[2016] UKUT 0018 (TCC)

Reference number: FS/2015/0018

FINANCIAL SERVICES-Decision Notice refusing permission for authorisation to carry on debt adjusting and debt counselling activities-whether giving of Decision Notice terminated Applicant's Interim Permission to carry on those activities-Yes-Article 58 Financial Services and Markets Act 2000 (Regulated Activities) (Amendment (No 2)) Order 2013-s133A (4) FSMA

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

PDHL LIMITED **Applicant**

- and -

THE FINANCIAL CONDUCT AUTHORITY **Respondent**

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

Sitting in private at The Royal Courts of Justice, Strand, London WC2 on 7 January 2016

Tom Weisselberg QC and John Virgo, Counsel, instructed by Michelmores LLP, for the Applicant

Javan Herberg QC and Simon Pritchard, Counsel, instructed by the Financial Conduct Authority, for the Respondent

DECISION

Introduction

1. On 16 December 2015 the Financial Conduct Authority ("the Authority") gave a Decision Notice to the Applicant refusing its application for a Part 4A permission to carry on the regulated activities of debt adjusting and debt-counselling.

2. By a reference notice dated 16 December 2015 the Applicant referred the matter to the Tribunal. In its reference notice the Applicant contends that, contrary to the view of the Authority, the giving of the Decision Notice did not have the effect of terminating the interim permission held by the Applicant as a consequence of the operation of article 56 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013 ("the Order").

3. If the Applicant is right on that point, then as is the usual position where decision notices are referred to this Tribunal, the Applicant may continue to carry on the business covered by its interim permission until its reference is determined. If the Authority is right, then the Applicant's right to carry on its business would, without more, cease with the giving of the Decision Notice as a consequence of the operation of the provisions of article 58 of the Order. The only route by which it could continue to carry on its business would be if the Tribunal made a direction suspending the effect of the Decision Notice pending the determination of the reference, pursuant to Rule 5 (5) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules"), an application which the Applicant has also made ("the Suspension Application") in case it is unsuccessful in its contentions regarding the interpretation of the relevant provisions of the Order.

4. In order to prevent a hiatus between the termination of the interim permission in accordance with article 58 of the Order and a hearing of the Suspension Application, sensibly, the Applicant applied to the Tribunal with the consent of the Authority, for a direction to be made under Rule 5(5) to cover the limited period between the date of the Decision Notice and the determination of the Suspension Application. The Authority did, however, only give its consent on the basis that the Applicant agreed voluntarily to vary its permission so as to carry on no regulated activity whilst that direction remained in force. Accordingly, the Tribunal gave a direction under Rule 5(5) in the terms sought on 16 December 2015.

5. The Tribunal has made a separate decision today dismissing the Suspension Application. That decision has not yet been made public. However, since the construction point to which this decision relates is of general importance this decision has been issued initially in anonymised form.

Background and relevant legislation

6. Before April 2014, firms carrying on consumer credit activities were authorised and regulated by the Office of Fair Trading ("OFT") under a licensing system provided for by the Consumer Credit Act 1974. Firms carrying on debt management

activities, in particular debt adjusting and debt-counselling, were required to obtain an OFT licence before carrying on those activities.

7. Parliament decided in 2013 to transfer responsibility for the regulation of the consumer credit industry to the Authority. The Authority published a consultation paper setting out its detailed proposals for its regulation of consumer credit in October 2013. The transfer of responsibility for the regulation of the consumer credit industry from the OFT to the Authority took effect on 1 April 2014. This transfer was effected in legislative terms by specifying various consumer credit activities as regulated activities for the purposes of the general prohibition in s 19 of the Financial Services Markets Act 2000 ("the Act") with the consequence that as from 1 April 2014 a firm requires the appropriate permissions under Part 4A of the Act before it can lawfully carry on consumer credit regulated activities.

8. The term "debt management" is commonly used to describe two related activities which are now regulated by the Authority by virtue of having been specified as regulated activities under the Financial Services and Markets Act 2000 (Regulated Activities Order) 2001 (the "RAO"), namely "debt adjusting" and "debt- counselling". The former is defined by article 39D of the RAO as, in relation to debts due under a credit agreement or consumer hire agreement, (a) negotiating with the lender or owner, on behalf of the borrower or hirer, terms of the discharge of the debt; (b) taking over, in return for payments by the borrower or hirer, that person's obligation to discharge a debt; or (c) any similar activity concerned with the liquidation of the debt. The latter is defined by article 39E of the RAO as advice (relating to a particular debt and debtor) given to (a) a borrower about the liquidation of the debt due under a credit agreement; or (b) a hirer about the liquidation of a debt due under a consumer hire agreement.

9. Pursuant to article 56 of the Order, a firm which immediately before 1 April 2014 held an OFT licence in respect of consumer credit activities acquired on 1 April 2014 an interim permission to carry on as regulated activities the consumer credit activities that were covered by its OFT licence without the Authority having to undertake any consideration as to whether the firm concerned met the threshold conditions for authorisation ("the Threshold Conditions") set out at Schedule 6 to the Act. However, the effect of the Order is that a firm would lose its interim permission unless it applied by a date specified by the Authority for a Part 4A Permission which the Authority could only grant if it was satisfied that the firm satisfied the Threshold Conditions.

10. The Authority has made directions pursuant to the Order setting out application periods for different categories of firm based on various factors including the level of risk they pose; debt adjusting and debt-counselling are regarded by the Authority as higher risk activities and so were in the earlier application periods. In doing so, the Authority took account of the OFT''s findings in September 2010 that debt management was a market where poor practices appeared to be widespread, including the provision of poor advice based on inadequate information.

11. The Applicant has been trading as a debt management firm for a number of years and accordingly was regulated from the time it commenced business by the OFT until 31 March 2014.

12. The Applicant obtained an interim permission on 1 April 2014 by virtue of the operation of the Order and within the application period directed by the Authority, applied to the Authority for a Part 4A permission to carry on the consumer credit regulated activities of debt adjusting and debt-counselling.

13. Article 58(1) of the Order, in so far as relevant, prescribes the duration of an interim permission as follows:

> " (1) P's interim permission, in so far as it relates to a particular regulated activity or class of activity ... ceases to have effect –
>
> > (a) if P applies to the appropriate regulator for Part 4A permission to carry on that activity or (as the case may be) to vary P's permission to add that activity to those to which the permission relates, before a date specified in a direction given by the FCA ("the application date"), the date on which that application is determined;
> >
> > …"

14. Article 58(3)(c) of the Order in so far as relevant prescribes when an application is to be regarded as determined for the purposes of Article 58 (1)(a) as follows:

> "(3) For the purposes of paragraph (1) (a) … the date on which an application is determined is—
>
> …
>
> (c) if the appropriate regulator gives a decision notice under section 388 of the Act in relation to the application, the date on which that notice is given."

15. If the Authority decides to refuse an application for a Part 4A permission it must give the applicant a decision notice: see s 55X (4) of the Act.

16. As was the position in this case, where the Authority proposes to refuse an application for a Part 4A permission the Applicant would have been given a warning notice complying with the provisions of s 387 of the Act, stating that the Authority proposed to refuse the application. That warning notice would have given the Applicant the opportunity to make representations to the Authority's decision maker, the Regulatory Decisions Committee ("the RDC"). The Applicant took that opportunity in this case and the RDC having considered those representations decided to give the Decision Notice.

17. Pursuant to s 388 of the Act, the Decision Notice gave the Applicant the reasons for the decision to take the action to which the notice related (in this case the refusal

of the application for the Part 4A permission) and gave an indication of the Applicant's right to have "the matter" referred to the Tribunal.

18. For firms that have been authorised by the Authority to carry on regulated activities otherwise than by virtue of an interim permission arising under article 56 of the Order, the giving of a decision notice informing the firm that the Authority has decided to cancel the firm's permission does not of itself result in the permission being cancelled. This is because the Act prescribes a further process that has to be followed before the cancellation can take effect.

19. Both in the case of a decision to cancel a Part 4A permission and a decision to refuse an application for such a permission, the subject of the notice has a right to refer the matter to the Tribunal, a right that can be exercised within 28 days of the date on which the notice was given: see paragraph 2(2) of the Rules.

20. If the recipient does not refer the matter to the Tribunal within the prescribed 28 day period then pursuant to s 390 of the Act the Authority must give the recipient a final notice "on taking the action to which the decision notice relates": see s 390 (1) of the Act. Thus it is implicit that the action to which the decision notice relates cannot be taken unless a final notice is given.

21. If the matter is referred to the Tribunal, then the Tribunal becomes part of the regulatory process to determine what is the appropriate action to take in relation to the matter referred: see s 133 of the Act.

22. Section 133 (3) of the Act makes provision permitting Tribunal Procedure Rules to "make provision for the suspension of a relevant decision which has taken effect, pending determination of the reference ..." It does not specify what type of notice this relates to but it is clear that it covers a Supervisory Notice, for example such a notice given by the Authority removing a firm's permissions with immediate effect. The Authority is entitled to give such a notice under s 55J of the Act if it determines that the firm is not meeting the Threshold Conditions. Rule 5(5) of the Rules contains the relevant suspension power.

23. It is not necessary for an application to be made to the Tribunal to suspend the effect of a decision notice given, for example, in respect of a decision to cancel a firm's Part 4A permission or a decision to refuse an application for a Part 4A permission. This is because of the provisions of s 133A(4) of the Act which provides as follows:

> "(4) The action specified in a decision notice must not be taken-
>
> (a) during the period within which the matter to which the notice relates may be referred to the Tribunal ...; and
>
> (b) if the matter is so referred, until the reference, and any appeal against the Tribunal's determination, has been finally disposed of."

24. I observe at this stage that this provision is consistent with s 390 of the Act. Sub sections (2) and (2A) of that provision require a person to whom a decision notice has been given the subject matter of which has been referred to the Tribunal to be given a final notice in accordance with the directions made by the Tribunal in determining the reference and if those directions were to dismiss the reference then the Authority may, in relation to the examples I have given, then proceed to cancel the firm's permission which would only take effect upon the giving of the final notice, or to state in a final notice that an application has been refused.

25. Thus it is clear that there are two types of notice that can be referred to the Tribunal; those that have immediate effect, such as Supervisory Notices, and those which do not, such as decisions to cancel a firm's Part 4A permission or to refuse an application for such a permission. Where a notice does not have immediate effect the Authority cannot take the action it has decided to take, as specified in the decision notice, until it is permitted under s 390 of the Act to issue a final notice.

26. Regulation 6 of The Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001 specifies the dates on which a document "given" by the Authority is to be treated as having been received. This provision clearly applies to decision notices.

27. I should observe that the phrase “is given” in Article 58 (c) of the Order was inserted by article 2 of the Financial Services and Markets Act 2000 (Consumer Credit) (Transitional Provisions) (No 4) Order 2014 with effect from 21 October 2014 in place of the words “takes effect”.

Issue to be determined

28. The issue I have to determine is whether a decision notice given on refusal of an application for a Part 4A permission to a firm which immediately before that decision notice was given had an interim permission by virtue of article 56 of the Order has the effect of terminating that permission, or whether the true construction of the relevant provision is that it does not have that effect where the matter to which the decision notice relates is referred to the Tribunal until the reference is determined and, if the reference is dismissed, a final notice is given in accordance with the Tribunal's directions.

Discussion

29. Mr Weisselberg submits that before the amendment to Article 58(3)(c) of the Order in October 2014 was made a decision notice refusing a firm which held an interim permission a Part 4A permission did not have the effect of ending the interim permission. That was because s 133A (4) of the Act prevented the Authority “taking the action specified in the decision notice” where the decision to refuse had been referred to the Tribunal pending the determination of the reference, the action in question being the ending of the interim permission. In my view it is implicit in Mr Weisselberg’s submission that the phrase “takes effect” in the original version of

Article 58(3)(c) of the Order is synonymous with the concept of "taking the action specified in the decision notice".

30. Mr Weisselberg submits that the change made to the provision in October 2014 does not have the consequence that the interim permission ceases on the mere giving of the decision notice for the following reasons:

> (1) The action specified in the Decision Notice that may not by virtue of s 133A (4) of the Act be taken before the determination of the reference is the action of refusing the Applicant's application for a Part 4A permission. By s 133 of the Act, that action cannot be taken by the Authority (and therefore cannot take effect) until the determination of the reference. A construction which divorces (a) the effect of the Decision Notice from (b) the status of the interim permission would produce an anomalous outcome in which the refusal of the application for a Part 4A permission is in effect suspended under s 133A of the Act but the firm's interim permission nonetheless lapses so that it is unable lawfully to continue its business operations until an adjudication in its favour is made as a result of the referral of the Decision Notice to the Tribunal.
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> (2) That anomalous scenario would - if permitted - deprive s 133A of the Act of all practical effect. The loss of the interim permission would effectively destroy the firm's business so that by the time any reference was heard and determined there would be no business left or available to be conducted. This entails a construction inimical to commercial common sense. Moreover, it is inconsistent with the Tribunal's function as part of the regulatory process.
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> (3) It is also a construction that is incompatible with Article 1 of the First Protocol to the European Convention on Human Rights ("the ECHR") which prevents the deprivation of possessions except in the public interest and subject to the conditions provided for by law and the Applicant's due process rights under Article 6 of the ECHR which afford it in the determination of its civil rights and obligations the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

31. Mr Weisselberg submits that a more commercial and ECHR compliant construction is to treat the reference to a "Decision Notice" in the Order (as amended) as a reference to an *effective* Decision Notice, that is one in relation to which s 133A of the Act no longer applies - either because the firm has chosen not to refer the decision notice to the Tribunal or has done so with the result that the decision notice is either upheld or quashed. This construction would also address a further anomaly which the Authority's approach entails, namely if the mere giving of a decision notice was apt to terminate an interim permission automatically then a decision notice which indicated that the Authority was intending to grant a Part 4A permission would result in permission being lost until the Part 4A permission was in fact later issued.

32. In my view these submissions misunderstand the nature of a decision notice and the clear differences between a decision notice and a final notice. They also fail to appreciate that Parliament has in the clear wording of article 58 (3)(c) of the Order

made provisions for the termination of an interim permission which operate outside the scope of the integrated arrangements contained in s133, 133A and 390 of the Act. What triggers the termination is another decision of the Authority to which those provisions do apply, namely the refusal of the application for a Part 4A permission.

33. In my view a decision notice never “takes effect” in the manner envisaged by Mr Weisselberg's submissions. It is a staging post on the road leading to the ultimate determination of the matter to which it relates and the point where it is lawful for the Authority to take the relevant action to which the decision notice relates.

34. Thus when a decision notice is given (and this is the term used in both s 55X (4) and s 390 of the Act) it either results in a reference of the matter to which the notice relates to the Tribunal if the subject so chooses, or in the issue of a final notice if he does not make a reference. In either case it is the final notice that has operative force in relation to the taking of the action concerned. The decision notice has no such force so the phrase “taking effect” cannot mean any more than being validly given in accordance with the Regulations referred to at [26] above. It may be for this reason that Parliament clarified the issue by amending article 58(3) (c) in October 2014 by demonstrating what was meant by “taking effect”. Whether or not that was the reason, in my view it is absolutely clear that the phrase was chosen deliberately so as to mean what the words in question clearly mean when read in the context of the purpose and function of a decision notice.

35. Mr Weisselberg’s reference in his submissions to a decision notice being "upheld or quashed" is also inaccurate. The tribunal process is not an appeal process; the tribunal decides what is the appropriate action to take in relation to "the matter referred". Neither is a decision notice issued when an application for a Part 4A permission is approved. In that case there will simply be a notification that authorisation has been granted; a decision notice is only necessary where an application is refused: see s 55X (4) of the Act.

36. Consequently, s 133A(4) of the Act is not inconsistent with the Order. It is consistent with the scheme of the Act whereby the action the Authority has decided to take can only be taken when a final notice has been issued which, where a reference has been made, is after a reference has been determined and directions given by the Tribunal. That is why the section prevents the Authority "taking the action specified in the decision notice". It operates to prevent the issue of a final notice, not to stop the decision notice "taking effect".

37. In any event the “action specified in the decision notice” in this case is the action of refusing the application for a Part 4A permission. The ceasing of the Applicant’s interim permission is not an “action specified in the decision notice”. It arises as a matter of operation of law, that is upon the occurrence of the event specified in Article 58(3)(c) of the Order, namely the *giving* of the decision notice. As Mr Herberg submitted, to read the automatic termination of the interim permission as being an “action” of the Authority is a clear departure from the normal meaning of the word “action”.

38. None of this has any impact on the Applicant's rights in respect of the Decision Notice. It has referred the matter concerned to the Tribunal. Consistent with s 133(4)A of the Act a final notice cannot be issued in respect of the refusal unless the Tribunal dismisses the reference. The decision notice therefore performs two functions in this case; the giving of it is the event that terminates the Applicant's interim permission as a matter of operation of law but it gives rise to a right to refer the matter of the refusal to the Tribunal.

39. It is therefore clear to me that the policy behind the legislation concerned is that a firm should lose its interim permission at the point at which the Authority decides to refuse the firm's application for a Part 4A permission and give the firm a decision notice. That is against a background where widespread poor practices in the consumer credit market have been identified and where any relevant firm was given a long period of time to adapt to the standards expected by the Authority before being faced with the loss of its interim permission.

40. I do accept, however, that unless there is a process by which the effect of article 58 (3)(c) can be suspended by a decision of an independent and impartial tribunal established by law then the Applicant's due process rights under the ECHR would have been violated.

41. However, because the Tribunal has power under Rule 5(5) of the Rules to direct that the ceasing to have effect of an interim permission be suspended pending determination of the reference, as submitted by Mr Herberg, the Applicant has an effective remedy administered by an independent and impartial tribunal to "hold the ring" in an appropriate case pending the determination of the reference of the Decision Notice. I accept Mr Herberg's analysis that the test which the Tribunal must apply when considering an application under Rule 5(5), namely that the suspension would not prejudice the interests of any persons (whether consumers, investors or otherwise) intended to be protected by the notice represents an appropriate balance between the policy concerns regarding the continuation of interim permissions, which are particularly acute in circumstances where the Authority has positively decided it cannot be satisfied that a firm meets the Threshold Conditions, and the need to ensure that firms have effective access to the Tribunal.

42. I accept that this seems a harsh result and differs from the practice adopted when other areas of financial services business were brought into the scope of regulation by the Authority and its predecessors. In particular, when general insurance came to be regulated an interim permission lasted until the Tribunal process and any appeal rights had been exhausted. It is however clear that in this case Parliament has deliberately decided not to follow that precedent.

43. It will not, however, be immediately obvious, except to highly experienced practitioners, that the Rule 5(5) process can mitigate the effects of article 58 of the Order. I therefore recommend that where the Authority is proposing to refuse the application for a Part 4A permission made by a firm which has an interim permission, the warning notice and any decision notice makes reference to that process so that the firm concerned can take steps, as has occurred in this case, to preserve the effect of

the interim permission pending any application to the Tribunal under Rule 5(5). In my view it is not however fatal to such an application that there may be a gap between the interim permission ceasing and the Rule 5(5) application being made. There is nothing in the Rule that suggests that an application cannot be made after the interim permission has ceased to have effect.

44. I should say for completeness that Mr Weisselberg made other submissions to the effect that the amendment to article 58(3)(c) was ultra vires the enabling power in s 426 of the Act but as those submissions were dependent upon it being the case that the October 2014 amendment made a substantive change to the meaning of the original provision and as I have rejected Mr Weisselberg's submissions in that respect, it is not necessary for me to consider those further submissions.

Conclusion

45. I therefore conclude that the correct construction of article 58(3)(c) of the Order is that the Applicant's interim permission which arose under article 56 of that Order ceased to have effect when a decision notice was given in respect of the Applicant's application for a Part 4A permission, without prejudice to its right to make an application under Rule 5(5) upon it having referred the matter of the refusal of its application to the Tribunal.

TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE
RELEASE DATE: 28 January 2016