

***PERMISSION TO CARRY ON REGULATED ACTIVITIES – Cancellation
of Part IV permission – Failure to comply promptly with FOS award –
Whether Applicant a fit and proper person***

FINANCIAL SERVICES AND MARKETS TRIBUNAL

HEATHER, MOOR & EDGECOMB LIMITED

Applicant

- and -

FINANCIAL SERVICES AUTHORITY

The Authority

**Tribunal: SIR STEPHEN OLIVER QC
IAN ABRAMS
COLIN SENIOR**

Sitting in public in London on 19 May 2008

Anthony Speaight QC for the Applicant

Daniel Thornton and Dan Enraght-Moony, counsel, for the Authority

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DECISION

1. The Applicant, Heather, Moor & Edgecomb Ltd (“HME”), have referred a Decision Notice dated 2 October 2007 informing it that, on the basis that it had failed to conform with an award made by the Financial Ombudsman Service (“FOS”) dated 13 October 2003 (in favour of a Mr and a Mrs Crofts, “the Crofts’ FOS Award”), the Authority had decided to cancel its Part IV permission.

2. Shortly stated, the Authority’s case is that the failure by HME to pay the Crofts’ FOS Award means that the Authority cannot be satisfied that HME is a fit and proper person having regard to all the circumstances, and that HME is therefore failing and likely to fail to satisfy Threshold Condition 5. As a result, say the Authority, HME’s Part IV permission should be cancelled.

3. HME says that nothing about its conduct in respect of the Crofts’ FOS Award has rendered it not fit and proper in the relevant sense. HME relies further on the fact that, when sued for the Crofts’ FOS Award by Mr and Mrs Crofts, the proceedings concluded with the claim being dismissed by consent; for the Authority to use its power to withdraw HME’s Part IV permission would, it is argued, be in breach of the Rule of Law and of Article 1 of the First Protocol to the Convention on Human Rights (“Article 1P”).

4. HME further argue that the Crofts’ FOS Award is non-enforceable; there is no FOS register or, if so, the Crofts’ FOS award was not entered in the register. We refer to this as “the absence of a FOS register argument”.

The Crofts’ FOS Award

5. The Crofts’ FOS Award was accepted by Mr and Mrs Crofts on 15 October 2003. Section 228(5) of Financial Services and Markets Act 2000 (and all further statutory references in this decision are to that Act) came into play and the award was binding on HME. The relevant Authority rule (DISP 3.7.12(1) R) requires prompt compliance with an award or direction of the FOS. (Prior to 6 April 2008 the relevant rule was DISP 3.9.14(1) R which also required prompt compliance.)

6. HME say they decided, having regard to the high cost of challenging the legality of the Crofts’ FOS Award by way of judicial review, not to challenge it. On 6 January 2004 HME confirmed this by letter. The award therefore stood as binding and HME was obliged to comply promptly with it. In July and August 2004 the Ombudsman clarified how to calculate the redress, but HME disputed the amount due. As a result, on 14 October 2004 the individual Ombudsman who had determined the Crofts’ FOS Award wrote to supplement his final decision, explaining how he had intended the calculation to work and requiring HME to pay to the Crofts £5,352.84 by 11 November 2004.

7. HME set about obtaining further figures. On 7 December 2004 however the FOS wrote requiring £5,352.84 to be paid forthwith. HME wrote to the FOS in

December 2004 and January 2005 questioning the quantum of the award, raising challenges on public law grounds and threatening judicial review.

5 8. The Authority take the position that the “prompt compliance” required by the relevant DISP rules has meant paying the Crofts’ FOS Award by 11 November 2004 at the latest.

The Crofts’ Enforcement Action

10 9. In June 2005 the Crofts wrote a letter before taking enforcement action. HME responded on 29 July 2005 that an enforcement action would be resisted on public law grounds. The Crofts issued a claim form in the Swindon County Court against HME for £5,352.84 plus £760 of interest. By its “amended defence” HME challenged the Crofts’ FOS Award on public law grounds on the basis that FOS had acted beyond its
15 powers and in breach of Article 6 of the Convention on Human Rights.

10. Following disclosure, the Crofts expressed concern about costs and offered (in a letter from their solicitors dated 15 May 2006) to withdraw the proceedings if there were no order for costs. By consent order of 5 June 2006 the Crofts’ claim was
20 dismissed with no order as to costs.

The appropriate course

11. The issue for us is to determine what, if any, is the appropriate action for the
25 Authority to take in relation to the matter referred to it: see section 133(4).

12. The Authority’s decision is that HME’s Part IV permission should be cancelled. The basis for the decision referred to us is (as we have already noted) that the failure by HME to pay the Crofts’ FOS Award means that HME cannot be
30 regarded as a fit and proper person (with particular reference to Threshold Condition 5) having regard to all the circumstances.

13. The relevance of the Crofts’ Enforcement Action, argued Mr Speaight QC for HME, is this. HME’s defence in the County Court challenging the lawfulness of the Crofts’ FOS Award was a proper and permissible challenge. The outcome of the
35 County Court proceedings was favourable to HME; the outcome should be taken as the acceptance of the legality of HME’s case. It follows, so the argument runs, that it is wrong in principle for the Authority to use its statutory powers of removing Part IV permission from HME as a lever to secure compliance with the Crofts’ FOS Award.
40 The Tribunal’s determination should therefore recognise the outcome of the Crofts’ Enforcement Action.

14. We start by examining the Crofts’ Enforcement Action and its outcome. The Crofts’ Enforcement Action sought enforcement of the Crofts’ FOS Award (as a
45 “money award” within section 229(2)(a)) under section 229(8) which says of a money award that it “is enforceable by the complainant in accordance with Part III of Schedule 17.”

15. Schedule 17 paragraph 16 provides that a money award which has been registered in accordance with scheme rules may "... if a County Court so orders ... be recoverable by execution ..."

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16. The Crofts' Enforcement Action was between the Crofts as complainants and HME. Neither the FOS nor the Authority played any part in the proceedings. The outcome of the proceedings in the form of the consent order was dismissal of the Crofts' claim. The Crofts' ability to enforce the Crofts' FOS Award was thereby extinguished.

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17. Does the outcome of the Crofts' Enforcement Award have any further significance? HME's (amended) defence to the Crofts' (amended) particulars of claim challenged the FOS Award on public law grounds, claiming that FOS had acted beyond its powers and in breach of Article 6 of the Convention. But in our view the circumstances of that dismissal leave the lawfulness of the Crofts' FOS Award unaffected.

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18. We were referred in this connection to the decisions of the House of Lords in *Wandsworth London BC v Winder* [1985] AC 461 and in *Boddington v British Transport Police* [1999] 2 AC 143. Those decisions were applied in the course of High Court proceedings in *Bunney v Burns Anderson plc and Another* [2007] 4 All ER 246. In the *Bunney* proceedings, the complainant sought an injunction under section 229(9) for enforcement of a decision of the FOS. (Section 229(9) applies to compliance with directions of the FOS under section 229(2)(b) considered to be just and appropriate. It provides that compliance with such directions be "enforceable by an injunction". Section 229 makes a distinction between such awards and the manner of enforcement and "money awards" with which the present proceedings are concerned.) The Court decided in *Bunney* that the firm against which the complaint had been made could legitimately raise the question, in the course of the enforcement proceedings, whether the Ombudsman had jurisdiction to make the determination that he had purported to make (see paragraph 53 of the judgment of Lewison J). Mr Speaight did not seek to raise the lawfulness of the FOS award as an issue for this Tribunal. That leaves us with the outcome of the Crofts' Enforcement Action dismissing by consent the Crofts' claim, but making no ruling on the lawfulness of the FOS award. We are in agreement in this respect with the contention of Daniel Thornton for the Authority that HME remains in the same position as if the Crofts never initiated the civil action.

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19. It must follow, we think, that the Authority is in no way estopped from taking whatever action is appropriate in the circumstances. Their withdrawal of Part IV permission does not violate the Rule of Law or HME's rights under Articles 6 or 1P.

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20. They have already noted that as from 11 November 2004 at the latest HME was obliged promptly to comply with the Crofts' FOS Award, as explained in the Ombudsman's letter supplementing his final decision. We recognise that the individual members of HME have a deeply held conviction that the manner in which the Crofts'

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FOS Award was reached has rendered it unlawful. But, in the absence of a successful judicial review challenge (or a challenge on the *Bunney* lines), that personally held conviction does not exonerate HME from the requirement for prompt compliance with the Crofts' FOS Award.

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21. We are concerned only to determine what is the appropriate action for the Authority to take in relation to the non-compliance of HME with the Crofts' FOS Award. Reference was made by both sides to two other FOS Awards which are currently the subject of judicial review proceedings. We ignore the existence of those because HME are taking wholly proper legal steps to challenge their validity. Other than the fact that HME have failed to comply with the Crofts' FOS Award, the Authority have made no complaints about the fitness and propriety of HME to carry on the relevant regulated activities. Nonetheless, we think that HME has failed in its duty of prompt compliance with the Crofts' FOS Award. In these circumstances we have concluded that the appropriate action for the Authority is to withdraw HME's Part IV permission unless HME complies with the Crofts' FOS Award and pays the Crofts' interest as compensation for their being wrongfully deprived of the amount of the award since 11 November 2004. HME should be allowed 28 days in which to pay before facing cancellation of its Part IV permission.

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The absence of a FOS Register Argument

22. The point taken for HME is this. The Crofts' FOS Award is unenforceable because either there is no FOS register or the Crofts' FOS Award was not entered on the register. Section 229(8), as already noted, provides that a money award is enforceable by the complainant in accordance with Schedule 17 paragraph 16; paragraph 16 enables recovery of a money award "if a County Court so orders" where the money award "has been registered in accordance with scheme rules". The DISP rules contain "scheme rules" made for those purposes; prior to 6 April 2008 DISP 3.9.15R provided that "the Ombudsman must maintain a register of each money award and direction made". Since that date DISP 3.7.7R has required FOS to "maintain a register of each money award."

23. HME may be right (assuming it is correct that there is no register) in asserting that the Crofts' FOS Award is not enforceable by the complainants (the Crofts) under section 229(8). That does not however detract from the fact that the Crofts' FOS Award is binding on HME by reason of section 228(4), all the conditions of which are satisfied. This leaves in place HME's regulatory obligation to comply promptly.

24. It follows from that decision that it is not necessary for us to explore the question of whether FOS keep a FOS register in the relevant sense. We merely note for the record that we were provided with evidence of a Mr Bentall of FOS that there is an internal database at FOS which, he asserted, serves as a register. The Crofts' FOS Award was recorded on that database.

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The quantum of the payment to be made by HME

25. The amount of the Crofts' FOS Award as determined by the individual
Ombudsman on 14 October 2004 worked out at £5,352.84. That money award was to
be paid by 11 November 2004. Payment of that amount should, we think, be
supplemented by a reasonable amount of interest. The Authority have suggested that,
5 for the sake of simplicity, a period of 3½ years (for the period November 2004 until
May 2008) be used and that interest at 5% imposed. The interest works out at
£996.77 making a total amount payable of £6,349.61. We therefore direct as follows:

10 “The appropriate action for the Authority to take is to cancel the Applicant’s
Part IV permission UNLESS within 28 days from the release of this Decision,
or, if an application be made for permission to appeal, the final disposal of any
appeal from it, the Applicant shall have paid to Mr and Mrs Crofts the amount
of £6,349.61.”

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**SIR STEPHEN OLIVER QC
CHAIRMAN**

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