[2017] UKUT 0142 TCC

Reference number: FS/2017/001

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 under Rule5(5) Tribunal Procedure (Upper Tribunal) Rules 2008 for direction to suspend effect of Decision Notice until reference determined - whether Tribunal satisfied that the direction to suspend the effect of the notice would not prejudice the interests of consumers – no - application refused – application under rule 14 of the Rules to restrict publication of the Decision Notice refused

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

NATIONWIDE DEBT CONSULTANTS LIMITED

Applicant

- and –

THE FINANCIAL CONDUCT AUTHORITY

Respondent

Tribunal: Judge Greg Sinfield

Sitting in public at the Royal Courts of Justice, Strand, London WC2 A2LL on 16 February 2017

Simon Popplewell, counsel, instructed by TLT LLP

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

DECISION

Introduction

1. The Applicant ('NDCL') is a debt management company. NDCL provides advice to indebted consumers about possible solutions to their financial difficulties. Such debt solutions include bankruptcy, individual voluntary arrangements ('IVAs') and debt management plans ('DMPs') which NDCL negotiates with its customers' creditors and administers on their behalf by taking payments from the customers and distributing them to the creditors in return for monthly fees paid by the customers. NDCL has around 1,025 customers who are all members of the Bengali community living in the United Kingdom who do not have English as a first language.

2. On 24 January 2017, the Financial Conduct Authority ('FCA') issued a Decision Notice to NDCL refusing its application for permission under Part 4A of the Financial Services and Markets Act 2000 ('FSMA') to carry on the regulated activities of debt adjusting and debt counselling. Until the issue of the Decision Notice refusing its application, NDCL had been carrying on the regulated activities of debt adjusting and debt counselling under an interim permission granted by the FCA. When the Decision Notice was issued, the interim permission immediately 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. Accordingly, NDCL was no longer able to carry on regulated activities such as debt adjusting and debt counselling.

3. By a reference notice dated 25 January 2017, NDCL referred the refusal of its application in the Decision Notice to the Upper Tribunal. In its reference notice, NDCL 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'). The effect of the application, if granted, is that NDCL would be able to carry on the regulated activities of debt adjusting and debt counselling under the interim permission until the Upper Tribunal has heard and determined the substantive issues in the reference.

4. NDCL also applied for a direction 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. At the hearing, Mr Popplewell, who appeared for NDCL, accepted that if the application under rule 5(5) for suspension is refused then the privacy application under rule 14 would inevitably fail for the reasons given by the tribunal at [118] of *PDHL Limited v FCA* [2016] UKUT 0129 TCC ('*PDHL'*).

5. For the reasons set out below, I have decided to refuse NDCL's applications.

Background

6. NDCL was set up by Mr Mohabbat Ali, its sole director and shareholder, in 2008. It provides debt management services to customers throughout the UK. All of NDCL's customers are of Bengali origin and, as their first language is not English, they all prefer to speak to an adviser in Bengali. Mr Ali and his staff who advise the customers are all able to do so in Bengali.

7. Debt management usually involves consideration of what are referred to in the FCA Handbook Glossary as 'debt solutions': that is, an arrangement, scheme or procedure, whether statutory or not, the aim of which is to discharge or liquidate a customer's debts. It was common ground that the relevant debt solutions in this case were:

> (1) DMPs, which are non-statutory agreements between a debtor and one or more of its creditors under which a debtor makes regular payments to discharge their debts; and
>
> (2) three statutory procedures provided for by the Insolvency Act 1986 ('IA 1986') under which a debtor's debts are released, compounded or written off, being:
>
> > (a) debt relief orders ('DROs') which are orders under Part VIIA of the IA 1986 under which a moratorium on enforcement by certain creditors is imposed and certain qualifying debts are written off after a certain period;
> >
> > (b) IVAs which are binding legal arrangements under Part VIII of IA 1986 between a debtor and creditors for implementation of a composition in satisfaction of their debts or a scheme of arrangement for their affairs; and
> >
> > (c) bankruptcy, a legal process governed by Part IX of IA 1986 under which the debtor obtains release from their debts with their estate being realised by a trustee in bankruptcy and the proceeds distributed to creditors.

8. The term 'debt management' is commonly used to describe two related activities which are now regulated by the FCA 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'. Debt adjusting 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. Debt counselling is defined by article 39E of the RAO as advice (relating to a particular debt and debtor) given to (a) a borrower about the liquidation of the debt due under a credit agreement; or (b) a hirer about the liquidation of a debt due under a consumer hire agreement.

9. Before 1 April 2014, consumer credit firms, which included firms providing debt management activities such as debt adjusting and debt counselling, were authorised and regulated by the Office of Fair Trading ('OFT') under Part III of the Consumer Credit Act 1974 ('the CCA'). Firms carrying on debt adjusting and debt counselling, were required to obtain an OFT licence before carrying on those activities. NDCL held a licence from the OFT under Part III of the CCA in respect of "ancillary credit business" covering "debt adjusting" and "debt counselling" from 19 November 2008.

10. In 2013, Parliament decided to transfer responsibility for the regulation of the consumer credit industry to the FCA. The FCA published a consultation paper setting out its detailed proposals for its regulation of consumer credit in October 2013.

11. On 1 April 2014, the regulation of consumer credit activities was transferred from the OFT to the FCA. This transfer was effected in legislative terms by specifying

various consumer credit activities as regulated activities for the purposes of the general prohibition in section 19 of the FSMA with the consequence that, from 1 April 2014, a firm required the appropriate permissions under Part 4A of the FSMA before it can lawfully carry on consumer credit regulated activities. As a consequence, the OFT licences were revoked and consumer credit firms previously licensed by the OFT were granted interim permission by the FCA to carry on their consumer credit regulated activities.

12. Having been granted interim permission, the consumer credit firms wishing to carry on the regulated activities of debt adjusting and debt counselling were required to apply for full permission under Part 4A of the FSMA by a date specified by the FCA. In setting the date by which applications had to be made, the FCA had regard to, among other things, the level of risk they posed. Debt adjusting and debt-counselling were regarded by the FCA as higher risk activities. In reaching that view, the FCA took account of the OFT's findings in September 2010 that debt management was a market where poor practices, including the provision of poor advice based on inadequate information, appeared to be widespread.

13. NDCL submitted its application for authorisation to carry on the regulated activities of debt adjusting and debt counselling by 1 September 2014. As part of the authorisation application process, the FCA reviewed NDCL's procedures, systems and controls. At that point, NDCL had 1,102 customers whom it was advising and for whom it administered their DMPs in return for monthly fees. As part of the review, the FCA asked NDCL to provide a number of client files. The FCA reviewed 25 customer files provided by NDCL. The FCA issued a 'minded to refuse' letter on 1 September 2016 and a Warning Notice on 5 October. NDCL subsequently informed the FCA that it had made changes to its policies and procedures and provided a further five client files and a QA log in respect of three of them which it said demonstrated compliance.

14. The Decision Notice identified a number of concerns that led the FCA to conclude that it could not be satisfied that NDCL was capable of being effectively supervised by the FCA (threshold condition 2C (effective supervision)), had appropriate non-financial resources (threshold condition 2D (appropriate resources)) and was fit and proper so as to be able to meet threshold condition 2E (suitability). The Decision Notice identified five specific issues which I do not need to set out in full as the FCA accepted that NDCL had taken steps to address some of the concerns raised in the 'minded to refuse' letter and Warning Notice by the time of the Decision Notice. As the application to suspend the effect of the Decision Notice is only concerned with the effect on NDCL's customers going forward, I only need to consider the effect on NDCL's existing and potential customers of the issues that the FCA considered remained outstanding at the time of the Decision Notice. Those issues were that NDCL:

(1) did not keep orderly records which were sufficient to enable the FCA to ascertain that NCDL was complying with its obligations under CONC when giving debt advice, contrary to SYSC 9.1.1R;

(2) did not include in its written advice to its customers the matters specifically required by CONC 8.3.4R and 8.3.4 R(1); and

(3) had a QA process that the FCA could not be satisfied was adequate due, in part, to the failings in NDCL's record-keeping.

In the context of the nature of the DMPs in relation to which NDCL provides its services, failure to comply with the required standards gives rise to a risk of significant prejudice to customers who may, as a result, make a wrong choice and pay more than he or she needs to and/or be in debt longer than necessary.

15. There was also a concern that NDCL was sending customers misleading and unclear communications in relation to their fees. NDCL acknowledged that there was some lack of clarity around the description of the fees which Mr Popplewell said was due to a "reference error" which has since been corrected. He submitted that the error could not be the cause of any prejudice going forward. That submission was not opposed at the hearing.

Evidence

16. The FCA provided statements of three witnesses, namely James O'Connell, a manager in the Authorisations Division of the FCA; Garry Hunter, a senior manager in the Authorisations Division of the FCA; and Colin Kinloch, a debt advice strategy and innovation manager at the Money Advice Service. Evidence on behalf of NDCL was provided in the form of two witness statements by Mohabbat Ali, its sole director. No live evidence was given and, therefore, there was no cross-examination of any witness. As the Tribunal pointed out in *PDHL*, at [41], this places the Tribunal in a difficult position where there is conflicting evidence from the parties. Further, in an application of this sort, the evidence is often not evidence of fact but of untested and conflicting opinion. The background facts above were not matters of dispute and I make findings of fact relevant to the disputed issues in this application when I discuss them below.

Legislation

17. Under 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."

18. It was common ground that rule 5(5)(b) and (c) of the Rules are not relevant in the circumstances of this reference. Accordingly, the only issue in this application is whether I am satisfied that the condition in rule 5(5)(a) is met, namely that the suspension of the effect of the Decision Notice would not prejudice the interests of any consumers intended to be protected by the Decision Notice.

19. Rule 2(1) of the Rules states that the overriding objective of the Rules is "to enable the Upper Tribunal to deal with cases fairly and justly". Rule 2(3) provides that the Upper Tribunal must seek to give effect to the overriding objective when it (a) exercises any power under the Rules, or (b) interprets any rule or practice direction.

Guiding principles

20. Both parties agreed (subject one minor and immaterial, for the purposes of this application, point made by Mr Popplewell) that the principles to be applied in

considering applications under rule 5(5)(a) of the Rules were set out by the Upper Tribunal in *Walker v FCA* (FS/2013/0011) and *PDHL* and summarised in *Koksal (t/a Arcis Management Consultancy) v FCA* [2016] UKUT 0192 (TCC). In summary, the principles are 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, 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].

Approach to NDCL's application

21. Mr Popplewell accepted that NDCL had a case to answer. NDCL did not seek to argue that there was no reasonable prospect of the FCA succeeding on the reference. This is an important concession. I consider that the fact that NDCL accepts that there is a case to answer in relation to those concerns which the FCA asserts remain unaddressed at the time of the Decision Notice means that NDCL must also accept, purely for the purposes of this application, that there was a risk of prejudice to its existing and future customers at the time that the Decision Notice was issued. That follows from the nature of the issues identified by the FCA and the logical consequences that flow from them. It is clear that inadequate record keeping and QA processes, which mean that the FCA and the business itself are unable to check that appropriate advice has been given to customers, expose those customers to the risk of prejudice. Similarly, the failure to include in its written advice to its customers the matters specifically required by CONC 8.3.4R and 8.3.4 R(1) creates a risk of prejudice.

22. The focus of the inquiry in an application such as this is not whether NDCL has caused its customers any prejudice in the past but whether it has taken steps to ensure that the issues identified by the FCA and which have not been addressed by the time of the Decision Notice cannot prejudice the interests of NDCL's existing and future clients if the effect of the Decision Notice is suspended. I cannot suspend the effect of the Decision Notice unless NDCL satisfies me, on the balance of probabilities, that its existing and potential customers face no risk of prejudice, other than the normal risk inherent in engaging a debt management company. That poses a significant hurdle for NDCL to overcome. If the FCA, by its own evidence or submissions casting doubt on NDCL's evidence, shows that there is a realistic, not fanciful, risk that NDCL's clients

will be prejudiced if the effect of the Decision Notice is suspended then I must refuse NDCL's application.

23. Even if I am satisfied that suspending the effect of the Decision Notice would not prejudice the interests of NDCL's existing and future customers, I am not obliged to grant the application. 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. The power is a case management power which must be exercised in accordance with the overriding objective in rule 2(2) of the Rules to deal with the matter fairly and justly: see *PDHL* at [33]. Accordingly, even I if conclude that suspension would not prejudice NDCL's customers, I must carry out a balancing exercise in light of all relevant factors and decide whether, in all the circumstances, it is fair and just to grant the application.

Discussion

24. I now turn to consider the three issues that remain outstanding from the Decision Notice.

Record keeping

25. The FCA Handbook, specifically Senior Management Arrangements, Systems and Controls ('SYSC') 9.1.1 R, requires an authorised firm to

> "… arrange for orderly records to be kept of its business and internal organisation, including all services and transactions undertaken by it, which must be sufficient to enable [the Authority] to monitor the firm's compliance with the requirements under the regulatory system, and in particular to ascertain that the firm has complied with all obligations with respect to clients."

26. In the Decision Notice, the FCA stated that NDCL's records were not sufficiently detailed to enable the Authority to assess the quality of NDCL's advice. The requirement for firms which provide debt counselling and debt adjusting to provide suitable and appropriate advice is contained in the Consumer Credit sourcebook ('CONC') of the FCA Handbook. CONC 8.3.2R states:

> "A firm must ensure that
>
> (1) all advice and action taken by the firm or its agent or its appointed representative:
>
> (a) has regard to the best interests of the customer;
>
> (b) is appropriate to the individual circumstances of the customer;
>
> (c) is based on a sufficiently full assessment of the financial circumstances of the customer;
>
> (2) customers receive sufficient information about the available options identified as suitable for the customer's needs; and
>
> (3) it explains the reasons why the firm considers the available options suitable and other options unsuitable."

27. The FCA initially based its view on a review of 25 customer files provided by NDCL. The FCA concluded that the files showed that NDCL's record keeping did not comply with SYSC 9.1.1R because, in particular, notes were not kept of advice calls to customers and no adequate records were kept of income and expenditure. The result was that the FCA considered that it could not verify that NDCL had complied with, among others, CONC 8.3.2R in relation to advice given to those customers.

28. In response to the concerns about NDCL's record keeping that were set out in the Warning Notice of 5 October 2016, NDCL provided five more files to the FCA as evidence that NDCL had addressed all the concerns and was fully compliant. The FCA reviewed those files but concluded that, although it had improved, NDCL's record keeping remained inadequate and still did not enable the FCA to verify that NDCL had complied with CONC 8.3.2R.

29. Mr Ali's first witness statement, dated 9 February 2017, in support of the application to suspend the effect of the Decision Notice set out, among other things, NDCL's sales process and record keeping procedures. In summary, the first contact by a potential customer would normally be when the customer telephoned NDCL. Mr Ali, or his employee Mr Akhtar, would go through a Fact Find exercise to establish the customer's financial situation and explain the options available to them and then make a recommendation. After the telephone call, NDCL sent documents (in English) to the customer setting out the recommendation that had been given and leaving the final decision to the customer. If the customer returned the letter of authority then NDCL sent out a Welcome Pack that included various documents, including a Debt Solutions guide and an Insolvency Guide. Mr Ali also exhibited five further sample customer files.

30. In his witness statement, Mr O'Connell illustrated the FCA's concerns by reference to file 293749, which was one of the five files produced by NDCL in response to the Warning Notice. Mr O'Connell observed that the notes lacked detail and were unclear. He gave, as an example, the fact that the Fact Find document stated that the customer's wife's loss of work in February 2016 contributed to the customer's current financial position and noted "yes" to redundancy. Mr O'Connell stated that it was unclear whether the redundancy point related to the customer's wife and, if so, whether NDCL had assessed the availability of any redundancy payment. In his second witness statement, Mr Ali said that redundancy would have been discussed over the telephone but where a customer did not qualify or had not been offered a redundancy package, as was the case, NDCL did not record one was available but would have made a note if the customer's wife had had access to a redundancy package. It appears to me that the notes were not as detailed as they should have been and, without an understanding of NDCL's procedures, would not have given a complete picture to a third party such as the FCA. Mr O'Connell also stated that it was unclear how the customer had been assessed as having a disposable income of £50 where the notes on the Fact Find document stated that he was relying on credit facilities. Mr Ali stated that Mr O'Connell was mistaken and the notes actually stated that the customer "relied" on credit facilities that is that she (presumably the customer's wife) had relied on them in the past and was no longer doing so. Mr Ali explains in his witness statement that some customers use up all their remaining credit facilities to keep going until they can establish a DMP. I do not find the explanation provided by Mr Ali satisfactory. It seems to me that the notes were ambiguous in that they did not set out clearly the position and, further, did not state whether the customer had ceased to rely on credit facilities because he or his wife no longer had any credit or because they had obtained income from another source. Mr O'Connell also stated that the notes on the Fact Find recorded that the customer's income and expenditure were likely to change in the near future without explaining why, when and by how much. In his witness statement, Mr Ali explains that this was due to the customer's recent redundancy and the fact that NDCL did not expect a person to be unemployed for a significant period of time and so

was unable to record by how much the customer's income would increase when they gained employment. Again, I consider that Mr Ali's response merely serves to underline the unsatisfactory nature of the notes in that they do not record sufficient detail to enable a person outside NDCL to understand the context in which the advice is given to the customer. Mr O'Connell also criticised the fact that the notes were not sufficiently detailed to determine why the customer's disposable income of £50 per month meant that the customer did not qualify for an IVA. Mr Ali stated that anyone who is experienced in dealing with IVAs would understand that a disposable income of £50 per month against an outstanding debt balance of £30,500 would not be acceptable to the creditors. If that is the correct position then it seems to me that it would have been a simple matter for an explanation to be recorded or referred to in the notes. The absence of such an explanation means that the FCA would be unable to ascertain from reading the Fact Find whether the customer had been correctly advised or not. Mr O'Connell's final point was that the notes of the initial telephone call did not state whether the customer had been advised of the option of self managing the debts. In his witness statement, Mr Ali stated that everyone would be told, as part of the advice process, that they have the option of self managing. That may be so but, in my opinion, it does not relieve NDC from the obligation of recording the advice that it gives to customers during the telephone call. I accept Mr O'Connell's evidence in relation to the shortcomings of the notes and records and I reject Mr Ali's explanations. In conclusion, I accept that NDCL had not complied with the record keeping requirements in SYSC 9.1.1R in relation to this file.

31. Mr Popplewell said that NDCL accepted that, historically, its record keeping had not been as good at it should have been. It had, however, taken steps to rectify this issue since the issue of the Decision Notice. Mr Popplewell submitted that NDCL was now compliant with this Rule and that was shown by the five most recent files produced by Mr Ali. In his statement, Mr O'Connell stated that, in his opinion, the most recent files produced by Mr Ali showed that NDCL was still falling short of the standard of record keeping required by SYSC 9.1.1R. In his second witness statement, Mr Ali commented on Mr O'Connell's criticisms.

32. I now consider those files and whether they show that NDCL had improved its record keeping so that it is now compliant with SYSC 9.1.1R. If not then, in my opinion, I will not be able to be satisfied that there is no risk of prejudice to existing or future customers of NDCL because the FCA would not be able to monitor the firm's compliance with the regulatory system, in particular, that NDCL was meeting its obligations under CONC 8.

33. The first file is 293759. Mr Popplewell submitted that file 293759 recorded the following:

> (1) all client correspondence, showing what correspondence has been sent and when;
>
> (2) the advantages and disadvantages of each debt solution being drawn to the customer's attention;
>
> (3) the welcome letter sent to the customer which records what NDCL will do for the customer; sets out a summary of the advice given to the customer; refers the customer to the leaflet "debt solutions", which contains further information about each debt solution; sets out the charges for the service and the necessary

warnings required by CONC; and refers the customer to other documentation provided by NDCL.

(4) NDCL's terms and conditions of business;

(5) a written explanation of each debt solution potentially available;

(6) a booklet from the Insolvency Service explaining the various debt options;

(7) the Fact Find recording the customer's information;

(8) a record of the customer's income and expenditure with notes;

(9) a statement of affairs;

(10) a letter of authority;

(11) a note of the written complaints procedure;

(12) a summary of the customer's financial situation;

(13) a compliance checklist; and

(14) records of communications with creditors.

34. Mr Popplewell submitted that all that SYSC 9.1.1R required is that NDCL can demonstrate that it is complying with the regulatory regime. He contended that the records maintained by NDCL enable the FCA to establish what information the customer gave about their financial affairs and what advice was given to the customer which was sufficient for the FCA to be able to assess whether NDCL was complying with CONC 8.3.2R(1).

35. Mr O'Connell made three points. The first was that the notes were not sufficiently detailed and clear. He gave as an example that the income and expenditure notes stated that rent was all-inclusive but failed to record what it included. Had this been the only criticism, I would have disregarded it as it appears to me that the meaning of all-inclusive is fairly clear and, in the absence of any exclusions, I would have assumed that it included all utilities and council tax. Mr O'Connell's second point was that the notes and the advice letter sent to the client state that a DRO would not be suitable as the client's debt level is not significantly high without stating what this means. Mr O'Connell pointed out there is no lower limit to the debt level for a DRO. In his second witness statement, Mr Ali pointed out that the customer's disposable income of £70 per month was above the limit for a DRO. It is clear that "debt level" was a typographical error for "disposable income". That is still a concern as the error was repeated in the advice letter sent to the client and could indicate that there had been incorrect advice or inadequate record-keeping. Mr O'Connell's third point was that the Fact Find stated that the customer had no County Court judgments but NDCL had a copy of the County Court claim, dated 10 October 2016, for one of the debts and there was no record of NDCL contacting the customer in relation to it. In his witness statement, Mr Ali stated that the County Court judgment had been discussed with the customer but confirmed that no note to that effect had been made. That is clearly an example of inadequate record-keeping. Mr Popplewell submitted that the records showed that the creditor with the County Court judgment was contacted via his solicitors in respect of the debt. That is correct but is not an answer to the inadequacy of the record keeping which should record sufficient detail to enable the FCA to monitor the firm's compliance and the absence of a note of the discussion with the customer raises serious concerns.

36. In relation to file 293761, Mr O'Connell observed that the notes on file are not sufficiently detailed and clear. In particular, the income and expenditure notes state that the customer had lost her job and was currently out of work but did not state whether NDCL discussed what out of work benefits may be available with the customer. Mr Ali stated that the customer's partner was working and both parties were, at the time, in receipt of tax credits and so the customer would not qualify for jobseeker's allowance. That does not seem to me to be a sufficient explanation. Mr Ali has effectively admitted that the records are inadequate in that they do not set out a complete picture of the situation. In those circumstances, the FCA would be unable to determine, simply by reading the notes, what advice had been given and whether it was suitable and appropriate. Mr Popplewell pointed out that there was no suggestion that the DMP was not the most suitable solution for the customer, given the information available. That is correct but it does not address the breach of the requirement to keep records and, in other cases, such a breach could mean that the FCA would be unable to determine whether suitable and appropriate advice had been given which leads to a risk of prejudice in other cases if not in this one.

37. Mr O'Connell also referred to the fact that the advice letter sent to the customer on 1 November 2016 in file 293761, referred to the customer's outstanding total debt as £4,635.48 and the duration of the DMP as three years and two months. On 5 December, NDCL received a letter from Barclaycard that showed a debt of £16,388. Mr O'Connell stated that NDCL's client correspondence log showed that the firm spoke with the customer on 9 December but did not advise the customer on this date or any subsequent date that the duration of the DMP would no longer be as originally advised. Further, there was nothing to indicate that NDCL considered with the customer whether the DMP remained the most suitable debt solution. Mr Ali did not respond to this point in his second witness statement. Mr Fell submitted that this was a concrete example of prejudice. I consider that it demonstrates either a failure of record keeping in that the records do not reveal that the client received updated advice in circumstances where such advice was clearly necessary or a failure to advise the customer properly.

38. The third file is 293762. Mr O'Connell noted that the Fact Find recorded that the customer was a self-employed minicab driver whereas the wage slip provided by the customer as evidence of his income showed that he was employed in a restaurant. Further, the Fact Find stated that there were no County Court judgements but there was evidence on the file of a County Court claim from Northumbrian Water dated 25 August 2016. There was no mention in NDCL's client log of the County Court claim or what actions, if any, NDCL took in relation to it. Mr O'Connell also stated that it was not clear from the file that NDCL had advised the customer on whether an IVA would be a more suitable solution than the DMP that the customer entered into which would last for more than 13 years. In his witness statement, Mr Ali acknowledged that the reference to the customer being self-employed was an error. He stated that the error had no impact on the advice given to the customer. Mr Popplewell submitted that a single error in recording the customer's employment status should not invalidate all the information obtained. Mr Ali stated that Northumbrian Water was contacted and its offer was accepted by NDCL by telephone which was shown in the client correspondence log for 21 December 2016. In his second witness statement, Mr Ali states that the customer was fully advised about the benefits of the IVA and decided to choose the DMP. The advice was given during the income and expenditure assessment and set out as options in the Welcome Letter and materials sent with it such as the Debt

Solutions note. The Fact Find noted that the customer expected a change in his circumstances and wished to buy a house. Mr Ali said that an IVA would hinder the customer's chances of purchasing a house because of the impact on his credit rating. In my view, Mr Ali's explanation does not show that NDCL satisfied the requirement to keep records sufficient to enable the FCSA to monitor NDCL's compliance. Even setting aside the error as to the customer's employment status, the records do not show that the Northumbrian Water claim was discussed with the customer or that NDCL fully explored how the customer's circumstances would change or when such a change was likely nor did the records give any timescale for the plan to buy a house. More significantly, it appears that there is no record of NDCL advising the customer on the pros and cons of a DMP and an IVA in the context of the expected change in circumstances and the customer's desire to buy a house. If those matters were not taken into account or if advice about all available debt solutions was not given then there would be a clear risk of prejudice. Even if all those things were explored and this customer was not prejudiced, it was not possible for the FCA to ensure that the advice given to the customer was suitable and appropriate if the customer's details and the advice were not contained in the records. Such record keeping creates a risk that prejudice to the interests of customers would go undetected.

39. Mr O'Connell said that the FCA had no specific record keeping concerns about the fourth file, 293763, or the fifth file, 293768. In relation to file 293768, Mr O'Connell questioned the appropriateness of NDCL's advice that the customer set up a DMP given the customer's concern that an IVA would not be appropriate as his credit rating might be affected if he failed to keep up his payments and he wished to set up a business. Mr O'Connell stated that the notes showed that NDCL advised that a DMP, which would last for more than 12 years, would be the most practical solution as there are no serious ramifications and the customer's credit file would not be affected any further if the Plan failed. Mr O'Connell stated that the FCA was concerned that the advice was not appropriate because the customer's credit file would be affected if the DMP failed. In his second witness statement, Mr Ali acknowledged that the notes on the customer file could have been fuller to reflect the thought process. Mr Ali then explained that the effect of missing payments on an IVA would be more serious because the creditors could petition for bankruptcy. Even if Mr Ali is correct in his analysis of the impact of the IVA, his statement shows that the notes on file 293768 were not as detailed as they should have been and this casts doubt on the adequacy of NDCL's record keeping in that case even if the advice is accepted as appropriate which itself is uncertain because of the inadequacy of the records.

40. Mr Popplewell submitted that the FCA was clearly able to determine whether or not NDCL has complied with the applicable regulatory obligations. He submitted that, in relation to the five most recent files, the FCA sought to challenge the advice given which showed that the FCA was able to determine NDCL's compliance.

41. Mr Popplewell also contended that, when considering customer prejudice, what mattered was the quality of the advice and not the record of that advice. He argued that if the customer was advised appropriately than it did not matter to that customer whether the adviser has kept an adequate record which the customer would never see. The issue of whether a firm maintains adequate records is relevant to the determination of the full reference but, even if the records were inadequate, it did not necessarily follow that customers would suffer prejudice.

42. I do not accept Mr Popplewell's submissions. According to Mr Ali's evidence in his second witness statement, some of the FCA's criticisms of the advice given by NDCL arise from notes that were not as full as they should have been. Further, I have accepted that some of the most recent files provided by NDCL do not include relevant information or contain information that is not sufficiently detailed. Those shortcomings may, in some cases, indicate that actual prejudice has occurred but I am not concerned with that in considering this application. The only issue which I must decide is whether I am satisfied that NDCL's customers will not be prejudiced if the effect of the Decision Notice is suspended. NDCL must either satisfy me that it is now compliant with SYSC 9.1R or that it has taken steps to ensure that its existing and future customers will not be prejudiced by any failure to keep adequate records. NDCL has not satisfied me on either point. The review of the latest five files produced by NDCL has shown that, while there has been some improvement, NDCL is still not complying fully with SYSC 9.1R. Failure to comply compromises the FCA's ability to monitor the advice given by NDCL to its customers. Although, as Mr Popplewell submitted, a customer may not care whether NDCL has kept an adequate record so long as the customer receives appropriate advice, that does not address the issue of risk of prejudice to other customers who may not receive appropriate advice. In the absence of adequate records, the FCA is not able to check that NDCL has given advice that is appropriate to the customer. The issues relating to the quality of the advice given by NDCL identified by the FCA when reviewing the latest files and those produced previously show that the risk of prejudice to customers is not fanciful. In conclusion, I am not satisfied that NDCL's existing and future customers will not be prejudiced if the effect of the Decision Notice is suspended.

43. It follows from my decision in relation to NDCL's failure to comply with SYSC 9.1R that the application to suspend the Decision Notice must be refused. As I heard submissions on them, I consider the other matters at issue in this application although only briefly.

CONC 8.3 4R and 8.3.4 R(1)

44. CONC 8.3.4R and 8.3.4 R(1) provide:

> "A firm must ensure that advice provided to a customer, whether before the firm has entered into contract with the customer or after, is provided in a durable medium and:
>
> (1) makes clear which debts will be included in any debt solution and which debts will be excluded from any debt solution;"

45. In the Decision Notice, the FCA concluded that the files demonstrated that NDCL did not include in its written advice to its customers the matters specifically required by CONC 8.3.4R and 8.3.4.R(1). The FCA stated that the files revealed that the notes of telephone advice calls, which could last one or two hours, were overly brief and insufficiently detailed to enable the FCA to determine whether NDCL had provided sufficient information to customers. Further, the FCA considered that, by focussing solely on the chosen solution of a DMP, NDCL failed to provide customers with information on which debts will be included and excluded in relation to every potential debt solution available to a customer.

46. Mr Popplewell submitted that NDCL complied with CONC 8.3.4R because it provided its advice in a durable medium, namely the Welcome Letter. The Welcome Letter set out the solutions available to a customer, which of the available solutions

NDCL considered suitable and why. Mr Popplewell submitted that NDCL also complied with CONC 8.3.4R(1) in that it provided information about which debts were included in or excluded from a DMP in the statement of affairs and the financial summary and fees illustration. Mr Popplewell submitted that, even if there was a breach, no customer prejudice would be caused by it as information would be provided by the relevant solution provider.

47. There was a disagreement between the parties as to the interpretation of CONC 8.3.4R(1). The FCA considered that the rule requires the firm to provide information on which debts will be included or excluded in relation to all available debt solutions. NDCL's position was that the rule only required the firm to provide such information in relation to the specific debt solution chosen by the customer. Mr Fell submitted that, while the FCA did not concede it, the point was not of enormous importance in considering whether there was a risk of prejudice to customers in this case. I consider that the risk of prejudice arises from a customer choosing an inappropriate and unsuitable debt solution because he or she has not been provided with sufficient information to make an informed choice. That does not turn on whether a particular range of debt solutions was fully set out in writing and provided to the customer but, especially in the case of these customers, whether the available solutions were fully explained during the initial telephone advice call and any subsequent telephone contact. The real concern that arises from a breach of CONC 8.3.4R where a firm does not produce all of its advice to customers in a durable medium, is that the FCA is not able to determine the if the firm provided sufficient information to comply with other parts of the Handbook, eg CONC 8.3.5G. That would be the case, for example, where advice given by telephone is not fully and accurately recorded in the notes on the file. The FCA has not pointed to any files where a customer has been prejudiced by the absence of advice in a durable medium or a failure to comply with CONC 8.3.4R(1) (even as the FCA interprets it). Whether or not NDCL complied with CONC 8.3.4R and CONC 8.3.4R(1), which is for hearing of the reference, I accept that NDCL provided advice to customers in writing, as well as orally, and that the absence of an explanation of which debts are included or excluded in relation to all available debt solutions is not likely to prejudice the interests of customers in all the circumstances of this case.

Quality Assurance Process

48. The FCA identified concerns about NDCL's QA process at an early stage. Despite requests by the FCA in February and July 2016, NCDL did not provide any QA policy and could not identify which files had gone through a QA process. The FCA raised concerns in the minded to refuse letter and the Warning Notice and NDCL provided further files, three of which included QA logs. The FCA did not accept that the files and QA log, provided by NDCL, addressed the FCA's concerns. The FCA considered that the QA logs showed that NDCL's QA process was still inadequate in that they did not explain how compliance had been assessed and failed to identify the compliance issues identified by the FCA and discussed above.

49. Mr Popplewell said that NDCL recognised that there may have been deficiencies in its QA process historically and had acted to remedy them. Since the Decision Notice, NDCL had formally instructed a compliance company, Consumer Credit Compliance Limited, to carry out NDCL's QA process. The company is authorised by the FCA and a member of the Association of Professional Compliance Consultants: the director of the company is the chair of the association. The instruction is for a period of at least

one year. During that period, the company will carry out an assessment of two files per month. Mr Popplewell pointed out that two files per month is approximately twice as many as would have been assessed under NDCL's previous QA process which assessed 10% of files a month. Mr Popplewell submitted that there is no risk of customer prejudice as a result of the new QA process.

50. It is clear that the absence of an effective QA process does not, of itself, prejudice customers' interests. The QA process is, however, an important safeguard based on the ability of the firm itself and, on a review, the FCA to check that the firm is compliant. If a firm does not have an effective QA process and where there have been doubts cast on the suitability of that firm's advice, it is clear that there is a risk that the interests of the existing and future customers might be prejudiced. By its own admission, NDCL has not had an effective QA process in the past and that frank acknowledgement is supported by the FCA's review of QA logs in files provided by NDCL. The appointment of a company specialising in compliance to carry out a review of two files each month does not address the fundamental difficulty which is that if NDCL's record keeping is inadequate, as I have found above, then the compliance company would find it difficult, if not impossible, to assess the quality of the advice given by NDCL to the customers. It may be that the compliance company is able to interrogate not only the files but also Mr Ali and his staff and verify that NDCL is giving suitable advice to customers. However, as the company had yet to begin its compliance role at the time of the hearing, I cannot be satisfied that is the case at this stage. In conclusion, the steps taken by NDCL to improve its QA process are not sufficient to satisfy me that NDCL's existing and potential customers face no risk of prejudice, other than the normal risk inherent in engaging a debt management company.

Other matters

51. NDCL urged me to take account of matters not raised by the FCA. In effect a submission that, in conducting the balancing exercise, I should have regard to the fact that the FCA found no cause for complaint in relation to certain matters and its criticism of NDCL only extended to a limited part of the business. There was, for example, no suggestion that there was any risk to client money. I was also asked to consider the fact (not disputed by the FCA) that, between June 2015 to June 2016, the majority of clients seeking advice from NDCL were either referred to the free debt advice sector or advised to manage their debts themselves for which NDCL received no compensation. I have taken these matters into account but, in a matter such as this, the fact that a person performs some functions well does not compensate for those areas where performance is below the required standard if there is a real risk that those shortcomings would prejudice the interests of some of NDCL's existing and future customers.

Adequacy of FCA's alternative arrangements

52. Finally, I should deal briefly with the submission that the clients would be worse off if NDCL's interim permission is not restored. Despite detailed submissions and evidence on this point, I cannot see that it can assist NDCL. I am not able to suspend the effect of the Decision Notice unless I am satisfied that to do so would not prejudice the interests of any existing or future customers of NDCL. As I have concluded that the customers would be exposed to the risk of prejudice then I cannot suspend the effect of the Decision Notice even if I conclude that the customers' interests would also be prejudiced if the Decision Notice remains in force. The effect on customers of being forced to rely on the arrangements that the FCA has put in place for customers of debt

management firms whose interim permission ceases would be a relevant consideration if I had decided that suspending the effect of the Decision Notice would not prejudice the interests of NDCL's existing and future customers and then had to consider whether to exercise my discretion to grant the application. I am not in that position but if I had been I would have held that NDCL's customers would be unlikely to suffer prejudice if NDCL could not act for them and they were forced to rely on the arrangements put in place by the FCA. I acknowledge that NDCL's customers, who are all Bengali speakers, pose a particular challenge for the Money Advisory Service which would provide advice and assistance in place of NDCL but I note that translation services have been engaged. In conclusion, I find (if it is necessary to do so) that NDCL's customers would not be in a materially worse position if NDCL cannot act for them.

Privacy

53. NDC accepted that if the rule 5(5) application is not granted then the privacy application will inevitably fail. That must be correct. If the Decision Notice is not suspended then there will be an urgent consumer contact exercise in which it will be clear to NDCL's clients that the interim permission has been terminated. In those circumstances, NDCL would not obtain any advantage from the Decision Notice not being published or the details of the reference not being entered in the Tribunal's public register. Accordingly, I refuse NDCL's application under rule14(1) of and paragraph 3(3) of Schedule 3 to the Rules to restrain publication of the Decision Notice and prevent the details of the reference from appearing on the Tribunal's public register.

Decision

54. For the reasons given above, I refuse NDCL's application under rule 5(5) of the Rules that the effect of the Decision Notice, ie the cessation of NDCL's interim permission, be suspended pending final determination of the reference. I also refuse NDCL's privacy application under rule14(1) of and paragraph 3(3) of Schedule 3 to the Rules.

55. I direct the parties to cooperate so as to bring the reference to a substantive hearing as soon as possible. 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.

Judge Greg Sinfield

Release date: 10 April 2017