



IN THE FIRST-TIER TRIBUNAL

(CONSUMER CREDIT)

GENERAL REGULATORY CHAMBER

Case No. CCA/2011/0003

On appeal from:

Office of Fair Trading's

Decision reference: ADJ/2200 –639164

Dated: 31 January 2011

**Appellant: (1) Antony Clements
(2) Clements Cars Limited**

Respondent: The Office of Fair Trading

Heard at: Audit House, 58 Victoria Embankment, London, EC4Y 0DS

Date of Hearing: 14 June 2011 (sitting in public)

Date of Decision: 30 June 2011

Before

District Tribunal Judge Findlay (Chairman)

Christopher Perrett

Miriam Scott

Attendances:

For the Appellants: Antony Clements, Managing Director of Clements Cars Limited

For the Respondent: Brendan Magennis of The Office of Fair Trading

Subject matter: Appeal against the revocation of consumer credit standard licence number 616531, licensee name Mr Antony Douglas Clements (Appeal 1) and appeal against refusal of application for a consumer credit licence, application number 639164, applicant Clements Cars Limited (Appeal 2) Consumer Credit Act 1974 sections 25 to 41 and 145.

Cases referred to: Russel V Ministry of Commerce for Northern Ireland[1945] NI 184 at 188
North Wales Motor Auctions v Secretary of State for Trade [1981]CCLR 1

Decision

1. This is the unanimous decision of the Tribunal.
2. The Tribunal has before it two closely related appeals. With the consent of the parties we have heard both appeals together and this decision relates to both.

Appeal 1

3. The first appellant Antony Douglas Clements (“Mr Clements”) appeals against a determination of an Adjudicator of the Respondent (one Mr S Vernon), dated 31 January 2011, revoking a standard licence issued to the Appellant as a sole trader on 7 May 2008 (licence number 0616531) (“the first determination”).

Appeal 2

4. The second Appellant Clements Cars Limited (“the Company”) appeals through its agent Mr Clements against a determination of an Adjudicator of the Respondent 31 January 2011 refusing to grant it a standard licence (“the second determination”).
5. We dismiss both appeals and uphold both determinations for the reasons set out below.

The Proceedings

6. On 1 April 2008 Mr Clements lodged with the Respondent an application for a consumer credit licence to be granted to himself as a sole trader. A licence was issued to him on 7 May 2008 authorizing him to carry on business of consumer credit, consumer hire, credit brokerage, credit reference agency, debt adjusting/counselling, and debt collecting, and authorizing him to canvass away from trade premises for the purposes of creditor-debtor-supplier agreements and regulated consumer hire agreements. The licence authorized him to trade as a sole trader under the trading names Clements Car Credit, Clements Cars, T C Trading and V10 Credit.
7. On 8 September 2010 Mr Clements lodged with the Respondent an application for a consumer credit licence to be granted to the Company to cover consumer credit, consumer hire, credit brokerage, debt adjusting on a non-commercial basis, debt counselling, debt administration and credit information services (excluding credit repair). Following correspondence with the Respondent the Company amended its application so as to seek a licence excluding cover under categories A, G and Z.

8. On 5 November 2010 the Adjudicator, Mr Vernon, issued to Mr Clements, on behalf of the Respondent, a notice that he was minded to revoke Mr Clements' licence. That notice was given under Section 32 of the Consumer Credit Act 1974 ("the Act"), as amended by the Consumer Credit Act 2006. For the avoidance of doubt all references hereafter to the Act are to the Act as thus amended.
9. Also on 5 November 2010 Mr Vernon issued to the Company, on behalf of the Respondent, a notice that he was minded to refuse its application for a licence.
10. Both notices invited representations and Mr Clements made oral and written representations on his own behalf and on behalf of the Company. On 26 November 2010 he attended an interview with Mr Vernon and a Mr Paul Dowden of the Respondent (referred to by the Respondent as "an oral hearing").
11. A transcript of that interview which is not disputed appears in our bundle [Tab S].
12. On 31 January 2011 Mr Vernon on behalf of the Respondent issued the first determination to Mr Clements. On the same date he issued the second determination to the Company. On 22 February 2011 Mr Clements and the Company submitted a joint Notice of Appeal, initiating the proceedings before this Tribunal. The Respondent issued a Response to both appeals which does not bear a date. Its author Mr Brendan Magennis has represented the Respondent before this Tribunal.
13. On 23 March 2011 the Principal Judge of the First-tier Tribunal (Consumer Credit) issued directions, including a direction that both appeals be heard together.
14. In correspondence (in an email to the Respondent dated 6 June 2011) Mr Clements indicated that he wished to submit to the Tribunal a weblink issued by the Company containing a promotional video, which he suggested had an evidential bearing on the fitness of the Company to be granted a consumer credit licence. No direction was made on this point, but all three members of the Tribunal viewed the weblink on the internet. We did not consider it material to our decision.
15. Elsewhere in correspondence (in his letter to the Tribunal Office dated 30 March 2011) Mr Clements invited the Tribunal to direct that the Respondent had made out "no case to answer". No direction was made on this invitation and at the hearing Mr Clements (who represented himself and the Company with ability and care) expressly stated that he had no preliminary points to raise in any respect. We did not consider that any proper preliminary point arose, and determined to deal with all the issues in the appeal together at the conclusion of the oral hearing.
16. At the oral hearing before the Tribunal we heard submissions from Mr Magennis on behalf of the Respondent, evidence from Miss C O'Flaherty on oath on behalf of the Respondent, and oral evidence and submissions from Mr Clements on behalf of both Appellants. A contemporaneous manuscript note was made by the Chairman.
17. We considered an agreed bundle of documents.
18. Mr Magennis sought to raise a new point on behalf of the Respondent and invited the Tribunal to consider that Mr Clements has been and continues to trade at new premises and has failed to notify the Respondent of his new trading address. The Tribunal decided that it was not necessary to amend the Response and has in any event attached no weight to this new point.

The Facts

19. There is little dispute about the relevant primary facts.
20. It is common ground between the parties, and we find, that the following events took place.

21. The consumer credit licence was issued to Mr Clements as a sole trader on 7 May 2008. A letter of that date was sent to him by the Respondent and received by him [Tab F]. We accept Mr Clements' oral evidence that he "paid no attention" to the letter which we take to be an assertion that he did not read it in detail. The letter included information that he had a duty to notify to the Respondent certain changes in details affecting his business. It expressly referred to a change of name of the licence holder, and a change of trading name including additions or deletions of trading names. It included the following paragraphs :-

"You should not consider yourself as licensed under any new name or category of business activity until you receive the varied licence. A name may be refused if it is considered to be misleading or undesirable.

If you want to change your status for example from a sole trader to a partnership or a partnership to a limited company you will need to apply for a new licence. Application forms for a new licence [...] are available on line on our website.

A licence cannot be varied to pass between one legal entity and another."

22. On 8 May 2008 Mr Clements sent an email to an official of the Respondent, Miss Diana Slavovska, to say that his name had been spelt incorrectly on the licence. His first name, which is "Antony", had been spelt on the licence as "Anthony".

23. On 12 May 2008 Miss Slavovska sent an email to Mr Clements stating "Dear Tony, Could you take my apology for misspelling you name. Please find attached copies of your license (sic) and the license (sic) details. I can confirm that the hard copies of these are also in the post. If you have any further queries regarding your license (sic) do not hesitate to give us a call." She attached to this email a Microsoft Word document containing the details of the licence issued to Mr Clements ("the Document") and a further copy of the letter of 7th May 2008 amended in respect of the spelling of his name.

24. The Document was sent in a form which allowed it to be amended by the recipient.

25. Mr Clements states that at a date which has not been identified in the evidence before us, but which we take to be shortly after 12 May 2008, he had a telephone conversation with Miss Slavovska. He tells us that he found her friendly and "human". He says that she told him that he could use the Document to record changes in his business circumstances. He says that he told her that he had a plan to move his business premises and expand his business over the next three years. He says that he was left with the understanding that he could make changes to the details appearing on the Document without seeking further authority from the Respondent. He does not assert in express terms that he was told he could alter the Document so as to suggest that the licence holder was a legal entity other than himself. The Respondent makes no admission about this conversation and Miss Slavovska has left her employment with them. She was not called by either party and no statement from her has been lodged.

26. We find that such a conversation took place. We reject as inherently improbable Mr Clements' contention that Miss Slavovska used words capable of leading him to believe that he could make changes to the Document and supply it to third parties in its amended form without further reference to the Respondent. We find that he was not told that he could alter the identity of the licence holder on the Document. We find on the balance of probabilities that he was told that he could use the Document to record other changes, but only as a means of notifying such changes to the Respondent. We further find on the balance of probabilities that Miss Slavovska did not say anything on the telephone which was inconsistent with the contents of the letter of 7 May 2008. We reach these conclusions in part on our assessment of the general probabilities of the situation, and in part because Mr Clements' account of the conversation both in his interview of 26 November 2010 and in his evidence to us today has been vague and self-serving. We also attach weight to the fact that Miss Slavovska took the trouble to send him a further copy of the letter by email.

27. Returning to the matters of fact which are not contentious between the parties, we find that the Company was incorporated on 12 May 2009. At all material dates Mr Clements has owned all its shares and been its sole director.
28. In or about July 2010 Mr Clements, having decided to move his business to new premises and to trade primarily through the Company, made four alterations to the Document on his own initiative and without raising the matter with the Respondent. He replaced his own name as the holder of the licence with the name "Clements Cars Limited", he added a new trading address, he set out the registered office of the company and he gave the registration number of the company.
29. At a date not precisely identified in the evidence before us, but which we find to be shortly before 12 August 2010, Mr Clements approached Carlyle Finance, a finance company based in Cardiff, with a view to setting up a business relationship with them under which they would provide finance for car purchases negotiated by the Company. As part of their standard process Carlyle Finance asked Mr Clements for evidence of a consumer credit licence. He supplied to them a copy of the Document as altered by him in July 2010. We accept his frank evidence that did nothing to alert Carlyle Finance to the fact that there was in truth no licence issued to the Company and the only licence in existence was that issued to him personally. Investigations by Carlyle Finance with the Respondent revealed the true position. We accept in its entirety the contents of the witness statement of Mr Phil Dooley of Carlyle Finance dated 4 October 2010 and lodged by the Respondent. Mr Clements has not challenged its contents.
30. Carlyle Finance did not pursue a business relationship with either Appellant. In or about September 2010 Mr Clements made further alterations to the Document by adding his own name as licence holder to the name of the Company and by deleting his former business address.
31. On 8 September 2010 Mr Clements lodged with the Respondent an application for a consumer credit licence in the name of the Company.
32. On 13 September 2010 an official of the Respondent accessed the website www.clementscars.com, which is the website of the Company. Under the heading "Finance", it stated " Finance is available subject to status. Prime and Sub-prime solutions. Full UK Driving Licence Required." Further, under the heading "What is the £99 Admin Fee?" it stated "A £99 Fee including VAT at 17.5% is a fixed payment with every vehicle sold to contribute to our administration and compliance costs and includes a HPI Check, V5/Logbook Submission to DVLA in your name, Invoicing and finance submission/document handling if purchased on finance."
33. The website made no reference to any typical APR.
34. Mr Clements lodged a credit competency plan on behalf of the Company with the Respondent on 14 September 2010.
35. In the application for a consumer credit licence made on behalf of the Company the reply to the question "does your organisation have a controller?" was "no". As noted above at all material dates Mr Clements was the sole shareholder and director of the Company and therefore its controller within the meaning of section 189 of the Act.

The case for the two Appellants

36. In his grounds of appeal Mr Clements argues that he had done everything in his power to inform the Respondent of his "status, location and registration number". He had paid a fee of £970 for a licence in the Company name to operate exactly the same functions of selling motorcars by way of finance. As he puts it in his grounds of appeal "Ltd is the only change." He had received no customer complaints, he had no disputes with finance companies, his business affairs were and had always been in order, he had no complaints from

the Police or trading standards bodies, he did not have a criminal record and had not been involved in any wrongdoing, no customer had ever suffered detriment in a finance case he had brokered or advertised, he was a VAT registered motor dealer and he operated from trade premises and paid business rates and taxes.

37. As to the Document he points out that there is no longer a requirement to produce a paper licence or display it on the premises. He had been sent “a template licence” by the Respondent, which had been sent to him in order to enable him to make amendments. He had not changed the original licence details because they were held by the Respondent electronically. He asks why if the Respondent did not want him to change the “paper copy licence” they sent him a template for that purpose.
38. As to the absence to a reference to a typical APR on the website he apologised for this and pointed out that there had been no consumer complaint or detriment to any person. He said he had corrected the error.
39. He said that the version of the Document presented to Carlyle Finance was to set up a business relationship with them in anticipation of the grant of a licence to the Company. He described his conduct as “simply planning ahead, prior to my summer holiday and moving into the new premises”. When he had completed the move he submitted an application for a licence on behalf of the Company and duly paid the required fee. He pointed out that, sadly, he had just separated from his wife and daughter after twenty years of marriage. He nevertheless dealt with all the formalities required with his business and believed he had done everything reasonably possible.
40. Mr Clements makes similar points in his interview of 26 November 2010 and in correspondence.
41. He amplified and repeated these arguments at the oral hearing, and also drew attention to what he described as delays on behalf of the Respondent and (to paraphrase) an excessively pedantic attitude on the part of their officials. He drew attention in particular to the following matters :-
 1. He had a blameless record as a businessman with no history of complaints.
 2. He had satisfied HM Revenue & Customs, his local trading standards office and the DVLA (who provided him with number plates) that he was a person to be trusted.
 3. He had satisfied Banks of his probity sufficiently to permit him to take credit card payments.
 4. He was under considerable stress in 2010 as a result of the breakdown of his marriage, the sale of the matrimonial home, the move of his business premises, the transfer to the Company as a new trading entity, and the many bureaucratic hurdles which had to be surmounted.
 5. In submitting the altered Document to Carlyle Finance he had no intention to deceive but was merely anticipating a state of affairs which he expected to come about shortly. He wanted simply to save time and avoid any damage to his business which might result from delay, and he feared that there would be delay on the part of the Respondent. He was surprised that Carlyle Finance and the Respondent did not contact him with any queries. If they had he would have answered openly and truthfully.
 6. He did not understand that there was an obligation to refer to a typical APR. It would in any event have been difficult to give a realistic typical APR bearing in mind that he was not himself proposing to provide finance, and rates differed from case to case.
 7. He was not in fact trading and there was no risk of any third party coming to any harm.
 8. If the appeals failed he expected that he would be unable to continue in business with consequent severe hardship for him and employees.

The Legislative Background

42. We bear in mind that the preamble to the Act gives its primary purpose as “to establish for the protection of consumers a new system... of licensing.”
43. The provisions material to these appeals are set out in sections 24 and 32 of the Act. It is not necessary to recite those sections *in extenso*, but we note that it is a condition of entitlement for a standard licence that an applicant for a licence in relation to a type of business should satisfy the Respondent that “he is a fit person to carry on that type of business with no limitation” (section 24 subsection 1).
44. Subsection 2 requires that in determining whether an applicant is a fit person for the purposes of section 24 the Respondent is to 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 credit hire businesses or ancillary credit businesses;
 - ...
 - (c) practices and procedures that the applicant proposes to implement in connection with any such business;
 - (d) evidence of the kind mentioned in subsection(2A).
45. Subsection 2A refers to evidence tending (inter alia) to show that the applicant or the controller of a corporate applicant has engaged in business practices appearing to the Respondent to be deceitful or oppressive or otherwise unfair or improper (whether unlawful or not).
46. Section 32 provides, at subsection 1:
- “Where at a time during the currency of a licence the [Respondent] 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.”
47. Section 32 goes on to lay down certain procedural requirements. We record that no argument has been put to us that there has been any procedural defect, and we can detect no evidence of any defect in the procedure used by the Respondent in making the determinations under appeal.

The Reasons for the Decision

48. The appeals centre on the question of Mr Clements’ fitness to hold a consumer credit licence, in Appeal 1 in his own capacity, and in Appeal 2 in his capacity as controller of the Company. If at the date of the determinations he was not a fit person to hold a licence both determinations must be upheld.
49. We take into account in Mr Clements’ favour the following points:-

- 49.1. We accept that he has had a lengthy business career without complaints, investigations or convictions, and he has satisfied HMRC, the trading standards office, DVLA and various Banks that he can be trusted.

- 49.2. It might be suggested that one should infer from his conduct towards Carlyle Finance, in particular in supplying them with an altered version of the Document, that he was guilty of an intention to deceive. We place on record that we do not draw this inference. We regard Mr Clements' course of conduct towards Carlyle Finance as reckless rather than deliberately deceptive.
- 49.3. We accept that the breakdown of his marriage and the consequential adjustments in his life coupled with the complex matter of changing his trading premises and trading entity are likely to have made heavy demands on him and to have caused him a significant degree of stress.
- 49.4. We accept that in sending him an amendable electronic copy of the Document an official of the Respondent not only made it easy for him to make alterations, but very probably conveyed the impression that alterations were of no great significance.
- 49.5. We agree with Mr Clements that the fact that he has a law degree is of little relevance. Certainly, the possession of a law degree would not in our judgment create any expectation that he would on that account be familiar with the detailed law concerning consumer credit licences. At its highest the possession of his degree says no more than that he is not an unsophisticated applicant.
- 49.6. We accept that the failure to refer to a typical APR on the Company's website was inadvertent and no more than venial. We also accept that it would have been difficult in the circumstances to identify a typical APR. Nevertheless we agree with the Respondent that the circumstances were such that in law a reference to typical APR was required and that the website was in consequence in breach of the law.
- 49.7. It has not been submitted on behalf of the Respondent that any part of the conduct of Mr Clements relied on amounted to a criminal offence.
50. Nevertheless, we are compelled to conclude that Mr Clements' conduct in regard to the Document raise such grave concern that the above considerations are outweighed. Mr Clements on his own admission failed in the most elementary manner to inform himself of his obligations to report important matters to the Respondent by failing to read, adequately or at all, the letter of 7 May 2008. That letter is very clear in its language and no literate person who had read it with any attention could fail to be clear about the obligations placed on a holder of a consumer credit licence. Further, his conduct in altering the Document and sending it to a third party, namely Carlyle Finance, displays a degree of carelessness and lack of scrupulousness which can only be regarded as reckless. He has frankly admitted that he took no steps to correct any false impression he was creating in the minds of the employees of Carlyle Finance. No more than a moment's thought would have been required to realise that the sending of the Document in its altered form would create the impression that the Company was already the holder of a consumer credit licence and Mr Clements knew perfectly well that this was not the case. It is no mitigation to say, as Mr Clements does say, that he would have given a truthful answer if he had been questioned about it, or that he was merely anticipating a state of affairs which he expected to come into being. In sending the altered Document he was making an assertion that was untrue and was known by him to be untrue. He could not have had any reasonable certainty that Carlyle Finance would have made the enquiries it did, and if it had not made those enquiries it would have been put at obvious risk of trading unlawfully itself and entering into unenforceable consumer credit arrangements, to its obvious detriment. Mr Clements provided the altered Document to Carlyle Finance because it was expedient for him to do so and he saw it as being advantageous to his and the Company's business.
51. A person capable of self-interested recklessness on this scale cannot in our judgment be regarded as a person fit to hold a consumer credit licence under a system designed to protect consumers, and Mr Clements' conduct in this regard reveals among other things a lack of basic skills and knowledge in relation to consumer credit businesses. Further, Mr Clements' conduct towards Carlyle Finance was in our judgment unfair and improper within the meaning of those words in subsection (2A) of section 24 of the Act.

52. It follows that the Respondent has satisfied us that it would have been minded not to renew Mr Clements' licence had it expired at the relevant dates and therefore revocation was appropriate under section 32. It further follows that the Company, controlled as it was by a person not fit to carry on consumer credit business, was itself not a "fit person" within the meaning of that phrase in subsection (1)(b) of section 24.

53. We conclude that both the determinations under appeal were correctly made and both appeals are dismissed.

Costs

54. No application has been made for costs. We are satisfied that this is not a case in which an order for costs would be appropriate and no order for costs is made.

Signed on the original

District Tribunal Judge Jacqueline R Findlay (Chairman)

30 June 2011

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Amended 25 July 2011