[2020] UKUT 0002 (TCC)

Reference number: FS/2018/057

FINANCIAL SERVICES– strike out application - reference of Supervisory Notice removing regulated activity of exercising lender's rights and duties under regulated credit agreements - firm's Part 4A permission subsequently cancelled for failure to file regulatory returns - whether reference should be struck out on the basis that it has no reasonable prospect of succeeding -yes- Rule 8 (3) (c) The Tribunal Procedure (Upper Tribunal) Rules 2008

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

P.F. (INTERNATIONAL) LIMITED	**Applicant**
- and -	
THE FINANCIAL CONDUCT AUTHORITY	**The Authority**

TRIBUNAL: Judge Timothy Herrington

The Tribunal determined the matter on 8 January 2020 without a hearing with the consent of the parties having considered the written representations made by the parties

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. PFI referred the matter to the Tribunal, by a reference notice dated 13 September 2018. An application that the decision to remove the fourth of the activities referred to above (the "Lender's Rights Decision") be suspended pending the determination of the reference pursuant to Rule 5 (5) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Rules") was dismissed by this Tribunal on 29 October 2018.

3. The Authority 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. A renewed application to suspend the Lender's Rights Decision was dismissed by this Tribunal on 21 November 2018. Written reasons for that decision were released on 6 December 2018 ([2018] UKUT 0400 (TCC)) and the reader is referred to that decision for further background information relating to this reference which is not repeated here.

4. PFI subsequently referred the Second Supervisory Notice to this Tribunal which made directions that the reference would now relate only to the Second Supervisory Notice. PFI only sought to challenge the Lender's Rights Decision, having ceased all other regulated activities.

5. The substantive hearing of the reference has been listed to be heard between 23 and 27 March 2020.

6. In June 2019, the Authority's Threshold Conditions Team commenced fresh regulatory proceedings against PFI in respect of matters unrelated to the subject matter of this reference.

7. Pursuant to those proceedings, on 13 September 2019, the Authority gave PFI a Decision Notice cancelling its Part 4A permission for failing to submit four types of regulatory returns which it had been required to submit to the Authority by 16 January 2019. PFI had 28 days to refer the Decision Notice to this Tribunal, but it did not do so. The Authority therefore gave the Firm a Final Notice ("the Final Notice") confirming that the Firm's permission was cancelled on 8 November 2019.

The Strike Out Application

8. On 22 November 2019, having previously had no response from PFI's solicitors to an invitation in a letter dated 8 November 2019 to withdraw the reference in the light of the Final Notice, the Authority applied to the Tribunal for a direction that PFI's reference be struck out.

9. The application was made on the basis of Rule 8(3)(c) of the Rules which provides that the Tribunal may strike out the whole or part of proceedings where it considers there is no reasonable prospect of the applicant's case, or part of it, succeeding.

10. In support of the application, the Authority contends that now that PFI has had its Part 4A permission cancelled by virtue of the Final Notice, there is no longer any utility to PFI's continued pursuit of its reference. The Authority contends that even if PFI were to be successful in the proceedings and the Tribunal were to determine that the Authority's action in imposing the Second Supervisory Notice was not within the range of reasonable decisions available to it in the circumstances[1], the Firm's Part 4A permission nonetheless will remain cancelled by virtue of the Final Notice; the Tribunal's determination of this reference will not change that. Since PFI has no permission to conduct any regulated activity and is no longer authorised, the Second Supervisory Notice has no continuing effect. In the Authority's view, even a successful challenge to the validity of the Second Supervisory Notice in the Tribunal would be academic and of no practical use to PFI.

11. The Authority submits that PFI's reference now cannot possibly "succeed" in any true sense of the word, because the very matter on which the Tribunal must rule in this reference has been rendered moot by the existence of the Final Notice, the lack of continuing effect of the Second Supervisory Notice and the fact that PFI is no longer authorised to conduct any regulated activity.

12. The Authority contends that PFI will suffer no prejudice from the striking out of its reference, because as matters stand its current position (namely that it cannot carry out any regulated activity and therefore cannot exercise its rights as lender under any

[1] This is the basis on which the Tribunal has the right to interfere with the Authority's decision to issue the Second Supervisory Notice: see s 133 (6) and (6A) of the Financial Services and Markets Act 2000 as interpreted in *Carrimjee v FCA* [2016] UKUT 0447 (TCC) at [57] and [58].

of its outstanding credit agreements with its customers) cannot any longer be improved by its continued pursuit of the reference. In the circumstances, the Authority's view is that continuing the proceedings will have no benefit to PFI and will be a waste of both the parties' and the Tribunal's resources.

13. PFI resists the application. In its initial response to the application in a letter dated 6 December 2019 its solicitors stated that PFI wished "to pursue the reference as a matter of principle". In response to an invitation to provide more detailed reasons as to why the application was opposed, PFI's solicitors made further representations in a letter dated 19 December 2019 which can be summarised as follows:

(1) It would be a breach of natural justice if the application were granted. It is accepted that PFI has no extant permission to conduct any regulated activity and is no longer authorised by the Authority, but it is anxious that it is given the opportunity to have "their day in court" with the stated aim of PFI's name being cleared. PFI hopes that if it is successful before the Tribunal it will be provided with a platform to be able to rebuild its business and ultimately once again be authorised by the Authority and have permission to conduct regulated activities as before the First Supervisory Notice.

(2) PFI wishes the tribunal to have regard to the significant investment made by both parties, in relation to this matter, and especially to have regard to the hours of work and legal costs incurred in getting to this stage with the reference. The amount of work and legal costs incurred to date in getting to this stage with the reference relative to PFI's resources is significant and it is submitted it would be unreasonable, at this late stage, to deny PFI the opportunity to pursue the reference to a conclusion.

(3) PFI feels that the way the Authority has pursued it has been unfair, unreasonable and less than transparent and the reference will be an opportunity for such matters to be aired and considered as part of the overall case. PFI have felt the Authority have proceeded against it without substantive evidence and wish to challenge the reliance by the Authority on what PFI feels amounts to no more than assumptions and hearsay.

(4) PFI seeks the opportunity to challenge the narrative that this matter is one that is straightforward, and that the Authority are confident in their outcome and do not accept that if this is the case then why should the Authority wish the reference struck out rather than proving their case especially given both sides are likely to be trial ready with the hearing date looming fast.

14. The parties have agreed that I should determine the application without a hearing in on the basis of the submissions made by the Authority in its application, as summarised above, and the written representations made by PFI solicitors, as also summarised above.

Discussion

15. In deciding whether to make a direction to strike out proceedings I must have regard to the Tribunal's overriding objective in Rule 2 of the Rules. That Rule requires the Tribunal to deal with cases fairly and justly and, as provided in Rule 2 (2), includes dealing with the case in ways which are proportionate to the importance of the case and the complexity of the issues and ensuring, so far as practicable, that the parties are able to participate fully in the proceedings.

16. Consequently, the power to strike out must be exercised with care: see *Sharma v Financial Services Authority* (2010) FS/2010/0008 at [37], a decision of the Financial Services and Markets Tribunal, the predecessor tribunal to this Tribunal. As was stated by the Financial Services and Markets Tribunal in *Townrow v Financial Services Authority* (2012) FS/2012/007 at [11], no one should be deprived of access to justice summarily save for compelling reasons.

17. Therefore, as stated at [43] of *Sharma*:

> "The [Authority] must satisfy [the Tribunal] that there is no real prospect of [the applicant's] case succeeding. "Succeeding" means that [the applicant] must have a real prospect of securing from the Tribunal a determination as to the appropriate action which is more favourable to him than that contained in the Decision Notice."

18. The word "real" distinguishes "fanciful" prospects of success: see Lord Woolf in *Swain v Hillman* [1999] EWCA Civ 3053 at [7]. As was made clear by the Court of Appeal in considering the corresponding civil procedure rules applicable in the courts, which have consistently been regarded in this Tribunal as a source of helpful guidance, a statement of claim should not be struck out as disclosing no reasonable cause of action "save in clear and obvious cases, where the legal basis of the claim is unarguable or almost incontestably bad": see Sir Thomas Bingham MR in *X (Minors) v Bedfordshire CC* [1995] 2 AC 633 at page 693 E.

19. Furthermore, it is not the function of the courts or tribunals to decide hypothetical or academic questions. As Lord Justice-Clerk Thomson said in *Macnaughton v Macnaughton's Trustees* [1953] SC 387, 392:

> "Our Courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions, and that they have no concern with hypothetical, premature or academic questions…"

20. I turn now to apply the principles to be derived from Rule 2 and the authorities referred to above to the present case.

21. There is some force in PFI's submissions as regards the principles of natural justice and that it should not be deprived of its right to challenge the Authority's decisions in an independent and impartial tribunal without a compelling reason. As PFI say, a judicial determination of the underlying facts and matters which the Authority relied on in deciding to vary PFI's Part 4A permission would be of considerable assistance in relation to any application it may wish to make in the future for a new Part 4A permission. It is also right to assume that the evidence which either party would rely on in the reference proceedings has been prepared and significant resources expended by both parties in doing so, the benefit of which will be lost to a large degree if the proceedings are struck out.

22. However, in my view these factors are heavily outweighed by the inevitable conclusion that this reference has become academic as a result of the issue of the Final Notice cancelling PFI's Part 4A permission. The reference must therefore be struck out for the following reasons.

23. I cannot fault the reasoning of the Authority as to why the reference has become academic. Because of the cancellation which has been effected as a result of the issue of the Final Notice, there is no prospect of PFI securing a more favourable determination than that set out in the Second Supervisory Notice. As the Authority says, even if the Tribunal were to find that the decision to issue the Second Supervisory Notice was flawed with the result that the Authority should be directed to reconsider its decision, as PFI's Part 4A permission has been cancelled as a result of the issue of the Final Notice it cannot be revived through the process of the Authority reconsidering its earlier decision to issue the Second Supervisory Notice. The only route available to PFI to revive its Part 4A permission and therefore be in a position to exercise its rights as lender under the existing credit agreements is to make a new application to the Authority for a fresh Part 4A permission. Therefore, although factual determinations made by the Tribunal may be helpful to PFI in that regard, they cannot justify the continuation of proceedings that have no prospect of success.

24. In essence, the subject matter of the reference has disappeared in that the Second Supervisory Notice no longer has any effect because PFI is no longer an authorised person and accordingly there is no live, practical question to be determined on this reference.

25. I do not find the arguments that PFI raises as to the expenditure of legal costs to be persuasive. It is clear that the four day hearing for which the reference has been listed will result in the further expenditure of considerable financial and other resources for both parties as well as for the Tribunal itself and cannot be justified in the circumstances. This outweighs the fact that the previous sums spent may turn out to have been wasted, but of course it goes without saying that that would not have been the case had PFI contested the latest regulatory proceedings brought by the Authority by referring the matter to the Tribunal. As mentioned above, in any event the resources expended may be of some benefit if it has resulted in the collection of evidence that will be of some use in any further application for a Part 4A permission.

26. As regards the complaints made by PFI as to the manner in which the Authority has pursued its investigations, no evidence has been adduced to support those assertions. In any event those matters may not be relevant to the issues which the Tribunal would have had to have determined on the reference. If PFI has complaints about the manner in which the investigation and subsequent regulatory proceedings were conducted, then it may seek redress through the Authority's complaints scheme.

Conclusion

27. For the reasons set out above, I direct that PFI's reference be struck out.

Costs

28. The Authority suggested in its application that PFI's continued pursuit of these proceedings following the Authority's letter dated 8 November 2019 inviting PFI to withdraw the reference constitutes a waste of costs and is unreasonable.

29. I cannot make any direction in that regard without a formal application for costs in accordance with Rule 10 (3)(d) of the Rules. Therefore, if the Authority wishes to pursue the matter it should make an application for costs in the manner and within the time limit specified by the Rules.

JUDGE TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE

RELEASE DATE: 8 January 2020