[2016]UKUT 0211 (TCC)
Reference number: FS/2016/004

FINANCIAL SERVICES–Decision Notice refusing permission for authorisation to carry on 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

Privacy-application for direction to prohibit publication of Decision Notice and for Register not contain particulars of the reference-whether prohibition justified-no-application dismissed-Rule 14 and para 3(3) Schedule 3 The Tribunal Procedure (Upper Tribunal) Rules 2008

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

MONEY MATCHER LIMITED **Applicant**

- and -

THE FINANCIAL CONDUCT AUTHORITY **Respondent**

TRIBUNAL: JUDGE TIMOTHY HERRINGTON
MICHAEL HANSON

Sitting in private at Alexandra House, 14-22 The Parsonage, Manchester M3 3JA on 4 April 2016

Hannah Vachre, Solicitor Advocate, Abacus Solicitors LLP, for the Applicant (adjournment application only)

Simon Pritchard, Counsel, instructed by the Financial Conduct Authority, for the Respondent

DECISION

Introduction

1. On 9 March 2016 the Financial Conduct Authority ("the Authority") gave a Decision Notice to the Applicant ("Money Matcher") 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 20 March 2016 Money Matcher referred the matter to the Tribunal. As a consequence of the giving of the Decision Notice the interim permission held by Money Matcher 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. Money Matcher, however, in its 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"). On 24 March 2016 the Tribunal gave a direction with the consent of the parties that suspended the effect of the Decision Notice pending the determination of this application. At the same time Money Matcher voluntarily entered into a requirement with the Authority that it would not carry on any regulated activities pending the determination of the application mentioned above.

4. This decision relates to that application ("the Suspension Application") and the other applications mentioned at [5] below, all of which we heard on 4 April 2016.

5. Money Matcher has also applied for directions that publication of the Decision Notice be prohibited pursuant to Rule 14 of the Rules and that the Register maintained by the Tribunal pursuant to paragraph 3 of Schedule 3 to the Rules shall not include particulars of the reference. We refer to these applications in this decision as the Privacy Applications.

Procedural Matters

6. On 9 March 2016, following the giving of the Decision Notice, the Authority wrote a letter to Money Matcher drawing its attention in bold type to the power of the Tribunal to grant a suspension of the effect of the Decision Notice under Rule 5 (5). The letter also reminded Money Matcher that the firm's interim permission had now lapsed and warned it that it was a criminal offence to carry on regulated activities without the necessary authorisation.

7. On 11 March 2016 the Authority wrote again to Money Matcher indicating that it was willing to consider a short-term suspension of the effect of the Decision Notice pending a decision by the Tribunal on an urgent Rule 5 (5) application. The Authority also drew Money Matcher's attention to the recent tribunal decisions in *PDHL Limited v FCA* which set out the principles to be applied in considering a Rule 5 (5) application in similar circumstances.

8. Money Matcher, through its director Mr Gary Solomons, did not reply until 15 March. Mr Solomons said that he had been out of the country but he indicated that Money Matcher wished to make an application under Rule 5 (5) but gave no further detail.

9. On 16 March in order to try and push matters along the Authority telephoned Mr Solomons who confirmed during the call that Money Matcher was going to make a Rule 5 (5) application. He also indicated that Money Matcher was looking to find a new home for its clients in the event that its reference to the Tribunal was unsuccessful. Mr Solomons also said that he needed to "update himself" as to the Rule 5 (5) application. The Authority encouraged Mr Solomons to instruct a lawyer and mentioned again its willingness to consider agreeing to a short-term suspension pending the hearing of the Rule 5 (5) application. The Authority also informed Mr Solomons that he would need to put in evidence to the Tribunal to support the application and that the Tribunal was likely to hear the application urgently. Mr Solomons was encouraged to make the application urgently.

10. Mr Solomons did not however act promptly. Money Matcher's reference of the Decision Notice, which included the Suspension and Privacy Applications, was not submitted to the Tribunal until late on Friday, 18 March 2016.

11. On 21 March 2016 the Authority sought clarification from Mr Solomons as to whether Money Matcher intended to submit evidence in support of its applications. The Authority informed Mr Solomons that in the absence of a reply by 5 pm that day it would write to the Tribunal putting forward proposals for directions for the hearing of the applications.

12. On the same day at 16.08 Mr Solomons replied confirming his agreement to short-term relief pending the hearing of the applications. As regards the filing of evidence, Mr Solomons said that he was taking advice as to the form and content of this and would hope to be able to forward this before the end of the week, stating that to a large extent he was in the hands of his advisers.

13. On 22 March the Authority wrote to the Tribunal requesting an urgent hearing of Money Matcher's application. It invited the Tribunal to make directions pursuant to which Money Matcher would file its evidence by 5 pm on 24 March, the Authority would file its evidence in reply by 5 pm on 30 March with skeleton arguments being exchanged and filed by 10 am on 1 April 2016. The Tribunal had already indicated to the parties that it was available for a hearing to take place on Monday, 4 April 2016.

14. Mr Solomons replied on the same day requesting a longer timetable due to the Easter break. He suggested that Money Matcher be given until 30 March to file its evidence with the Authority's evidence in reply being filed by 4 April.

15. The Tribunal considered this correspondence and issued directions on 23 March for a hearing of the applications on the afternoon of 4 April. In his directions, Judge Herrington gave Money Matcher further time to provide its evidence, namely until 5

pm on 29 March, one day less than Mr Solomons had requested, and the Authority was directed to file its evidence in response by 31 March .

16. In giving the reasons for the directions that he had made Judge Herrington said:

> "I recognise the need that these applications be dealt with urgently. It is neither in the interests of the firm itself nor consumers that the current period of uncertainty last any longer than is necessary. However, in my view it would be fair to give the Applicant slightly longer to prepare its evidence and instruct lawyers if necessary and accordingly I have given it until next Tuesday to file its evidence. This may be inconvenient in the light of the Easter holidays, but the future of the business is at stake and the Applicant must consider whether it is to give preference to that over holiday arrangements. I have slightly shortened the period for the Authority to respond; I envisage that little of the evidence that it is likely to file will come as a surprise to the Applicant and it will have one and a half working days as well as the weekend before the hearing to consider it."

17. The time for the filing and exchange of skeleton arguments was also extended, namely to 5 pm on Friday 1 April.

18. Money Matcher appears to have ignored the directions. It filed no evidence or any skeleton argument as directed and gave no explanation to the Tribunal as to why that was the case. Indeed there was no communication of any kind with the Tribunal until the commencement of the hearing on 4 April. It transpires that Mr Solomons instructed Abacus Solicitors to represent it, but not until 1 April by which time it was too late to comply with the directions. Abacus were in fact only instructed to seek an adjournment of the hearing for a period of 14 days. No instructions were given for Abacus to represent Money Matcher at the substantive hearing of the applications should the application to adjourn be refused.

19. Accordingly, Ms Vachre made an application for an adjournment at the commencement of the hearing.

20. There were two grounds on which the adjournment was sought. First, it was contended that the Applicant had not had sufficient time to consider the evidence filed by the Authority on 31 March. Secondly, it was contended that Money Matcher was in the process of selling its assets and in that context was seeking to comply with the Authority's requirements that customers be notified of the sale. An adjournment of 14 days would enable the sales to be completed. It was asserted that there were two potential purchasers, both of whom currently had an interim permission and each of which intended to acquire the details of 175 customers, the remaining 100 customers on Money Matcher's existing customer base of 450 being dormant. Ms Vachre submitted that if the sales were completed the customer would be able to decide whether to continue with a debt management plan or be provided with free advice through the safety net arrangements put in place by the Authority. She submitted that there would be no prejudice to consumers for the short period of time for which the adjournment was sought bearing in mind that all of the customers concerned had had a long relationship with Money Matcher. Ms Vachre also said that she had been told that Mr Solomons was ill and unable to attend the hearing.

21. We made an oral decision at the hearing dismissing the application for an adjournment for the following reasons.

22. As regards the first ground, Money Matcher had been given adequate time to prepare for the hearing notwithstanding the fact that the hearing had been fixed on short notice. The Authority had given Money Matcher clear information as to the Rule 5 (5) process when the Decision Notice had been issued. It had drawn its attention to the *PDHL* decisions at an early stage in its discussions with Mr Solomons following the giving of the Decision Notice. If Mr Solomons had read these decisions at an early stage he would have been given a clear indication of what was involved and the evidence that the Authority was likely to lead. The Authority also at an early stage alerted Mr Solomons of the need to instruct lawyers urgently if he was going to do so and the need to support Money Matcher's application with evidence. The Authority had also clearly indicated to Money Matcher of the need for applications of this sort to be determined urgently, and this would have been readily apparent from the *PDHL* decisions.

23. Thus even before the Authority made an application to the Tribunal for directions, Mr Solomons had been warned of the need to address the Rule 5 (5) application urgently, instruct lawyers if necessary and prepare the necessary evidence. Indeed as recorded at [12] above, Mr Solomons had indicated on 21 March in his conversation with the Authority that he was taking advice as to the form and content of the evidence and would hope to be able to submit it before the end of that week, that is before the Easter break. It is obvious that Mr Solomons did not follow up on that.

24. Judge Herrington's directions, and the reasons given for them as set out at [16] above, again emphasised the need for the applications to be dealt with urgently. In the light of the previous indications by Mr Solomons that he had the matter of evidence in hand, the directions made provided a reasonable period of time to prepare and file the necessary evidence, bearing in mind the need to act urgently. Indeed Mr Solomons himself had indicated in his response to the Authority's proposed directions that he would be in a position to file Money Matcher's evidence by 30 March. As far as review of the Authority's evidence was concerned, as it transpired the evidence contained little that would be new to Money Matcher, consisting of documentation which Mr Solomons had already seen as well as a large repeat of the evidence that Mr Hunter of the Authority gave in the *PDHL* cases which would have been apparent to Money Matcher had it read those decisions.

25. In those circumstances, the approach of Mr Solomons, which was not to instruct lawyers at all until it was too late and to ignore the Tribunal's directions without any form of communication with the Tribunal, was irresponsible. As Ms Vachre rightly conceded, Mr Solomons failed to appreciate the seriousness of the situation Money Matcher was faced with and act with the required degree of urgency and commitment.

26. Accordingly, we found no merit in Money Matcher's first ground for its adjournment application.

27. As far as the second ground is concerned, we had absolutely no evidence to verify the assertions made by Ms Vachre as to the fact that negotiations were taking place with two potential purchasers for a sale of the assets. No detail was given as to how far advanced negotiations were, what the terms of the sales might be or indeed even what assets might be sold. It was hopeless to make an application for an adjournment in circumstances where the Tribunal's role will be to assess the potential detriment to consumers if an adjournment were granted and balance that against the likelihood of a sale in short order without any evidence at all of the potential sales. In any event, the question of a potential sale was more properly to be dealt with on the substantive hearing of the Suspension Application as a factor to weigh in the balance as to whether the application should be granted. It would have been perfectly possible for Mr Solomons to have attended and provided evidence of the potential sales and be cross-examined on that. We were told that he was ill but again no evidence of his illness was provided.

28. A further delay of 14 days could prejudice the interests of consumers who are currently unable to obtain ongoing advice from Money Matcher and, it would seem, make contact with the firm. The further delay could therefore only be contemplated if there was clear evidence that concluding a sale quickly was likely to achieve a better outcome. We therefore found no merit in the second ground for the adjournment application. In our view it was in the interests of justice in all the circumstances that the adjournment application be dismissed and the Suspension and Privacy Applications be heard immediately, Money Matcher having been given full opportunity to participate in the proceedings.

29. As Ms Vachre confirmed that she had no instructions to represent Money Matcher on those applications and there being no other representative of Money Matcher present we proceeded to hear only oral evidence from the Authority's witnesses who were asked a number of questions by the Tribunal. We then heard Mr Pritchard's submissions.

Background

30. 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.

31. 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.

32. 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.

33. 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.

34. 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.

35. Money Matcher has been trading as a debt management firm since January 2012 and accordingly was regulated from that time by the OFT until 31 March 2014.

36. Money Matcher obtained an interim permission on 1 April 2014 by virtue of the operation of the Order and on 22 December 2014, 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.

37. Money Matcher’s business model entails sourcing indebted customers who are seeking debt advice. Although it offers advice on a range of debt solutions the only product it offers itself is a debt management plan (" DMP”) which is a non-statutory agreement between a customer and one or more of its lenders, the aim of which is to

discharge or liquidate the customer's debts by making regular payments. Under Money Matcher's business model payments are made by the customer to Money Matcher who administers the plan and distributes the money to the lenders in the agreed amounts. It would appear that no formal legal agreements are entered into between the relevant lenders and the customer, the arrangements in effect amounting to forbearance on the lender's part to accept, while the arrangement is in force, payments towards the discharge of the debts owed which are different to those contractually agreed.

38. If a customer agreed to enter into a DMP, Money Matcher would negotiate with the customer's creditors to set up repayment plans in respect of each debt, for which it will receive and administer the customer's payments to creditors. Money Matcher's principal source of income is from fees it charges customers who are on active DMPs. Money Matcher is a small firm and its current customer base for DMPs is about 450 individuals. Money Matcher charges a fee for setting up a DMP which is equivalent to 2 months' worth of a customer's disposable income. This fee is spread equally over the first 6 months of the DMP. Money Matcher also charges a monthly administration fee, which is 17.625% of a customer's disposable income. This is subject to a minimum of £35 per month, and a maximum of £100 per month.

39. Money Matcher has stated that it does not actively source new customers seeking debt advice and that any new customers are obtained via referrals from existing customers. We were told that most of its existing customers were acquired as a result of asset transfers from other firms which took place some years ago and so would have been on DMPs for a considerable period of time.

40. As mentioned at [9] above, in order to obtain a Part 4A permission, Money Matcher needs to satisfy the Authority that it satisfies and will continue to satisfy the Threshold Conditions in relation to all of the regulated activities for which it is seeking permission (see s 55B(3) of the Act). The Threshold Conditions which have been an issue in relation to Money Matcher's application are condition 2D (appropriate resources) and condition 2E (suitability).

41. Condition 2D so far as relevant provides:

> "(1) The resources of A must be appropriate in relation to the regulated activities that A carries on or seeks to carry on.
>
> (2) The matters which are relevant in determining whether A has appropriate resources include-
>
> (a) the nature and scale of the business carried on, or to be carried on, by A;
>
> …"

42. 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)…

(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;

…"

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

44. In relation to condition 2D the guidance states that in considering whether a firm has appropriate resources it will, among other things, consider whether the firm has sufficient systems and controls, human resources in terms of quantity, quality and availability and effective means by which to manage risk. The Authority will have regard to matters including whether the firm has installed appropriate systems and controls and appointed appropriate human resources to measure them prudently at all times.

45. In relation to condition 2E, the Authority will have regard to whether the firm complied and is complying with the relevant regulatory requirements imposed by the Authority and conducts its business in compliance with proper standards with exercise of due skill, care and diligence and that robust information and reporting systems have been developed, tested and properly installed.

46. The Decision Notice was given because the Authority was not satisfied that Money Matcher will satisfy, and will continue to satisfy, the Threshold Conditions for the following principal reasons as set out in paragraphs 7 to 9 of the Notice:

"7. In particular, the Authority is not satisfied that Money Matcher has appropriate non-financial resources to be able to meet the Threshold Condition set out in paragraph 2 D of Schedule 6 to the Act (Appropriate resources), or that it is fit and proper so as to be able to meet the Threshold Condition set out in paragraph 2 E of Schedule 6 to the Act (Suitability). Specifically, the Authority:

(a) considers that Money Matcher does not have appropriate human resources to ensure it can comply with the regulatory requirements imposed on it as a debt management firm. In particular, the Authority is not satisfied that the Director of Money Matcher has demonstrated that he has the skills and experience required to manage the business in a sound and prudent manner and with due regard to the interests of consumers; and

(b) has identified deficiencies in Money Matcher's systems and controls relating to compliance monitoring, quality assurance, staff training, MI and policies and procedures.

8. While Money Matcher has introduced certain policies and procedures to address some of the issues raised by the Authority in the course of considering its Application, and has stated that it has engaged consultancy services (including training) from an external firm in respect of its compliance, Money Matcher has not been able to demonstrate that its systems and controls are adequate to ensure that it is compliant with the requirements of the regulatory system. The Authority considers that Money Matcher has not demonstrated that it is ready, willing and organised to comply on a continuing basis with the requirements and standards under the regulatory system which will apply to it if it is granted Part 4A permission. In particular:

(a) While Money Matcher has stated its intention to appoint a compliance officer, it has not yet done so. It has stated that, in the interim, this role will be carried out by the Director; the Authority is not satisfied that that individual has the necessary skills and experience to fulfil that function on an interim basis.

(b) The new policies and procedures are not sufficiently detailed or tailored to Money Matcher's debt management business. Money Matcher has also not satisfied the Authority that the new policies and procedures have been effectively implemented and that, as a result of the changes it has made, it is now compliant with the relevant regulatory requirements.

(c) Money Matcher has not provided evidence of the scope of engagement of the external compliance consultant, nor adequate details of the training which is to be implemented. Accordingly the Authority cannot be satisfied with regard to the adequacy of these matters.

(d) Money Matcher has not demonstrated that its Director has the required level of competence to manage the business in accordance with the regulatory requirements or that he will do so with due skill, care and diligence.

9. Therefore, the changes made by Money Matcher to its systems and controls are not sufficient for the Authority to ensure that Money Matcher, in relation to the regulated activities for which Part 4A permission is sought, will satisfy, and will continue to satisfy, the Threshold Conditions."

Relevant law and issues to be determined

The Suspension Application

47. Pursuant to Rule 5(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008 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."

48. Rule 5(5) has been considered in very similar circumstances in this Tribunal in the recent decisions of *PDHL v FCA* [2016] UKUT 0018 (TCC) and *PDHL v FCA* [2016] UKUT 0129 (TCC), the second of these decisions relating to a renewed application following a change of circumstances. The request for suspension is designed to preserve Money Matcher's interim permission pending the determination of Money Matcher's reference. The effect of the Decision Notice is that Money Matcher's interim permission and therefore its ability to carry on regulated activities lawfully will cease unless the Suspension Application is successful.

49. In our view Rule 5(5) is wide enough to give the Tribunal jurisdiction to suspend the effect of the Decision Notice and consequently in effect allow the interim permission to continue until the reference has been determined. 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 the Tribunal has made the interim direction described at [3] above.

50. It is also our view that in determining the Suspension Application we are only concerned with whether the condition in Rule 5(5) (a) is met and in particular with the question as to whether we 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.

51. 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 Pritchard provided a helpful summary of the principles in his skeleton argument which we are 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].

52. 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* at [33].

53. In its application, as set out in the reference notice, Money Matcher maintains that in order to protect its clients' interests it is necessary to have the effect of the Decision Notice suspended. It says that it is holding client monies which are awaiting distribution to the creditors which they cannot release until the suspension has been granted. Money Matcher also says that it will not be taking on any new business and that clients seeking new advice will be directed to alternative services.

The Privacy Applications

54. Rule 14 of the Rules so far as relevant provides:

> "(1) The Upper Tribunal may make an Order prohibiting the disclosure or publication of:
>
> (a) specified documents or information relating to the proceedings; or
>
> (a) …
>
> (2) The Upper Tribunal may give a direction prohibiting the disclosure of a document or information to a person if:
>
> (a) the Upper Tribunal is satisfied that such disclosure will be likely to cause that person or some other person serious harm; and
>
> (b) the Upper Tribunal is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction."

55. Money Matcher seeks a direction under Rule 14 to prohibit publication of the Decision Notice pursuant to s 391 of the Act pending determination of the reference.

56. Rule 3(3) of the Rules provides:

"The Upper Tribunal may direct that the register is not to include particulars of a reference if it is satisfied that it is necessary to do so having regard in particular to any unfairness to the Applicant or prejudice to the interests of consumers that might otherwise result."

57. Money Matcher seeks a direction under this rule that the register shall not contain particulars of its reference.

58. It is clear that the principles established in *Arch v Financial Conduct Authority (*2012) FS/2012/20 and *Angela Burns v Financial Conduct Authority* [2015] UKUT 0601 TCC are applicable to the Privacy Applications. As summarised by the Tribunal at [36] and [37] of *PDHL* these provide:

(1) The open justice principle is to be applied such that the starting point is a presumption in favour of publication in accordance with the strong presumption in favour of open justice generally;

(2) The onus is on the applicant to demonstrate a real need for privacy by showing unfairness;

(3) In order to tip the scales heavily weighted in favour of publication the applicant must produce cogent evidence of how unfairness may arise and how it could suffer a disproportionate level of damage if publication were not prohibited; and

(4) a ritualistic assertion of unfairness is unlikely to be sufficient. The embarrassment to an applicant that could result from publicity, and that it might draw the applicant's clients and others to ask questions which the applicant would rather not answer does not amount to unfairness.

59. It is clear that if publication would result in the destruction of a firm's business then it would be unfair to publish a decision notice. The Tribunal said this at [89] to [90] of *Angela Burns*:

"89. I accept that cogent evidence of destruction of or severe damage to a person's livelihood is capable of amounting to disproportionate damage such that it would be unfair not to prohibit publication of a Decision Notice. Although I should be careful not to approve specifically the criteria that the Authority sets out in its recent consultation paper on publishing information about Warning Notices at a time when that paper is still open for comment, it appears to me that by including paragraph 2.17 of that paper the Authority accepts that a disproportionate loss of income or livelihood would mean that it would be unfair to publish. In my view damage of that kind is of a different and more serious kind than damage of reputation alone.

90. The requirement of cogent evidence in applications of this kind leads me to conclude that the possibility of severe damage or destruction of livelihood is insufficient; in my view the evidence should establish that there is a significant likelihood of such damage or destruction occurring. Mr Herberg in his submission summarised at paragraph 85 above appears to accept that to be the correct test. It would be too high a hurdle to surmount which would make the jurisdiction almost

> illusory if the requirement were to show that severe damage or destruction was an inevitable consequence of publication."

60. In this case, Money Matcher contended in its reference notice that "any publication... would unfairly detriment [Money Matcher], the Director and clients that are not regulated by the [Authority]".

Evidence

61. As mentioned above, Money Matcher filed no evidence to support its applications.

62. The Authority, in opposing the applications, relied on the evidence given by the following three witness statements which were filed with the Tribunal in accordance with its directions:

> (1) Mr Garry Hunter, a Senior Manager in the Credit Authorisations Division ("CAD") of the Authority, a role he has held since joining the Authority in 2014;
>
> (2) Mr James O'Connell, a Manager in CAD, a role he has held since August 2014. As part of this role, he has had oversight of CAD's review progression of Money Matcher's application for a Part 4A permission; and
>
> (3) Melanie Mitchley, the Interim Director of UK Debt Advice at the Money Advice Service ("MAS"). MAS is an independent service, set up by the Government, to help people manage their money by giving free and impartial advice.

63. As Money Matcher did not participate in the proceedings, none of the witnesses were cross-examined but Mr O'Connell and Ms Mitchley answered questions from the Tribunal. As the evidence of all of the Authority's witnesses was unchallenged we have accepted it.

64. We were also provided with a bundle of documents much of which formed the exhibits to the various witness statements.

Findings of fact

65. From the evidence we make the following findings of fact.

66. Money Matcher made its application for a Part 4A permission on 22 December 2014. This was initially assessed on the papers and on 13 March 2015 the Authority wrote to Mr Solomons a detailed letter in which it concluded that it was minded to recommend that both Money Matcher's application and that of Mr Solomons for the Director and Compliance Oversight function be refused. In summary, concerns were expressed about the firm's financial and non-financial resources and the Authority observed that the firm had submitted a poor quality application lacking in detail and substance. Money Matcher was given the opportunity of responding to these concerns and consequently Mr O'Connell and a colleague interviewed Mr Solomon at Money Matcher's premises on 30 July 2015.

67. It is clear from Mr O'Connell's evidence that Mr Solomons gave a poor impression at interview. As Mr O'Connell confirmed in answer to questions from the Tribunal, it was the answers given at interview which to a large part led to the Authority's eventual conclusion that Money Matcher could not meet the Threshold Conditions.

68. The particular matters which gave Mr O'Connell concern can be summarised as follows.

69. First, Mr Solomons said in interview that he was not aware which rules or guidelines he needed to read and he said that he was unable to identify any risks to consumers based on the firm's business model "short of the office burning down".

70. Secondly, in interview Mr Solomons explained that Money Matcher's sales and compliance manager, Mr Edwards, had left the firm in October 2014. Mr Edwards had been responsible for auditing customer calls and training. Mr Solomons said that there had not been any audit of calls or training since Mr Edwards' departure and that he had not kept up to date with training and audit of staff activities.

71. Thirdly, in interview Mr Solomons said that he did not receive any management information, which he said was more for the sales side of the business.

72. Fourthly, Mr Solomons appeared to show no knowledge of Money Matcher's prudential resource requirement, how it was calculated or who was responsible for it.

73. Finally, Mr Solomons attended his interview without various documents that he had been asked to make available, such as a loan agreement which Money Matcher had entered into.

74. On 12 November 2015 the Authority gave Money Matcher a Warning Notice informing the firm that it proposed to refuse its application for a Part 4A Permission. The firm was also informed of its right to make representations to the Regulatory Decisions Committee ("RDC").

75. Money Matcher made both written and oral representations to the RDC and it submitted some material indicating that it had in response to the concerns expressed by the Authority introduced certain policies and procedures. It also said that it had engaged consultancy services (including training) from external consultants in respect of its compliance. Money Matcher did not however provide the Authority with a copy of the engagement letter of the external consultants.

76. Money Matcher told the RDC that it was actively seeking the recruitment of a compliance manager although no suitable candidate had yet been identified so that Mr Solomons was fulfilling the compliance role on an interim basis.

77. In the Decision Notice the RDC found that the new policies and procedures were not, in a number of respects, sufficiently detailed and did not set out the specific steps that Money Matcher's staff must take in relation to the handling of complaints, in the giving of advice or explanations to be given to customers in compliance with the

Authority's regulatory requirements or in the handling of client money. The RDC also was not satisfied that the new policies and procedures had been effectively implemented or that, as a result of the changes it had made, Money Matcher was now compliant with the relevant regulatory requirements, the firm having admitted that the procedures are in the process of implementation and, in particular, the client money procedures are in the course of being updated. The firm also said in its written representations to the RDC that it was developing ongoing training. During the course of its oral representations to the RDC, Money Matcher indicated that the new compliance manager would take ownership of the procedures and make amendments as appropriate.

78. It has at no time had been part of the Authority's case against Money Matcher that it has been demonstrated that customers have actually been given poor advice on any specific instance. Mr O'Connell confirmed that the Authority had not examined any customer files or attempted any review of the quality of advice given. The focus of the Authority's concerns is on the lack of adequate systems and controls and human resources which in its view pose a significant risk to consumers. Mr O'Connell did however point out that many of the customers appear to have been on debt management plans for a number of years since their business was acquired by Money Matcher which in itself gave him cause for concern in that debt management plans are not normally expected to continue for long periods of time, bearing in mind the fees that will be incurred by the customer. There would therefore be questions as to whether the plans will provide value for money if they continue for long periods.

79. Since the giving of the Decision Notice on 9 March 2016 the Authority has been concerned as to how due regard would be given to the interests of customers following the lapsing of Money Matcher's interim permission and its continuing inability to give debt advice.

80. Mr O'Connell's evidence shows that Money Matcher has "taken down" its webpage and replaced it with a blank page. There was no explanation to customers as to why Money Matcher has done this. As at 31 March 2016, the Authority has received 4 calls from 3 of the firm's customers who were effectively raising concerns that they could not contact the firm. In its call with Mr Solomons on 16 March 2016 the Authority raised concerns that Money Matcher was not giving consumers the information they needed. Mr Solomons indicated during the call that Money Matcher would update its website and telephone messages by the next day. As at the date of the hearing of its applications Money Matcher's website had not been updated and Mr Solomons did not respond to the Authority's request for information as to whether the telephone message had been updated.

81. It is therefore clear, as Mr O'Connell said in his evidence, that at the present time Money Matcher's customers are being left in the dark about what is going on and, if and when they need advice they do not know the firm cannot provide it and should therefore seek help elsewhere.

82. In an email to the Authority on 17 March 2016 Mr Solomons stated that the firm had decided to begin an orderly wind-down of the debt management business and a

controlled and methodical transfer of customers to either the not-for-profit or commercial debt management sectors. Mr Solomons said that the firm was not taking on any new business and anticipated the transfer process to take no longer than 30 working days. He also said that the firm were currently interviewing prospective acquirers.

83. As we have mentioned above, no evidence has been produced as to the status of these negotiations and whether any sale is likely in the immediate future. We can therefore make no findings as to whether there is an ongoing sales process. Neither is there any evidence that Money Matcher is continuing to address any of the concerns expressed in the Decision Notice. In our view it is likely that if Money Matcher is engaged in attempting to dispose of its debt management business and bearing in mind the steps it has taken with regard to its website then it will be taking no further steps at the present time to address the Authority's concerns.

84. As the Tribunal stated at [90] of its decision on PDHL's first Suspension Application, it is clearly a relevant factor as to whether there are adequate contingency arrangements for dealing with customers if a Decision Notice resulting in the ceasing of a firm's interim permission is allowed to take effect. Mr Hunter gave detailed evidence on the Authority's and MAS's contingency plans which is recorded at [91] to [97] of the first PDHL decision. In that decision the Tribunal accepted that although the arrangements were not without risk to consumers those risks did not outweigh the risks involved if the Suspension Application were granted in case.

85. In his witness statement prepared in relation to the hearing of Money Matcher's Suspension Application Mr Hunter in substance repeated the evidence he gave in respect of PDHL. In the absence of any challenge to that evidence, we have no reason not to accept it on the same basis as the Tribunal did in relation to PDHL.

86. Ms Mitchley's evidence described MAS's current capacity to assist consumers who are impacted as a result of a debt management firm's interim permission ceasing. Bearing in mind the relatively small number of Money Matcher customers who are likely to be affected, we have no reason to doubt Ms Mitchley's conclusion that the demand on MAS's resources and those of its partners to whom Money Matcher's customers seeking advice may be referred will be low and that there will be available capacity within MAS and its partners to assist those customers should Money Matcher's interim permission lapse.

Discussion: the Suspension Application

87. As we observed at [52] above it is necessary for us to carry out a balancing exercise in light of all relevant factors and decide whether or not a suspension should be granted.

88. As we also observed at [51] above, the burden is on Money Matcher to satisfy the Tribunal that the interests of consumers will not be prejudiced. That task is very difficult for Money Matcher in that it has chosen not to adduce any evidence in support of its application. In the absence of any evidence from Money Matcher we

can do no more than examine such evidence as is before us and assess whether any of it points clearly to a conclusion that a suspension can be safely granted without any significant risk to consumers beyond the normal risk of a firm that is doing business in a broadly compliant manner.

89. We start by considering whether we can be satisfied that there is a case to answer on the reference. As we have indicated at [51] above, although we are not concerned with the merits of the reference itself, were we of the view that the Decision Notice did not make findings which were capable of demonstrating that Money Matcher 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.

90. In our view without doubt Money Matcher has a serious case to answer on the reference. All of the matters arising out of the interview with Mr Solomons that caused concern to Mr O'Connell in our view give serious concerns as to whether Mr Solomons properly understands the risks that Money Matcher's business exposes its customers to. This raises a serious concern that the firm does not have adequate human resources to meet the Threshold Conditions. Additionally, there are continuing concerns relating to Money Matcher's systems and controls relating to compliance monitoring, quality assurance, staff training, management information and policies and procedures. Although revised procedures have been produced, Money Matcher has not yet demonstrated that these have been implemented. There is still no full-time compliance manager and Mr Solomons has been unable to demonstrate that he has the necessary aptitude and expertise to fill the position even on an interim basis.

91. It might have been possible for Money Matcher to alleviate these concerns had it produced evidence as to how it was addressing these deficiencies following the Decision Notice but as we have previously observed we have no such evidence before us.

92. We referred to the fact that the Authority had not carried out a review as to the quality of advice actually given to customers. It might therefore have been promising ground for Money Matcher to work on in terms of demonstrating, by reference to the particular circumstances of its own customers, why the Tribunal could be satisfied that there would be no concerns as to any ongoing prejudice to consumers during a suspension because of the nature of the advice previously given and what limited advice might be necessary during that period. Again, we have no such evidence and therefore cannot take this factor into account.

93. Indeed, the conduct of Mr Solomons since the giving of the Decision Notice has increased rather than allayed the concerns. In particular, he has failed to engage with the Tribunal process and have regard to its directions. He has made statements of intent to the Authority as regards the updating of the website and telephone messages for the benefit of customers which have not been carried through with any action. Assertions have been made about the intention to engage in a sales process but no relevant evidence has been produced.

94. We have explained why we cannot take into account the possibility of a sale in the absence of any evidence. We would, however observe, as the Tribunal did in the PDHL case, that there was nothing to stop a sale proceeding notwithstanding the fact that the firm's interim permission had ceased.

95. With regard to the specific grounds put forward in Money Matcher's reference notice as to why a suspension was justified, as recorded at [53] above, in our view the client money issue is not relevant as there is no reason why client monies cannot be released after the firm's interim permission has ceased. To do so would not result in the firm carrying on any regulated activities. The fact that Money Matcher says it will not be taking on any new business and that clients seeking new advice would be directed to alternative services is also not an adequate response because, as the Authority observes, there may be existing clients who need advice now on their existing debt management plans which they may not obtain unless they are specifically signposted to other providers.

96. We have accepted the evidence of Mr Hunter and Ms Mitchley with regard to the contingency arrangements should Money Matcher's interim permission cease and accordingly this is not a factor in this case which should weigh against refusing the Suspension Application.

Conclusion on the Suspension Application

97. In conclusion, given the serious concerns identified in the Decision Notice and those which have arisen since it was given and a lack of any evidence that any of these inadequacies have been addressed or remedied, we cannot be satisfied that allowing Money Matcher to continue trading pending the determination of its reference will not prejudice the interests of consumers, and in particular the existing customers of Money Matcher. In those circumstances, we must dismiss the Suspension Application.

Discussion: The Privacy Applications

98. In view of our decision on the Suspension Application this can be dealt with shortly. The consequences of that decision is that there will be an urgent consumer contact exercise in which it will be readily apparent that Money Matcher's interim permission has terminated. In those circumstances, prohibiting publication of the Decision Notice will not preserve Money Matcher's privacy and we accept Mr Pritchard's submission that publication of the Decision Notice in circumstances where its suspension has been refused will help achieve the objective of ensuring that consumers are made fully aware of the situation regarding Money Matcher. We therefore dismiss the Privacy Applications.

99. As the Tribunal observed at [119] of the first PDHL decision, we would have taken a different view had we granted the Suspension Application. In our view in those circumstances the position is analogous to where a Supervisory Notice has been issued and referred to the Tribunal. Section 391 (5) of the Act makes it clear that publication of a Supervisory Notice is justified when "it takes effect" and s 391 (8) of

the Act makes it clear that the notice is not to be treated as having taken effect where the matter has been referred to the Tribunal but has not been dealt with. The effect of a suspension under Rule 5(5) is that the notice would not have taken effect.

Conclusion

100. For all the reasons we have given we cannot suspend the effect of the Decision Notice. Money Matcher is directed to notify the Authority and the Tribunal within 7 days of the release of this decision whether it intends to pursue its reference in which case the Authority should file its Statement of Case in accordance with the Rules.

101. This decision will remain confidential to the parties for the period during which it may be subject to an application for permission to appeal and until any such application is determined.

TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE
RELEASE DATE: 13 April 2016