[2017] UKUT 422 (TCC)
Appeal number: FS/2016/0016

FINANCIAL SERVICES– cancellation of Part 4A permission - procedure-Applicant failed to serve Reply-whether proceedings should be stayed pending investigation of complaint-no-whether proceedings should be struck out-yes-Rules 2,5 (3) (j) and 8(c) Tribunal Procedure (Upper Tribunal) Rules 2008

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

LARKSWAY INVESTMENTS LIMITED **Applicant**

- and -

THE FINANCIAL CONDUCT AUTHORITY **The Authority**

TRIBUNAL: Judge Timothy Herrington

Sitting in public at The Rolls Building, Fetter Lane, London EC4A 1NL on 28 September 2017

Mark Mayhew, Director, for the Applicant

Adrian Berrill-Cox, Counsel, instructed by the Financial Conduct Authority, for the Authority

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DECISION

Introduction

1. This decision relates to two applications for procedural directions involving a reference made by the Applicant ("Larksway") on 21 November 2016. The reference relates to a Decision Notice dated 25 October 2016 (the "Decision Notice") given by the Financial Conduct Authority (the "Authority") to Larksway pursuant to which the Authority decided to cancel Larksway's Part 4A permission on the basis that Larksway had failed to comply with an award made against it by the Financial Ombudsman Service ("FOS").

2. The first of the two applications before the Tribunal (the "Stay Application") is an application by Larksway made on 2 August 2017 that proceedings on the reference be stayed pending the outcome of an investigation of a complaint made by Larksway to the Authority on 28 July 2017, which is being considered under the Authority's Complaints Scheme.

3. The second application (the Strike-Out Application") is an application by the Authority dated 30 June 2017 in which the Authority stated that, in the Authority's view, Larksway had not filed and served a Reply which complied with the relevant provisions of The Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Rules") and directions in that regard made by the Tribunal on 17 May 2017. The Authority therefore applied to the Tribunal for a direction that the reference be struck out if Larksway failed to file and serve a Reply which complied with the Rules by 17 July 2017.

Background to the reference

4. The basis of the Decision Notice is that Larksway failed to comply with a final decision made by the FOS on 17 December 2014 in relation to a customer of Larksway, Ms B. As recorded in the Decision Notice, Ms B's complaint to the FOS related to the sale to her by Larksway of a specialist landlord's insurance policy. When Ms B made a claim on the policy in respect of a break-in at her property whilst it was empty, the claim was rejected on the basis that liability for theft and malicious damage was excluded when the property was not furnished for normal habitation. Ms B complained to the FOS that Larksway had not provided her with an insurance policy that met her needs and that Larksway had failed to explain important restrictions on the policy that could affect her.

5. The FOS upheld Ms B's complaint and directed Larksway to pay Ms B the value of her claim in accordance with the remaining terms and conditions of her policy as if the exclusion did not apply, as determined by an independent loss adjuster appointed by Larksway at its own cost, together with interest at 8% simple per annum from the date of loss to the date of payment.

6. On 5 January 2015, Ms B accepted the FOS award, at which stage the FOS's decision became binding on her and Larksway. Larksway disputes the FOS award. However, it has not sought judicial review of the award, which therefore remains binding on it under the provisions of s 228 (5) of the Financial Services and Markets Act 2000 ("FSMA"). Larksway is therefore bound to comply with the award.

7. The Authority has a rule, DISP 3.7.12R (1) which requires a firm which is authorised by the Authority to comply promptly with any award or direction made against it by the FOS. The Authority will as a matter of course be notified by FOS where a firm fails to comply with a FOS award. The Authority's approach in the circumstances is to request the firm to comply with the award, and if the firm fails to comply with the Authority's requests it will institute regulatory action to cancel the firm's permission granted pursuant to Part 4A of FSMA to carry on the regulated activities which are the subject of that permission. This is on the basis that by not complying with the award the firm has not only breached DISP 3.7.12R (1) but has also breached Principle 6 of the Authority's Principles for Businesses, which requires a firm to pay due regard to the interests of its customers and treat them fairly and Principle 11 of those Principles, which requires a firm to deal with its regulator in an open and cooperative way.

8. The Authority takes the view that such failings will have the result that in all the circumstances, the firm is not a fit and proper person because it is failing to satisfy the Authority that it is conducting its affairs in an appropriate manner, having regard in particular to the interests of consumers, and is therefore failing to satisfy one of the Threshold Conditions for authorisation set out in Schedule 6 to FSMA, namely the suitability condition. That condition provides that a firm must be a fit and proper person having regard to all the circumstances including, the need to ensure that its affairs are conducted in an appropriate manner, having regard in particular to the interests of consumers and the question as to whether the firm's business is being, or is to be, managed in such a way as to ensure that its affairs will be conducted in a sound and prudent manner.

9. Accordingly, in this case on being informed that Larksway had not complied with the FOS award to Ms B, the Authority made repeated requests to Larksway for it to comply and in the absence of compliance, the Authority instituted regulatory proceedings to cancel Larksway's Part 4A permission.

10. This culminated in the issue of the Decision Notice following representations made by Larksway to the Regulatory Decisions Committee ("RDC") of the Authority.

11. Larksway made representations to the Authority to the effect that the award had been wrongly made and that Ms B had committed fraud in respect of the claim which was the subject of the award. It said it had not sought a judicial review of the award as it would have been too expensive for it to bring such proceedings but said that despite its reservations, it "would acquiesce with the FOS's findings" and therefore the action to cancel its permission should be suspended.

12. The Authority rejected these representations on the basis that it is not the Authority's role to review the FOS's decisions. It also noted that since informing the Authority that it would acquiesce with the FOS's findings, Larksway had taken no steps to comply with the FOS award. Therefore, as it appeared that Larksway did not have a genuine intention to comply with the award, the Authority decided it was appropriate to proceed with the action against Larksway set out in the Decision Notice, which was to cancel Larksway's Part 4A permission for failure to satisfy the suitability Threshold Condition because of its breaches of DISP 3.7.12R (1) and Principles 6 and 11.

13. I was told by Mr Berrill-Cox in the course of the hearing of the applications that notwithstanding earlier repeated failures to comply with requests to satisfy a FOS award, regulatory proceedings to cancel a firm's permission could be discontinued were the firm to comply with the award. That might even be the case after a Decision Notice had been issued, and a reference made to the Tribunal, depending on the circumstances.

Developments since the making of the reference

14. On 21 November 2016 Larksway referred the Decision Notice to the Tribunal. The reasons for the reference, which were settled by Counsel, can be summarised as follows:

(1) the RDC misconstrued the award by treating it as an unconditional obligation to pay a sum of money whereas it required Larksway to appoint an independent loss adjuster to determine Mrs B's claim under the policy as if the exclusion did not apply and to pay the amount, if any, found to be due by the loss adjuster plus interest;

(2) the RDC failed to appreciate that Larksway was refusing to comply with the award for principled reasons but had the RDC properly and correctly explained the nature and effect of the final decision it would have abandoned its refusal to comply and instead it would have told the RDC that it wished to comply with the award;

(3) Ms B failed to respond to steps which Larksway took to comply with the award;

(4) Larksway had not been the subject of regulatory enforcement action before, had an unblemished regulatory record and a substantial business and there was no basis for supposing that its objection to the award was symptomatic of any wider reluctance to comply with its regulatory and legal obligations;

(5) Larksway had now taken legal advice and the effect of the award had been explained to it. It had appointed fresh loss adjusters and was actively taking steps to provide them with sufficient material in order they can determine the amount of the claim; and

(6) Larksway now accepts that the award is legally binding and, while the construction of the policy upon which the final decision has been based is arguably mistaken, the binding nature of the decision cannot now be impugned.

15. On 1 December 2016, the Authority applied for a direction to stay the proceedings for a period of 3 months from the date of the reference to allow the parties to engage in without prejudice discussions with a view to settling the matter which was the subject of the reference. The Tribunal consented to this application on 15 December 2016.

16. As regards the settlement discussions, I was told at the hearing that Larksway had instructed advisers in October 2016 after the Decision Notice had been issued and that a loss adjuster was appointed to determine the amount of the claim. The loss adjuster determined the amount of the claim at £13,500 in December 2016. Mrs B agreed to accept payment in 4 stages, and Larksway made the first stage payment of £3,000 in February 2017.

17. However, Larksway did not continue to meet the stage payments with the result that on 8 March 2017 the Authority informed the Tribunal that the settlement discussions had failed to resolve the matter and consequently asked for the stay to be lifted and that the Tribunal issue directions regarding the conduct of the matter going forward. The Authority provided draft directions on which Larksway did not comment, despite having been invited to do so. On 23 March 2017, the Tribunal made directions for the filing of the Authority's Statement of Case and Larksway's Reply together with other directions to progress the reference to a substantive hearing.

18. On 27 March 2017, the Authority informed the Tribunal that a petition to wind up Larksway was presented to the High Court on 3 March 2017 and that a hearing of that petition had been listed for 8 May 2017. Accordingly, the Authority asked for a further stay of proceedings until 15 May 2017.

19. Whilst the Tribunal was awaiting Larksway's representations on that application, the Authority filed its Statement of Case on 10 April 2017.

20. The Authority's case was essentially the same as that set out in the Decision Notice, namely that Larksway was failing to satisfy the suitability Threshold Condition because of its breaches of DISP 3.7.12R and Principles 6 and 11. The Statement of Case made reference to the fact that Larksway had partially complied with the award by appointing a loss adjuster and making a partial payment of the sums determined by the loss adjuster to Ms B.

21. However, the Authority's conclusion was that Larksway had failed to demonstrate that it satisfied the suitability Threshold Condition. In particular, the Authority stated that it considered that notwithstanding numerous requests by the Authority that Larksway comply with the award, Larksway's approach, which was to attempt to avoid complying with the award, did not alter. Instead of complying with the award, Larksway had sought to invoke spurious reasons why its obligations to comply should not be enforced by the Authority, including that because Ms B's claim was fraudulent if it paid the award it would be acting in breach of Money Laundering

Regulations. Consequently, the Authority considered that by seeking to avoid complying with the award whilst at the same time giving the impression of a willingness to comply, Larksway was failing to deal with the Authority in an open and cooperative manner and that it appeared to the Authority that Larksway's conduct since the award was issued demonstrates that Larksway does not have a genuine intention to fully comply with the award.

22. Consequently, the Authority stated that Larksway's continued unreasonable failure to comply fully with the award together with the manner in which Larksway had dealt with the FOS and the Authority strongly suggests that Larksway's business was not being, and will not be, managed in such a way as to ensure that its affairs are conducted in a sound and prudent manner. Therefore, the Authority requested that the Tribunal determine that the Authority's decision to cancel Larksway's Part 4A permission was reasonably open to the Authority to make.

23. It would appear that the winding up proceedings against Larksway arose out of a dispute between Larksway and an insurer. Larksway alleges that after the stage payment agreement had been reached with Ms B, it found that one of its employees had been stealing and passing client information to another insurance broker with the assistance of that insurer. Larksway has notified the Authority of the activities of that insurance broker and insurer but has not been content with the manner in which the FCA has dealt with the question. It would appear that the insurer has been taking legal action against Larksway for the payment of insurance premiums which the insurer alleges Larksway has not passed on to the insurer and that action is the basis for the winding up petition. Larksway's bank accounts have also been frozen following the issuing of the winding up petition. Larksway alleges that those premiums relate to policies which were mis-sold by the insurer. Larksway has counterclaimed against the insurer for damages in relation to the misuse of client information and has itself issued a winding up petition against the insurer. I was told that this dispute was to be subject of further hearings in the High Court shortly.

24. Larksway contends that it cannot therefore make any further payments to Ms B in respect of the award whilst this dispute carries on and its bank accounts are frozen. Mr Mayhew, who conducted the hearing on behalf of Larksway, told me that he had funded Larksway out of his own pocket to enable it to carry on its business and pay its outgoings while this dispute went on.

25. The proceedings on the winding up petition against Larksway were not determined on 8 May 2017 and, as mentioned above, further pre-trial proceedings are to take place shortly. In those circumstances, the Authority applied to lift the stay on these proceedings which was granted by the Tribunal on 17 May 2017. The Tribunal made directions on the same date for the future conduct of the reference, including that Larksway should file and serve its Reply to the Authority's Statement of Case no later than 16 June 2017.

26. In view of the fact that in its previous communications with the Tribunal the Applicant had failed to take a cooperative approach to the Tribunal process, having stated for instance shortly before the proceedings were stayed that "I have absolutely

no idea what is going on, I cannot afford legal advice any more..", the Tribunal in its reasons for the directions informed Larksway that if it wished to proceed with its reference it was its responsibility to familiarise itself with the Rules and engage with the process. The Tribunal set out in some detail what Larksway needed to do to prepare a Reply which was compliant with the Rules in response to the Authority's Statement of Case. The Applicant had previously made complaints about the Authority's conduct and the RDC process so the Tribunal informed Larksway that those matters were not relevant to the reference and that the purpose of the Reply was for the Applicant to set out what matters in the Statement of Case it disputes and why it disputes them.

27. On 19 June 2017 Larksway sent, in purported compliance with its obligation to serve a Reply, a copy of the document it had filed with its notice of reference, which set out the reasons for the reference, and which I have summarised at [14] above. That document clearly was insufficient to constitute a Reply, prepared as it was before the Authority's Statement of Case and there had been further developments since it was prepared, such as the appointment of the loss adjuster and the agreement to make stage payments to Ms B.

28. Accordingly, on 30 June 2017 the Authority wrote to the Tribunal pointing out the deficiencies in the document as a Reply and applied for a direction that if Larksway failed to file and serve a Reply that complies with the Rules by Monday, 17 July 2017, the reference be struck out in accordance with Rule 8 (1) (a) of the Rules. That provision of the Rules provides for the automatic striking out of a reference where the applicant has failed to comply with a direction that stated failure to comply with it would lead to the striking out of the proceedings. The Authority stated that it would have no objection if the Tribunal instead struck out the reference of its own volition on the grounds of lack of cooperation with the Tribunal on the part of Larksway.

29. Larksway was asked for representations on the application within 14 days, the Tribunal indicating that following the response it would determine the application on the papers. Larksway's response was flippant; it purported not to understand what was being asked.

30. The Tribunal, however decided to give Larksway one last chance to engage with the process. It made directions on 13 July 2017 to the effect that unless within 7 days Larksway filed a compliant Reply to the Authority's Statement of Case or requested the Tribunal to list a hearing to consider the Authority's application to strike out the proceedings, then the proceedings would be struck out without further reference to the parties. In its reasons for its directions the Tribunal said the following:

> "1. The Authority has applied for a direction that if the Applicant does not file a Reply which complies with the Tribunal's Rules that the reference be struck out. It is quite clear from the Applicant's response to this application that he has ignored the matters that I urged him to consider in the reasons I gave the directions released on 17 May 2017. The Applicant professes not to understand the process at all. I do not believe that to be the case, but it appears that the

Applicant is continuing to make no effort to understand the process and comply with it.

2. In those circumstances, I have serious concerns as to whether the Applicant is cooperating with the Authority and the Tribunal to the extent necessary to enable the Tribunal to deal with these proceedings fairly and justly.

3. I am therefore giving the Applicant one last chance to engage with the process. I am very reluctant to strike out a reference without a party being given the opportunity to address the Tribunal on the matter. I have therefore given the Applicant an option; either comply with the outstanding direction or request a hearing at which the question as to whether the Applicant does intend to progress his reference can be determined after the Tribunal has heard what he has to say on the matter. Failure to take either of these courses will demonstrate clearly that the Applicant does not intend to cooperate with the Tribunal and in those circumstances it is inevitable that the reference will have to be struck out. Therefore, the reference will be struck out automatically unless this latest direction is complied with."

31. On 19 July 2017 Larksway requested a hearing of the Authority's application. That hearing was listed on 23 August 2017 to be heard on 28 September 2017. The same day, Larksway requested a stay of the proceedings pending the investigation of a complaint it had made to the Authority. A copy of the letter of complaint dated 28 July 2017 was subsequently provided to the Tribunal. The subject matter of the complaint was the Authority's alleged failure in the handling of a complaint made against the insurer and ex-employees of Larksway, by Larksway as referred to at [23] above.

32. The Authority objected to the application for a stay. It stated in an email of 24 August 2017 to the Tribunal that the complaint had no bearing on Larksway's reference and that the fact that the complaint was still to be determined by the Authority was not an adequate basis for staying the proceedings relating to the reference.

33. On 25 August 2017, the Tribunal made directions to the effect that the Stay Application should be considered at the hearing already listed on 28 September 2017 to hear the Strike-Out Application.

Issues to be Determined

34. In its skeleton argument, in relation to the Strike-Out Application, the Authority requested that the Tribunal should either strike out the reference with immediate effect on the grounds of non-compliance with the Tribunal's previous directions regarding the filing of Larksway's Reply, or alternatively give the Applicant no more than 14 days to file such a Reply with a direction that if Larksway fails to file the Reply within the required period its reference should be struck out without further reference to the parties.

35. In its skeleton argument, prepared by Mr Mayhew on behalf of Larksway, Mr Mayhew did not address the issue as to whether Larksway was able and willing to file

a compliant Reply but in effect set out the reasons why the Tribunal should determine the reference in Larksway's favour. In essence, Mr Mayhew's submissions, as supplemented at the hearing, were:

(1) If the reference were struck out, four employees would lose their job and Mr Mayhew himself will be unable to find other employment;

(2) This would be unfair bearing in mind that the Authority itself had made many mistakes in regulating the industry;

(3) Larksway's attempts to meet the stage payments to Ms B had been thwarted by the dispute with the insurer over the use of client information;

(4) He had been given no assistance by the Authority to resolve the matter and the Authority had failed to act on the report of illegality that he had made;

(5) His only failing was to make a mistake and misunderstand the nature of the award, a mistake which he is in the process of resolving but he could not pay the award because Larksway's bank accounts were frozen. If those accounts were unfrozen he would pay the rest of the award "tomorrow"; and

(6) He did not deny that he had been argumentative but has felt all along that he was being bullied.

36. In the light of those submissions, in my view the appropriate course is to consider whether any of those points demonstrate that Larksway has a realistic possibility of succeeding on the reference. If not, then the appropriate course is to strike out the reference now. Alternatively, should I be of the view that any of those points have some merit then directions could be made to bring the reference to a hearing on the basis that Mr Mayhew's skeleton argument could stand as Larksway's Reply.

37. As far as the Stay Application is concerned, the issue is whether the circumstances surrounding the complaint are such to justify a stay in the proceedings until the complaint is determined through the Authority's Complaints Scheme.

Relevant Law

38. It is important to bear in mind the limited powers of the Tribunal in relation to a reference of this kind.

39. Section 133(5) to (7) FSMA, following amendments made by the Financial Services Act 2012, now provide as follows:

> "(5) In the case of a disciplinary reference or a reference under section 393(11), the Tribunal must determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter, and on determining the reference, must remit the matter to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination.
>
> (6) In any other case, 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 findings of the Tribunal.

5 (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
10 of the decision.

(7) The decision-maker must act in accordance with the determination of, and any direction given by, the Tribunal."

40. "The decision-maker" in relation to this reference is the Authority.

41. It can be seen that there is now a distinction between the powers of the Tribunal
15 on what is described as a "disciplinary reference" and other references. Pursuant to s 133(7A) FSMA a "disciplinary reference" is broadly speaking a reference of a decision to impose a financial penalty or other sanction and in relation to such a reference the Tribunal has power to determine at its discretion what (if any) is the appropriate action for the Authority to take. A reference of a decision to cancel a Part
20 4A permission is a "non-disciplinary reference", and the powers of the Tribunal in relation to such a reference are the more limited powers set out in s 133(6). The jurisdiction in respect of such a reference may now be characterised 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
25 Authority with a direction to reconsider its decision in accordance with the findings of the Tribunal.

42. The Tribunal explained the extent of its powers on a non-disciplinary reference in *Carrimjee v FCA* [2016] UKUT 0447 (TCC), a case involving a prohibition order where the same limited powers apply, at [39] and [40] as follows:

30 "39. 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.

35 40. 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
40 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."

43. Thus, in this case the Tribunal would have to dismiss the reference unless it made findings of fact and law which indicated that the decision made by the Authority to cancel Larksway's permission was not one that was reasonably open to the Authority. Furthermore, even if the Tribunal were to find flaws in the Authority's decision-making process, it should not remit the reference if it were of the view that despite such failings, it was inevitable that if the matter were remitted the Authority would come to the same conclusion: see on this point *Palmer v FCA* [2017] UKUT (TC) 0313 at [270].

44. The Tribunal has the power to stay any proceedings. The relevant power is set out in Rule 5 (3) (j) of the Rules.

45. The relevant power to strike out proceedings is contained in Rule 8 (3) (c) of the Rules which so far as relevant provides that the Tribunal may strike out the whole or a part of the proceedings if:

"(c)… The Upper Tribunal considers there is no reasonable prospect of the… Applicant's case, or part of it, succeeding."

46. As is the case with all of the Tribunal's case management powers, in exercising these powers the Tribunal must have regard to the overriding objective in Rule 2 which requires the Tribunal to deal with cases fairly and justly. As provided in Rule 2 (2) that includes avoiding delay, so far as compatible with proper consideration of the issues and ensuring, so far as practicable, that the parties are able to participate fully in the proceedings.

47. The principles to be applied in deciding whether to exercise the power to strike out proceedings in this Tribunal were considered recently in *Arif Hussein v* FCA [2016] UKUT 0549 at [99] to [102] of the Decision. In summary:

(1) In deciding whether to make such a direction, regard must be had to the Tribunal's overriding objective in Rule 2 of the Rules which requires the Tribunal to deal with cases fairly and justly, which includes dealing with the case in ways which are proportionate to the importance of the case and the complexity of the issues;

(2) Consequently, the power to strike out must be exercised with care because no one should be deprived of access to justice summarily save for compelling reason. Therefore, the Authority must satisfy the Tribunal that the applicant has

no real prospect of securing from the Tribunal a determination as to the appropriate action which is more favourable to him than that contained in the Decision Notice; and

(3) The word "real" distinguishes "fanciful" prospects of success; proceedings should not be struck out save in clear and obvious cases where the legal basis of the claim is unarguable or almost incontestably bad.

Discussion

48. I shall deal with the Stay Application and the Strike-Out Application in turn.

The Stay Application

49. I agree with the Authority that the subject matter of the complaint has no bearing on the merits of the reference. Even if there was a finding following an investigation of the complaint that the Authority had not responded adequately to the notifications that Larksway has made regarding the conduct of the relevant entities in relation to the alleged misuse of client information, that can have no bearing on the subject matter of this reference, which is whether it is appropriate to cancel Larksway's Part 4A permission in the light of its failure to comply with the FOS award.

50. Some of the circumstances which have given rise to the complaint are relevant to the reference. In particular, Larksway contends that the reason that it cannot comply with the FOS award now is because its bank accounts are frozen as a result of the legal action that is being taken against it by the insurer, of whose conduct Larksway has complained to the Authority. However, that is a matter that can be taken into account in determining the reference itself and there is no need to stay the proceedings until the complaint has been dealt with. Larksway may say that had the Authority acted differently in relation to the notification that Larksway had made then the dispute with the insurer may have been resolved but in my view, that is not relevant. The Tribunal must look at the circumstances as they are now and not how they might have been in the past if certain things had been done differently. The relevant circumstances now are that the FOS award remains outstanding and the task of the Tribunal is to consider why that is the case having considered all the circumstances, including the extent to which Larksway is unable to make relevant payment and the reason for that. Waiting for the resolution of the complaint will not assist in determining that issue.

51. Therefore, a stay will not assist the Tribunal in ensuring that there is a proper consideration of the issues and bearing in mind the need to avoid unnecessary delay in the proceedings the Stay Application must be refused.

The Strike-Out Application

52. As I have mentioned above, the test I must apply to this issue is whether on the basis of the material before me Larksway has any real prospect of securing from the Tribunal a determination as to the appropriate action which is more favourable to it than that contained in the Decision Notice. In the context of a reference relating to a

decision to cancel a firm's Part 4A permission, as in this case, which is a non-disciplinary reference, that means that Larksway must persuade me that there is a real prospect of the Tribunal deciding that the Authority's decision to cancel Larksway's Part 4A permission was not one that in all the circumstances is within the range of reasonable decisions open to the Authority. In other words, I would have to decide that it is arguable that the Authority's decision to cancel is irrational or that there is been some other flaw in the Authority's decision-making process, or there are other facts and circumstances which would merit the Authority reconsidering its decision.

53. I start by considering the appropriateness of the Authority's policy to seek cancellation of a firm's Part 4A permission where that firm, despite repeated requests from the Authority, does not comply with a FOS award.

54. Clearly, if I were to consider that such a course of action would be disproportionate in all circumstances then any decision to cancel would be irrational and would have to be reconsidered.

55. However, in my view the Authority's policy can in no respects be considered to be disproportionate or irrational. The ability of consumers to obtain redress against a firm regulated by the Authority through the FOS rather than having to undertake the more formal, more expensive and slower route of taking action through the courts is a cornerstone of the consumer protection measures provided by the regulatory system established under FSMA.

56. As mentioned above, s 228 (5) FSMA provides that a firm is bound to comply with a FOS award. It is therefore not surprising that this obligation is underpinned by the Authority's rules, and in particular the requirements of DISP 3.7.12R. It seems to me that merely imposing a financial penalty on a firm which declined to comply with a FOS award would not necessarily have the desired result of DISP 3.7 .12R which is that the firm should comply with the award. Therefore, although the threat of cancellation may be seen as something of a "nuclear option" it seems to me that persistent failure to comply with a FOS award is clear evidence of failure to deal with customers fairly, failure to deal with the Authority in an open and cooperative manner and consequently a failure to carry on business in a sound and prudent manner. As a result, the firm may be said to be failing to satisfy the Threshold Conditions for authorisation which would justify the institution of regulatory proceedings for cancellation of the firm's Part 4A permission.

57. However, it appears that not all cases of persistent failure to comply with the Authority's requests to meet a FOS award will inevitably result in cancellation. Quite properly, the Authority will discontinue the action if the failings are remedied and the Authority is satisfied that henceforth the firm's affairs will be conducted in a sound and prudent manner.

58. It is undoubtedly the case that a firm will from time to time consider that it has been the victim of "rough justice" as a result of the making of a FOS award which the firm believes is unjustified. As mentioned above, the FOS process is much more informal than court proceedings and a claimant's evidence is not tested in the same

way as it would be in a court or tribunal. Compensation may be ordered if the FOS considers it to be "fair" and the FOS may direct a firm to take such steps as it considers "just and appropriate" whether or not a court could order those steps to be taken. The protection for the firm is that there is a financial limit on the amount of a claim that can be dealt with under the scheme and it has the ability to take judicial review proceedings if it considers that the decision is one that could not reasonably have been taken in all the circumstances, although I accept that that can be an expensive route for a small firm to take.

59. However, Parliament has decided that the interests of consumers in obtaining swift and informal resolution of complaints against the firm is paramount. In those circumstances, if the firm obtains what it believes to be a rough decision, it can do no more than grit its teeth, pay up and move on if it chooses not to seek a judicial review. The firm is rather in the position of a batsman who believes he has been wrongly given out in a game of cricket by the umpire. There is no point in disputing the decision; he can be momentarily angry and disappointed but he has to return to the pavilion and move on.

60. Turning to the facts in this case, there is no question that Larksway has persistently over a long period of time disputed the umpire's decision, to continue the analogy. In its reference notice to this Tribunal it tried to justify its position by saying that it was refusing to comply with the award for "principled reasons" but for the reasons given above, there is no basis for such a stance to be taken.

61. In its reference notice, Larksway recited the fact that it had now taken legal advice and was going to take steps to comply with the award by appointing a loss adjuster and providing the loss adjuster with sufficient material to determine the amount of the claim.

62. It is clear that Larksway did just that, and the amount of the claim had been determined by December 2016 and an agreement made with Ms B to pay the claim in stages. Had that agreement been followed through then there would be a case for the matter to go to a full hearing before the Tribunal so it could be established whether there was sufficient evidence on the basis of which the Tribunal could make a finding of fact that Larksway's attitude had changed and that it was now conducting its business in a sound and prudent manner. Such a finding might well justify the Tribunal remitting the matter to the Authority for further consideration.

63. I therefore turn to the circumstances which Larksway say now prevents it from complying with the FOS award. I should say that those circumstances are merely assertions on the part of Mr Mayhew in that I have been provided with no documentary evidence as to the dispute with the insurer and the legal proceedings that are said to be going on. Had Larksway complied with its obligations to file a Reply to the Statement of Case it could have pleaded the circumstances of the proceedings in its Reply and included a list of documents on which it sought to rely on in that respect. As it has not done so, I am proceeding on the assumption that what Mr Mayhew told me at the hearing was true, as recorded at [23] to [25] above and I make no findings of fact in that respect.

64. However, even making such an assumption, I am satisfied that the circumstances described are not sufficient to give rise to a real prospect of success on the reference.

65. The current situation is entirely of Larksway's own making. It may be that it has now found itself in financial difficulty as a result of the legal proceedings and the freezing of its bank accounts but that situation would not have prevented Larksway meeting the FOS award had it recognised its obligations at an earlier stage. It will just have to live with the situation as it now stands.

66. Furthermore, it is clear that despite the freezing of the bank accounts Larksway has been able to continue to operate and presumably pay its outgoings. Mr Mayhew says that it is been able to do so by virtue of his funding of the business personally. If that is the case, there is no reason why payment of the sums due under the award according to the stage payments could not have been made on the same basis as one of the outgoings of the business. Indeed, Larksway should have regarded it as a matter of priority to ensure that those payments were met, bearing in mind the threat of cancellation. If it had done so, I would not have regarded that as an unlawful preference, bearing in mind its legal obligation to make those payments. It is therefore clear that Larksway still does not consider that it should give priority to settling the award. Mr Mayhew says that he would pay the amount "tomorrow" if the bank accounts were unfrozen, but I fear that offer has come too late and the situation has been overtaken by events. He still does not seem to appreciate that it is the duty of the firm to put the interests of its customers first.

67. Therefore, there is nothing that indicates to me that Larksway will be in a position to produce evidence that its affairs are being conducted in a sound and prudent manner.

68. I turn now to the submissions made by Mr Mayhew, which are summarised at [35] above. It follows from what I said above, that the fact that if the reference fails the firm's employees will lose their jobs is not a relevant factor. This is a case where the interests of consumers must come first and the Authority cannot allow a firm to continue to operate which is failing to satisfy the Threshold Conditions in order to protect the employment of those who work in it. Neither can the fact that the Authority itself has made mistakes, if that is proved to be the case, be relevant. Again, the paramount interest is that of the consumer. Neither is it the role of the Authority to assist Larksway in resolving the position. If Larksway believes that it is being bullied by the Authority, then that is a matter for a formal complaint but cannot be relevant to these proceedings.

69. Furthermore, the manner in which Larksway has dealt with the Tribunal has aggravated the situation. At no point until the hearing, did Larksway seek to explain what its case was in answer to the Authority's Statement of Case. It purported to submit the grounds attached to its reference notice as its Reply, despite knowing that events had moved on since that document was prepared. The Tribunal has been very indulgent with Larksway and gave it adequate opportunity to comply with the Rules, as demonstrated by what it said in making its directions on 13 July 2017, as set out at

[30] above. All of this is further evidence that Larksway was not seriously engaging with the issues and it certainly has not cooperated with the Tribunal.

70. Larksway is to be given some credit for finally engaging with the process and explaining the position at the hearing. However, the suggestion that it will pay the award when its bank accounts are unfrozen is too little too late and is insufficient to satisfy me that there is a real prospect of Larksway being able to persuade the Tribunal that the matter should be remitted to the Authority for reconsideration. On the basis of the position as it now stands, it appears to me inevitable that if the Authority were asked to reconsider its decision then the result would inevitably be the same, and in the current circumstances the Authority would be fully justified in taking that course.

Conclusion

71. For the reasons set out above, I direct that the reference be struck out on the grounds that there is no reasonable prospect of Larksway's case succeeding.

JUDGE TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE

RELEASE DATE: 30 OCTOBER 2017