[2018] UKUT 0258 (TCC)

Reference numbers: FS/2018 /003, 005-014,016-042 & 045-051

FINANCIAL SERVICES – consumer credit agreements entered into through the intermediation of an unauthorised broker - whether decision of the Authority to validate the agreements reasonably open to the Authority- no - references allowed and remitted to the Authority for it to reconsider its decision - ss 28A and 133 (6) and (6A) FSMA

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

PLAXEDES CHICKOMBE AND 44 OTHERS **Applicants**

- and -

THE FINANCIAL CONDUCT AUTHORITY **The Authority**

-and-

CLYDESDALE FINANCIAL SERVICES LIMITED
T/A BARCLAYS PARTNER FINANCE

Interested Party

TRIBUNAL: Judge Timothy Herrington

Sitting in public at The Royal Courts of Justice, London on 19 June 2018

James Sheehan, Counsel, instructed by EC3 Legal LLP, Solicitors, for the Participating Applicants
Mark Fell, Counsel, instructed by the Financial Conduct Authority, for the Authority
Simon Pritchard, Counsel, instructed by Hogan Lovells International LLP, Solicitors, for the Interested Party

DECISION

Introduction and decision referred

1. This decision concerns 45 references (the "References") of the determination of the Authority made under s 28A of the Financial Services and Markets Act 2000 ("FSMA") on 5 February 2018 (the "Validation Order").

2. The Validation Order was made on the application of the Interested Party in this case ("BPF") whose ultimate parent company is Barclays Bank Plc. The Validation Order concerns 1,444 regulated credit agreements entered into by BPF as lender between 1 April 2014 and 24 April 2016 (the "Regulated Agreements") under which the total amount payable is currently in the region of £47 million. The Regulated Agreements are "borrower-lender-supplier" agreements (as defined in Article 60 L (1) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("RAO")). The agreements financed the acquisition of timeshare accommodation from a group of companies, known as "Azure". BPF informed the Authority that the Regulated Agreements were brokered by an unauthorised broker within Azure known as Azure Services Limited ("the Broker") in breach of the general prohibition set out in s 19 FSMA against persons carrying on regulated activities in the United Kingdom without authorisation by the Authority or an applicable exemption from authorisation applying.

3. As explained in more detail below, under s 27 (1) (d) (i), (1A) and (2) FSMA the fact that the Regulated Agreements were made in consequence of something said or done by a third party in contravention of the general prohibition rendered the Regulated Agreements unenforceable against borrowers and entitled those borrowers to recover money or property transferred to BPF under the Regulated Agreements.

4. On 26 May 2017 BPF applied to the Authority for a determination under s 28A (3) FSMA allowing relief from the consequences of the provisions of s 27 FSMA referred to at [3] above, that is a determination which would allow BPF to enforce the Regulated Agreements and to retain money paid under them. Following this application, the Validation Order was, as mentioned above, made on 5 February 2018.

5. The basis of the Validation Order was that the Authority considered that it was just and equitable to allow the Regulated Agreements to be enforced and for the money paid under them to be retained for the following reasons:

(1) BPF did not intentionally contravene the requirement to only engage with permitted (authorised or exempt) third parties when making the Regulated Agreements. The failure occurred because BPF did not have sight of the structure within Azure or the specific entity that was authorised to provide broking services.

(2) BPF satisfied the Authority that there has not been any consumer detriment caused by the fact that the broker did not have any permission under

FSMA, at the time when the Regulated Agreements were made. The relevant customers are unlikely to have been treated differently if the broker had been authorised.

(3) BPF had amended its training manual to ensure that their staff check the full legal name of any brokers they engage with, in order to be able to identify the specific entity within a group that will provide broking services. BPF has also introduced weekly cross-checks with the financial services register to ensure that they have oversight of their brokers' regulatory status.

6. BPF says a copy of the Validation Order was sent to all of the borrowers under the Regulated Agreements, although this is disputed by some borrowers. A number of the borrowers have exercised their right to make a reference to this Tribunal of the Validation Order pursuant to s 28B (3) FSMA. The basis of these references is that the borrowers concerned allege that they have suffered detriment arising from the conduct of the Broker in connection with the entry into the Regulated Agreements. In summary, the principal allegations of consumer detriment are:

(1) the terms of regulated agreements were not explained to borrowers prior to entry;

(2) there are concerns proper credit checks and assessments were not carried out;

(3) borrowers were not given adequate time to consider the terms of proposed agreements;

(4) borrowers were pressurised into signing Regulated Agreements;

(5) false representations were made to borrowers relating to the financial impact of regulated agreements;

(6) borrowers were not properly informed and/or misled as to the duration of regulated agreements;

(7) vulnerable consumers were inappropriately treated; and

(8) there are concerns about commission arrangements and disclosure thereof.

7. The Authority had not been made aware of these allegations prior to the making of the Validation Order and accordingly did not take them into account when deciding to make the Validation Order.

8. On 8 March 2018 the Authority informed the Tribunal that it conceded the References that had been made at that point and asked the Tribunal to remit the matter to the Authority to reconsider it on the basis that the concerns raised by the References as to the circumstances in which the Regulated Agreements were entered into were matters that should be taken into account in deciding whether to grant the Validation Order.

9. After further correspondence with the Authority and having sought representations from the Interested Party, the Tribunal directed that there should be a hearing of a preliminary issue, namely whether the question of consumer detriment is

a relevant factor to be taken into account in deciding whether to issue a validation order, and if so, whether the failure to do so means that the Tribunal should determine the References in favour of the Applicants and remit the matter to the Authority for a fresh decision. The Tribunal also stated that it would consider the effect a decision to remit would have on the existing Validation Order at the preliminary issues hearing.

10. The parties' positions on the issues set out at [9] above are as follows.

11. The Authority contends as follows:

(1) The evidence provided by the borrowers as to consumer detriment is a probative indication of conduct and outcomes that the regulatory scheme under FSMA seeks to prevent;

(2) Further enquiry is needed to assess the full extent of the detriment to borrowers under the Regulated Agreements;

(3) The evidence of consumer detriment is a relevant matter for the purposes of the Authority's power under section 28A FSMA;

(4) Because the evidence of consumer detriment was not taken into account by the Authority when making the Validation Order, the Tribunal cannot be satisfied, in the particular circumstances of this case, that the decision to grant the Validation Order is one that is within the range of reasonable decisions open to the Authority. Accordingly, the matter should be remitted by the Tribunal pursuant to s 133(6) FSMA; and

(5) The effect of remission would be that the Validation Order ceases to have effect from the date of the Tribunal's order.

12. The Authority also made contentions regarding the principle of proportionality, but as will become apparent, it is not necessary for that matter to be addressed in this decision.

13. Those of the Applicants who participated in the hearing (the "Participating Applicants") through their counsel, Mr Sheehan, supported the Authority's stance. They invited the Tribunal to:

(1) Find as a matter of law that detriment to consumers was and is a relevant consideration in the Authority's determination under section 28A (3) whether to make a validation order; and

(2) Determine the references in favour of the Applicants and remit the matter to the Authority to make a fresh decision on BPF's application for a validation order with a direction to take into account that consideration.

14. The Participating Applicants also contend that the effect of remitting the Authority's decision is that the Validation Order thereby ceases to have effect.

15. BPF accepts that the matter should be remitted to the Authority for reconsideration but maintains its position that a validation order should be granted. BPF agrees that on such reconsideration the Authority will consider the evidence now

before it which will include, amongst other things, any representations or evidence adduced by the Applicants in addition to any arguments or representations made by BPF.

16. BPF, however, contends that in deciding whether to grant a Validation Order, the Authority should only have regard as to whether consumers suffered a detriment as a result of the Broker's unauthorised status, which was the position that the Authority took when giving its reasons for making the Validation Order as recorded at [5] above. BPF contends that no consumer detriment was caused by the Broker being unauthorised because the way the Broker conducted its credit broking activities was the same when it was carrying on activities when it ceased to be acting in breach of the general prohibition as it was before that time.

17. BPF contends that if the matter is remitted, the Validation Order is not quashed pending the reconsideration by the Authority of its decision, the powers of the Tribunal being limited to remitting the matter to the Authority with a direction to reconsider its decision.

18. This decision determines the matters set out at [9] above and makes consequential directions in the light of the determination.

Applicable legal and regulatory provisions

19. Section 27 FSMA sets out the consequences if an agreement is entered into through the intermediation of a third party who was acting in breach of the general prohibition in s 19 FSMA or, in relation to a credit-regulated activity, in breach of s 20 FSMA (which deals with the consequences of an authorised person acting outside the scope of its permission) in, so far as relevant, the following terms:

> "(1) This section applies to an agreement that—
>
> (a) is made by an authorised person ("the provider") in the course of carrying on a regulated activity,
>
> (b) is not made in contravention of the general prohibition,
>
> (c) if it relates to a credit-related regulated activity, is not made in contravention of section 20, and
>
> (d) is made in consequence of something said or done by another person ("the third party") in the course of—
>
> (i)a regulated activity carried on by the third party in contravention of the general prohibition, or
>
> (ii)a credit-related regulated activity carried on by the third party in contravention of section 20.
>
> (1A) The agreement is unenforceable against the other party.
>
> (2) The other party is entitled to recover—
>
> (a) any money or other property paid or transferred by him under the agreement; and

(b) compensation for any loss sustained by him as a result of having parted with it.

(3) "Agreement" means an agreement—

(a) made after this section comes into force; and

(b) the making or performance of which constitutes, or is part of, the regulated activity in question carried on by the provider.

(4) This section does not apply if the regulated activity is accepting deposits."

20. It is common ground that s 27 applied so as to make the Regulated Agreements unenforceable in this case because although BPF was an authorised person and entered into those agreements in the course of carrying on a regulated activity which was not being carried on in contravention of s 20 FSMA the Regulated Agreements were brokered by the Broker who was not an authorised person and therefore was acting in breach of the general prohibition in s 19 FSMA.

21. Section 28 FSMA generally applies to an agreement which is unenforceable because of s 27 FSMA. Broadly speaking, among other things, pursuant to s 28 (3) if the court is satisfied that it is just and equitable in the circumstances of the case it may allow the agreement to be enforced or money paid or property transferred under the agreement to be retained.

22. However, s 28 does not apply to agreements entered into in the course of carrying on a credit-related regulated activity. Section 28A makes specific provision in that regard in the following terms:

"(1) This section applies to an agreement that—

(a) is entered into in the course of carrying on a credit-related regulated activity, and

(b) is unenforceable because of section 26, 26A or 27.

(2) The amount of compensation recoverable as a result of that section is—

(a) the amount agreed by the parties, or

(b) on the application of either party, the amount specified in a written notice given by the FCA to the applicant.

(3) If on application by the relevant firm the FCA is satisfied that it is just and equitable in the circumstances of the case, it may by written notice to the applicant allow—

(a) the agreement to be enforced, or

(b) money paid or property transferred under the agreement to be retained.

(4) In considering whether to allow the agreement to be enforced or (as the case may be) the money or property paid or transferred under the agreement to be retained the FCA must—

(a) if the case arises as a result of section 26 or 26A, have regard to the issue mentioned in subsection (5), or

(b) if the case arises as a result of section 27, have regard to the issue mentioned in subsection (6).

(5) The issue is whether the relevant firm reasonably believed that by making the agreement the relevant firm was neither contravening the general prohibition nor contravening section 20.

(6) The issue is whether the provider knew that the third party was (in carrying on the credit-related regulated activity) either contravening the general prohibition or contravening section 20.

(7) An application to the FCA under this section by the relevant firm may relate to specified agreements or to agreements of a specified description or made at a specified time.

(8) "The relevant firm" means—

(a)in a case falling within section 26, the person in breach of the general prohibition;

(b) in a case falling within section 26A or 27, the authorised person concerned.

(9) If the FCA thinks fit, it may when acting under subsection (2)(b) or (3)—

(a) limit the determination in its notice to specified agreements, or agreements of a specified description or made at a specified time;

(b) make the determination in its notice conditional on the doing of specified acts by the applicant."

23. It can be seen that the key difference between s 28 and s 28A is that in relation to the latter provision the determination as to whether it is just and equitable to allow the agreement to be enforced is made by the Authority rather than the court. As explained by Mr Fell, this continues the policy which applied when consumer credit agreements were regulated by the Director General (later the Office) of Fair Trading pursuant to the Consumer Credit Act 1974. The corresponding provision was contained in s 149 of that statute in the following terms:

"(1) A regulated agreement made by a debtor or hirer who, for the purpose of making that agreement, was introduced to the creditor or owner by an unlicensed credit-broker is enforceable against -the debtor or hirer only where—

(a) on the application of the credit-broker, the Director has made an order under section 148(2) in respect of a period including the time when the introduction was made, and the order does not (whether in general terms or specifically) exclude the application of this paragraph to the regulated agreement, or

(b) the Director has made an order under subsection (2) which applies to the agreement.

(2) Where during any period individuals were introduced to a person carrying on a consumer credit business or consumer hire business by an unlicensed credit-broker for the purpose of making regulated agreements with the person carrying on that business, that person or his successor in title may apply to the Director

for an order that regulated agreements so made are to be treated as if the credit-broker had been licensed at the time of the introduction.

(3) Unless the Director determines to make an order under subsection (2) in accordance with the application, he shall, before determining the application, by notice—

(a) inform the applicant, giving his reasons, that, as the case may be, he is minded to refuse the application, or to grant it in terms different from those applied for, describing them, and

(b) invite the applicant to submit to the Director representations in support of his application in accordance with section 34.

(4) In determining whether or not to make an order under subsection (2) the Director shall consider, in addition to any other relevant factors—

(a) how far, if at all, debtors or hirers under regulated agreements to which the application relates were prejudiced by the credit-broker's conduct, and

(b) the degree of culpability of the applicant in facilitating the carrying on by the credit-broker of his business when unlicensed.

(5) If the Director thinks fit, he may in an order under subsection (2)—

(a)limit the order to specified agreements, or agreements of a specified description or made at a specified time;

(b)make the order conditional on the doing of specified acts by the applicant."

24. Whilst therefore both s 28A FSMA and s 149 Consumer Credit Act 1974 require the relevant regulator to make an administrative decision, subject to the usual public law principles, it is arguable that s 28A requires the Authority to take into account a wider set of circumstances than was required under s149 in that in addition to the specific matters referred to at s 28A (4) the Authority must be satisfied that it is "just and equitable in the circumstances of the case" which in my view requires it to consider all relevant circumstances and weigh them up before making a decision in a quasi-judicial manner. By contrast, there is a focus in s 149 on the extent to which consumers were "prejudiced" by the unlicensed broker's conduct and there is no overarching "just and equitable" test.

25. Section 28B FSMA sets out the procedure that the Authority must follow when making a decision on an application made pursuant to s 28A (3) FSMA by the relevant firm to allow the agreements in question to be enforced and gives a right to refer the Authority's decision to this Tribunal in the following terms:

"(1) A notice under section 28A(2)(b) or (3) must—

(a) give the FCA's reasons for its determination, and

(b) give an indication of—

(i) the right to have the matter referred to the Tribunal that is conferred by subsection (3), and

(ii) the procedure on such a reference.

(2) The FCA must, so far as it is reasonably practicable to do so, give a copy of the notice to any other person who appears to it to be affected by the determination to which the notice relates.

(3) A person who is aggrieved by the determination of an application under section 28A(2)(b) or (3) may refer the matter to the Tribunal."

26. It is common ground that the Validation Order, the terms of which are summarised at [5] and [6] above, meets the requirements of s 28B FSMA in relation to these references.

27. Both Mr Fell and Mr Sheehan drew my attention to a number of provisions of the Authority's Handbook that may have been breached if the allegations made by the consumers, as summarised at [6] above, in their reference notices are made out. In summary, those provisions are:

(1) Principle 6 of the Authority's Statement of Principles for Businesses which requires a firm to pay due regard to the interest of its customers and treat them fairly. CONC 2.2.2G gives guidance to the effect that targeting customers with regulated credit agreements which are unsuitable for them and subjecting them to high-pressure selling, aggressive or oppressive behaviour, or unfair coercion contravenes this Principle;

(2) Principle 7 of those Principles which requires a firm to pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading;

(3) Principle 8 of those Principles which requires a firm to manage conflicts of interest fairly between itself and its customers;

(4) CONC 2.5.3 R (1) which requires a credit broker to (a) explain the key features of a regulated credit agreement to enable the customer to make an informed choice as to whether to enter into it, (b) take reasonable steps to satisfy itself that a product it is recommending is not unsuitable; and (c) advise the customer to read the terms and conditions of a regulated credit agreement and allow him or her sufficient time to do so, before entering into it; and

(5) CONC 2.5.8 R which prohibits a credit broker from inappropriately offering a financial or other incentive or inducement to a customer to enter, immediately or quickly, into a credit agreement.

28. As Mr Fell observed, strictly speaking the Broker would not have been capable of breaching any of these provisions because the Authority's Handbook of rules only applies to persons who are authorised persons at the time the relevant activities were carried out, but Mr Fell submits that detriment arising from treatment by an unauthorised person acting in breach of the general prohibition which falls below the standards imposed by or under these provisions on authorised persons is a relevant matter for the purposes of deciding whether an order under s 28A (3) FSMA should be granted, a matter which I return to later.

Issues to be determined and the role of the Tribunal

29. Section 133(4) FSMA provides that, on a reference, the Tribunal may consider any evidence relating to the subject matter of the reference whether or not it was available to the decision-maker at the material time. A reference is not an appeal against the Authority's decision but a complete rehearing of the issues which give rise to the decision.

30. Section 133(5) to (7) FSMA, following amendments made by the Financial Services Act 2012, now provide as follows:

> "(5) In the case of a disciplinary reference or a reference under section 393(11), the Tribunal must determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter, and on determining the reference, must remit the matter to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination.
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> (6) In any other case, the Tribunal must determine the reference or appeal by either-
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> (a) dismissing it; or
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> (b) remitting the matter to the decision-maker with a direction to reconsider and reach a decision in accordance with findings of the Tribunal.
>
> (6A) The findings mentioned in subsection (6) (b) are limited to findings as to-
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> (a) issues of fact or law;
>
> (b) the matters to be, or not to be, taken into account in making the decision; and
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> (c) the procedural or other steps to be taken in connection with the making of the decision.
>
> (7) The decision-maker must act in accordance with the determination of, and any direction given by, the Tribunal."

31. "The decision-maker" in relation to this reference is the Authority.

32. It can be seen that there is now a distinction between the powers of the Tribunal on what is described as a "disciplinary reference" and other references. Pursuant to s 133(7A) FSMA "disciplinary reference" includes a decision to impose a financial penalty. The term does not include a reference made pursuant to s 28B (3) FSMA. Thus, in respect of these references the powers of the Tribunal as set out in s 133(6) are more limited than those in respect of "disciplinary references". The jurisdiction may be characterised as a supervisory rather than a full jurisdiction in that unless the Tribunal believes the reference to have no merit and therefore dismisses it its powers are limited to remitting the matter to the Authority with a direction to reconsider its decision in accordance with the findings of the Tribunal. The Tribunal explained the

extent of its powers on a non-disciplinary reference in *Carrimjee v FCA* [2016] UKUT 0447(TCC), a case involving the exercise of the Authority's power to prohibit a person from working in the financial services industry pursuant to s 56 FSMA, although the principles are equally applicable to these references. The Tribunal said at [39] and [40]:

> "39. If, having reviewed all the evidence and the factors taken into account by the Authority in making its decision, and having made findings of fact in relation to that evidence and such other findings of law that are relevant, the Tribunal concludes that the decision to prohibit is one that is reasonably open to the Authority then the correct course is to dismiss the reference.
>
> 40. Alternatively, if the Tribunal is not satisfied that in the light of its findings that the decision is one that in all the circumstances is within the range of reasonable decisions open to the Authority, the correct course is to remit the matter with a direction to reconsider the decision in the light of those findings. For example, that course would also be necessary were the Tribunal to make findings of fact that were clearly at variance with the findings made by the Authority and which formed the basis of its decision. That course would also be necessary had there been a change of circumstance regarding the applicant which indicated that the original findings made on which the decision was based, for example as to his competence to undertake particular activities, had been overtaken by further developments, such as new evidence which clearly demonstrated the applicant's proficiency in relation to the relevant matters. Such a course would not usurp the Authority's role in making the overall assessment as to fitness and propriety but would ensure that it reconsidered its decision on a fully informed basis. In our view such a course is consistent with the policy referred to at [31] and [32] above as it leaves it to the Authority to make a judgment as to whether a prohibition order is appropriate."

33. These references are unusual in that the Authority accepts that its decision to issue the Validation Order is flawed and invites the Tribunal to remit the matter to the Authority with a direction that it reconsider its decision. The Authority contends that the evidence provided by the consumers as to consumer detriment is a relevant factor to be taken into account in deciding whether it is just and equitable to make a validation order and accordingly because that evidence has not been taken into account by the Authority (on the basis that it was not aware of it at the time it made the Validation Order) and as a consequence its decision is no longer one that in all the circumstances is within the range of reasonable decisions open to it.

34. Section 133(4) FSMA makes it clear that in considering the decision that has been referred, the Tribunal may take into account evidence that was not available to the decision-maker at the time the relevant decision was made. The passage from *Carrimjee* referred to above makes it clear that where the Tribunal makes findings of fact that are at variance from those made by the Authority when it made the relevant decision, then there may be grounds for remitting the matter to the Authority for it to reconsider its decision in the light of the findings that the Tribunal has made so that the Authority can ensure that its decision has been made on a fully informed basis.

35. Therefore, if I were to conclude that on the facts there is evidence of consumer detriment which has not previously been taken into account by the Authority and I take the view that such evidence is a relevant factor to be considered by the Authority in making a decision as to whether in the circumstances of this case a validation order should be made, then it would be appropriate for me to make a direction to remit the matter to the Authority for further consideration. If I decide to take that course, I must then consider what further directions to make, if any, regarding the matters referred to in s 133 (6 A) FSMA.

36. Unsurprisingly, the Participating Applicants support the Authority's stance on this issue. As far as BPF is concerned, initially it opposed the matter being remitted and submitted that the references should be dismissed, on grounds which included a contention that consumer detriment was not relevant to the exercise of the s 28A power because there was no mechanism in FSMA or in the Authority's procedures for granting a validation order, for the consumers to make submissions to the Authority in advance of the Authority deciding to grant a validation order.

37. BPF has now changed its position and accepts that the matter should be remitted to the Authority for reconsideration. It has come to this decision on the basis that on 7 June 2018, in the course of preparing for the hearing, BPF identified an email sent to an individual at BPF from the Azure Group on 26 September 2014. That email referred to the role of the Broker within Azure and stated that the Broker employed the personnel who handled the back office functions for the entity within Azure which provided the timeshare accommodation and which itself had no employees. BPF is investigating the email and the circumstances surrounding it to determine whether (and, if so, how) it affects what BPF knew (or ought to have known) regarding the involvement of the Broker in the sales process during the relevant period.

38. As a consequence, since in the Validation Order the Authority said that BPF became aware on 10 August 2016 that the referrals were conducted by an entity which had no relevant permissions, that finding may need revisiting in the light of the newly discovered email. In the circumstances, BPF accepts that the newly discovered email is likely to be a matter that the Authority would wish to consider as part of its decision-making process. Accordingly, BPF has formed the view that the matter should be remitted for reconsideration.

39. However, there is a dispute between the parties as to the extent to which consumer detriment should be taken into account upon such reconsideration and BPF maintains its position that a validation order should be granted. BPF accepts that on such reconsideration the Authority will consider the evidence now before it which will include representations or evidence adduced by the Applicants, in addition to any arguments or representations made by BPF.

40. The parties also agree that in deciding whether to grant a validation order, the Authority must have regard to whether consumers suffered detriment as a result of the Broker's unauthorised status. However, BPF contends that the consumer detriment is only a relevant factor to the extent that it has been caused by the fact that the Broker was not authorised or licensed at all material times. It contends that the way the

Broker has conducted its credit broking activities, including the way it dealt with customers, was the same when it was carrying on activities for Azure as when it became an appointed representative of BPF. Moreover, both before and after being an appointed representative, the Broker sought to follow the relevant rules set out in the Authority's Handbook and those rules also form part of the training package given to customer-facing staff. In short, customers have had exactly the same customer experience both before and after the Broker became an appointed representative with the result that there's been no consumer detriment caused by the fact that the broker was not authorised or licensed at all material times.

41. BPF also contends that it operates a robust complaint handling procedure with employees specifically trained in considering complaints relating to timeshare products. To the extent that complainants consider that they are the victim of mis-selling then they can make a complaint to BPF which will be duly considered and if the customer is not satisfied with the outcome of the complaint then it can escalate the matter by, for example, referring the matter to the Financial Ombudsman Scheme.

42. It therefore appears to me that the parties are agreed that I should remit the matter to the Authority and that I should make directions as to the matters that the Authority should take into account in reconsidering its decision. The only dispute between the parties is therefore the extent to which my direction should require consumer detriment to be taken into account and whether there should be any limitations on what the Authority be directed to consider in that regard.

43. There was also a dispute between the parties as to whether the effect of a direction to the Authority to reconsider its decision meant that the existing Validation Order thereupon ceased to have effect with the result that the Regulated Agreements once again became unenforceable. The Authority and the Participating Applicants contended that although s 133 FSMA was silent on the matter the effect of the matter being remitted was that the Validation Order thereby ceased to have effect, reflecting the basic public law principle that a decision shown to be unlawful cannot ordinarily stand.

44. In the event, it has not been necessary for me to come to a definitive conclusion on this point because BPF indicated at the conclusion of the hearing that it would confirm in writing to the Authority that it would take no enforcement action in relation to the Regulated Agreements until the Authority had remade its decision on the application for a validation order and that in relation to matters concerning the Regulated Agreements which did not relate to enforcement, BPF would take account of its obligations to treat its customers fairly. On that basis, it seems to me that the Authority has adequate supervisory tools to deal with the matter if necessary.

45. However, I should say that I have considerable doubt as to whether the Tribunal can make a direction setting aside a decision which is remitted to the Authority for reconsideration under section 133 (6). This Tribunal only has a statutory jurisdiction and has no general judicial review function of the kind vested in the Administrative Court. Had Parliament intended that it should have the same powers as the Administrative Court to set aside a decision which it finds to be flawed, it would have

said so specifically in s 133. Indeed, I drew the attention of the parties to such a specific provision in s 16 Finance Act 1994 which empowers the First-tier Tax Tribunal when exercising a supervisory jurisdiction in relation to various indirect tax matters, not only to remit a decision which it finds to be flawed but also to direct that the original decision shall thereupon cease to have effect.

Evidence and findings of fact

46. In view of the fact that the dispute between the parties has been narrowed significantly since directions were given for the hearing of the matters that are the subject of this decision, I need only make limited findings of fact.

47. I had a witness statement from Ms Karen Avis, a senior manager in the Wholesale Department within the Authorisations Division of the Authority in which Ms Avis gave evidence as to the manner in which the Authority dealt with the application for the Validation Order and the events since that time. Ms Avis's evidence also contained a review of the contemporaneous documents.

48. Ms Avis's evidence was not challenged. I therefore accept that by way of the References, letters, emails and a number of telephone calls from consumers who are parties to the Regulated Agreements, that the Authority has now received from consumers a substantial amount of evidence of potential consumer detriment that raises concerns as to the circumstances in which customers entered into the Regulated Agreements and that the Authority was not aware of that evidence at the time it decided to grant the Validation Order and I find accordingly. I find that the potential consumer detriment is that summarised at [6] above but for the avoidance of doubt I confirm that I make no findings at this stage as to whether such consumer detriment actually occurred.

49. Ms Avis referred to the fact that the Authority has a standard application form to be completed for a validation order. Most of the questions on that form relate to the details of the unauthorised third-party, how the applicant became aware of its status and what checks et cetera it carried out before dealing with it. In addition, the applicant must obtain and submit a legal opinion with the application which considers whether and how far the agreements which are the subject of the application and the supporting sales processes complied with applicable consumer protection legislation. Surprisingly, the only specific legislation referred to is the relevant legislation that applied before the Authority assumed responsibility for the regulation of consumer credit, and no reference is made to the relevant provisions of CONC or the Authority's Principles for Businesses, as referred to at [27] above. The legal opinion provided in this case, by Hogan Lovells International LLP, dealt mainly with compliance with the form and content requirements of the Regulated Agreements and the provision of pre-contractual information.

50. However, during the consideration of the application the Authority requested that BPF provide an analysis of whether consumer detriment has occurred as a result of broker behaviour and the impact on non-complainants "and other cohorts" that may

require remediation together with a list of all brokers where there is materially adverse information, a summary of the issue and the current status.

51. In response, BPF provided information relating to the Broker that during 2017 BPF received 63 "mis-selling" complaints alleging misrepresentations during the sale of the timeshare products, that two of these complaints were upheld and that BPF faced a number of litigation claims where the customers were alleging misrepresentations during the sale of the timeshare product by Azure.

52. However, it is clear from the terms of the Validation Order and as confirmed by Ms Avis's evidence that the Authority only took such evidence that it had regarding consumer detriment, as referred to at [52] above into account in determining that there had not been any consumer detriment caused by the fact that the Broker did not have any permission under FSMA at the time the Regulated Agreements were entered into. This is confirmed by notes of telephone conversations that the Authority had with consumers once the Validation Order had been issued and sent to those consumers who were party to the Regulated Agreements. For example, a note of a telephone conversation held on 27 February 2018 between a member of the Authority's staff and a consumer records the following:

> "I explained the remit of my decision, the fact I am independent and impartial, and that legislation prescribes very specifically what I can and cannot consider/look at (i.e I did not look at the product (timeshares) or the form of selling of timeshares by the provider)."

53. Another note of a telephone conversation records an explanation being given that if there were issues with mis-selling the Financial Ombudsman Scheme would be the right organisation to look into the complaint, the implication being that it was not a matter that was relevant to the Authority's determination as to whether or not to issue a Validation Order, an approach which is also illustrated by another note where the member of the Authority's staff explains that the selling of the product is not necessarily related to the validation decision.

54. I had witness statements on behalf of BPF from Ms Jennifer Page, an in-house Legal Counsel, and Mr David Lewis, the Head of Customer Relations for BPF. Again, this evidence was unchallenged and from Ms Page's evidence I find that the way the Broker has conducted its credit broking activities, including the way it dealt with customers, was the same when it was carrying on activities for Azure, as it was when it became an appointed representative of BPF and that both before and after becoming an appointed representative the Broker sought to follow the rules set out in CONC. I find from Mr Lewis's evidence that BPF has a complaint handling procedure with employees specifically trained in considering complaints relating to timeshare products and that complainants who consider that they are the victims of mis-selling can make a complaint to BPF which will be duly considered. In addition, as appears from Mr Lewis's evidence, a number of the applicants have previously made timeshare related complaints to BPF none of which were upheld. I also had a witness statement from Mr Graham Denny, a partner in the firm of solicitors acting for the Participating Applicants, in which Mr Denny gave evidence as to issues experienced

by his clients in dealing with Azure. Again, I reiterate that at this stage I make no findings as to whether or not any of the consumers who are party to the Regulated Agreements have been the victims of mis-selling.

Discussion

55. I was referred by both Mr Sheehan and Mr Fell to a number of authorities dealing with s 28 (3) FSMA where the court has had to consider whether it was just and equitable to grant a validation order. I accept their submissions that these cases are relevant to consideration of what factors are relevant to be taken into account when considering whether it is just and equitable to make a validation order pursuant to s 28A (3) FSMA.

56. I need only refer specifically to *Helden v Strathmore Limited* [2010] EWHC 2012 (Ch) where Newey J considered whether it was just and equitable to allow a regulated mortgage contract to be enforced against a consumer under the court's jurisdiction under s 28 FSMA notwithstanding that the contract had been entered into in breach of the general prohibition. Lord Neuberger MR at [45] of the judgment of the Court of Appeal at [2011] Bus LR 1592 set out the following relevant parts of the analysis of Newey J at [100] of his judgment and approved it at [46]:

> "The more general factors which the Judge took into account were explained thus:
>
> > "100. The case for allowing enforcement of the agreement relating to the [main] loan is, as it seems to me, particularly compelling. The reasons include these:
> > v) Mr Helden has had the use of the property which Strathmore's loan enabled him to buy … since 2006 without making any rent or interest payments;
> > vi) The property has increased substantially in value. Whereas it was bought for £1 million, agents last year suggested that it should be marketed at £1.8m … . The loan from Strathmore has thus enabled Mr Helden to achieve a large profit;
> > vii) … I accept that … Strathmore would not have been willing to make the loan on an unsecured basis;
> > viii) … Strathmore could be expected to have generated a return on the £1 million by investing it elsewhere had it not been lent to Mr Helden. They have lost that potential profit as a result of lending the money to Mr Helden;
> > ix) There is no question of Mr Helden having been taken advantage of. He had considerable experience in property matters, including as a mortgage broker. Further, the rates of interest charged were agreed with Mr Helden and were not exorbitant;
> > x) Mr Helden preferred not to pursue alternative funding because of his concern that he should be able to make lump sum repayments without penalty …;

> xi) Mr Helden has not identified respects in which he would have been better placed if Strathmore had been an 'authorised person' for FSMA purposes; and
> xii) The Ashtons did not realise that FSMA could apply, and it was reasonable for them not to do so."

57. Whilst I accept Mr Pritchard's observation that item xi) of the factors identified by Newey J indicates, as BPF contend in this case, that the question as to whether consumers have suffered detriment as a result of the relevant broker being unauthorised is a relevant factor it does not suggest that that is the only relevant issue in relation to consumer detriment. As both Mr Fell and Mr Sheehan submitted, factor ix) clearly goes to consumer detriment and is expressed in general terms. This factor indicates that how the broker and lender have conducted their business in relation to the selling process in respect of the relevant agreements is a relevant factor to be taken into account.

58. This approach is, as Mr Fell submitted, consistent with the policy behind the predecessor legislation to s 28A, namely s 149 (4) of the Consumer Credit Act 1974, which specifically required the Office of Fair Trading to take into account any prejudice which has resulted from the unlicensed credit broker's conduct. Although this is no longer a mandatory factor to be considered under the new legislation, the only mandatory factor now being the extent of the relevant firm's knowledge of the regulatory status of the third-party broker, there is nothing in the new legislation to suggest that the question of prejudice caused by the unlicensed credit broker's conduct should not be considered at all and it would be very surprising if Parliament had intended that it should cease to be a relevant factor, bearing in mind that Parliament took forward the policy into the new legislation that the question as to whether it was just and equitable to enforce the relevant agreements should, in relation to credit-related activity, be initially the subject of a regulatory rather than a judicial decision.

59. Mr Pritchard relied on the fact that the Authority itself had limited its consideration of consumer detriment to considering whether consumers had been prejudiced as a result of the Broker being unauthorised. That was clearly the case, as demonstrated by the reasons given in the Validation Order itself, as well as the responses given by the Authority in the various telephone conversations had with consumers which I have referred to above. However, in my view that was too narrow an approach on the part of the Authority and in taking that approach it unlawfully fettered its discretion.

60. In my view, the question as to whether it is just and equitable to enforce an otherwise unenforceable agreement requires the Authority to consider all relevant factors and conduct a multifactorial assessment by reference to all the circumstances and balancing the various factors which it identifies as being relevant to the matter. That being the case, it is understandable that s 28A does not seek to limit the scope of the Authority's enquiry and does not set out a number of factors that it is required to take into account in carrying out that process. There is a clear signal by the inclusion of s 28A (6) that the question of knowledge on the part of the relevant firm as to the

regulatory status of the third-party broker is a strong factor to be weighed up in the balancing exercise but aside from that, it is for the Authority to decide what weight to place on the various factors that need to be considered, subject to the supervisory jurisdiction of the Tribunal in assessing whether the Authority's decision is one that could in all the circumstances be reasonably arrived at.

61. It follows that in considering the consumer detriment issue, the question as to what prejudice was caused as a result of the credit broker being unauthorised will have to be weighed up in the balancing exercise alongside evidence of consumer detriment more generally and the Authority will have to decide the respective weights to be given to those factors.

62. Consequently, since:

(1) I have found that there is evidence of potential consumer detriment, albeit unsubstantiated at this stage, most of which was not taken into account by the Authority in making its decision to issue the Validation Order;

(2) I have concluded that consumer detriment is a relevant factor to be taken into account in deciding whether to issue a validation order under s 28A (3); and

(3) The Authority acted unlawfully in fettering its discretion by the narrow manner in which it took into account evidence of consumer detriment when deciding to issue the Validation Order with a consequence that such decision was one that could not be reasonably arrived at;

I must determine these references in favour of the Applicants and remit the matter to the Authority for it to reconsider its decision.

63. It follows from what I said above that the Authority should be directed to take consumer detriment into account without placing any further limitation on the scope of what the Authority should consider.

64. I have considered what directions, if any, I should give as to the procedure that the Authority should follow in reconsidering its decision, bearing in mind the power to that effect contained in s 133 (6A) (c) in that regard.

65. As Mr Sheehan recognised in his submissions, given the broad nature of the balancing exercise required by s 28A (3), in my view it is not necessary that the Authority be directed to take any particular procedural steps in assessing the weight to be given to consumer detriment when reconsidering its decision. The Authority has a general public law duty to act fairly and in that regard, as Mr Sheehan observed, I would expect that it will put in place a suitable procedure for soliciting and obtaining evidence of consumer detriment from relevant consumers within a given timescale, taking into account that a considerable amount of evidence has already been provided through the Reference Notices themselves and other communications that the Authority has had with consumers. Clearly, BPF must be given the opportunity of making representations itself on that evidence and what steps it has taken to address any consumer detriment that has been alleged. I note that Ms Avis in her evidence

suggested that there may be a role for one of the Authority's separate decision makers, the Regulatory Transactions Committee, so as to ensure separation between the investigation process and the decision as to how to proceed in the light of the evidence gathered during the course of the investigation and it seems to me that that is a suggestion with considerable merit. In relation to future matters of this kind, the Authority will obviously also need to consider whether its current application form for a validation order is fit for purpose.

Conclusion

66. The references are allowed.

Directions

67. I therefore remit the matter to the Authority with a direction to reconsider its decision to issue the Validation Order in accordance with my findings.

68. The relevant findings that the Authority must consider in this case are the findings of fact that I have made and the further findings at [62] above.

69. As well as all other relevant factors, the Authority must take into account the question of consumer detriment in reconsidering its decision.

70. I remit the references to the Authority with a direction that effect be given to my determination.

JUDGE TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE
RELEASE DATE: 01 August 2018