



**IN THE FIRST-TIER TRIBUNAL
(CONSUMER CREDIT)
GENERAL REGULATORY CHAMBER**

Case No. CCA/2010/0003

On appeal from:

Office of Fair Trading's

Decision reference:

ADJ/2056-610192

Dated:

21 December 2009

Appellant:

Compensation Professionals Network Limited

Respondent:

The Office of Fair Trading

Heard at:

The Tribunals Service, 45 Bedford Square,
London WC1B 3DN

Date of hearing:

13 May 2010 (sitting in public)

Date of decision:

17 May 2010

Before

HH Judge Peter Wulwik

Attendances:

For the Appellant: Simon Charles,
instructed by Grindeys LLP

For the Respondent: Mark Fell,
instructed by Sudip Sen, Legal Division
of the Office of Fair Trading

Subject matter: Appeal against revocation of consumer credit
standard licence – disclosure – relevance – privilege
against self incrimination - public interest immunity –
Consumer Credit Act 1974, Sections 25 – 41

Cases referred to: R v FSA ex p. Fleurose [2001] EWCA Civ. 2015
Re Westminster Property Management Limited
[2000] 1WLR 2230
R v Chief Constable ex p. Wiley [1995] 1 AC 274
Prudential Insurance Company Limited v Revenue
and Customs Commissioners (2006) VAT Decision
19675
Goodwill v Chief Constable of Lancashire
Constabulary [1993] PIQR 187

DECISION OF THE FIRST-TIER TRIBUNAL ON DISCLOSURE ISSUES

A. The Hearing

1. This was a directions hearing in an appeal by Compensation Professionals Network Limited (“the Appellant”) from the determination by Elaine Rassaby the Adjudicator acting on behalf of the Office of Fair Trading (“the Respondent”) made on 21 December 2009 under Section 32 of the Consumer Credit Act 1974 to revoke a consumer credit standard licence.
2. The matter was listed for directions pursuant to an order made on 18 February 2010. The majority of the directions were not in dispute. The directions that were in issue related to:
 - (1) The request by the Respondent for disclosure of the following –
 - (a) A list of telephone numbers from which the Appellant makes or has made or instigates or has instigated automated direct marketing calls to customers and potential customers since 1 January 2009.
 - (b) A list of addresses and numbers from which it transmits or has transmitted or instigates or has instigated electronic mail communications to potential customers since 1 January 2009.
 - (c) A list of telephone number from which its agents and/or outsource providers make or have made or instigate or have instigated automated direct marketing calls to customers and potential customers since 1 January 2009.

(d) A list of addresses and numbers from which its agents and/or outsource providers make or have made or instigate or have instigated electronic mail communications to potential customers since 1 January 2009.

(2) The request by the Appellant for disclosure of the following documents –

(a) “Thresholds for Action under CCA 74”.

(b) Draft version of “Business Names and the Consumer Credit Act”.

(c) Draft version of “Internet Investigations Manual”.

B. The Respondent’s request for disclosure

3. The Respondent contended that the disclosure sought by it was relevant to the issues set out in paragraphs 14 and 15 of its Response to the notice of appeal, that it had tried to ensure that the disclosure was proportionate by limiting the numbers and addresses to those used since 1 January 2009 and that it would in any case have power under Section 36B of the Consumer Credit Act 1974 to require the documents and information.
4. The Appellant opposed the disclosure requested on the basis that the legal burden of proof in a revocation case falls upon the Respondent to demonstrate that the Appellant is not fit to hold a licence, that the directions sought could require the Appellant to disclose information which might expose it to fresh or additional allegations of regulatory breaches, that it could potentially result in a significant delay in the case and that it was no more than a fishing expedition.
5. The Respondent submitted that the disclosure would be of considerable assistance in resolving the matters in issue between the parties referred to in paragraphs 14 and 15 of its Response to the notice of appeal. Paragraph 14 of the Response referred to the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003, with paragraph 15 of the Response alleging breaches of the Regulations inter alia by making or instigating unsolicited automated direct marketing communications over the telephone to customers who were registered with OFCOM’s Telephone Preference Service and transmitting or instigating unsolicited mail to consumers, the conduct in each case being said to be evidenced by the matters there set out. The Respondent argued that what mattered was what was relevant to the appeal and the particular issues, the central issue being fitness to hold a licence.

6. With regard to the privilege against self-incrimination the Respondent submitted that it did not arise, relying by analogy on the fact that the Court of Appeal had held that FSA disciplinary proceedings and proceedings under the Directors Disqualification Act 1986 were not criminal in nature: See Phipson on Evidence (16th Edition) and the cases there cited of R v FSA ex p. Fleurose [2001] EWCA Civ. 2015 and Re Westminster Property Management Limited [2000] 1WLR 2230.
7. The Respondent considered that if there was any delay resulting from the disclosure sought it would be reasonable and proportionate to the issues involved. It denied that it was on a fishing expedition or that it was otherwise seeking to bolster a weak case, as suggested by the Appellant.
8. The starting point is the Tribunal's case management powers which are dealt with in Rule 5 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. By Rule 5(3)(d) the Tribunal may inter alia require a party to provide documents or information. By Rule 15(1)(a) it is provided that without restriction on its general case management powers the Tribunal may give directions as to the exchange between parties of lists of documents which are relevant to the appeal, or relevant to particular issues, and the inspection of such documents.
9. In the Tribunal's judgment, the disclosure sought by the Respondent is relevant to the issues referred to in paragraph 15 of the Respondent's Response to the notice of appeal and the central issue of fitness to hold a licence. The fact that the legal burden of proof in a revocation case is on the Respondent has no bearing on the question of disclosure, if the disclosure sought is relevant to the issues that the Tribunal has to determine.
10. With regard to the Appellant's reliance on the privilege against self-incrimination, in the Tribunal's view proceedings relating to the revocation of a licence under the Consumer Credit Act 1974 are not to be treated as criminal in nature so as to bring into effect the wider protection under Article 6 of the ECHR and the privilege against self-incrimination. The Tribunal accepts the analogy with FSA disciplinary proceedings and proceedings under the Directors Disqualification Act 1986, neither of which are treated as criminal in nature.
11. The Tribunal does not consider that any delay that may result from the disclosure requested would be unreasonable or disproportionate to the issues before the Tribunal, not least bearing in mind that the central issue for the Tribunal is fitness to hold a licence.
12. Again, with the Tribunal having found the disclosure to be relevant to the appeal and the particular issues in the appeal, it cannot be said that the disclosure sought is a fishing expedition.

13. As indicated in argument, the Tribunal proposes to limit disclosure in so far as the information is within the Appellant's possession or control or may be obtained by it with reasonable diligence.

C. The Appellant's request for disclosure

14. The Appellant contended that disclosure of the documents sought from the Respondent and whether or not the Respondent had complied with its own internal guidance was relevant to a consideration of whether the Respondent had carried out its regulatory activities in a way which was transparent, accountable, proportionate and consistent for the purpose of Section 21 of the Legislative and Regulatory Reform Act 2006, that under the Act enforcers of regulations had a duty to comply with the Regulators' Compliance Code and that the methodology and procedures operated by the Respondent when it collected or collated the evidence on which it relies would be of significance.

15. The Appellant submitted that the document entitled "Thresholds for Action under CCA 74" was relevant to the issue of proportionality of the proceedings, the issue of alternative sanctions and possibly the issue of associates of the Appellant company. With regard to the draft Names guidance and the draft Internet Investigations Manual, the Appellant argued that whatever guidance there was should be disclosed as being relevant to the use of domain names, the significance of URLs, the use or probative value of screen prints of websites, the significance of trade names used by any associate and the use of electronic mail.

16. The Respondent opposed the disclosure requested. In relation to the Appellant's reliance on the Legislative and Regulatory Reform Act 2006 and the duty to comply with the Regulators' Compliance Code, the Respondent referred to paragraph 2.4 of the Code to the effect that the duties to have regard to the code under Sections 22(2) and (3) of the Act did not apply to the exercise by a regulator or its staff of any specified regulatory function in individual cases.

17. With regard to the Threshold guidance, it was said that this was historic internal guidance on thresholds for the Respondent taking action under the Consumer Credit Act 1974, that it was rarely consulted by investigators though it might be used by junior members of staff, and that it was of no relevance to the issue of fitness to hold a licence which had to be determined by the Tribunal on the evidence before it, this being a rehearing.

18. As a further argument, the Respondent submitted that the public interest in the effective functioning of the Respondent and of the statutory scheme enacted by the Consumer Credit Act 1974 would be substantially harmed by allowing the Appellant to inspect the Threshold guidance, the Respondent relying on the cases of *R v Chief Constable ex p. Wiley* [1995] 1 AC 274 at p.281 (as to the

substantial harm test), Prudential Insurance Company Limited v Revenue and Customs Commissioners (2006) VAT Decision 19675 (inspection refused of parts of HM Revenue and Customs' internal manuals on the basis that their disclosure would prejudice the assessment or collection of tax or assist tax avoidance or evasion) and Goodwill v Chief Constable of Lancashire Constabulary [1993] PIQR 187 (public interest immunity held to cover a Police public order manual).

19. The Respondent considered that allowing the Appellant to inspect and rely upon the Threshold guidance would result in the loss of the document's internal and confidential status and would or might result in a number of consequences adverse to the public interest namely that consumers and traders might rely on the Threshold guidance without appreciating its historic and internal status, that knowledge of the contents of the document could enable delinquent traders to form a view as to what conduct they might be able to get away with and that it could enable such traders to evade detection through knowledge of the manner in which the Respondent investigated and gathered evidence. In so far as a freedom of information request was to be made by the Appellant in respect of the Threshold guidance, the Respondent maintained that it could decline to disclose it on the basis of the exemptions in the Freedom of Information Act 2000, including the exemption in Section 31(2)(c) of the Act.
20. In relation to the draft Names guidance and Internet Investigations Manual, the Respondent submitted that they were not relevant being in draft form and with the draft Names guidance not addressing whether acronyms are to be included separately on a licence. Again, by way of further argument the Respondent claimed public interest immunity to prevent disclosure.
21. The Appellant accepted that the Threshold guidance was not in the public domain and that the other documents might only be draft documents. The Appellant also accepted that it was possible for the Respondent to claim public interest immunity in this type of case, though submitting that the present case fell a long way short of justifying reliance on public interest immunity to prevent disclosure of the documents requested.
22. In the Tribunal's judgment, the Threshold guidance as an internal and historic document of the Respondent is not relevant to the issue of fitness which it is for the Tribunal to determine on the evidence before it, this being a rehearing on the merits. The Tribunal also accepts the Respondent's further argument that the public interest in the effective functioning of the Respondent and of the statutory scheme enacted by the Consumer Credit Act 1974 would be substantially harmed by allowing the Appellant to inspect and rely upon the Threshold guidance, which would result in the loss of the Threshold guidance's internal and confidential status and with a real possibility of the consequences referred to by the Respondent. The Tribunal accepts that this would be contrary to the public interest.

23. With regard to the draft Names guidance and Internet Investigations Manual, these documents are in draft form only, they are internal documents of the Respondent and in the Tribunal's view would not assist the Tribunal to determine the issue of fitness to hold a licence. Again, the Tribunal accepts the Respondent's further argument based on public interest immunity in relation to these documents.

D. Directions

24. There is attached to this decision a directions order to give effect to this decision and to the other directions which were discussed at the hearing.

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HH Judge Peter Wulwik

17 May 2010