



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

**Case No. CCA/2012/0004**

**On appeal from:**

**Office of Fair Trading's      Determination of Minded to Refuse Notice  
Decision reference:      ADJ/2364-CCA-645136  
Dated:      9 January 2012**

**Appellant:      Direct Accident & Injury Centre UK Limited**

**Respondent:      The Office of Fair Trading**

**Heard at:      Field House, 15 Bream's Buildings, London EC4A 1DZ**

**Date of hearing:      7 June 2012 (sitting in public)**

**Date of Decision:      21 June 2012**

**Before**

**Mr Peter Hinchliffe  
Tribunal Judge**

**Attendances:**

**For the Appellant:      Mr Steven McGarry instructed by Ozon & Co  
For the Respondent:      Ms Ruby Adesuyi of the Office of Fair Trading**

**Subject matter:** Application to strike out an appeal against the refusal of a consumer credit licence. Consumer Credit Act 1974 Sections 25-41. Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009, Rule 8 (3) (c)

**Cases referred to:** Swain v Hillman (2001) 1 All ER 91

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**DETERMINATION OF APPLICATION TO STRIKE OUT**

1. The Tribunal sitting by a Tribunal Judge sitting alone strikes out the Appellant's notice to appeal dated 30<sup>th</sup> January 2012 under Rule 8 (3) (c) of the Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009 (the "Tribunal Rules") on the basis that there is no reasonable prospect of the appeal, or part of it, succeeding.

**REASONS FOR THE DETERMINATION**

2. This is an application by the Respondents, ("the OFT"), for the striking out of the Appellant's notice of appeal under the Tribunal Rule referred to above. This application is made on the basis of Rule 8 (3) of the Tribunal Rules, which provides that:

*"The Tribunal may strike out the whole or any part of the proceedings if –*

.....

- (c) the Tribunal considers that there is no reasonable prospect of the Appellant's case, or part of it, succeeding".*

3. On 7<sup>th</sup> July 2011, the Appellant ("DAIC") applied to the OFT for a consumer credit licence authorising it under the Consumer Credit Act 1974 (the "Act") to engage in the activity of consumer hire. DAIC had already held a consumer credit licence from December 2005 to December 2010. DAIC is a registered company. Mr. Arif Mahmood is the owner of 100% of the shares in DAIC. Until April 2012 he was the sole director of DAIC.
4. By a notice dated 22<sup>nd</sup> November 2011 the OFT informed DAIC that it was minded to refuse its application for a consumer credit licence. After considering representations on behalf of DAIC the adjudicator appointed by the OFT issued a Determination refusing the application for a credit licence on 9<sup>th</sup> January 2012. The Determination set out its conclusions in the following terms:

*"Mr Arif Mahmood remains the majority shareholder and continues to be the sole director at the time of this determination. Accordingly, he continues to exercise control over the day to day running of the applicant business, and his conduct must be taken into account in my assessment of the fitness of the applicant to hold a consumer credit licence.*

*My priority must be the protection of consumers. As this is a licence application, the burden is on the applicant to satisfy me that it is fit to hold a consumer credit licence. Although Mr Arif Mahmood may not be in frequent face-to-face contact with consumers, I am concerned that the consumer may ultimately be liable for the higher fee, and that there is scope for dishonesty in the setting of the higher charge. Given Mr Arif Mahmood's two recent convictions, which evidence a lack of respect for the law, fraudulent activity and a willingness to use violence, I cannot be satisfied that consumers would not be at risk of dishonesty or of violent behaviour from Mr. Arif Mahmood."*

5. DAIC submitted a Notice of Appeal (the "Appeal") dated 30<sup>th</sup> January 2012. DAIC stated that the adjudicator appointed by the OFT had placed too much emphasis on Mr Mahmood's fitness rather than that of DAIC itself, had ignored relevant information and had not looked at safeguards within or restrictions upon DAIC.
6. On 21<sup>st</sup> February 2012 the OFT submitted an application requesting the Tribunal to strike out the Appeal on the basis that DAIC's case has no reasonable prospect of success.

## **THE LEGISLATIVE BACKGROUND**

7. Section 25 of the Act 1974 deals with the requirement that the holder of a consumer credit licence must be a fit person. It provides that,

*"25 – Licensee to be a fit person*

*(1) If an applicant for a standard licence –*

*(a) makes an application within section 24A (1)(a) in relation to a type of business, and*

*(b) satisfies the OFT that he is a fit person to carry on that type of business so far as it falls within the description or descriptions of business set out in his application in accordance with subsection (2) of that section,*

*he shall be entitled to be issued with a standard licence covering the carrying on of that type of business so far as it falls within the description or descriptions in question.*

*(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)*

.....

*(d) evidence of the kind mentioned in sub-section (2A).*

*(2A) That evidence is evidence tending to show that the applicant, or any of the applicant's employees, agents or associates (whether past or present) or, where the applicant is a body corporate, any person appearing to the OFT to be a controller of the body corporate or an associate of any such person, has*

*(a) committed any offence involving fraud or other dishonesty or violence;”*

## **THE ROLE OF THE TRIBUNAL**

8.1 Section 41ZB of the Act deals with disposal of appeals by the Tribunal. It provides insofar 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.*

8.2 The question to be decided by the Tribunal was whether on the evidence adduced before them DAIC is a fit person to hold a licence at the time the appeal comes before the Tribunal. While the reasons given in the Determination remain the foundation for the Appeal, the Tribunal is entitled to consider any further matter which had a bearing on DAIC's fitness so long as DAIC has been given the opportunity to make representation on such matters. The standard of proof on any issue is the usual civil standard of a balance of probability.

## **APPLICATION TO STRIKE OUT**

9.1 Rule 8 (3) (c) of the Tribunal Rules is set out at 2. above. If this application to strike out this Appeal is to succeed, the Tribunal must consider that there is no reasonable prospect of the Appeal, or part of it succeeding. The Tribunal finds, and the parties have accepted, that useful guidance on the application of this provision can be found in Part 24 of the Civil Procedure Rules of the Supreme Court. The relevant principles were considered by the Court of Appeal in

Swain v Hillman (2001) 1 All ER 91. In deciding whether to make a summary order under CPR 24.2. Lord Woolf MR said,

*“Under R24.2, the court now has very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words ‘no real prospect of being successful or succeeding’ do not need any amplification, they speak for themselves. The word ‘real’ distinguishes fanciful prospects of success or ... they direct the court to the need to see whether there is a ‘realistic’ as opposed to a ‘fanciful’ prospect of success”.*

*“The power under part 24... is not meant to dispense with the need for trial where there are issues which should be investigated at the trial.”*

9.2 In order to determine this Application, the Tribunal must determine whether the Appeal has a realistic prospect of success and whether a full hearing is required in order to resolve disputed matters of fact or law.

## **THE AGREED FACTS**

10. The representatives of DAIC and the OFT have assisted the Tribunal and the efficient determination of this Appeal by recording their agreement on certain basic facts that are relevant to this appeal. There are:

10.1 On 9<sup>th</sup> November 2010 Mr. Arif Mahmood was convicted of unlawful wounding contrary to Section 20 of the Offences against the Person Act 1861 and violent disorder contrary to Section 2 (1) of the Public Order Act 1986. Mr. Mahmood was sentenced to 18 months imprisonment.

10.2 On 5<sup>th</sup> August 2011 Mr. Mahmood was convicted of dishonestly failing to disclose information and intending thereby to make gain for himself or another or cause loss to another or to expose another to a risk of loss, contrary to Section 1 of the Fraud Act 2006. For this offence Mr. Mahmood was sentenced to 17 weeks imprisonment (suspended for 12 months) 100 hours of unpaid work supervised by a probation officer, to pay costs of £800 towards the prosecution, and a confiscation order in the sum of £51,338.25.

10.3 The rehabilitation period for the offences refer to above under the Rehabilitation of Offenders Act 1974 has not yet expired.

## AGREED LEGAL POSITION

11.1 The Tribunal finds, and the parties have both accepted, that the OFT is required under Section 25 of the Act to have regard to any offence involving fraud or other dishonesty or violence by an associate or controller of an applicant for a Consumer Credit Licence. The requirement for the OFT to ‘have regard’ to such offences must, by implication, mean that it is not automatically required to refuse a licence because an applicant or an associate or controller of an applicant has committed any offence involving fraud or other dishonesty or violence. The parties also accepted that under Section 25 (1) it is for the applicant to satisfy the OFT that it is a fit person to hold a consumer credit licence.

11.2 It was confirmed to the Tribunal at the hearing that Mr. Mahmood retains ownership of all of the issued shares in DAIC. This contradicted submissions by DAIC, during the course of the appeal and in their response to the OFT's Minded to Refuse Notice dated 13<sup>th</sup> December 2011 that stated that Mr. Mahmood had sold some part of his shareholding. Therefore, the Tribunal finds and the parties have accepted that Mr. Mahmood is a controller of DAIC within the meaning of Section 189 of the Act. Section 189 provides:

*“Controller” in relation to a body corporate, means a person –*

.....

*(b) Who either alone or with any associate or associates, is entitled to exercise, or control the exercise of, one third or more of the voting power at any general meeting of the body corporate or of another body corporate which is its controller;”*

11.3 By virtue of being a controller of DAIC, the Tribunal finds and the parties have accepted that, Mr. Mahmood is an associate of DAIC within the meaning of Section 184 (4) of the Act. Section 184 of the Act provides:

*“184 – Associates*

.....

*(3) A body corporate is an associate of another person if that person is a controller of it or if that person and persons who are his associates together are controllers of it.*

## **THE OFT'S POSITION**

- 12.1 The OFT argue that the offences committed by Mr. Mahmood are both recent and serious. They assert that the Tribunal should not look behind the offences.
- 12.2 Mr. Mahmood remains in a position where he can control the day-to-day running of DAIC. There are no safeguards that the Tribunal could impose that could sufficiently address the OFT's legitimate concerns about Mr. Mahmood's control over DAIC. Mr. Mahmood's offences are completely incompatible with fitness under the Act.
- 12.3 An applicant must satisfy the OFT that it is a fit person to engage in activities covered by the licence. Mr. Mahmood's offences establish that he lacks integrity. The OFT states that it can only conclude that, if DAIC were granted a consumer credit licence, Mr Mahmood as the controller and associate of DAIC, would be in a position to cause harm to consumers, be they customers of DAIC or members of the public. The grant of a consumer credit licence to DAIC would pose an unacceptable risk to consumers and as a consequence, the OFT argue, DAIC's case has no reasonable prospects of succeeding. The public interest requires that the Appeal be struck out.

## **DAIC'S POSITION**

13. Counsel for DAIC asks the Tribunal to take account of the following factors in considering the application:
- 13.1 The offences were committed in isolated and particular circumstances.
- 13.2 The conviction for violence was disclosed to the OFT by DAIC.
- 13.3 The conviction for fraud arose as a result of a disclosure made by Mr. Mahmood at the time he was being sentenced for the violent disorder and offences against the person.
- 13.4 DAIC has always met its legal, regulatory and statutory obligations and continues to do so.
- 13.5 The business model of DAIC is unusual in that it seldom, if ever, deals with consumers. Its business requires it to arrange with solicitors or claims management companies for the hire of cars to their clients. The cost of the car hire is to be recovered from the other party in an accident or from insurers and not from DAIC's client. DAIC state that Mr Mahmood has no dealings with members of the public at all. There have only been five occasions where DAIC sought to recover charges or payment directly from its consumer customers and these all related to circumstances in which the customer had invalidated their



claim against an insurer by their own activity, which activity it was suggested was improper.

13.6 DAIC is not in a position to set its own hire charges to the detriment of consumers. It follows industry agreed standards and its charges are vetted by solicitors and insurance companies.

13.7 Whilst DAIC intends to argue that it is entitled to an unconditional licence, it is of the view that should the matter proceed to a full hearing, the Tribunal will need to hear arguments about the grant of a consumer credit licence that is subject to conditions.

13.8 Mr. Mahmood's probation officer has written a letter dated 20th January 2012 "to whom it may concern", in which he stated that:

*"the likelihood of Mr. Mahmood reoffending is assessed as low. There are currently no indications that Mr. Mahmood presents a risk of causing harm to others".*

*"He has been compliant with his Licence Supervision and diligent in keeping to the licence conditions."*

13.9 Mr. Mahmood has now appointed a new director to the board of DAIC: Mr. Imjiad Mahmood was appointed as a director in April 2012.

13.10 Counsel for DAIC stated their concern that the OFT had reacted to the convictions of Mr. Mahmood as if these were an automatic cause for the refusal of the consumer credit licence application. It was argued that the OFT had to exercise some discretion and judgement in having regard to the offences committed by a controller and associate of DAIC. The OFT should have exercised their discretion by considering and establishing at the very least a material risk of consumer harm before refusing DAIC's application for a consumer credit licence. DAIC referred to earlier decisions of the First-tier Tribunal (Consumer Credit) in support of this argument and in particular case number CCA/2009/0010 and CCA/2009/0011 Logbook Loans Ltd and Nine Regents Ltd v the OFT. Had the OFT consider the risk posed by Mr Mahmood to consumers and taken account of the safeguards inherent in DAIC's business model and the points set out above, DAIC argue that they would have realised that Mr Mahmood represented a low risk to consumers. For these reasons, Mr McGarry argued on behalf of DAIC, the Appeal has a reasonable prospect of success and a full hearing was required.

## **DECISION ON THE APPLICATION**

14. In considering this application to strike out the Appeal, the Tribunal needs to consider the agreed factual and legal positions and the parties arguments as summarised above and whether there are other facts or matters of law that remain in dispute or other arguments or representation that could be made in a

substantive hearing that might realistically lead to a different conclusion to that reached by the OFT. The Tribunal finds that the offences committed by Mr. Mahmood were serious and relevant to the carrying out of a consumer credit business. The offences were committed close together and relatively recently. The sentences received by Mr. Mahmood were at the lower end of those possible for these particular offences, but the duration of the custodial sentence and the amount of the confiscation order against Mr. Mahmood indicates the gravity of the offences. The Tribunal notes that the offence under Section 1 of the Fraud Act required a dishonest intent on the part of Mr. Mahmood, notwithstanding that the offence was committed by omission rather than deliberate and active deception by Mr. Mahmood. The Tribunal accepts that the OFT was required to exercise some discretion and judgement in deciding how to deal with the application for a consumer credit licence from a company whose controller and associate has committed offences of violence and dishonesty. The OFT could not simply make an automatic decision to refuse that application on the basis that such offences had been committed. The Tribunal accepts that the key issue in exercising that discretion was assessing the risk that Mr. Mahmood would use his ability to direct or influence DAIC in a way that would result in consumers, customers, members of the public or others incurring harm or detriment. It is, therefore, apparent from DAIC's submissions that there are two areas of factual disagreement between the parties that could be relevant in assessing DAIC's fitness to hold a consumer credit licence: Firstly, whether Mr. Mahmood would have an opportunity to cause harm or detriment to consumers given the specific business model of DAIC and the limited range of its work and the parties with whom it deals. Secondly, whether Mr Mahmood represented a risk to consumers and others that DAIC might deal with. It was not apparent to the Tribunal that the arguments put forward on behalf of DAIC gave rise to other factual disagreements that were likely to determine the outcome of this appeal and might, therefore, need to be considered at a substantive hearing.

15. The Tribunal is also required to consider whether there are legal arguments or representations that could be made at a substantive hearing which might affect the outcome of that hearing. In this regard, whilst the legal and regulatory position was largely agreed between the parties and did not raise many issues that might realistically affect the outcome of the Appeal, it is apparent from DAIC's submissions that the possibility of attaching qualifications to a licence was an issue that DAIC was likely to raise at a substantive hearing of the Appeal. The role of Mr. Mahmood in DAIC is fundamental to the fitness of DAIC to hold a licence. DAIC raised the possibility of the grant of a consumer credit licence on terms that ensured that Mr. Mahmood is excluded from any activity that might provide an opportunity to cause harm or detriment to others. In the Appeal DAIC had already raised the argument that the OFT could have imposed restrictions or safeguards on DAIC.
16. The Tribunal has considered the issues identified in 14. and 15. above in order to decide whether they need to be resolved at a full hearing of the Appeal and if they give rise to a real prospect that DAIC would be able to establish that it was fit person to hold a consumer credit licence for the purpose of carrying out consumer hire activities. The Tribunal's conclusions are set below:

16.1 DAIC argued that the particular nature of DAIC's activity was such that there was no material or significant opportunity for consumers or members of the public to suffer any harm, notwithstanding any lack of integrity in the operation of the business.

The Tribunal finds that the business model of DAIC requires it to hire vehicles to the clients of solicitors and claims management companies and to wait to receive payment for such hire charges when the outcome of a claim or a court case against a third party is known. DAIC would then expect to be paid either out of the proceeds of any legal claim or court judgement or by insurers. The fees charged by DAIC would normally be vetted by solicitors or insurers. There is, however, nothing in the consumer credit licence application that would specifically restrict DAIC to following this business model. It is possible that restrictions could be considered and discussed at a full hearing of the Appeal that might have the effect of limiting DAIC's activities and this possibility is considered below. In any event, the business model does not entirely preclude direct dealings with consumers, as the example of the five customers who had been pursued for payment by DAIC after they had invalidated the terms of their insurance policy demonstrates. The Tribunal is of the view that there are legitimate concerns about the integrity of the controller of DAIC and it is difficult and unrealistic to accept that the OFT should award a licence to DAIC on the basis that it was up to others, such as the solicitors, insurers or claims management companies with which DAIC deals, to police and supervise DAIC in order to ensure that any lack of integrity does not result in harm or detriment to themselves or others. In the circumstances of this case, any such decision could leave the parties dealing with DAIC, or their regulators, with a responsibility that they may reasonably conclude the OFT should have discharged. In addition a conscientious and well informed regulator aware of the market in which DAIC operates may well have legitimate concerns about the integrity of those, including consumers, claims management companies and solicitors, who operate in that market and may have concerns about the willingness and capability of all participants in that market to overcome any lack of integrity or honesty on the part of DAIC. The Tribunal concludes that there is no real prospect of the Appeal succeeding on the basis that DAIC's business model is such that consumers and others would not be at risk from any lack of integrity in the operation or management of DAIC.

16.2 DAIC argued that Mr. Mahmood did not represent a risk to consumers due to the specific circumstances of his convictions, the evidence from his probation officer and the other factors referred to in 13. above.

The Tribunal will not look behind the conviction and sentencing for the offences. It has already set out its view that the offences committed by Mr. Mahmood were serious, recent and relevant to the carrying out of a consumer credit business. The duration of the custodial sentence and the amount of the confiscation order indicate the gravity of the offences. The offence under Section 1 of the Fraud Act required a dishonest intent on the part of Mr. Mahmood. The good record of DAIC in meeting its legal and regulatory responsibilities and Mr. Mahmood's good record in the short period since his convictions are not yet sufficient to resolve the doubts about Mr. Mahmood's

integrity. The Tribunal concludes that there is no real prospect of the Appeal succeeding on the basis that the Tribunal will have regard to Mr. Mahmood's offences of dishonesty and violence and all other relevant circumstances and conclude that his control over the operation and management of DAIC does not represent a risk to consumers and others dealing with DAIC.

16.3 DAIC argued that there were conditions that could be attached to the consumer credit licence that would permit any concerns over the integrity of Mr. Mahmood and the fitness of DAIC to hold a consumer credit licence to be mitigated or alleviated and thereby remove any significant or material risk of harm to consumers or members of the public.

In the circumstances of this case, where the objection to the application by DAIC for a consumer credit licence lies in its connection with a controller and associate and where the applicant pursues a limited business model that may restrict its dealing with unsophisticated parties and consumers, there appears to be potential for a licence to be issued subject to conditions that alleviate concerns over fitness. However, the Tribunal regards Mr. Mahmood's failure to comply with the statements that he has made in the course of his dealings with the OFT indicating that he would sell some or most of his shareholdings in DAIC as relevant to this issue. In DAIC's Response to the OFT's Minded to Refuse Notice dated 13<sup>th</sup> December 2011, DAIC stated that Mr Mahmood "*had already sold and transferred 49% of the shareholding*". In DAIC's additional submissions dated 27<sup>th</sup> February 2012 they stated that they had "*sought, recruited and awaits the appointment of a new Director and 80% of the shareholding is being sold to one or more third parties*". At the hearing the Tribunal was informed that Mr. Mahmood continues to own 100% of the shares in DAIC and that the appointment of a new director alongside Mr Mahmood had only been effected one month prior to the Tribunal hearing. Relying on conditions in any consumer credit licence that have the effect of reducing Mr. Mahmood's influence over DAIC when Mr. Mahmood has misrepresented the position on this issue to the OFT and has done nothing since his first conviction to reduce his control or influence over DAIC until a month before the hearing is not, in the opinion of the Tribunal, a satisfactory route to address concerns about the fitness of DAIC to hold a licence. Similarly, setting out conditions restricting the basis upon which the consumer credit activity is carried on and with whom DAIC may deal is not provide an adequate means of addressing issues of integrity and honesty. The OFT must satisfy itself that an applicant for a consumer credit licence is a fit person to carry out a consumer credit business. If the OFT has doubts about the integrity or honesty of a licence holder and chooses to address these by imposing conditions or restrictions on the applicant, then it must retain a responsibility to monitor compliance with these conditions. This responsibility must be greater that would be the case with other licence holders who the OFT may be entitled to regard as honest. The OFT may reasonably conclude that it does not wish to take on such a responsibility or that it will not be able to discharge it effectively. The Tribunal finds that it is not realistic to assume that arguments could be made out at a full hearing that would lead the Tribunal to conclude that the legitimate concerns about DAIC's fitness to hold a licence arising out of the criminal convictions of DAIC's controller

could be adequately resolved by the imposition of conditions on the licence granted to DAIC.

16.4 Mr. Mahmood's position as a controller and associate of DAIC means that his recent convictions for violence and dishonesty must be considered by the OFT when assessing the fitness of DAIC to hold a consumer credit licence. The Tribunal has considered the arguments and evidence submitted by DAIC in response to the application to strike out the Appeal and concludes that DAIC has no realistic prospect of satisfying a Tribunal at a full hearing of the Appeal that it is a fit person to be licensed under the Act to carry out a consumer hire business.

### **THE DECISION OF THE TRIBUNAL.**

17 In all of the circumstances of this Appeal and after having considered all of the evidence and arguments, the Tribunal finds that there is no reasonable prospect of DAIC's Appeal succeeding in whole or in part and accordingly the Tribunal strikes out the Appeal pursuant to Rule 8 (3) (c) of the Tribunal Rules.

[Signed on the original]

**Peter Hinchliffe**  
Tribunal Judge

21 June 2012