[2016] UKUT 0192 (TCC)

Reference number: FS/2016/002

FINANCIAL SERVICES–Decision Notice refusing variation of permission to allow carry on credit broking debt adjusting and debt counselling activities –giving of Decision Notice terminated Applicant's Interim Permission to carry on those activities- Application for direction to suspend effect of Decision Notice until reference disposed of -whether Tribunal satisfied that the direction to suspend the effect of the notice would not prejudice the interests of consumers –No- Application dismissed-Rule5(5) The Tribunal Procedure (Upper Tribunal) Rules 2008

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

DR SAIM KOKSAL T/A ARCIS MANAGEMENT CONSULTANCY **Applicant**

- and -

THE FINANCIAL CONDUCT AUTHORITY **Respondent**

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 12 April 2016

Ms Wafa Shah, Counsel, for the Applicant

Mark Fell, Counsel, instructed by the Financial Conduct Authority, for the Respondent

DECISION

Introduction

1. On 22 December 2015 the Financial Conduct Authority ("the Authority") gave a Decision Notice to the Applicant ("Dr Koksal") refusing his application to vary his existing Part 4A permission to include the regulated activities of credit broking, debt adjusting, debt-counselling and debt administration.

2. By a reference notice dated 16 January 2016 Dr Koksal referred the matter to the Tribunal. As a consequence of the giving of the Decision Notice the interim permission held by Dr Koksal to carry on the regulated activities referred to above has ceased to have effect by operation of the relevant provisions of article 58 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013 (the "Order").

3. Dr Koksal, however, in his reference notice also applied for a direction that the effect of the Decision Notice be suspended pending the determination of the reference pursuant to Rule 5 (5) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules"). Dr Koksal made no application for interim relief pending the hearing of his application and accordingly he has not been permitted to carry on the regulated activities referred to above pending the hearing of his application pursuant to Rule 5 (5). I refer to that application in this decision as the Suspension Application, which I heard on 12 April 2016.

Background

4. 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 "ancillary credit businesses", a category which included credit brokerage, debt adjusting, debt-counselling and debt administration, were required to obtain an OFT licence before carrying on those activities.

5. 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 and Markets Act 2000 ("the Act") and the requirement for a permission in s 20 of the Act. Consequently, as from 1 April 2014 a firm which was not at that time an authorised person under the Act requires the appropriate permissions under Part 4A of the Act before it can lawfully carry on consumer credit regulated activities and a firm which was an authorised person (such as Dr Koksal) requires to vary its Part 4A permission so as to include within its scope the relevant consumer credit activities

which it wishes to carry on in order to avoid contravening the provisions of s 20 of the Act.

6. The consumer credit activities referred to at [4] above 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"). I deal later with how those activities are now defined in the RAO.

7. 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. This was subject to the firm having notified the Authority that it wished to have an interim permission (see article 57 of the Order). However, the effect of the Order is that a firm would lose its interim permission unless (in the case of a firm such as Dr Koksal which already held a Part 4A permission for other regulated activities) it applied by a date specified by the Authority for a variation of its existing Part 4A permission to include the activities covered by the interim permission. The Authority could only grant the variation if it was satisfied that the firm satisfied the Threshold Conditions in relation to the activities concerned.

8. 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 in the markets covered by these activities poor practices appeared to be widespread, including the provision of poor advice based on inadequate information.

9. Dr Koksal obtained his first consumer credit licence for credit brokerage, debt adjusting and debt counselling from the OFT in 1989 and accordingly was regulated from that time by the OFT until 31 March 2014.

10. Dr Koksal obtained an interim permission on 1 April 2014 by virtue of the operation of the Order and on 27 November 2014, within the application period directed by the Authority, applied to the Authority to vary his existing Part 4A permission (which related to insurance mediation) so as to add permissions to carry on the regulated activities of credit broking, debt adjusting, debt counselling and debt administration. I refer to that application in this decision as the “Variation Application”.

11. As referred to in more detail later, the Variation Application contained little detail as to the activities which Dr Koksal intended to carry on if the application were granted. Following requests by the Authority for clarification on this point, Dr Koksal indicated that the credit broking activity involved the introduction of small businesses and self-employed individuals to banks and financial institutions for the purpose of

obtaining business loans for freehold and leasehold purchases and for start-up businesses to obtain loans for business development purposes, for loan amounts in excess of £10,000. Dr Koksal indicated that in relation to the other activities he had been dealing with commercial loan disputes (and disputed commercial gas and electricity accounts) between his clients and banks and energy suppliers. As referred to in more detail later, Dr Koksal contended that none of these activities involved the carrying on of regulated activities but it appears that nevertheless he sought the variation of his Part 4A permission because financial institutions were unwilling to deal with an unregulated entity in relation to these matters.

12. As mentioned at [7] above, in order for the Variation Application to be approved, Dr Koksal needs to satisfy the Authority that he satisfies and will continue to satisfy the Threshold Conditions in relation to all of the regulated activities for which he is seeking permission (see s 55B(3) of the Act). The Threshold Conditions which have been an issue in relation to the Variation Application are condition 2C (effective supervision) and condition 2E (suitability).

13. Condition 2C so far as relevant provides:

> "(1) A must be capable of being effectively supervised by the FCA having regard to all the circumstances including-
>
> (a) the nature (including the complexity) of the regulated activities that A carries on, or seeks to carry on;
>
> (b) the complexity of any products that A provides or will provide in carrying on those activities;
>
> (c) the way in which A's business is organised;
>
> …
>
> …"

14. Condition 2E provides, so far as relevant:

> "A must be a fit and proper person having regard to all the circumstances, including-
>
> (a)…
>
> (b) the nature (including the complexity) of the regulated activities that A carries on or seeks to carry on;
>
> (c) the need to ensure that A's affairs are conducted in an appropriate manner, having regard in particular to the interests of consumers and the integrity of the UK financial system;
>
> (d) whether A has complied and is complying with requirements imposed by the FCA in the exercise of its functions, or requests made by the FCA, relating to the provision of information to the FCA and, where A has so complied or is so complying, the manner of that compliance;

(e) whether those who manage A's affairs have adequate skills and experience have acted and may be expected to act with probity;

(f) whether A's business is being, or is to be, managed in such a way as to ensure that its affairs will be conducted in a sound and prudent manner;

…"

15. That part of the Authority's Handbook known as COND gives guidance on how the Authority interprets the Threshold Conditions.

16. In relation to condition 2C the guidance states that in considering whether a firm is capable of being adequately supervised the Authority will, among other things, consider whether it is likely that the Authority will receive adequate information from the firm to determine whether the firm is complying with the requirements and standards under the regulatory system for which the Authority is responsible and to identify and assess the impact on its statutory objectives; this will include consideration of whether the firm is ready, willing and organised to be open and cooperative with the Authority and the Authority's requirements regarding the provision of information to the Authority.

17. In relation to condition 2E, the Authority will have regard to the firm's plans to seek to vary its Part 4A permission to carry on additional regulated activities as well as to whether the firm has been open and cooperative in all its dealings with the Authority and is ready, willing and organised to comply with the requirements and standards under the regulatory system.

18. The Decision Notice was given because the Authority was not satisfied that Dr Koksal will satisfy, and will continue to satisfy, in relation to the additional regulated activities for which permission is sought, the Threshold Conditions for the following principal reasons which can be summarised as follows:

(1) The Authority requested an explanation as to how the permissions applied for would be used in the day-to-day running of Dr Koksal's business but received only a brief outline in response and, in further correspondence, the Authority repeatedly asked Dr Koksal to provide more detailed information and clarification in respect of these matters which has not been provided, his answers largely repeating the brief information given in his initial response;

(2) Dr Koksal's answers to its request for details relating to the roles and relevant experience of his staff were an inadequate answer to the detailed question posed;

(3) Dr Koksal did not provide any substantive answer to the Authority's request for information in relation to how the concerns arising from the Authority's 2012 supervisory visit had been addressed and indicated, in general terms, that he did not accept the validity of the concerns or that they were relevant to the current application. Although this request was repeated several times in subsequent correspondence, Dr Koksal had not

given any substantive response in relation to how he has addressed the issues identified in that supervisory visit; and

(4) In total, between 7 January and 15 July 2015, the Authority had sent nine letters or emails requesting from Dr Koksal information summarised above and, although Dr Koksal has engaged in extensive communication with the Authority, his application remains incomplete because he has failed to provide all of the required information.

Relevant law and issues to be determined

19. Pursuant to Rule 5(5) of the Rules the Upper Tribunal has the power to direct that the effect of the decision in respect of which the reference is made (in this case the giving of the Decision Notice) is to be suspended pending the determination of the reference:

> "….if it is satisfied that to do so would not prejudice –
>
> (a) the interests of any persons (whether consumers, investors or otherwise) intended to be protected by that notice;
>
> (b) the smooth operation or integrity of any market intended to be protected by that notice; or
>
> (c) the stability of the financial system of the United Kingdom."

20. Rule 5(5) has been considered in similar circumstances in this Tribunal in the recent decisions of *PDHL v FCA* [2016] UKUT 0129 (TCC) and *PDHL v FCA* [2016] UKUT 0130 (TCC), the second of these decisions relating to a renewed application following a change of circumstances. The Tribunal held in those cases that Rule 5(5) is wide enough to give the Tribunal jurisdiction to suspend the effect of a decision notice which operates so as to terminate a firm's interim permission and consequently in effect allow the interim permission to continue until the reference has been determined. The request for suspension is designed to preserve Dr Koksal's interim permission pending the determination of his reference. The effect of the Decision Notice is that Dr Koksal's interim permission, and therefore his ability to carry on the consumer credit activities for which he seeks permission, has ceased and he will be unable to resume those activities unless the Suspension Application is successful. As the Tribunal held in a third decision concerning PDHL, *PDHL Limited v FCA* [2016] UKUT 0018 (TCC) it is not fatal to an application under Rule 5 (5) that there is a gap between a firm's interim permission ceasing and the suspension application being made: see [43] of the decision.

21. In determining the Suspension Application I am only concerned with whether the condition in Rule 5(5) (a) is met and in particular with the question as to whether I can be satisfied that the suspension of the effect of the Decision Notice would not prejudice the interests of any consumers intended to be protected by the Notice.

22. As this Tribunal said in *PDHL Limited v FCA* [2016] UKUT 0129 (TCC), the consumers in question are primarily those who are existing or potential customers of the firm for the services for which it seeks the variation of its permission: see [26] of the decision.

23. Accordingly, when considering the Suspension Application I must consider whether there will be prejudice, and the degree of that prejudice, to the interests of the particular type of consumer with whom the firm commonly deals or potentially may deal in relation to the services in question. As Mr Fell observed, although the term "consumer" is not defined in Rule 5 (5) (a) or elsewhere in the Rules, it is defined in s 1G of the Act. The definition is extremely wide and says that "consumers" means persons who use, have used or may use, inter alia, regulated financial services. This definition therefore covers large financial institutions who obtain financial services from another such institution so it is clear that the term "consumer" does not bear its normal natural meaning of an individual not acting in the course of a business obtaining services from a person who does so act. In the absence of any different definition in the Rules, in my view I should proceed on the basis that in Rule 5 (5) the term "consumer" bears the same meaning as it does in s 1G of the Act.

24. As a consequence, in considering the risk of prejudice to the persons for whom Dr Koksal deals in relation to the consumer credit related activities which he wishes to provide I need to consider all such persons regardless of their status as businesses and regardless of their levels of expertise. However, it is clear to me, and Mr Fell in argument did not dispute this, that where the consumers concerned do have a level of sophistication or expertise then, in common with the philosophy of regulation under the Act, it is open for the Tribunal to find that the risk of prejudice to such consumers will be much less than would otherwise have been the case where the consumers concerned are more vulnerable. There is clearly a world of difference in terms of the risks involved where a firm, such as PDHL, was dealing with consumers experiencing financial difficulties, many of whom are vulnerable and have a history of being unable to cope with their financial affairs, in relation to their personal debts and where a firm's customer base consisted wholly of business entities. I must also consider the nature of the services being provided; for example in PDHL the service provided was that of a debt management plan, which had been identified as being characterised with high risk and poor practices in the past and where the consequences of poor advice given to consumers experiencing financial difficulties could have a serious impact on their ability to make ends meet. On the other hand, if the services provided by the firm consisted primarily of introductions of businesses seeking credit from financial institutions without the provision of any advice, then clearly the risk of prejudice to consumers is going to be considerably lower than in the PDHL example.

25. It was common ground that the key principles to be applied in considering applications under Rule 5 (5) were set out by this Tribunal in *Walker v FCA* (FS/2013/0011) and *PDHL v FCA* [2016] UKUT 0129 (TCC). I need not set out the relevant passages in those decisions in full again. Mr Fell provided a helpful summary of the principles in his skeleton argument which I am happy to adopt as follows:

(1) The Tribunal is not concerned with the merits of the reference itself and will not carry out a full merits review but will need to be satisfied that there is a case to answer on the reference: see *Walker* at [20] and *PDHL* at [31];

(2) The sole question is whether in all the circumstances the proposed suspension would not prejudice the interests of persons intended to be protected by the notice: see *Walker* at [20];

(3) The persons intended to be protected by a decision notice refusing to grant a Part 4A permission to a firm with an interim permission, will include the existing or potential customers of that firm: see *PDHL* at [26];

(4) Detriment to the applicant, such as it being deprived of its livelihood, is not relevant to this test: see *Walker* at [21];

(5) The burden is on the applicant to satisfy the Tribunal that the interests of consumers will not be prejudiced: see *Walker* at [21] and *PDHL* at [30]; and

(6) So far as consumers are concerned, the type of risk the Tribunal is concerned with is a significant risk beyond the normal risk of a firm that is doing business in a broadly compliant manner: see *Walker* at [22] and PDHL at [27] to [31].

26. Additionally, the Tribunal is not obliged to grant a suspension if it is satisfied that to do so would not prejudice the interests of consumers. The use of the word "may" in Rule 5(5) means that it is a matter of judicial discretion as to whether or not a suspension should be granted. It is necessary for the Tribunal to carry out a balancing exercise in light of all relevant factors and decide whether in all the circumstances it is in the interests of justice to grant the application. The power is a case management power, which in accordance with Rule 2(2) of the Rules must be exercised in accordance with the overriding objective to deal with the matter fairly and justly: see *PDHL* [2016] UKUT 0129 at [33].

27. I set out as follows the definitions, so far as relevant, contained in the RAO of the relevant activities for which Dr Koksal seeks the variation of his Part 4A permission:

"**36A.— Credit broking**

(1) Each of the following is a specified kind of activity—

(a) effecting an introduction of an individual or relevant recipient of credit who wishes to enter into a credit agreement to a person ("P") with a view to P entering into by way of business as lender a regulated credit agreement (or an agreement which would be a regulated credit agreement but for any of the relevant provisions);

(b) effecting an introduction of an individual or relevant recipient of credit who wishes to enter into a consumer hire agreement to a person ("P") with a view to P entering into by way of business as owner a regulated consumer hire agreement or an agreement which would be a regulated consumer hire agreement but for article 60O (exempt agreements: exemptions relating to the nature of the agreement) or 60Q (exempt agreements: exemptions relating to the nature of the hirer);

(c) effecting an introduction of an individual or relevant recipient of credit who wishes to enter into a credit agreement or consumer hire agreement (as the case may be) to a person who carries on an activity of the kind specified in sub-paragraph (a) or (b) by way of business;

(d) presenting or offering an agreement which would (if entered into) be a regulated credit agreement (or an agreement which would be a regulated credit agreement but for any of the relevant provisions);

(e) assisting an individual or relevant recipient of credit by undertaking preparatory work with a view to that person entering into a regulated credit agreement (or an agreement which would be a regulated credit agreement but for any of the relevant provisions);

(f) entering into a regulated credit agreement (or an agreement which would be a regulated credit agreement but for any of the relevant provisions) on behalf of a lender.

(2) Paragraph (1) does not apply in so far as the activity is an activity of the kind specified by article 36H (operating an electronic system in relation to lending).

(3) For the purposes of paragraph (1) it is immaterial whether the credit agreement or consumer hire agreement is subject to the law of a country outside the United Kingdom.

(4) For the purposes of this article, the "relevant provisions" are the following provisions—

(a) article 60C (exempt agreements: exemptions relating to the nature of the agreement);

(b) article 60D (exempt agreements: exemptions relating to the purchase of land for non-residential purposes);

(c) article 60E (exempt agreements: exemptions relating to the nature of the lender), except for paragraph (5) of that article;

(d) article 60G (exempt agreements: exemptions relating to the total charge for credit);

(e) article 60H (exempt agreements: exemptions relating to the nature of the borrower)."

39D.— Debt adjusting

(1) When carried on in relation to debts due under a credit agreement—

(a) negotiating with the lender, on behalf of the borrower, terms for the discharge of a debt,

(b) taking over, in return for payments by the borrower, that person's obligation to discharge a debt, or

(c) any similar activity concerned with the liquidation of a debt,

is a specified kind of activity.

(2) When carried on in relation to debts due under a consumer hire agreement—

(a) negotiating with the owner, on behalf of the hirer, terms for the discharge of a debt,

(b) taking over, in return for payments by the hirer, that person's obligation to discharge a debt, or
(c) any similar activity concerned with the liquidation of a debt,
is a specified kind of activity.

39E.— Debt-counselling
(1) Giving advice to a borrower about the liquidation of a debt due under a credit agreement is a specified kind of activity.
(2) Giving advice to a hirer about the liquidation of a debt due under a consumer hire agreement is a specified kind of activity.

39G.— Debt administration
(1) Subject to paragraph (3), taking steps—
(a) to perform duties under a credit agreement or relevant article 36H agreement on behalf of the lender, or
(b) to exercise or enforce rights under such an agreement on behalf of the lender,
is a specified kind of activity
(2) Subject to paragraph (3), taking steps—
(a) to perform duties under a consumer hire agreement on behalf of the owner, or
(b) to exercise or enforce rights under such an agreement on behalf of the owner,
is a specified kind of activity.
(3) Paragraphs (1) and (2) do not apply in so far as the activity is an activity of the kind specified by article 36H (operating an electronic system in relation to lending) or article 39F (debt-collecting).
(4) In this article, *"relevant article 36H agreement"* means an article 36H agreement (within the meaning of article 36H) which has been entered into with the facilitation of an authorised person with permission to carry on a regulated activity of the kind specified by that article."

28. As Mr Fell observed, all these activities are defined by reference to the concept of a "credit agreement". This is defined broadly in article 60B (3) of the RAO as "an agreement between an individual or a relevant recipient of credit ("A") and any other person ("B") under which B provides A with credit of any amount."

29. The concept of a "credit agreement" is different to the concept of a "regulated credit agreement" referred to in paragraph (1) (a) of the definition of "credit broking" as set out above. It is not necessary to set out in any detail the definition of "regulated credit agreement" except to say that a "credit agreement" will be a "regulated credit agreement" unless it is an "exempt agreement". It is not necessary to go into any detail here as to all the types of agreement that are exempt but, most relevantly in relation to this matter, an agreement under which the lender provides the borrower with credit exceeding £25,000 and where the agreement is entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower is an exempt agreement: see article 60 B (3) and article 60 C (3) of the RAO.

30. Thus it can be seen that where a firm engages in any of the activities of credit broking, debt adjusting, debt counselling or debt administration then those activities will be regulated activities under the RAO and will therefore need to be covered by a

Part 4A permission if they are to be lawfully carried on, regardless of the amount lent under the underlying credit agreement or the purpose for which the borrowing was sought. This is the result, in the case of credit broking, of including within its scope activities in relation to credit agreements that would have been regulated credit agreements but for the exemption in article 60 C relating to loans in excess of £25,000 provided for business purposes and, in relation to the other activities, including within their scope activities in relation to all types of credit agreement. The only credit agreements to be excluded from the scope of these activities are those where the borrower is a corporate body or a partnership or unincorporated association whose members are all corporate bodies, the latter two bodies not falling within the definition of "relevant recipient of credit" in article 60 B (3) of the RAO.

31. Thus it can be seen that a firm which carries on any of the ancillary credit businesses referred to above will find that those activities are regulated by the Authority unless the borrower under the underlying credit agreement is a corporate body or a partnership or unincorporated association all of whose members are corporate bodies.

32. I was referred at my instigation briefly to the provisions of that part of the Authority's Handbook known as CONC, which sets out the conduct of business requirements for those firms carrying out consumer credit related activities. I have also looked at CONC at a high level since the hearing and it is apparent from its provisions that the level of obligation on a firm carrying on ancillary credit businesses and consequently the level of consumer protection afforded to the customer does vary depending on, for example, whether the activity relates to a regulated credit agreement or whether the customer is an individual. The definition of "individual" is somewhat unusual and confusing in that as well as including a natural person it includes a partnership consisting of 2 or 3 persons not all of whom are bodies corporate and also an unincorporated body of persons which does not consist entirely of bodies corporate. So for example, in relation to credit broking, the requirement in CONC 2.5.3 to explain the key features of an agreement to a customer and to take reasonable steps to satisfy itself that the product it wishes to recommend is not unsuitable for the customer's needs and circumstances only applies where the agreement concerned is to be a regulated credit agreement. Therefore, although credit broking in relation to non-regulated credit agreements is a regulated activity, unless the firm's customer is an individual the requirement will not apply. Similarly, the financial promotion rules will only apply if the person to whom the services to be provided is an individual. Likewise, in the area of debt advice, where the Authority has particular concerns regarding standards of behaviour, the provisions in CONC relating to unfair business practices and appropriate advice will not apply unless the person to whom the services are provided is an individual.

33. These brief observations on the scope of CONC, which I will not develop further as neither party made submissions on the relevant provisions and, as discussed below, no detailed evidence was provided as to the nature of Dr Koksal's consumer credit related business and his customer base, reinforce the views expressed at [24] above of the need, when considering an application for suspension under Rule 5 (5), to take

account of the nature of the business carried on by the firm and of the persons with whom the firm deals.

34. Dr Koksal did not in his reference notice set out any specific grounds in support of the Suspension Application. The grounds only became apparent when set out in Ms Shah's skeleton argument which was filed on the morning of the hearing of the Suspension Application. In summary, Dr Koksal contends that since the substance of the Decision Notice does not reveal specific concerns regarding consumer protection in the running of Dr Koksal's business activities which are the subject of the Variation Application and a poorly completed or pursued application is not tantamount to evidence that suspension of the effect of the Decision Notice would prejudice consumers, granting the Suspension Application will not result in a significant risk beyond the risk of doing business in a broadly compliant manner. Consequently, Dr Koksal contends that the condition in Rule 5 (5) (a) is met.

Evidence

35. Dr Koksal filed a witness statement in support of the Suspension Application in accordance with the Tribunal's directions. On the morning of the hearing, without having applied for a direction to permit him to do so, Dr Koksal filed an updated and expanded witness statement which effectively superseded his earlier statement. Neither of the two statements contained significant evidence which was relevant specifically to the Suspension Application, as opposed to the substantive reference. The second statement in essence contended that Dr Koksal and his staff had adequate experience to run his business effectively and efficiently and he concluded the statement by asking the Tribunal to "ignore the irrelevant concerns of the FCA regarding the "consumer protection" issue".

36. Also on the morning of the hearing and without having previously applied for permission to do so, Dr Koksal filed a further document entitled "Statement of Case and Material Facts (2) Amended". I understand that this document was intended to replace Dr Koksal's existing Reply filed in response to the Authority's Statement of Case in relation to the substantive reference. This document does, however, contain a number of statements which are more properly described as evidence rather than pleadings and accordingly I have treated those statements as if they were contained in his witness statement. I observe in relation to this document that it indicates a change of approach to the combative and confrontational style manifested in Dr Koksal's previous correspondence with the Authority and other documents relating to these proceedings. It is likely that this change of style has been influenced by the fact that on the day before the hearing Miss Shah was instructed to represent Dr Koksal. Some of the statements in this document which I am regarding as evidence are relevant to the Suspension Application and I have considered them accordingly.

37. Mr Fell, fairly, made no objection to the admission of the new material and, as it would be helpful to the Tribunal and was relevant to the issues to be considered in respect of the Suspension Application, I admitted it.

38. Dr Koksal also relied on the evidence contained in the witness statements of two of his customers, who I will refer to as Customer A and Customer B respectively in this decision. The evidence in these witness statements effectively amount to a positive testimonial from each of the customers concerned as to the manner in which Dr Koksal dealt with their affairs.

39. The Authority, in opposing the Suspension Application, relied on the evidence given by Mr Michael Baker, a Manager in the Credit Authorisations Division ("CAD") of the Authority, a role he has held since June 2013. Mr Baker's evidence was contained in a witness statement and exhibits which was filed with the Tribunal in accordance with its directions.

40. None of the witnesses were cross-examined. Accordingly, as the evidence of the various witnesses was unchallenged I have accepted it except to the extent that it appears inconsistent with any of the other documentary evidence. As mentioned below, I do not seek to make full findings of fact from the evidence on matters which will be aired more fully in relation to the substantive reference.

41. I was also provided with two bundles of documents; one prepared by the Authority and one prepared by Dr Koksal. Except in relation to one document the documents contained in Dr Koksal's bundle were either duplicative of those contained in the Authority's bundle or irrelevant to the Suspension Application. I have therefore focused my attention on the Authority's bundle, much of which was formed by the exhibit to Mr Baker's witness statement.

Findings of fact

42. From the evidence I make the following findings of fact. As indicated above, I have tried to be careful not to make definitive findings on disputed matters which will be explored in more detail on the hearing of the substantive reference, bearing in mind that none of the witnesses who provided evidence in relation to the Suspension Application have been cross-examined. Therefore, my findings have been necessarily short and I have tried only to make findings which are directly relevant to the Suspension Application.

43. Dr Koksal has been involved in financial services since 1989 and first obtained a consumer credit licence covering certain ancillary credit businesses at that time. Dr Koksal has operated as a sole trader under the trading name of Arcis Management Consultancy since 1997, carrying on a management consultancy and finance brokerage business. When his consumer credit licence was renewed in November 2009 it covered credit brokerage, debt adjusting, debt counselling, debt administration and the provision of credit information services. Dr Koksal has sought to obtain a variation of his Part 4A permission to cover all of these activities save for the last mentioned. It appears that the focus of his business is on giving assistance to small and medium enterprises ("SMEs") and start-up businesses.

44. In addition to its interim permission in respect of the ancillary credit businesses that Dr Koksal undertakes, he continues to have permission from the Authority to

carry on regulated activities relating to insurance mediation. From 2004 until March 2012 he also had permission from the Authority to give advice on regulated mortgage contracts but following a supervision visit carried out by the Authority in February 2012, he varied his permission to remove that activity. He applied on 2 December 2013 to reinstate that permission but that application was refused on 9 December 2014. This Tribunal dismissed Dr Koksal's application to make a reference in respect of that refusal out of time on 13 October 2015.

45. On 27 November 2014, Dr Koksal made the Variation Application. The application form required by the Authority for an application of this type does not call for detailed information. It was rightly described by Dr Koksal as a "tick box" application, although as with any application the Authority has the right to ask for further information when considering it.

46. In relation to consumer credit activities, Dr Koksal ticked a number of boxes on the form as follows. He applied for permission to carry on credit broking, indicating a limitation to such activity so that it would only cover "non-regulated commercial loans, commercial mortgages, buy to let property purchases, bridging loans etc." In respect of debt adjusting, this was expressed to be limited to debt adjusting with no debt management. In relation to debt administration this was expressed to be limited to dealing with disputes between clients and electricity, gas, communication suppliers, banks and insurance companies. In relation to debt counselling, this was expressed to be limited to counselling with no debt management. At the end of the form, Dr Koksal ticked a box to indicate confirmation that the firm had a suitable business plan available that reflected the firm's current business and proposed changes. There was no requirement to file the business plan itself. Two further relevant boxes were ticked. First, Dr Koksal confirmed that he had in place a compliance manual and a compliance monitoring program that reflected the firm's current business and the proposed change in business. Secondly, he confirmed that the firm was ready willing and organised to comply with the relevant provisions in the Authority's Handbook relating to conduct of business. Somewhat surprisingly, he was not asked to give that confirmation in relation to CONC.

47. On 7 January 2015 the Authority sought further information on the application. The request asked for "an explanation as to how each of the permissions you have applied for will be used in the day-to-day running of the business". This request was therefore not very explicit as to the level of detail expected in the answer. In particular, it did not ask the kind of customer to whom Dr Koksal provided his services. It is perhaps surprising, bearing in mind that Dr Koksal had had to confirm on the application form that he had a business plan covering the activities for which permission was sought, that the Authority did not simply ask for a copy of the business plan which, if prepared correctly, would presumably contain the information that the Authority was seeking in a format that it would expect.

48. Dr Koksal's reply was equally short on detail. He wrote on 15 January 2015 that although credit broking comprises a wide range of credit activities, he had never arranged or dealt with any secured or unsecured personal loans or hire purchase. He stated that he had only been working as a "business finance broker" and intended to

continue to do so. In relation to the other activities for which permission was sought, he only addressed debt adjusting and debt counselling and stated that he had only been involved in commercial loan disputes with banks and building disputes with energy companies. He stated that he had never dealt with "consumer credit". It is clear from this answer that at this stage Dr Koksal did not (wrongly as he now accepts) believe that dealing with businesses could amount to carrying on consumer credit related activities that fell within the scope of the Authority's regulation.

49. Mr Fell is critical of the level of detail contained in Dr Koksal's response and the fact that he had not at this stage appreciated the fact that services to businesses could come within the scope of his permission but to be fair to Dr Koksal the Authority's question was equally non-specific and could have indicated more clearly the type of information that was being requested. I would therefore not be too critical of Dr Koksal in his initial answer bearing in mind the terms of the question he was asked to respond to. On the other hand, if Dr Koksal did have a business plan (and I make no findings on that issue at this stage) he could have answered the question by providing a copy of it.

50. The Authority responded on 19 January 2015, quoting extracts from the Authority's Handbook setting out summaries of the definitions of the regulated activities in question. In particular, the summaries appear to be drafted taking into account the scope of CONC and the definition of "customer" used in its provisions because, at least in relation to credit broking, it describes the activities as being covered where the services concerned are provided to an individual. This approach was not strictly correct because even though CONC only applies to services provided to individuals, the scope of regulation (and therefore the need to have a permission) goes wider in so far as services were provided to businesses who were partnerships or unincorporated bodies. The Authority asked Dr Koksal to review these definitions and to revert confirming whether the activities he wished to carry on were covered by the permissions and if so to provide "some detail regarding the exact activities you will be doing with the permissions in question." Again, there was no indication as to the level of detail that was required in answer to this question and again no request for a copy of the business plan. In particular, the Authority's response did not specifically indicate that services to businesses could be covered, although Dr Koksal in his response indicated that he only provided services to businesses and it could be taken from his reply that he believed (wrongly) that in those circumstances his activities would not be subject to detailed regulation.

51. Dr Koksal continued in his misapprehension in his reply on 26 January 2015, reiterating again that he did not deal with "personal loans". He emphasised that the firm's introductions to lenders related to "business loans" and the disputes he acted in relation to involved "commercial loans". He said that he had introduced "SMEs, self-employed individuals to banks and financial institutions as business loan applicants; and dealt with business loans for freehold and leasehold purchases and for business development purposes for start-up businesses for loan amounts over £10,000". He concluded his response by saying:

> "Therefore, it is obvious that our business dealings do not include any regulated business activities, but, to my comprehension, those activities above may fit into those umbrella categorisations you have stated in your email. However, if the FCA has different understanding and interpretation for our business activities described above, please urgently advice [sic]"

52. It is clear from this answer that Dr Koksal had still not appreciated that business loans to individuals would be caught by the Authority's regulatory provisions. I accept that it is not for the Authority to give advice to individual firms as to whether they required a permission to carry on their activities or not but I see no reason why they should not explain why they think a response indicates that a firm has got the wrong end of the stick on a point. That was clearly the case in this instance.

53. The Authority did this to a degree in its next response on 29 January 2015. It is clear that the Authority now understood that among other things Dr Koksal dealt with commercial loan disputes so it asked him to "confirm what type of clientele you do this work on behalf of (for example individual consumers or businesses)?" This did miss the target to a certain extent in that the key point was whether those businesses were individuals or not; the distinction between individual consumers and businesses was irrelevant because Dr Koksal had made it clear that he only dealt with businesses in his previous responses. The Authority went on to say, in response to Dr Koksal's statement in his last reply that his business activities did not include regulated activities that it was "somewhat confused by this as the activities you have applied for are indeed regulated, which is the purpose of this application. I would therefore appreciate your clarification in respect of this comment." It was therefore clear that the parties were at cross purposes. The Authority concluded by saying that it was unable to provide advice in respect of the application and recommended that if advice was required Dr Koksal should seek independent legal advice.

54. Notwithstanding the criticisms that can be made as to the manner in which some of the Authority's answers were expressed, it would have been prudent if at that stage Dr Koksal did in fact take advice and clarify the position. What he did do was to reply to the Authority on 2 February 2015 by stating that his customer base was self-employed individuals who were business owners and also companies. In response to the request for clarification as to whether the activities were regulated or not, Dr Koksal simply said that he been doing the same business for the last 26 years and merely quoted the terms of his existing licences from the OFT.

55. On 26 February 2015, as well as seeking further clarification on Dr Koksal's business activities, the Authority asked for detail concerning the roles of staff members and their experience. The Authority also asked for an explanation as to how Dr Koksal had addressed the concerns expressed by the Authority arising out of the supervision visit which took place in early 2012.These were clearly matters relevant to the consideration of the Variation Application. The Authority asked again for "a detailed explanation regarding (i) the activities the business is involved in at the moment, and (ii) the activities that will be carried out using the permissions you have applied for as part of this application...For assistance with this, please refer back to my email of 19 January 2015, which contain the definitions for the activities applied

for." The Authority also asked for confirmation as to which lenders Dr Koksal would refer customers to.

56. It is at this point that the tone of the correspondence changed and it is fair to describe Dr Koksal's tone from now on as being confrontational. In what appears to be a frustrated tone, he repeated in his response of 26 February 2015 what he had previously said about the nature of his credit related activities. With regard to the questions regarding his staff, Dr Koksal said he could not understand why this question was being asked but he described briefly what those members of staff are dealing with and said that they all have more than 12 years experience in their field. As regards the question regarding the supervision visit, Dr Koksal appeared to dispute that anything further was required as a result of the visit or that those matters were relevant to the Variation Application.

57. The correspondence continued in the same vein over the next few months. It is fair to say that no more information emerged and a stalemate was created. Dr Koksal maintained the position that he had provided all the information that had been requested.

58. On 15 July 2015 the Authority wrote to Dr Koksal informing him that unless the information that had been requested was provided by 29 July 2015 the application would be determined as it currently stood and CAD would recommend that Dr Koksal be issued with a Warning Notice setting out the basis on which the Authority proposed to refuse the application.

59. After further inconclusive correspondence, a Warning Notice was issued on 23 September 2015. Dr Koksal made written representations on the Warning Notice to the Authority's Regulatory Decisions Committee ("RDC"). It is fair to say that the tone of his representations was somewhat intemperate. In particular, he questioned why what he regarded as inexperienced officers of the Authority had sought to tell him what to do, he being a person with 36 years practical, academic and professional experience in dealing with SMEs. The representations indicated that Dr Koksal still had not understood why some of the credit related activities he carried on would be subject to regulation, even though he dealt only with businesses. No further detailed information was provided to the RDC as to the profile of the ancillary credit businesses that Dr Koksal carried on.

60. Having considered Dr Koksal's representations the RDC gave the Decision Notice on 22 December 2015, the terms of which have been summarised at [18] above.

61. As indicated above, Dr Koksal has now changed his tone somewhat. He has given more detail about the staff who work for him. He now accepts that he should have given more information to the Authority in response to its requests, whether or not he regarded them as acting unreasonably in asking for it. He accepts that he must be cooperative with the Authority because of their duties to regulate the sector and admits that he has been "excessively defensive and closed" which he should not be. He does say, however, that the Authority should be "a little bit more transparent and understandable".

62. One of Dr Koksal's members of staff is now taking a CeMap course, and the firm has now engaged the services of a leading compliance consultancy firm, SimplyBiz, to give ongoing compliance support in relation to the firm's consumer credit activities. It was clarified that SimplyBiz had not been engaged to undertake a full review of these activities, but was merely engaged to provide support through its consumer credit technical team to answer queries as and when requested.

63. Limited further information about the nature of Dr Koksal's credit related activities is to be found in the witness statements of the two customers that were filed.

64. Customer A confirms that he is self-employed and has known Dr Koksal for 20 years. He first used Dr Koksal's services in order to seek financial advice on the purchase of a property 20 years ago and has since used his services in connection with financial advice on the purchase of residential properties and commercial property. He is complimentary about Dr Koksal and the way he has been dealt with by him.

65. Customer B gives similar evidence. He is self-employed running his own grocery business. He says he was first introduced to Dr Koksal in order to seek financial advice on the purchase of a commercial property and has since used his services for advice on many matters including residential mortgages, commercial mortgages and personal loans. He is also complimentary about Dr Koksal and the way he has been dealt with by him.

66. In his evidence, Mr Baker explains the nature of the supervision that the Authority would carry out in relation to a small firm similar to Dr Koksal's firm. Firms of this nature are not individually, proactively supervised. Generally, when the Authority becomes aware of significant risk to consumers or to markets arising out of the activities of such a firm it will react but the firm would not be allocated a named individual supervisor and would not be subject to the same level of proactive, firm-specific supervisory attention afforded to larger firms. Therefore, as Mr Baker explained, the Authority would rely heavily on the information that the firm itself provides, both in response to information requests and by way of self-reporting where required. The Authority's supervisory model requires these firms to be cooperative with the Authority in order for it to effectively assess and mitigate risks that those firms might present to consumers. A failure to provide information by such a firm would, Mr Baker says, prevent the Authority from building a proper understanding of the nature and extent of any risk to consumers, and can prevent the Authority from understanding the full extent of the firm's possible failings.

67. Mr Baker's view is that in his dealings with the Authority in respect of the Variation Application, Dr Koksal has demonstrated a failure to understand fundamental aspects of the regulatory regime and the Authority takes the failure by a firm which is not subject to individual supervision to provide it with information it either seeks or would otherwise be expected to be provided seriously. Mr Baker says that if an applicant for regulatory approval is proving non-cooperative at the gateway then that is a cause for real concern and is likely to lead to a recommendation that the application be refused, as has happened in Dr Koksal's case. The Authority considers that there is a real risk that Dr Koksal would not provide the Authority with adequate

information with respect to its consumer credit regulated activities in the future were he to be authorised to carry them on as a result of the behaviour that has been demonstrated during the processing of the Variation Application.

Discussion: the Suspension Application

68. As I observed at [26] above it is necessary for me to carry out a balancing exercise in light of all relevant factors and decide whether or not a suspension should be granted.

69. As I also observed at [25] above, the burden is on Dr Koksal to satisfy the Tribunal that the interests of consumers will not be prejudiced. Therefore, for an application of this nature to have a chance of being successful the applicant must make detailed evidence available to the Tribunal as to the scale and nature of the business that is to be carried on in relation to the activities in question during the period up to the hearing of the reference.

70. I start by considering whether I can be satisfied that there is a case to answer on the reference. As I have indicated at [25] above, although I am not concerned with the merits of the reference itself, were I of the view that the Decision Notice did not make findings which were capable of demonstrating that Dr Koksal had failed to meet the Threshold Conditions then it would be possible for the Tribunal to take the view that granting the Suspension Application would not result in a significant risk to consumers.

71. In my view Dr Koksal has a serious case to answer on the reference. I accept Mr Baker's evidence to the effect that, where the supervision model applying to a firm relies on the firm being open and cooperative with its regulator, there will be serious concerns as to whether such a firm can be authorised where it has demonstrated a lack of cooperation during the authorisation process. Dr Koksal now accepts that he could have demonstrated a more cooperative attitude during the process. However, the fact remains that, aside from the issue about the information concerning the consumer credit business, the failure to provide the information regarding the steps taken following the supervision visit and information about the roles of his staff continue to give rise to concerns in this respect.

72. There is now an apparent welcome change of attitude and the employment of the services of a compliance firm is encouraging but it has come very late in the process. There needs to be further time to demonstrate that these improvements are embedded into the business and its culture and Dr Koksal will need to provide more evidence as to how he will deal with the Authority going forward. These are clearly matters to be addressed in the context of the hearing of the substantive reference where it is to be expected that Dr Koksal will give evidence on which he can be cross-examined but I cannot be satisfied at this stage that all of the concerns expressed by the Authority in the Decision Notice have at this stage been adequately addressed. It is a matter of concern, which is not irrelevant in the assessment that needs to be made, that Dr Koksal did not engage with this hearing until the last minute, only instructing counsel

the day before the hearing with the result that he failed to comply with the Tribunal's directions in some respects.

73. With respect to the information concerning the credit related activities which were requested by the Authority in the course of considering the Variation Application, as I have indicated above, there have been faults on both sides in the way in which this has been handled. Nevertheless, the fact remains that there is still no clear evidence as to the nature and scale of the credit related activities. We still do not know how many customers the services are provided to, what the level of income derived from those services are, what is the precise nature of the services provided and how the customers break down into the various categories, such as company, individual or partnership. There is no information as to the likely scale of those activities in the period up to the determination of the reference, which is the relevant period in considering the Suspension Application. As I have already indicated, all of these issues are highly relevant in assessing the risks posed to consumers by the manner in which the business is carried on and they are clearly relevant to the assessment as to whether Dr Koksal can satisfy the Threshold Conditions.

74. There is nothing available from which a judgment can be made as to the extent to which the business carried on falls to be regulated by CONC and what the impact of CONC will be on those activities which do fall within its scope. That can only be ascertained by a full description of the nature of the service provided in particular cases, for example whether advice is given, the amount of the loan and the experience of the customer. Until that information is provided there must be serious concerns about whether Dr Koksal is able to meet the Threshold Conditions in relation to the credit related activities.

75. I turn now to the question as to whether I can be satisfied that there is no significant risk to consumers (that is in this case the type of customer that Dr Koksal deals with and taking account of the nature of the services provided) in the manner in which the credit related activities are carried on beyond the normal risk of a firm that is doing business in a broadly compliant manner.

76. Ms Shah submits that suspension will not prejudice the interests of persons intended to be protected by the notice because the Decision Notice has not specifically identified any consumer protection issues in the running of the business activities which are the subject of the Variation Application. Although Ms Shah accepts that it is for Dr Koksal to persuade the Tribunal that the condition under Rule 5 (5) is met, she submits that where the substance of the Decision Notice itself does not reveal specific concerns regarding consumer protection and relies primarily on the fact that an application remains "incomplete" or inadequately pursued, the burden on the applicant must be lower than in cases where the reasons for the RDC's decision to refuse an application turns on concerns about consumer protection.

77. Ms Shah also submits that the evidence of Customer A and Customer B reveal that Dr Koksal has been providing services for over 20 years with a loyal and content customer base and give adequate information as to the type of customer with whom Dr Koksal deals in relation to the credit related activities.

78. I cannot accept that the absence of evidence of poor standards of behaviour can lead to a conclusion that there will be no significant risk to consumers in the absence of any positive evidence on the part of the applicant as to the manner in which he conducts his business. In order to be satisfied on this point, the Tribunal requires up-to-date evidence as to the manner in which the activities concerned are actually being conducted. This inevitably follows from the fact that the burden to satisfy the Tribunal of the business being run in a broadly compliant fashion is on the applicant and therefore entails providing the sort of information referred to at [73] and [74] above so that the Tribunal can make an assessment as to the nature of the risks which are posed by the carrying on of the activities in question. In addition, it will be necessary to examine what compliance procedures and other processes are in place to ensure that in carrying on these activities the applicant is doing so in a broadly compliant fashion. Evidence from the complaints register, for example, would be relevant in this regard. The difficulty with the application in this case is that it is devoid of any support by any significant evidence in this regard. The brief testimonials of two customers, which give very little detail as to the nature of the services provided or indeed of the profile of the customers themselves can hardly be described as sufficient to make an extrapolation of a similar profile across the entire customer base. I do not even have any information as to the extent of that customer base. And, as Mr Fell points out, the fact that a customer expresses satisfaction with a firm's services cannot be taken as conclusive evidence that the business has been carried out in a broadly compliant fashion.

Conclusion

79. In conclusion, given the serious concerns identified in the Decision Notice and the lack of evidence as to the nature and scale of the credit related activities that might be carried on in the period up to the hearing of the reference and the arrangements in place to ensure compliance with the relevant regulatory requirements during that period, I cannot be satisfied that allowing Dr Koksal to continue to carry on those activities pending the determination of his reference will not prejudice the interests of consumers. In those circumstances, I must dismiss the Suspension Application.

80. I have now made directions with a view to the hearing of the substantive reference as soon as practicable.

TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE

RELEASE DATE: 22 April 2016