[2018] UKUT 0400 (TCC)

Reference number: FS/2018/057

FINANCIAL SERVICES– Supervisory Notice-Application for direction to suspend the effect of notice until reference disposed of-Notice varied Applicant's permission by removing regulated activity of exercising lender's rights and duties under regulated credit agreements - Reason for notice being failure to satisfy Threshold Conditions and to advance Authority's consumer protection objective - whether Tribunal satisfied that the direction to suspend the effect of the notice would not prejudice the interests of consumers – no - Application dismissed - Rule 5 (5) The Tribunal Procedure (Upper Tribunal) Rules 2008

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

PF (INTERNATIONAL) LIMITED **Applicant**

- and -

THE FINANCIAL CONDUCT AUTHORITY **The Authority**

TRIBUNAL: Judge Timothy Herrington

Sitting in public at The Rolls Buildings, Royal Courts of Justice, London EC4 on 21 November 2018

The Applicant in person through Tim Stewart, Compliance Manager

Tetyana Nesterchuk, Counsel, instructed by the Financial Conduct Authority, for the Authority

DECISION

Introduction

1. By way of a First Supervisory Notice issued on 31 July 2018 (the "First Supervisory Notice") to the Applicant ("PFI") the Authority decided, pursuant to s 55J of the Financial Services and Markets Act 2000 ("FSMA"), to vary the permission granted to PFI pursuant to Part 4A FSMA by removing the following regulated activities:

(1) Agreeing to carry on a regulated activity;

(2) Credit broking;

(3) Entering into regulated credit agreements as lender; and

(4) Exercising/having the right to exercise the lender's rights under a regulated credit agreement.

The first three of these activities were removed from PFI's permission with immediate effect and the fourth with effect from 1 November 2018.

2. The Notice also required, pursuant to the powers contained in s 55L FSMA, that PFI by 7 August 2018 send the Authority a draft letter, which it proposes to send to each of its existing customers to whom it has lent funds and from whom funds remain outstanding under regulated agreements ("Existing Customers"), explaining to them the existence and effect of the First Supervisory Notice and nature of the rights they have under the law and requiring PFI to send the letter to the Existing Customers within 5 working days of the Authority agreeing the content of the letter.

3. PFI referred the matter to the Tribunal, by a reference notice dated 13 September 2018. The reference was made out of time, but following an application for an extension of time, it has been admitted by the Tribunal. In its reference notice, PFI applied for a direction (the "Suspension Application") that the decision to remove PFI's right to exercise lender's rights and duties under regulated credit agreements (the Lender's Rights Decision") and the decision to impose the requirement referred to at [2] above (the "Notification Decision") be suspended pending the determination of the reference pursuant to Rule 5 (5) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Rules").

4. I initially heard the Suspension Application on 29 October 2018 and gave an oral decision dismissing it. The basis of that decision was, in relation to the Lender's Rights Decision, since all monies due to PFI from customers was collected by direct debit on or about the 26th day of each month and no further monies were due to be collected until 26 November 2018, there was no need to grant a suspension at that stage, particularly in view of the fact that PFI was due to make oral representations to the Authority's decision-maker, the Regulatory Decisions Committee ("RDC") on 13 November 2018 on the First Supervisory Notice which may result in a change in the position. In relation to the Notification Decision, in view of the lack of clarity as to

what should be included in the letter to be sent to Existing Customers, I suggested that the Authority might prepare a suitable draft that PFI could consider. I subsequently directed that PFI should be at liberty to make a further Suspension Application at any time.

5. Following the meeting with the RDC held on 13 November 2018, and in the expectation that the RDC would not issue its decision whether to issue a Second Supervisory Notice before 26 November 2018, PFI made a further Suspension Application which was listed to be heard before me on 21 November 2018.

6. In fact, the RDC issued a Second Supervisory Notice on 20 November 2018 (the "Second Supervisory Notice) in which it decided not to rescind the variation of permission and the requirements that were notified to PFI in the First Supervisory Notice. Because by the time of the hearing on 21 November 2018 PFI had not yet had an opportunity to refer the Second Supervisory Notice to the Tribunal, I considered its renewed Suspension Application in the context of the requirements of the First Supervisory Notice.

7. In the renewed application, PFI only sought a suspension of the Lender's Rights Decision. I was told that discussions continue between PFI and the Authority as to the terms of the letter to be sent to Existing Customers, but that PFI had agreed in principle that such a letter should now be sent.

8. I gave an oral decision dismissing the renewed application following the hearing. What follows are my reasons, based on the oral decision.

Background

9. The Authority's decision to issue both the First and Second Supervisory Notices is based on the facts and circumstances described below, as set out in the respective Notices, as supplemented by matters I was told about at the hearing. I should emphasise at this stage I have made no definitive findings of fact on any of the matters that have not been accepted as common ground which will have to be resolved through the substantive hearing of the reference, so I will seek to indicate where matters which I describe are the subject of dispute.

10. PFI is a small business based in Bristol and its business model previously included selling premium vacuum cleaners door-to-door. Customers could purchase the cleaners by cash or on credit. The credit was either supplied directly by PFI, or PFI would broker credit to another lender. On 13 November 2018 PFI told the Authority that it had ceased its sales activities. Its activities are now confined to collecting outstanding payments under credit agreements with Existing Customers and servicing the vacuum cleaners that it previously sold.

11. Mr Stewart explained that there were currently 1,134 active credit agreements with existing customers, with a total principal amount outstanding under those agreements in the region of £400,000. Approximately £20,000 was collected under these agreements every month. Since PFI had ceased taking on new business, the cash flow necessary to enable PFI to meet its servicing commitments to Existing

Customers (approximately 100 services a month) could only come from these collections so that if the Lender's Rights Decision was not suspended PFI would not have the resources to meet its servicing commitments.

12. On 1 October 2015, PFI was authorised by the Authority to conduct the following regulated activities:

(1) Agreeing to carry on a regulated activity;

(2) Credit broking;

(3) Entering into a regulated credit agreement as lender (excluding high-cost short-term credit, bill of sale agreements, and home collected credit agreements); and

(4) Exercising/having the right to exercise the lender's rights under a regulated credit agreement (excluding high-cost short-term credit, bill of sale agreements, and home collected credit agreements).

13. At the time of its authorisation, the Authority imposed a requirement on PFI that it should not canvass regulated borrower-lender-supplier agreements or regulated consumer hire agreements off trade premises.

14. The Second Supervisory Notice recites a considerable number of what the Authority regards as failings on the part of PFI to meet the Authority's regulatory requirements both in the manner in which it deals with its customers and the manner in which it has dealt with the Authority. In addition, the Authority makes reference to PFI's connection to persons who the Authority regards as being unfit. On the basis of those alleged failings, the Authority considers that PFI is failing to satisfy the threshold condition in paragraph 2E of Schedule 6 to FSMA (suitability). That provision refers to the requirement that to be authorised a firm must be a fit and proper person having regard to all the circumstances, including the need to ensure that its affairs are conducted in an appropriate manner, having regard in particular to the interests of consumers, whether the firm was complying with requirements relating to the provision of information to the Authority and whether the firm's business is being managed in such a way as to ensure that its affairs will be conducted in a sound and prudent manner.

15. The failings on which the Authority relies can be summarised under a number of headings as follows.

Canvassing off Trade Premises

16. The Authority says that PFI has been trading in breach of the requirement imposed upon it when it became authorised by attending the homes of consumers, without a prior appointment, with a view to persuading them to enter into credit agreements in order to purchase vacuum cleaners.

17. There is a significant dispute between the parties as to the extent to which PFI has been engaged in the practice of canvassing consumers to enter into credit agreements at their homes. That dispute stems to a large extent because there is no

common ground as to what the statutory definition, contained in s 48 of the Consumer Credit Act 1974 ("CCA") prohibits. Mr Stewart explained PFI's business model when it came to selling vacuum cleaners on credit. According to him, vacuum cleaners were only sold on credit to existing customers, that is customers who already owned a vacuum cleaner purchased from PFI. At the point at which it was necessary to arrange an appointment with the customer, at his home, to carry out the servicing of his existing vacuum cleaner, contact would be made with the customer by telephone to arrange the service and he would be told that the agent carrying out the servicing would also be in a position to discuss the sale of a new vacuum cleaner. It is not clear from Mr Stewart's explanation, as to whether that conversation for the home visit would have involved the customer giving explicit consent to discussions taking place with him at his home as regards the provision of credit.

18. It was apparent from Mr Stewart's explanation that PFI's position was that all but a few of the sales of new vacuum cleaners on credit which occurred during the course of a home visit which had been set up on this basis did not involve a breach of the requirement imposed upon PFI not to canvass credit agreements off trade premises, on the basis that the conversations took place in response to a request made by the customer.

19. The Authority's position is that although the factual circumstances of each sale would need to be examined, it is likely that many, if not substantially all, of the sales carried out in this manner would have breached the requirement not to canvass credit agreements off trade premises, it being doubtful whether it could be said that the canvassing took place in response to a request made by the customer.

20. I was shown a witness statement obtained from one customer, whose evidence was that PFI made a prearranged visit to a customer's house, in order to service a vacuum cleaner and then made no attempt to do so. The evidence was that instead PFI's representative pressurised the customer into purchasing a new vacuum cleaner on credit in circumstances where the customer had no intention prior to the visit of purchasing a vacuum cleaner or entering into a credit agreement, so that although the visit was prearranged, the true nature of it was hidden from the prospective customer. Mr Stewart observed in relation to this customer, that in due course when the customer complained PFI terminated the agreement and the vacuum cleaner was returned at no cost to the customer.

Affordability checks

21. It appears to the Authority that the firm has entered into consumer credit agreements on a number of occasions without conducting adequate creditworthiness assessments, as required to do so under the relevant requirements of the Authority's Handbook (CONC 5.2.1 (R).

22. I was shown a witness statement obtained from one customer, whose evidence was that she was pressurised into entering into an agreement for the purchase of a vacuum cleaner on credit. The customer was asked whether she had a job. When she answered that she did not, she was asked whether she had worked before and PFI's

agent then used information about her previous job on a credit application, including her previous salary, as if she were still in that employment, which the customer did not notice at the time. This agreement was also cancelled at no cost to the customer.

Paying due regard to the interests of customers

23. The Authority considers that PFI's sales practices are in contravention of Principle 6 of the Authority's Principles for Businesses, which requires a firm to pay due regard to the interests of its customers and treat them fairly. In particular, the Authority says there is evidence that PFI has targeted customers with credit agreements which are unsuitable for them, by virtue of their age, poor credit history, indebtedness or disability and has subjected customers to high-pressure selling, aggressive or oppressive behaviour.

Misleading the Authority

24. The Authority believes that it has been misled by PFI on a number of occasions, including by representing that it believed it had permission to canvass off trade premises from its previous regulator, the Office of Fair Trading (which was not correct) and representing to the Authority when seeking a variation of its permission to enable it to canvass off trade premises that it had not completed any credit agreements which would have required the permission which was being sought in the application when it had previously entered into many such agreements.

Failing to inform the Authority of relevant matters

25. The Authority says that PFI is under investigation by another regulatory authority in respect of the way that it conducts its business and, in breach of the Authority's requirements (SUP 15.3 .15 (R) has failed to notify the Authority of this investigation. The Authority also says that PFI failed to notify the Authority that it was in breach of the requirement not to canvass off trade premises, in breach of the requirement of Principle 11 of the Authority's Principles for Business to be open and cooperative in its dealings with the Authority.

Unreliability of information provided by PFI to the Authority

26. The Authority refers to a number of occasions where PFI indicated that it would be taking various steps, such as winding down its business within a particular timescale, which have not materialised, despite reminders of outstanding actions being given by the Authority.

PFI's connection to unfit persons

27. The Authority says that PFI has substantial connections to another entity operating a similar business model to PFI, and individuals connected with that entity, which call into question whether PFI is fit and proper. That entity (referred to in this decision as X Limited) is considered by the Authority to be a controller of PFI. X Limited's consumer credit licence was revoked in 2012 and its appeal against that decision was dismissed by the First-tier Tribunal in the same year. The individual who

the First-tier Tribunal found to be the ultimate controller of X Limited and therefore also of PFI, was publicly censured for his role as a controller of X Limited.

28. X Limited has a direct debit collection facility. That facility is provided to PFI free of charge for the purpose of collecting payments from Existing Customers on behalf of PFI and is the only means available to collect payments due from Existing Customers. The Authority therefore has concerns about the involvement of X Limited in the process of collecting sums due to PFI from Existing Customers.

29. The Authority has expressed concerns as to whether by providing this collection facility X Limited was carrying out the regulated activity of debt administration for which it had no permission. Mr Stewart explained that although the necessary direct debit guarantee was given to customers by X Limited, in fact X Limited had an agreement with a regulated commercial provider of direct debit facilities to provide the collection service in practice.

Basis of the Supervisory Notices

30. On the basis of the matters summarised at [9] to [29] above, the Authority considers that PFI is not fit and proper having regard to all the circumstances and it appears to the Authority that PFI is failing to satisfy the threshold condition in paragraph 2E of Schedule 6 to FSMA (suitability). In addition, the Authority considers that consumers are likely to continue to be harmed by PFI's practices if it is permitted to continue trading with its current permissions. Accordingly, the Authority considers that the action it is taking and requires PFI to take is appropriate and proportionate in order to advance the Authority's consumer protection objective.

PFI's response

31. PFI takes issue with most of the matters on which the Authority has relied in giving the Supervisory Notices. In short, it says that the problem with the lack of licence to canvass off trade premises arose due a mistake due to confusion rather than any deliberate attempt to ignore the rules. It denies that it failed to make appropriate affordability checks. It disputes the notion that its sales practices are in contravention of Principle 6 and where issues over sales practices have been raised with PFI it has dealt robustly and believes all customers who expressed dissatisfaction were reimbursed and contracts cancelled. PFI does not accept that the Authority has been misled on any occasion. In particular, it denies that it entered into agreements which arose as a result of canvassing off trade premises knowing that it had no licence to do so. It does, however, accept that it failed to notify the Authority that an investigation had been started by another regulator but that was due to its understanding that it was only necessary to notify the Authority if they were to be charged with an offence.

32. PFI say that consumers will be directly affected if it is unable to exercise its rights under the credit agreements with Existing Customers. If they are unable to collect monies owed to them, then they will be unable to provide the maintenance services that they have contracted to provide, the vacuum cleaners having been sold on the basis that they have a long life expectancy as well as an annual service for life.

This will affect not only customers who are still in the process of paying off their credit balances, but the thousands of customers who have satisfied their debts and are still reliant on the annual service of their machines. Selling the loan book is not an option as PFI has an ongoing commitment for the annual service which can only be undertaken by an authorised distributor of the vacuum cleaners concerned otherwise it will invalidate the warranty on the product. PFI is seeking to identify a distributor who would be able to take on the ongoing service obligation which is an integral part of the finance package, but it will be unable to finance this if there is no ability for it to continue to collect monies owed to it.

33. As far as PFL's direct debit collection facility is concerned, PFI say that the Authority has made no complaint regarding the operation of the collection processes and indeed has admitted that it has not specifically analysed the way in which PFI has carried out its collecting activities to date. Therefore, they see no justification for PFI being prevented from exercising its right to collect monies from customers through the use of that facility.

Relevant law

34. Pursuant to Rule 5(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008 the Upper Tribunal has the power to direct that the effect of the decision in respect of which the reference is made (in this case the giving of the Supervisory Notices) 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."

35. It is my view that in determining the Suspension Application I am only concerned with whether the condition in Rule 5(5) (a) is met and in particular with the question as to whether I can be satisfied that the suspension of the effect of the Supervisory Notices would not prejudice the interests of any consumers intended to be protected by the relevant notices.

36. The key principles to be applied in considering applications under Rule 5 (5) were set out by this tribunal in *Walker v FCA* (FS/2013/0011) and *PDHL v FCA* [2016] UKUT 0129 (TCC). I need not set out the relevant passages in those decisions in full again. The principles to be applied can be summarised 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) Detriment to the applicant, such as it being deprived of its livelihood, is not relevant to this test: see *Walker* at [21];

(4) 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

(5) 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].

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

38. PFI relies on the matters set out at [31] to [33] above as its basis for the Suspension Application.

Discussion

39. As I observed at [37] above, it is necessary for me to carry out a balancing exercise in light of all relevant factors and decide whether or not a suspension should be granted.

40. As is apparent from the authorities, the burden is on PFI to satisfy the Tribunal that the interests of consumers will not be prejudiced if a suspension were to be granted. Because PFI is no longer writing new credit business, the focus of the Tribunal's enquiry is on whether I can be satisfied that consumers will not be prejudiced were PFI to be permitted to continue to collect monies due to it under credit agreements it has entered into with Existing Customers, under its existing collection arrangements.

41. In that context I do not need to consider to any material extent the past history of the manner in which PFI has carried on its lending business with its customers. Those matters would obviously be highly material were PFI seeking to contest the removal of its permission to write new business.

42. However, there is one aspect of PFI's past activities which is highly material to my assessment, which is the question as to whether a significant number of the agreements with Existing Customers were entered into in breach of the requirement

not to canvass credit agreements off trade premises. That point is highly material because if there has been a breach of such requirement, then the agreements concerned will be unenforceable, unless validated by the Authority upon an application in that regard made by PFI.

43. Section 48 CCA contains the definition of "canvassing off trade premises" as follows:

> " (1) An individual (the "canvasser ") canvasses a regulated agreement off trade premises if he solicits the entry (as debtor or hirer) of another individual (the "consumer ") into the agreement by making oral representations to the consumer, or any other individual, during a visit by the canvasser to any place (not excluded by subsection (2)) where the consumer, or that other individual, as the case may be, is, being a visit—
>
> (a) carried out for the purpose of making such oral representations to individuals who are at that place, but
>
> (b) not carried out in response to a request made on a previous occasion.
>
> (2) A place is excluded from subsection (1) if it is a place where a business is carried on (whether on a permanent or temporary basis) by—
>
> (a) the creditor or owner, or
>
> (b) a supplier, or
>
> (c) the canvasser, or the person whose employee or agent the canvasser is, or
>
> (d) the consumer."

44. As mentioned at [13] above, it was a requirement of PFI's Part 4A permission that it should not canvass regulated borrower-lender-supplier agreements off trade premises. The agreements that PFI entered into with Existing Customers were borrower-lender-supplier agreements.

45. If PFI has acted in breach of the requirement not to canvass agreements off trade premises, then s 26A FSMA comes into play. This provision deals with the consequences of a firm having engaged in 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) and, so far as relevant, provides:

> "(1) An agreement that is made by an authorised person in contravention of section 20 is unenforceable against the other party if the agreement is entered into in the course of carrying on a credit-related regulated activity involving matters falling within section 23(1C) (a).
>
> (2) The other party is entitled to recover—
>
> (a) any money or other property paid or transferred by that party under the agreement, and
>
> (b) compensation for any loss sustained by that party as a result of having parted with it.

(3) In subsections (1) and (2) "agreement" means an agreement—

(a) which is made after this section comes into force, and

(b) the making or performance of which constitutes, or is part of, the credit-related regulated activity."

46. If any of the agreements with Existing Customers are unenforceable by virtue of s 26A FSMA it would be open to PFI to apply to the Authority pursuant to s 28A FSMA for a validation order, which the Authority may grant if it is satisfied that it is just and equitable to do so in the circumstances of the case. In the absence of a validation order, the agreements may not be enforced against the relevant customers.

47. As I have previously indicated, it is not for me at this stage to make definitive findings and accordingly I cannot determine now that the agreements referred to at [11] above are unenforceable.

48. However, on the basis of such evidence that is currently available, there is a serious case to answer on the canvassing off trade premises issue. On the basis of the explanation given by Mr Stewart of the selling process, as summarised at [17] above, there is no clarity as to whether it could be said that the customer had given explicit consent to being canvassed at his home regarding the provision of credit for the purchase of a vacuum cleaner. PFI have not produced any evidence as to how on its business model the sales process should have been conducted so as to ensure that no unlawful canvassing off trade premises took place, for example by producing written procedures as to how the initial telephone conversation from PFI's office was to be conducted so as to ensure that the customer's consent to being canvassed at home was obtained, or a script that was used for that purpose.

49. There is also a legal issue to be determined, namely whether the contents of such conversations could constitute a "request made on a previous occasion" within the meaning of s 48 CCA.

50. Furthermore, such evidence as there was before me, in particular the witness statement from a customer referred to at [20] above, gives rise to serious concerns that the process did not involve a specific request from the customer to be canvassed regarding the provision of credit before the visit to his home. I had no evidence from PFI (on whom the burden lies) that what happened in that case was in breach of the procedures that had been laid down and was not typical of the other sales which took place. The fact that in that particular case the agreement was terminated without cost to the customer does not assist PFI, but rather indicates that what had happened was not appropriate.

51. Therefore, I cannot be satisfied at this stage that PFI has not, in relation to most, if not all, of the agreements with Existing Customers, acted in breach of the requirement not to canvass off trade premises and this is a strong factor in favour of me dismissing the Suspension Application.

52. Similarly, on the basis of such evidence as was before me, and in particular the witness statement referred to at [22] above, there are serious concerns that there are Existing Customers who have entered into credit agreements which are unaffordable. At this stage, there is much less evidence that such a practice was widespread and accordingly it would be wrong for me to place much weight on this factor.

53. As regards the debt collection practice, whilst there are concerns regarding the role of X Limited and the fact that it may have been carrying out debt administration activities without the necessary authorisation, the Authority has candidly admitted that it has not at this stage carried out any significant analysis of the debt collection process and it is difficult to say that at this stage there are serious concerns that consumers would be prejudiced if that process were allowed to continue. Accordingly, it would be wrong for me to place much weight on this factor at this stage.

54. However, the fact that the Notification Decision has not yet been implemented by PFI is a relevant factor to which I should give some weight. In view of the serious concerns which I have identified above, the question as to whether it would be appropriate to continue to allow PFI to collect outstanding sums from Existing Customers without those customers having been informed of the fact of the issue of the Supervisory Notices, the current position with PFI's business and their rights under the law should be considered.

55. The process set out in the First Supervisory Notice by which the letter to Existing Customers was to be settled and then sent was not entirely satisfactory. It depended upon PFI itself preparing a draft for the Authority to consider, without clear indications as to what the letter should contain. As I indicated at the initial hearing held on 29 October, in view of PFI's hostility to such a letter being sent, it would be more appropriate for the Authority to prepare a draft for PFI's consideration. That has now happened, but it was clear at the hearing on 21 November that the parties were far apart in terms of what the letter should contain. PFI has some legitimate concerns with the Authority's draft, notably the extensive references to provisions of the CCA and other legislation which it will be difficult for the kind of consumer with whom PFI has dealt to appreciate the significance of. These consumers are unlikely to be able to afford to pay for legal advice on these issues, even if expert advisers were available in the area in which they live.

56. However, PFI's response to the Authority's draft was inappropriate. Rather than give any detailed comments on the Authority's draft, it prepared a short counter draft of its own which did not explain to any material extent the effect of the First Supervisory Notice or the nature of the customers' rights. Furthermore, the draft proposed by PFI gave a misleading impression to the Existing Customers as to the reasons for the variation of PFI's permissions by the First Supervisory Notice and wrongly suggested that the customer could settle his account in part or in full with PFI at any time, a suggestion that contradicted the terms of the First Supervisory Notice.

57. The fact that PFI has not engaged seriously with the terms of the Authority's draft letter and its approach in its own draft is in my view a strong factor against the granting of the Suspension Application.

58. There is one factor which tends in favour of the issue of the Suspension Application. That is the prejudice that Existing Customers may suffer if PFI is unable to provide the maintenance services that they have contracted to provide because of a lack of funds if they are unable to continue to collect payments under the existing credit agreements.

Conclusion

59. In my view the balancing exercise comes out clearly in favour of dismissing the Suspension Application. The serious concerns regarding the canvassing off trade premises issue is sufficient in itself to justify the dismissal of the application. It would not be appropriate to agree to the application in circumstances where there is a serious concern that the agreements concerned are unenforceable as a matter of law. That concern overwhelmingly outweighs the prejudice to Existing Customers that may arise if PFI is unable to fulfil its obligations under the servicing arrangements agreed with the customers. In the absence of any evidence on the part of PFI to refute those concerns, and in the light of the position regarding the draft letter to Existing Customers, I cannot be satisfied that allowing PFI to continue to collect monies from Existing Customers under the relevant credit agreements will not prejudice the interests of consumers. In those circumstances, I must dismiss the Suspension Application.

60. As I indicated to the parties after the hearing, because of the restrictions that have been imposed upon PFI it is appropriate that the parties cooperate with a view to the substantive reference being progressed to a hearing as soon as possible. Subject to PFI filing the appropriate reference notice, the reference will now relate to the Second Supervisory Notice. The parties should therefore endeavour to agree directions to that end and submit them to the Tribunal for its approval as soon as possible.

JUDGE TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE

RELEASE DATE: 6 December 2018