Neutral Citation: **[2022] UKUT 00257 (TCC)**

UT (Tax & Chancery) Case Number: UT-2022-000065

Upper Tribunal
(Tax and Chancery Chamber)

FINANCIAL SERVICES – Decision Notice refusing application for registration as a cryptoasset exchange provider and custodian wallet provider – giving of Decision Notice terminated Applicant's temporary registration – application for direction to suspend effect of Decision Notice until disposal of appeal – whether case to answer – whether Tribunal satisfied that the direction to suspend the effect of the notice would not prejudice the interests of persons intended to be protected by the Decision Notice – Application dismissed – Rule 5(5) The Tribunal Procedure (Upper Tribunal) Rules 2008

Hearing venue: Video Hearing
Heard on: 23 August 2022

Judgment given on 22 September 2022

Before

DEPUTY UPPER TRIBUNAL JUDGE ANNE REDSTON

Between

MONEYBRAIN LIMITED

Applicant

and

THE FINANCIAL CONDUCT AUTHORITY

Respondent

Representation:

For the Applicant: Mr Lee Birkett, Director of the Applicant

For the Respondent: Mr Adam Temple, Counsel, instructed by the Financial Conduct Authority

DECISION

1. On 30 May 2022, the Financial Conduct Authority ("the Authority") gave a Decision Notice ("the Decision Notice") to the Appellant, Moneybrain Limited ("Moneybrain") refusing its application to be registered as a cryptoasset exchange provider and a custodian wallet provider pursuant to Regulation 57 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ("the MLRs").

2. Moneybrain had created a type of cryptocurrency known as BiPS Tokens ("BiPS" or "Tokens"). The Authority issued the Decision Notice because it decided Moneybrain had deliberately and recklessly published on its websites misleading marketing and promotional material relating to the Tokens, and so was not a "fit and proper person" within the meaning of Regulation 58A of the MLRs.

3. At the same time and for the same reasons, the Authority decided that the Decision Notice was to have immediate effect. As a result, the temporary registration held by Moneybrain to carry on the cryptoasset activities referred to above ceased to have effect by operation of Regulation 56A(1)(b)(ii) of the MLRs.

4. By a notice dated 24 June 2022, Moneybrain made a reference to the Tribunal by way of an appeal against the Decision Notice ("the Reference"). In the Reference, Moneybrain also applied for a direction that the effect of the Decision Notice be suspended pending the determination of the appeal ("the Suspension Application"), pursuant to Rule 5(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules"). For the reasons set out in this judgment, I decided to refuse the Suspension Application.

THE MLRS, DEFINITIONS AND THE DECISION NOTICE

5. The MLRs were amended with effect from 10 January 2020 to require cryptoasset providers and custodian wallet providers to be registered under the MLRs. Regulation 14A includes the following definitions:

> (1) a "cryptoasset" is "a cryptographically secured digital representation of value or contractual rights that uses a form of distributed ledger technology and can be transferred, stored or traded electronically";
>
> (2) a "cryptoasset exchange provider" includes a firm which "by way of business provides one or more of the following services, including where the firm…does so as creator or issuer of any of the cryptoassets involved, when providing such services—
>
> > (a) exchanging, or arranging or making arrangements with a view to the exchange of, cryptoassets for money or money for cryptoassets,
> >
> > (b) exchanging, or arranging or making arrangements with a view to the exchange of, one cryptoasset for another…"
>
> (3) a "custodian wallet provider" includes a firm which by way of business provides services to safeguard and/or to administer, cryptoassets on behalf of its customers.

6. In this judgment, the term "fiat currency" means currencies such as sterling or dollars declared by governments to be legal tender, but which are not backed by tangible assets, and the abbreviation "AML" denotes "anti-money laundering".

7. It was common ground that the MLRs applied to Moneybrain with effect from 10 January 2020 and that it was a "relevant person" as defined by Regulation 3(1). On 29 June 2020, Moneybrain applied to be registered to perform the following activities in the UK:

> (1) exchange of fiat currency for cryptoassets;

(2) exchange of one cryptoasset for another; and

(3) providing custodian wallets for storing cryptoassets on behalf of customers.

8. The amendment to the MLRs included a transitional period for registration of pre-existing cryptoasset exchange providers, allowing them to continue to operate until 10 January 2021, later extended to 31 March 2022, providing certain conditions had been met. Because Moneybrain's application had not been determined by 10 January 2021, it moved on to the Authority's "Temporary Registration Regime". This applies to all cryptoasset firms who had been active prior to 10 January 2020, and who had outstanding applications as at 16 December 2020.

9. Regulation 58A of the MLRs is headed "Fit and proper test: cryptoasset businesses" and provides:

> "(1) The FCA must refuse to register an applicant ("A") for registration in a register maintained under regulation 54(1A) as a cryptoasset exchange provider or as a custodian wallet provider if A does not meet the requirement in paragraph (2).
>
> (2) A, and any officer, manager or beneficial owner of A, must be a fit and proper person to carry on the business of a cryptoasset exchange provider or custodian wallet provider, as the case may be.
>
> (3) A person who has been convicted of a criminal offence listed in Schedule 3 is to be treated as not being a fit and proper person for the purposes of this regulation.
>
> (4) If paragraph (3) does not apply, the FCA must have regard to the following factors in determining whether the requirement in paragraph (2) is met—
>
> (a) whether A has consistently failed to comply with the requirements of these Regulations;
>
> (b) the risk that A's business may be used for money laundering or terrorist financing; and
>
> (c) whether A, and any officer, manager or beneficial owner of A, has adequate skills and experience and has acted and may be expected to act with probity."

10. It was common ground that Reg 58A(3) did not apply to Moneybrain. However, on 30 May 2022, the Authority issued the Decision Notice. It said that:

(1) Moneybrain had made prominent statements on its websites presenting the Token as a type of cryptoasset that was "backed" by assets and as "stabilised";

(2) those statements were misleading;

(3) they were made for the purpose of inducing customers to purchase Tokens;

(4) in making those misleading statements for that purpose, Moneybrain had acted deliberately and recklessly. It had therefore not acted, and was not expected to act, with probity; and

(5) the Authority was therefore required by Regulation 58A(4)(c) to refuse to register Moneybrain.

11. By the Decision Notice, Moneybrain was also removed from the list of firms with temporary registration with immediate effect.

THE ISSUE TO BE DECIDED

12. Rule 5(5) of the Rules provides:

> "In a financial services case, the Upper Tribunal may direct that the effect of the decision in respect of which the reference has been made 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."

13. In *Sussex Independent Financial Advisers Limited v FCA* [2019] UKUT 228 (TCC) ("*Sussex*"), this Tribunal set out the conditions to be met before a suspension can be granted under Rule 5(5) as follows (with citations omitted):

> "[14] The key principles to be applied…are…
>
> (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…
>
> [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…"

14. In *Gidiplus v FCA* [2022] UKUT 00043 (TCC) at [46], Judge Herrington said:

> "I start by considering whether I can be satisfied that there is a case to answer on the appeal. Although I am not concerned with the merits of the appeal itself, were I of the view that the Decision Notice did not make findings which were capable of demonstrating that Gidiplus has not met the conditions for registration as a crypto asset business contained in the MLRs then it would be possible for the Tribunal to take the view that granting the application would not result in a significant risk of money laundering."

15. In deciding the Suspension Application I must therefore first decide whether there is "a case to answer" – in other words, I must be satisfied that there is evidence to support the

Authority's conclusions, or as Judge Herrington put it in *Gidiplus*, that the Decision Notice made findings capable of demonstrating that Moneybrain failed to meet the conditions for registration as a cryptoasset business.

16. If I find there is a case to answer, the next stage is to consider whether allowing the Suspension Application would prejudice the interests of persons intended to be protected by the Decision Notice. I have taken it that the persons the Authority intended to protect are Moneybrain's existing or potential customers, see *PDHL Limited v FCA* [2016] UKUT 0129 (TCC) at [26].

THE EVIDENCE

17. The Authority provided a bundle of documents ("the Bundle"), which included:

(1) correspondence between Moneybrain and the Authority;

(2) a transcript of a voluntary recorded interview held via telephone conferencing on 8 December 2020 with Mr Birkett, Moneybrain's owner and sole director ("the Interview");

(3) various extracts from Moneybrain's websites dating from the period before the Decision Notice;

(4) various extracts from the website of Moneybrain Global Limited ("MGL"), a related company, downloaded in June 2022 from htpps://www.moneybrain.global ("MGL's website");

(5) Dame Elizabeth Gloster's Report (the Gloster Report") into the Authority's regulation of London Capital and Finance plc ("LCF"), and the Authority's Response to that Report; and

(6) the Authority's Annual Report and Accounts for the year ended 31 March 2022 ("the Report and Accounts").

18. I allowed Mr Birkett to give limited oral evidence during the hearing, including by providing some further background to Moneybrain's business by way of response to questions from the Tribunal; Mr Temple then cross-examined Mr Birkett on his evidence. I was satisfied that it was in the interests of justice to take that course, bearing in mind (a) the Tribunal's obligation to give effect to the overriding objective by avoiding unnecessary formality and seeking flexibility in the proceedings, and (b) that Mr Birkett had not had the benefit of legal advice when he prepared his evidence. I was also satisfied that the Authority would not be prejudiced by that course being taken, due to the limited nature of the material in question and Mr Temple's overall familiarity with the matter.

THE GUIDANCE

19. In July 2019, so before the MLRs were amended to require cryptoasset exchange providers to be registered, the Authority published PS19/22, its Guidance on Cryptoassets ("the Guidance"). Paragraph 1.7 states that its aim was to "provide clarity on the FCA's regulatory perimeter" and "to help consumers better understand the cryptoasset market and the resulting implications for the protections they have, depending on the product".

20. Under the heading "Attempts to stabilise volatility", the Guidance says at paragraph 51 that "attempts might be made to stabilise the volatility of cryptoassets, where the resulting token is commonly referred to as a 'stablecoin'." Paragraph 53 says that "the most popular observed methods of stabilisation" are the following:

(1) Fiat-backed, where the token is "backed with fiat currencies, most commonly the US dollar", and "in some cases, this involves the issuer 'pegging' the value to that

currency – i.e. guaranteeing the value of the token, while holding a reserve of fiat currency(ies) to ensure it can meet any claims. In other cases, the token gives the token holder an interest or right to the custodied fiat currency(ies), with the value of the tokens being directly linked to the value of the fiat currency held";

(2) Crypto-collateralised, where the tokens are backed with a basket of cryptoassets with the aim of spreading risk and reducing price volatility;

(3) Asset-backed, where the tokens are backed "with a tangible or intangible asset that usually has some economic value"; and

(4) Algorithmically stabilised, defined as tokens which "attempt stabilisation through algorithms that may, for example, control the supply of the tokens to influence price".

21. Appendix 1 is headed "Perimeter Guidance" which sets out "the boundary which separates regulated and unregulated financial services activities". It includes consideration of "e-money tokens", saying at paragraph 69 that "these are tokens that meet the definition of e-money under the EMRs. Firms issuing e-money must ensure they are appropriately authorised or registered". Under the same heading, the Appendix says this at paragraph 74, in a passage relied on by Mr Birkett:

> "Some tokens might be stabilised by being pegged to a fiat currency, most commonly the USD, and most commonly with a 1:1 backing. This is a form of 'stablecoin' known as a 'fiat backed', 'fiat collateralised' or 'deposit backed' stablecoin. This stablecoin looks to hold a consistent value with the fiat currency, and is theoretically 'backed' by fiat currency. Any token that is pegged to a currency, like USD or GBP, or other assets, and is used for the payment of goods or services on a network could potentially meet the definition of e-money. However, the token must also meet the requirements above."

THE CONSULTATION

22. In January 2021, HM Treasury published a document entitled "UK regulatory approach to cryptoassets and stablecoins: Consultation and call for evidence" ("the Consultation"). Under the heading "What are cryptoassets", the Consultation refers to the FCA's classification of tokens, and adds at paragraph 1.18:

> "The FCA's classification of tokens above aimed to provide guidance on which tokens may lie within the FCA's regulatory perimeter and may be subject to its regulation. However different classification methodologies exist, for example by categorising tokens according to their economic function (for example, 'payment tokens and investment tokens'), or other relevant characteristics, such as the rights they confer to users. Classifications have also evolved in line with the changing nature of the market."

23. The Consultation continues at paragraph 1.19 by saying that "to provide continuity and clarity for market participants, the government proposes to maintain the FCA's broad approach to classification as far as possible", but that it was also considering whether "a new category of regulated tokens may be needed – stable tokens". The next paragraph begins:

> "The regulated category of stable tokens would refer to tokens which stabilise their value by referencing one or more assets, such as fiat currency or a commodity (i.e. those commonly known as stablecoins) and could for that reason more reliably be used as a means of exchange or store of value. The category would also include other forms of tokenised payment and settlement assets, as well as tokenised forms of central bank money..."

24. The Glossary to the Consultation defines the term "stablecoin" as "an evolution of cryptoassets, which are designed to minimise volatility in value. Stablecoins aim to maintain stability in their price, typically in relation to a stable asset such as fiat currency". It continues by stating that there are two types of stablecoin, namely asset backed, defined as "backed by collateral in the form of an asset, or a basket of assets, such as gold or a fiat currency", and "algorithmic", defined as "a coin programmed to regulate issuance and redemption to match supply and demand".

FINDINGS OF FACT

25. I next set out some limited findings of fact from the evidence summarised above. I have tried to be careful only to make findings which are directly relevant to the Suspension Application, and not to make definitive findings on disputed matters which will be explored in more detail on the hearing of the Reference. I have also proceeded on the basis that what Mr Birkett said about certain aspects of Moneybrain's business is correct. That is without prejudice to the position that may be established after full consideration of all the evidence following the hearing of the Reference.

26. As noted at §17(4) some of the evidence was downloaded in June 2022 from the website of MGL Ltd. Although this was after the issuance of the Decision Notice, I found that it was appropriate to make findings of fact about the position of MGL for the reasons explained at §83ff.

Moneybrain and other companies

27. Moneybrain was incorporated in the UK on 24 July 2007. It is 100% owned by Mr Birkett, who is also its sole director. On 19 October 2016, Moneybrain was authorised by the Authority to carry out credit broking. Until the issuance of the Decision Notice, Moneybrain was also carrying out the following crypto-related businesses in the UK:

(1) exchanging fiat currency for cryptoassets;

(2) exchanging of one cryptoasset for another; and

(3) providing custodian wallets for storing cryptoassets on behalf of customers.

28. Moneybrain is the only member of BiPS Asset Management Ltd ("the Foundation"), a company limited by guarantee. Mr Birkett is a director of the Foundation. He is also a director and 33% shareholder in eMoneyHub Ltd, trading as "Just Us". eMoneyHub uses its own internet platform to make "Peer-to-Peer" ("P2P") loans to individuals and businesses, and has been authorised by the Authority as a consumer credit business.

29. It was common ground that Mr Birkett also owns and controls MGL, a company registered in Jersey. On 14 February 2022, MGL was granted Virtual Currency Exchange Permissions by the Jersey Financial Services Commission, and was thus allowed to carry out cryptocurrency transactions.

30. In Moneybrain's Response for these proceedings, Mr Birkett stated that on issuance of the Decision Notice, Moneybrain was "forced to 'offshore' its cryptoasset operation". The Moneybrain website now redirects to the MGL website. I therefore find that the activities previously carried out by Moneybrain are now carried out by MGL. References to "Moneybrain" should therefore be read as also referring to MGL, and vice versa, unless otherwise specified. In particular, some of the text on the MGL website is different to that on the original Moneybrain websites, as explained below.

The Token and the Foundation

31. The Token is a cryptoasset created and promoted by Moneybrain. A person who wants to buy a new Token contacts Moneybrain via an "app", and then pays the price shown on the

website. The "buy" price for a Token on the MGL site shortly before the hearing was around £10.85. Moneybrain will also repurchase Tokens for a slightly lower "sell" price, and by offering to buy and sell, creates a market in Tokens.

32. Moneybrain retains 5% of the purchase price and pays the balance to the Foundation. The Foundation uses some of that money to purchase assets including gold, and it lends money to eMoneyHub, which in turn on-lends to borrowers using its P2P lending platform.

33. It was common ground at the inception of the hearing that a person who owns a Token has no right to, or charge over, the assets held within the Foundation. Mr Temple submitted that some of Mr Birkett's oral evidence indicated that Moneybrain may have moved away from that position, but that was not my understanding. I find as a fact that a Token does not give the owner of a Token any proprietary rights over the assets held by the Foundation. I come to this finding on the basis of the evidence in the Bundle, including an explicit statement to that effect in an email from Moneybrain to the Authority on 4 March 2022, together with the evidence provided by Mr Birkett during the hearing.

34. Moneybrain records the majority of trades in Tokens on its own private internal ledger and not on a public blockchain. There are two exceptions to this: a purchaser can pay a higher price and have the trade recorded on a public blockchain, and "team members" who work with Moneybrain and/or the Foundation have been given "Foundation BiPS" which have been recorded on a public blockchain.

The information provided to customers

35. The home page of Moneybrain's website htpps://www.moneybrain.com had the following wording in large, bold text: "BiPS – Digital currency backed by real assets. We do everything a bank can do and more". The MGL website instead has the following wording:

> "In 2018 the Moneybrain team established the asset backed digital currency BiPS on the Ethereum network to buy and sell leading digital assets within the SuperApp."

36. The same Moneybrain home page linked to a second website htpps://bips.moneybrain.com ("the BiPS website"). In this decision, the term "the Moneybrain websites" refers to both www.moneybrain.com and www.bips.moneybrain.com.

The video

37. A video was embedded on the BiPS website; this is not present on the MGL website. The video included the following statement:

> "…even the biggest fans of crypto coins admit that they are risky, because their values fluctuate wildly up and down. That's why it's time for BiPS, a revolutionary way of taking the crypto model removing the volatility and adding the one big thing that's missing – in a word, trust. You can trust BiPS because it's a token, not a coin."

38. The video went on to explain that:

> "The difference in a nutshell is that BiPS tokens will be based on property and other tangible assets. When you buy BiPS in the public sale 95% of the money is used to purchase property or other assets and the tokens will have a stable underlying value firmly based on those assets."

39. The video also said:

> "Best of all, not only can you trust BiPS to work hard to maintain their value you can also benefit from the eighth wonder of the world, compound interest and growth of the underlying token value."

40. The video included the following statements, each on its own slide:

(1) Based on property.

(2) 95% asset backed.

(3) Stable, underlying value.

(4) Compound interest.

(5) Less volatility.

The Foundation

41. The BiPS website included a section on the Foundation, which stated:

> "The value of the token is tacitly stabilised through the publication of the value of assets purchased through the issuance of tokens. Other crypto currencies only have intrinsic speculative value, with no underlying assets. The sentiment of purchasing BiPS is far stronger as 95% of the value of a freshly minted BiPS is used by the BiPS Foundation to purchase real world assets (UK property, Gold etc).
>
> The purpose of the BiPS Foundation is to securely hold these assets (never being able to dispose of the value), continuously publish the value of these underlying assets and with any surplus over and above the speculative value of the issued tokens, build better infrastructure (speed, cost and security) for token holders and create a centre of excellence for the education of digital currencies."

42. Identical text is present on the MGL site, with the addition of the word "some" at the beginning of the sentence beginning "Other crypto currencies only have intrinsic speculative value".

43. In the Interview, Mr Birkett was asked why he had set up the Foundation, and he said:

> "…we looked at the legal framework of property and the structure of basically how the Bank of England and the Fed work. You know, just because you've got a pound in the wallet, it doesn't give you a claim on the Fed's reserves, and that tacitly-linked legal definition is an acceptable form of relationship. So, the assets are held tacitly linked to a foundation which is a company limited by guarantee. It's not a charity…It's just there's no shareholders to distribute returns."

44. The objects of the Foundation as set out in its Articles of Association are:

> (a) the education of the public (and in particular those who use the BiPS digital currency) in relation to distributed ledger technologies and decentralised unregulated currencies; and
>
> (b) the accessibility, speed and security of distributed ledger technologies and decentralised unregulated currencies.

45. Mr Birkett was asked about the Foundation's educational purpose during the Interview, and he said:

> "It was originally set up to allow other people to have access to UK assets where the current banking frameworks restricted them from moving capital around the world. So, the whole original objective of this was to provide financial inclusion and options for many people around the world. There's a very passionate financial literacy element to what we're doing. There's a financial inclusion to what we're doing. I'm part of a very big programme with the United Nations SDG [sustainable development goals], of which our

> currency will be the currency for those global crowd funding and elements. So, the whole purpose of the foundation is to do good."

The Project Memorandum

46. A "BiPS Project Memorandum" ("the Original Memorandum") was available to download from the BiPS website. It said on page 1:

> "The BiPS Exchange Token is a new digital currency backed by Property and Assets. The press are referring to the Token type as an Exchange Token. The BiPS Exchange Tokens will be sold in an orderly manner to create stability and value for the BiPS Exchange Token holders. Unlike other digital currencies that have very little behind them, the BiPS network will have cash and property creating stability and liquidity…"

47. The Memorandum on the MGL website ("the MGL Memorandum") has a slightly different text. It reads:

> "The BiPS Exchange Token is a new digital currency tacitly backed by property and assets. It is an unregulated Exchange Token. The BiPS Exchange Tokens will be exchanged in an orderly manner to create stability and value for the BiPS Exchange Token holders. Unlike other digital currencies that have 'Proof of Work' or 'Proof of Stake' behind them, the BiPS Foundation has cash and property creating stability and liquidity together underpinned by the following four elements;
>
> 1. Security (Proven Platform)
> 2. Trust (The team)
> 3. Regulatory experience
> 4. Privacy (Blockchain anonymity via smart contracts)."

48. The Original Memorandum said that "BiPS currency receives underlying capital growth which will be reinvested to stabilise the underlying Token value". The MGL Memorandum has instead the following words:

> "BiPS Foundation receives the underlying assets which are tacitly linked to stabilise the underlying Token value."

49. The Original Memorandum stated that "to create stability for the network as a whole, Moneybrain will purchase secured assets". This sentence has been replaced in the MGL Memorandum by one which reads: "to create stability for the Token as a whole, BiPS Foundation will purchase assets".

50. The Original Memorandum stated:

> "The BiPS Token is designed to give acquirors direct line of sight to the asset backed security value of the Token itself. This visibility alone provides transparency on the value above and beyond current offerings…As the number of tokens in issue grow, the value of assets grow in parallel. This is designed to give those tokens a clear, intrinsic value. The value of token proceeds is directly linked to the asset base. The higher the token issue value, the higher the value of assets acquired to support it."

51. The MGL Memorandum repeats the same text, but with the words "the value of token proceeds" replaced by "the sentiment value of token proceeds". The following passage has been added:

> "It is important to appreciate there is not a direct claim to the underlying assets as these are the property of the BiPS Foundation. Any surplus in the

> foundation is used for the advancement in education of distributed ledger technologies and the infrastructure that supports BiPS."

52. The Original Memorandum and the MGL Memorandum both have a section setting out "Important Risks". The Important Risks section of the MGL Memorandum includes the following two risks (there was no equivalent in the Original Memorandum):

> "The value of the BiPS exchange token is stabilised by the sentiment of 95% of the purchase price being transparently ringfenced by the Foundation although there is no direct claim to these assets.
>
> Being unregulated there are no methods of recourse if there is a lack of liquidity in the BiPS community and the value of the token can fluctuate. Any value stored in BiPS is at risk."

The KYA

53. Moneybrain's website included a downloadable "Know Your Asset" ("KYA") document in relation to the Token, and the same document is present on the MGL website. The document's purpose is set out on the cover page:

> "This paper has been prepared by Moneybrain Ltd to help explain the regulatory status of the Moneybrain BiPS Token (BiPS Token) and the legal framework underpinning its operation."

54. The text includes the following statements:

(1) The Token is "not a Stablecoin" because it "is not 'pegged to' or backed by fiat currency or other assets which automatically stabilise its volatility".

(2) Moneybrain "will (as a trustee) utilise cash generated from the issue/ transfer of BiPS Tokens to acquire certain property assets on behalf of the BiPS Foundation".

(3) The Foundation "will retain beneficial title to all assets held on its behalf by its trustees (which include Moneybrain)".

Correspondence with the Authority's Financial Promotions Team

55. On 4 October 2021, Mr Furlonger of the Authority's Financial Promotions Team wrote to Moneybrain with a list of concerns, one of which was that the website said that the Token was "backed by real assets". Mr Furlonger asked Moneybrain to "provide an explanation of what this means, and in particular, the value it provides in increasing the safety of an investor's capital".

56. On 10 January 2021, Mr Birkett responded: his email repeats the website text relating to the Foundation set out earlier in this judgment at §41. He also provided a cross-reference to the KYA document and said that the website now included an additional link to that document. On 27 January 2022, Mr Furlonger thanked Mr Birkett and said "we confirm we have now closed our file".

THE SCOPE OF THE AUTHORITY'S POWERS

57. The first issue was whether the Authority was acting outside of its powers in refusing to register Moneybrain. I begin with the parties' submissions, followed by my view.

Mr Birkett's submissions on behalf of Moneybrain

58. Mr Birkett submitted that in issuing the Decision Notice, the Authority had exceeded its legal powers, for the following reasons:

(1) The Authority had based its refusal to register Moneybrain on its opinion about Moneybrain's promotional material, but that was not a relevant consideration. Instead, such matters fell within the remit of the Advertising Standards Authority ("ASA"). In

addition, the Authority's own Financial Promotions Team had considered essentially the same issue and closed their file after having considered Moneybrain's response.

(2) The Authority was also acting on the basis of "preventing consumer harm", which goes beyond its legal remit in the context of the MLRs. Mr Birkett drew attention to page 52 of the Report and Accounts, which read "We have no consumer protection powers and very limited regulated remit over most types of crypto activities".

Mr Temple's submissions on behalf of the Authority

59. Mr Temple said that the Authority was required by Regulation 58A(4)(c) to consider probity before deciding whether or not to include a person on the AML register. In his submission, the concept of probity had to be considered broadly, as could be seen from the following:

(1) The case of *Frensham v FCA* [2021] UKUT 0222 (TCC) ("*Frensham*"). Mr Frensham had been convicted of sexual grooming; the Authority decided he was not a fit and proper person, and had prohibited him from carrying on any regulated activity. The UT held that in deciding whether a person is "fit and proper", the Authority "is fully entitled to take into account non-financial misconduct which occurs outside the work setting", see [178] of *Frensham*. Mr Temple said that it must follow that when assessing probity the statements on Moneybrain's website plainly fell to be considered, because they were "closely connected" to its business.

(2) The first recommendation made by the Gloster Report (at Chapter 2, paragraph 5.3(a)) was that the Authority "should direct staff responsible for authorising and supervising firms, in appropriate circumstances, to consider a firm's business "holistically". Chapter 1, paragraph 5.2 of the Report specifically stated that this obligation arose from the "fit and proper" test under paragraph 2E to Schedule 6 of the Financial Services and Markets Act 2000, which was essentially identical to the "fit and proper" requirement of the MLRs. Paragraph 5.3(a) of the same Chapter said that looking at the business "holistically" included "looking not solely at the regulated business of a firm, but also at its unregulated business, where that unregulated business had a significant impact on the firm's fitness and propriety…"

60. In Mr Temple's submission, deliberately and/or recklessly making misleading statements to induce customers to purchase the Tokens demonstrated a lack of probity, and thus fell squarely within the matters the Authority was required to consider when deciding whether to register a person under the MLRs.

Mr Birkett's response to those submissions

61. Mr Birkett strongly objected to the comparison with *Frensham,* given that Mr Frensham had been convicted of a sexual offence. In his submission, there was no parallel with Moneybrain's case.

62. As to the recommendations of the Gloster Report, he said that these were made in the context of very different facts. The Report concerned LCF, a company which had "a huge marketing spend and appalling sales tactics", whereas Moneybrain has "no marketing budget" and its "disputed promotion was on less than a handful of website pages". Mr Birkett also drew attention to the Authority's response to that Report, which stated at paragraph 3.2:

> "We agree with the LCF Review's suggestion that we should do more to encourage staff to look beyond the regulated activities of a firm; for example, when we receive credible evidence of fraud or serious irregularity, or when an overwhelming proportion of a firm's business does not require authorisation

> but is in the financial sector, creating a greater risk of consumer confusion about the scope of our regulation."

63. Mr Birkett said that the Authority had not refused to register Moneybrain because they had "credible evidence of fraud or serious irregularity", and they should therefore not be looking beyond Moneybrain's regulated activities (which were limited to credit broking); and were therefore exceeding their legal powers.

64. He also relied on the Report and Accounts, in which Nikhil Rathi, the Authority's Chief Executive, said:

> "With our limited remit, we ensure that the anti-money laundering rules apply to crypto exchanges, so they are not used to funnel money to fuel crime, terrorism or war."

65. Mr Birkett submitted that this was a correct definition of the purposes of the MLRs. The Authority had not refused to register Moneybrain in order to prevent money being used to "fuel crime, terrorism or war". Instead, they had issued the Decision Notice because they considered certain wording used on Moneybrain's websites to be misleading, and in doing so had relied on "a fraction of a single MLR".

66. In Mr Birkett's submission, the Tribunal should conclude that there was "no case to answer" because the Authority had acted outside its legal powers when it issued the Decision Notice.

The Tribunal's view

67. I begin with Regulation 58A(1), which provides that the Authority "must refuse" to register an applicant who does not meet the requirement in Regulation 58A(2), namely that it is "a fit and proper person" to carry on the business of a cryptoasset exchange provider and/or custodian wallet provider. Thus, the Authority is obliged to refuse registration when an applicant is not "fit and proper", and plainly has the power to make a decision to that effect.

68. In deciding whether a person is "fit and proper", Regulation 58A(4) requires the Authority to consider certain specified matters, one of which is whether the applicant "has acted and may be expected to act with probity". Although, as Mr Birkett said, this requirement is contained within "a fraction of a single MLR", it is nevertheless binding on the Authority.

69. I agree with Mr Temple that *Frensham* and the case law there cited provides strong support for the Authority's position that when assessing probity all potentially relevant matters must be considered; that case decides that even conduct in a person's private life is relevant, providing it "realistically touches on their practice of the profession concerned", see [64(5)] of the judgement. It must follow from *Frensham* that the websites of the person applying for registration are within scope. I also agree with Mr Temple that the Gloster Report provides further support for this broad approach.

70. If, having considered all potentially relevant matters, the Authority decides a person lacks probity, it is obliged to refuse registration. That obligation is not displaced by references made in the Report and Accounts; by the separate regulatory requirements placed on the ASA, or by a decision of the Authority's Financial Promotions Team to close their file having considered matters within the remit of that Team.

71. I thus reject Mr Birkett's submission that there is "no case to answer" because the Authority was not acting within its powers when it decided Moneybrain was not "fit and proper" on the basis of material on its websites.

WHETHER MISLEADING, AND WHETHER LACK OF PROBITY

72. I next considered whether, as Mr Temple submitted, there was a case for Moneybrain to answer because the websites included misleading material. I first set out the parties' submissions, and then my view.

Mr Temple's submissions on behalf of the Authority

73. Mr Temple said that the key facts were as follows:

(1) When a person purchased a Token from Moneybrain, 95% of the purchase price was transferred to the Foundation.

(2) The Token-holder has no legal or beneficial interest in the Foundation, or in the assets within the Foundation.

(3) The Tokens are not "asset-backed" as that term is defined in the Guidance and the Consultation.

(4) If Moneybrain stops purchasing Tokens, and there is no third party willing to do so, the Token has no value.

74. Mr Temple submitted that the websites were misleading for the following reasons:

(1) The Moneybrain websites described the Tokens as "asset-backed" and this description continues to be used on the MGL website.

(2) Although the video has now been removed, it was present at the time of the Decision Notice. The video not only said that the Tokens were "asset-backed", but it also contained other misleading statements, including that the Tokens "have a stable underlying value" which was "firmly based on" the assets held by the Foundation and that they "benefitted from compound interest". In Mr Temple's submission, none of those statements was true.

(3) Both the original Moneybrain website and the MGL website state that the "the value of the token is tacitly stabilised through the publication of the value of assets purchased through the issuance of tokens". Mr Temple submitted that:

> "Moneybrain expects people to believe in a connection between BiPS tokens and the assets held by BiPS Asset Management Limited where no relevant connection in fact exists. Given that the assets are separate from the BiPS tokens, the supposed linkage is no stronger than a cryptocurrency that claimed to track the value of gold, or shares in a specific company, simply by the publication of the value of gold or those shares. It is, quite simply, a mirage."

(4) The same web pages say that "the sentiment of purchasing BiPS is far stronger as 95% of the value of a freshly minted BiPS is used by the BiPS Foundation to purchase real world assets". Mr Temple said that "sentiment":

> "does not provide stability or backing to the value of a cryptocurrency. The mere fact that the BiPS token 'references' assets is irrelevant if the tokens are not secured or backed by those assets. A firm could assert that the value of a cryptocurrency 'referenced' the value of (say) shares in Microsoft, but absent an equivalent holding of Microsoft shares available to support that cryptocurrency, the 'reference' is meaningless."

(5) The original list of "Important Risks" did not include any reference to the risk that the Tokens were not backed by any assets. Although there was additional wording on the MGL site (see §52), that text included another misleading reference to "sentiment",

and also said "there is no direct claim to these assets", when the reality is that Token holders have "no claim" to the assets.

(6) Although the Authority accepted that the KYA document accurately described the Token, Mr Temple noted that (a) a consumer would need to scroll down the Moneybrain website and the MGL website and click on a link to download that document, and (b) the cover page says that the purpose of the document was to explain the "regulatory status" of the Token, so a consumer would not easily realise that it explained the (lack of) assets backing the Token. Mr Temple said "some consumers may read the KYA but many will not"; that the latter will "be left with the misleading statements", and the former will "presumably puzzle" over the contradictions between the KYA and the other material on the websites.

75. Mr Temple submitted that Moneybrain lacked probity because:

(1) it "must have considered" what to include in its list of "Important Risks" and decided not to include the risk that "the Token is not backed by assets and, therefore, is potentially volatile and that Token holders may lose the funds they use to purchase the Token". The Authority had decided this omission was deliberate, which was plainly correct; and

(2) in making the other misleading statements about the Token, Moneybrain had acted "at least recklessly". The Authority had decided that Moneybrain's motivation was to make the Token "as attractive as possible to investors" and that it either "did not consider, or dismissed, the possibility that consumers would be misled", and so was reckless.

76. Mr Temple concluded by saying that there was plainly a "case to answer" on this issue.

Mr Birkett's submissions on behalf of Moneybrain

77. Mr Birkett said that potential consumers were not misled, because they had access to the KYA, which clearly set out the factual and legal position. He took issue with the Authority's reliance on the definition of "asset-backed" in the Guidance and the Consultation, saying that "in the unregulated space of cryptoassets there are only rudimentary definitions of product design". In this context he relied on paragraph 74 of the Guidance (see §21), which referred to "stablecoins" which were "theoretically 'backed' by fiat currency". Mr Birkett said that the Tokens could similarly be regarded as theoretically backed by the assets in the Foundation.

The Tribunal's view

78. I begin by considering what is meant by "deliberate" and "reckless", given that neither term was defined in the Decision Notice.

(1) In *Tooth v HMRC* [2021] UKSC 17 at [43], the Supreme Court said "deliberate is an adjective which attaches a requirement of intentionality to the whole of that which it describes". In the context of this case, I have taken the term "deliberate" to mean that Moneybrain knew that there was a risk that purchasers of the Tokens would lose money because there was no asset backing, but intentionally did not include this as an "Important Risk".

(2) The meaning of the term "reckless" was considered in *R v G* [2003] UKHL 50, where Lord Bingham (with whom other members of the Judicial Committee agreed) held that a person acts recklessly when he is aware that a risk exists or will exist and it is in the circumstances known to him, unreasonable to take the risk. That definition has been frequently applied in subsequent cases, see for example *Canada Square Operations v Potter* [2021] EWCA Civ 339 at [88]. In the context of this case, Moneybrain would be "reckless" if it knew there was a risk that people accessing the website would be misled

into believing that the Token was "backed by collateral in the form of an asset, or a basket of assets, such as gold or fiat currency", and also knew it was unreasonable to put people in that position.

79. I have approached the parties' submissions on the basis that they had the same understanding of the terms "deliberate" and "reckless". I begin with the submissions made by Mr Birkett:

(1) He said that the Authority was wrong to place weight on the definition of "asset-backed" because the terminology was still in flux, and he referred to the Guidance and the Consultation in support of his submission. I accept that the Consultation said there were "different classification methodologies" in addition to those used in the Guidance. However:

(a) the Consultation defines "asset-backed" as meaning "backed by collateral in the form of an asset, or a basket of assets, such as gold or a fiat currency", and there was no suggestion in the Consultation that this definition was under review or should be revised; and

(b) Moneybrain stated in the KYA that the Token is "not a Stablecoin" because it is "not 'pegged to' or backed by fiat currency or other assets which automatically stabilise its volatility". Moneybrain itself therefore accepted the definition of a Stablecoin set out in the Guidance (see §20).

(2) Mr Birkett submitted that the purchasers were not misled by the statements on the website because it was clear from the KYA that the assets were beneficially owned by the Foundation and that Token-holders had no right to those assets. However, Moneybrain has not provided evidence to show (for example) that all purchasers had read the KYA. Given that the Moneybrain website stated that the Tokens were "digital currency backed by real assets", and the video said that "when you buy BiPS in the public sale 95% of the money is used to purchase property or other assets and the tokens will have a stable underlying value firmly based on those assets", and also reiterated that the Tokens are "asset-backed", it is plainly arguable that a purchaser would believe the Tokens to be "backed by collateral in the form of an asset, or a basket of assets, such as gold or a fiat currency".

(3) Finally, Mr Birkett said that the Tokens were in a similar position to the stablecoins referred to at paragraph 74 of the Guidance (see §21) which were "theoretically 'backed' by fiat currency". However, this does not assist Moneybrain, because:

(a) paragraph 74 forms part of Appendix 1, which sets out "the boundary which separates regulated and unregulated financial services activities". The purpose of paragraph 74 is therefore not to redefine the term "asset-backed", but to clarify that stablecoins which are "pegged" to a currency might be e-money and regulated as such; and

(b) paragraph 74 deals only with types of stablecoin, and the KYA states that the Tokens are not stablecoins.

80. I was thus unpersuaded by Mr Birkett's submissions. I instead agree with Mr Temple that there is a case to answer, for the reasons he gave. I find that it is arguable that Moneybrain acted deliberately and/or recklessly in the words used on its websites, and so lacked probity.

INTERESTS OF CONSUMERS

81. Having found that there is a case to answer, the next question is whether allowing the Suspension Application would prejudice "the interests of any persons (whether consumers,

investors or otherwise) intended to be protected by that notice", see Rule 5(5). By this is meant "a significant risk beyond the normal risk of a firm that is doing business in a broadly compliant manner", see *Sussex* cited earlier.

Risk to consumers?

82. Mr Birkett said that if the Suspension Application were to be granted, Moneybrain would "legally repatriate itself" to the UK and resume operations here. In his submission, consumers would not be at risk because the nature of the Token was clear, in particular from the KYA document.

83. Mr Temple said that allowing Moneybrain to resume operations in the UK would prejudice the interests of consumers, because there remained a risk that they would be misled by the website material. This was the case whether that material remained the same as at the time of the Decision Notice, or whether a relaunched UK website used the material currently on the MGL website. Mr Temple emphasised that the latter:

(1) continues to describe the Token as "asset-backed", see §35;

(2) contains almost identical text about the Foundation to that on the Moneybrain website, see §42;

(3) retains the text that "the sentiment of purchasing BiPS is far stronger as 95% of the value of a freshly minted BiPS is used by the BiPS Foundation to purchase real world assets"; and

(4) although the statement that the Tokens are "backed by Property and Assets" has been replaced by one which says they are "tacitly backed by Property and Assets", the Tokens are not "backed" by anything, and the addition of the word "tacitly" served only to create a "mirage".

84. I first considered whether it was appropriate to consider the material on the MGL website, and decided that it was, because:

(1) MGL is controlled and managed by Mr Birkett and is currently selling the Tokens.

(2) Mr Birkett has stated (see §30) that Moneybrain was "forced to 'offshore' its Cryptoasset operation" and also that it would like to "legally repatriate itself" to the UK.

(3) In *Gidiplus* at [26] the UT held that 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 appeal* (my emphasis).

(4) Mr Birkett did not provide any evidence that a relaunched Moneybrain website would be operated in any different manner from MGL.

85. Having considered the wording on the MGL website emphasised by Mr Temple, I am not satisfied that the interests of consumers would be protected were the Suspension Application to be granted. In other words, Mr Birkett has not satisfied me that allowing Moneybrain to resume operations would not prejudice the interests of its customers and potential customers.

BALANCING EXERCISE?

86. In *Sussex*, the Tribunal held at [15]:

> "…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."

87. In Mr Temple's submission, a balancing exercise was only necessary where a Tribunal was satisfied that granting the Suspension Application would not prejudice the interests of consumers. I agree. As I am not satisfied that allowing Moneybrain to resume operations would not prejudice the interests of consumers, there is no need to carry out a balancing exercise.

88. It is also clear from the foregoing that I have not identified any factor in Moneybrain's favour which would come anywhere close to outweighing the risk of harm to consumers from the material on Moneybrain's websites (much of which continues to be present on MGL's website).

OVERALL CONCLUSION

89. The Authority issued the Decision Notice on the basis that Moneybrain lacked probity. I have found that there is a case to answer, in other words, that there is evidence to support the Authority's conclusions.

90. Moneybrain has failed to demonstrate that the interests of consumers would not be prejudiced were it to resume operations in the UK. I therefore cannot be satisfied that allowing Moneybrain to continue to carry on its activities pending the determination of this appeal will not prejudice those who are intended to be protected by the Authority's decision to refuse to register Moneybrain under the MLRs. As a result, I dismiss the Suspension Application.

Signed on Original

ANNE REDSTON
UPPER TRIBUNAL JUDGE

Release date: 22 September 2022