[2016] UKUT 0129 (TCC)

Reference number: FS/2015/0018

FINANCIAL SERVICES - Decision Notice refusing permission for authorisation to carry on debt adjusting and debt counselling activities-giving of Decision Notice terminated Applicant's Interim Permission to carry on those activities - Application for direction to suspend effect of Decision Notice until reference disposed of - whether Tribunal satisfied that the direction to suspend the effect of the notice would not prejudice the interests of consumers - No - Application dismissed-Rule5(5) The Tribunal Procedure (Upper Tribunal) Rules 2008

Privacy - application for direction to prohibit publication of Decision Notice and for Register not to contain particulars of the reference - whether prohibition justified -no- application dismissed- Rule 14 and para 3(3) Schedule 3 The Tribunal Procedure (Upper Tribunal) Rules 2008

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

PDHL LIMITED **Applicant**

- and -

THE FINANCIAL CONDUCT AUTHORITY **Respondent**

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

Sitting in private at The Royal Courts of Justice, Strand, London WC2 on 7 January 2016

Tom Weisselberg QC and John Virgo, Counsel, instructed by Michelmores LLP, for the Applicant

Javan Herberg QC and Simon Pritchard, Counsel, instructed by the Financial Conduct Authority, for the Respondent

DECISION

Introduction

1. On 16 December 2015 the Financial Conduct Authority ("the Authority") gave a Decision Notice to the Applicant ("PDHL") refusing its application for a Part 4A permission to carry on the regulated activities of debt adjusting and debt-counselling.

2. By a reference notice dated 16 December 2015 PDHL referred the matter to the Tribunal. Although PDHL disputes that this is the case, the Tribunal has determined, in a separate decision released on the same day as this decision, that as a consequence of the giving of the Decision Notice the interim permission held by PDHL to carry on the regulated activities referred to above has ceased to have effect by operation of the relevant provisions of article 58 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013 ("the Order").

3. PDHL, however, in its reference notice also applied for a direction that the effect of the Decision Notice be suspended pending the determination of the reference pursuant to Rule 5 (5) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules") and in the light of this Tribunal's decision that PDHL's Interim Permission has ceased to have effect, this decision relates to that application ("the Suspension Application") and the other applications mentioned at [4] below, all of which I heard on 7 January 2016.

4. PDHL has also applied for directions that publication of the Decision Notice be prohibited pursuant to Rule 14 of the Rules and that the Register maintained by the Tribunal pursuant to paragraph 3 of Schedule 3 to the Rules shall not include particulars of the reference. I refer to these applications in this decision as the Privacy Applications.

Background

5. Before April 2014, firms carrying on consumer credit activities were authorised and regulated by the Office of Fair Trading ("OFT") under a licensing system provided for by the Consumer Credit Act 1974. Firms carrying on debt management activities, in particular debt adjusting and debt-counselling, were required to obtain an OFT licence before carrying on those activities.

6. Parliament decided in 2013 to transfer responsibility for the regulation of the consumer credit industry to the Authority. The Authority published a consultation paper setting out its detailed proposals for its regulation of consumer credit in October 2013. The transfer of responsibility for the regulation of the consumer credit industry from the OFT to the Authority took effect on 1 April 2014. This transfer was effected in legislative terms by specifying various consumer credit activities as regulated activities for the purposes of the general prohibition in s 19 of the Financial Services and Markets Act 2000 ("the Act") with the consequence that as from 1 April 2014 a firm requires the appropriate permissions under Part 4A of the Act before it can lawfully carry on consumer credit regulated activities.

7. The term “debt management” is commonly used to describe two related activities which are now regulated by the Authority by virtue of having been specified as regulated activities under the Financial Services and Markets Act 2000 (Regulated Activities Order) 2001 (the “RAO”), namely “debt adjusting” and “debt counselling”. The former is defined by article 39D of the RAO as, in relation to debts due under a credit agreement or consumer hire agreement, (a) negotiating with the lender or owner, on behalf of the borrower or hirer, terms of the discharge of the debt; (b) taking over, in return for payments by the borrower or hirer, that person's obligation to discharge a debt; or (c) any similar activity concerned with the liquidation of the debt. The latter is defined by article 39E of the RAO as advice (relating to a particular debt and debtor) given to (a) a borrower about the liquidation of the debt due under a credit agreement; or (b) a hirer about the liquidation of a debt due under a consumer hire agreement.

8. Pursuant to article 56 of the Order, a firm which immediately before 1 April 2014 held an OFT licence in respect of consumer credit activities acquired on 1 April 2014 an interim permission to carry on as regulated activities the consumer credit activities that were covered by its OFT licence without the Authority having to undertake any consideration as to whether the firm concerned met the threshold conditions for authorisation (“the Threshold Conditions”) set out at Schedule 6 to the Act. However, the effect of the Order is that a firm would lose its interim permission unless it applied by a date specified by the Authority for a Part 4A Permission which the Authority could only grant if it was satisfied that the firm satisfied the Threshold Conditions.

9. The Authority has made directions pursuant to the Order setting out application periods for different categories of firm based on various factors including the level of risk they pose; debt adjusting and debt-counselling are regarded by the Authority as higher risk activities and so were in the earlier application periods. In doing so, the Authority took account of the OFT's findings in September 2010 that debt management was a market where poor practices appeared to be widespread, including the provision of poor advice based on inadequate information.

10. PDHL has been trading as a debt management firm since 26 July 2007 and accordingly was regulated from that time by the OFT until 31 March 2014. PDHL is funded in part by a finance company which as security for such funding holds a debenture over PDHL's assets. PDHL’s last reported annual turnover is £9,158,832 and it currently employs around 180 people.

11. PDHL obtained an interim permission on 1 April 2014 by virtue of the operation of the Order and on 21 December 2014, within the application period directed by the Authority, applied to the Authority for a Part 4A permission to carry on the consumer credit regulated activities of debt adjusting and debt-counselling.

12. As part of its Part 4A application, PDHL submitted a business plan which demonstrates that its business model entails sourcing indebted customers who are seeking debt advice. In that context, it offers a range of debt solutions based on an assessment of a customer’s circumstances. PDHL will provide relevant debt advice

which can include advice to enter into arrangements such as individual voluntary arrangements ("IVAs") which are formal legal agreements between a customer and his creditors to liquidate his debts over a set period of time under the administration of a qualified insolvency practitioner and, more commonly, debt management plans ("DMP") which are non-statutory agreements between a customer and one or more of its lenders, the aim of which is to discharge or liquidate the customer's debts by making regular payments. Under PDHL's business model payments are made by the customer to PDHL who administers the plan and distributes the money to the lenders in the agreed amounts. It would appear that no formal legal agreements are entered into between the relevant lenders and the customer, the arrangements in effect amounting to forbearance on the lender's part to accept, while the arrangement is in force, payments towards the discharge of the debts owed which are different to those contractually agreed.

13. If a customer agreed to enter into a DMP, PDHL would negotiate with the customer's creditors to set up repayment plans in respect of each debt, for which it will receive and administer the customer's payments to creditors. PDHL's principal source of income is from monthly fees it charges customers who are on active DMPs or IVAs. PDHL's current customer base is about 22,000 individuals. PDHL does not charge a setup fee for its DMPs but makes charges which are deducted from the monthly payment which it makes to a customer's creditors. Its fees are currently £38 a month for the first four debts and £2.50 for each additional debt thereafter. Its DMPs only cover unsecured debts such as credit cards, personal and payday loans. Secured debts such as hire purchase and mortgage arrangements are deducted from income in calculating a customer's affordable monthly payment.

14. PDHL's business has expanded over the years both by natural growth and by acquiring books of customers from other debt management firms. Its most recent acquisition was on 20 February 2015 when it acquired a client book of about 15,000 customers and the transfer of their DMPs from another firm operating in the same sector, Kensington Financial Management Consultants Ltd ("Kensington"). The firm accepts that this acquisition caused difficulties for PDHL due to its size, the standard of competency of the staff transferred and the quality of the compliance advice available to PDHL to deal with the issues.

15. As mentioned at [8] above, in order to obtain a Part 4A permission, PDHL needs to satisfy the Authority that it satisfies and will continue to satisfy the Threshold Conditions in relation to all of the regulated activities for which it is seeking permission (see s 55B(3) of the Act). The Threshold Conditions which have been an issue in relation to PDHL's application are condition 2D (appropriate resources) and condition 2E (suitability).

16. Condition 2D so far as relevant provides:

> "(1) The resources of A must be appropriate in relation to the regulated activities that A carries on or seeks to carry on.
>
> (2) The matters which are relevant in determining whether A has appropriate resources include-

(a) the nature and scale of the business carried on, or to be carried on, by A;

…"

17. Condition 2E provides, so far as relevant:

"A must be a fit and proper person having regard to all the circumstances, including-

(a)…

(b) the nature (including the complexity) of the regulated activities that A carries on or seeks to carry on;

(c) the need to ensure that A's affairs are conducted in an appropriate manner, having regard in particular to the interests of consumers and the integrity of the UK financial system;

(d)…

(e) whether those who manage A's affairs have adequate skills and experience have acted and may be expected to act with probity;

(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;

…"

18. That part of the Authority's Handbook known as COND gives guidance on how the Authority interprets the Threshold Conditions.

19. In relation to condition 2D the guidance states that in considering whether a firm has appropriate resources it will, among other things, consider whether the firm has sufficient systems and controls, human resources in terms of quantity, quality and availability and effective means by which to manage risk. The Authority will have regard to matters including whether the firm has installed appropriate systems and controls and appointed appropriate human resources to measure them prudently at all times.

20. In relation to condition 2E, the Authority will have regard to whether the firm complied and is complying with the relevant regulatory requirements imposed by the Authority and conducts its business in compliance with proper standards with exercise of due skill, care and diligence and that robust information and reporting systems have been developed, tested and properly installed.

21. The Decision Notice was given because the Authority was not satisfied that PDHL will satisfy, and will continue to satisfy, the Threshold Conditions for the following principal reasons as set out in paragraph 9 of the Notice:

"(1) PDHL lacks appropriate human resources. There is a need for senior and Board level recruitment following the recent resignation of PDHL's Managing Director, Head of Customer Services, Risk Manager and Compliance Director. Although a new Head

of Customer Services has joined the firm and interim appointments have been made to fill the Managing Director and Compliance Director vacancies, the Authority is concerned that, should it grant the Application, there would be a lack of experienced senior management in place at a time when PDHL's systems and procedures and staff capability require significant improvement.

(2) PDHL also lacks appropriate human resources because it only has two members of staff capable of dealing with particularly vulnerable consumers and lacks sufficient QA staff and debt advisers. It informed the Authority that it needs 30 debt advisers in order to service effectively its customers, but currently only has 14 debt advisers that it has assessed as competent.

(3) Other non-financial resources of PDHL are inappropriate. The Authority has identified outstanding issues with PDHL's policies and procedures and is not satisfied that the failings it identified in respect of PDHL's advice process and systems and controls have been adequately addressed. This is supported by recent evidence which shows that PDHL's customers remain at risk of not being treated fairly.

(4) Further, even if the Authority had not identified such issues, updating its policies and procedures is not sufficient for PDHL to satisfy the Threshold Conditions, in particular given the significant failings previously identified by the Authority. Instead, the new policies and procedures need to be effectively implemented (i.e "embedded") and PDHL needs to demonstrate that, as a result of the changes it has made, it is now compliant with the relevant regulatory requirements. PDHL has accepted that its new policies and procedures are not yet embedded. This supports the view of the Authority which cannot therefore be satisfied that the failings it identified in respect of PDHL's advice process and systems and controls have been effectively remedied."

Relevant law and issues to be determined

The Suspension Application

22. Pursuant to Rule 5(5) of the Rules the Upper Tribunal has the power to direct that the effect of the decision in respect of which the reference is made (in this case the giving of the Decision Notice) is to be suspended pending the determination of the reference:

> "….if it is satisfied that to do so would not prejudice –
>
> (a) the interests of any persons (whether consumers, investors or otherwise) intended to be protected by that notice;
>
> (b) the smooth operation or integrity of any market intended to be protected by that notice; or
>
> (c) the stability of the financial system of the United Kingdom."

23. Rule 5(5) has been considered in a number of cases before this Tribunal and its predecessor. The cases commonly concern situations where a firm with a full authorisation has been the subject of a Supervisory Notice which has removed the

firm's permission to carry on regulated activities because the Authority was of the view that the firm was failing to meet the Threshold Conditions. The firm then seeks to persuade the Tribunal that the effect of the Notice should be suspended pending determination of the reference.

24. The position in this case is different, and so far unique. The request for suspension is designed to preserve PDHL's interim permission pending the determination of PDHL's reference. The effect of the Decision Notice is that PDHL's interim permission and therefore its ability to carry on regulated activities lawfully will cease unless the Suspension Application is successful.

25. It is common ground that Rule 5(5) is wide enough to give the Tribunal jurisdiction to suspend the effect of the Decision Notice and consequently in effect allow the interim permission to continue until the reference has been determined. In order to prevent a hiatus between the termination of the interim permission in accordance with article 58 of the Order and a hearing of the Suspension Application, sensibly, PDHL applied to the Tribunal with the consent of the Authority, for a direction to be made under Rule 5(5) to cover the limited period between the date of the Decision Notice and the determination of the Suspension Application. The Authority did, however, only give its consent on the basis that PDHL agreed voluntarily to vary its permission so as to carry on no regulated activity whilst that direction remained in force. Accordingly, the Tribunal gave a direction under Rule 5(5) in the terms sought on 16 December 2015.

26. It is also common ground that in determining the Suspension Application I am only concerned with whether the condition in Rule 5(5)(a) is met and in particular with the question as to whether I can be satisfied that the suspension of the effect of the Decision Notice would not prejudice the interests of any consumers intended to be protected by the Notice. In my view in this case the consumers in question are primarily those who are existing or potential customers of PDHL for debt management services; it is clear that in issuing the Decision Notice the Authority had concerns that if PDHL was granted the Part 4A permission it had applied for such persons would not be afforded the appropriate level of consumer protection.

27. In *Walker v The Financial Conduct Authority* (2014) FS/2013/0011 this Tribunal set out some general principles to guide it in considering a Rule 5(5) application at [20] to [24] of the decision:

> "20.At this stage I am not concerned with the merits of the reference itself; the question as to whether the Authority was right in its conclusions on the facts and what is the appropriate action to take in the light of the facts ultimately found are matters to be determined after the hearing of the reference and live evidence from the parties involved. At this stage the sole question for me is whether in all the circumstances, with the competing positions of the parties as described above, I can be satisfied that suspending the immediate effect of the Notice would not prejudice the interests of any relevant person. In this case, as the Notice itself states, the persons intended to be protected by the Notice are consumers so I approach the issue from the perspective of whether it is necessary not to suspend the effect of the Notice in order to protect the interests of consumers.

21. I stress the fact that the sole consideration is the question of consumer protection. It is not necessary for me to balance the consumer protection issue against the clear detriment to Mr Walker involved in the fact that he has been deprived of his livelihood since the Notice was issued; if I am not satisfied that suspending the Notice would not prejudice the interests of consumers I must not suspend its effect, regardless of the effect on Mr Walker's business. Parliament has given the Authority the power to vary an authorised person's permission with immediate effect because a delay in taking the action may be prejudicial. In so doing it has put the burden on the subject of the Notice to satisfy the Tribunal that consumer interests will not be prejudiced by its suspension and has essentially decided that clear priority must be given to the interests of consumers.

22. That is not to say that any risk to consumers will justify the restrictions not being suspended. Any financial services business, however well run, poses a risk that in at least some cases there will be a risk to consumers in the activities it carries on. The question is whether there is a significant risk which is beyond the normal risk of doing business in a broadly compliant manner.

23. It is also necessary to consider whether the circumstances on which the Authority has concluded that a Supervisory Notice imposing the restrictions concerned is justified are sufficient, if ultimately established, to justify such a Notice and if the circumstances prevailing at the time the application to suspend is considered demonstrate that the applicant has a serious case to answer on the reference. So, for instance, if in this case the Authority was relying purely on Mr Walker having honestly misunderstood the terms of his permission after it was varied but it was clear that customer consent had been given to the transfers the Tribunal may take the view that suspension would be justified.

24. I should emphasise that each case must be considered in the light of its own circumstances and I have not derived much assistance from the previous cases cited to me which have all been on largely different factual scenarios to the one I am faced with in this case."

28. It is common ground that these were the correct principles to apply in this particular case, subject to the following.

29. First, Mr Herberg observed that the Tribunal was not obliged to grant a suspension if it was satisfied that to do so would not prejudice the interests of consumers. The use of the word "may" in the Rule did in his submission mean that it was a matter of judicial discretion as to whether or not a suspension should be granted. I accept that submission and I did not take Mr Weisselberg to disagree. It is necessary for the Tribunal to carry out a balancing exercise in light of all relevant factors and decide whether in all the circumstances it is in the interests of justice to grant the application. The power is a case management power, which in accordance with Rule 2 (2) of the Rules must be exercised in accordance with the overriding objective to deal with the matter fairly and justly.

30. Second, Mr Weisselberg argued, although not with any great force, that it was not the case that the burden lies on the subject of the notice to satisfy the Tribunal that

consumer protection interests will not be prejudiced by its suspension. Although I accept that the Tribunal must look at all the circumstances, it is clearly the case that the application is brought by PDHL. It is faced with serious concerns expressed by the Authority in the Decision Notice. The Tribunal will need to be satisfied that notwithstanding the serious concerns, there will be no prejudice to consumers if the Suspension Application is granted and the responsibility for satisfying the Tribunal that is the case must lie with PDHL. Therefore in my view Mr Weisselberg's point is purely one of semantics.

31. I should also clarify what was said at [23] of *Walker* with regard to it being necessary to consider whether the circumstances on which the Authority has concluded that a notice is justified are sufficient, if ultimately established, to justify the notice and that there is a serious case to answer on the reference. As the language suggests, although the Tribunal will not carry out a full merits review of the Authority's decision, it will need to satisfy itself that there is a case to answer, so that if it was clear that there was no reasonable prospect of the Authority succeeding on the reference, then that would clearly amount to grounds for a suspension. It was not argued that was the position in this case and I proceed on the basis that the Decision Notice demonstrates that PDHL has a serious case to answer on the reference.

The Privacy Applications

32. Rule 14 of the Rules so far as relevant provides:

> "(1) The Upper Tribunal may make an Order prohibiting the disclosure or publication of:
>
> (a) specified documents or information relating to the proceedings; or
>
> (a) …
>
> (2) The Upper Tribunal may give a direction prohibiting the disclosure of a document or information to a person if:
>
> (a) the Upper Tribunal is satisfied that such disclosure will be likely to cause that person or some other person serious harm; and
>
> (b) the Upper Tribunal is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction."

33. PDHL seeks a direction under Rule 14 to prohibit publication of the Decision Notice pursuant to s 391 of the Act pending determination of the reference.

34. Rule 3(3) of the Rules provides:

> "The Upper Tribunal may direct that the register is not to include particulars of a reference if it is satisfied that it is necessary to do so having regard in particular to any unfairness to the Applicant or prejudice to the interests of consumers that might otherwise result."

35. PDHL seeks a direction under this rule that the register shall not contain particulars of its reference.

36. It was common ground that the principles established in *Arch v Financial Conduct Authority* (2012) FS/2012/20 and *Angela Burns v Financial Conduct Authority* [2015] UKUT 0601 TCC were applicable to the Privacy Applications. As correctly summarised by Mr Herberg in his skeleton argument these provide:

> (1) The open justice principle is to be applied such that the starting point is a presumption in favour of publication in accordance with the strong presumption in favour of open justice generally;
>
> (2) The onus is on the applicant to demonstrate a real need for privacy by showing unfairness;
>
> (3) In order to tip the scales heavily weighted in favour of publication the applicant must produce cogent evidence of how unfairness may arise and how it could suffer a disproportionate level of damage if publication were not prohibited; and
>
> (4) a ritualistic assertion of unfairness is unlikely to be sufficient. The embarrassment to an applicant that could result from publicity, and that it might draw the applicant's clients and others to ask questions which the applicant would rather not answer does not amount to unfairness.

37. It is clear that if publication would result in the destruction of a firm's business then it would be unfair to publish a decision notice. The Tribunal said this at [89] to [90] of *Angela Burns*:

> "89. I accept that cogent evidence of destruction of or severe damage to a person's livelihood is capable of amounting to disproportionate damage such that it would be unfair not to prohibit publication of a Decision Notice. Although I should be careful not to approve specifically the criteria that the Authority sets out in its recent consultation paper on publishing information about Warning Notices at a time when that paper is still open for comment, it appears to me that by including paragraph 2.17 of that paper the Authority accepts that a disproportionate loss of income or livelihood would mean that it would be unfair to publish. In my view damage of that kind is of a different and more serious kind than damage of reputation alone.
>
> 90. The requirement of cogent evidence in applications of this kind leads me to conclude that the possibility of severe damage or destruction of livelihood is insufficient; in my view the evidence should establish that there is a significant likelihood of such damage or destruction occurring. Mr Herberg in his submission summarised at paragraph 85 above appears to accept that to be the correct test. It would be too high a hurdle to surmount which would make the jurisdiction almost illusory if the requirement were to show that severe damage or destruction was an inevitable consequence of publication."

38. In this case, PDHL contends that there is clear evidence that publication would precipitate an insolvency event, resulting in effect in the destruction of PDHL's business.

Evidence

39. PDHL's applications were supported by two witness statements from Mr Ged Finneran, a director of PDHL and a witness statement from Mr Anthony Rawlins, a compliance consultant who has been advising PDHL and who has now agreed to become a non-executive director of the firm.

40. The Authority, in opposing the applications, relied on the evidence given by Mr Garry Hunter in a witness statement. Mr Hunter is a Senior Manager in the Credit Authorisations Division ("CAD") of the Authority, a role he has held since joining the Authority in 2014.

41. None of the witnesses was called for cross-examination. It would have been helpful for the Tribunal had that been the case. It is quite apparent that each party disputes significant parts of the other's evidence and I indicated that there are a number of questions I would have liked to have put to the witnesses to clarify their evidence. A decision on an application under Rule 5(5) must be based on evidence of the circumstances prevailing at the time of the application and the fact that it is an interlocutory matter should not deter the parties from making their witnesses available for cross-examination, notwithstanding the fact that proceedings may be longer as a result. There were a number of points where a request for clarification resulted in either Counsel coming perilously close to giving evidence themselves or seeking further instructions from those behind them which is clearly unsatisfactory. The Tribunal has therefore had to make its findings of fact on the basis of what is said in the witness statements and the supporting exhibits. Much of what was said in each statement was not explicitly challenged and where it is clearly uncontroversial I have accepted it by recording it as statements of fact. That applies in particular to the facts set out in the background section of this decision which is largely based on the witness statements of Mr Hunter and Mr Finneran. Where there is clearly a dispute between the parties as to what is said in the respective witness statements I have endeavoured where possible and necessary to resolve the dispute.

42. I was also provided with a bundle of documents much of which formed the exhibits to the various witness statements.

Findings of fact

43. From the evidence I make the following findings of fact.

44. In addition to its application for a Part 4A permission, in respect of which PDHL has been dealing with CAD, PDHL has engaged with the Supervision Division of the Authority ("Supervision") since obtaining its interim permission.

45. In particular, on 30 March 2015 Supervision made requests for information regarding the Kensington transaction in response to information received from

consumers whose business was acquired by PDHL from Kensington. PDHL accepts that it struggled to respond properly to these information requests and in May 2015 it obtained specialist advice, from Michelmores LLP, solicitors and Mr Anthony Rawlins, a specialist risk management and compliance expert. Mr Rawlins undoubtedly has significant expertise on compliance matters and has undertaken skilled persons reviews under s 166 of the Act for the Authority. PDHL accepts that at that point, which was almost a year after PDHL obtained its interim permission, the requisite standards expected by the Authority had not been satisfactorily addressed.

46. The Authority followed up with a visit to PDHL's offices before which five case files were reviewed. Based on the information received and the analysis of these files, the Authority expressed concerns as to PDHL's ability to give appropriate debt advice. PDHL applied on 12 June 2015 for a voluntary requirement ("vREQ") under s 55L of the Act not to enter into any new contractual arrangements with customers that involved the carrying on of regulated debt adjusting or debt-counselling. The application was granted on the same day. As Mr Finneran said, this enabled PDHL to devote its resources to working hard to "get its house in order". Mr Rawlins had now been instructed to undertake a full review of the firm's governance, systems and controls and conduct of its business leading to a remediation plan, as well as to oversee the process for the application for PDHL's Part 4A permission.

47. It was clear that the Authority had serious concerns regarding the Kensington acquisition and in particular, whether the customers whose business was acquired pursuant to that transaction were receiving appropriate advice or had in fact been effectively transferred to PDHL. It led to the Authority to suggest at a meeting with PDHL on 2 July 2015 that the Kensington plans be passed to the non-profit sector. PDHL was unwilling to do this and continues to dispute the Authority's analysis of the legal arrangements with the Kensington clients. It is clear, however, from Mr Finneran's evidence that PDHL believes that the Authority's suggestion has coloured its approach to PDHL's application for a Part 4A permission and that the Authority's preferred solution is that PDHL's business should in fact be transferred to the voluntary sector.

48. PDHL also at this time asked The Compliance Consortium, a large consultancy, to produce a scope of work document for a past business review ("PBR") to address the Authority's concerns. The Authority indicated on 6 August 2015 that they did not wish to engage with PDHL on a PBR at that stage.

49. On 20 July 2015 PDHL appointed a new highly experienced compliance director. He only stayed a few months before being head-hunted by another firm and currently compliance arrangements are the responsibility of Mr Andrew Heath, PDHL's interim Managing Director.

50. In a letter dated 30 July 2015 the Authority acknowledged that PDHL was putting in place "sweeping changes" to address the Authority's concerns but expressed concern that some of the remedial measures were taking place at a late stage in the application process and that there was insufficient time for any new processes to be implemented effectively (i.e. to be embedded). Mr Rawlins had produced a first report

on his findings on 29 July 2015 which indicated that much work needed to be done to come up to the Authority's standards. The Authority's letter indicated that it was minded to issue a warning notice proposing to refuse PDHL's application for a Part 4A permission.

51. PDHL's Part 4A application indicated that it had started preparations for regulation by the Authority in August 2013. It does however, now accept that those preparations were inadequate.

52. As part of its consideration of PDHL's application, CAD undertook a sampling exercise of 20 customer files out of a wider population of 9,819 customer files and reviewed them against the various requirements contained in the Authority's Handbook for the conduct of debt management business (contained in that part of the Authority's Handbook known as CONC). The review focused on the period from June 2014 to June 2015 and the conclusions of that review which demonstrated widespread failings, led to the "minded to refuse" letter.

53. PDHL responded to the "minded to refuse letter" on 20 August 2015 stating that the Authority's concerns related to historic failings which were acknowledged as being serious but would be remedied by the completion of its PBR. It was clear however, that the Authority was not prepared to delay a decision on PDHL's application pending the completion of the PBR and henceforth PDHL devoted its resources to resisting the Warning Notice (which was issued on 14 September 2015) and carrying on with its remediation plan under the oversight of Mr Rawlins.

54. PDHL decided to make oral representations to the Authority's decision maker, the Regulatory Decisions Committee ("RDC"), on the Warning Notice.

55. Before those representations were heard, on 30 October 2015 PDHL provided the Authority with a second report from Mr Rawlins, dated 25 October 2015, which indicated considerable progress on PDHL's part in endeavouring to meet the Threshold Conditions and implementing its remediation plan. The report stated that PDHL would satisfy the Threshold Conditions relating to staff and systems and controls although not at senior management level. However, the detailed findings of the report indicated continued failings in certain aspects of advice and information given to customers and gaps in staff knowledge.

56. The oral representations meeting took place on 10 November 2015. During that meeting, PDHL (through its Counsel) accepted that at that time it did not satisfy the Threshold Conditions and requested further time to be able to do so which was not given.

57. It is clear however, that PDHL continued to make further efforts to meet the Threshold Conditions after the oral representations meeting and before the RDC made its decision.

58. In addition, prudently, bearing in mind the clear risk now that PDHL would have to cease carrying on business, PDHL instigated efforts to sell its debt management

plan customer book. It sought a delay to the making of the RDC's decision for a period of eight weeks to allow a sale to be concluded. This request was refused.

59. Since 12 November 2015 PDHL had been aware that a decision was expected from the RDC no later than 16 December 2015. On 14 December 2015 PDHL e-mailed the RDC and CAD with a further report from Mr Rawlins. The conclusions of this report were that PDHL had now reached the point that it would achieve compliance with CONC in its business and that in his view PDHL was now meeting the Threshold Conditions.

60. PDHL places strong reliance on this report in support of the Suspension Application. I should therefore refer to it in some detail, although the substantive part of the report is relatively brief. Its overall conclusion, set out in paragraph 1.3 of the report is as follows:

> "We would reiterate that in our opinion PDHL took the regulators' visit in June 2015 and the implications of that visit seriously and have employed external consultants to assist them in finalising the Remediation Plan. The costs of appointing those consultants to date amount to £412,700. The work undertaken and the conversations that the Firm has had with the FCA over the past few months and the promptness and completeness of responses to FCA s 165 Requirement Notices together with the willingness for the Firm to meet regulatory requirements does in our opinion indicate that the FCA can effectively supervise this Firm.
>
> In addition, the Firm has appointed a very experienced interim MD to oversee the management of this Firm to the point of sale and together with the external consultants and Head of Customer Services meets the senior management conditions.
>
> PDHL and its external consultants together with senior management (particularly the Head of Customer Services) has set in place and implemented the policies and procedures referred to in our report dated 25 October 2015. In addition, the sales process has vastly changed and now reflects a true advisory process that identifies the solution based on the needs of the customer. Indeed, the suitability letter produced exclusively by the Firm has now been imitated and used by other debt management firms. From the evidence that we have seen we do believe that PDHL does continue to take account of the customer's needs and that our findings do not question the outcome of the debt management solution.
>
> We are of the opinion that PDHL does now meet those Threshold Conditions set out in this report and the CONC 8 requirements relating to a debt management firm. We are also of the opinion that by remaining static in its opinion of the Firm following its visit in June 2015, the FCA has failed to acknowledge the changes or advances made by the Firm particularly with regard to the competence of the advisers where its views of their competence has prevented the sale to another Firm.
>
> We are conscious that not only are the 20,000 customers of the Firm about to face potential detriment (even moving to a not for profit organisation would leave them in abeyance with their creditors), but also 200 staff are in danger of becoming unemployed. We would therefore recommend that the FCA reconsider its position and revisit this Firm, however we would add that they should be undertaken by a different team within CAD and one that has not been influenced by historical activity."

61. As far as the various areas or deficiency identified in Mr Rawlins's previous reports were concerned the following broad conclusions were reached in the report:

Governance and Oversight

Structure and organisation

Deficiencies in the roles and responsibilities of senior management had been addressed.

Structure and resources

The firm now had an experienced interim Managing Director, who although also responsible for compliance was assisted by an experienced interim compliance manager. PDHL now had a pool of 18 competent advisers who provided holistic debt management advice, a figure due to increase to 21 shortly with three new members currently under training. The firm had set itself a target of 30 such advisers.

Roles and responsibilities

The firm now had policies and procedures in place to enable the firm to meet its obligations under the regulatory system and for the Board to review them, the policies and procedures forming part of the compliance and quality assurance monitoring process.

What had been identified as the greatest stumbling block to the provision of appropriate advice, that is the script used within the advice area which effectively led the adviser to a debt management solution, had been withdrawn and advisers now work with clear guidelines that enable them to provide holistic debt advice to customers. The report recorded that a review of free annual customer checks established that advisers listen to the customer and provided appropriate advice. Mr Rawlins therefore concluded that staff have a clear understanding of their role and responsibilities to both the firm and customers and that the firm will meet regulatory requirements.

Risk management framework

The management team "do now have a tighter control and understanding of the risks that they and PDHL face".

Reports to the Board and Management Information

Mr Rawlins's earlier reports had identified that information provided to the Board was brief and extremely high level and there was no meaningful Management Information in regard to monitoring, challenge or adequacy of information provided such that the information provided little value. In his third report he concluded "There has been a significant change in information being given to the Board".

Monitoring and Oversight Arrangements

Mr Rawlins's earlier reports identified serious failings in compliance and quality assurance. His third report recorded that the firm now does not take on new customers, but gave little detail on the monitoring programme implemented other than to say it was now in place and quality assurance staff provided feedback to line management based on those processes.

With regard to compliance systems and procedures the report concludes that "there are areas for improvement" although documentation produced by the compliance function was more relevant to the operations of the business.

Training and competence

Mr Rawlins found that advisers had been trained to provide debt management advice and to identify the correct debt management solution to meet the client needs, confirmed by a review of three recent cases. It concluded on this point as follows:

> "The training now provided is to a high standard and quite possibly the adviser teams have received more training than in most other debt management firms. We would reiterate that there is no doubt that the visit by the FCA in June was a wake-up call to the Firm and management. Since that time a great deal of effort has gone into setting in place training programs that have set the cornerstone for the business going forward."

Systems and Controls within Debt Management Operations

Mr Rawlins's previous reports recorded that PDHL's systems were not capable of providing a facility to enable the firm to undertake a reasonable assessment of a client's circumstances as required by CONC and that, as required by CONC, the firm was not adequately taking into account changes in financial circumstances and then advising on whether to change the plan in place.

In his third report, Mr Rawlins referred to the changes made to the advice script and the introduction of a follow up suitability letter setting out the customer's current circumstances and which also identified the customer's needs and appropriate solutions. His conclusion was:

> "This has been an area of greatest concern to the FCA. The changes made within this area of the business have effectively established the Firm as giving appropriate debt advice and not merely a conduit for a debt management plan. The Firm meets the Suitability Threshold Conditions and CONC 8.3 and 8.8 requirements. Indeed, the suitability letter designed exclusively by the Firm is now being used and copied by other firms as evidenced by receipt of such material from customers when firms have been trying to poach the customer from PDHL."

62. Amongst the appendices to the third report was one in tabular form setting out the points required to be implemented under the remediation plan and the extent to which they had been implemented and validated. In relation to the Threshold Conditions, the appendix records the action points as being "not completed until all actions [in the plan] have been completed and validated."

63. On 15 December 2015 CAD expressed its view to PDHL and the RDC that the report did not provide sufficient comfort that the Threshold Conditions were now being met.

64. As far as progress to find a purchaser for all or any part of PDHL's business is concerned, it is clearly apparent from what I was told that the market is a limited one and most of the potential purchasers are other firms with interim permissions who are awaiting decisions on their Part 4A applications. Three potential purchasers have expressed serious interest in an acquisition, all of which hold interim permissions. Two of these potential purchasers signed heads of terms for sale but withdrew after the Authority expressed concerns regarding each of the proposed purchaser's ability to devote the necessary resources to take on such a large client book. Most recently, PDHL contends that a third potential purchaser has also had potential concerns expressed to it by the Authority and it therefore seems unlikely that the potential purchaser will be in a position to proceed quickly, as is the case with other potential declarations of interest made in the days immediately before the hearing of this application.

65. Mr Finneran expresses the view that the Authority is deliberately trying to thwart a sale because of what he believes is the Authority's preferred option of the business being transferred without consideration to the voluntary sector. In my view the evidence does not point to that conclusion. It is to be expected that the Authority would be cautious about a firm which has interim permission and has not yet been assessed as being compliant with the Threshold Conditions taking on significant new commitments in a sector which has been shown to carry a high risk of consumer detriment in the way that it has operated in the past. The Authority confirmed through its Counsel at the hearing that it had no objection in principle to a trade sale.

66. Mr Weisselberg did not disagree with the suggestion that the securing of a trade sale in the immediate future was in the circumstances optimistic, although he submitted that it was realistic. In the circumstances, I must proceed on the basis that a trade sale in the immediate future is unlikely and it is not therefore a factor I should take into account in considering whether to grant a suspension.

67. On 16 December 2015 the Authority gave PDHL the Decision Notice. As set out at [21] above paragraph 9 of the Decision Notice summarises the principal reasons why the RDC decided to refuse PDHL's application for a Part4A permission.

68. At paragraph 26 the Decision Notice had this to say about the deficiencies in PDHL's advice processes:

> "As a firm carrying on debt management activities, PDHL is required to comply with various obligations in CONC. In particular, CONC 8 sets out the conduct standards expected of authorised firms that give debt advice. Having reviewed a number of PDHL's customer files, the Authority identified that PDHL is failing to comply with this requirement; the Authority is concerned by the nature and extent of the breaches identified, which indicate that PDHL is failing to meet regulatory standards in respect of a key aspect of its regulated business."

69. At paragraph 33 of the Decision Notice the Authority set out the detailed findings with regard to the 20 customer files it had sampled and reviewed. The results show serious failings to comply with CONC to a substantial degree.

70. In its conclusions as to whether PDHL had satisfied the Authority that it met Threshold Condition 2D the notice concludes at paragraph 82:

> "(1) As set out more fully in paragraphs 33 to 34 above, the Authority identified widespread and substantial failings in PDHL's advice process. The failings are of a type and of a level such that, in the Authority's view, the Authority cannot be satisfied that PDHL treats its customers fairly and pays due regard to their interests and information needs.
>
> (2) The failings that the Authority has identified are supported by (i.e consistent with and are reinforced by) the outcomes of further file reviews conducted by the Authority: see paragraphs 37 to 38 (call recordings on the Visit) and 40 to 41(Kensington book files) above.
>
> (3) The changes made by PDHL to its business had not adequately addressed these failings by November 2015 (see paragraphs 71 to 75 above). Whilst further progress may be being made in this regard, PDHL is not able to provide evidence that they have now been satisfactorily resolved.
>
> (4) The Authority's concerns are heightened by the fact that PDHL:
>
> i. holds an interim permission and has therefore been required to comply with the Authority's regulatory requirements and standards since 1 April 2014; and
>
> ii. was before April 2014 licensed and regulated by the OFT, which applied effectively the same standards to debt management firms as the Authority has applied to them since April 2014.
>
> (5) The rules that PDHL has breached are designed to ensure that those offering debt advice do so in a way that gives due regard to the needs of the firm's customers (in circumstances where those customers find themselves in a difficult/stressful situation and are likely to place significant reliance on the firm's expertise)."

71. In its conclusions as to whether PDHL had satisfied the Authority that it had met Threshold Condition 2E the notice concludes at paragraphs 90 to 91:

> "90. The matters referred to in paragraphs 82 to 87 also raise issues in respect of the suitability of PDHL. In particular, the Authority considers that the firm has:
>
> 1) Not made arrangements to put in place an adequate system of internal control to comply with the requirements and standards for which the Authority is responsible under the regulatory system (see COND 2.5.6(16) G). This is evidenced by PDHL's failure to identify and remedy promptly the issues as to its systems and controls around MI, QA and particularly vulnerable consumers.
>
> 2) Not taken reasonable care to ensure that robust information and reporting systems have been developed, tested and properly installed (see COND 2.5.6(16)

G). This is evidenced by the failings in respect of the adequacy of the MI and QA.

91. In the circumstances, the Authority considers that the firm has not demonstrated that it can ensure that its affairs are conducted in an appropriate manner, having regard in particular to the interests of consumers (COND 2.5.1A (1)(c)). The Authority therefore cannot ensure that, where the Application to be granted, PDHL would satisfy, and will continue to satisfy, threshold condition 2E."

72. The RDC did take into account Mr Rawlins's third report and CAD's observations on it before giving the Decision Notice, although it would have had little time to absorb it and review it in detail. It treated the report as additional representations and set out its observations on it at paragraphs 20 to 22 of Annex B to the Decision Notice as follows:

"20. The Authority has reviewed the report and, having regard to the timing of this submission and the requirements in section 55V (2) of the Act that the Authority must determine an application within 12 months from the date on which it received the application, considers there is insufficient time for the Authority to satisfy itself that the changes described by the report have addressed the Authority's concerns. This is because the history of the Application suggests that the conclusions set out in the report cannot be fully relied upon without some further verification and, even if the changes described in this submission were all sufficient to resolve the previous failings (which, as described below, does not appear to be the case), they would need to be implemented and embedded in order for the Threshold Conditions to be met.

21. Further, the Authority is of the view that the report does not establish that PDHL has satisfactorily resolved all the failings identified in this Notice. In particular, the Authority notes:

- PDHL now has a pool of 18 debt advisers considered to be competent, which should shortly increase to 21, but this is still far fewer than the 30 debt advisers that PDHL informed the Authority that it needs in order to service effectively its customers.

- The report concludes that PDHL now operates upon a solid management base. However, the Managing Director is acting in an interim capacity, has been in this role for only a short period of time and appears also to be the firm's MLRO and have responsibility for compliance. This, together with the firm's reliance on external support, leads the Authority to question the report's conclusions and also does not give the Authority confidence that PDHL would be able to comply with relevant regulatory requirements without significant external input.

- It is not clear from the report whether PDHL now has sufficient QA staff and, if so, whether this is as a result of recruitment, training or buying in of services.

- New guidelines have been provided to debt advisers which the report considers should ensure that appropriate advice is provided to customers,

but the Authority has not been given sufficient time to review whether these guidelines are appropriate and effective.

- The report states that three recent customer cases were reviewed and appropriate advice was given in each case. The Authority is not satisfied that this is an adequate basis for a proper assessment of PDHL's capability. It also has not been given sufficient time to carry out its own review of these cases to verify the findings.

- The report does not provide evidence that the Authority's concerns, set out in this Notice, regarding the identification and treatment of particularly vulnerable customers have been addressed.

22. Overall, while the Authority notes PDHL's continuing activity and its commitment to achieving compliance with the relevant regulatory requirements, this report does not fully resolve the Authority's concerns. The report's very late submission and its contents do not give the Authority confidence that the necessary actions have been implemented and embedded (i.e will be followed in the ordinary course of business). For a written submission at this very late stage to cause the Authority to overcome evidence of existing failings and be satisfied that the firm is satisfying, and will continue to satisfy, the Threshold Conditions from its own resources, the Authority would expect to see evidence that is clear, unconditional and capable of being evaluated on the basis of the written submission alone. PDHL's submission of 14 December 2015 does not provide such evidence."

73. PDHL is highly critical of the RDC's reasons for not accepting that the report had demonstrated that it now met the Threshold Conditions and believes that the RDC should not have rushed to issue its decision without the Authority having taken further time to verify the report.

74. In my view that criticism is not justified, although I regard the reliance the RDC placed on the fact of the 12 month statutory deadline for considering an application for a Part 4A permission unconvincing. The Authority is as a matter of practice prepared to go beyond that deadline if it believes it necessary to do so to ensure an application is properly scrutinised. Nevertheless, the report was unsolicited as far as the RDC is concerned and it had made clear its timetable for the issue of the Decision Notice. PDHL is not to be criticised for attempting to persuade the RDC that matters have been improved since it accepted at the oral representations meeting that it had not yet met the Threshold Conditions, but it had to accept the risk that time would run out before the decision was finalised.

75. It is clearly a relevant factor when considering the Suspension Application whether there are adequate contingency arrangements for dealing with PDHL's customers if the Decision Notice is allowed to take effect. Mr Hunter provided evidence to the effect that the Authority has been working to put in place arrangements to ensure that customers of a firm become aware that their debt management firm's interim permission has ceased and the options available to them and that this was a general project not one specific to the circumstances of PDHL's application.

76. It is clear that there may be a significant call on those contingency plans. I was told that there were approximately 120 debt management firms with interim permissions going through the full authorisation process, covering about 300,000 customers in the sector. None have yet been authorised. Mr Hunter gave the following high-level summary of the arrangements:

> (1) The Authority will write to each customer of the firm promptly on the giving of the decision notice following the ceasing of the firm's interim permission, that is within a matter of days (for PDHL the Authority would expect to send these letters over a five day period). The customer will be informed that the firm's interim permission has ceased and that it can no longer provide debt management services and be directed to the Money Advice Service ("MAS") (described in more detail below).
>
> (2) The Authority has arranged with MAS for it to put in additional and ring-fenced capacity to provide debt advice to customers impacted by the lapsing of the firm's interim permission.
>
> (3) The Authority has agreed with the trade bodies of the major creditors (namely the Lending Standards Board, British Bankers' Association, The Finance and Leasing Association, The Credit Service Association and The UK Cards Association) that it will inform them when a debt management firm's interim permission ceases; they will then exercise at least two months' forbearance in respect of any impacted customers (e.g. they will not seek payment of the debt or apply any interest or charges in this period). Mr Hunter said that he had engaged with these bodies over a number of months and re--confirmed with them that their members would offer forbearance in these cases at a meeting on 17 December 2015.
>
> (4) In the period between the giving of a warning and decision notice, CAD will engage with a specialist team in Supervision responsible for monitoring compliance with the Authority's client money/asset requirements. Where the Authority considers that there is a real risk of client money being dissipated, or otherwise not secured, it will work with the specialist department to consider the appropriate response.

77. Mr Hunter provided more detail about these arrangements.

78. As far as the customer contact process is concerned, Mr Herberg did not disagree that a significant number of the customers concerned would not read the letter. That is often the case with vulnerable consumers whose finances are precarious and are wary of looking at their mail in case it contains further unwelcome news and, as Mr Finneran said, their failure to look at official letters is often part of the reason why they have ended up having debt management problems. I accept, however, that within a reasonable time those customers who do not read the letter are likely to become aware of the issue, for instance from their creditors who will be aware that the existing plan will have to cease and if the customer continues to pay monies to PDHL

it is likely to find that if the relevant bank account was frozen, the payments will be returned.

79. Mr Hunter's witness statement records that MAS is an independent organisation that gives free, unbiased money advice online, over the phone and face-to-face across the UK. MAS was set up by the UK Government and is paid for by a statutory levy (raised through the Authority) on the financial services industries. Its statutory objectives are to enhance the understanding and knowledge of members of the public about financial matters (including the UK financial system), and to enhance the ability of members of the public to manage their own financial affairs. MAS was given a further statutory role in the Financial Services Act 2012 to work with partners to improve the availability, quality and consistency of debt advice. In pursuance of this role, MAS funds and manages debt advice services across the UK.

80. Mr Hunter gave details of his latest conversations with MAS regarding their ability to assist customers in the event their existing provider did not gain authorisation from the Authority. It is clear from Mr Hunter's evidence that preparations started in this regard in November 2014. MAS has been working with partners in the not-for-profit debt management sector who, Mr Hunter says, will pick up the advice and administration service previously supplied by a firm who is no longer able to service the customer.

81. In particular, it appears that MAS will operate a triage service. One firm, Konnecta, will operate MAS's helpline. The Citizens Advice Bureau, will provide debt advice through a web-chat facility (there being a direct link to this facility through MAS's online portal) or alternatively MAS's helpline will direct customers to this facility. A third organisation, StepChange, a not for profit provider, will offer debt advice by telephone and online.

82. It is clearly difficult at this stage for the Authority to predict accurately what capacity from MAS and its partners will be needed to assist customers impacted by their provider's loss of authorisation. Mr Hunter does give detailed figures as to the additional capacity to provide debt advice calls and web contacts based on MAS's and the Authority's predictions. Contingency plans are also being developed in case numbers requiring assistance is greater than anticipated. The availability of debt advice is, I was told, to be the subject of a consumer public relations campaign if required.

83. PDHL is highly critical of these contingency plans. It complains of a lack of detailed documentation or evidence directly from MAS and contends that it appears that these arrangements were only belatedly finalised around the time of the giving of the Decision Notice. It also criticises the fact that the Authority does not appear to have satisfied itself of the levels of skill and competency of those who will be providing advice.

84. Furthermore, PDHL contends that the plans show that only about a quarter of PDHL's client base over initial four-week period would be dealt with leaving the remaining 75% to fend for themselves. Mr Hunter accepts that a number of customers

will not react to the developments, and in my view it can be expected that because of the nature of the customer base that number will be significant.

85. I accept that Mr Hunter's evidence is short on detail, but I do not accept that the Tribunal will, as Mr Weisselberg put it, be making a "leap in the dark" if it relied on what Mr Hunter said in concluding that appropriate contingency plans were in place.

86. It would be extremely difficult for the Tribunal to make its own detailed assessment of the likelihood that the contingency plans will work whatever the level of detail provided. There is, as Mr Hunter acknowledges, an element of risk and it will undoubtedly be the case that it will be an unsettling and worrying time for affected customers. However, I am satisfied from Mr Hunter's evidence that the Authority has been working for some time on detailed plans and the evidence does not bear out PDHL's contention that they were only finalised on 14 December 2015. Mr Hunter's evidence refers to a conversation on that date in which he discussed the arrangements that had been put in place by MAS with senior individuals there. It is unsurprising that he should hold such conversations to check the current position knowing as he did that the Decision Notice was imminent. Whilst it might have been better if MAS itself provided some further detail of its own regarding the arrangements I have no reason to believe that Mr Hunter has misdescribed the arrangements or held back on any relevant significant material.

87. It is over simplistic to suggest that because the plans demonstrate only about 4,000 customers being dealt with over a four week period, a figure which represents one quarter of PDHL's current customer base, that most customers who need and want new advice will be unable to obtain it within a reasonable period. The arrangements appear to have been designed to ensure that those who do get in touch can be dealt with appropriately. It seems unlikely that the entire customer base or anything like it will get in touch with MAS at once, any more than all of them would be seeking advice from PDHL at the same time.

88. Mr Finneran referred to enquiries made by Mr Rawlins in August 2015 as to the capacity of StepChange to take on more business which indicated that it would not take on any more customers at that time. I can place little reliance on that evidence as it was a no-names general enquiry and the information was given some months ago.

89. As far as arrangements with creditors are concerned, I accept that the discussions that Mr Hunter has had with the trade bodies cannot be said to bind individual creditors to grant forbearance to affected customers. Nevertheless, I was shown the provisions in CONC 7.3.4 which require a credit firm to treat customers in default or in arrears difficulties with forbearance and due consideration, and a report on discussions between the Authority and the trade bodies in late December 2015 which recorded a "widespread agreement" amongst the trade associations that an extension to what would normally be regarded as a "breathing space" to allow customers to put together alternative repayment plans would be reasonable.

90. In these circumstances, I am satisfied that in practice lenders are likely to grant additional forbearance to take account of the difficulties customers of the debt

management firm are likely to experience as a result of the firm's interim permission terminating.

91. I accept that if the Suspension Application is refused it is likely that PDHL will enter insolvency proceedings immediately. KPMG, who have been advising PDHL and who have considerable expertise on these matters, wrote to the Authority on 1 December 2015 setting out the ways in which customers would suffer in an unfunded compulsory liquidation or an administration as follows:

> "(a) In a liquidation or administration bank accounts of the company would be frozen for a period of time from the start of the process.
>
> (b) The costs of the administration and liquidation would be deducted from all assets of the company. This would cause inconvenience and losses to the customers making payments under the DMPs and possible defaults of the plans for reasons out of the control of the customers.
>
> (c) There would be no PDHL employees to deal with the orderly transfer of the paperwork and the monies for each DMP to MAS or any purchaser as the administrator/liquidator would have no funds to pay them and would make them redundant on day one. The administrator/liquidator would have no funds to make their staff available to deal with customer queries and it would be difficult for customers to find out what was happening to their plan and the relevant documents relating to it.
>
> (d) The administrator / liquidator would need to vacate the company premises and put the records into store as he would not have funding to pay the rent.
>
> (e) There would be no funding to send letters to the customers as the FCA have requested to inform them of the position and their choices. The sending of letters to 20,000 people is costly and not something an administrator or liquidator will have funds to do, when the only funds will be the customer monies which are trust monies.
>
> (f) There will need to be a Berkeley Applegate application to court to move the client monies, and that would involve costs and deductions from the monies.
>
> (g) The customers, having thought that their debts were under control, would be faced with a complex situation over the Christmas period where the status of their individual plan would be unclear and it would take many months for them to obtain the full information to transfer the DMP and the client monies to MAS or a new purchaser."

92. Mr Hunter dealt with these concerns in his witness statement. His response can be summarised as follows:

> (a) The customer impact of frozen accounts is unlikely to last long; payments in are likely to "bounce back" and since payments out to creditors are usually made within five days the amounts concerned may not be substantial.
>
> (b) The costs of the insolvency process would only be an issue for customers whose client money was used for this purpose because payments were generally made out of PDHL's client bank account within five days so only a limited ratio of the customer base will be affected.

(c) and (d) The lack of staff available to deal with customers and access to records will not have a significant impact because the arrangements with MAS should ensure that customers receive new and comprehensive advice.

(e) The Authority will itself carry out the customer contact exercise.

(f) This does not amount to a compelling reason to suspend the effect of the Decision Notice; the need for an insolvency practitioner to obtain an order in respect of the monies is standard practice.

(g) The Authority does not believe there are deficiencies in PDHL's financial records and client money is generally only held for a short period and this issue will be mitigated by forbearance from creditors.

93. I accept that there may be risks to customers arising from the insolvency process and Mr Hunter may have underestimated the difficulties that may arise regarding client money and the possibility that it will be diminished by costs. Some customers may therefore find the funds they have paid to PDHL frozen for a considerable period of time so they do not reach the creditors concerned and those funds may be diminished by costs. However, it appears that the amounts are likely to be small in the context of the entire customer base because of PDHL's efficiency in distributing client monies and it is reasonable to assume that individual creditors will be sympathetic to affected customers who might otherwise have to pay twice as a result of funds being frozen.

Discussion: the Suspension Application

94. In the light of my findings of fact I now turn to the balancing exercise required in order to decide whether I should exercise my discretion to grant the Suspension Application.

95. I take as the starting point for my consideration the current state of PDHL's business and its compliance with the required regulatory standards following Mr Rawlins's third report.

96. As I have indicated, PDHL places strong reliance on the conclusions in Mr Rawlins’s third report and contends that in the light of its findings I can be satisfied that if I were to grant the suspension PDHL's business would be carried on in a broadly compliant manner.

97. In making my assessment I take into account that because of the terms of the vREQ it entered into on 12 June 2015 PDHL will only be able to deal with existing customers if the application were granted. I also take into account that the suspension is likely only to be for a limited period. There was some debate before me as to how quickly PDHL's reference can come on the substantive hearing. The Tribunal and the parties are in agreement that the hearing should be expedited and although considerable amounts of evidence will need to be prepared, including the likelihood of expert evidence, in my view it would be realistic to proceed on the basis that the substantive reference could be heard in June 2016, if not slightly earlier.

98. As regards Mr Rawlins's third report, Mr Weisselberg submits that PDHL has moved "heaven and earth" to get up to the mark and the latest report of Mr Rawlins demonstrates that it has done so. Consequently, the best current evidence shows that PDHL is both Threshold Condition and CONC 8 compliant. He asks the rhetorical question: where is the prejudice in allowing PDHL to continue to operate under its interim permission pending a hearing of the substantive reference?

99. Mr Weisselberg draws attention to the strong efforts made to come up to the relevant standard since May 2015 when Michelmores and Mr Rawlins were engaged. The previous compliance officer was removed and replaced, initially by an experienced compliance director and after he left unexpectedly Mr Heath has taken overall responsibility with assistance from an experienced compliance professional who is employed on a short-term arrangement.

100. Mr Weisselberg submits that PDHL has been candid in accepting its previous failings and has been open with the Authority about them, particularly before the RDC. It has acted prudently by entering into the vREQ and shown its willingness to address past failings by undertaking a PBR, a proposal that the Authority has not engaged with. It can now be said that the past failings are historic but the Authority continues to put emphasis on them. Neither CAD nor the RDC gave serious consideration to the third report of Mr Rawlins.

101. In my view in considering Mr Weisselberg's submissions the historic position remains a very significant factor. PDHL was aware of the standards it would be expected to meet to obtain a Part 4A permission as long ago as 2013. Those standards, as laid down in CONC 8 were materially no different to those it was expected to meet when it was regulated by the OFT. Its application was made as long ago as December 2014 and on its own admission it was initially inadequate and it was not until it engaged specialist advice in May 2015 that matters began to be properly addressed. PDHL must have been aware at that time that there was a significant risk that it would be unable to remedy its failings in order to satisfy the Threshold Conditions before its application came to be determined.

102. I accept that PDHL has acted responsibly and has made great efforts to meet the Threshold Conditions since the Authority expressed its initial concerns in March 2015. I would therefore accept, as Mr Weisselberg submitted, that it has "moved heaven and earth" in an attempt to do so.

103. It is, however, clear that the problems were deep-seated and as recently as 25 October 2015, as found in Mr Rawlins's second report, many of the calls to customers made by PDHL's advisers were failing to meet the requirements of CONC. Whilst PDHL continued to work hard to improve the situation, it had very little time to address these issues before the expected decision on its application and more importantly, satisfy the Authority that the improvements had become embedded in PDHL's business.

104. It is also necessary to have regard to the nature of PDHL's business and the profile of its customer base. The Authority has identified debt management business

as being high risk, characterised by poor practices in the past. The consequences of poor advice given to consumers experiencing financial difficulties, many of whom are vulnerable and have a history of being unable to cope with their financial affairs, can have a serious impact on their ability to make ends meet. A customer who has been poorly advised to take out a debt management plan will in the case of PDHL be incurring fees of £38 a month out of what is likely to be a limited budget to meet basic necessities, which is likely to have a significant impact, particularly with regard to vulnerable consumers.

105. The scenario I am faced with is therefore quite different to, for example, a failing investment management firm where the impact of allowing the suspension may be considered to be acceptable against a background of decisions made with regard to long-term investments. It must be the case that a large number of PDHL's existing customer base are currently in unsuitable plans because of its past failings and there is clearly a need to address that situation as soon as possible, bearing in mind that many of these customers may be living from hand to mouth.

106. Against that background, the hurdle PDHL must clear to satisfy me that its business will be carried out in a broadly compliant fashion if it is to be permitted to continue to advise its existing customers, even for a short period, is a high one. The test I have to apply makes it clear that the interests of consumers are paramount and that is particularly so in relation to a business of this nature.

107. I have decided that I cannot be satisfied that the conclusions in Mr Rawlins's third report demonstrate that PDHL's business would be carried on in a broadly compliant manner during the anticipated period of suspension. In particular:

(1) PDHL places much reliance on the script to be used by advisers and its suitability letter (on which I have no evidence) and how they have been demonstrated to work in practice. However, the only evidence of how these documents have been working is the audit of three customer review calls which took place on 8 December 2015. This audit was carried out by Mr Rawlins on 11 December 2015. In my view this is far too small a sample for me to be satisfied that the new processes are working satisfactorily, against a background of non-compliant calls taking place as recently as October 2015.

(2) The number of competent advisers still fall short of the target set by PDHL itself; and

(3) Whether the existing compliance arrangements are satisfactory is unsubstantiated; Mr Heath who has overall responsibility is not a compliance specialist and there is no permanent specialist compliance director in place; the report concludes that there is room for improvement on compliance systems and procedures.

108. In my view it was therefore not unreasonable for the Authority to have taken the approach it did to Mr Rawlins's third report, that is that it needs more detailed consideration (of which there has been little time to carry out) and its conclusions

need to be validated. Indeed as I have found, Mr Rawlins himself accepts that whether the remediation plan has been completed needs to be validated. It may be the case that after full consideration of further evidence the Tribunal will be satisfied after the hearing of a substantive reference that Mr Rawlins's conclusions are justified but in my view I cannot rely on the report at this stage to be satisfied that the serious concerns expressed in the Decision Notice have been satisfactorily addressed or even that the prospect of that being the case on the evidence before me is a high one. My position is broadly neutral on that point at this stage.

109. In my view it was not unreasonable of the Authority to decide not to delay its decision on PDHL's Part 4A application pending a full consideration and validation of the report. Although the point the RDC made about the statutory 12 month period is weak, it is clear that following the oral representations meeting and before it received the report the RDC had all the information needed to make an informed decision and it was not obliged to amend its timetable because of the submission of Mr Rawlins's (unsolicited) report and give a further indeterminate period of time to allow it to be investigated further.

110. The other matter that PDHL relied on to justify suspension was the prospect of an early sale of the business, such that it would be in the interests of consumers to allow the interim permission to continue for a short period of time to complete such a sale. As I have found at [66] above, the prospect of a sale being concluded in the immediate future is unlikely and I therefore have not taken this factor into account.

111. In the light of my conclusions on Mr Rawlins's report and the prospects of a sale I must now consider the other relevant circumstances. In particular, if I were to take the view that existing customers are likely to be in a worse position if PDHL's interim position terminated then notwithstanding my concerns about the risks to consumers if a suspension were granted, then I may give consideration as to whether the status quo should be allowed to continue, in effect as the "lesser of two evils".

112. In that context, I need to consider the contingency arrangements that Mr Hunter described and the potential consequences of insolvency as described by KPMG in its letter of 1 December 2015.

113. It is clearly the case that both the contingency arrangements and a possible insolvency process pose risks to PDHL's customers. In my view, however, I should only allow these risks to prevail over my findings about the risk to consumers if the suspension were to be granted if there was cogent and compelling evidence that the risks of the former would result in serious risk of prejudice to existing customers of PDHL.

114. In my view Mr Herberg is correct in his submission that it is not sufficient for PDHL to point to potential holes in the safety net arranged by the Authority with a view to ensuring that consumers are not prejudiced and conclude that as a result the arrangements are deficient and those consumers will be prejudiced. Mr Herberg is also correct to submit that I must evaluate the likelihood of the alleged harm arising.

115. It is clear from my findings at [75] to [90] above that such findings do not provide cogent and compelling evidence of potential serious risk to consumers. It is not, as PDHL in effect contends, obvious that the arrangements are going to be inadequate. Considerable efforts appear to have been made to put in place what the Authority believes to be robust arrangements and I should not interfere with their judgment unless it is obviously flawed. Therefore I cannot be satisfied that it is likely that consumers will be prejudiced by the contingency arrangements such that the risks concerned outweigh the risks involved if the Suspension Application were granted.

116. As far as the potential impact of insolvency proceedings is concerned, I have found at [93] above that although there may be some adverse impact on some consumers, particularly as regards client money, in my view these risks are not so serious that they outweigh the risks involved if I granted the Suspension Application. Nor do I believe that the cumulative effect of the potential risk in the contingency arrangements and the potential effect of an insolvency process alters the position.

Conclusion on the Suspension Application

117. It is therefore my view that the balancing exercise comes out clearly against the granting of this application.

Discussion: The Privacy Applications

118. In view of my decision on the Suspension Application this can be dealt with shortly. The consequences of that decision is that there will be an urgent consumer contact exercise in which it will be readily apparent to a large number of members of the public that PDHL's interim authorisation has terminated. In those circumstances, prohibiting publication of the Decision Notice will not preserve PDHL's privacy and I accept Mr Herberg's submission that publication of the Decision Notice in circumstances where suspension has been refused will help achieve the objective of ensuring that consumers are made fully aware of the situation regarding PDHL. I therefore dismiss the Privacy Applications.

119. I would have taken a different view had I granted the Suspension Application. In my view in those circumstances the position is analogous to where a Supervisory Notice has been issued and referred to the Tribunal. Section 391 (5) of the Act makes it clear that publication of a Supervisory Notice is justified when "it takes effect" and s 391 (8) of the Act makes it clear that the notice is not to be treated as having taken effect where the matter has been referred to the Tribunal but has not been dealt with. The effect of a suspension under Rule 5(5) is that the notice would not have taken effect.

Conclusion

120. For all the reasons I have given I cannot suspend the effect of the Decision Notice. The parties should now cooperate so as to bring the reference to a substantive hearing as soon as possible. In that regard, the Authority should file a statement of case by 28 January 2016.

121. As I indicated at the hearing, this decision will remain confidential to the parties for the period during which it may be subject to an application for permission to appeal and until any such application is determined.

TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE
RELEASE DATE: 28 January 2016