[2020] UKUT 139 (TCC)

Appeal number: FS/2019/015

FINANCIAL SERVICES– Decision Notice cancelling Part 4A permission on grounds applicant did not have professional indemnity insurance and was failing to pay fees and levies - whether applicant continued to satisfy the threshold conditions of having appropriate resources and suitability-whether matter should be remitted for reconsideration in the light of Tribunal's findings – yes - reference allowed - ss 55B, 55J, Schedule 6 para 2D and 2E FSMA 2000- MIPRU 3.2.1 and FEES 2.3.1R of the Authority's Handbook of Rules and Guidance

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

FINANCIAL SERVICES (EURO) LIMITED	**Applicant**
- and -	
THE FINANCIAL CONDUCT AUTHORITY	**The Authority**

TRIBUNAL: Judge Timothy Herrington
Member Jo Neill
Member Peter Freeman

Sitting in public at The Rolls Building, The Royal Courts of Justice, Strand, London, EC4A 1NL on 25 February 2020

Ian Rees Phillips, Counsel, for the Applicant

Adam Sampson, Counsel, instructed by the Financial Conduct Authority, for the Authority

DECISION

Introduction and decisions referred

1. On 23 May 2019 the Financial Conduct Authority ("the Authority") gave a decision notice (the "Decision Notice") to the Applicant ("FSE") pursuant to which the Authority decided to cancel FSE's Part 4A permission pursuant to s 55J of the Financial Services and Markets Act 2000 ("FSMA"). By a reference notice dated 20 June 2019, FSE referred the matter to the Tribunal.

2. In summary, in the Decision Notice the Authority decided that FSE has failed to satisfy the Authority that it is ready, willing and organised to comply with the requirements and standards of the regulatory system and has failed to satisfy the Authority that its business is being managed in such a way as to ensure that its affairs will be conducted in a sound and prudent manner or that FSE is a fit and proper person having regard to all the circumstances. The basis for that decision is that FSE has failed to comply with the Authority's rules that require it to pay fees and levies to the Authority. As a consequence, the Authority considers that FSE is failing to satisfy the suitability Threshold Condition (in paragraph 2E of Schedule 6 FSMA). In addition, the Authority considers that by failing to satisfy the Authority that FSE has effected compliant professional indemnity insurance ("PII"), FSE is failing to make appropriate provision in respect of its liabilities and is therefore in breach of Principle 4 of the Authority's Principles for Businesses, in that it does not maintain adequate resources, and does not meet the appropriate resources Threshold Condition (in paragraph 2D of Schedule 6 FSMA).

3. Accordingly, the Authority considers that FSE's Part 4A permission should be cancelled.

4. FSE disputes these findings. It contends that FSE has not failed to satisfy the suitability Threshold Condition and the appropriate resources Threshold Condition. In particular, FSE contends that its failure to obtain PII was a direct result of the Authority carrying out investigations into FSE and its director, such that no insurance provider would grant a PII policy to FSE while these investigations were ongoing and as a consequence of not having PII, FSE had taken the appropriate decision not to trade, and therefore could not afford to pay the Authority its fees and levies.

5. FSE contends that the Authority failed to give proper consideration to its power to remit and reduce fees and in any event, it was irrational not to remit or reduce the fees in circumstances where FSE was not trading by reason of the Authority's own regulatory action. FSE also contends that applying the Authority's rules in respect of the failure to pay fees and the failure to have PII was irrational where FSE could not comply with these obligations because of the Authority's actions and that this had the effect or withdrawing FSE's Part 4A permission "by the back door".

6. Alternatively, FSE contends that it was wrong or irrational for the Authority to cancel FSE's Part 4A permission and not to just vary the description of the regulated

activities permitted so as to add a condition that they may not be carried on unless and until FSE had PII cover in place and/or that it paid any fees due to the Authority.

Relevant Law and Guidance

Own initiative power to vary or cancel a Part 4A permission

7. Section 55J (2) FSMA gives the Authority power, inter-alia, to vary a firm's Part 4A permission by removing a regulated activity from those to which the permission relates or to cancel the firm's Part 4A permission. Pursuant to s 55 (1) FSMA, the Authority may exercise that power if it appears to it that the firm is failing, or likely to fail, to satisfy the Threshold Conditions.

The Threshold Conditions

8. Schedule 6 FSMA sets out the Threshold Conditions for authorisation. The Threshold Conditions which are relevant to this reference are Condition 2D and Condition 2E which provide, so far as relevant, as follows:

> "2D. Appropriate resources
>
> (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 the 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 and, if A is a member of a group, which other members of the group make, in respect of liabilities;
>
> …
>
> 2E. Suitability
>
> A must be a fit and proper person having regard to all the circumstances, including—
>
> …
>
> (f) whether A'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. That part of the Authority's Handbook known as COND gives guidance on how the Authority interprets the Threshold Conditions.

10. In relation to Condition 2E, the Authority will have regard to whether the firm has been open and cooperative in all its dealings with the Authority and is ready, willing and organised to comply with the requirements and standards under the regulatory system and whether the firm has contravened, amongst other things, any provisions of the regulatory system, which includes the Principles and other rules.

11. The Authority's policy in relation to its enforcement powers is set out in the Enforcement Guide ("EG").

12. EG 8.2.6 (1) (a) specifies that the Authority will consider exercising its own-initiative power under s 55J FSMA where the firm appears to be failing, or appears likely to fail, to satisfy the threshold conditions relating to one or more, or all, of its regulated activities. That provision states that an example where a firm's resources are inappropriate is when it has failed to manage risk with PII.

13. EG 8.5.1 (1) states that the Authority will consider cancelling a firm's Part 4A permission using its own initiative powers contained in s 55J FSMA in circumstances where the Authority has very serious concerns about the firm, or the way its business is or has been conducted. EG 8.5.2 provides examples of the types of circumstances in which the Authority will consider cancelling a firm's Part 4A permission, and EG 8.5.2(5) specifies that non-payment of the Authority's fees is one such circumstance.

14. That part of the Authority's Handbook known as MIPRU contains provisions requiring a firm with permissions to carry on insurance distribution activities and home finance mediation activity, which includes the activities for which FSE has permission, to maintain PII.

15. MIPRU 3.2.1R provides, so far as relevant, as follows:

> "A firm must take out and maintain professional indemnity insurance that is at least equal to the requirements of this section from:
>
> (1) an insurance undertaking authorised to transact professional indemnity insurance in the EEA; or
>
> (2) a person of equivalent status in:
>
> (i)
>
> a Zone A country; or
>
> (ii)
>
> the Channel Islands, Gibraltar, Bermuda or the Isle of Man."

16. MIPRU 3.2.4R provides:

> "The contract of professional indemnity insurance must incorporate terms which make provision for:
>
> (1) cover in respect of claims for which a firm may be liable as a result of the conduct of itself, its employees and its appointed representatives (acting within the scope of their appointment);
>
> (2) the minimum limits of indemnity per year set out in this section;
>
> (3) an excess as set out in this section;
>
> (4) appropriate cover in respect of legal defence costs;
>
> (5) continuous cover in respect of claims arising from work carried out from the date on which the firm was given Part 4A permission for the insurance distribution activity or home finance mediation activity concerned; and
>
> (6) cover in respect of Ombudsman awards made against the firm."

17. That part of the Authority's Handbook known as FEES makes provision for firms to pay periodic fees and other levies to the Authority.

18. FEES 4.2.1R requires a firm to pay each periodic fee applicable to it, calculated in accordance with the relevant provisions of FEES. Broadly speaking, the fees payable are calculated by reference to the reported annual income of the firm for that firm's particular financial year end as notified to the Authority. It is therefore clear that the firm pays a fee in respect of the year in which it is to be regulated by the Authority calculated by reference to the firm's previously reported income. This principle is consistent with the provisions of FEES 4.2.7E which provides for a firm's fees for its first year of authorisation to be based upon the projected figures for the firm's business during its first year of operation.

19. Other provisions of FEES impose requirements upon a firm to pay various levies, including any levy made by the Financial Services Compensation Scheme ("FSCS"), in accordance with the relevant timetables set out therein.

20. FEES 2.3.1R states, so far as relevant, that:

> "If it appears to the [Authority] that in the exceptional circumstances of a particular case, the payment of any fee… would be inequitable, the [Authority], may … reduce or remit all or part of the fee… in question which would otherwise be payable."

Powers of the Tribunal

21. The powers of the Tribunal on a reference are set out in s 133 of FSMA. Since this reference does not involve a "disciplinary reference" or a reference under s 393(11) of FSMA, the Tribunal's powers are as set out in the following provisions of s 133:

> "(4) The Tribunal may consider any evidence relating to the subject matter of the reference or appeal, whether or not it was available to the decision-maker at the material time
>
> ….
>
> (6) In any other case [i.e. one not involving a disciplinary reference or a reference under s393(11) of FSMA], 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."

The scope of the Tribunal's powers under s 133(6) and s 133(6A) has been considered in *Carrimjee v FCA* [2016] UKUT 0447 (TCC) and later cases including *Dr Saim Koksal T/A Arcis Management Consultancy v Financial Conduct Authority* [2016] UKUT 478 (TCC). The general principles derived from those cases were most recently summarised by this Tribunal in *North London Van Centre Limited v FCA* [2019] UKUT 0233 at [14] of the decision. We gratefully adopt that summary as follows:

> (1) The Tribunal may consider evidence relating to the "subject-matter of the reference" that was not available to the Authority when it made its decision (s133(4) of FSMA). That "subject matter" is not limited to the question posed by s 55J of FSMA whether it "appears" to the Authority that FSE is failing, or is likely to fail, the threshold requirements (see [30] and [31] of *Koksal*).
>
> (2) If, having reviewed all the relevant evidence and the factors taken into account by the FCA in making its decision, and having made findings of fact in

relation to that evidence and such other determinations of law as are relevant, the Tribunal considers that the Authority's decision was one that was reasonably open to it, then the correct course is to dismiss the reference (see [27] of *Koksal*).

(3) If the Tribunal is not satisfied, in the light of its findings that the FCA's decision was within the range of reasonable decisions, the correct course is to remit the matter back to the Authority under s133(6)(b) FSMA ([28] of *Koksal*).

(4) The Tribunal would be entitled to conclude that the Authority's decision was outside the range of reasonable decisions if it were to make findings of fact that were clearly at variance with findings made by the Authority and which formed the basis of the Authority's decision (see [29] of *Koksal*).

22. We would just clarify one point arising out of the above summary as follows. It is clear that the Tribunal must review the factors taken into account by the Authority in making its decision: see [14 (2)] above. Accordingly, if the Authority fails to take into account a relevant factor, or takes into account irrelevant factors in making its decision, then its decision will be flawed with the result that the decision will not be within the range of reasonable decisions open to the Authority: see on this point *Chickombe and others v FCA* [2018] UKUT 0258 TCC at [33].

23. As is well established in references of this nature, the burden of proof lies with the Authority and the standard of proof to be applied is the ordinary standard of the balance of probability, namely whether the alleged events more probably occurred than not.

Evidence

24. Mr Markos Markou, the sole Director and shareholder of FSE, filed a witness statement on which he was cross-examined. The essence of this statement is that the Applicant was not refusing to pay the outstanding fees due to the Authority but had been in correspondence with the Authority on this issue over a long period of time, explaining that FSE was not trading and could not pay the fees as it was prevented from renewing its PII, solely because of the failure of the Authority to conclude investigations that had been opened against both the Applicant and Mr Markou personally as regards, among other things, FSE's policies and procedures aimed at countering mortgage fraud.

25. We regard Mr Markou as an honest witness who gave consistent and credible answers under cross-examination. We therefore have no hesitation in accepting his evidence which to a significant degree was corroborated by the documentary evidence that we saw. In particular, Mr Markou was mindful of his and his firm's legal and regulatory obligations and demonstrated to us a willingness to comply with those obligations wherever possible in relation to the matters which are the subject of this reference. That was clearly demonstrated by his voluntary act in ensuring that FSE carried on no further regulated activity once issues had been raised in a supervision visit that place in 2017 and the impact that had on the ability of FSE to obtain PII. It is

clear that Mr Markou's reputation in his community was as important to him as the success of his business and he was not willing to do anything that might adversely affect his reputation in his community.

26. Unusually, the Authority filed no witness evidence. That is surprising, bearing in mind that the burden of proof lies on the Authority, yet it has only sought to rely on the documentary material that was before us. That has not only hindered the Tribunal in making comprehensive findings of fact but, as we shall see, has had an adverse effect on the Authority's case.

27. In particular, evidence from the Authority as to its policy in two particular areas would have been helpful. First, as to its policy in relation to the exercise of the Authorities powers to remit fees under FEES 2.1.3R and secondly, as regards its approach to PII. As regards the latter point, the Authority asserted that FSE had not demonstrated that FSE could not obtain PII after the results of the supervision visit, but gave us no assistance as regards the width of the relevant PII market and the approach of insurers in circumstances where a small firm subject to serious concerns raised by the Authority as regards the conduct of its business seeks to renew its PII.

28. Furthermore, we had no evidence from the Authority as to the status of the enforcement investigations against FSE and Mr Markou and the decision-making process that led it to proceed with separate enforcement action for the failure to pay fees and failure to maintain PII whilst those earlier investigations still appear to be ongoing.

29. We were provided with two bundles of documents, not all of which we were referred to during the hearing, but we have had regard to all of the documents before us in making our findings.

30. From the evidence that we heard, and the documents we saw, we make the findings of fact set out below.

Findings of fact

Background

31. FSE is solely regulated by the Authority. It was authorised by the Authority on 9 November 2004 and has permission to conduct designated investment business, general insurance mediation business, regulated home finance business and credit broking activities. FSE is not permitted to hold and control client money. Mr Markou at all relevant times was the sole CF 1 (Director) and CF 3 (Chief Executive). He is also FSE's sole shareholder.

32. FSE was the subject of a supervision visit by the Authority's predecessor, the Financial Services Authority ("FSA") on 9 February 2011. As a consequence of that visit, the FSA issued FSE with a Private Warning on 11 January 2012 relating to systems and controls failings. In particular, issues relating to adequate supervision and assessment of the competence of FSE's mortgage advisers were identified.

The Authority's Supervision Visit of 9 May 2017

33. FSE was the subject of a Supervision Visit from the Authority on 9 May 2017 (the "Supervision Visit") in order to assess the firm for compliance. Shortly before that visit, it appears that the Authority learnt that FSE had been removed by Barclays from its broker's panel and there were suspicions that FSE's business may have been used to facilitate organised mortgage fraud.

34. It appears from his own evidence that Mr Markou was aware that Barclays' action had prompted the visit. He notified his insurance brokers of this development at the same time, which happened to coincide with the time that FSE's PII came up for renewal. FSE's PII was due to expire on 11 May 2017 and clearly this development was material in the context of the renewal. Accordingly, after discussion with the broker, Mr Markou decided not to renew FSE's PII until the outcome of the visit was known and that FSE would cease to undertake any new business in the meantime.

35. FSE's PII had been arranged through Oak Insurance Services and placed with Axa Insurance UK plc. It had last been renewed on 12 May 2016 for a period of 12 months for a premium of £1,792.50. The policy carried an excess of £2,000 in respect of each and every claim and the limit of the indemnity was £1.2 million for each and every claim. It was clear from the terms of the policy that the insurance operated on a "claims made" basis, that is the policy covered legal liability for any claim for compensation and/or damages first made against FSE and notified to the insurer during the period of the policy in consequence of any negligence in the conduct of FSEs business.

36. It is to be noted that there was a policy endorsement to the effect that the insurer would not be liable to meet any claim arising directly or indirectly from, consequent upon, or in any way relating to the FSA's supervision visit of 9 February 2011 and the private warning letter issued thereafter.

37. On 9 June 2017 the Authority's Supervision Department wrote to Mr Markou in a letter (the "Supervision Letter") with its conclusions following the Supervision Visit and its subsequent review of various customer files which it asked FSE to provide following the visit.

38. The Authority's overall assessment was that (i) Mr Markou's competence and capability fell below the standards expected and therefore the Authority had serious concerns over Mr Markou's suitability to be a director and approved person of a financial services intermediary and (ii) FSE had inadequate financial crime systems and controls and there was a significant level of suspicion that FSE was being used to commit financial crime on a repeated basis.

39. There was no suggestion that either Mr Markou or FSE had itself engaged in fraudulent activities. The failings alleged by the Authority related to whether there had been adequate oversight of staff, maintaining an adviser competency framework, adequate checks and assessment of sales and failure by Mr Markou to inform himself

about the affairs of the business. Consequently, the Authority concluded that Mr Markou had failed to take reasonable steps to carry out and monitor adequate and appropriate systems of control and had failed to implement or monitor financial crime systems and controls effectively. Appendices to the letter set out the results of the Authority's review of 19 customer files.

40. The Authority referred to the removal of FSE from Barclays' mortgage broker panel, referring to the fact that Barclays identified at least 48 cases submitted from FSE where the income for the applicants reduced or ceased shortly after the mortgage completed which the Authority said was indicative of FSE being used to facilitate financial crime on a systematic basis, the number of suspicious files leading the Authority to believe that there may be a fraud which is organised in nature.

41. The Authority concluded that Mr Markou appeared to be in breach of the Authority's requirements as to acting with due skill care and diligence, taking reasonable steps to ensure that FSE was organised and controlled effectively and that FSE complied with the relevant requirements and standards of the regulatory system. The Authority also concluded that FSE appeared to be in breach of the requirements to establish, implement and maintain adequate policies and procedures sufficient to ensure its compliance with its obligations under the regulatory system and for countering the risk that the firm might be used to further financial crime.

42. The Supervision Letter then said:

> "Given the serious nature of our concerns, we would ask you to consider applying on a voluntary basis to cancel the Firm's Part IV permission and your approved person status by 23 June 2017…"

43. On 26 June 2017 Mr Markou responded substantively to the Supervision Letter. The Authority's invitation to apply for a voluntary cancellation of permission and Mr Markou's approved person status was declined. Mr Markou referred to the fact that FSEs procedures had been previously approved by the Authority and that no fraud on the part of FSE had been found.

44. The Authority responded on 6 July 2017. As regards the request for voluntary cancellation, the Authority noted FSE's and Mr Markou's position. It then said that in the light of the refusal to cancel voluntarily, the Authority was "now considering how to proceed, and will notify you of our decision when it has been made."

Efforts to obtain PII insurance

45. As we have mentioned above, FSE decided not to take steps to renew its PII until the position following the Supervision Visit had been clarified. FSE maintained its decision not to undertake any new business until it had been able to obtain PII. Accordingly, it asked its brokers, Oak Insurance Services to arrange cover. The brokers were unsuccessful in doing so. On 7 July 2017 they forwarded to Mr Markou an email they had received from the underwriting agents which said:

> "In light of the ongoing regulatory issues this firm are experiencing we will not be providing terms, we have closed our file accordingly."

46. At this stage, the regulatory issues would have been those disclosed in the Supervision Letter, including the request to FSE that it should cancel its permission.

47. In his oral evidence, Mr Markou described the attempts he made to obtain PII following the receipt of the Supervision Letter. It is clear that he primarily left this in the hands of Oak Insurance Services and in turn that firm contacted the underwriting agents, Collegiate. Whilst we have no direct evidence of this, it is to be presumed that as underwriting agents Collegiate would have approached not only Axa, FSE's previous insurer, but also other companies in the market and the email therefore from Oak Insurance Services referred to above would have disclosed the results of the market survey by the underwriting agents. Mr Markou made his own informal enquiries. From those enquiries, Mr Markou concluded that there was little chance of being able to obtain PII except on extortionate terms and there would be a very negative impact were any application for insurance refused, when it came to make any applications in the future.

48. It was put to Mr Markou that there had been no difficulty in obtaining PII following the issue of the private warning in 2012, albeit that the insurers excluded from cover issues arising out of the 2011 Supervision visit. Mr Markou made the very fair point that the private warning had been issued following a negotiated settlement which was unlike the circumstances he was faced with in July 2017 where is unclear how, if at all, the Authority would take matters forward in the light of the Supervision Letter.

49. Mr Markou produced further evidence of the enquiries made as regards the availability of PII to the Authority's Regulatory Decisions Committee ("RDC") when he made representations to that committee in 2019 in respect of the regulatory proceedings which are the subject of this reference. This evidence was in the form of a letter from Oak Insurance Services to Mr Markou dated 21 March 2019 in which they said, having perused their file, that they were able to confirm that further enquiries after Collegiate's email of 7 July 2017 confirmed that underwriters advised that in FSE circumstances, they were either unwilling or unable to provide PII cover, so long as regulatory issues with the Authority remained outstanding. It was indicated that the underwriters would require a copy of the "full FCA report" on completion of the Authority's enquiries to confirm the position, so that they could consider FSE's new application for cover.

50. Mr Sampson submitted that this evidence was insufficient to demonstrate that FSE could not have obtained PII cover following the Supervision Letter. He submits that all the evidence shows is that one insurer was unwilling to provide PII in mid-2017, and that Oak Insurance Services was unable to obtain insurance in March 2019 and that the evidence did not demonstrate that Mr Markou exhausted the entire insurance market available to him.

51. We do not accept those submissions and we conclude that in the circumstances that FSE found itself in July 2017 it would have been unable to obtain PII until the Authority's investigations had been concluded. Our reasons for those conclusions are as follows:

(1) We had no evidence as to the breadth of the market for firms of this kind and what effect an ongoing investigation against a small firm would have in terms of its ability to obtain PII. Our view, based on our own experience, is that the market is unlikely to be a wide one and that the underwriting agents who surveyed the market at the request of Oak Insurance Services are likely to have surveyed all potential underwriters before concluding that they were unable to obtain cover.

(2) As we have said, the cover was previously given on a "claims made" basis. It is to be presumed that any new cover would be granted on the same basis. Thus, any insurer considering whether to underwrite the business in July 2017 would be doing so against the background of a request by the Authority that FSE should cancel its permission in the light of the serious concerns raised by the Authority. In those circumstances, even if the insurer was willing to consider granting cover, it was in our view only likely to do so if it were to exclude any claims that might be made during the currency of the policy in respect of matters to which the Supervision Letter related, which affected the whole of FSE's business. In those circumstances, any cover granted was likely to be of little value.

(3) Whilst a large firm might indeed be able to continue to obtain cover whilst there was an ongoing regulatory investigation, particularly where that investigation only affected a small part of the firm's business, in our view it is unlikely that this would be the case in respect of a small firm such as FSE where regulatory issues in respect of which the Authority had concerns affected substantially the whole of the firm's business and where the Authority expressed the view that the concerns were so serious that the firm should consider cancelling its permission. The Authority led no evidence on the experience of small firms being able to obtain cover in circumstances similar to those in which FSE found itself in July 2017.

(4) As we have said, we found Mr Markou to be a credible witness, and accept that he himself made further enquiries, which, unsurprisingly, did not lead to a different conclusion to that arrived at by his brokers.

Referral to Enforcement and the subsequent investigations

52. Following FSE's decision not to undertake any new regulated activity in the light of the results of the Supervision Visit and its consequential failure to obtain renewal of its PII, it was not surprising that FSE and Mr Markou hoped that the position regarding the instigation of any enforcement proceedings would be known as soon as possible. We observe that the Authority took no steps to exercise its supervisory powers to prevent FSE carrying on any regulated business following FSE's refusal to cancel its permission voluntarily and we assume therefore that the

Authority took the view that the concerns it had expressed in the Supervision Letter were not so serious that they merited further supervisory action.

53. Between July and October 2017, Mr Markou pressed the Authority for updates on the position as regards possible enforcement action. On 15 September 2017 the Authority informed Mr Markou that a decision on this matter was due on 28 September 2017 and that he would be informed of the outcome shortly after that time. Mr Markou sent a further chasing email on 3 October 2017. On 6 October 2017 Mr Markou was informed that a decision had been taken in principle to open an investigation, that there was some paperwork to be completed and that he would be contacted to discuss the matter in due course.

54. We have not seen any further correspondence on this issue, after a further chasing email by Mr Markou on 9 October 2017, other than the correspondence referred to below, but it seems that FSE lodged a complaint with the Authority as to the delay in dealing with the issue, which the Authority later investigated.

55. On 13 February 2018 the Authority gave FSE and Mr Markou separate notices of the fact that investigators had been appointed to conduct an investigation into their conduct.

56. FSE was informed that the Authority would investigate whether FSE contravened various of the Authority's Principles for Businesses, in particular, whether it had conducted its business with integrity, due skill, care and diligence, had taken reasonable care to organise and control its affairs responsibly and had dealt with its regulators in an open and cooperative way. The Authority referred in its letter to the matters appearing to them to give rise to potential breaches of the Authority's requirements, which were the issues identified in the Supervision Letter.

57. Mr Markou was informed that the Authority would investigate whether Mr Markou had failed to comply with various of the Authority's Statement of Principles for Approved Persons, in particular whether he had failed to act with integrity, had dealt with the Authority in an open and cooperative way, had taken reasonable steps to ensure that the business of FSE was organised so that it can be controlled effectively, whether he had failed to act with due skill, care and diligence and whether he had taken reasonable steps to ensure that FSE's business complied with the relevant requirements and standards of the regulatory system. The Authority referred in its letter to the matters appearing to them to give rise to the potential misconduct and potential lack of fitness and propriety that they were alleging against Mr Markou, which again related to the matters identified in the Supervision Letter. The Authority said that among other things, it appeared to them that Mr Markou had responsibility for the alleged failings of FSE that it had identified in the Supervision Letter.

58. Mr Markou referred in his oral evidence to the fact that he had been interviewed by the Authority in relation to the matters which were the subject of the investigation on 18 June 2018 but we have no further evidence as to what, if any, further steps the Authority has taken in relation to the investigations against FSE and Mr Markou. At paragraph 20 of its Statement of Case, the Authority stated that it would periodically

review the course of investigations it undertakes to ensure that it is meeting its statutory objectives in the best way possible. It went on to say that when new facts (for example non-payment of fees) came to light during the course of the original investigation and which suggested fresh grounds for enforcement action of a type different to that originally envisaged were available, the Authority acted reasonably, properly and in good faith when the investigation team referred FSE to the Threshold Conditions team.

59. Unfortunately, this pleading is not backed up by any evidence as to the current status of the investigations since the Authority did not provide any witness evidence. The statement does however suggest that the Authority effectively abandoned the original investigation against FSE at least in favour of pursuing enforcement action through a different route, namely the cancellation of FSE's Part 4A permission on the grounds of a failure to meet the Threshold Conditions.

Non-payment of fees

60. There are three invoices issued to FSE in respect of periodic fees and other levies payable to the Authority which have not been paid. The first of these invoices, dated 9 August 2017 and with a payment due date of 8 September 2017, was in respect of periodic fees and various levies and was for an amount of £3,792.11. The invoice was expressed to cover the period between 1 April 2017 and 31 March 2018 The second of these invoices, dated 19 March 2018 with a payment due date of 18 April 2018, was in respect of a Financial Services Compensation Scheme levy in an amount of £64. This invoice was expressed to cover the period between 1 April 2017 and 31 March 2018. The third invoice, dated 23 July 2018 with a payment due date of 22 August 2018, was in respect of periodic fees and various levies and was for an amount of £2,873.82. This invoice was expressed to cover the period between 1 April 2018 and 31 March 2019. In the case of all of the invoices, the amount of the invoice was calculated by reference to FSE's previously reported income, as provided for in the Authority's Fees Manual.

61. On 5 February 2018 the Authority wrote to FSE reminding it that the amount of the first invoice remained unpaid. FSE responded to that letter on 8 February 2018 stating that it was in dispute with the amount charged due to the Authority's actions that "prevent our firm trading in regulated business as the matter did not yet solved [sic] since 9 May 2017". The letter also said that FSE was awaiting a response from the Authority's Enforcement Department ("Enforcement") on this issue.

62. On 15 March 2018 following a telephone conversation between Mr Markou and a member of the Authority's finance team, the Authority wrote to Mr Markou referring to the fact that his complaint regarding the Authority's inaction following the Supervision Visit had been resolved on 21 December 2017 and therefore the firm was liable to pay the overdue fees for the period 2017/2018. Mr Markou was asked why the firm was not allowed to trade since May 2017.

63. In response on 16 March 2018, Mr Markou informed the Authority that because the Authority's Supervision Department had not concluded the enquiries begun on 9

May 2017, FSE could not get PII cover and therefore could not place any business and therefore be liable for any fees because the firm was prevented by the Authority from trading.

64. The matter was escalated by a letter of 10 October 2018 from the Authority to FSE. By this point, all three invoices had, according to their terms, become payable which meant that an amount of £6,729.93 was outstanding. In this letter, FSE was informed that as a result of the non-payment the Authority was of the view that FSE was failing to satisfy the minimum standards to remain authorised to conduct regulated activities and would shortly be referred to Enforcement to take action to cancel its permission, unless the outstanding fees were paid within 7 days.

65. On 31 October 2018 the Authority wrote to Mr Markou informing him that FSE had been referred to Enforcement with the result that there would be a recommendation to the RDC that FSE's permission be cancelled, unless the outstanding fees were paid in full within 7 days.

66. On 2 November 2018 Enforcement telephoned Mr Markou to check whether he had received the correspondence regarding the overdue fees. A note of that conversation made by the Authority records that Mr Markou explained that he would not be paying the fees as FSE had not been able to trade and so cannot afford to pay the fees. Mr Markou also confirmed that he had not been able to renew FSE's PII due to the ongoing investigation. Mr Markou followed up that conversation with a letter dated 7 November 2018 in which he confirmed what he had said in the telephone call. He also added in the letter that his insurers could not provide PII whilst the Supervision enquiry was continuing. He also referred to the fact that the Enforcement investigation was still ongoing.

67. On 28 November 2018, a member of the Authority's finance team wrote in response to Mr Markou's letter of 7 November 2018, stating that she had "found no record on our systems of an instruction against trading for the firm.". She said that in the absence of evidence of such an instruction, the fees were fully payable. That position was later reiterated during the regulatory proceedings before the RDC: it would appear that the Authority would regard the fees as not being payable had there been evidence that FSE had been instructed by the Authority to cease trading.

68. During his cross-examination, Mr Markou explained that due to the fact that FSE ceased to trade after 9 May 2017, it did not have the resources to pay the outstanding fees. The firm did have some income after that date, some £13,000 according to its last financial return. Mr Markou explained that 85% of that income is payable to the advisers who had placed the business to which the income related so that there was very little income available to pay the firm's other debts. Mr Markou explained that he had used his own resources to pay some of the firm's other debts. The usual practice of the firm was to pay the Authority's fees out of current income rather than make provision for them in earlier accounting periods, on the basis that on the assumption that the firm was continuing to trade, there would be sufficient income to pay the fees as they became due.

69. We accept Mr Markou's evidence on this point and also his further evidence given in cross-examination that had the firm had the resources to do so the fees would have been paid, but that those resources were not available because of the decision taken by the firm to cease trading pending the resolution of the issues that arose after the Supervision Visit. Mr Markou made it clear that in his view the circumstances that created the situation were caused by the fact that FSE could not trade and generate the resources necessary to pay the fees unless and until the position as regards enforcement investigation could be resolved. Mr Markou made it clear that if the investigation had concluded with no adverse outcome as far as FSE is concerned, then FSE would resume trading and generate resources to pay the firm's debts and he therefore was of the view that the Authority should have refrained from pursuing the outstanding fees until the matter had been resolved.

The Regulatory Proceedings

70. In an Enforcement Submissions Document dated 23 January 2019 Enforcement recommended to the RDC that FSE's Part 4A permission be cancelled. The basis of the recommendation was that FSE had failed to maintain PII and had also failed to pay fees and levies owed to the Authority despite repeated reminders and warnings. That, in Enforcement's view, meant that FSE was failing to meet the Threshold Conditions as regards maintaining appropriate resources and suitability. The Enforcement Submission Document did refer to the dispute as regards the liability to pay the fees but said that was because of a complaint it had made about the Authority's investigation. The document also referred to the fact that FSE had been unable to obtain PII cover because of the ongoing investigation. Enforcement expressed the view that because the complaint had been resolved and that FSE had a reasonable opportunity to satisfy the Authority that it holds PII and has failed to do so that it was appropriate to continue with the recommended action.

71. The Enforcement Submissions Document made it clear that in assessing appropriate resources the Authority looks at the firm's financial position as a whole, the nature of any PII it has, its PII claims record and its past business mix. It made it clear that some firms will be permitted to continue to trade with non-compliant PII, albeit with some additional financial resource requirements.

72. As regards failure to pay fees, the Enforcement Submissions Document stated that the significance of the failure by FSE to pay the regulatory fees and levies is that it "signifies a breakdown in the relationship between FSE and the Authority, such that it appears that the Authority can reasonably conclude that it may not respond adequately to future communications sent to them by the Authority."

73. It is clear from the terms of the Enforcement Submissions Document that the case was presented as being one of a simple routine case of a firm refusing without good reason to pay fees and, without good reason, failing to obtain PII. Indeed, in his submissions Mr Sampson stated that this case was a routine one as far as the Authority was concerned. Nothing was said about the current status of the enforcement investigation.

74. A note of the substantive communications that took place between the RDC and Enforcement dated 19 February 2019 records that the RDC asked Enforcement whether FSE was asked to agree to vary its Part 4A permission having regard to the fact that the firm had repeatedly stated that it was not trading due to its lack of valid PII cover and also records Enforcement's response as being that no such attempt was made.

75. The RDC accepted Enforcement's recommendation and accordingly a Warning Notice was given to FSE on 19 February 2019, informing FSE that the Authority proposed to cancel FSE's Part 4A permission. The Warning Notice referred to FSE's disputing its obligation to pay fees on the grounds that it claimed that the Authority prevented it from trading, as an ongoing regulatory investigation caused FSE's insurer not to renew its PII and FSE could not trade without valid PII but concluded that FSE had failed to provide evidence of the Authority's instruction against trading.

76. FSE made oral and written submissions to the RDC on the Warning Notice. In the Decision Notice, the RDC decided to take the action proposed in the Warning Notice, and on the same basis as that set out in the Warning Notice. In an Annex to the Decision Notice, the RDC summarised FSE's representations and its response to them.

77. The RDC did appear to recognise during its questioning of Enforcement during the oral representations meeting that situation had, as the RDC Chairman put it, created "a bit of a vicious circle" and that the only way out of it, in Mr Markou's mind was for the Authority to complete its investigations and say that it was not going to take any further action. The RDC Chairman recognised that if that were the result, then FSE could "get PII, start crank up trading again, earn some fees and pay the Authority." The RDC Chairman went on to say that this could not be ignored, and that he followed Mr Markou's argument. He referred to the fact that from time to time firms remained authorised despite not being able to conduct any regulated activities because of the imposition of a Supervisory Notice. Ms Couzens, one of the Enforcement representatives, observed at this point that this could be a solution to the current situation as regards PII, but the fees would still remain due. The RDC Chairman then clarified that he was considering whether there were any other angles that could be explored.

78. In relation to FSE's representation that the failure to obtain PII is the direct result of the ongoing investigations the RDC said at paragraph 5 of the Annex that the effect of the ongoing investigations on FSE is not relevant to FSE's regulatory obligations and then said this at paragraph 7 of the Annex:

> "Under the rules set out in the Handbook and referred to in this Decision Notice, FSE is obliged to hold valid PII cover, and the fact that it does not do so results in FSE failing to meet the appropriate resources Threshold Condition."

79. As regards the failure to pay fees, the RDC said at paragraph 10 of the Annex that the lawful investigations undertaken by the Authority do not obviate FSE's obligation to pay fees and levies and that if it wished to remain authorised, it is required to continue to pay fees and levies to the Authority. At paragraph 19 of the

Annex, the RDC expressed the view that the investigations are separate matters from the subject matter of the procedure that has resulted in the issue of the Decision Notice, which is based exclusively on the failure to maintain PII cover and to pay fees and levies and that either of those failures on its own would be a sufficient basis for cancellation of FSE's Part 4A permission.

80. During the oral representations meeting, Mr Markou raised the question as to why the Authority had not considered to exercise its power under FEES 2.3.1 to remit fees, noting that it had not been mentioned in the Warning Notice. The Authority's representatives at the meeting were asked how the discretion in FEES 2.3.1 would normally be exercised. The answer given was that if the issue was raised during enforcement proceedings, the question would be remitted back to the revenue team for them to make a decision if the enforcement team thought it was appropriate to do so.

81. It would appear, however, that the RDC did not ask for any further detail as to the Authority's policy as regards the exercise of the discretion, whether from the revenue department or otherwise. It did, however, say this at paragraph 20 of the Annex to the Decision Notice:

> "Although the Authority had not considered the application of FEES 2.3.1 R before it was referred to at FSE's oral representations meeting, the Authority has concluded that in FSE's case it is not appropriate to remit or reduce the fees and levies due from FSE to the Authority. As stated by FSE, despite the fact that it does not conduct any trading at present, it still generates some income from commissions from past trading."

82. It is therefore apparent from this statement that the RDC took the view that it was not appropriate to exercise the discretion in circumstances where the firm has at least some income.

Summary of principal factual findings

83. We summarise as follows our principal findings of fact that are relevant to our assessment as to whether the Authority's decision to cancel FSE's Part 4A permission was reasonably open to it:

(1) FSE was unable to obtain PII after 9 May 2017 as a direct consequence of the conclusions in the Supervision Letter, and in particular the request by the Authority that FSE should cancel its permission: see [51] above.

(2) The Authority did not pursue the issue of a Supervisory Notice in order to restrict FSE's regulated activities notwithstanding the concerns expressed in the Supervision Letter: see [52] and [74] above.

(3) There was a significant delay in making a decision as to whether to refer FSE and Mr Markou to Enforcement after the Supervision Letter and little progress was made in progressing those investigations once the investigations were opened: see [53] to [58] above.

(4) FSE had not paid any of the fees which became due and payable after 9 May 2017 because it had insufficient resources to do so, notwithstanding its receipt of income of some £13,000 after it ceased trading. Mr Markou remained willing to ensure that FSE paid the outstanding fees as and when it was able to resume trading. FSE's policy was to pay its regulatory fees out of current trading income and provisions were not made in earlier accounting periods in respect of fees becoming due in the next accounting period: see [68] and [69] above.

(5) The Threshold Conditions case was presented to the RDC on the basis of it being a simple routine case of a firm failing to meet the Threshold Conditions because of its refusal to pay fees and not having PII for good reason: see [73] above.

(6) The Warning Notice suggested that had the Authority itself given an instruction to FSE not to trade then enforcement action for non-payment of the fees and the failure to obtain PII would not have been taken: see [75] above.

(7) The RDC recognised Mr Markou's arguments concerning the reasons why PII was not obtained and the fees not paid and that it was necessary to consider whether other angles should be explored: see [77] above.

(8) The RDC considered whether the discretion in FEES 2.3.1R should be exercised so as to remit the fees but declined to exercise the discretion itself. It did not refer the matter back to Enforcement or any other division of the Authority for policy guidance: see [78] above.

Discussion

84. In his opening submissions, Mr Sampson identified that the area of controversy in this case is whether (i) FSE was able to obtain PII and (ii) whether it was able to pay the fees and levies. In his closing submissions, in relation to the PII issue Mr Sampson submitted that the evidence did not establish that FSE was unable to obtain PII. As regards the unpaid fees and levies, Mr Sampson submitted that FSE could not establish it was unable to pay the fees and levies for two reasons. First, he submitted that FSE acted imprudently in not making provision for those fees and levies in the period prior to them becoming due and that it did not behave responsibly in adopting a policy of paying fees and levies out of current income. Secondly, he submitted that because FSE continued to generate income after 9 May 2017, to the extent of £13,000, it did in fact have sufficient resources to pay the fees and prioritised other creditors.

85. We accept that it would be reasonably open to the Authority to cancel FSE's Part 4A permission were Mr Sampson able to make out the Authority's case on the factual matters set out above. We accept that a firm would be failing to meet the Threshold Conditions in circumstances where it was able to obtain PII and yet failed to do so and where it refused to pay the Authority's fees in circumstances where it had the resources to do so. In those circumstances, the firm would clearly be failing to manage its affairs prudently, would be failing to cooperate with the Authority and would be failing to maintain adequate resources by making appropriate provision in respect of its liabilities. That would put the case in the same category as the numerous

cases where the Authority comes across those circumstances and uses the cancellation procedure to end the firm's authorisation. Such cases are properly regarded by the Authority as routine. If those were the facts in this case, we should properly dismiss the reference.

86. However, in our view this case is not routine, and it is clear from our findings of fact that we do not accept the factual premise on which the Authority's case rests. Mr Sampson did not explicitly accept that were we to reject the Authority's factual case then we would be bound to remit the matter to the Authority for further consideration. We do, however, consider that having rejected the Authority's factual case then it is necessary for the Authority to reconsider its decision on the basis of the facts that we have found. In those circumstances, it is clear that there are a range of other factors that the Authority must take into account in considering whether in the light of the fact that FSE has not been able to secure PII and has not had the resources to pay the fees and levies the firm is failing to satisfy the Threshold Conditions.

87. As we have said, we have found that FSE was unable to obtain PII after 9 May 2017 as a direct consequence of the conclusions in the Supervision Letter, and in particular the request by the Authority that FSE should cancel its permission.

88. As regards the failure to pay the fees and levies, we have explained that FSE did not have the resources to do so after it ceased to trade. We do not accept that the fact that the firm continued to generate a small amount of income after it ceased to trade cast doubt on that conclusion. 85% of the income received was not due to the firm itself and very little was left to meet the firm's other debts. We are not aware of any rule that says that the Authority should be regarded as a preferential creditor in respect of the fees that are due to it.

89. We do not accept that it was imprudent of FSE not to have made provision for the payment of fees that may become due in the future. Its inability to trade was not foreseeable. It is clear from the way that the Authority's fees scheme is structured that fees are payable each year to pay for the cost of regulating the firm in the year that the invoice is rendered. Therefore, when a firm receives an invoice for fees, it is being asked to pay fees in respect of the cost regulating the firm for the year in which the invoices received rather than being asked to pay for the cost of regulating the firm in previous periods. In those circumstances, it appears to us that FSE's approach of meeting the fees out of current income is perfectly reasonable and prudent.

90. In our view, FSE also acted responsibly and prudently in ceasing to carry on any regulated activities once the concerns in the Supervision Letter had been expressed and by deciding to await further developments rather than attempt to renew its PII immediately. Clearly, the risk to consumers has been mitigated by that approach. In that regard, we note that Condition 2D of the Threshold Conditions requires the question as to whether the firm has appropriate resources to be assessed having regard to the nature and scale of the business carried on, or to be carried on by the firm. In the light of the firm's decision not to trade for the time being after the issue of the Supervision Letter, then at least so far as incurring potential further liabilities are concerned, the resources requirement is diminished.

91. In those circumstances, we find as a matter of fact that after 9 May 2017 FSE was managing its business in such a way as to ensure that its affairs were being conducted in a sound and prudent manner. It did everything it reasonably could to push the enforcement process along. It was of course, open to the Authority at that point to use its supervisory powers to put the cessation of business for the time being on a formal footing until circumstances changed by varying FSE's Part 4A permission by, for example, making it a condition that it did not resume trading until it obtained PII and paid its outstanding fees. It is clear from our findings of fact that had such an instruction been given, then the Authority would not have pursued the cancellation of the firm's Part 4A permission and then could have pursued the enforcement investigations which, if the outcome was favourable to FSE, would have enabled it to resume trading because it would then be likely that it would be in a position to pay the fees and obtain PII. We therefore agree with the RDC's observation that without the investigation being pursued and the firm not being in a position to trade it was indeed caught in a "vicious circle".

92. Because the Authority treated the case simply as a routine case of a firm simply failing to have PII and pay its fees, and it is clear from our findings of fact that there was more to the case than that, it follows that the Authority has failed to take into account a number of relevant factors in reaching its decision. As the authorities we have referred to above demonstrate, that in itself justifies us allowing the reference and referring the matter back for reconsideration.

93. In particular, the Authority has failed to take into account the following factors;

(1) The fact that the failure to obtain PII was as a consequence of the findings of the Supervision Letter which could only be remedied once it was clear whether or not FSE and Mr Markou were to be referred to enforcement and, if so, the outcome of those investigations was known. The RDC were wrong to say in the Decision Notice that in the circumstances of this case, the fact that there were ongoing investigations was an irrelevant factor.

(2) Whether in the circumstances, the Authority should have considered exercising its power to remit the fees, or at least forbear from taking action to enforce them pending the outcome of the investigation. Mr Sampson criticised the fact that this matter was only raised by Mr Markou at the RDC oral representations meeting. We reject that criticism. The Authority is presumed to be aware of its own rulebook and also, as a public authority, that it has a duty to take all relevant factors into account before making a decision. It was clear that Mr Markou had put forward cogent reasons why the fees could not be paid, and, in those circumstances, it was the duty of the Authority to consider whether in the circumstances it was appropriate to pursue payment for the time being. The RDC did consider the issue to a degree, but it did not take steps to ascertain a full picture as to the policy of the Authority as regards the exercise of the discretion in the rule.

(3) Whether as an alternative to pursuing the cancellation route, the Authority should have considered whether to exercise its powers to issue a Supervisory Notice pending the outcome of the enforcement investigations. The Authority

must have come to the view that, notwithstanding its request that the firm cancel its permission following the Supervision Visit, the concerns were not so great that they justified the Authority pursuing a cancellation on its own initiative based on the findings after the visit and after the firm had declined the invitation to cancel. The Authority did not, as our findings of fact show, consider pursuing the alternative route of varying the firm's Part 4A permission, a route which the RDC Chairman had himself identified at the oral representations meeting.

(4) Whether it should, as an alternative to pursuing the cancellation route, conclude its investigation into FSE and Mr Markou either by discontinuing the investigation or instituting regulatory proceedings.

Conclusion

94. The reference is allowed. Our decision is unanimous.

Directions

95. We therefore remit the matter to the Authority with a direction to reconsider its decision to cancel FSE's Part 4A permission in accordance with our findings.

96. The relevant findings that the Authority must consider in this case are our findings of fact, as summarised at [83] above, and our further findings at [86] to [91] above.

97. The Authority must take into account the matters set out at [93] above in reconsidering its decision.

98. We remit the reference to the Authority with a direction that effect be given to our determinations.

JUDGE TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE

RELEASE DATE: 22 April 2020