[2019] UKUT 228 (TCC)

Reference number: FS/2019/016

FINANCIAL SERVICES– Supervisory Notice- Application for direction to suspend the effect of notice until reference disposed of- Notice varied Applicant's permission by removing regulated activities from those to which its Part 4A FSMA permission related- Reason for notice: failure to satisfy Threshold Conditions of appropriate resources and suitability - whether Tribunal satisfied that the direction to suspend the effect of the notice would not prejudice the interests of consumers – no - Application dismissed - Rule 5 (5) The Tribunal Procedure (Upper Tribunal) Rules 2008

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Sussex Independent Financial Advisers Limited **Applicant**

- and -

THE FINANCIAL CONDUCT AUTHORITY

Respondent

TRIBUNAL: Judge Swami Raghavan

Sitting in public at the Royal Courts of Justice, London on 16 July 2019

Andrew Cousins, Counsel, instructed by DWF Law LLP for the Applicant

James Purchas, Counsel, instructed by the Financial Conduct Authority, for the Authority

DECISION

Introduction

1. The Applicant ("Sussex"), a firm of financial advisers, challenges a decision of the Financial Conduct Authority ("FCA"). The FCA varied Sussex's Part 4A regulatory permissions, removing all its permitted regulated activities[1], with effect from 8 July 2019. It also imposed requirements restricting Sussex's use of the firm's assets[2].

2. The FCA's decision, which was in the form of a Supervisory Notice, stemmed from their concerns over Sussex's non-payment and handling of four Financial Ombudsman Service ("FOS") final awards made to Sussex's previous clients.

3. According to the FCA, when the significant liabilities arising from the FOS awards are taken account of, Sussex appears insolvent, and fails to meet its regulatory requirement to hold appropriate resources. In addition, they do not regard Sussex as fit and proper, and accordingly Sussex do not meet the threshold condition of suitability. This is because of the way Sussex wrote to the FOS complainants, encouraging them to settle for less than the full amount, and also as the company continued to pay significant dividends while not paying the FOS awards.

4. Sussex disagree; they maintain they do have appropriate resources, in particular when account is taken of an unresolved complaint they have made to the FOS regarding their Professional Indemnity Insurer ("PII") which might yet come out in their favour, and in view of ongoing proposals to settle the FOS awards. They argue their communications with the FOS complainants, and offers to pay reduced sums, reflected the reality of the firm's financial situation. There was also nothing untoward about paying dividends to Sussex's shareholder; this was part of his remuneration for his ongoing advice work for Sussex.

5. Sussex's challenge to the FCA's Supervisory Notice takes the form of a reference to the Tribunal, by a notice dated 3 July 2019.

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[1] 1) Advising on a home reversion plan; 2) Advising on investments (except on pension transfers and pension opt-outs); 3) Advising on P2P agreements;4) Advising on pension transfers and pension opt-outs; 5) Advising on regulated mortgage contracts; 6) Agreeing to carry on a regulated activity;7) Arranging (bringing about) a home reversion plan; 8) Arranging (bringing about) deals in investments; 9) Arranging (bringing about) regulated mortgage contracts;10) Credit broking;11) Debt adjusting;12) Debt-counselling; 13) Making arrangements with a view to regulated mortgage contracts;14) Making arrangements with a view to transactions in investments; and 15) Providing credit information services.

[2] In summary, Sussex requires the written consent of the FCA before it can dispose of, withdraw, transfer, deal with or diminish the value of its assets (but can continue to make monetary payments of no more than £5000 in the ordinary course of business)

6. This decision concerns Sussex's application to the Tribunal, contained within their reference, to suspend the effect of the FCA's decision (as it regards the variation of permission) until the Tribunal decides on the Supervisory Notice at a final hearing ("the suspension application"). The Tribunal's power to direct a suspension is contained in Rule 5(5) of its Rules[3].

7. With the parties' consent, the Tribunal (Judge Herrington) directed on 5 July 2019 that the effect of the Supervisory Notice, in relation to variation of permission, was suspended pending determination of this suspension application.

Tribunal's proposal for short adjournment of application to allow Sussex opportunity to inject funds

8. The outcome of the suspension application is significant because without the requisite regulatory permissions Sussex cannot continue its trade in the run up to the final hearing of its reference. That in turn is a grave source of concern for some of the FOS award recipients who fear that, if Sussex closes down, their claims in insolvency and on the Financial Services Compensation Scheme ("FSCS") will yield a lot less than the settlement sums proposed by Sussex. Those settlement sums are not in fact agreed because Sussex's offer was conditional on the FCA not withdrawing permission and agreeing not to take enforcement action; conditions the FCA was unwilling to agree to, in essence because by doing so, it would impermissibly restrict it from carrying out its statutory regulatory responsibilities.

9. It was apparent to me from the papers I received before the suspension application hearing, which included details of correspondence between Sussex and the FCA, that the directors had indicated that they were prepared to inject sums into the business to pay the full FOS award amounts outstanding as a lump sum with a shortfall of £60,000 (to be split between two of the FOS recipients) which was to be paid in instalments over three years.

10. Given that proposal, the FOS award recipients' concerns, the current financial state of Sussex, from which it appeared that it did not currently have the resources to meet the FOS debts (there was no information on the likely date Sussex's PII complaint to the FOS would finally be resolved), and therefore that its minimum threshold condition of Appropriate Resources was not met, it struck me there was merit in exploring whether a short two week adjournment of the suspension application should be given. This would, in effect, continue the suspension in place following Judge Herrington's direction, and would allow the opportunity for the business to be put in funds so that it could go ahead and make payments to the FOS award recipients. Further it would give some additional time to further investigate if there was any way the shortfall amount of £60,000 could be paid over in lump sums rather than by instalment. On taking instructions, Mr Cousins, for Sussex, confirmed however, that if the adjournment were granted, the opportunity to inject funds would not be taken up; the directors were wary of "continuing regulatory intervention" if the

[3] The Tribunal Procedure (Upper Tribunal) Rules 2008

funds were put into the company. By this they meant that there was little point in putting their own money into the company if they could not be sure that their regulatory permissions would not be varied and would continue. Given that indication, the FCA's objection, and the FCA's position that its statutory regulatory responsibilities meant that it could not agree to funding on the conditions sought, there appeared to be no point in pursuing the short adjournment. I therefore went ahead to hear Sussex's application.

11. At the end of the hearing, I announced my decision which was that the suspension application should be dismissed. This decision sets out my reasons.

Relevant law

12. Rule 5(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Rules") gives the Upper Tribunal the power to direct that the effect of the decision in respect of which the reference is made (in this case the giving of the Supervisory Notice insofar as it concerns the variation of Sussex's Part 4A permission) 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;
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> (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. There was no dispute that, on the facts of this case, I am only concerned with whether the condition in Rule 5(5) (a) is met; I must be satisfied that the suspension of the effect of the Supervisory Notice would not prejudice the interests of any consumers intended to be protected by the relevant notices.

14. The key principles to be applied in considering applications under Rule 5 (5) were set out by this tribunal in *Walker v FCA* (FS/2013/0011) and *PDHL v FCA* [2016] UKUT 0129 (TCC) and in *Koksal (t/a Arcis Management Consultancy) v FCA* [2016] UKUT 0192 (TCC). In summary these 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: see *Walker* at [20] and *PDHL* at [31];

(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: see *Walker* at [20];

(3) Detriment to the applicant, such as it being deprived of its livelihood, is not relevant to this test: see *Walker* at [21];

(4) The burden is on the applicant to satisfy the Tribunal that the interests of consumers will not be prejudiced: see *Walker* at [21] and *PDHL* at [30]; 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: see *Walker* at [22] and PDHL at [27] to [31]. The reference to consumers should for such purposes have the same meaning as in section 1G of Financial Services Markets Act 2000 ("FSMA") which defines consumers to mean person who use, have used, or may use among other things regulated financial services: see *Koksal* at [23].

15. Additionally, as noted in the above 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: see *PDHL* at [33].

Procedural Background and the Supervisory Notices

16. In a First Supervisory Notice dated 18 April 2019, the Authority proposed to vary the Part 4A FSMA permission of Sussex by removing all of the regulated activities from those to which its permission related (these are listed at footnote to [1] above). The activities encompassed the whole range of Sussex's business which as a small firm of retail financial advisers, involved providing advice on mortgages, investments, and pensions to individuals. The Notice also imposed requirements restricting Sussex's use of its assets.

17. By way of a Second Supervisory Notice issued on 2 July 2019 (the "Supervisory Notice") to Sussex the Authority decided, pursuant to s 55J FSMA, to vary the Part 4A permission as proposed above, and not to rescind the assets requirements. The Part 4A permission variation was specified to take effect on 8 July 2019. Sussex referred this Supervisory Notice to the Tribunal, by a reference notice dated 3 July 2019. In its reference notice, Sussex applied for a direction that the decision to vary the Part 4A permission be suspended pending the determination of the reference pursuant to Rule 5 (5) of the Rules.

18. The Supervisory Notice is a twenty-page document setting out the reasons for the action taken, the particulars of the facts and matters relied on, and the FCA's view of Sussex's relevant regulatory failings. It also sets out the relevant statutory provisions, a summary of Sussex's representations and the FCA's response to those.

19. The two regulatory failings stated concern 1) the Appropriate Resources Threshold Condition[4] and 2) the Suitability Threshold Condition[5]. Both failings are in relation to unpaid FOS awards. The Supervisory Notice sets out the history of four FOS awards relating to clients who had received advice from Sussex concerning the transfer of their pensions to a SIPP. Following refusal of their complaints by Sussex, each client obtained and accepted final determinations in the client's favour, which accordingly became final and binding. The total amount of the four awards as mentioned in the Supervisory Notice is £447,419.37 (because of interest accruing at 8% this amount is continually increasing).

20. Sussex is said to fail the Appropriate Resources Threshold because, when taking account of the FOS awards which Sussex is obliged to pay, Sussex appears to be insolvent in that its liabilities exceed its assets, and because by failing to pay the awards when due, Sussex is unable to meet its debts as they fall due.

21. The FCA consider Sussex fails the Suitability Threshold because it tried to persuade the FOS complainants to accept significantly reduced sums by claiming that, otherwise, Sussex would be rendered insolvent, and the complainant would recover no more than the FSCS maximum. Sussex also stated it would expend its resources in resisting any attempt to enforce the FOS awards, thereby reducing the sum which would otherwise be available to them. Also, until the FCA imposed the assets requirement, despite claiming to lack resources to pay the FOS awards, and being aware of its regulatory obligation to do so, Sussex continued to pay considerable dividend sums to its shareholder.

22. In the light of those matters the FCA considered it necessary to vary Sussex's Part 4A Permission to prevent it from continuing to carry on regulated activities and that the variation should take effect from 8 July 2019. The FCA also considered the assets requirement had to be maintained until the FOS awards were paid.

23. In its reference to the Tribunal, Sussex makes a number of points as to why the Supervisory Notice was unnecessary, disproportionate and contrary to the FCA's statutory objectives, in particular that of consumer protection:

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[4] Paragraph 2D Schedule 6 FSMA which so far as relevant provides:

"(1) The resources of A must be appropriate in relation to the regulated activities that A carries on or seeks to carry on. (2) The matters which are relevant in determining whether A has appropriate resources include - (a) the nature and scale of the business carried on, or to be carried on, by A; (b) the risks to the continuity of services provided by, or to be provided by A; (3)…the matters which are relevant in determining whether A has appropriate financial resources include-(a) the provision A makes…in respect of liabilities"

FSMA Schedule 6 Paragraph 1A provides that "liabilities" include "contingent liabilities". The guidance in the FCA's handbook explains it will interpret "appropriate" as meaning sufficient in terms of quantity, quality and availability and that it will have regard to whether there are any indications that the firm will not be able to meet its debts as they fall due .

[5] Paragraph 2E Schedule 6 FSMA

(1) Since it was authorised in 2002 Sussex has only had four FOS complaints upheld it against it for investment advice. The advice took place in 2009/10.

(2) It agreed a settlement with two complainants, which if it had not been refused by the FCA, would mean that once the agreed payments were made there would be no outstanding liabilities. No complainant has sought to enforce their award in court.

(3) No final decision has been made by FOS yet on Sussex's complaint against the PI insurer who had refused cover in relation to the complainant.

(4) Its shareholder takes his remuneration mainly by way of dividends for reasons of tax-efficiency.

Evidence

24. I heard evidence from Mark Thomas, who is a Chartered Accountant and one of Sussex's three directors, and from Anna Couzens, a solicitor and manager within the FCA's Enforcement and Market Oversight Division. Both witnesses had provided witness statements in advance of the hearing in accordance with the Tribunal's directions. They were each cross-examined by the opposing party and assisted the Tribunal with its questions. Both Mr Thomas and Ms Couzens were forthcoming with their answers and I found each to be honest and credible witnesses of fact. There was, to my mind, no serious challenge to the matters of underlying fact raised by each witness, rather the contention between the parties was about how those facts were to be evaluated against the relevant regulatory standards relating to appropriate resources and suitability.

25. In his very brief statement, Mr Thomas's evidence suggested that Sussex were still seeking to resolve the FCA's issues, and that removal of the firm's permissions would have the effect of shutting down the firm as it could no longer perform the main core of its business and would lose its business introducers and the confidence of its clients. In his view the wind-down of the firm would likely cause detriment to the FOS award recipients whereas allowing the business to continue to trade pending the final hearing would cause no risk to current customers. The FOS awards related to business transacted a decade ago. Mr Thomas also referred to comments from the FCA's Regulatory Decisions Committee hearing (which convened prior to the issue of the Supervisory Notice) sympathising with the firm's predicament. Mr Thomas's answers in cross-examination covered a wide range of topics including his knowledge of complaints against the firm, the particular FOS complainant's issues, his understanding of the effect of FOS awards and the terms of the letters written to the award recipients, together with his understanding of the basis on which continuing dividend payments had been made. While these topics were relevant to the FCA's concerns around the threshold condition of Suitability I am conscious that this application is not the final hearing and I therefore restrict my findings of fact to those necessary to understand the business and current state of the firm and the issues I found necessary to deal with in reaching my decision on the suspension application.

26. Ms Couzens's statement on behalf of the FCA set out the background to the Supervisory Notice, the relevant regulatory standards, why it was considered certain

minimum threshold regulatory conditions were not met, and details of the significant risk of prejudice to the persons intended to be protected by the Supervisory Notice which would arise if Sussex were allowed to continue carrying on regulated activities. Her statement explained that firms are required by the regulatory rules to comply promptly with any awards made by FOS[6]. As regards the Appropriate Resources threshold, an insolvent firm at risk of being wound up created a significant risk to existing and future customers, in terms of the firm's ability to provide services on an ongoing basis. Ms Couzens highlighted the example of the risk that the firm could go out of business in the middle of arranging a mortgage application or a time limited pension transfer or other investment close to the relevant deadline, causing the consumer, for instance, to lose out financially or a house purchase to fail. A firm trading while insolvent might also be unable to meet future customer liabilities including financial redress arising from an upheld complaint or FOS award. The exhibits to Ms Couzen's statement included copies of Sussex's accounts.

27. In addition, the Tribunal received an e-mail shortly before the hearing and one in the course of the hearing, from two firms of solicitors representing two of the FOS award recipients (respectively Mrs S and Mr B). The e-mails were copied to and made available to both parties. In almost identical terms, the e-mails expressed concern that the outcome of the application might result in the closure of Sussex. As well as being unfair to Sussex, this outcome, it was submitted, would also be highly prejudicial to the award recipients because they would then have to seek compensation from the FSCS potentially receiving a lesser sum than the settlement that was being discussed with Sussex.

Facts

28. Sussex is a relatively small firm which provides financial advice to individuals principally investment, mortgage and pension advice and, upon request, claims management advice, together with some debt-counselling / adjustment. It has three directors, (Karl Hopper-Young (also its sole shareholder), Mark Thomas and Robert Slaughter), six employees and uses three independent contractor advisers, two of whom are located on the premises of local estate agents. The firm has been regulated since 2002 and its Part 4A permissions allow it to carry on a range of regulated advisory and transactional activities (listed at the footnote to [1] above). The directors are approved to perform controlled functions: Mr Hopper-Young (CF1 (Director), CF10 (Compliance Oversight), CF11 (Money Laundering Reporting) and CF30 (Customer)), Mr Thomas (CF1), Mr Slaughter (CF1 and CF30).

29. The firm has 6000 clients on its database of which around half are clients of advisers who have since left, and who are not viewed as active clients except to the extent that Sussex corresponds with them once a year. Of the remaining two to three thousand active clients, around half are clients of the advisers based in local estate agents. Their advice typically concerns mortgages for individuals including buy to let investors, and sometime insurance and remortgage advice when products need to be

[6] Handbook provisions DISP 1.4.4 R and DISP 3.7.12 R

renewed. The remainder of clients deal with Mr Hopper Young and Mr Slaughter; most of their advice concerns investment and pensions. In terms of acquisition of new business, Mr Thomas estimated that the advisers in the estate agents got about four to five new referrals a week and Mr Hopper-Young and Mr Slaughter about one to two a week. Apart from having a website with details of the firm and its advisers, and its previous sponsorship of a local youth rugby team, Sussex did not advertise and it obtained its new business through word of mouth.

30. The advice which gave rise to the FOS awards related to transfers of pensions into SIPPs and was given around 2009/10. Final FOS determinations were made in the period 9 November 2017 to 22 January 2019. These were accepted by the complainants. Sussex did not challenge any of the FOS determinations by judicial review (Mr Thomas explained this was due to the high cost of bringing such actions). The awards were final and enforceable as debts. As at 31 March 2019 the FOS awards stood at £170,281 (Mrs S), £163,019 (Mr B), £77,960 (Mr F) and £49,473 (Mr and Mrs L). Interest on those awards continues to accrue at 8%.

31. Sussex's last publicly filed accounts of 31 March 2018 did not show the liabilities from the awards which had arisen at the relevant time. Accounts produced by Sussex since in order to take account of the awards show that as at 31 March 2018 net assets stood at minus £70,747 and, as at 31 March 2019, at minus £298,532.76.

32. As at 5 July 2019 Sussex calculated the amount outstanding in relation to the awards as £460,733.

33. Sussex made a complaint against its former PII insurer in relation to the FOS complainant (Mr B). No other complaints were made in relation to cover for the other FOS award recipients. Mr Thomas's own assumption, although he has not taken advice on the matter, is that, if Sussex's complaint about the PII Insurer's refusal to indemnify Sussex is successful in Mr B's case, the PII insurer will also provide an indemnity in respect of the other FOS award recipients' cases. The FOS adjudicator's decision and the Ombudsman's provisional decision were in favour of the PII insurer on the basis that Sussex's insurance renewal form contained materially incorrect information. There is no current indication on when the final FOS decision will be received. Sussex currently have PII cover with a different insurer with an excess of £10,000.

34. It has not proved possible to secure funding from commercial lenders such as banks for the purpose of paying the awards. However, as at 10 July 2019, Sussex were proposing Mr Hopper-Young and Mr Thomas would inject funds into the business with a view to enabling payment of the outstanding award sums (except that in the case of Mrs S and Mr B £30,000 of the sum owed would be paid in instalments over three years through some of Sussex's advisers forgoing their commissions). This proposal is conditional on the FCA agreeing not to vary Sussex's permissions which is a condition the FCA are unwilling to sign up to. Mr Thomas was entirely frank in explaining his own perspective and his understanding of Mr Hopper-Young's which was that there was little point putting in private money into the business if it was not clear that it would be allowed to continue. On behalf of the FCA, Ms Couzen's

evidence was equally clear as to the reasons why the FCA would not agree to the condition sought principally given that it was inappropriate for a firm that did not meet the threshold conditions to be permitted to carry on conducting regulated activities and for the FCA to fetter its discretion on how to exercise its regulatory functions by agreeing not to take supervisory or enforcement action.

Sussex's arguments and Discussion

35. The relevant law and legal principles to be applied in an application to suspend are set out above at [12] to [15] above. Sussex argues, as described in more detail below, that it satisfied the pre-condition, that there should be no prejudice to the persons intended to be protected by the Supervisory Notice, and submits that the tribunal should exercise its discretion to grant a suspension of the effect of the notice (as regards variation of permission) pending the final hearing of Sussex's reference to the tribunal, or alternatively for at least an interim period. The FCA disagree on each of these points.

Case to answer?

36. In line with legal principles set out above the appropriate starting point, without getting into the merits of the reference itself, is to consider whether I can be satisfied that there is a case to answer on the reference. This is because if the facts and matters relied on in the Supervisory Notice were not even capable of demonstrating that Sussex had failed to meet the Threshold Conditions, then I could be satisfied that suspending the effect of the Supervisory Notice would not result in a significant prejudice to the relevant persons.

37. Having considered the matters raised in the Supervisory Notice, there clearly is a case to answer. As regards the Appropriate Resources threshold condition, the amounts of the final FOS awards and their negative impact as shown in Sussex's own management accounts demonstrate there is a serious question on this threshold condition. As regards the Suitability Threshold Condition, there is no dispute that Sussex wrote the letters to the FOS recipients which the FCA say it did, or that dividends were paid in the amounts and at the time stated. Although Sussex disagree with the significance the FCA place on those letters and payments, those matters do at least raise a serious case to answer at a final hearing of Sussex's reference. While Sussex's case referred at various points to comments said to have been made by the members of the panel on the FCA's Regulatory Decisions Committee ("RDC") which Sussex regarded as favourable, whether or not those comments were made and the content of those comments are irrelevant; the decision to vary permissions and impose an assets requirement that has been referred to the Tribunal is reflected in the Supervisory Notice following the RDC.

Is the Tribunal satisfied that suspension of the Supervisory Notice (as regards variation of permissions) would not prejudice the interests of persons intended to be protected by the notice?

38. For a number of reasons Sussex argues there is no proven risk of significant harm to those persons intended to be protected, beyond the normal risk of a firm that is doing business in a broadly compliant manner.

39. The firm, it is submitted, meets the Appropriate Resources Threshold Condition. First, if it were successful in its complaint against its former PII insurer this, it is said, would have a profound effect on Sussex's finances. Even if the award was just in relation to the complaint made (Mr B) this would still have an impact on what external funding could be found and in turn the sums offered to all of the FOS recipients. Second, from Sussex's viewpoint, negotiations are still ongoing. If the FCA were willing to agree not to pursue the variation, and not to take enforcement action, funding could then be secured to settle the claims in full (albeit that some amount would be paid in instalments). That would remove the liabilities which gave rise to the appropriate resources concern.

40. As regards the Suitability Threshold Condition, Sussex argued the dividends paid to Mr Hopper-Young were a tax efficient way of remunerating him in circumstances where he was foregoing commission payments he was due under his commission agreement. As recognised by one of the comments made by the panel at the RDC hearing, he was entitled to earn a living. In terms of the letters from Sussex to the FOS recipients it was accepted the wording was awkward, but Sussex's position was not obstructive and reflected the reality of the firm's limited resources at the time.

41. Sussex submitted the particular circumstances of the firm needed to be appreciated. The firm was a small business taking on around five clients a week; it was compliant and professional and the risks its clients faced were comparable to a firm run in a broadly compliant way. The FOS awards related to SIPP advice given back in 2009/2010. The issue involved a small number of clients and a type of advice area the firm had not since returned to. However, the variation went much further in removing all of the regulatory activities for which Sussex had permission, even those unrelated to the original complaints.

42. Sussex emphasised, relying on the e-mails from the two FOS complainants that there was in fact a far greater risk of harm if the suspension application was not granted. Those complainants did not want to rely on the lower FSCS compensation limit but wanted the higher settlement amount proposed by Sussex.

43. As is apparent from the authorities, the burden is on Sussex to satisfy the Tribunal that the interests of persons intended to be protected by the Supervisory Notice would not be prejudiced if a suspension were to be granted. Given the terms of the Supervisory Notice it is clear that it seeks to protect in broad terms the interests of consumers, whether they be past, existing or future consumers. It also refers to the action enhancing the overall regulatory system which best serves consumers as a whole. The Supervisory Notice explicitly acknowledges that Mrs S and Mr B (whose awards exceed the FSCS cap of £85,000) may be disadvantaged compared to their

position under the proposed settlement agreements; I deal with the relevance of that issue to this application below at [52] onwards).

44. I am unable to be satisfied that, if the suspension is granted, the interests of the persons intended to be protected would not be prejudiced. There can be no dispute that when the FOS awards are properly accounted for as liabilities, as indicated by Sussex's own management accounts, the company has a very significant deficit and appears insolvent. I cannot accept that the possibility of a successful payout arising from a successful FOS decision relating to PII cover makes the difference Sussex says it does. Both the prospect of success, and the amount that would be derived are too uncertain in my view to act as a realistic mitigant to the FOS award liabilities which are currently due. The adjudicator's decision and provisional decision are in favour of the insurer. It is not at all clear whether Mr Thomas' assumption that success on Mr B's claim would result in payouts for the other FOS awards, where no complaints were lodged, will hold true. Even if the complaint in respect of cover for Mr B were successful, there is no reason to suppose, given the reluctance of the directors to put in their own money to the company without obtaining assurances, which the FCA have said they cannot give, would result in the outstanding awards being paid. It is also clear the FCA do not share Sussex's view that a settlement, on terms whereby the FCA ties its hands on its enforcement options, is possible. The prospect of such a settlement, which depends on the awards being paid through external funds, is again too remote to act as a mitigant.

45. That being the case it is readily apparent, from the current financial resources of Sussex, which show a significant deficit, that it is in breach of the Threshold Condition on Appropriate Resources. It may well be that in other cases, the question of whether the threshold condition has been breached will not, taking account of the points in dispute between the parties, become clear, until the final hearing of the reference but this is not such a case.

46. As suggested by the name, threshold conditions are minimum requirements. Parliament has enacted through FSMA, that firms need to meet those minimum requirements in order to be authorised in the first place, and in order to continue carrying on regulated activities. In the light of that I cannot accept Sussex's submission that the risks faced by its consumers are those faced by a broadly compliant firm; such a firm could not be assumed to be in breach of a minimum threshold condition.

47. Sussex highlight the small scale of their business and that there have been no problems with their current day to day business which is different from isolated incidents which gave rise to the FOS complaints.

48. While the nature and scale of the business are explicitly stated as relevant matters to consider in the statutory test (set out at footnote 4 above), there is nothing to suggest that size is a relevant factor in the case of a firm whose liabilities exceed its assets and which cannot meet its liabilities. The consumers of a firm in this position will face risks to continuity whether the firm is large or small.

49. The extent to which Sussex's current business is different from that which gave rise to the FOS awards and the argument that it has not attracted complaints is beside the point. When the risks facing Sussex's existing and future consumers are compared with a broadly compliant firm (who, as such, would hold appropriate resources) there are clear risks to those consumers irrespective of whether their advice was related to SIPPs, in terms of continuity of service and to the ability to meet claims of financial redress. These risks were elaborated on in Ms Couzens' evidence (see [26] above). The firm's existing PII cover would not necessarily address this concern given there is an excess of £10,000. Sussex make the point that none of the complainants appear currently to be seeking to enforce their awards. Again this is beside the point; the fact the risk has not yet materialised does not mean the risk is not there. As Mr Purchas for the FCA pointed out, there is nothing to prevent anyone so entitled, whether the award complainants, or other creditors or indeed the FCA from initiating a winding up given the firm's current financial state.

50. I conclude, having considered all the circumstances, that because of the clear and serious concern that the Appropriate Resources Threshold Condition has not been met, there would be a significant risk of prejudice to the interests of existing and future consumers of Sussex as well as its former consumers (for instance, to the extent further redress claims arise). I must therefore refuse the suspension application as the condition in Rule 5(5) is not satisfied.

51. Sussex apply in the alternative for a temporary suspension pending confirmation from the FOS as to when the firm's PII complaint will be resolved. However, no indication has been given of when such confirmation might be known or indeed whether the confirmation would, in any event be given before the likely final hearing of Sussex's reference. In any case for the reasons set out at [44] above even it is known when the final determination will be given the PII complaint does not alter the analysis on why the condition in Rule 5(5) is not satisfied. There is no basis to grant a temporary suspension.

52. Sussex emphasises, as endorsed by the representations of the relevant complainants that two FOS award recipients, Mrs S and Mr B will be significantly worse off if no suspension is ordered, because if Sussex can no longer continue in business, those complainants would receive far less than they could get under Sussex's proposed settlement as the FSCS limit is £85,000. This significant risk of prejudice must, it is submitted, be taken into account. Mrs S and Mr B, as former customers of Sussex undoubtedly count as "consumers" too. The argument, however, in effect, invites the tribunal to be drawn into the exercise of balancing the interests of one set of specific consumers whose interest, it is said, will be prejudiced if the suspension order is *not* granted as against the interests of a rather more open category of past, existing and future consumers whose interests, as I have found above, would be prejudiced if the order *were* granted. However, as highlighted by Mr Purchas's submissions, the tribunal cannot approach the matter in this way as it would not properly respect what is required by the condition stipulated in Rule 5(5).

53. The Tribunal's discretion to grant the suspension order only becomes relevant once it is first satisfied "that to do so would not prejudice persons…intended to be

protected by the notice" (emphasis added). It is the prejudice which arises if the suspension *is* granted which is relevant. What the Tribunal is not directed to consider, so far as the pre-condition is concerned, is the risk of prejudice to consumers if the suspension order *is not* granted. That nuance may at first sight appear an unduly restrictive gateway to the Tribunal's discretion but it is important and reflects the starting point that Parliament has, given the regulator (whose operational objectives include securing an appropriate degree of consumer protection) the power, subject to the constraints in FSMA, to specify that a Supervisory Notice varying permission takes effect on a specified date where it reasonably considers it necessary. Therefore, even if it were concluded that the FOS award recipients were prejudiced by <u>not</u> granting the order, this would not overcome the obstacle presented by the pre-condition in Rule 5(5)(a) that the tribunal was not satisfied that the interests of consumers more generally (i.e. past, existing and future consumers) *would* be prejudiced by granting the suspension.

54. In any case the benefit of the settlement perceived by the FOS award recipients Mrs S and Mr B appears illusory in reality given the impasse between Sussex and the FCA. The settlement proposed by Sussex is dependent on the FCA agreeing not to vary Sussex's Part 4A permitted regulated activities and the FCA are clear that they are unwilling to restrict their regulatory powers and duties in that way. It also seems clear there is no current appetite on the directors' part to fund the settlement without such condition (see [10] above regarding their stance on the proposed adjournment and Mr Thomas's evidence at [34]).

55. Given my conclusion that the pre-condition in Rule 5(5) is not satisfied, the question of the exercise of the Tribunal's discretion does not arise. I do not therefore deal with the appellant's arguments under that heading. That conclusion also means it is not necessary for me to engage with the question of whether consumers' interests would be prejudiced by a suspension order given the FCA's concerns over the Suitability Threshold condition. I accordingly do not make findings on that matter. The question of what significance ought to be placed on Sussex's conduct towards the FOS award recipients and its payment of dividends remain to be considered at any substantive hearing on the reference.

Conclusion

56. The suspension application is dismissed.

57. The parties were directed at the end of the application hearing to try to agree directions in relation to hearing of the final reference and to submit them to the Tribunal for its approval within 7 days.

JUDGE SWAMI RAGHAVAN
UPPER TRIBUNAL JUDGE
RELEASE DATE: