or related documents published under this Publication policy, unless or to the extent that publication of that individual's identity is considered fair and necessary in all the circumstances and is in compliance with any applicable data protection laws.
>
> 28 Decisions will normally be published promptly but the Committee retains discretion to delay publishing them, or parts of them, if it considers there are public interest reasons for doing so.
>
> 29 Save where urgent publication is desirable to safeguard the public interest, any Member or Member Firm and any other party named in an

> announcement will be given a copy of its terms a minimum of 3 days before the making of the announcement. Advance notification will also be given to the relevant Scheme Participants and any regulatory body or prosecuting authority with a known interest in the matter in question. Amendments to the wording of press announcements will not generally be accepted, except in relation to matters of factual inaccuracy…
>
> 31 Save as otherwise set out in this Publication policy or required by law, publication will usually take the form of:
>
> - a short statement on the FRC's website setting out the brief factual details of the decision or action in question; and
>
> - where considered appropriate in all the circumstances, a link to any related detailed decision(s).
>
> 32 In addition, press announcements will usually be published and circulated in a manner determined by the FRC Executive. The press announcement may contain a link to the website statement and any accompanying report or document.
>
> 33 In certain circumstances and where not contravening any publication requirements under the Schemes, the FRC may decide to vary the form or procedure in which it publishes an announcement made under this policy.

12. I would note here that the 3-day notice period stipulated under paragraph 29 is a *minimum* period.

13. In accordance with its Publication Policy, the FRC intended to publish a press release announcing the Settlement Agreement and the imposition of sanctions. The Settlement Agreement and the Particulars would then be published and made freely available on the FRC's website.

14. On Friday 8 June 2018, at 10.28, Kate Davies, Deputy General Counsel emailed Deborah Cooper at Taveta:

> "I write to you as representative of the Taveta Group, Arcadia and Sir Philip Green.
>
> Please note, on a strictly confidential basis, that the FRC has settled regulatory action taken against PwC and [Mr Denison] in relation to the statutory audit of the financial statements of BHS. Publication of this outcome by the FRC is intended to take place on Wednesday 13 June at 7am.
>
> In line with our Publication Policy, as the above corporate entities and Sir Philip are identified in the documents intended to be published, I attach an advance copy of our proposed press release which will link to the attached settlement agreement and statement of facts.
>
> Amendments to the wording of the press notice and documents will not generally be accepted, except in relation to matters of factual inaccuracy. Please inform us by **2pm on Tuesday 12 June** if there are any accuracy concerns you would like us to take into consideration…" (emphasis in original)

15. This was the first warning that Taveta got of the impending publication of the press release, Settlement Agreement and the Particulars (collectively "the Sanction Documents"). In terms of the Publication Policy, Taveta was given barely the minimum period of notice allowed under paragraph 29 (see [11] above).

16. At 15.15 on Saturday 9 June 2018, the Claimant's solicitors replied to Ms Davies on behalf of the Claimant and certain directors and managers within the Taveta group:

> "… Ms Cooper has forwarded to us your email to her dated 8 June 2018 concerning the proposed press notice relating to your investigation into [PwC and Mr Denison].
>
> I left a voicemail for you on Friday afternoon. My clients and I urgently need to speak with you in order to discuss the content of the documents attached to your email and their very serious concerns in relation to the content of those documents. Please may we speak at 9am on Monday morning? My clients would also intend to attend that call. I should be grateful if you would confirm your availability as soon as possible and I will circulate a dial in."

17. Ms Davies responded at 10.59 on Sunday 10 June 2018:

> "… I am sorry that we are not able to join a call at 9am tomorrow. Please instead set out the concerns you refer to in writing for our consideration and so that we can reflect if a call would be helpful and who should attend once those concerns have been articulated.
>
> Please note in doing so that the documents linked to the proposed press notice are not FRC documents; they are documents (a settlement agreement and agreed statement of facts and misconduct) agreed by the parties to a disciplinary action… and approved by a member of an independent tribunal panel. For that reason when publishing enforcement outcomes, the FRC can invite factual accuracy comments only, not comments as to substance agreed and approved by the parties. [A link was given to the Publication Policy]."

18. In response, at 17.49 that Sunday, the Claimant's solicitors sent a further letter. Complaint was made that the press release and the Particulars contained statements that were "*materially inaccurate*". Three matters in particular were identified "*by way of example only*". Two of them were alleged factual inaccuracies in the Particulars. The other was complaint about an implied criticism of BHS management in the draft press release to which they had not been given an opportunity to respond. The letter continued:

> "You must be aware that your report will attract significant attention. This knowledge should heighten the obligation on you to be factually accurate and careful not to cause damage. Publishing a report in the form provided to our client today has potential to be very damaging to not only the relevant individuals but also their businesses and the many thousands [of] employees of those businesses.
>
> There is absolutely no need for the documents published to contain criticism of anyone other than the subjects of your investigation. Our clients were not the subject of your investigation and have the right not to be criticised by you to

> bolster your findings against PwC and Mr Denison. All such criticism should be removed from the documents that you put into the public domain.
>
> It is imperative that our clients have a proper opportunity to correct the inaccurate factual statements in the documents and to address the unwarranted criticism of them. The time you have afforded them to do that is insufficient and entirely unreasonable. Our clients have no wish to interfere in your process… but will now work diligently to provide you with details of each inaccuracy and potentially prejudicial comment which needs to be addressed to ensure no unfair harm should raise. However, this requires a more reasonable period of time to be afforded to them."

The letter concluded by stating that representations would be provided by 5pm on Friday 15 June 2018 and by requesting an undertaking that the documents would not be published pending receipt of representations. In default of provision of the requested undertaking by 2pm on Monday 11 June 2018, the Claimant's solicitors advised that an application would be made to Court to prevent publication.

19. On Monday 11 June 2018, Ms Davies responded on behalf of the FRC. As to the two material inaccuracies that had been identified, she rejected the contention that the first was inaccurate and stated that the second was not materially inaccurate. As to the implied criticism, she contended that it was clear from the Particulars that the criticism was directed at the auditors. She rejected the suggestion that the Particulars contained any adverse findings against identified third parties. However, without prejudice to this contention, she stated that the FRC would be willing to append the following disclaimer to the Particulars ("the Disclaimer") (drawn from the recent decision of Nicola Davies J in ***R (Lewin) -v- FRC and others*** **[2018] 1 WLR 2867** [62]):

> "This press release, the Settlement Agreement and the [Particulars] do not make (and nor would it be fair to treat any part of these documents as constituting or evidencing) findings against any individual or entity other than PwC and/or Mr Denison"

20. Ms Davies gave the Claimant until 2pm on Tuesday 12 June 2018 to provide details of any remaining alleged inaccuracies.

21. Taveta's solicitors sent two letters in reply in the very early hours of 12 June 2018. The first enclosed a schedule of the matters included in the Particulars to which objection was taken. The second letter from Taveta's solicitors protested that the Claimant had not been afforded a fair opportunity to make its representations and that there was no urgency that justified publication before its representations could be considered.

The Claim for Judicial Review and the Interim Application

22. In light of the looming publication, on 12 June 2018, the Claimant issued the present claim for judicial review together with an urgent application for interim relief to restrain publication of any part of the Sanction Documents that contained or referred to any express or implied criticisms of Taveta and/or its directors and/or employees ("the alleged criticisms"). The basis of the claim for judicial review was that the FRC's decision to publish the relevant documents without first giving the Claimant a fair opportunity to answer any criticisms contained therein was unlawful.

23. At 12.54 on Monday 12 June, Ms Davies sent an email to Taveta's solicitors noting the issue of the judicial review claim and the application for interim relief. She indicated that the FRC would delay publication until 7am on Thursday 14 June.

24. The applications came before me, on paper, as the Administrative Court urgent applications Judge shortly after 14.15 on 12 June 2018. As the relief sought affected the FRC's right of freedom of expression (s.12(2)(a) Human Rights Act 1998) and generally, I was concerned that the FRC should have an opportunity to respond. It also appeared to me that the application for interim relief was unsuitable to be dealt with on paper. An email was sent to Ms Davies (copied to Taveta's solicitors) at 14.58. In it, the parties were told that I did not consider that the application for interim relief was suitable for determination on paper and that a hearing could be fixed for either Thursday 14 or Friday 15 June 2018 (with the latter being more likely). I sought representations from the FRC by 16.30 as to whether a delay in publication pending this hearing would cause prejudice to the FRC. I invited the parties, if they could, to agree a timetable towards a hearing and a delay in publication until then, but in default of agreement I would determine the application for interim relief on paper.

25. Anne McArthur, General Counsel and Company Secretary of the FRC responded by email at 16.29. It included the following:

> "Given that the matters at issue between the Claimant and the FRC concern the contents and publication of a settlement agreement and associated documents, it is open to the FRC to publish the fact of the settlement and the regulatory outcome on Thursday but without the documents in issue. Whilst we would prefer, in the interests of transparency and fairness to publish the outcome with the relevant documentation we cannot, on the FRC's behalf, argue that prejudice would be caused. To be clear, if there is to be any delay caused to the Claimant's application we will proceed to publish the outcome only on Thursday with the associated documents to follow as soon as possible.
>
> However, we anticipate that the [Interested Parties] to the FRC matter would argue that any delay would be severely prejudicial to them. This is not least because there has been a leak and the fact of the settlement is in the public domain. Further, for the outcome to be published without the associated documents which provide the context to the admissions and regulatory sanctions could also be prejudicial…"

26. Having considered those representations, at 16.45, I was satisfied that it was not practicable to have a hearing prior to 7am on Thursday (the limit of the undertaking not to publish offered by the FRC). I directed that the application for interim relief be heard on Friday 15 June 2018 and made a limited order restraining publication of the alleged criticisms in the Sanction Documents until that hearing. I was satisfied that, if this temporary order was not made, Taveta's application would be rendered nugatory before the Court could decide the merits. The order contained the usual provision granting permission to apply to vary or discharge at short notice. I also directed that, if it had not already been served, the application for judicial review and interim relief should be served forthwith on the Defendants and the Interested Parties.

27. Media reports of the sanctions started to appear during the evening of 12 June 2018. At 23.04, Ms McArthur emailed Taveta's solicitors:

> "You will be aware that the fact of the settlement agreement and the sanctions imposed on the [Interested Parties] was leaked to the press earlier today. We do not know the source of the leak. Following the breaking of the story and with the agreement of [the Interested Parties] we published confirmation of the regulatory outcome. Our press release can be found at [website address given]."

28. It was, of course, a matter for the FRC how and when it chose to make the announcement, but the decision to release information relating solely to sanction whilst withholding the reasons underpinning the decision led (predictably) to concern as to why the findings had not been published. On 13 June 2018, Frank Field MP, Chair of the Work and Pensions Committee of the House of Commons ("the Select Committee"), sent an open letter to the Chief Executive of the FRC asking the following questions (amongst others): "*(1) what was the nature of the misconduct for which (a) PwC and (b) Mr Denison have been fined?; [and] (2) why has the FRC not published a report? Will you be doing so?*". Mr Field's public questions to the FRC were understandably the subject of further media reports.

29. At 14.11 on 13 June 2018, Ms McArthur sent a letter to the Court concerning the hearing that the Court had fixed for Friday 15 June 2018.

> "I mentioned in my email yesterday that the fact of the settlement had been leaked to the press. In light of the leak and further press coverage yesterday evening, the FRC brought forward its press announcement and last night published the fact of the settlement and the sanctions imposed against PwC and Mr Denison. These have been widely reported in the press (including the BBC and The Times). Whilst the FRC had originally intended to publish the settlement agreement (which contains the passages objected to by the claimant) at the same time as it published the fact of the settlement and the sanctions, given the combination of the leak and the ex parte order made yesterday, this is obviously now impossible. It follows that the urgency has unavoidably receded. At the same time, it will be impossible for the FRC to marshal its evidence in time for the deadline at 4.30pm today.
>
> The FRC obviously wishes to proceed to deal with the interim position at an inter partes hearing as soon as possible, and suggests a hearing be fixed if possible on Monday 25 June 2018. This would allow the FRC time to marshal its evidence in response to the application and give the Claimant an opportunity to file evidence in reply.
>
> On the basis that a hearing can be arranged in that timeframe, the FRC will undertake not to publish any information relating to the settlement insofar as the information contains or refers to express or implied criticism of the Claimant… until the conclusion of the hearing."

30. So far as the FRC was concerned, it was content for the hearing to be adjourned to 25 June 2018 and for it to provide an undertaking that it would not publish the alleged criticisms until that hearing. I do not know whether Ms McArthur was aware of Mr Field's letter to the Chief Executive of the FRC when she proposed a delay in publication of the Sanction Documents until 25 June 2018.

31. At 15.21 on 13 June, Taveta's solicitors sent a letter to the Court indicating that, with a minor adjustment to the timetable for evidence, it was content with the FRC's proposals for a hearing on 25 June 2018.

32. At 15.25, the parties were informed that the Court could not accommodate a hearing on 25 June 2018. The parties were told to contact the Administrative Court Office to fix a hearing. That was to be done promptly and in any event by 20 June 2018. I invited the parties to agree an order reflecting the directions (including case management directions) and to submit this to the Court by 11am on Friday 15 June.

33. During the late afternoon of 14 June 2018, several emails were sent to the Court regarding the listing of Taveta's application. The FRC asked the Court to direct a hearing on 26 June or, failing that, 25 June, referring in particular to Mr Field's letter of 13 June 2018. Taveta shortly thereafter confirmed its agreement to the FRC's request but sought an order extending the prohibition of publication of the alleged criticisms pending the hearing. Issues then arose as to the FRC's willingness to provide an undertaking unless the hearing was fixed for 25 or 26 June 2018. Finally, at 18.23, Taylor Wessing, solicitors acting for PwC, also wrote to the Court. The letter confirmed that PwC did not have any objections to amendments being made to the terms of the Sanction Documents to accommodate Taveta's concerns, but that PwC's immediate concern was that there should not be a substantial delay in publication of the Sanction Documents. PwC pressed for a hearing (as originally directed) on Friday 15 June.

The Hearing on Friday 15 June 2018

34. Having considered those representations, at 10.17 on Friday 15 June 2018, an email was sent to the parties by the Court. I directed that the hearing would take place in the week commencing 25 June 2018, but that it was not possible at that stage to direct any particular day. The email continued:

> "If the parties – including the interested parties – cannot agree (a) an order that the hearing of the application be fixed as indicated above; and/or (b) what (if any) restrictions there should be on publication of [the alleged criticisms] in the meantime – then the Judge is prepared to hear the parties at 2.30pm today… At the hearing any disputed issues can be resolved. For reasons of complexity, practicality and open justice, the Judge is not prepared to deal with this matter on paper. In light of Taylor Wessing's letter, the Judge considers that PwC has a very real interest in what order should be made. That is before any wider consideration of the public interest as a result of the announcement of sanction earlier this week… If the parties are not able to reach an agreed order (acceptable to the Judge) and no hearing takes place, the restrictions imposed by the Order of 12 June 2018 will lapse. Given the importance of the issues, the Judge is not prepared to allow the interim restriction on publication to continue by default…"

Responses from the parties were requested by 2pm.

35. At 10.38, Taveta's solicitors emailed the FRC to confirm that they were content with the proposed listing arrangements and sought the FRC's agreement as to the restrictions on publication continuing until the hearing.

36. At 13.47, Ms McArthur replied:

> "The FRC has now considered the Judge's proposed direction. In addition, there has been a further practical development which is that the fact of Taveta's challenge has been leaked to the media. At 11.30am today Sky News reported the challenge. Neither the FRC nor Taveta commented to Sky News. The report… illustrates the strong public interest in having the reasons behind the FRC's sanction of PwC made public…
>
> In all the circumstances, including today's further publication, the FRC considers that it must invite the Court to reconsider the principle of interim relief pending a return date. The FRC considers that an injunction of this kind, restraining a regulator from publishing its reasons for decision in the exercise of its public enforcement powers, on a matter of considerable public interest, should only be granted if a strong prima facie case is shown. [Taveta] has not made out such a case in the light of, among other things, the recent decision of the High Court in ***R (Lewin) -v- FRC*** … which decides that the appropriate protection for a third party such as [Taveta] is to include an appropriate disclaimer (or other explanation) in the text of the published materials. The FRC offered such a disclaimer before the issue of proceedings but [Taveta] refuses it in principle…
>
> Accordingly and without prejudice to other grounds for resisting the claim and the application, the FRC's position is that no interim relief should be granted.
>
> If the Court were to take a different view, then the FRC would wish to make submissions on: (1) the date for the hearing, which should be set so as to involve the bare minimum of delay consistent with allowing it an opportunity to submit evidence; and (2) whether it should be permitted to provide the full reasons for its decision… to the Select Committee for Work and Pensions (as requested on behalf of that Committee) and if so, under what conditions. The FRC would normally seek to cooperate with other public agencies and would wish to do so in this case."

37. The implied suggestion in the word "*leaked*" that there was something inappropriate in the media being told about the proceedings was wholly misplaced. Although, as a matter of practical expediency, urgent applications in the Administrative Court are routinely dealt with on paper, that does not in any way suggest that they are secret. The principle of open justice applies to these applications just as much to hearings in open court. As is clear from what is set out above, the Court has been astute to ensure that this matter has been conducted as far as possible in open court.

38. At 13.53, Taylor Wessing responded on behalf of PwC. It repeated PwC's concern that the matter should be resolved as quickly as possible so the facts underpinning the sanctions could be published. Taylor Wessing suggested that "*with goodwill on both sides*" it ought to be possible to agree wording to satisfy the concerns of Taveta. PwC asked the Court to direct Taveta to produce a marked-up copy of the Sanction Documents showing its suggested changes and for the parties to attempt to reach agreement during the following week.

39. The hearing took place at 2.30pm in open court. Mr Green QC and Mr Steele represented Taveta. Mr Béar QC and Mr Medcroft represented the FRC and Mr Julian Randall, from Taylor Wessing, represented PwC. As a result of redeployment of judicial resources, the Court was able to offer the parties a 1-day hearing the following

week on 18, 20, 21 or 22 June 2018. Following discussion, the parties settled upon a hearing on 21 June 2018. I so directed. A minor dispute about the timing of evidence was resolved by me, but otherwise the parties agreed the directions for the service of evidence. Mr Béar QC did not submit that there should be no restriction on publication in the meantime; on the contrary, the FRC was content to provide an undertaking regarding publication until the hearing. He did ask that any undertaking should not prevent the FRC from providing a copy of the Sanction Documents to the Select Committee (pursuant to its request). Although Taveta opposed that application, I allowed the FRC's limitation to its undertaking to allow this. I considered that the prejudice Taveta complained about only arose from publication to the world at large and that, balancing the obvious public interest, a restriction upon publication to the Select Committee was not justified. As I would expect, the Select Committee has respected the fact that the FRC has agreed to delay publication of the Sanction Documents pending the determination of Taveta's application and not published any of the Sanction Documents itself.

40. I have set out that history, in some detail, because it is important to record what has happened. The public is entitled to know why the Court imposed temporary restrictions on publication, the extent of those restrictions (i.e. it was not a 'ban' on publication of the Sanction Documents, just the parts of the documents that contained alleged criticisms) and that this process has been carried out (so far as practically possible) with urgency, openly and not in secret. The Court has had to balance the competing interests of several parties (and the public interest) in response to an urgent application, the merits of which had yet to be determined.

41. I can now turn to Taveta's application for interim relief.

Hearing in Private and restrictions on access to the Court file

42. Taveta applied for an order under CPR Part 39.2(3) that I should hear the application in private. The grounds advanced were that publicity would defeat the object of the hearing and/or it involves confidential information and publicity would damage that confidentiality and/or it is necessary in the interests of justice.

43. I refused that application, save for that part of the hearing when the parties made submissions on the alleged criticisms contained in the Sanction Documents. It is only that aspect of the hearing that could justify sitting in private. I was satisfied that it was strictly necessary to sit in private to hear that part of the application. If it had been heard in open court, then the interests which Taveta were seeking to protect in these proceedings would have been destroyed by the proceedings themselves. That is not based on confidentiality; the information is not said to be confidential. The justification is that, if the Court ultimately decides to grant the interim order, if the hearing has taken place in public that which the Court will have restrained the FRC from publishing will nevertheless be freely available to be reported as a report of the proceedings in open court.

44. For the same reason, I have continued, for the time-being, the order made pursuant to CPR Part 5.4C that no non-party can obtain from the records of the Court a copy of any document filed in the case (including a statement of case) insofar as it contains the alleged criticisms.

45. Prior to the hearing I had directed the parties to ensure that their skeleton arguments were drafted to ensure that they could be provided to the media (using, as necessary, a confidential appendix containing specific submissions as to the alleged criticisms). This is a public judgment. There is also a confidential Appendix which records my conclusions as to the submissions made by the parties as to the detail of the alleged criticisms. The Appendix will be withheld from the public unless and until that restriction is released by a further order of the Court.

46. This is an application for interim relief. The decision whether to grant interim relief necessarily requires, as a first step, an analysis of the claim for judicial review and its prospects of success.

Taveta's claim for judicial review

47. In summary, Taveta claims:

    i) the FRC intends to publish the Sanction Documents, in particular the Particulars, which contain the alleged criticisms ("the Publication Decision"); and

    ii) the Publication Decision is unlawful because Taveta has not been given a fair opportunity to make representations as to the alleged criticisms.

48. As a fall-back position, it seeks to challenge the decision of the Third Defendant to conclude the Settlement Agreement (with the Particulars) without having given Taveta a fair opportunity to make representations before the terms of those documents were finalised ("the Settlement Decision"). Whichever Decision is targeted, the complaint is the same: fairness requires that Taveta have a fair opportunity to make submissions as to the alleged criticisms. Whilst recognising that each of the Defendants may be the target of a claim in relation to particular decisions, in this judgment I shall use "the FRC" to refer generally to the Defendants.

49. Since commencement of proceedings, Taveta has made submissions to the FRC as to the alleged criticisms:

    i) On 12 June 2018, the Claimant's solicitors invited the FRC to "*confirm that the FRC is not restricted to making changes only in relation to matters of 'factual accuracy' and that the FRC will consider all of the representations from the Claimant (as set out in our letter dated 12 June) and to make such changes as it fairly and reasonably considers appropriate to any of the documents sent on 8 June in the light of such representations*".

    ii) The FRC replied that "*many of the points raised in your correspondence will be addressed in our response to your application [for judicial review] which we are preparing and on which, you will appreciate, we must now focus*".

    iii) On 13 June 2018, the Claimant's solicitors proposed that the time before the application could be heard could be used, "*to work with you to ensure that the points we have made are fully understood. It is clearly in everyone's interest that any material placed in the public domain is accurate and not unfair to third parties who were not the subject of your investigation*".

iv) No response was received until 18 June 2018, when the Claimant received the witness statement of Ms McArthur, which appended a schedule setting out "*the FRC's responses*" to the Claimant's representations ("the Schedule"). Save in two very minor factual respects, all the submissions made by Taveta were rejected and the FRC refused to make any alterations to the Sanction Documents. I deal with the Schedule in more detail in the Appendix to the judgment.

The parties' submissions

50. For Taveta, Mr Green QC's submissions can be summarised as follows:

i) the Particulars contain serious criticisms of Taveta, its directors and its employees;

ii) there is plainly a duty of fairness owed by the FRC in this case;

iii) the duty was breached by the decisions to agree the text of and/or to publish the Sanction Documents without first giving Taveta a proper and fair (or indeed any) opportunity to respond to the criticisms;

iv) the breach cannot be said to have made no difference; at the very least, had it been given an opportunity to make representations at a stage when the decision-makers had an open mind, there are points that could have been made which *might* have made a difference, which is sufficient for present purposes.

v) the breach has not been cured by anything that has happened after the Publication Decision: (a) the correct individuals, including the independent tribunal member, have not considered the Claimant's representations; (b) those individuals within the FRC who have considered the representations have not done so with an open mind, as the responses in Ms McArthur's schedule reveal; and

vi) the proposed Disclaimer does not and cannot satisfy the duty of fairness.

51. For the FRC, in summary Mr Béar QC submits:

i) the Scheme makes no provision for the involvement of third parties in the processes of investigating, settling or adjudicating upon alleged disciplinary breaches by members of its regulated community;

ii) such third-party participation would be totally impractical;

iii) this case had proceeded by way of settlement, but Taveta would have had no right to be heard before the Tribunal and consequently, *a fortiori*, it has no right to be heard before the Third Defendant accepted admissions from the target(s) of a complaint;

iv) as regards the decision to publish the Sanction Documents, under the Scheme, the FRC is under a duty to publish and there is a compelling public interest in openness and transparency in the regulation of those who participate in financial markets;

v) any duty of fairness that the FRC is under as regards Taveta is satisfied by the publication of the Disclaimer with the Sanction Documents; and

vi) in any event, the FRC has now considered Taveta's representations and has therefore discharged any duty of fairness.

52. I remind myself that, at this stage, I am considering whether Taveta's claim raises a serious issue to be tried. If permission to bring the claim for judicial review is granted, the merits of the claim will be determined later. I am only concerned, at this stage, with assessing the merits of the claim in the context of the application for interim relief.

The Regulatory Context

53. The importance of regulators operating with transparency and openness hardly needs stating. It inspires confidence both in those who are regulated and in the wider public, and it allows areas of concern or weakness to be identified. When a regulator sanctions one of its regulated community, publicity for the sanction (and the reasons for it) promotes the maintenance of standards and protects the public from those whose standards fall below the required level. Mr Béar QC has rightly referred me to (and relies upon) the following matters as demonstrating the particular importance that is attached to the regulation of those who operate in financial markets, and the FRC's role in regulating auditors:

i) In 2003, the EU Commission issued a Communication to the Council and European Parliament titled "*Reinforcing the statutory audit in the EU*". In it, the Commission noted that investors' confidence in capital markets worldwide had been eroded and that public credibility of the audit profession has been impaired. In relation to the role of disciplinary sanction and publication, it noted:

> "Systems of disciplinary sanction are an important instrument to correct and prevent inadequate audit quality. At the same time they are also a means for the audit profession to demonstrate its public credibility… the Commission will consider further steps towards the convergence of disciplinary procedures, notably with regard to transparency and publicity… In particular, systems of disciplinary sanctions should be subject to external public oversight… The existing requirement for appropriate sanctions in the 8th Directive will be reinforced by requiring that all Member States will have an appropriate and effective system of sanctions."

ii) Following further proposals and consideration, the public interest in publication and transparency in relation to the regulation and oversight of statutory audit was recognised in the EU Directive 2006/43/EU. Recital 9 of which provided:

> "The public interest function of statutory auditors means that a broader community of people and institutions rely on the quality of a statutory auditor's work. Good audit quality contributes to the orderly functioning of markets by enhancing the integrity and efficiency of financial statements."

Article 30 states:

> "Systems of investigations and penalties
>
> (1) Member States shall ensure that there are effective systems of investigations and penalties to detect, correct and prevent inadequate execution of the statutory audit.
>
> (2) Without prejudice to Member States' civil liability regimes, Member States shall provide for effective, proportionate and dissuasive penalties in respect of statutory auditors and audit firms, where statutory audits are not carried out in conformity with the provisions adopted in the implementation of this Directive.
>
> (3) Members States shall provide that measures taken and penalties imposed on statutory auditors and audit firms are appropriately disclosed to the public.

iii) The subsequent EU Directive 2014/56/EU promulgated more detailed rules. Article 30a requires 'competent authorities' (in the UK, the FRC) should have powers to take measures and sanctions which include publication of statements indicating the person sanctioned and the nature of the breach on their websites. Article 30(c) provided:

> "Publication of sanctions and measures
>
> … Competent authorities shall publish on their official website at least any administrative sanction imposed for breach of the provisions of this Directive or of Regulation (EU) No.537/2014 in respect of which all rights of appeal have been exhausted or have expired, as soon as reasonably practicable immediately after the person sanctioned has been informed of that decision, including information concerning the type and nature of the breach and the identity of the natural or legal person on whom the sanction has been imposed."

These measures reflect recital (1):

> "… in order to reinforce investor protection, it is important to strengthen public oversight of statutory auditors and audit firms by enhancing independence of Union public oversight authorities and conferring on them adequate powers, including investigative powers and the power to impose sanctions with a view to detecting, deterring and preventing infringements of the applicable rules in the context of the provision by statutory auditors and audit firms of auditing services."

54. I need not set it out in this judgment, but I have also considered, in this respect, the FRC's own statement of its position contained in its publication *Regulatory Approach* (2014) in which it explains its commitment to transparent regulation in the public interest.

55. It is clear from these materials, and I accept, that there is a significant public interest attaching to competent authorities, like the FRC, making public statements of any

sanction that is imposed on an auditor and the reasons for it. Mr Béar QC is right to submit that, in a regulatory context, the EU Directive is unusually (but deliberately) highly prescriptive as to the obligations of competent authorities regarding publicity of its decisions and that this reflects the importance that is attached to the principle.

Do the Particulars contain criticism of Taveta?

56. Mr Green QC's submissions have naturally focused on the individuals at Taveta against whom he says the Particulars make implied criticisms. Although not formally challenging Taveta's locus, Mr Béar QC submits that none of these individuals is a claimant in these proceedings. That is right, but I consider that Taveta is a suitable claimant to bring these proceedings. The Particulars contain statements directed at "*the management*" of Taveta. No individuals are named, but that does not mean that they are not being referred to or that they are not identifiable (see [60(iii)] below). Taveta (as a company) has a legitimate interest in ensuring that any duty of fairness owed to their directors or employees is observed. Further, allegations reflecting negatively upon the conduct of its directors are likely to have an adverse impact on the company. To that extent, their interests coincide.

57. The FRC's original position was that the Particulars contained no criticism (express or implied) of Taveta, its directors or employees ("the Taveta Personnel"). By the hearing, its position shifted to accepting that the Particulars contained "material which could be used as part of grounds for advancing criticism" (see [83] below). Nevertheless, Mr Béar QC submitted that any harm caused by this was adequately dealt with by the proposed publication of the Disclaimer. His submission, shortly, is that readers of the Particulars will recognise from the Disclaimer that the Taveta Personnel did not participate in the FRC's investigations, were not party to the Settlement Agreement and therefore "*no findings are being made against them*".

58. As to any implied criticism in the Particulars, Mr Béar QC was reluctant to accept that principles of defamation law should be applied to the determination of what (if any) allegations were being levelled at the Taveta Personnel. He submitted that they were not apt to be used in a public law context. He did not advance an alternative basis on which the Court was supposed to ascertain meaning, but did argue in the alternative that no reasonable reader of the Particulars could construe them as containing findings against Taveta (or Taveta Personnel).

59. I am quite satisfied that the defamation authorities should be applied to this issue. This is a classic case of determining meaning. Taveta's complaint is that the Particulars are about to be published to the world at large. The meaning of what is published cannot depend on whether the complaint made about the publication is in the context of a public law complaint about an alleged breach of the duty of fairness, or a defamation claim. The determination of meaning(s) is the same whatever the nature of the legal wrong that publication is said to involve.

60. The well-established principles to be applied when ascertaining the meaning of the Particulars can be summarised as follows:

    i) although it may contain several imputations, the Particulars will convey a single natural and ordinary meaning (the so-called 'single-meaning'): ***Slim –v- Daily Telegraph*** **[1968] 2 QB 157**, 173D-E *per* Lord Diplock;

ii) the natural and ordinary meaning is the *objective* meaning that the hypothetical ordinary reasonable reader would understand the Particulars to bear ***Lachaux -v- Independent Print Limited*** **[2016] QB 402** [15(2)] *per* Davis LJ;

iii) the single natural and ordinary meaning is assessed by the Court using the principles identified in ***Jeynes -v- News Magazines Ltd*** **[2008] EWCA Civ 130** [14] *per* Sir Anthony Clarke MR;

iv) in assessing meaning, no evidence beyond the words complained of is admissible: ***Charleston –v- News Group Newspapers*** **[1995] 2 AC 65**, **70** *per* Lord Bridge;

v) the ordinary reasonable reader is taken to have read the whole of a publication. That is important, because the context in which the words complained of appear will often influence the meaning: ***Bukovsky -v- Crown Prosecution Service*** **[2018] EMLR 5** [14]-[16] *per* Simon LJ;

vi) this principle is particularly important in 'bane and antidote' cases. Where the publisher relies upon some words to draw the sting of what otherwise would be a defamatory statement of the claimant, the bane and antidote must be read together: ***Cruise -v- Express Newspapers plc*** **[1999] QB 931, 939A** *per* Brooke LJ; but cases where the defamatory meaning will be wholly removed by the antidote are rare: ***Stern -v- Piper*** **[1997] QB 123, 136B** *per* Simon Brown LJ;

vii) the meaning the publisher *intended* to convey is irrelevant: ***Cassidy -v- Daily Mirror*** **[1929] 2 KB 331**, **354** *per* Russell LJ;

viii) for a viable defamation claim, the words complained of must refer to the claimant. The claimant need not be named; the question is whether reasonable people would understand the words to refer to the claimant: ***Lachaux*** [15(1)] *per* Davis LJ;

ix) a meaning is defamatory of the claimant if (1) objectively judged, it substantially affects in an adverse manner the attitude of other people towards him, or has a tendency so to do: ***Thornton -v- Telegraph Media Group Ltd*** **[2011] 1 WLR 1985** [96] *per* Tugendhat J; ***Lachaux*** [15(5)] *per* Davis LJ; and (2) the requirements of s.1 Defamation Act 2013 are satisfied; and

x) the Particulars may contain additional meanings that are defamatory of particular individuals as a result of particular facts known to some, but not all, readers of the Particulars; these are innuendo meanings: ***Grubb -v- Bristol United Press*** **[1963] 1 QB 309, 327** *per* Pearce LJ. For example, some readers will be familiar with the particular legal duties owed by directors of companies and if, when they read the Particulars, they consider that they allege that Taveta Personnel have breached those duties, the individuals referred to would also have a complaint based on that further innuendo meaning.

61. I have applied those principles to the assessment of the meaning of the Particulars. My detailed conclusions are necessarily included in the Appendix to this judgment, but in this public judgment I summarise my findings as follows:

i) The Particulars and Settlement Agreement in their current form make implied criticisms of the Taveta Personnel. I have found that they bear a meaning which is capable of defaming them (Appendix [A12]). Were they to be published in that form, then there is a serious issue to be tried as to whether they would defame the Taveta Personnel in the meaning that I have found. Objectively judged, that meaning would be serious and arguably satisfies the requirements of s.1 Defamation Act 2013 (Appendix [A15]).

ii) It is well arguable that the Disclaimer is ineffective to remove the defamatory character of the Particulars when taken as a whole; that the antidote does not remove the bane.

iii) The publication is also likely to convey other innuendo meanings defamatory of the Taveta Personnel, but I cannot assess the viability of such claims without an investigation into the legal duties owed by particular Taveta Personnel.

Duty of fairness

62. Put at the forefront of his submissions, Mr Green QC contends that there is a well-established legal principle that a person should not be criticised in a public report without first having a fair opportunity to respond to that criticism. Such an opportunity can be provided during the evidence-gathering stage of an investigation, or towards its conclusion (but before the decision-maker has reached any concluded view), for example by providing the person with the passages of the draft report containing the proposed criticism.

63. The process of providing such an opportunity prior to publication is often called "Maxwellisation". That term derives from litigation involving Robert Maxwell in the early 1970s, which arose from an investigation into the affairs of Pergamon Press Ltd carried out by inspectors appointed by the Board of Trade. That litigation led to two Court of Appeal decisions: ***In re Pergamon Press*** **[1971] Ch 388** and ***Maxwell -v- Department of Trade and Industry*** **[1974] QB 523**.

64. Mr Green QC submits that both those decisions affirmed the general principle that a person should not be criticised in a public report without having had a fair opportunity to respond to that criticism. In the ***Pergamon*** case, Lord Denning MR set out the following statement of principle (at p.399H-400A):

> "The inspectors can obtain information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him. They need not quote chapter and verse. An outline of the charge will usually suffice."

65. The central legal principle set out in ***Pergamon*** and ***Maxwell*** was approved by the House of Lords in ***F Hoffmann La Roche & Co AG v Secretary of State for Trade and Industry*** **[1975] AC 295**. Lord Diplock stated at p.368D-E:

> "… I would accept that it is the duty of the commissioners to observe the rules of natural justice in the course of their investigation – which means no more than that they must act fairly by giving to the person whose activities are being investigated a reasonable opportunity to put forward facts and arguments in justification of his

> conduct of these activities before they reach a conclusion which may adversely affect him."

66. Mr Béar QC submits that the underlined passage indicates that the principle for which Mr Green QC contends is limited to the subject of the investigation. He also contends that Taveta simply falls outside the Scheme and the remit of the FRC and the investigation into the Interested Parties.

    i) Taveta is not regulated by the FRC; is not subject to the Scheme (or the penalties available under it); has never been (and never could be) the subject of an FRC investigation; and was not party to the Settlement Agreement.

    ii) The Settlement Agreement resulted in the Particulars which are a record of the admissions made by the Interested Parties. From this it is clear that they record admissions made under the Scheme to which Taveta is not subject, at the end of a process to which Taveta was not party and presented in a document which Taveta has not approved.

    iii) The Particulars themselves identify breaches by the Interested Parties. Reference to third parties is merely to provide the essential factual background to and context for the admissions which the Interested Parties have agreed to make.

67. Mr Green QC submits that the following principles emerge from the authorities:

    i) The principle applies to all inquiries, investigations and reviews: ***Pergamon*** pp.402H-403C; ***R -v- Race Relations Board, ex parte Selvarajan*** **[1975] 1 WLR 1686**, 1693H-1694D; and ***Re R*** **[2001] EWHC Admin 571** [24].

    ii) The principle applies to both natural and legal persons: ***R -v- Secretary of State for the Environment, ex p Hammersmith and Fulham LBC*** **[1991] 1 AC 521**, 598F; and ***R -v- Commission for Racial Equality, ex parte Westminster CC*** **[1985] ICR 827**, 841B-C.

    iii) The principle applies to any criticism that may adversely affect a person's interests (including in that term career or reputation): ***Mahon -v- Air New Zealand Ltd*** **[1984] AC 808**, 820H; ***Selvarajan*** at p.1693H-1694D. This includes criticisms against a company, its directors or employees that could lead to litigation: ***Pergamon*** p.407B.

    iv) The principle requires a fair opportunity to respond, including in particular (a) sufficient information about the proposed criticisms so that the subject knows what is being alleged against him, and (b) sufficient time to respond: ***Maxwell*** p.538H; ***Pergamon*** p.400A; ***Furnell -v- Whangarei High Schools Board*** **[1973] AC 660**, 685A. In ***Re R***, Collins J encapsulated it thus [21]:

> > "Fairness does not require that a person to be criticised knows from whom or from what source or why those criticisms have been made. What he needs to know is that the criticism has been made and what that criticism is and to be given sufficient information about it to enable him to deal with it and to make the necessary investigations on his own side

> and to come up with any explanations or to set right any errors of fact which may lie behind it…"

v) To be fair, the opportunity to respond must be given before the decision-maker has reached a concluded view. If an opportunity to respond to criticisms is given to a witness when giving evidence to an inquiry, the decision-maker need not put its tentative conclusions to the witness to allow further comment: ***Maxwell*** p.534B-D. But if the decision-maker proposes to criticise a third-party who has not given evidence or had proposed criticisms put to him, he must be given an opportunity to respond before the decision-maker reaches a concluded view.

vi) A claimant need only show that his representations *might* have made a difference: ***Mahon -v- Air New Zealand Ltd*** at p.821B.

68. I reject the submission that ***Hoffmann La Roche*** restricts the ambit of the duty of fairness to the subject of an investigation. The principle is not so limited. Of course, the subject of an investigation, whether under a statutory inquiry or as part of a regulatory process, would have a legitimate expectation that he would be afforded the opportunity to understand what was being alleged against him and to defend himself. But the principle is wider than that. There will be inquiries that do not have an individual as their focus or, as here, where third parties become embroiled in the matters under investigation. Those people may not even participate in the investigation process, but they are just as much in jeopardy if findings of misconduct are made against them in published reports without their having the opportunity to make representations prior to publication. It is that essential unfairness that lies at the heart of the rules of natural justice that have developed so clearly in the authorities to which Mr Green QC has referred me.

69. I accept Mr Green QC's submissions, on the basis of those authorities, that it is arguable that the FRC owed a duty of fairness to Taveta (and the Taveta Personnel). That duty arises because I am satisfied (see [61] above) that the Particulars and the Settlement Agreement do make criticisms of the Taveta Personnel is capable of bearing a meaning that is defamatory of them (and seriously so). It is clearly arguable (at least) that the publication of the Particulars (with the Settlement Agreement) may adversely their interests.

70. The duty of fairness only arises when a body has decided to publish criticism of an individual. Of course, prior to this, the body will ask itself whether it is *necessary* to include criticism of the individual. If it is, the next question is whether the individual's interests could be protected by anonymising him/her in the report. If that is impossible or impractical, then the duty of fairness will arise. The importance of that duty being observed is, in part, because, once published, defamatory allegations contained in the report will almost certainly be protected by qualified privilege, leaving the subject of the criticism without any remedy for the consequent damage to reputation.

71. In arguing that no obligation of fairness falls on the FRC, Mr Béar QC relies upon the decision of Nicola Davies J in ***Lewin***. In that case, the FRC brought a complaint under the Scheme against an accountancy firm and a partner in the firm, contending that their statutory audit of the financial statements of a public company had failed to prevent or detect serious wrongdoing by the management of the company. At the end of the investigation, the tribunal prepared a report of its decision on the complaint which

included findings of serious wrongdoing on the part of the claimant, Lewin, one of the company's directors. He had not been invited to give evidence or make representations to the tribunal. In what was described as a "*matter of courtesy*", the claimant was provided with a copy of the report in advance of its publication. The FRC rejected complaints by the claimant that publication of the report would be a breach of his right to respect for his private life under Article 8 and decided to publish the report in full. The claimant brought a claim for judicial review challenging both the lawfulness of the decision to include in the report unqualified findings about his conduct and the decision to publish the report in full.

72. The Judge held:

i) since the disciplinary tribunal had been required to investigate the nature and extent of the fraud at the company to determine whether there had been any culpability on the part of either the accountancy firm or its partner, it had been required to express a view in its report on the claimant's conduct [57];

ii) there was nothing in the Scheme which permitted the sending of a draft report, or part of it, to a non-party to invite comments [58], [62];

iii) the tribunal was *fuctus officio* once it had concluded its final report; it could not re-write it or change parts of it [64];

iv) the claimant's interest in protecting his reputation was adequately protected by the law of defamation, specifically s.15(1) Defamation Act 1996 and Paragraph 14(b) of Schedule 1 Part II (fair and accurate reports subject to explanation or contradiction) [43];

v) Article 8 may protect a person against an attack on his reputation, but only if it is a serious interference with his private life so as to undermine his personal integrity and the claimant had provided insufficient evidence to support such a level of interference [47]; the criticism of the claimant related to his professional role in a public company and so did not represent a serious interference with his private life [66];

vi) any interference in the claimant's Article 8 rights was justified by the Article 10 rights of the public generally to receive information about the outcome of disciplinary proceedings in public [48]; and

vii) given the constraints of the Scheme and the gravity of the findings against the claimant, fairness required the tribunal to set out, at the beginning or end of the report, the Disclaimer [62].

73. Mr Green QC submits that there are important distinctions between the current case and ***Lewin***. In ***Lewin***, the Judge held that the claimant had been aware of the proceedings – which were held in public – and would reasonably have known that there could be criticism of him, but he chose not to attend [60]. In relation to the Conduct Committee's decision to publish the Tribunal's Report in full and unredacted, the Judge noted that the Chair of the Tribunal had attempted "*to solve the issue of means of redactions within the Report*" but that "*[t]his was unlikely to be satisfactory to any party because the actions of the claimant and the documentation which related to him, or of which he had*

knowledge, was an integral part of the evidence and was woven through the findings" [63]. Consequently, the Tribunal's decision, "*could not properly be understood without reference to the role of the claimant*", and the absence of detail which would place in context the finding of misconduct would harm the auditors [67].

74. Based on ***Lewin***, Mr Béar QC advanced the submission that:

i) the FRC could include in a Tribunal Report, or in particulars of fact and misconduct as part of a settlement agreement, findings that were seriously defamatory of a third party (and potentially false), the publication of which would cause serious reputational harm to that third party;

ii) in such a case the FRC was under no duty to permit the third party an opportunity to make submissions to the FRC before publication of these findings; and

iii) the interests of the third party were adequately protected by (a) the publication of the Disclaimer; (b) the potential availability of a remedy in judicial review proceedings of a declaration that the allegations should not have been published; and (c) the right of explanation of contradiction in respect of reports of the Particulars under s.15 Defamation Act 1996.

75. Unhesitatingly, I reject those propositions. I do not consider that ***Lewin***, properly understood and applied, provides the support that Mr Béar QC submits. If contrary to that view, it does, then I would respectfully prefer the line of authorities identified in [67] above.

i) The fact that the FRC has a remit only over auditors and actuaries does not mean that it does not have a duty to act fairly to other third parties if it intends to publish criticisms of them. Nicola Davies J accepted that proposition [62]. An organisation discharging functions like the FRC does not need be given specific rules or powers to act fairly; it has a public law duty to do so and such powers as are required to do so would necessarily or readily be implied.

ii) I do not believe that ***Lewin*** is authority that the duty of fairness can, in all cases, be satisfied by publication of a disclaimer. If it were, then respectfully I would disagree. Whether any particular form of wording in a disclaimer will act as a sufficient antidote to extinguish the defamatory imputation(s) contained in a publication (such as to obviate the need to give the third party a right to comment on the imputation(s)) must be a matter of fact and degree, depending on upon the well-established rules of meaning I have already set out (see [60] above) and common sense.

iii) The reputational interests that are engaged by the threatened publication of a report which is capable of bearing defamatory imputations of third parties are sufficient to engage the duty of fairness (see [67(iii)] above).

iv) The Article 10 rights of the regulator and/or the public cannot extinguish any duty of fairness that arises. Further, if a failure to give a third party the opportunity to comment on proposed criticisms leads to the publication of allegations that are false, the public interest is damaged (see [77] below). Any balancing of competing rights under Article 10 and Article 8 arises *only* once

the "regulator" (a term I will use as shorthand for the body or individual publishing the report) has offered the third party the opportunity to comment and considered those representations. The representations may cause the regulator to revise or remove its criticism. It is at that stage that the regulator balances the competing rights, applying an intense focus to the respective rights and deciding the proportionality of and justification for the respective interference (***In Re S (A Child) (Identification: Restriction on Publication)*** **[2005] 1 AC 593** [17]). The assessment is for the regulator, but the question is: is it *necessary* to include the criticism of the third party in the report? In the current case, in my judgment the answer may well be found to be no. It would be possible to publish the Particulars in an amended form which would not bear a meaning capable of defaming the Taveta Personnel.

v) The most significant differences between the current case and ***Lewin*** are that the FRC does not contend that it is essential to include any criticism of Taveta or Taveta Personnel to understand the allegations made against the Interested Parties, and it positively disavows any intention to publish any criticism of them.

vi) Perhaps because the Court did not have detailed submissions on the point, but the effectiveness of any remedy provided by s.15 Defamation Act 1996 is significantly overstated in ***Lewin***.

a) The section would apply only to fair and accurate *reports* of the FRC's Particulars. It would give Taveta the opportunity to request (not require) the publisher of such a report (e.g. a newspaper) that it publish "*in a suitable manner a reasonable letter or statement by way of explanation or contradiction*". If the newspaper "*refused or neglected*" to publish Taveta's letter or statement, then it could not avail itself of a defence under s.15(2) to the publication of any defamatory imputations contained in its report. But a newspaper might look elsewhere for its defence to any action for defamation (e.g. s.4 Defamation Act 2013). It is unlikely that the publication of any letter or statement by way of explanation or contradiction would be read by all of those who read the original report.

b) More importantly, it is highly arguable that the section does not apply to publication of the Particulars by the FRC. Taveta has **no** right to request (still less to require) that the FRC publish anything by way of explanation or contradiction. Seeking the publication of explanations or contradictions in newspapers that report any defamatory imputations in the Particulars might be of limited use if the Particulars can continue to be published by the FRC on its website, without any explanation or contradiction.

vii) A subsequent finding in a judicial review claim that the inclusion in a report of defamatory imputations against third parties is unlawful is unlikely to be an adequate remedy for any reputational harm that will have been occasioned:

a) the court is unlikely to determine the truth or falsity of the allegation that had been included in the report; the decision will be limited to the lawfulness of the decision to include the material;

b) the overwhelming likelihood is that any subsequent finding of the Administrative Court will not receive anything like the publicity that will have attended the publication of the original report; and

c) damages for injury to reputation are not available.

76. In summary, in the circumstances of this case, it is strongly arguable that the remedies that a trial would afford to a third-party who contends his reputation has been seriously damaged by the publication of defamatory imputations contained in an FRC report are inadequate. The fact that, in my judgment, the remedies are arguably so inadequate provides even more reason why the duty of fairness should be observed *before* any defamatory allegations are published.

77. I draw support for these conclusions from ***Reynolds -v- Times Newspapers Ltd*** **[2001] 2 AC 127**. Emphasising the importance of reputation, and noting that the public interest is harmed by the publication of false information, Lord Nicholls said (at p.201A-C):

> "Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation."

The position is *a fortiori* where the reputation is damaged by publication of defamatory allegations by a body like the FRC, which is discharging a regulatory role of significant public interest (see [53]-[55] above) and whose decisions are likely to be regarded as authoritative. Lord Nicholls continued:

> "When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed, choice, the electorate needs to be able to identify the good as well as the bad. Consistently with these considerations, human rights conventions recognise that freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputations of others."

To like effect, Lord Hobhouse said (at p.238A-C):

> "The liberty to communicate (and receive) information has a similar place in a free society but it is important always to remember that it is the communication of information not misinformation which is the subject of this liberty. There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society, being informed not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society. There is no duty to publish what is not true: there is no interest in being

misinformed. These are general propositions going far beyond the mere protection of reputations."

78. For these reasons, it is plainly not in the public interest for bodies like the FRC to publish defamatory allegations against third parties (that can thereafter be freely and widely reported in the media under the protection of privilege) that are false. The chances of avoiding the publication of allegations that turn out to be false is immeasurably improved by observing the duty of fairness and giving third parties who are the subject of such defamatory allegations the opportunity – if they can – to refute them. It is not difficult to think of examples. If Mr Béar QC's submissions were to be accepted, the FRC could, in a report into the misconduct of an auditor, make allegations (of equivalent seriousness to those in ***Lewin***) that a director had misled an auditor about the trading position of her company, without giving the director an opportunity to comment. If the director had evidence, for example in the form of emails, showing that she had clearly provided information to the auditor, but that he had overlooked it, then the criticism of the director contained in the FRC report would have been false. The fact that the director thereafter is unlikely to have any adequate remedy to correct the falsehood for the reasons I have already explained merely aggravates the position. As Nicol J noted in ***R (MRH Solicitors Ltd) -v- County Court at Manchester*** **[2015] EWHC 1795 (Admin); [2016] Inquest LR 198**, in the context of the court making findings against third parties [34]–[35]:

> [34] …in the absence of good reason a Judge ought to be extremely cautious before making conclusive findings of fraud unless the person concerned has at least had the opportunity to give evidence to rebut the allegations. This is a matter of elementary fairness. In ***Vogon International Ltd -v- the Serious Fraud Office*** **[2004] EWCA Civ 104** [29] May LJ (with whom Lord Phillips MR and Jonathan Parker LJ agreed) said,
>
> > "It is, I regret to say, elementary common fairness that neither parties to the litigation, their counsel nor judges should make serious imputations or findings in any litigation when the person concerned against whom such imputations or findings are made have not been given a proper opportunity of dealing with the imputations and defending themselves."
>
> [35] This is not only required because of fairness to the party affected but also to avoid the Court falling into error... As Megarry J memorably said in ***John -v- Rees*** **[1970] Ch 345, 402**,
>
> > "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were answered; of inexplicable conduct, which was fully explained…Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events".

79. For these reasons, I am satisfied that Taveta has demonstrated that there is a serious issue to be tried as to whether the FRC owed Taveta a duty of fairness arising from its intention to publish the Particulars which, as I have found, contain criticism of Taveta.

Has there been a breach of the duty of fairness?

80. Mr Green QC submits that once it is recognised that a duty of fairness arose and that the Particulars contain criticisms of Taveta, the FRC breached that duty because it did not give them a proper and fair opportunity to respond to the criticisms.

81. It is something of an oddity that the FRC's Publication Policy (in paragraph 29 – see [11] above) ostensibly provides an opportunity for third parties to suggest amendments to factual inaccuracies in only the press release that accompanies the substantive documents containing the FRC's decision. If a factual inaccuracy were accepted as having been identified in the press release, it would be positively perverse not to correct the corresponding factual inaccuracy in the underlying documents. Ms Davies, in her email of 8 June 2018, did not limit challenges to factual accuracy to the press release (see [14] above). She invited comments on "*the press notice and documents*". The documents being referred to were the Settlement Agreement and Particulars. Some insight into her reasoning appears from her email of 7 June 2018, sent to members of the FRC Conduct Committee, in which she sought authority to publish the Sanction Documents. She noted:

> "It is recently our practice to also give advance notice to certain third parties reasonably identifiable in or by the press notice or associated published documents to mitigate the risk of challenge or complaint. In this case, some third parties have been anonymised but some third parties are identifiable. We have assessed the risk of challenge from most of those identifiable parties as low but would recommend providing advance notice of publication to the following key parties identifiable in the documents: The Taveta Group (including Taveta 2 and Arcadia), Sir Philip Green, [a named director of Taveta] and BHS."

82. It is clear from that email that Ms Davies (at least) recognised that there was a "*risk of challenge or complaint*" from Taveta (and others) so that "*advance notice*" should be given to them. That risk of challenge arose because, in my judgment, it was recognised that the Sanction Documents contained implied criticism of Taveta. The recommendation that Taveta should be given advance notice appears to have been driven more by a concern to avoid a complaint by the third parties than a desire to provide a fair opportunity to them to respond to the criticism. That objective would also be consistent with Taveta being given only the minimum period of 3 days within which to provide any response. By the time the emails of 7 and 8 June 2018 were sent, there is a serious issue to be tried whether the decision to publish the Sanction Documents had already been taken and whether giving notice to Taveta and the other third parties was done to protect the FRC not the third parties.

83. In relation to the notification of third parties, Ms McArthur in her witness statement states:

> "The third parties notified… were in each case named in the [Particulars], albeit they were not named as the subject of criticism. The FRC was, of course, aware that certain parts of the material to be published could potentially be used as a basis on which to criticise persons concerned in BHS's accounts."

84. I struggle to see the difference between "*a basis on which to criticise*" and implied criticism. This appears to be a semantic difference without substance. In any event, for

the reasons I have given in the Appendix, I am satisfied that the Particulars *do* contain implied criticism of Taveta.

85. Mr Béar QC contends that even if the duty of fairness arises, it has been satisfied (a) by publication of the Disclaimer and (b) since the proceedings have been commenced, by the FRC considering the representations that Taveta has submitted to it.

86. In support of the former point, he relies upon the finding in ***Lewin*** that the duty is discharged by publication of the Disclaimer (see [72(vii)] above). I reject that submission for the reasons I have given in [75(ii)] above.

87. As regards the latter point, Mr Green QC makes two submissions:

i) the FRC has not fairly considered the submissions that Taveta have made since commencement of the claim for judicial review: it is in, he says, "*litigation mode*"; and, in any event

ii) the FRC has provided no evidence that the decision maker (i.e. the person(s) at the FRC who authored the Particulars) had considered the submissions; the available evidence suggests that only Ms McArthur has done so.

88. In support of these submissions, Mr Green QC relies upon ***R (Banks) -v- Secretary of State for the Environment, Food and Rural Affairs*** **[2004] EWHC 416 (Admin)**. In that case, the respondent to the judicial review claim similarly contended that it had "*considered all the fresh evidence and it did 'not cause it to change its view…'*" [106]. On the evidence in that case, Sullivan J was unimpressed:

> [107] I might have accepted that submission if there had been any evidence that a properly authorised inspector had carried out, in a fair, open-minded and comprehensive manner, a genuine review of the case in the light of all the evidence that has emerged since the 28th March 2003. There is no evidence that such a review has been carried out. Firstly, there is no indication that Mr. Dunn, or any other inspector, has been involved in the decision making process since 29th August 2003. Although the revocation notice of that date was signed by Mr. Frost, Mr. Dunn's Witness Statement explains that he did so during Mr. Dunn's absence on leave and following Mr. Dunn's "consideration and assessment that such action was appropriate". No documents have been disclosed relating to Mr. Dunn's consideration and assessment at that time, so it is not possible to ascertain the basis upon which he was so satisfied. There is nothing to indicate that Mr. Dunn, or any other inspector has considered Mr. Church's reports.
>
> [108] Secondly, there is a world of difference between carrying out a genuinely open-minded review, and striving to defend an earlier decision in the context of adversarial litigation. Reading Mr. Smith's evidence as a whole leaves me in no doubt that it is the latter, rather than the former, exercise that has been carried out by officials on behalf of the Defendant in these proceedings. I have reached this conclusion for the following reasons: …
>
> iv) The reaction to new evidence has not been one of genuine reappraisal, but a dogged determination to uphold the original decision…

89. I accept that there is a serious issue to be tried as to whether the same can be said of the FRC's response to Taveta's submissions.

    i) In my judgment, the clearest indication that the FRC is currently operating with a closed mind is the, almost dogged, refusal to countenance any changes to the Particulars in response to Taveta's submissions (see the Schedule). I have explained in the Appendix why the particular wording of the Particulars gives rise to implied criticism of Taveta and Taveta Personnel. These points are not subtle, and Taveta's solicitors have made the objections clear. The FRC's original position was a denial that the Particulars contained *any* criticism of Taveta. But that position was abandoned at the hearing in favour of the alternative submission that the Disclaimer was the answer to all of Taveta's complaints.

    ii) I am also satisfied that there is substance in the point that the FRC has not submitted any evidence that the points raised by Taveta have been considered by the original authors of the Particulars. It is right to note that the FRC submits that the Particulars are a product of agreement between the FRC and the Interested Parties. But within that bilateral arrangement, PwC has indicated that it does not oppose the alterations suggested by Taveta, so it is a question of whoever on the FRC's side who negotiated the Particulars considering whether they could be reworded to accommodate the concerns that have been identified. Mr Denison would need to be consulted, but the reality of the matter is that the changes that Taveta seek are not going to affect either PwC or Mr Denison. It is a striking feature of this case that Taveta is not seeking to change *any* of the criticisms of the Interested Parties in the Particulars.

90. For these reasons, I am satisfied that Taveta has demonstrated that there is a serious issue to be tried as to whether there has been a breach of the duty of fairness.

Interim Relief

91. By this application, Taveta seeks an interim order restraining publication of the alleged criticism until its claim for judicial review has been determined.

92. It is common ground that the Administrative Court can grant interim relief in proceedings for judicial review, including orders restricting publication. But the relief sought by Taveta would, if granted, affect the FRC's right of freedom of expression. In consequence, pursuant to s.12(3) Human Rights Act 1998, no relief is to be granted to restrain publication before trial unless the Court is satisfied that Taveta is likely to establish that publication should not be allowed.

93. "*Likely*" in this context usually means "*more likely than not*": ***Cream Holdings -v- Banerjee*** **[2005] 1 AC 253**. Warby J summarised the position for the Court at the interim stage in ***YXB -v- TNO*** **[2015] EWHC 826 (QB)** [9]:

> "The test that has to be satisfied by the claimant on any application for an injunction to restrain the exercise of free speech before trial is that he is 'likely to establish that publication should not be allowed': [s.12(3)]. This normally means that success at trial must be shown to be more likely than not: ***Cream Holdings***... In some cases it may be just to grant an injunction where the prospects of success

> fall short of this standard; for instance, if the damage that might be caused is particularly severe, the court will be justified in granting an injunction if the prospects of success are sufficiently favourable to justify an order in the particular circumstances of the case: see ***Cream*** at [19], [22]. But ordinarily a claimant must show that he will probably succeed at trial, and the court will have to form a view of the merits on the evidence available to it at the time of the interim application."

94. If the test to be applied is that under s.12(3), then I would grant the injunction sought by Taveta. I am satisfied that Taveta has shown that it likely to succeed in showing that publication of the implied criticisms is not allowed (at least pending the FRC complying with the duty of fairness). Alternatively, I am satisfied that its prospects of success are sufficiently favourable to justify the order it seeks in the particular circumstances of this case. I have set out my present assessment of the merits of the claim for judicial review above, but in summary my reasons for reaching this conclusion are:

    i) Taveta is not seeking prohibition of the Sanction Documents in their entirety, simply the parts "*that contain or refer to express or implied criticisms of the Claimant and/or any of its directors and/or employees.*" I am satisfied that it would be a relatively simple exercise for the FRC to make what would amount to limited changes to the text of the Particulars and which would then enable publication of the Particulars and the Settlement Agreement in a form which would not publish the alleged criticisms. As such, the real question is whether Taveta is likely to succeed in demonstrating that publication of the alleged criticisms is not allowed. This is a much narrower and focused question than whether the entire Sanction Documents can be published.

    ii) If published in their current form, the Particulars and Settlement Agreement will make implied criticisms of the Taveta Personnel which are capable of defaming the Taveta Personnel in a meaning that would be serious and arguably satisfies the requirements of s.1 Defamation Act 2013 (see [61(i)] above and Appendix [A12]-[A15]).

    iii) This is sufficient arguably to impose a duty of fairness upon the FRC to give Taveta a fair opportunity to respond to the implied criticism (see [62]-[79] above).

    iv) There is a serious issue to be tried whether FRC has failed to comply with that duty of fairness (see [80]-[90] above).

    v) I am satisfied that the consequences for the Taveta Personnel from publication, particularly given the lack of an adequate remedy for any wrongful reputational harm that might be caused (see [75(vi)] and [76]), are sufficiently serious as to justify interim relief.

    vi) If the Court does not grant interim relief, and publication of the unamended Sanction Documents then takes place, then the purpose of these judicial review proceedings will substantially have been rendered nugatory. A declaration, later, that the FRC's decision to publish was unlawful is arguably not an adequate remedy (see [75(vii)] above).

vii) The hearing of the substantive judicial review claim could be expedited so as to limit the interference with the Article 10 rights of the FRC and the public.

95. However, the test for the grant of injunctions in public law cases is higher than that applied in private law proceedings. In ***R (Interim Executive Board of X) -v- Ofsted*** **[2017] EMLR 5**, Stuart-Smith J attempted to draw together the relevant principles from the sometimes "incongruent" case law.

i) there is a significant public interest in publication of reports by public bodies, particularly when they are under a duty to publish ([32]; ***Cambridge Associates in Management -v- Ofsted*** **[2013] EWHC 1157 (Admin)** [60]; and ***R (City College Birmingham) -v- Ofsted*** **[2009] ELR 500** [28];

ii) in such cases the grant of an injunction requires "*pressing grounds*": ***R (Matthias Rath BV) -v- Advertising Standards Authority*** **[2001] EMLR 22** [30]; "*the most compelling reasons [are required] to prohibit a public body which is embarked on a quasi-judicial task… from publishing its decision*": ***R (Debt Free Direct Ltd) -v- Advertising Standards Authority*** **[2007] EWHC 1337 (Admin)** [24]; or "*exceptional circumstances*" ***R (J) -v- A*** **[2005] EWHC 2609 (Admin)** [23];

iii) where, as in Taveta's case, what is sought to be restrained is allegedly defamatory allegations, then the Court should have regard to the fact that, in private law cases, the principle in ***Bonnard -v- Perryman*** **[1891] 2 Ch 269** would usually prevent the grant of an order to restrain publication of defamatory statements where the respondent contends that the proposed publication was defensible: [34]; and ***R -v- Advertising Standards Authority ex parte Vernons Organisation Ltd*** **[1992] 1 WLR 1289**, **1293E-1294B**.

96. These are powerful and clear authorities. In the context of this case, Laws J's observations in the ***Vernons*** case referenced above deserve setting out in full:

> "… [Counsel for the ASA contends] that there is nothing in [Vernons'] application except a bare desire to protect reputation, and that would not be protected by an interlocutory injunction in an analogous case where the respondent was a newspaper, as one can see from the libel cases to which I have referred.
>
> [The ASA] submitted, in my judgment correctly, that the real heart of the case lies in [Vernons'] second point. Is there here a set of circumstances which disengages the general principle that the courts will not prevent the publication of opinion or the dissemination of information save on pressing grounds? ... If a private individual will not be restrained from expressing his opinion save on pressing grounds I see no reason why a public body having a duty, other things being equal, to express its opinion should be subject to any less rigid rules. It seems to me that the case is, if anything, analogous to one where an administrative body has an adjudicative function and in the course of its duties publishes a ruling criticising some affected person and the ruling is later disturbed or reversed by an appropriate appellate process. There are many such instances and many of them involve the criticism of members of the public, corporate or natural.

> I do not know of an instance in which a public body of that kind would fall to be restrained from carrying out what is no more nor less than its ordinary, but important, everyday duties simply upon the grounds that the intended publication contains material which is subject to legal challenge as being vitiated by some error of law. If the application for judicial review here is successful I cannot think but that there are ample means at the applicant's disposal to correct any adverse impression which what, *ex hypothesi*, would be an unlawful report may have given to the public. Indeed, though it has not been canvassed in argument, I know of no reason why the fact that they have obtained leave should not itself be disseminated if they wish to take any steps in that direction since this is an attempt to prevent the public and indeed, in fairness to the applicant, its fellow advertisers and others in the trade to which it belongs from seeing that the authority has reached these conclusions. I do not consider that the effects of that publication are damaging to the applicant in a manner which would be so irreparable, so past recall as to amount to a pressing ground, in the language of Strasbourg, a pressing social need, to restrain this public body from carrying out its function in the ordinary way."

97. Laws J's express linking of the public law approach to ***Bonnard -v- Perryman*** has led, as I have noted above, to the threshold for injunctions restraining publication of reports of public authorities to be set very high indeed. The cases in which interim injunctions are granted in private law defamation claims are vanishingly few. Respectfully, however, I have serious reservations as to whether setting the bar so high is still correct or can be justified.

i) Although the principle from ***Bonnard -v- Perryman*** has been approved, post-Human Rights Act 1998, by the Court of Appeal in ***Greene -v- Associated Newspapers*** **[2005] QB 972**, one of the bases of doing so was that the determination of meaning (so often the heart of a defamation claim) was reserved to the jury ([57]). The Court distinguished the authority of ***In re S (A Child)***, stressing "*the distinction between a defamation case (where the claimant's right to a reputation has been put in issue and the issue cannot be effectively resolved before the trial) and a case which raises direct issues of privacy or confidentiality*" [79]-[81].

ii) Since the decision in ***Greene***, the right to trial by jury in defamation claims has been removed (s.11 Defamation Act 2013). A key plank of the justification for retaining the rule in ***Bonnard -v- Perryman*** has therefore gone. In any event, when an issue arises in public law proceedings concerning the alleged publication of defamatory statements, the matter has always been resolved by a judge sitting alone and not by a jury.

iii) Application of the rule in ***Bonnard -v- Perryman*** and (the equivalent, in public law) ***Vernons*** gives a presumptive priority to Article 10 (freedom of expression) right over Article 8 (including the right to reputation). It has been held in private law litigation that such presumptive priority is not justifiable, being inconsistent with the jurisprudence of the ECHR: ***Douglas -v- Hello! Ltd*** **[2001] QB 967** [133], [135] *per* Sedley LJ, approved by the House of Lords in ***Campbell -v- MGN Ltd*** **[2004] 2 AC 457** [55] *per* Lord Nicholls; [111] *per* Lord Hope; [138]-[139] *per* Baroness Hale and in ***In re S (A Child)*** [17] *per* Lord Steyn. The authorities identify the correct test whenever Article 10 and Article 8

interests conflict as that in ***In re S (A Child)*** [17] and the test to be applied at the interim stage as that provided by s.12 Human Rights Act 1998.

98. Nevertheless, Laws J's decision from ***Vernons*** has been repeatedly applied in public law cases since: e.g. ***R (Babylon Healthcare Ltd) -v- Care Quality Commission*** **[2017] EWHC 3436 (Admin)** [42]-[43]; ***Interim Executive Board of X*** [34]; ***City College Birmingham*** [25]; ***Debt Free Direct*** [18]-[21]; ***R (J) -v- A*** **[2005] EWHC 2609 (Admin)** [23]-[24]; and ***Matthias Rath BV*** [30]. Although all are first-instance decisions, they have consistently applied the principle identified by Laws J. Notwithstanding my real misgivings that this line of authority has given a presumptive priority to Article 10 that can no longer be justified, I do not feel able to depart from it. The principle is too well-established, and the doctrine of precedent means that I am bound to follow it.

99. Therefore, applying the principles that I have identified in [95] above, but not without hesitation, I conclude that Taveta has not demonstrated that this is the sort of exceptional case that permits the grant of an interim injunction on publication. The injunction is sought to restrain the publication of statements alleged to defame Taveta Personnel pending Taveta's judicial review claim. Although I have found that the threatened publication does make criticisms of the Taveta Personnel that are capable of being defamatory of them (and seriously so), such a threatened publication is not exceptional. The test in this area assumes that an injunction is being sought to restrain a defamatory publication. The defamatory meaning that I have found the words capable of bearing is not of the utmost seriousness. Taveta has not put forward evidence of the likelihood of harm that is so serious that that element marks it out as exceptional.

100. In ***Debt Free Direct*** Sullivan J said:

> [23] Although it is asserted that the claimant will suffer financial damage by reason of the effect on its commercial reputation, it is difficult to see how this case differs, save perhaps in matters of degree, from the ordinary case where a regulator responsible for regulating a particular area of activity publishes an adverse report in respect of the person or body who is subject to regulation. If the person who is the subject of an adverse adjudication contends that the adjudication is unlawful then it can say so. It can say that it does not accept the adjudication and proposes to appeal, either by way of internal review or appeal process, by way of statutory appeal or by judicial review, whichever is appropriate in the circumstances of the particular case. The mere fact that the person criticised is challenging the lawfulness of the decision cannot possibly be a proper ground for preventing a public body from doing its public duty and publishing an adjudication that it has made.
>
> [24] There would, in my judgment, have to be the most compelling reasons to prohibit a public body which has embarked on a quasi judicial task of that kind from publishing its decision. For example, there might be circumstances where there was persuasive evidence that the public body had engaged in vendetta against the person the subject of the adjudication, and the adjudication was prompted by a deliberate desire to inflict damage on the reputation of the person criticised. In my judgment, there would have to be extreme circumstances of that kind before the court would be prepared to intervene and grant injunctive relief. There are no such exceptional circumstances here. The challenge to the lawfulness of the decision is on

> conventional judicial review grounds. It is said there was a failure to take account of relevant considerations, that inadequate reasons were given, that the procedure adopted was unfair, and that the nature of the advertisement was misunderstood.

101. Taveta's claim is a conventional challenge to the lawfulness of the decisions of the FRC regarding publication of the Sanction Documents. None of the elements akin to bad faith identified in [24] is alleged by Taveta. In the circumstances, I cannot find a basis on which I can distinguish Taveta's case. The consequence is that I must refuse to grant an injunction.

102. I make only one further observation. It may be that Taveta Personnel will not, in the particular circumstances of this case, be left without remedy if the FRC publishes, unamended, the Sanction Documents. Given:

    i) my findings as to the criticisms made against the Taveta Personnel and the defamatory meaning that the Particulars are capable of bearing; and

    ii) the FRC's disavowal of any intention to criticise or make findings against Taveta Personnel (see [75(v)] above),

    the FRC might be concerned that reliance on a defence of qualified privilege as an answer to a claim for defamation risks being met by a contention that the publication was malicious. That would not be on the grounds of any improper motive on the part of the FRC but on the footing that, if the publication is held to bear the meaning I have found the words are capable of bearing, the FRC could not believe that that was true. I say no more about that. It is for the FRC to consider whether it would be lawful to publish the Sanction Documents in unamended form following this judgment.

103. Therefore, for the reasons set out in this judgment I refuse Taveta's claim for interim relief. Given my view of the merits of the underlying claim, I am minded to grant Taveta permission to bring its claim for judicial review, but as I have not heard the parties on that latter point I will not make a final decision until the FRC has had a chance to make any further submissions it wishes to make on this issue after considering the judgment. I will invite the parties to agree an order reflecting the decisions I have made and further case management directions.