



Reference number: UT-2021-000128

FINANCIAL SERVICES– Decision Notice refusing application for registration as a claims management business– giving of Decision Notice terminated Applicant’s temporary permission – application for direction to suspend effect of Decision Notice until reference disposed of – 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

Application for disclosure of documents relating to the Authority’s decision-making processes-application refused

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

**PRZEMYSŁAW SOSZYNSKI
T/A PHENIX CONSULTANCY**

Applicant

- and -

THE FINANCIAL CONDUCT AUTHORITY

**The
Authority**

TRIBUNAL: Judge Timothy Herrington

Sitting in public by way of remote video Microsoft Teams hearing, treated as taking place in London, on 7 February 2022

The Applicant in person

Nicholas Kamlish, Counsel, instructed by the Financial Conduct Authority, for the Authority

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DECISION

Introduction

1. On 28 May 2021 the Financial Conduct Authority (“the Authority”) gave a Decision Notice to the Applicant (“Phenix”) refusing its application under s 55 A of the Financial Services and Markets Act 2000 (“FSMA”) to carry on the regulated activities of:

(1) seeking out, referrals and identification of claims or potential claims (personal injury claim; financial services or financial product claim; housing disrepair claim; claim for a specified benefit; criminal injury claim; employment related claim);

(2) advice, investigation or representation in relation to a personal injury claim;

(3) advice, investigation or representation in relation to a financial services or financial product claim;

(4) advice, investigation or representation in relation to a housing disrepair claim;

(5) advice, investigation or representation in relation to a claim for a specified benefit;

(6) advice, investigation or representation in relation to a criminal injury claim; and

(7) advice, investigation or representation in relation to an employment related claim.

2. By a reference notice dated 25 June 2021, Phenix referred the refusal of its application to the Tribunal. As a consequence of the giving of the Decision Notice the temporary permission held by Phenix to carry out the claims management activities referred to above has ceased to have effect by operation of Article 82 of the Financial Services and Markets Act 2000 (Claims Management Activity) Order 2018.

3. Phenix, however, in its reference notice also applied for a direction (“the Suspension Application”) that the effect of the Decision Notice be suspended pending the determination of the reference pursuant to Rule 5 (5) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (“the Rules”).

4. Phenix has also applied for disclosure of certain documents by the Authority (“the Disclosure Application”). This decision relates to both the Suspension Application and the Disclosure Application. The Authority opposes both applications.

Background

5. Phenix is a claims management business. It operates as a sole trader and Mr Przemyslaw Soszynski is the firm’s principal. The firm has no employees. The firm’s

business is representing clients in the small claims track and Employment Tribunal. Mr Soszynski can both offer advice and appear on behalf of clients in those jurisdictions but as he is not a UK-qualified lawyer, he can only represent claimants in other courts/tracks as a lay representative or McKenzie friend, e.g., by providing advice on the conduct of a case. Phenix was regulated between 9 May 2011 and 31 March 2019 by the Ministry of Justice through the Claims Management Regulator, and then became regulated by the Authority under a temporary permission on 1 April 2019.

Decision Notice

6. The Decision Notice was given because the Authority considered that Phenix had not been able to demonstrate that it can meet the Authority's standards in relation to each of the claims management sectors in respect of which it applied for permissions. In particular, Phenix has not satisfied the Authority that it is able to meet the requirements of Threshold Conditions 2C (Effective supervision), 2D (appropriate resources) and 2E (Suitability). In summary, the reasons given for that conclusion were:

(1) Phenix has failed on a number of occasions to provide in a timely manner documentation that is essential to the Authority's assessment of its application. Additionally, Mr Soszynski, Phenix's sole employee, informed the Authority that he should not have to provide detailed information to the Authority about how Phenix operated. This gives rise to concerns that, if authorised, Phenix would not meet the standards of the Handbook, in particular, Principle 11 of the Principles for Businesses, which requires an authorised firm to deal with the Authority in an open and co-operative way.

(2) Phenix has been unable to demonstrate that it has adequate or compliant professional indemnity insurance ("PII") cover, has failed to show that it can meet the prudential requirements for a firm of its nature, and does not meet the CASS requirements for protecting client money.

(3) Phenix has also failed to demonstrate that it has adequate business continuity plans. Further, Phenix has not demonstrated that it has adequate or appropriate human resources. Mr Soszynski has demonstrated a lack of awareness of the rules with which Phenix must comply, which suggests that he is not competent to run the firm in a compliant manner.

(4) Moreover, Mr Soszynski does not have rights of audience, and instead acts for clients as a McKenzie friend. Phenix does not have the systems or controls to ensure that this is communicated to clients in a fair and transparent manner, so there is a risk that Phenix's clients would not be able to understand the services that Phenix can and cannot provide. Phenix therefore lacks the controls to protect the interests of its consumers, and to ensure continued compliance with the Authority's rules.

7. I set out at [8] to [25] below a summary of the principal findings in the Decision Notice on which the Authority based its decision to refuse Phenix's application for

authorisation. I should emphasise at this stage I am not adopting these findings as findings of fact for the purposes of either this decision or the reference as a whole.

Failure to provide information in a timely manner

8. The only supporting documents submitted with the Application were a Compliance Procedures Document, a very brief Business Plan, and a Claims Management Individual Form. On 17 September 2019, the Authority asked Phenix to provide the following additional supporting documents that had not been submitted with the Application:

- Business plan
- Vulnerable customer policy document
- Pre-contractual information document
- Sample client contract
- Opening balance sheet
- Closing balance sheet
- Projected monthly cash flow
- Projected monthly profit and loss
- Latest end of year accounts
- Compliance monitoring document

9. The Decision Notice says that these documents should be readily available for a regulated firm and should have been available at the point Phenix applied for authorisation. The Authority gave Phenix a deadline of 1 October 2019 to provide the documents.

10. Some of these documents were provided in stages during October and November 2019, with the business plan being provided on 11 December 2019.

11. There were further requests for information and documents which were complied with.

12. On 5 May 2020 the Authority conducted an interview with Mr Soszynski following which a request for further information was stated. On 28 May 2020 Mr Soszynski queried some of the Authority's rules, including the client money rules for claims management companies, and stated his belief that he should not be required to provide detailed information to the Authority about how the business operates. Not all the information requested was provided according to the deadlines set by the Authority, the remaining information being provided by email on 12 June 2020, 30 days after it was originally requested, and in that email, Mr Soszynski questioned the

fairness of the prudential requirements for claims management companies, rather than demonstrating compliance with the requirements.

13. A second interview was conducted with Mr Soszynski on 9 September 2020, covering Mr Soszynski's competence in the Personal Injury, Housing Disrepair, and Financial Services or Financial Products claims sectors. Questions were also asked about the firm's client money procedures, vulnerable customer policies, quality assurance policies and business continuity arrangements. Further requests for information followed this interview which were not complied with by the deadlines which were set. The Authority had not at the time of the issue of the Decision Notice received the firm's management accounts, as requested.

Inadequate PII cover

14. The PII policy provided by Phenix did not comply with the Authority's requirements regarding the undertaking of regulated personal injury claims management activities and Phenix was in breach of its requirement to notify the Authority of that fact.

Client money

15. Phenix was in breach of its requirement to notify the Authority of the failure of its bank to issue a client bank account acknowledgement letter which was only disclosed during Mr Soszynski's second interview.

Prudential requirements

16. Phenix would have a prudential resources requirement of at least £5,000 and if it held client money, it would also be subject to a client money requirement of £20,000. The firm has not provided recent evidence that it met these requirements.

Complaints and telephone calls

17. Under the Authority's rules, a claims management firm must record all telephone calls and retain all other communications. Mr Soszynski told the Authority that it was unable to have telephone calls with clients as he was unable to record the calls. The Authority expects firms to be able to take and record complaints by telephone because of the requirement that a firm's complaints procedure should allow complaints to be made by all reasonable means.

Contracts

18. The Authority identified various deficiencies with Phenix's contractual documents, which it said either omitted several key pieces of information or are misleading, particularly by not explaining that where Mr Soszynski does not have rights of audience he can only act as a McKenzie friend so that clients would need to make oral representations on their own behalf.

Vulnerable customers

19. The Authority identified concerns with Phenix's vulnerable customer policy, regarding how it would ensure vulnerable clients' sensitive medical data would be handled in a fair and safe manner, and how it would ensure appropriate representation for vulnerable clients who had poor written or spoken English where they had to represent themselves in court. It was also noted that because Mr Soszynski stated he could not have telephone calls with clients and did not meet them face-to-face there would be difficulties in explaining legal procedures to vulnerable clients where he could only do that in writing and where they may have learning or literacy difficulties.

Business continuity

20. Phenix had not taken any steps to mitigate business continuity risks in line with the Authority's requirements, Mr Soszynski stated that he believed all sole traders face business continuity risks and he had limited opportunities to mitigate these risks. Mr Soszynski also stated when interviewed that if he was incapacitated, clients would have original documents relating to their cases and would be free to engage other firms to support them. This implies Mr Soszynski would expect his clients, some of whom are vulnerable, to take on a greater role conducting their cases at short notice in the event of his incapacity. This is unrealistic and potentially unfair or harmful to his clients, especially when tight court deadlines could be applied. Mr Soszynski also suggested his wife could manage the firm's business, without providing evidence of her competence to do so.

Impact on Threshold Conditions

21. As regards the effective supervision condition, COND 2.3.3 G states that, when assessing this Threshold Condition, "factors which the [Authority] will take into consideration include, among other things, whether it is likely that the [Authority] will receive adequate information from the firm, and those persons with whom the firm has close links, to enable it to determine whether the firm is complying with the requirements and standards under the regulatory system for which the [Authority] is responsible and to identify and assess the impact on its statutory objectives; this will include consideration of whether the firm is ready, willing and organised to comply with Principle 11 (Relations with regulators) and the rules in SUP on the provision of information to the [Authority]..."

22. The Authority concluded that because of Mr Soszynski's conduct in not providing all the required documents in a timely fashion, as mentioned above, his view that he should not have to provide detailed information to the Authority about how Phenix operated and his questioning of the fairness of the rules in respect of the prudential requirements rather than demonstrating compliance with these requirements, it could not be satisfied that Phenix can and will provide the Authority with adequate information in a timely or open and cooperative manner as required by Principle 11. The Authority therefore considered that Phenix did not meet the effective supervision condition.

23. The Authority concluded that Phenix did not meet the appropriate resources condition, because it had not demonstrated that it is able to meet and continue to meet

its prudential requirements; its PII policy did not meet the Authority's requirements and its general systems, controls, procedures, and resources were inadequate. In that regard, the Authority made specific reference to the deficiencies in the vulnerable customer policy and the business continuity arrangements.

24. The Authority concluded that Phenix did not meet the suitability condition, in particular, that it will conduct its business in compliance with proper standards because the matters detailed above establish that the firm has not been open and cooperative in all its dealings with the Authority and is not ready, willing, and organised to comply with the requirements and standards under the regulatory system.

25. It should be noted that according to the summary of Mr Soszynski's representations made to the Regulatory Decisions Committee, set out in an Annex to the Decision Notice, in relation to the Authority's requirements concerning client money, prudential requirements, call recording and vulnerable customers and business continuity, he questioned the proportionality and/or appropriateness of those requirements as they applied to his firm.

The Suspension Application

Relevant law and issues to be determined

26. Pursuant to Rule 5(5) of the Rules the Upper Tribunal has the power to direct that the effect of the decision in respect of which the reference or appeal is made (in this case the giving of the Decision Notice) is to be suspended pending the determination of the reference:

“... if it is satisfied that to do so would not prejudice –

- (a) the interests of any persons (whether consumers, investors or otherwise) intended to be protected by that notice;
- (b) the smooth operation or integrity of any market intended to be protected by that notice; or
- (c) the stability of the financial system of the United Kingdom.”

27. The Tribunal set out the conditions to be met before the Tribunal can grant a suspension under Rule 5 (5) most recently, summarising the effect of earlier cases, in *Sussex Independent Financial Advisers Limited v FCA* [2019] UKUT 0228 (TCC) (“*Sussex*”) at [14] and [15] as follows (with citations omitted):

“14...

- (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...;
- (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...;

(3) Detriment to the applicant, such as it being deprived of its livelihood, is not relevant to this test.;

(4) The burden is on the applicant to satisfy the Tribunal that the interests of consumers will not be prejudiced...; 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.... The reference to consumers should for such purposes have the same meaning as in section 1G of Financial Services Markets Act 2000 ("FSMA") which defines consumers to mean person who use, have used, or may use among other things regulated financial services...

15. Additionally, as noted in the [cited] decisions, even if satisfied that granting a suspension would not prejudice the interests of consumers, the Tribunal is not obliged to grant a suspension. 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 the 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..."

28. In his written submissions, Mr Soszynski said that the principles set out above are not relevant in this case because Phenix has applied for permission to provide legal services. That is not correct; the principles are of general application to applications that are made under Rule 5(5) regardless of the nature of the regulated activities that the applicant undertakes. So, for example, those principles have been applied previously in relation to firms carrying on mainstream investment business, as well as consumer credit activities and, most recently, a firm carrying on business as a cryptoasset firm. They are equally applicable to a firm such as Phenix, which carries on claims management activities.

29. Mr Soszynski also misunderstands the extent of the Tribunal's jurisdiction with regard to its review of the activities of the Authority. Mr Soszynski submits that the Tribunal has to consider if the rules set by the Authority are reasonable and are not discriminatory towards non-British applicants.

30. Those are not matters that fall within the jurisdiction of the Tribunal. The Upper Tribunal is a creature of statute and can only exercise the functions given to it by Parliament. In that regard, it hears references of decisions made by the Authority, including decisions such as the one in this case to refuse an application for authorisation to carry on regulated activities. In relation to such references, the role of the Tribunal is to determine the lawfulness of the Authority's decision by reference to the legal framework set out in the Financial Services and Markets Act 2000 and the rules made thereunder by the Authority under the authority of Parliament. The Tribunal must interpret the requirements of those rules as they have been made and has no jurisdiction to substitute its own view, or that of the applicant, as to the

reasonableness or appropriateness of the rules. That would be an unwarranted exercise of judicial law making, contrary to constitutional principles. The Tribunal must apply the law as it has been laid down by Parliament or, in this case, by the Authority under the authority of Parliament, and cannot disapply or modify the requirements of any rule or regulation on the grounds that the rule is either unreasonable or inappropriate.

31. If any person, including a person regulated by the Authority, considers that any particular rules are unreasonable or inappropriate then the appropriate course is to lobby the Authority or, where appropriate, Parliament for a change in the rules. In the meantime, if the firm wishes to have the benefit of authorisation by the Authority it must comply with the rules as it finds them, not as how it would wish them to be.

32. Therefore, the sole issue for me in relation to the Suspension Application is whether I can be satisfied that if I grant the application, the interests of consumers will not be prejudiced if Phenix is permitted to carry on its regulated activities pending determination of its reference.

33. Assuming that the Tribunal can be satisfied that there is a case for Phenix to answer on the reference (which I consider below), the essential question for the Tribunal is whether it can be satisfied that if the Suspension Application is granted there will be no significant risk beyond the normal risk of a firm that is undertaking business in a broadly compliant manner. I would therefore need to be satisfied that if a suspension were granted, Phenix would, pending the determination of its reference, carry out its activities in a manner which was broadly compliant with the Authority's regulatory requirements.

Basis for the Suspension Application

34. During his oral submissions, Mr Soszynski helpfully clarified the business that the firm wished to carry on during the period up to the determination of Phenix's reference.

35. Mr Soszynski clarified that the firm no longer wished to hold client money. It also no longer wished to provide services relating to personal injury claims and therefore, as accepted by Mr Kamlish, the Authority's requirements for the firm to hold professional indemnity insurance would not apply. The effect of not holding client money would also reduce the firm's prudential resources requirement to a minimum of £5,000.

36. Mr Soszynski gave details of four cases in the Employment Tribunal or Employment Appeal Tribunal where he wished to continue to provide services to clients pending the determination of Phenix's reference. In all those cases, Mr Soszynski would be able to represent the client both in terms of giving advice and also appearing on behalf of the client in the relevant Tribunal as there is no restriction on rights of audience in those tribunals. Accordingly, it is clear that the concerns expressed by the Authority in the Decision Notice regarding the difficulties that could arise where the firm does not have a right of audience would not be applicable during the period up to the determination of the reference.

37. In two of the cases mentioned, it appears that there is little further work to be done. One of the cases is an appeal to the Employment Appeal Tribunal which may not proceed. Another case, in the Employment Tribunal, is waiting for an issue regarding compensation to be determined by the Tribunal and no further hearing is necessary. However, the remaining two cases do require substantial work to be done; one involves representations to be made in the Employment Tribunal in April or May and there is a discrimination case due to be heard in November where documents need to be prepared for the hearing.

38. Mr Soszynski said that there are a limited number of advisers who can provide legal services to Polish residents in the UK. He noted that there were only 675 Polish speaking solicitors on the roll and a large number of Polish speaking clients to whom it was necessary to explain the relevant legal concepts in their own language. Mr Soszynski himself has 10 years' experience in employment matters. If his current clients were required to go elsewhere, they would have to pay higher fees. Mr Soszynski provides his services on a no win no fee basis and other providers may not be willing to do so. He considers that if he were unable to provide his services, the clients concerned may simply drop their cases because they will not believe that they could be presented by somebody else satisfactorily.

Discussion

39. As set out at [15] of *Sussex*, quoted at [27] 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 was emphasised in *Sussex*, the burden is on Mr Soszynski to satisfy the Tribunal that the interests of consumers will not be prejudiced if the application is granted. Therefore, for an application of this nature to have a chance of being successful the applicant must make detailed evidence available to the Tribunal as to how its business will be carried on in a broadly compliant fashion during the period up to the hearing of the reference.

41. I start by considering whether I can be satisfied that there is a case to answer on the reference. Although I am not concerned with the merits of the reference itself, were I of the view that the Decision Notice did not make findings which were capable of demonstrating that Phenix has not met the conditions for authorisation as a firm carrying on claims management activities then it would be possible for the Tribunal to take the view that granting the application would not result in a significant risk to consumers.

42. In my view Phenix has a serious case to answer on the reference. Phenix is a small firm and the Authority's supervision model in relation to small firms of this kind relies on the firm being open and cooperative with its regulator. There will be serious concerns as to whether such a firm can be authorised where it has demonstrated a lack of cooperation during the authorisation process.

43. I am prepared to accept that some of the delays that occurred in the authorisation process due to failure of Phenix to provide the information requested by the Authority in a timely fashion can be accounted for, in a number of instances, due to circumstances beyond Mr Soszynski's control, but I do not accept that the prevailing political situation, or Mr Soszynski's assertion that he had been the subject of race discrimination, are good reasons why he was not in a position to respond to the information requests promptly.

44. Of more concern, however, is Mr Soszynski's failure to comply with particular requirements on the basis that the relevant rules were not appropriate or reasonable. That, in particular, applies to the Authority's requirements regarding prudential matters, the recording of telephone calls, the vulnerable customers policy and the business continuity policy. It appears that the reason the information requested has not been provided is because Mr Soszynski does not believe that the rules in question are either reasonable or appropriate. In order for a firm to obtain the benefit of authorisation, it needs to demonstrate that it is able and willing to comply with the Authority's requirements as they are to be found.

45. For these reasons alone, Phenix has a serious case to answer on the reference. If demonstrated to be well-founded on the substantive hearing of the reference, the concerns expressed by the Authority in the Decision Notice regarding the matters referred to above are clearly capable of justifying its decision to refuse authorisation. Mr Soszynski does not seek to deny that he has not complied with the Authority's requirements in respect of the matters referred to at [44] above.

46. I now turn to the question as to whether I can be satisfied that there is no significant risk to consumers (that is in this case the type of customer that Phenix proposes to deal with and taking account of the nature of the services to be provided), in the manner in which the services are to be provided in respect of the employment claims referred to above, beyond the normal risk of a firm that is doing business in a broadly compliant manner.

47. In that regard, a strong factor in favour of me granting the application is the limited nature of the services that Phenix proposes to provide during the period up to the determination of the reference. There appear to be only two substantive matters where work needs to be done. The matters concerned do not appear to require Phenix to carry professional indemnity insurance.

48. I can also see that at this stage in those proceedings, it may be inconvenient for the clients concerned to have to change their representative, particularly where they have placed their trust in Mr Soszynski and rely on him because of his Polish speaking skills. I also accept that a change of representative may also result in additional cost for the clients concerned. Furthermore, there may well be a limited number of Polish speaking representatives with the necessary experience of employment matters who would be prepared to take the matter on. The information that I have been provided as regards a number of Polish speaking solicitors does not really help in that regard without knowledge of their particular skills.

49. There could therefore be prejudice to consumers were I not to grant the Suspension Application if the result was that their access to justice was significantly impaired as a result of Mr Soszynski not being able to represent them. That is a matter to take into account in the balancing exercise that I must undertake.

50. In particular, if I were to take the view that existing customers are likely to be in a worse position if the Suspension Application was not granted then notwithstanding any concerns about the risks to consumers if a suspension were granted, then I may give consideration as to whether the status quo should be allowed to continue, in effect as the "lesser of two evils".

51. In my view, however, I should only allow the risk of the customers concerned not being able to obtain satisfactory alternative representation to prevail over the findings I make about the risk to consumers if the suspension were to be granted if there was cogent and compelling evidence that the risks of the former would result in serious risk of prejudice to Phenix's existing customers.

52. In that respect, I do not regard the current evidence as being cogent and compelling. I have had no detail as to the particulars of the cases concerned, how much work would be necessary for those cases to be completed, and how easy or difficult it would be for another representative to take the case on and the cost implications of such a course. Furthermore, I have no evidence as to the particular circumstances of the customers concerned that would make it very difficult for alternative representation to be arranged. Mr Soszynski has not been able to provide services to the clients concerned for a period of some months now and there has therefore been adequate opportunity for alternative solutions to have been explored. In both cases, there is also still a significant amount of time before the cases concerned come to a hearing, therefore adequate time to make alternative arrangements. Mr Soszynski provided no evidence to support his assertion that the customers concerned would drop their cases if he was unable to continue to represent them.

53. On the other side of the equation, as I have said, the burden is on Phenix to satisfy me that if I were to grant the Suspension Application the business would be carried on in a broadly compliant manner. In that regard, I would need to be satisfied that there has been a change of attitude on the part of Mr Soszynski and that he would be able and willing to do what was necessary to comply with the Authority's requirements during the period up to the hearing of the reference.

54. Unfortunately, there is no evidence to that effect. On the contrary, in his written submissions in relation to the Suspension Application, and in his Reply to the Authority's Statement of Case filed in relation to the substantive reference, Mr Soszynski continues to dispute the necessity for his firm to comply with the Authority's requirements. He gave me no impression during his oral submissions at the hearing of this application that he had changed his position. Therefore, I can have no confidence that he would provide the outstanding information to the Authority to enable it to assess the firm's current financial position and no confidence that he would meet the prudential requirements and deal with the other requirements relating to the recording of telephone calls and business continuity. Those are all matters that I

regard as being highly significant factors in deciding whether there would be prejudice to consumers were Phenix given permission to complete its current caseload. In particular, in the absence of the need for professional indemnity insurance, the Authority's prudential resource requirements are of particular importance.

55. Accordingly, I cannot be satisfied on the basis of the evidence currently available to me, that if I were to grant the Suspension Application, Phenix would, until its reference is determined, carry out its business in a broadly compliant fashion.

56. It would therefore be a very uncomfortable position were I to grant the Suspension Application in circumstances where Mr Soszynski has not given any indication that he will make all necessary efforts to ensure that the firm's business is carried on in a broadly compliant fashion and where the remedy lies in his own hands. That factor in my view strongly outweighs the potential prejudice to the existing customers were I not to grant the Suspension Application which, as I have indicated above, cannot be properly assessed at the present time.

57. This is a case where I may have been able to take the contrary view were the necessary evidence about the current position with the customers been made available and were I to have the confidence that Mr Soszynski would change his position on the matters with which he takes issue with the Authority.

Conclusion

58. In conclusion, given the serious concerns identified in the Decision Notice and the lack of evidence as to how Phenix would undertake its business in a broadly compliant fashion pending determination of its reference, I cannot be satisfied that allowing Phenix to continue to carry on its activities pending the determination of this reference will not prejudice consumers. In those circumstances, I must dismiss the Suspension Application.

The Disclosure Application

59. As I have indicated above, the Authority has now filed its Statement of Case on the substantive reference, and Phenix has filed its Reply setting out the grounds on which it contests the Authority's decision to refuse its application for authorisation.

60. It is clear from Phenix's Reply and its written and oral submissions on the Disclosure Application that Mr Soszynski's primary reason for pursuing Phenix's reference is his belief that the Authority took the decision to refuse the application for authorisation because Mr Soszynski is Polish. He contends that the Authority's decision was based on his race and the result would have been different had he been British.

61. Mr Soszynski says that he was the subject of discrimination as a Polish national and received a biased judgment in the County Court, as a result of which he reported the judge to the Judicial Conduct Investigation Office and the Ministry of Justice. He considers the decision by the Authority to give Phenix a Warning Notice proposing to

refuse the application for authorisation is an act of victimisation for reporting the judge. He notes that this decision was made at a meeting on 27 January 2021, the same day on which a hearing had been scheduled for the determination of damages and costs in the civil matter, whereas the Authority had been required to make its decision on Phenix's application by 10 December 2020.

62. Mr Soszynski contends that this Tribunal is obliged to consider the fact that Phenix was subject to discrimination by the Authority. He also says that the Tribunal must consider the conduct of the Authority during the final stages of the authorisation process. He rejects the Authority's contention that the date of the Warning Notice and the County Court hearing were a coincidence. Accordingly, he has asked the Authority to disclose information which he needs to establish that the Authority was guilty of discrimination against him in the decision-making process.

63. The information that Mr Soszynski has asked the Authority to disclose is the following:

(1) The number of applications the Authority's staff member responsible for assessing Phenix's application had assessed for the period between 1 March 2020 to 1 April 2021. For ease of reference, I will refer to this staff member as "Person A", although he was named by Mr Soszynski.

(2) The reference number of the applications Person A assessed in the period from 1 March 2020 to 1 April 2021.

(3) The required decision date of each application and the date the decision was made.

(4) Who in the Authority made the decision and when about scheduling the Warning Notice meeting for 27 January 2021.

(5) The minutes of the meeting dated 27 January 2021.

64. Mr Soszynski contends that this information is required so that he can assess whether the circumstances of making the decision to refuse authorisation 48 days after the required decision date "are relevant for establishing if the decision is an act of victimisation."

65. It is well established that the Tribunal should only exercise its power to require a party to its proceedings to disclose documents pursuant to Rule 16 of the Rules where the documents concerned are relevant to the issues which the Tribunal has to determine on the reference and having regard to the cost and time involved in providing the documents. Those considerations must be balanced against the important consideration that an applicant on a reference should, where practicable, not be deprived of any material which might reasonably assist his case: see on this point *Arif Hussein v FCA* [2016] UKUT 0549 (TCC) at [139].

66. The Tribunal's jurisdiction in this case is concerned with the question of whether the Authority was right to have refused Phenix's application on the grounds that it had failed to satisfy the Authority that it had met the Threshold Conditions for authorisation. The subject matter of the reference is therefore confined to considering

whether the Authority has reached a decision on the application that could have been reasonably arrived at. That determination is made by reference to the matters on which the Authority relies as set out in its Statement of Case. As can be seen from the summary of the Decision Notice set out above, the question is whether the Authority was entitled to rely on the matters that it did in refusing the application.

67. The Tribunal is not concerned with the processes followed by the Authority in reaching its decision. A reference to the Tribunal is not an appeal from any decision of the Authority. The Tribunal has a first instance jurisdiction and considers the subject matter of the reference afresh by way of complete rehearing based on the pleadings of the parties. That means, in this case, the Authority needs to plead the matters on which it relies to establish that Phenix has failed to satisfy the Threshold Conditions and the Tribunal will need to assess the extent to which that is the case, having regard to the applicant's grounds on which he disputes the Authority's assessment.

68. The procedures by which the Authority arrived at its decision are therefore irrelevant as far as the Tribunal is concerned because of the way in which its jurisdiction has been circumscribed by Parliament, as discussed above.

69. This approach was confirmed in the Tribunal's decision in *Chiesa v FCA* [2017] UKUT 0275 (TCC) where it said this at [33]:

“In my opinion, the Tribunal does not have jurisdiction to deal with complaints about the FCA's conduct of investigations or proceedings. The issue for this Tribunal, at the substantive hearing of the references, is whether Mr and Mrs Chiesa lack fitness and propriety and, if so, what (if any) is the appropriate action for the FCA to take. The criticisms of the FCA's conduct made by Mr Edmonds and Mr Sampson do not address those issues and, even if those criticisms are valid, they would not be grounds for allowing the references and instructing the FCA to withdraw the Decision Notices although they might form the basis of a complaint to the Complaints Commissioner.”

70. All of the requests made by Phenix relate to the Authority's processes for assessing applications for authorisation. In the light of what I have said above as to the nature of the Tribunal's jurisdiction and its role, the documents requested by Mr Soszynski are clearly irrelevant to the questions that the Tribunal needs to determine on this reference, namely, whether the Authority's decision to refuse authorisation was reasonably arrived at. That question will be determined without any need to consider whether or not Mr Soszynski has been discriminated against by the Authority on the grounds of race. The Tribunal will look purely at the way in which the business operates and the fitness and properness of Mr Soszynski. As I have indicated above, that is a fresh assessment made without reference to the manner in which the Authority reached its decision. The documents concerned therefore cannot assist Phenix's case because the Authority's processes are not matters which the Tribunal can properly consider.

71. Accordingly, I must dismiss the Disclosure Application.

Postscript

72. Clearly, it is in Phenix's interests that this reference is swiftly determined, so as to ameliorate the fact that I have been unable to grant the Suspension Application.

73. I shall therefore proceed to make directions to bring the substantive reference to a hearing as soon as possible.

Signed on Original

JUDGE TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE

RELEASE DATE: 18 February 2022