



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

**Case No. CCA/2011/0008**

**On appeal from:**

**Office of Fair Trading's  
Decision reference: ADJ/2264-630336  
Dated: 28 June 2011**

**Appellant: Keith John Kirkcaldy**  
**Respondent: The Office of Fair Trading**  
**Heard at: Victoria House, Bloomsbury Place, London WC1A 2EB**  
**Date of hearing: 2 February 2012 (sitting in public)**  
**Date of decision: 6 February 2012**

**Before**

**HH Judge Peter Wulwik (Chairman)**

**D. Stuart McDonald**

**Christopher Perrett**

**Attendances:**

**For the Appellant: In person**

**For the Respondent: Ruby Adesuyi, Office of Fair Trading**

**Subject matter: Appeal against revocation of consumer credit standard licence  
- Consumer Credit Act 1974, Sections 25 - 41ZB**

**Cases referred to: Qsolvency Limited v OFT, CCA/2009/0004  
Leeds City Council v Hussain [2002] EWHC 1145 (Admin)**

**DECISION OF THE FIRST-TIER TRIBUNAL**

**A. The Appeal**

1. We were appointed to hear an appeal by Keith John Kirkcaldy trading as Ditch the Debt from the determination by Alison Spicer the Adjudicator acting on behalf of the Office of Fair Trading (“the OFT”) made on 28 June 2011 pursuant to Section 32 of the Consumer Credit Act 1974 to revoke Mr Kirkcaldy’s consumer credit standard licence. The appeal was heard on 2 February 2012 at Victoria House, Bloomsbury Place, London WC1A 2EB.

**B. The Background to the Appeal**

2. Mr Kirkcaldy was issued with his present consumer credit licence on 28 August 2009 authorising him as a sole trader to carry on the activities of debt collecting and the provision of debt adjusting and debt counselling on a commercial basis. These areas are considered by the OFT as high risk activities due to the potential for consumer detriment having regard to the vulnerability of consumers who require such services.
3. In November 2009, the OFT embarked on a compliance review of its Debt Management Guidance issued pursuant to its obligations under the Consumer Credit Act 1974. The review included a search of internet advertising websites and compliance visits to licensees engaging in debt management and advice. Mr Kirkcaldy’s business was randomly selected for a compliance visit.
4. On 3 March 2010 Hampshire Trading Standards visited Mr Kirkcaldy’s premises to review his compliance with the OFT’s Debt Management Guidance and his competence to undertake the categories of activities specified in his credit licence. There were a number of areas of concern including the following:
  - (a) The provision of insufficient information on cost, duration and nature of the agreement between Mr Kirkcaldy and clients.

- (b) The failure to include in his business terms and conditions the right of the consumer to a cooling off period under the Consumer Protection (Distance Selling) Regulations 2000.
  - (c) The failure to register the business under the Data Protection Act 1998.
  - (d) The failure to include relevant information relating to his terms and conditions on the business website.
  - (e) The failure to have a complaints procedure which complied with the requirements of the Financial Ombudsman Service.
5. On 6 April 2010 a summary of the findings of the visit to Mr Kirkcaldy's premises was sent to him. He was given until 6 May 2010 to address these concerns. Further, warning letters were sent to Mr Kirkcaldy on 15 September and 8 October 2010. On 12 October 2010 Mr Kirkcaldy replied stating that the non-compliance issues were being dealt with.
  6. On 27 October 2010 an email was sent to Mr Kirkcaldy seeking independent audit evidence by 16 December 2010 confirming compliance by him. Further letters were sent to him on 9 December 2010 and 12 January 2011, with Mr Kirkcaldy being warned that a failure to address the non-compliance issues would result in formal licensing action being taken against him. In the absence of any further evidence of compliance, the Adjudicator on 31 March 2011 issued a minded to revoke notice.
  7. On 15 April 2011 the OFT wrote to Mr Kirkcaldy reminding him of his right to make representations. On 27 April 2011 Mr Kirkcaldy provided brief written representations to the Adjudicator and a copy of his amended terms and conditions. There was a telephone hearing on 11 May 2011, when Mr Kirkcaldy indicated that he was willing to further amend his terms and conditions if considered necessary and that he did not understand why his licence was under threat.
  8. On 28 June 2011 the Adjudicator issued the decision notice revoking Mr Kirkcaldy's consumer credit licence. The Adjudicator was not satisfied that Mr Kirkcaldy had adequately addressed the OFT's concerns, with the only pro-active steps taken by him appearing to have been registering with the Information Commissioner's Office and some minor amendments to his terms and conditions, which terms and conditions did not appear to be appropriate to his sole trader business in any event. The Adjudicator found that Mr Kirkcaldy had failed to demonstrate the necessary skills, knowledge and experience in relation to consumer credit businesses within the meaning of Section 25(2)(a) of the Consumer Credit Act 1974 or that he had in place the required business practices and procedures within the meaning of Section 25(2)(c), and that he had failed to co-operate with the OFT or to take sufficient steps to comply with their

requests. A further contention that he had knowingly or recklessly sought to mislead the OFT was found not to be established. The Adjudicator concluded that Mr Kirkcaldy was not fit to hold a consumer credit licence and revoked the licence.

### **C. The Appeal**

9. On 25 July 2011 Mr Kirkcaldy filed his notice of appeal, maintaining that his ability to give debt advice had never been questioned or tested and that his experience had never been tested, with it being said that there was no formal test available to quantify his experience, that he would change his business practices to how the OFT wanted them to be and that he had co-operated with the OFT. He admitted that he should have taken further advice but stated that this would have been at a considerable cost and he did not see the need to justify his ability to give debt advice.
10. The OFT served their response to the notice of appeal on 14 September 2011, relying primarily on the same grounds as were set out in the Adjudicator's determination on 28 June 2011 and responding to Mr Kirkcaldy's contentions in the notice of appeal.
11. The Tribunal gave directions on 26 September 2011. On 6 October 2011 Mr Kirkcaldy sent an email stating that he had been giving debt advice for more than 9 years and that should the revocation of his licence be upheld he would be made unemployed and placed in financial hardship.
12. The appeal was heard on 2 February 2012 and pursuant to Section 41ZB(1) of the Consumer Credit Act 1974 was a rehearing of the determination appealed against. The OFT served a bundle of documents for the hearing and a skeleton argument.
13. At the hearing before us, Mr Kirkcaldy represented himself. He had considered it unnecessary to bring with him his documents bundle. Ms Ruby Adesuyi, a Solicitor, appeared for the OFT. Ms Adesuyi read from a written note of her opening submissions, which she helpfully provided to Mr Kirkcaldy and the Tribunal.
14. Ms Adesuyi outlined the statutory framework of the Consumer Credit Act 1974. It was the OFT's contention that Mr Kirkcaldy had failed to show that he was a fit person to hold a consumer credit licence by reason of his inability to demonstrate the necessary skills, knowledge and experience in relation to his consumer credit business and his inability to demonstrate that he had implemented the required business practices and procedures, and by his persistent unwillingness to co-operate with the OFT.

15. The OFT's view was that Mr Kirkcaldy's terms and conditions were non-compliant with the OFT's Debt Management Guidance, the Distance Selling Regulations and the requirements of the Financial Ombudsman Service, that they were lacking in transparency using the words 'the company' even though Mr Kirkcaldy was a sole trader and with there being inadequate information with regard to service and cost.
16. The OFT noted that Mr Kirkcaldy stated in his notice of appeal that the advice he gave was not debt management but merely advice to consumers implying a pure advisory service without any interaction with creditors, but that his email of 6 October 2011 indicated that his advisory work would in some instances include contacting creditors on behalf of his clients. The OFT was concerned that Mr Kirkcaldy did not appear to have in place a specific business model.
17. The OFT submitted that the information relating to cost, duration and nature of the agreement between Mr Kirkcaldy and clients remained unclear and did not comply with Clause 2.10 of the OFT's Debt Management Guidance. In particular, it was stated that:
- (a) Mr Kirkcaldy's terms and conditions made no clear distinction between his advisory service and the service that required contacting creditors on behalf of what he termed "vulnerable people who are afraid of the credit companies".
  - (b) There was no indication about the likely duration of the contract.
  - (c) There was insufficient information about the total costs a customer was likely to incur upon engaging his services.
  - (d) The costs provisions failed to explain the nature of his service and how the cost relating to each part of the service was likely to be applied, for example costs associated with his negotiations with creditors.
  - (e) There was no explanation regarding the service to be expected after payment of the upfront fee.
  - (f) It was unclear whether all clients were required to pay the upfront fee regardless of the level of service contracted for.
  - (g) It was unclear what a 'financial review' would entail.
18. In relation to the requirement to refer in the terms and conditions to a consumer's right to a cooling off period under the Distance Selling Regulations, the OFT submitted that Mr Kirkcaldy's cancellation policy did not reflect the requirements of the Regulations. In particular, it was stated that:

- (a) The cancellation policy failed to accurately state when the cancellation period commenced, the Regulations giving a consumer 7 working days beginning with the day after the day on which the contract was concluded as opposed to just 7 days. It was also unclear whether the 7 day period began on the date the contract was made or on the date of a written notice from Mr Kirkcaldy.
- (b) The cancellation policy wrongly stated the effective date of cancellation as being the date on which Mr Kirkcaldy received a consumer's request to cancel, the Regulations providing for the correct effective date of cancellation to be the date on which the consumer posts the notice to the trader and not as stated by Mr Kirkcaldy the date the notice was received by him.
- (c) There was no explanation as to how much if anything of the initial fee paid of £350 would be refunded upon cancellation.
- (d) Having regard to the nature of Mr Kirkcaldy's business being the provision of debt advice, the cancellation policy failed to state the consequences of agreeing to the service before the end of the cancellation period as required by the Regulations.

19. As regards the requirement to register the business under the Data Protection Act 1998, the OFT had ascertained that Mr Kirkcaldy had failed to maintain the registration and was not presently registered with the Information Commissioner's Office.

20. In relation to the requirement to have a Financial Ombudsman Service compliant complaints procedure, the OFT stated that since 6 April 2007 businesses with a consumer credit licence regulated by the OFT had been covered by the alternative disputes resolution operated by the Financial Ombudsman Service and that licensees were therefore obliged to submit to the jurisdiction of the scheme. The complaints procedure in Mr Kirkcaldy's terms and conditions did not mention the Financial Ombudsman Service's alternative dispute resolution scheme.

21. The OFT was concerned that Mr Kirkcaldy had informed the Adjudicator that he would not be joining a trade association, it being considered by the OFT that trade bodies and other similar organisations had an important role to play in achieving compliance within the industry.

22. The OFT referred the Tribunal to the case of *Qsolvency v OFT*, CCA/2009/0004 where the significance of competency in relation to fitness to hold a credit licence was considered by the Consumer Credit Appeals Tribunal, as it then was. The OFT accepted that each case turned on its own facts.

23. In relation to the alleged failure of Mr Kirkcaldy to co-operate with the OFT, it was submitted that Mr Kirkcaldy had persistently failed to co-operate with the OFT despite his assertion to the contrary, that he had failed to comply with the OFT's repeated requests to address the areas of non-compliance brought to his attention as long ago as 6 April 2010, and that he had failed to provide clear, comprehensive and compelling evidence by way of an independent report confirming that the areas of non-compliance had been addressed. The OFT considered that Mr Kirkcaldy had made no serious effort to address the areas of non-compliance or to submit written evidence of compliance.

24. The OFT considered the notice of appeal and submitted that:

- (a) The outcome of the compliance review visit highlighted the OFT's concerns with Mr Kirkcaldy's skills, knowledge and experience to conduct a consumer credit business.
- (b) He had shown an inability to comprehend basic regulatory requirements and to take appropriate steps to remedy the position, for example his non-compliance with the Distance Selling Regulations, the Data Protection Act, the Financial Ombudsman Service requirements or the OFT's Debt Management Guidance.
- (c) Organisations did offer formal debt qualifications or training programmes, for example the Institute of Credit Management and the Debt Resolution Forum.

25. With regard to Mr Kirkcaldy's acceptance that he ought to have taken further advice but that this would have been at a considerable cost and his failure to see the need to justify his ability to give debt advice, the OFT stated that:

- (a) In accordance with its regulatory obligations under the Consumer Credit Act, the OFT had to be satisfied that those who held or sought to hold credit licences were fit to do so and where the OFT had doubts about a licensee's fitness it was able to take enforcement action.
- (b) Despite the action taken by the OFT, Mr Kirkcaldy did not appear to consider it necessary to satisfy the OFT or the Tribunal that he had the necessary skills and ability.
- (c) The OFT had no confidence in his ability to engage in credit activities which were considered to be of a high risk nature having regard to the potential for consumer detriment.

26. As regards Mr Kirkcaldy's email of 6 October 2011 and his assertion that a revocation of his credit licence would result in him becoming unemployed and place him in financial hardship, the OFT submitted that this had no bearing on Mr



Kirkcaldy's fitness and with the OFT having a duty to protect the interest of consumers by monitoring the fitness of those holding or applying for credit licences. The OFT referred to the decision of Leeds City Council v Hussain [2002] EWHC 1145 (Admin) where Mr Justice Silber held that the local authority was not obliged to consider the effect that suspension of Mr Hussain's private hire driver and vehicle licences would have on his livelihood, the purpose of the power to suspend being to protect the public in general and users of licensed vehicles in particular and with such a purpose not requiring an investigation into the financial circumstances of the licence holder. The OFT submitted that the same principles applied to the consumer credit licensing regime, with the only question being whether Mr Kirkcaldy was fit to hold his consumer credit licence.

27. The OFT submitted that their concerns about Mr Kirkcaldy's fitness were justified and that he was not a fit person to engage in licensable activities.
28. Mr Kirkcaldy gave evidence before the Tribunal. He stated that he was a self-employed utilities collector, his work being provided by Utility Management Services based in Warrington. He was involved predominantly with gas and electricity visiting customers who were non-payers, establishing why they were not paying and effecting collection of the outstanding monies, if possible. He dealt with the elderly and disabled as part of his work. It was not part of his job to give debt advice. However, if he visited someone who had financial difficulties he would tell them what the priority debts were and what should be paid. He had been doing this work for a number of years, it being a full time job for him.
29. Mr Kirkcaldy stated that he had originally been granted a consumer credit licence some time before his present licence. He had carried on with his utilities work but could see the potential for debt advice and decided to give people advice as to how to manage their debts. As at the date of the compliance visit on 3 March 2010, he thought that he was undertaking one case every 2 or 3 months in terms of debt advice visiting somebody's house, sitting down with them and filling out a common financial statement, and deciding upon a debt plan. He would charge an upfront fee of £350 and if necessary come to an arrangement as to payment of the fee by instalments.
30. Mr Kirkcaldy stated that he had no dealings with the OFT before the compliance visit on 3 March 2010 and that he had received no complaints from his clients, only customer satisfaction. He had not carried on the business of debt advice since the OFT's decision on 28 June 2011 revoking his consumer credit licence. He had effectively stopped giving debt advice following the compliance visit on 3 March 2010, as a result of which he had not been giving debt advice for about two years. He had not been carrying on any licensable activities since 28 June 2011 since he did not wish to fall foul of the law.
31. Mr Kirkcaldy stated that he had tried to do his best with his terms and conditions from a consumer's perspective and that he had been trying to get his head

around it all to make sense of it since 28 June 2011 when the decision notice was issued revoking his licence. He stated that if his consumer credit licence was reinstated he would go back to the beginning and make better foundations for his business than previously and that he would do whatever the OFT required him to do. He had not joined any trade association and had not consulted a Solicitor because of the cost. He had had no compliance audit undertaken relating to his procedures. He accepted that he was a sole trader and not a company in the legal sense, despite his terms and conditions referring to a company.

32. In answer to questions from the OFT, Mr Kirkcaldy confirmed that he was currently not carrying on business under the trading name of Ditch the Debt. He stated that he needed a consumer credit licence to engage in the business of debt advice and to give debt counselling. In some cases, he would have to speak to creditors. He would provide a consumer with his terms and conditions at the first point of contact when he visited the person's home. He maintained that he was aware of a consumer's right to cancel a contract entered into in their home. He had previously had a website which was no longer up and running. He had advertised in Yellow Pages and had had his website on Google.
33. Mr Kirkcaldy stated that he had carried out his debt advice work on his own, having no one working with him. He had relied on the OFT's website to keep himself up to date with consumer protection, on the Information Commissioner's Office for data protection and on other relevant websites.
34. Mr Kirkcaldy stated that the terms and conditions provided to the Adjudicator had not been further amended. He accepted that they would need to be totally revised but that this had not been undertaken. He agreed that he had not taken any action since the decision notice of 28 June 2011. He had previously been trading from home.
35. The OFT in their closing remarks submitted that Mr Kirkcaldy had failed to demonstrate that he had the necessary skills, knowledge and experience or the necessary practices and procedures in place and that he had failed to co-operate with the OFT, failing to submit evidence to show that he was competent to have a licence. The OFT reiterated the Adjudicator's concern that Mr Kirkcaldy considered himself qualified to give advice to vulnerable customers but had failed to take any steps to undergo training or to join any trade body since he obtained his licence and had no intention of doing so. The OFT maintained that the Adjudicator's determination was correct and that Mr Kirkcaldy's appeal should be dismissed. The OFT confirmed that they were not seeking their costs against Mr Kirkcaldy.

#### **D. The relevant Statutory Regime**

36. Section 25 of the Consumer Credit Act 1974 deals with the requirement that the licensee is to be a fit person. It provides in so far as material that –

“(2) In determining whether an applicant for a licence is a fit person for the purposes of this section the OFT shall have regard to any matters appearing to it to be relevant including (amongst other things) –

- (a) the applicant’s skills, knowledge and experience in relation to consumer credit businesses, consumer hire businesses or ancillary credit businesses .....
- (b) practices and procedures that the applicant proposes to implement in connection with any such business .... “.

37. Section 32 of the Act deals with suspension and revocation. It provides that –

(1) Where at a time during the currency of a licence the OFT is of the opinion that if the licence had expired at that time (assuming, in the case of a licence which has effect indefinitely, that it were a licence of limited duration) it would have been minded not to renew it, and that therefore it should be revoked or suspended, it shall proceed as follows.

(2) In the case of a standard licence the OFT shall, by notice –

- (a) inform the licensee that, as the case may be, the OFT is minded to revoke the licence, or suspend it until a specified date or indefinitely, stating its reasons, and
- (b) invite him to submit to the OFT in accordance with section 34 representations –
  - (i) as to the proposed revocation or suspension .... “.

38. Section 41 of the Act deals with appeals to the First-tier Tribunal, with Section 41ZB dealing with the disposal of appeals. Section 41ZB provides in so far as material that –

“(1) The First-tier Tribunal shall decide an appeal under section 41 by way of a rehearing of the determination appealed against.

(2) In disposing of an appeal under section 41 the First-tier Tribunal may do one or more of the following –

- (a) confirm the determination appealed against;
- (b) quash that determination;
- (c) vary that determination;
- (d) remit the matter to the OFT for reconsideration and determination in accordance with the directions (if any) given to it by the tribunal;

(e) give the OFT directions for the purpose of giving effect to its decision”.

#### **E. The Tribunal's conclusions**

39. The Tribunal accepts the history of the matter as set out by the OFT. In particular, the Tribunal find that there were the deficiencies in Mr Kirkcaldy's practice and procedures revealed by the compliance review undertaken on 3 March 2010, that Mr Kirkcaldy was given every opportunity to address these concerns and to provide independent evidence to confirm compliance by him before enforcement action was taken, and that his only response at that time was his letter to the OFT of 12 October 2010 purporting to confirm that the non-compliance issues were being dealt with.
40. The Tribunal find that in the absence of any further evidence of compliance the OFT were entitled to issue the minded to revoke notice on 31 March 2011, that notice resulting in brief written representations being received from Mr Kirkcaldy on 27 April 2011 together with a copy of his amended terms and conditions and oral representations by him at the telephone hearing on 11 May 2011, when he indicated that he was willing to further amend his terms and conditions if considered necessary by the OFT and that he did not understand why his licence was under threat.
41. The Tribunal find that Mr Kirkcaldy failed to adequately address the areas of non-compliance brought to his attention by the OFT and that the steps which he did take, such as registration with the Information Commissioner's Office and making some minor amendments to his terms and conditions, did not go far enough to meet the OFT's legitimate concerns, with Mr Kirkcaldy's terms and conditions not being appropriate to his sole trader business in any event.
42. The Tribunal find that Mr Kirkcaldy's terms and conditions were non-compliant with the OFT's Debt Management Guidance, the Distance Selling Regulations and the requirements of the Financial Ombudsman Service, as set out in the OFT's decision notice of 28 June 2011. The Tribunal also accept that although Mr Kirkcaldy took his website off line there was and is no evidence that he has taken any steps to ensure that the website addresses the OFT's concerns or that he has any understanding of his responsibilities under the Data Protection Act 1998.
43. The Tribunal find that Mr Kirkcaldy has not done anything further to address the areas of non-compliance and the OFT's legitimate concerns. He appears to have ceased his licensable business activities in response to the enforcement action taken by the OFT but to have taken no further steps to address the OFT's concerns. He has not made any further amendments to his terms and conditions, effected any changes to his website other than taking it off line, joined any trade association or sought advice or assistance from any other organisation.

44. The Tribunal find that Mr Kirkcaldy has misunderstood the regulatory nature of the licensing regime, the purpose of the licensing role of the OFT being to consider whether persons are fit to conduct licensed business and not to revise a trader's terms and conditions for them. Further, the Tribunal share the Adjudicator's concern that Mr Kirkcaldy considers himself qualified to give advice to vulnerable consumers without taking any steps to undergo training or to join any trade association and with no apparent intention of doing so.
45. The Tribunal find on the evidence before it that Mr Kirkcaldy has failed to demonstrate the necessary skills, knowledge and experience in relation to consumer credit businesses for the purpose of Section 25(2)(a) of the Consumer Credit Act 1974, or that he has implemented or has in place the required business practices and procedures for the purpose of Section 25(2)(c) of the Act. In particular, the Tribunal find that Mr Kirkcaldy has shown an inability to comprehend or implement basic regulatory requirements, as evidenced by his failure to comply with the OFT's Debt Management Guidance, Distance Selling Regulations, the Data Protection Act and the Financial Ombudsman Service requirements. The Tribunal also find that Mr Kirkcaldy's failure to make any serious effort to address the areas of non-compliance brought to his attention by the OFT or to provide evidence of compliance suggests an unwillingness or inability on his part to co-operate with the OFT or to address their proper concerns.
46. The Tribunal agree with the OFT that the fact that the revocation of Mr Kirkcaldy's licence may affect his employment or cause him financial hardship has no bearing on Mr Kirkcaldy's fitness to hold a consumer credit licence: see *Leeds City Council v Hussain* [2002] EWHC 1145 (Admin). That apart, it would appear from what Mr Kirkcaldy told the Tribunal that he has a full time job as a self-employed utilities collector.
47. The Tribunal share the OFT's concerns as to Mr Kirkcaldy's competence to engage in licensable credit activities of a high risk nature, with the potential for consumer detriment. The Tribunal unanimously find on the evidence before it that Mr Kirkcaldy is not a fit person to engage in licensable credit activities and that he is unfit to retain his licence, it confirms the determination of the Adjudicator to revoke Mr Kirkcaldy's consumer credit standard licence and dismisses Mr Kirkcaldy's appeal against that determination.
48. The Tribunal makes no order as to the costs of the appeal.

**HH Judge Peter Wulwik (Chairman)**

**6 February 2012**