



Appeal number: FS/2018/0058

FINANCIAL SERVICES – Decision notice terminating applicant’s permission under Part 4A – “suitability” threshold – reference dismissed

**UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)**

NORTH LONDON VAN CENTRE LIMITED

Applicant

-and-

THE FINANCIAL CONDUCT AUTHORITY

Respondent

TRIBUNAL

**JUDGE JONATHAN RICHARDS
GARY BOTTRIELL
MARK WHITE**

Sitting in public at The Rolls Building, Fetter Lane, London on 15 July 2019

Daniel Cotier-McInerney, director of the Applicant, for the Applicant

Adrian Berrill-Cox and Matthew Stone of the Financial Conduct Authority, for the Respondent

DECISION

1. The applicant (“NLVC”) carries on a vehicle sales business. Since 27 March 2015, it has been an “authorised person” under Part 4A of the Financial Services and Markets Act 2000 (“FSMA”). By a decision notice dated 18 September 2018 (the “Decision Notice”), the Financial Conduct Authority (the “FCA”) cancelled NLVC’s Part 4A permission. NLVC referred that decision to this Tribunal and this is our decision on that referral.
2. In making our determination, we have heard witness evidence from Mr Cotier-McInerney, the director of the Applicant, and from Mr Alexander Banerjea of the FCA’s Enforcement and Market Oversight Division.
3. NLVC had not complied with Tribunal directions requiring any witness evidence on which it relied to be set out in a statement served by 4 April 2019. However, the FCA made no objection to Mr Cotier-McInerney giving oral evidence at the hearing and Mr Berrill-Cox asked him some questions by way of cross-examination. We were satisfied that Mr Cotier-McInerney was a reliable and honest witness.
4. Mr Cotier-McInerney explained that he did not challenge any of the evidence contained in Mr Banerjea’s witness statement and we have therefore accepted all the evidence in that statement.

The applicable regulatory regime

The FCA’s power to cancel a registration

5. Section 55J of FSMA provides so far as relevant as follows:

55J Variation or cancellation on initiative of regulator

- (1) Either regulator may exercise its power under this section in relation to an authorised person with a Part 4A permission (“A”) if it appears to the regulator that—
 - (a) A is failing, or is likely to fail, to satisfy the threshold conditions for which the regulator is responsible...
- (2) The FCA’s power under this section is the power—
 - ...
 - (b) to cancel the Part 4A permission.

6. In in the Decision Notice, the FCA concluded that NLVC was failing to satisfy the “suitability” threshold condition set out in paragraph 2E of Schedule 6 of FSMA which provides that:

2E

Suitability

A must be a fit and proper person having regard to all the circumstances, including—

...

(c) the need to ensure that A's affairs are conducted in an appropriate manner, having regard in particular to the interests of consumers and the integrity of the UK financial system;

(d) whether A has complied and is complying with requirements imposed by the FCA in the exercise of its functions, or requests made by the FCA, relating to the provision of information to the FCA and, where A has so complied or is so complying, the manner of that compliance;

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

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

7. The FCA has published guidance relating to these threshold conditions in the section of the FCA Handbook entitled "Threshold Conditions" ("COND"). Paragraph 2.5.4(G) of COND reads, so far as material, as follows:

(2) Examples of the kind of general considerations to which the FCA may have regard when assessing whether a firm will satisfy, and continue to satisfy, the threshold conditions set out in paragraphs 2E and 3D of Schedule 6 to the Act include, but are not limited to, whether the firm:

(a) conducts, or will conduct, its business with integrity and in compliance with proper standards;

(b) has, or will have, a competent and prudent management; and

(c) can demonstrate that it conducts, or will conduct, its affairs with the exercise of due skill, care and diligence.

8. COND 2.5.6 provides further guidance on the "suitability" threshold condition as follows:

Examples of the kind of particular considerations to which the FCA may have regard when assessing whether a firm will satisfy, and continue to satisfy, this threshold condition include, but are not limited to, whether:

(1) the firm has been open and co-operative in all its dealings with the FCA and any other regulatory body (see Principle 11 (Relations with regulators)) and is ready, willing and organised to comply with the requirements and standards under the regulatory system...

Applicable reporting requirements

9. The FCA's decision to cancel NLVC's Part 4A permission was, to a significant extent, influenced by its belief that NLVC has consistently either failed, or failed to comply on time, with applicable reporting requirements. The relevant reporting requirements are set out in the "Supervision" section of the FCA Handbook, a document

that the FCA issued pursuant to its statutory obligation in s1L of FSMA to “maintain arrangements for supervising authorised persons” and references in this decision to “SUP” are to this document.

10. SUP16.3.13R required NLVC to submit periodic reports to the FCA. One such report was a “CCR007” which was required to be submitted annually. The obligation to submit CCR007s applies to firms with limited permissions to conduct credit-related regulated activities. The CCR007 does not require extensive information to be reported and instead simply requires details on:

- (1) The firm’s total revenue and its revenue from credit related activities in the period.
- (2) The number of transactions involving credit-related regulated activities in the period.
- (3) The number of complaints relating to credit-related activities received in the period.
- (4) The category of credit-related activity that generated the highest revenue in the period.
- (5) Total annual income for the purposes of calculating the fee due to the FCA.

11. SUP16.12.29C required NLVC to submit its annual CCR007 within 30 business days of its accounting reference date.

The Tribunal’s powers

12. Section 55Z3 of FSMA permits NLVC to refer the Decision Notice to the Tribunal. NLVC did so in a reference notice signed on 2 October 2018 and stamped as “received” on 16 October 2018. That reference was therefore received by the Upper Tribunal within 28 days of the date of the Decision Notice as required by paragraph 2(2) of Schedule 3 of the Upper Tribunal Rules.

13. The powers of the Tribunal on a reference are set out in s133 of FSMA. Since this reference does not involve a “disciplinary reference” or a reference under s393(11) of FSMA, the Tribunal’s powers are as set out in the following provisions of s133:

- (4) The Tribunal may consider any evidence relating to the subject-matter of the reference or appeal, whether or not it was available to the decision-maker at the material time....
- (6) In any other case [i.e. one not involving a disciplinary reference or a reference under s393(11) of FSMA], the Tribunal must determine the reference or appeal by either—
 - (a) dismissing it; or
 - (b) remitting the matter to the decision-maker with a direction to reconsider and reach a decision in accordance with the findings of the Tribunal.

(6A) The findings mentioned in subsection (6)(b) are limited to findings as to—

- (a) issues of fact or law;
- (b) the matters to be, or not to be, taken into account in making the decision; and
- (c) the procedural or other steps to be taken in connection with the making of the decision.

14. The scope of the Tribunal’s power under s133(6) and s133(6A) was considered in *Carrimjee v FCA* [2016] UKUT 0447 (TCC) and later cases including *Dr Saim Koksai T/A Arcis Management Consultancy v Financial Conduct Authority* [2016] UKUT 478 (TCC). We consider that the Tribunal’s powers can be summarised as follows:

(1) The Tribunal may consider evidence relating to the “subject-matter of the reference” that was not available to the FCA when it made its decision (s133(4) of FSMA). That “subject matter” is not limited to the question posed by s 55J of FSMA whether it “appears” to the FCA that NLVC is failing, or is likely to fail, the threshold requirements (see [30] and [31] of *Koksai*).

(2) If, having reviewed all the relevant evidence and the factors taken into account by the FCA in making its decision, and having made findings of fact in relation to that evidence and such other determinations of law as are relevant, the Tribunal considers that the FCA’s decision was one that was reasonably open to it, then the correct course is to dismiss the reference (see [27] of *Koksai*).

(3) If the Tribunal is not satisfied, in the light of its findings that the FCA’s decision was within the range of reasonable decisions, the correct course is to remit the matter back to the FCA under s133(6)(b) of FSMA ([28] of *Koksai*).

(4) The Tribunal would be entitled to conclude that the FCA’s decision was outside the range of reasonable decisions if it were to make findings of fact that were clearly at variance with findings made by the FCA and which formed the basis of the FCA’s decision (see [29] of *Koksai*).

Findings of fact

NLVC’s business

15. NLVC was incorporated on 24 November 2014. It draws up accounts to 30 November in each year. Initially NLVC carried on a business that included both selling and hiring vans. However, over the past couple of years, it has ceased the hiring activity and has focused on selling vans. At all material times, NLVC has had two directors: Mr Cotier-McInerney and Mr Mark Mullen.

16. On 27 March 2015, NLVC obtained approval as an “authorised person” under FSMA with a limited permission under Part 4A of FSMA to carry on consumer credit

activities including credit broking. Mr Cotier-McInerney was designated as the “CF8” (i.e. the person responsible for the regulated apportionment and oversight function).

17. NLVC makes relatively little money from its regulated activity: its CCR007 for the year ended 30 November 2016 recorded just £1,850 of revenue from regulated activities. However, its Part 4A permission is nevertheless important to its business since the ability to introduce customers to sources of credit enables it to sell vans and approximately 30% to 40% of NLVC’s sales are made on credit.

The failures to submit CCR007s on time or at all

18. NLVC’s first CCR007 return (for its year ended 30 November 2015) was due on 14 January 2016. In the week before the due date, the FCA sent NLVC a letter, which NLVC received, warning of the impending deadline for submission of the return. However, the CCR007 was not received by that due date. In February 2016, the FCA sent NLVC three reminder letters, all of which were received. On 1 March 2016, the FCA sent a letter imposing a “late regulatory return administrative fee” of £250 and reminding NLVC of the need to submit the CCR007 within 10 days. NLVC paid the fee, but still did not submit the return. The CCR007 for the year ended 30 November 2015 was eventually filed on 15 June 2016, 155 days late.

19. A similar pattern applied to the submission of the CCR007 for the year ended 30 November 2016. Despite receiving a reminder letter before the deadline, and three reminder letters after the deadline (together with the imposition of a further late return fee of £250), NLVC did not submit that return.

20. On 1 September 2017, the FCA called NLVC to ask about the progress of the CCR007. On the instructions of Mr Cotier-McInerney, NLVC’s receptionist told the FCA that it would be submitted that day. However, when the CCR007 still did not materialise, the FCA sent NLVC a notice on 27 September 2017 warning that it was proposing to cancel the Part 4A permission. That prompted Mr Cotier-McInerney to call the FCA to say that he had sent the return to the FCA’s Enforcement team on 14 September 2017. However, the FCA had no record of receiving the return through its computerised “GABRIEL” system.

21. Eventually, the return was submitted on 13 October 2017, 270 days late and just in time for the FCA to withdraw its threat to cancel the Part 4A permission. In a letter of 17 October 2017, the FCA informed NLVC that it was discontinuing its action to cancel the Part 4A permission. However, it provided a clear warning as to future conduct in the following terms:

Please note that if your firm fails to submit either of the next two CCR007 returns by the relevant due dates... the Authority would recommend cancellation of your firm’s Part 4A Permission, even if the CCR007 were to be later submitted.

22. The CCR007 for NLVC’s year ended 30 November 2017 was due on 16 January 2018. NLVC received the same set of reminders as in previous years, both in the lead-up to this deadline and afterwards. As in previous years, NLVC received an invoice for

a £250 late filing fee which it paid on 16 March 2018, but it still did not submit the return. By the date of the hearing, NLVC had still not submitted the CCR007.

23. On 29 August 2018, the FCA sent NLVC a notice warning that it was proposing to cancel its Part 4A permission and gave it until 14 September 2018 to make representations. NLVC made no representations by the due date and the FCA issued the Decision Notice on 18 September 2018.

24. NLVC did not submit a CCR007 for its financial year ended 30 November 2018 which was due on 16 January 2019 and that CCR007 had not been submitted by the date of the hearing.

The reasons for the failures to submit the CCR007s

25. Mr Cotier-McInerney explained that the reason for the delayed submission of the first CCR007 (i.e. that due for the year ended 30 November 2015) was that NLVC did not really understand what needed to be done. He did not feel that the people he had involved in the business at the time were equipped to perform basic tasks. He felt that the problems were widespread and involved some dishonesty: for example, an employee was collecting some payments from customers who had hired vans to meet fines (which we took to mean parking and similar fines) but was not passing those on to NLVC which meant that Mr Cotier-McInerney had to spend a lot of time dealing with threats of associated legal proceedings and the attendant cash flow implications for the business. All of this was happening at the time Mr Cotier-McInerney and his fiancée were having their first child. He was horrified to find that the CCR007 had not been submitted and he submitted that himself. As a consequence of these and other experiences, Mr Cotier-McInerney decided that he needed to “step back in and take control”.

26. We accept Mr Cotier-McInerney’s evidence that he had some difficulties with staff and legal disputes. We are also prepared to make some allowance for the fact that the year ended 30 November 2015 was the first in which NLVC had been subject to FCA regulation. However, while there were some extenuating circumstances, the reasons put forward do not come close to justifying a delay of 155 days in submitting the CCR007 for the year ended 30 November 2015. Mr Cotier-McInerney might well feel let down by his staff, but ultimately the responsibility for submitting the CCR007 lay with NLVC (and indeed, given his role as the “CF8”, Mr Cotier-McInerney was himself accountable for any failures to discharge that responsibility). Therefore, if NLVC’s staff were not equipped to file the CCR007, it was incumbent on NLVC to obtain assistance from somewhere else to enable the return to be filed. While we accept that the birth of Mr Cotier-McInerney’s first child would have caused some disruption to his business life, that might excuse a delay of a couple of weeks, not a delay of over five months. The delay in filing the CCR007 for the year ended 30 November 2015 was not reasonable in the circumstances.

27. We accept Mr Cotier-McInerney’s evidence that, in late 2016, he became severely ill. He was in and out of hospital for some 6 to 8 months. His illness, which was first thought to be a stroke, but later diagnosed as problems with his vagus nerve affected

his memory. Understandably, the amount of time that Mr Cotier-McInerney was able to devote to NLVC reduced and he asked a Mr Ciprianou (who had been involved with NLVC from its formation) to take charge of the company. Also, around this time, Mr Mullen, the other director of NLVC, lost a child which understandably meant that he was not able to focus on the business for some time.

28. Mr Cotier-McInerney's illness was severe and excuses some delay in the filing of the CCR007 for the year ended 30 November 2016. Similarly, Mr Mullen's loss of his child would naturally have impacted on his ability to help with NLVC's filing obligations. However, neither event excuses a delay of 270 days. The CCR007 required only relatively basic information which, in spite of Mr Cotier-McInerney's illness and Mr Mullen's understandable grief should not have taken that length of time to prepare. While we can understand that Mr Cotier-McInerney felt let down by Mr Ciprianou, failings by Mr Ciprianou cannot absolve either NLVC or Mr Cotier-McInerney of their responsibilities to provide the FCA with the relatively modest information that is required in the CCR007.

29. Mr Cotier-McInerney himself accepted responsibility for the failure to file the CCR007 for the years ended 30 November 2017 and 30 November 2018 though, as we have noted, identifying the precise individual at fault is not of great significance since the obligation was that of the Company. By way of explanation, he pointed to the time that it was taking to sort out legacy issues affecting the business and the fact that NLVC was not just behind with its regulatory filings to the FCA, it also had outstanding VAT and corporation tax returns. Mr Cotier-McInerney explained that he was so busy trying to sort out previous years' tax returns, for example, that he did not have time to deal with current returns. Mr Cotier-McInerney also accepted that he had prioritised vehicle sales with the result that he had not spent enough time on the "compliance" side of the business. In response to questions from the Tribunal, Mr Cotier-McInerney confirmed that he was not seeking to excuse the failure to file the return for the year ended 30 November 2018 on the basis that he thought, by then, that his Part 4A permission had been cancelled.

30. It was to Mr Cotier-McInerney's credit that he frankly accepted his failings. However, his explanation does not come close to justifying or explaining a complete and protracted failure to submit basic regulatory filings.

The outlook for the future

31. Mr Cotier-McInerney invited us to conclude that NLVC is now better placed to comply with its regulatory and other obligations. He explained that NLVC has ceased its activity of hiring vans so it has more time to devote to its regulatory obligations. He told us that a Mr Cianan O'Shea, who has experience as an estate agent and who has formed his own car company, is now involved with NLVC and he has been liaising with Mr Matthew Stone at the FCA. He also explained that NLVC has a book-keeper on site. More generally, Mr Cotier-McInerney said that his experience with the FCA had made him realise that the Part 4A permission was important to NLVC and could be lost if it did not meet its regulatory obligations. In effect, he said NLVC had learned its

lesson and would, if permitted to keep its permission, comply with its obligations in the future.

32. We are unable to share Mr Cotier-McInerney's confidence. We formed the clear impression that he is well-meaning and honest, but has not put NLVC in a position to comply with its regulatory obligations. Mr O'Shea has been involved with NLVC since before September 2018 (as we were shown a note of a telephone call between him and the FCA from that date that referred to an earlier telephone conversation in which he was involved). However, despite his involvement, the CCR007s for the years ended 30 November 2017 and 30 November 2018 have not been filed. While we accept that NLVC has ceased its activity of hiring vans, so freeing up management time, we are not satisfied that this would lead to a material improvement in its compliance record. The CCR007s were not lengthy forms requiring detailed information. Therefore, we do not consider that lack of management time alone explains why they were filed so late, or not at all. It follows that even though the management of NLVC now has more time at its disposal we are not satisfied that its compliance record would improve if it maintained its Part 4A permission.

Discussion

33. In his oral submissions, Mr Cotier-McInerney repeatedly stressed that NLVC's position was that it acknowledged its failings, was not criticising the FCA's decision but was simply asking for "one last chance" to keep its Part 4A permission.

34. The problem with that approach is that, before we can interfere with the FCA's decision, we need to be satisfied that the decision was not reasonably open to it (see [14(2)] above). When we pressed Mr Cotier-McInerney to identify why he considered the FCA's decision to be wrong, he was eventually driven to submit that the FCA erred by revoking the permission instead of giving NLVC "one last chance".

35. We reject that submission. At the time of the Decision Notice, the FCA was confronted with a sustained pattern of non-compliance with the requirement to submit the CCR007 over three consecutive years. The excuses put forward did not justify the lengthy delays, or, in the case of the return for the year ended 30 November 2017, the complete failure to file the return. Moreover, NLVC appeared to be disregarding the FCA's threats of sanctions: despite being told in October 2017 that if its next two CCR007s were late the FCA would recommend removal of its permission, it did not file the next CCR007 at all, still less on the due date.

36. In those circumstances, the FCA was entitled to conclude that:

(1) NLVC was not "ready, willing and organised" to comply with its regulatory obligations (see COND 2.5.6 quoted at [8] above).

(2) NLVC did not have a "competent and prudent management" (see COND 2.5.4(G) referred to at [7] above) since it could not comply with a requirement to provide limited and basic information about its business in any reasonable timescale.

(3) NLVC's business was not being conducted in an appropriate manner having regard to the interests of consumers (see paragraph 2E(c) of Schedule 6 FSMA). We accept the FCA's submission that the FCA does not carry out day-to-day supervision of small firms such as NLVC with limited permissions. Therefore, from the FCA's perspective, the information in the CCR007s was vital as it provided the only "window" into NLVC's behaviour as an authorised person. When NLVC consistently failed to provide that information on time or at all, the FCA was entitled to be concerned that NLVC's business was being run in such a way that the FCA would not have any adequate notice of any problems, thereby prejudicing the FCA's ability to ensure that the interests of consumers were protected.

It follows that the FCA was entitled to conclude, in the Decision Notice, that NLVC did not meet the "suitability" threshold set out in paragraph 2E of Schedule 6 of FSMA.

37. The FCA did not, in their Statement of Case, seek to rely on a failure to submit the CCR007 for the year ended 30 November 2018 (which took place after the Decision Notice was issued) as a further reason to support their decision. However, since it was common ground that that CCR007 should have been, but was not, submitted we will observe only that this failure clearly does not undermine the FCA's decision and nor does it support NLVC's argument that the FCA should have given it "one last chance".

38. It is important to have in mind questions of proportionality. Revoking NLVC's Part 4A permission could have significant implications for its business since some 30% to 40% of all its sales involve the purchaser taking on credit. We consider the FCA's decision to revoke the Part 4A permission to be proportionate for the following reasons:

(1) The information in the CCR007s is important to the FCA's performance of its duty to regulate NLVC. NLVC is not, therefore, losing its permission simply because of a failure to comply with a mere technical or administrative requirement.

(2) The non-compliance is protracted (spanning multiple financial years). NLVC is not, therefore, losing its permission because of isolated failures.

(3) Since the information required by the CCR007s is so limited, it is appropriate that NLVC's persistent inability or unwillingness to provide that information in a reasonable timescale should cause the FCA material concern.

(4) Since the Part 4A permission is so important to NLVC's business, it was reasonable for the FCA to expect NLVC to make much greater efforts to comply with its regulatory obligations.

39. If NLVC had satisfied us that it had made sufficient changes to the way it operates as to give confidence that it could, and would, comply with its regulatory obligations in the future, we would have considered interfering with the FCA's decision on the basis set out at [14(4)] above. However, for reasons that we have given, NLVC has not satisfied us on this matter.

Disposition

40. For the reasons set out above, we are not satisfied that the FCA's decision was outside the bounds of reasonable decisions. Accordingly, NLVC's reference is dismissed.

JUDGE JONATHAN RICHARDS

RELEASE DATE: 6 August 2019