Neutral Citation: **[2025] UKUT 00082 (TCC)**

Case Number: UT-2024-000094

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Hearing Venue: Rolls Building, London

FINANCIAL SERVICES – decision by the Authority not to authorise the Applicant to carry out regulated activities on the basis that the Applicant would not satisfy and continue to satisfy the threshold conditions for authorisation as required by section 55B(3) of the Financial Services and Markets Act 2000 – whether the decision one which was reasonably open to the Authority – yes – reference dismissed

Heard on: 17 February 2025
Judgment date: 10 March 2025

Before

JUDGE MARK BALDWIN
MR DUNCAN BLACK
MRS JEAN PRICE

Between

E.A.K. GROUP LTD

Applicant

and

THE FINANCIAL CONDUCT AUTHORITY

The Authority

Representation:

For the Applicant: Erik Dalipi, a director of the Applicant

For the Authority: Calum Macdonald, a Lead Associate (Legal) with the Authority

DECISION

INTRODUCTION

1. On 10 July 2024 the Applicant referred ("the Reference") to this Tribunal a decision ("the Decision") of the Authority dated 25 June 2024 refusing the Applicant's application ("the Application") for authorisation to carry out regulated activities.

2. The Authority refused the Application as it was not satisfied that the Applicant, if authorised, would satisfy and continue to satisfy the threshold conditions as required by section 55B(3) of the Financial Services and Markets Act 2000 ("FSMA").

3. In summary, the Authority's concerns which led to the Decision were that:

a) the Applicant had failed to demonstrate the level of cooperation that is expected of a regulated firm;

b) the Applicant had refused to provide information when asked to do so by the Authority as part of the authorisation process; and

c) the Applicant was unable and / or unwilling to demonstrate that it could comply with applicable requirements.

LEGAL FRAMEWORK FOR THE REFERENCE

4. There is no dispute as to the legal framework relevant to the Application, the Decision or the Reference, which we summarise below.

5. By section 55A FSMA, an application to carry on regulated activities must be made to the appropriate regulator (here, the Authority).

6. By section 55B(3) FSMA, in giving permission to carry out regulated activities, the appropriate regulator "must ensure that the person concerned will satisfy, and continue to satisfy, in relation to all regulated activities for which the person has or will have permission the threshold conditions…" (the "Threshold Conditions").

7. The Threshold Conditions are (by section 55B(1) FSMA) those set out in Schedule 6 of FSMA. Relevant for these purposes are 2C (Effective Supervision), 2D (Appropriate Resources) and 2E (Suitability). We set out the terms of the Threshold Conditions later, when we come to discuss their applicability here.

8. If a firm conducts only "relevant credit activity" (as defined in paragraph 2G of Schedule 6 to FSMA), it is referred to by the Authority as a 'limited permission' ("Limited Permission") firm. The activities covered by the definition of "relevant credit activity" include credit broking, debt counselling, credit information services, debt adjusting and agreeing to carry on certain activities so far as relevant to those activities carried on by a person in connection with a supply of goods by that person to a customer. They would, therefore, cover the activities for which the Applicant sought authorisation.

9. An application for Limited Permission is still an application for authorisation under Part 4A of FSMA. It follows that, as with any other Part 4A application, in order to grant such an application the Authority must first ensure that the Threshold Conditions are met. However, reflecting that Limited Permission firms are carrying on regulated activity in support of their main business, the Threshold Conditions for such firms are adjusted. In particular (i) certain provisions of the effective supervision Threshold Condition do not apply; (ii) the appropriate resources Threshold Condition is modified so that a firm is deemed to have adequate financial resources if it can meet its debts as they fall due; and (iii) the 'business model' Threshold Condition does not apply. However, the suitability Threshold Condition is not modified for Limited Permission firms.

10. The section of the Authority's Handbook entitled the "Principles for Businesses" (or 'PRIN') comprises a general statement of the fundamental obligations of firms and the other persons to whom they apply under the regulatory system. Principle 11 provides that a firm must deal with its regulators in an open and cooperative way and must disclose to the Authority appropriately anything relating to the firm of which that regulator would reasonably expect notice.

11. By section 55Z3(1) FSMA, an applicant who is aggrieved by the Authority's decision may refer the matter to the Tribunal.

12. Section 133 FSMA contains some general provisions regarding the proceedings before the Tribunal.

13. By section 133(4) FSMA, on consideration of a reference the Tribunal may consider evidence relating to the subject matter of the reference whether or not such evidence was before the decision-maker at the time of the decision. In this context the "subject-matter" of the appeal has a broad meaning; see *Markou v FCA* [2023] UKUT 101 (TCC) at [136].

14. By section 133(6) and (6A) FSMA, which apply in the current proceedings:

> "(6) … , the Tribunal must determine the reference or appeal by either—
>
> (a) dismissing it; or
>
> (b) remitting the matter to the decision-maker with a direction to reconsider and reach a decision in accordance with the findings of the Tribunal.
>
> (6A) The findings mentioned in subsection (6)(b) are limited to findings as to—
>
> (a) issues of fact or law;
>
> (b) the matters to be, or not to be, taken into account in making the decision; and
>
> (c) the procedural or other steps to be taken in connection with the making of the decision."

15. The Tribunal in *Hussein v FCA* [2018] UKUT 0186 (TCC) described the Tribunal's jurisdiction on a reference such as this as "a supervisory rather than a full jurisdiction; in that unless the Tribunal believes the reference to have no merit and therefore dismisses it its powers are limited to remitting the matter to the Authority with a direction to reconsider its decision in accordance with the findings of the Tribunal."

16. The Tribunal further explained the extent of its powers on a reference such as this in *Carrimjee v FCA* [2016] UKUT 0447 (TCC) at [38] and [39] as follows:

> "38. If, having reviewed all the evidence and the factors taken into account by the Authority in making its decision, and having made findings of fact in relation to that evidence and such other findings of law that are relevant, the Tribunal concludes that the decision to prohibit is one that is reasonably open to the Authority then the correct course is to dismiss the reference.
>
> 39. Alternatively, if the Tribunal is not satisfied that in the light of its findings that the decision is one that in all the circumstances is within the range of reasonable decisions open to the Authority, the correct course is to remit the matter with a direction to reconsider the decision in the light of those findings. For example, that course would also be necessary were the Tribunal to make findings of fact that were clearly at variance with the findings made by the Authority and which formed the basis of its decision. That course would also be necessary had there been a change of circumstance regarding the applicant

> which indicated that the original findings made on which the decision was based, for example as to his competence to undertake particular activities, had been overtaken by further developments, such as new evidence which clearly demonstrated the applicant's proficiency in relation to the relevant matters. Such a course would not usurp the Authority's role in making the overall assessment as to fitness and propriety but would ensure that it reconsidered its decision on a fully informed basis. In our view such a course is consistent with the policy referred to at [31] and [32] above as it leaves it to the Authority to make a judgment as to whether a prohibition order is appropriate."

17. Although *Carrimjee* concerned the imposition of a prohibition order, the Tribunal has confirmed that the principles to be applied are the same in an authorisation case: see *Przemyslaw Soszynski t/a Phenix Consultancy v FCA* [2022] UKUT 00247 (TCC)] at [33] to [35], *Lewis Alexander Ltd v FCA* [2019] UKUT 0049 (TCC) at [33] to [34] and *Köksal v FCA* [2016] UKUT 478 (TCC) at [25] to [28].

18. The effect of all this is that the Tribunal must dismiss the Reference unless it makes findings of fact and/or law which indicate that the Decision was not one that was reasonably open to the Authority. Furthermore, even if the Tribunal finds flaws in the Authority's decision-making process, it should not remit the Reference if it is of the view that despite such failings, it is inevitable that if the matter were remitted, the Authority would come to the same conclusion.

19. Turning to the burden and standard of proof (see *Köksal* at [37] and *Lewis Alexander* at [36]): the initial legal burden is on the Authority to show, on the balance of probabilities, why the Authority cannot ensure that, if the application were granted, the Applicant would not satisfy and continue to satisfy the Threshold Conditions. This is not to be equated with a requirement that the Authority proves positively that the Applicant does not satisfy those Conditions. Once this is established, the burden then switches to the Applicant, who must establish that there are matters that justify remitting the matter to the Authority for further consideration.

THE APPLICANT'S DEALINGS WITH THE AUTHORITY

20. By way of background, the Applicant is a used car dealer which focuses on providing modestly priced vehicles to consumers. The Application was made to enable the Applicant to expand its business by enabling it to offer prospective purchasers the option to finance their acquisition. We were told that the Applicant already had an agreement in principle with a motor finance provider. Motor dealers offer finance for a variety of reasons including speed (the possibility of concluding a sale without needing to wait for a buyer to go away and sort out their own finance), eligibility (some third-party financiers might be unwilling to lend to particular individuals or on particular cars) and the possibility of earning commission. Although the size of a loan might be substantial (and for some borrowers the loan might be the largest, or send largest after a mortgage, loan they take out), car dealerships which undertake credit broking and linked activities are typically authorised under the Authority's Limited Permission regime on the basis that introducing prospective borrowers to providers of car finance is ancillary to the dealership's main activity of selling vehicles.

21. We heard from two witnesses, Mr Jason Sullivan (a Manager in the Authority's Credit & Lending Department) for the Authority, and Mr Dalipi for the Applicant. Mr Sullivan provided a witness statement and was cross-examined briefly. In particular, Mr Dalipi asked him about the meaning of "consumer". Mr Sullivan did not have a full grasp of this at his fingertips.

22. Mr Dalipi did not provide a witness statement, but by agreement we took as his evidence in chief the factual material and commentary in the Applicant's response to the Warning

Notice, its reply to the Authority's Statement of Case and form FTC3 (making the Reference to the Tribunal). Mr Dalipi was cross-examined at some length by Mr Macdonald. In addition, we had a hearing bundle containing just under 600 pages of documentary evidence.

23. We found both witnesses to be straightforward individuals who gave clear and credible evidence. Mr Dalipi was cross-examined extensively by Mr Macdonald and was completely transparent and candid in his replies, even when dealing with issues that were not entirely favourable to the Applicant. We have no hesitation in accepting their evidence.

24. Turing to that evidence, we deal first with the history of dealings between the Applicant and the Authority (in chronological order) and then with some broader issues on which Mr Macdonald questioned Mr Dalipi.

25. On 28 September 2023, the Applicant made the Application for permission under section 55A FSMA to carry on the following regulated activities:

a) Limited permission credit broking (limited to secondary broking);

b) Debt adjusting (limited to relevant credit activities);

c) Debt counselling (limited to relevant credit activities); and

d) Agreeing to carry on a regulated activity.

26. On 29 September 2023, having carried out a preliminary review of the Application, the Authority requested the Applicant to provide information, which had been omitted from the Application, including a Disclosure and Barring Service ("DBS") Certificate, financial forecasts including historic accounts, regulatory business plan, vulnerable customer policy, complaints policy, compliance monitoring plan, customer journey, and answers to additional questions including questions on regulated and unregulated activity and previous directorships. The Applicant responded to the Authority's request and provided supporting documents on 12 October 2023. The original DBS certificate provided by the Applicant was at an incorrect level and the correct certificate was provided on 20 October 2023.

27. On 13 October 2023, in the course of an email exchange about the DBS certificate and explaining why he had submitted a Basic DBS check, Mr Dalipi told the Authority that "I am indeed a Sole Director of the firm".

28. On 3 November 2023, the Authority's caseworker conducted an initial call (the "Call") with Mr Dalipi. One of the documents we reviewed were her notes of the Call. The notes of the Call record that they were written at 17:14 on 3 November 2023. According to her notes, the caseworker explained that this was a standard, unrecorded call which was an opportunity for the Authority to speak to the Applicant following an initial review of the Application. During the call, the caseworker enquired about the structure of the Applicant as, whilst the Application listed only one director and did not disclose any other controllers, a search of Companies House records had indicated that the Applicant in fact had three directors. Mr Dalipi then explained that the Applicant was jointly owned by himself and Mr Kevin Mira ("Mr Mira") and that the third director on Companies House records, Arjan Mira, is Mr Mira's father and was a former director of the Applicant who was removed prior to the Application. Mr Dalipi said that Mr Mira was young, currently at university and would have limited involvement. Mr Dalipi had taken the view that he was the sole director as he would be actively running the business. The Applicant was informed that a written information request together with a request for a Controllers Form for Mr Mira to complete would follow.

29. Mr Dalili says that the caseworker's notes are not accurate. They do not reflect the tone of the Call, his saying that the £5,000 capital requirement does not apply to the Applicant or the caseworker testing him on what "consumer" means or discussing his connections with

Albania. In response to the caseworker asking him about what "consumer" meant, Mr Dalipi (in the response to the Warning Notice) said:

> "What your case officer's notes don't capture (unsurprisingly) is my question as-posed to her - a very simple question surrounding Consumer Credit (the definition of a Consumer) - and she did not know the answer! I was forced to do this as she had clearly adopted the strategy of trying to expose me as having too little knowledge as regards Consumer Credit."

30. Mr Dalipi had not disclosed his involvement in companies he had been involved in previously, including one he set up when he was 18 years old. On the Application Form he answered "Yes" to the question as to whether he had held any directorships in the last 10 years, but did not go on to give the required details. The need to provide details was raised with him on the Call by the caseworker. Mr Dalipi told the caseworker that he had not put these companies on the application form as he considered they had no relevance to the regulated business. He was told that this information would be required.

31. Shortly after the Call on the same day, Mr Dalipi emailed the caseworker requesting a copy of the call recording. In his email he said that "If you do not [forward a copy of the call recording] – I will access it via a Subject Access Request, as well as escalating your non-compliance with the legally sound request to your Head of Department, and to the FCA Board,"

32. On 6 November 2023, the caseworker replied, explaining that the Call was not recorded in line with standard Authority policy and that this had been communicated during the Call.

33. On the same day, Mr Dalipi replied stating that the caseworker had told him that calls were recorded and requesting an email contact for the relevant Head of Department within the Authority's Authorisations Division.

34. On 9 November 2023, the Authority sent the Applicant an information request addressing various issues and missing information (including a Controllers Form for Mr Mira) in the Application (the "Information Request"). The Authority provided a deadline of 10 working days for the Applicant to provide a response. No response to any of these items has been provided. Mr Dalipi said that he had a completed Controllers Form for Mr Mira at home, but he had decided not to send it in for now.

35. On 13 November 2023, Mr Dalipi emailed the Head of Department of the Authority's Authorisations team ("HoD") setting out his concerns regarding the Call. He said that, although the Call was "friendly and informal" when it started, "it turned out to be anything but" and the Call quickly escalated in tone and attitude to bellicose and belligerent. He went on to observe:

> "Your caseworker was delivering a tirade of accusations about my competence and abilities – literally and blatantly drilling for trouble in my previous businesses. While you might feel within your rights to demand the information in question – the way this was done was utterly unprofessional, and actually amounted to bullying. I then sought to access the call recording from the area of the FCA that deals with that – and their story changed from 'we record all incoming and outgoing calls' to: 'The Authorisations Department doesn't record calls'!! [The caseworker] herself – in the mysteriously vanished recording – confirmed that calls are recorded 'sort of'. In her follow-up e-mail – it was completely self-evident that she was going by detailed notes extracted from a call recording."

36. Mr Dalipi said that if he did not receive the recording from the Authority, he would seek it via the ICO. He also indicated that he would refer the matter to the Authority's Board. Finally he observed that, "Separately – I will be addressing [the caseworker's] questions as-derived from the call recording (i.e. I will be complying with your statutory demands for further

information)." Mr Macdonald pointed out that, despite this assurance, Mr Dalipi did not address the Information Request. He asked Mr Dalipi what made him decide not to cooperate, and Mr Dalipi said that it was not being given the Call recording.

37. On 16 November 2023, the HoD replied to the Applicant explaining the reasons for the Call, confirming that such calls were not routinely recorded, that the option to complain was available and that feedback would be provided to the caseworker. Mr Dalipi confirmed that he had not taken up the invitation to make a complaint. He thought this might be because he was too tied up in trying to get the recording.

38. On 22 November 2023, Mr Dalipi emailed the Authority, stating that the Applicant would cease co-operating with the Application process. The reason given was the Authority's alleged unprofessional conduct, its failure to provide a call recording and its alleged incorrect application of the prudential resources requirements to Limited Permission firms such as the Applicant. Mr Dalipi accused the Authority of wanting "to harass me into giving up and [you] are willing to grasp at anything to do this - including misrepresenting FSMA 2000 and the Consumer Credit regime to me - to further emburden (sic) me with non-existent financiel (sic) burdens." He described their behaviour as "bullying, unprofessional conduct and at best misapplication of the law (at worst – lies …)". He requested the case go through the refusal process and said that he would not respond to the Information Request. Although this email was addressed to the caseworker and the HoD, in cross examination Mr Dalipi accepted that he did not think that the HoD's communications had been unreasonable.

39. On 18 January 2024, the Authority emailed the Applicant with a minded to refuse letter which repeated the Information Request.

40. In light of all this, Mr Sullivan's team recommended to the Authority's Executive Decision Maker to refuse the Application because they did not consider that the Applicant satisfied or would continue to satisfy the Threshold Conditions. Mr Sullivan explained that the Application was refused because. the Applicant had failed to demonstrate the level of cooperation and engagement expected of a regulated firm. The Applicant had refused to provide information when asked to do so by the Authority as part of the Authorisation process and had been unable and / or unwilling to demonstrate that it could comply with applicable requirements. These concerns led the Authority to decide that it could not ensure that the Applicant would meet or continue to meet the Threshold Conditions, specifically the Effective Supervision, Appropriate Resources and Suitability Threshold Conditions.

41. On 24 April 2024, the Authority issued a warning notice to the Applicant (the "Warning Notice") and the Applicant provided representations on the Warning Notice by way of an email on 8 May 2024.

42. On 26 June 2024, the Authority issued the Decision Notice to the Applicant.

43. It is clear from the passages we have extracted from the documents above and from Mr Dalipi's evidence that he was greatly upset by the Call. He repeatedly said that the caseworker's tone had been belittling and he was being treated unfairly. He was asked about his non-disclosure of Mr Mira's directorship and his involvement with other companies. The caseworker asked him what "consumer" meant and said that the Applicant would need to meet the £5,000 capital requirement.

44. Pressed by Mr Macdonald, Mr Dalipi said that he understood why the Authority was asking about Mr Mira and his own previous businesses. He accepted that, after he halted the Application process, the Authority did not have all the information it needed to deal with the Application. He agreed that the Authority would be expected to ask about these matters but objected to the belittling nature of the questioning and to the way his nationality was raised.

Mr Dalipi is Albanian and he told us that the caseworker asked him personal questions about his family in Albania and how much time he spends there. He accepts that Albania is a "high risk" jurisdiction and so it is reasonable to ask questions about it, but he does not see why the Authority needs to know about his relationship with his grandparents and how often he visits them.

45. Mr Dalipi accepted that being authorised was a privilege and something that would be a boost to his business. He says he is aware of the need to follow the Authority's rules and to make it easy for the Authority to supervise him. He just wants the Authority to give him a fair hearing.

46. When pressed about what in the call had been concerning or upsetting, Mr Dalipi said that it was "a feeling" and that, given the passage of time, he could not point to anything particular that was said. He recalled that the questions were accusing in tone. He had been asked how often he went to Albania and why he had neither disclosed that Mr Mira was a director of the Applicant nor provided information regarding his earlier directorships of now dissolved companies. It was the way the questions were asked, not what the caseworker was asking about, that worried him. He feels very strongly about this; he says that, if he thought he had been treated fairly, he would have taken a rejection and reapplied. Mr Macdonald asked, just accepting that the call had a negative tone, why he did not hold on and try to get authorised. Mr Dalipi said that the process was not fair; others he spoke to said they had not been treated in the same way and he was convinced the Application would fail.

47. Looking at the Information Request, Mr Dalipi agreed with Mr Macdonald that the tone is helpful and polite (asking questions and indicating where more information was needed) and suggests that the Authority was happy to keep working with him. Question 8 (for example) began "Please would you kindly revisit the compliance monitoring plan paying attention to the following …".

48. The Applicant's Reply to the Authority's Statement of Case is largely given over to the Authority's requirement that the Applicant show a minimum capital of £5,000. It makes two specific points. Firstly, it asserts that the Authority has inferred from the "general solvency requirement" a minimum capital requirement. Secondly, it asks why, if a Limited Permission firm is classed as a debt management firm, it is not subject to the Authority's debt management / prudential regulatory reporting standards.

49. We spent some time going through the relevant provisions. Dealing with the Applicant's first point, the "Consumer Credit" sourcebook (or 'CONC') in the Authority's Handbook is the specialist sourcebook for credit-related regulated activities.

> (1) CONC 10 applies to any firm that meets the definition of a 'debt management firm', which is defined as any firm which carries on "debt counselling or debt adjusting, alone or together, with a view to an individual entering into a particular debt solution". Mr Simpson explained that motor dealers (such as the Applicant) are caught by this definition because, when they undertake a 'part exchange' for a customer whose current vehicle is subject to finance, they engage in both debt counselling and debt adjusting (i.e. they advise the customer to liquidate their existing debt by selling their vehicle to them, and they negotiate the settlement of the finance with the lender). This 'part exchange' arrangement meets the definition of a 'debt solution' because it is a non-statutory arrangement, the aim of which is to discharge the customer from their existing finance. It therefore follows that the firm has engaged in debt counselling and debt adjusting, the aim of which was for the customer to enter into a debt solution, which is the definition of a 'debt management firm'.

(2) CONC 10.2.1R provides that a firm must, at all times, ensure that it is able to meet its liabilities as they fall due.

(3) CONC 10.2.2R provides that a firm must ensure that at all times, its prudential resources are not less than its prudential resources requirement.

(4) CONC10.2.8 provides that the prudential resources requirement is the higher of £5,000 and a sum calculated by reference to "debts under management".

50. Mr Macdonald took Mr Dalipi to some guidance (in the hearing bundle) produced by the Authority dealing with "some typical misconceptions about the way we authorise firms engaged in debt management activity". This makes it clear that a motor dealer could be carrying on debt management activity, even if it does not offer debt management plans, and would be subject to the Authority's prudential and client money rules. Mr Dalipi said that he had not seen this guidance before.

51. Pausing here, it is clear to us that a debt management firm (which can include a motor dealer) is subject to two, quite distinct requirements: a general solvency requirement (CONC 10.2.1R) and a prudential resources requirement (CONC 10.2.2R).

52. Turning to the second point (which Mr Macdonald described as a "reasonable question"), Mr Macdonald took Mr Dalipi to the chapter in the Authority's Handbook dealing with reporting requirements. SUP 16.12.1 provides that that section applies to every firm carrying on a business in column (1) of SUP16.12.4R. SUP16.12.4R lists regulated activities and groups them into regulated activity groups (or "RAG"). RAG12 covers "credit regulated activity". SUP16.12.29B sets out the reporting requirements for RAG12. A debt management firm is required to file a debt management regulatory return annually or six-monthly (depending on its revenue) unless (per Note 6) it is a Limited Permission firm. That is why a Limited Permission firm (such as the Applicant was seeking to be) is not required to file a debt management regulatory return; it only has to file a key data form once a year. Mr Dalipi said that he had not looked at this text previously, which Mr Macdonald said he was surprised by, given that Mr Dalipi was asserting that the Authority had got their approach to debt management firms wrong. He asked why Mr Dalipi did not seek help on this point from the Authority and Mr Dalipi again said he was deterred by the tone and negativity of the caseworker.

53. We should just pause to note that the caseworker did not give evidence before us, or submit a witness statement, and so (as there is no recording of the Call) the evidence around the Call is confined to the caseworker's notes and what Mr Dalipi said, in writing and latterly in evidence before us, about what took place. As we noted earlier, Mr Dalipi struck us as a fair, balanced witness who was trying to help the Tribunal. He was not prone to exaggeration and, when pressed on what in the Call unsettled him, said that it was a "feeling" and, given the passage of time, he could not point to any particular words or questions. Not least because of everything that followed, but also because this has been his position consistently all throughout his email and other written correspondence with the Authority, we accept Mr Dalipi's account that something happened on the Call which unsettled him and shook his confidence in the authorisation process so far as the Applicant was concerned. Exactly what that was, whether it was intentional on the part of the caseworker or not and whether it justified Mr Dalipi's reaction are not issues on which we are able (or need) to come to a conclusion.

DISCUSSION

54. Mr Dalipi's submission is essentially a request for this Tribunal to give him the fair hearing he feels the Authority denied him, and to look at the Application without setting him up to fail. He went down the route of asking the Authority to refuse the Application so that he could challenge that decision before an independent tribunal and get the fair hearing he thinks

the Authority (and in particular the caseworker) was refusing to give him. Again and again, in evidence and submissions we came back to the Call, where Mr Dalipi said he felt bullied and trapped with the caseworker creating stumbling blocks. He says that he is happy to cooperate with a process he considers reasonable, proportionate, and fair; he is not asking for special treatment. Finally, he says that he has knowledge and expertise in his industry and authorisation is important to help him grow his business.

55. The Authority's submission is more developed and links the reasons for refusing the Application to the Threshold Conditions. We will address the Authority's points as we review each of the Threshold Conditions.

56. Before we do that, we remind ourselves that the question we need to answer is whether the Decision was one which was reasonably open to the Authority. The question is not whether we agree with the Decision or whether, still acting reasonably, we or the Authority could have reached a different decision. Mr Dalipi expressed the hope that we would give the Applicant a fair hearing and look at the Application without setting it up to fail. We hope that Mr Dalipi feels that he has had a fair hearing. We would be very disappointed if he did not. However, Parliament has given the task of regulating the financial services industry to the Authority. Even if we were to conclude that the Decision was not one which was reasonably open to the Authority, we could not substitute our own decision (and effectively approve the Application); our power in such a case is limited to remitting the Decision to the Authority (effectively for it to reconsider) with such directions as we consider appropriate.

57. We should also remind ourselves of what the Authority actually decided. Its Decision was to refuse the Application because it was not satisfied (as FSMA requires the Authority to be before it approves an authorisation application) that the Applicant (i) met and would continue to meet the Suitability Threshold Condition, (ii) had appropriate resources in relation to the regulated activities that it seeks to carry on (the Appropriate Resources Threshold Condition), and (iii) was capable of being effectively supervised, having regard to all the circumstances (the Effective Supervision Threshold Condition).

58. We turn now to consider the Authority's conclusions as to whether the Applicant had met the Threshold Conditions we are concerned with.

Threshold Condition 2C: Effective Supervision

59. As it applies to Limited Permission applications, Threshold Condition 2C is as follows:

> "(1) A must be capable of being effectively supervised by the FCA having regard to all the circumstances including—
>
> …
>
> (c) the way in which A's business is organised;
>
> (d) if A is a member of a group, whether membership of the group is likely to prevent the FCA's effective supervision of A;
>
> …
>
> (f) if A has close links with another person ("CL")—
>
> (i) the nature of the relationship between A and CL,
>
> (ii) whether those links are or that relationship is likely to prevent the FCA's effective supervision of A, and
>
> (iii) if CL is subject to the laws, regulations or administrative provisions of a territory which is not an EEA State ("the foreign provisions"), whether those foreign provisions, or any deficiency in their enforcement, would prevent the FCA's effective supervision of A."

60. Mr Macdonald submits that the Authority is reliant on firms providing adequate information in a timely, open and cooperative manner in order to discharge its statutory objectives. This is particularly the case for smaller firms which are not subject to proactive supervision by allocated supervisors (as here).

61. This position was endorsed by this Tribunal's predecessor in *Eversure Financial Services Limited and Frederick George Young v FSA* FIN 2005/0027; FIN 2005/0028 which related to a failure by the applicant to disclose relevant information on the application forms for the firm and Mr Young (its principal). The Tribunal upheld the Authority's refusal decisions. At [58] the Tribunal stated:

> "[…] We start by observing that the Authority's regulatory function generally and its statutory approval function in particular is entirely dependent on its being provided with full and accurate information by the individuals seeking approval. […] The Authority cannot carry out its statutory approval responsibility without having the information to assess the candidate's integrity and willingness to be open and honest with it. If it fails to insist on absolute disclosure, it will not be fulfilling its public function. In this regard the Authority is entitled to expect anyone who performs or intends to perform controlled functions to adhere to high standards of competence and capability. […]
>
> Understandably the Authority, as Mr Honey explained, places a great deal of importance on an open and co-operative relationship with firms. Because small firms do not have regular contact with supervisory staff at the Authority, it is important that the Authority can rely on them to bring to its attention voluntarily any matters relating to their ability to comply with relevant rules and requirements."

This passage was cited with approval by the Tribunal more recently in *Jon Frensham v The Financial Conduct Authority* [2021] UKUT 0222 (TCC) at [69] and [70] and *Soszynski* at [156].

62. The Effective Supervision Threshold Condition was considered in *Lewis Alexander*. Here the applicant (Mr Johnson) ultimately provided much of the information requested by the Authority, but the Tribunal noted that Mr Johnson reacted to information requests in a way that was overly aggressive, uncooperative and unwarranted and concluded (at [203]) that the Authority was correct in its "assessment that the amount of time that was taken, the level of resource used by the Authority to obtain (often straightforward) information and the level of resistance that requests for information met led properly to concerns that LAL would not be capable of being effectively supervised if authorised."

63. Similarly, in *Köksal*, the Tribunal held (at [150]) that *"*the manner in which Dr Köksal dealt with the Authority in relation to its requests for information means that the Authority could not be satisfied that Dr Köksal would engage with the Authority in an open and cooperative manner in relation to his consumer credit business". It noted that Dr Köksal had been confrontational and contemptuously dismissive of the abilities of the Authority's staff he dealt with. It considered that this sort of behaviour is "not to be expected from a firm which seeks to be open and cooperative with its regulator. As the Authority's guidance in COND, set out at [16] and [17] above demonstrates, the Authority is entitled to take into account, when considering whether a firm meets the Threshold Conditions, whether the firm is ready, willing and organised to be open and cooperative with the Authority and whether it has in fact been open and cooperative in all its dealings with the Authority."

64. In *Soszynski*. The Tribunal (at [161](b) and [163]) concluded that the applicant's refusal to comply with the Authority's requests for information contributed to his inability to satisfy the effective supervision Threshold Condition: It observed:

> "He is not willing; as he has repeatedly disputed the need to comply with certain rules rather than provide requested information demonstrating his compliance. Certain requested information also still remains outstanding up to 21 months after it was sought.
>
> […] For these reasons, we, like the Authority, are satisfied on the balance of probabilities that the Applicant cannot and will not provide the Authority with adequate information in a timely or open and co-operative manner as required by Principle 11. The Authority was therefore entitled to conclude that the Applicant therefore does not meet the standards described in COND 2.3.3 G."

65. In justifying the Authority's conclusion on the Effective Supervision Threshold Condition, Mr Macdonald points to the Applicant's non-co-operation with the Authority and its failure to provide relevant information, the Applicant's use of its criticisms of the Authority's handling of the Application as an excuse to cease providing any further information, and Mr Dalipi's initial statement that he was the sole director of the Applicant. On that latter point, the Applicant failed to provide adequate and accurate information regarding its ownership and directorship to the Authority and had to be prompted to do so.

66. We agree with Mr Macdonald's analysis here. Whilst Mr Dalipi has (forcefully and repeatedly) criticised the behaviour of the caseworker, he did not initiate a formal complaint (despite being told that he could do so) and instead failed to respond to the Information Request (despite saying that he would) and ultimately made it clear that he would not cooperate with the application process. Whatever the rights and wrongs of what took place on the Call (which we are not in a position to judge), this cannot provide an excuse for the Applicant failing to provide the Authority with the information it needed, refusing to cooperate and behaving from the outset in a confrontational manner (for example, with the HoD).

67. As the authorities make clear, the Authority needs to feel confident that those it authorises (particularly small businesses like the Applicant, which do not have regular contact with the Authority) will be open, honest, cooperative and transparent and can be trusted to provide the Authority with the information it needs accurately and in a timely manner. Mr Dalipi's behaviour here would justify the Authority concluding that the Applicant might not exhibit these traits and instead that there was a high risk of it being obstructive, unnecessarily confrontational/disruptive, failing to provide required information without being prompted into complying, and a level of risk of the Applicant not providing required information at all and of any information provided not being accurate.

68. For these reasons we are satisfied that the Authority's conclusion that it was not satisfied that the Applicant was capable of being effectively supervised, having regard to all the circumstances, was one which was reasonably open to it.

Threshold Condition 2D: Appropriate Resources

69. This Threshold Condition requires that "The resources of A must be appropriate in relation to the regulated activities that A carries on or seeks to carry on." Where, as here, the only activities that an applicant seeks to carry on are relevant credit activities, "A has adequate financial resources if A is capable of meeting A's debts as they fall due".

70. As to whether A has appropriate non-financial resources, sub-paragraph 2D(4) provides:

> "(4) The matters which are relevant in determining whether A has appropriate non-financial resources include—

(a) the skills and experience of those who manage A's affairs;

(b) whether A's non-financial resources are sufficient to enable A to comply with—

(i) requirements imposed or likely to be imposed on A by the FCA in the exercise of its functions, or

(ii) any other requirement in relation to whose contravention the FCA would be the appropriate regulator for the purpose of any provision of Part 14 of this Act."

71. As to the Applicant's financial resources, Mr Macdonald submits that the Authority was unable to confirm if the Applicant satisfied the general solvency requirement due to the Applicant's failure to respond to the Information Request. Moreover, the financial information that was provided by the Applicant was incomplete, contained only future projections, and did not indicate the Applicant's current assets or liabilities.

72. On 12 October 2023, the Applicant sent the Authority some financial projections. There were no historic or current period figures, just a three-year forecast, which showed rising revenue (all from non-financial services sources), constant expenses and consequently rising profits. The Applicant was projected to retain earnings of £20,000 a year (giving cumulative retained earnings of £60,000 by the end of year three) and have a £5,000 share capital. In the Information Request, the caseworker asked the Applicant to explain how it would meet the £5,000 financial resources requirement. She asked for no other financial information/analysis (for example, she did not ask how profits/income would rise whilst expenditure stayed constant or more generally what the Applicant had based its projections on or whether they were just a "finger in the air"). The projections showed £5,000 of share capital being injected, which would (of course) be sufficient to meet the financial resources requirement. Given that the Applicant had supplied projections which answered the only question the caseworker asked about financial resources and that no other questions/issues had been raised with the Applicant about its financial resources, we do not consider that the Authority's conclusion that it was not satisfied about the Applicant's financial resources was one that was reasonably open to it.

73. As to the Applicant's non-financial resources, Mr Macdonald says that:

(1) the Applicant has failed to demonstrate that it has an appropriate compliance programme in place to ensure compliance with regulatory requirements and has declined to engage with the concerns the Authority proactively raised with its Compliance Monitoring Plan; and

(2) the Applicant has failed to satisfy the Authority that it has appropriate resources in place to ensure that products sold to customers are suitable and in their best interests and that appropriate policies and procedures are in place to protect all customers adequately.

74. In the Information Request, the Authority asked the Applicant "Please could you kindly revisit the compliance monitoring plan paying attention to the following: identifying the relevant risks and rules, identification of financial crime, conflicts of interest, the monitoring of the firms prudential resource requirement and the approach to root cause analysis". The caseworker identified key issues to be addressed in the compliance monitoring plan.

75. The Information Request went on to discuss suitability. The caseworker explained that she understood that "the firm is not a lender, however it still needs to ensure the credit broking performed is not unsuitable for the customer. In light of this please describe any measures in place to mitigate the risk of unsuitable sales such as fact find, income/expenditure assessment etc and how this is built into the sales process. Please also describe the process by which finance is offered. How are sales pitched?"

76. The Applicant has not provided this information, or indeed any other information addressed in the Information Request. It has clearly not done anything that might even begin to satisfy the Authority that it has the non-financial resources it needs to identify and deal with these obligations.

77. For these reasons we are satisfied that the Authority's conclusion that it was not satisfied that the Applicant had appropriate resources in relation to the regulated activities that it sought to carry on (the Appropriate Resources Threshold Condition), was one which was reasonably open to it.

Threshold Condition 2E (Suitability)

78. Threshold Condition 2E is that "A must be a fit and proper person having regard to all the circumstances". This is an open-ended test, although FSMA lists a number of factors to be taken into account (where appropriate). These include:

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

79. Mr Macdonald repeats his submissions in relation to Threshold Conditions 2C and 2D: an applicant which refuses to cooperate with the Authority, fails to provide requested information and behaves from an early stage in a confrontational manner is not suitable for authorisation by the Authority.

80. Mr Macdonald stresses that the Authority is not suggesting that the Applicant is unsuitable because Mr Dalipi questioned its interpretation of its own financial resources rules as they apply to the Applicant. He entirely accepts that the Applicant (and any other firm seeking authorisation) is perfectly entitled to question the Authority's requests for information and interpretations of rules in a reasonable manner. However, there is a distinction to be made between appropriate challenge and a refusal to cooperate with legitimate requests. As this Tribunal concluded in *Lewis Alexander* (at [196]):

> "[I]t is not the role of the individual firm to dictate to the Authority how it should deal with the firm in question and, in particular, that it should depart from its business model for the firm's own convenience. If the firm thinks that the regulatory approach taken by the Authority is inappropriate, then that is a matter to be raised with those who have ultimate responsibility for the regulatory structure, namely Parliament and the Government."

81. The reasons given for the Applicant's non-cooperation with the Authority (in its response to the Warning Notice) started with the Call, which Mr Dalipi described as "belligerent, accusatory in tone and clearly aimed at trying to 'trip me up' and 'catch me out'". As a result, he said that he was "not willing to cooperate with a body and a process which is clearly biased, out-of-control and demonstrating an obvious agenda to prevent most firms obtaining Limited Permissions - doing and saying whatever it takes to achieve this - and all completely unchecked".

82. He then asserted that the Authority's systems for vetting Limited Permission applications had "shifted dramatically" since 2021 and he described this as the "decimation of an already-struggling sector through the back door".

83. He also said that the Authority's systems and controls were not fit for purpose. He referred to the way the Authority was (in his opinion) seeking to "levy non-existent financial burdens on firms", ignoring the purpose of the Limited Permission regime, not recording its calls and inadequately training its staff (referring to his question to the caseworker about what

"consumer" means). The essence of his message to the Authority was (in his words), "Sort your own house out - and I will happily cooperate."

84. We have already discussed the Call at some length. Clearly, something happened on the Call (in terms of what was said or how it was put) that unsettled Mr Dalipi. The proportionate response to this would be to initiate a complaint. Particularly once the Call was followed by the entirely positively worded Information Request, the appropriate response was not to make sweeping accusations against the caseworker and the Authority and refuse to continue with the application process.

85. Turning to the alleged "shift" in the Authority's approach to authorising Limited Permission firms, Mr Sullivan's evidence was that the Authority's rules in relation to consumer credit firms have not changed, and the Authority has always expected Limited Permission firms to prepare documents and information such as regulatory business plans, policy documents and accounting forecasts. In the past, firms were required to confirm that they had robust policies, procedures, systems and controls in place. In recent years, the Authority's Authorisations Division has started to routinely request these underlying documents as part of the application process, given its importance to achieving good consumer outcomes. The fact that the Authority may request and review a firm's underlying policies and procedures is clearly indicated on the application form.

86. As far as broader criticisms are concerned, we have noted that the Call was not recorded, so no recording could be provided. We analysed the way the prudential rules apply to Limited Permission firms such as the Applicant and observed a modest (£5,000 share capital) capital requirement.

87. We consider that the point Mr Sullivan made, almost in passing, in his evidence about the application process seeking to achieve good consumer outcomes is a really important one. The application process is looking to make sure that those who are authorised are qualified, equipped and suitable to engage in regulated activities, in the case of the Applicant with retail customers.

88. Viewed through that prism, a failure to answer questions or provide information (assuming what is requested is reasonable and proportionate) or to engage honestly and transparently with the Authority during the application process marks an applicant out as unsuitable. Someone who behaves in that way (for whatever reason) has failed to grasp (or deliberately chosen to ignore) the primary importance of securing good outcomes for consumers (which the Authority secures by following its processes, reviewing information provided and asking questions to determine whether a person is appropriate to be authorised) and placed their own concerns ahead of that objective.

89. What this means here is that, whatever took place on the Call, however righteous Mr Dalipi's indignation and however valid his other criticisms of the Authority, none of these factors can excuse the Applicant's failure to engage with the authorisation process.

90. Mr Macdonald criticised the Applicant's behaviour (in Mr Dalipi's accusations against the Authority and its staff) as going beyond what is necessary to engage in proper debate and, given this behaviour has been repeated, he says that the Applicant is likely to demonstrate the same pattern of behaviour if authorised.

91. Whilst some of Mr Dalipi's language is rather high flown and occasionally worse (for example, his suggestion that the Authority had a recording of the Call but deliberately lost or destroyed it), we do not consider that the tone of his dealings with the Authority alone marks the Applicant out as unsuitable. Nor is the Applicant unsuitable because some of the points it raised (for example, the financial resources requirement applicable to it) were wrong.

92. What marks the Applicant out as unsuitable is its seeming failure to understand that the application process is designed for a purpose (to achieve good consumer outcomes) and therefore requires the Applicant to engage with that process in an open, cooperative and transparent way, whatever it feels about the process, and to demonstrate a similar mindset when it comes to engaging with the regulatory regime post-authorisation. We can entirely understand why the Applicant's behaviours during the authorisation process meant that the Authority was not persuaded that the Applicant was unequivocally prepared to do this.

93. For these reasons we are satisfied that the Authority's conclusion, that it was not satisfied that the Applicant was a fit and proper person having regard to all the circumstances, was one which was reasonably open to it.

OUR OVERALL CONCLUSION

94. We should pause here and observe that we have reached our decision on the Reference with a sense of sadness. This is because we agree with Mr Macdonald's comment made in the hearing that, as well as being entrepreneurial, Mr Dalipi is clearly a very intelligent and articulate man. It is a shame (to put it mildly) that the relationship between the Applicant (in reality, Mr Dalipi) and the Authority deteriorated to the point where Mr Dalipi felt that asking the Authority to refuse the Application and come to this Tribunal was the only way forward. It is much to be regretted that he did not step back, allow his anger at whatever happened on the Call to subside and proceed (even through gritted teeth) with the Application process.

95. The question Parliament has asked us to answer, however, is not whether this is a sorry state of affairs, but rather whether the Decision was one which was reasonably open to the Authority.

96. The Authority can only approve an authorisation request if it is satisfied that the Threshold Conditions are (and will continue to be) met; section 55B FSMA. We have examined the reasons why the Authority considered that the three Threshold Conditions in issue here were not met and have explained why we consider that their conclusion in each case was one which was reasonably open to them.

DISPOSITION

97. For the reasons set out above, we are satisfied that the Decision (that the Threshold Conditions were not met and therefore the Application could not be approved) was one which was reasonably open to the Authority.

98. The Reference is dismissed.

MARK BALDWIN
UPPER TRIBUNAL JUDGE

Release date: 10 March 2025