

IN THE CONSUMER CREDIT APPEALS TRIBUNAL

BETWEEN:

FINANCE SELECT (UK) LIMITED

Appellant

- and -

THE OFFICE OF FAIR TRADING

Respondent

Date of hearing: 4 December 2008 (sitting in public)

Venue of hearing: Alexander House, 14-22 The Parsonage, Manchester M3 2JA

**Tribunal: His Honour Judge Peter Wulwik (chairman)
Mrs Miriam Scott
Mr Vernon Fuller**

Appearances:

**For the Appellant: Mr Christopher Lake
Mr Stephen Knight**

For the Respondent: Mr James Eldridge – Legal Division, Office of Fair Trading

DECISION

A. The Appeal

5

1. We were appointed to hear an appeal by Finance Select (UK) Limited (“the Appellant”) from the determination on behalf of the Office of Fair Trading made on 23 June 2008 pursuant to Section 34 (3) of the Consumer Credit Act 1974 to revoke a consumer credit standard licence number 609258. The appeal was listed for hearing to determine the following preliminary issue namely whether or not the notice procedure followed by the Office of Fair Trading in seeking to revoke the Appellant’s licence complied with the provisions of the Consumer Credit Act 1974. The preliminary issue was heard on 4 December 2008 at Alexandra House, 14 – 22 The Parsonage, Manchester M3 2JA.

10

15

B. Background to the Preliminary Issue

20

25

30

35

40

45

2. An application for a consumer credit licence was submitted by the Appellant dated 26 September 2007 and received by the Office of Fair Trading on 2 October 2007. Due to concerns that the Office of Fair Trading had in relation to the application, an adverse marker should have been placed on the Office of Fair Trading’s new data base “PROMOD” against the name of the Appellant, the purpose of the adverse marker being to prevent a licence being issued without full consideration of the Appellant’s fitness to hold a licence including concerns about its associates.
3. Unfortunately, problems were being experienced with the new system with the result that on 30 November 2007 a licence was said to have been issued in error to the Appellant.
4. On 14 December 2007 the Office of Fair Trading issued four notices. Minded to refuse notices were issued to the Appellant and Stephen Graham and minded to revoke notices were issued to Charter Financial Solutions Limited and Christopher James. The Office of Fair Trading contended that Christopher Lake and Stephen Knight named on the Appellant’s application form as its company officers were the same individuals as Christopher James and Stephen Graham. The Office of Fair Trading alleged that each of the licensees or applicants for licences were unfit to hold a licence. The matters relied on were the same for the various notices.
5. The investigating officer of the Office of Fair Trading subsequently discovered that a licence had been issued to the Appellant. The Adjudicator was informed of this fact by email on 18 December 2007, only some four days after the minded to refuse notice had been sent to the Appellant. The email to the Adjudicator suggested either sending out a minded to revoke notice to the Appellant or dealing with the matter by way of an erratum note. On 19 December 2008 the Adjudicator replied by email requesting the preparation of

an erratum notice by the investigation team for him to send to the Appellant and the other associated licensees.

- 5 6. The Adjudicator was on leave from 12 January to 21 January 2008. An
erratum notice for each applicant or licensee was forwarded to the Adjudicator
by an investigation officer by email on 23 January 2008. The erratum notices
sought to explain the error that had been made in the case of the Appellant and
the circumstances in which it had been committed with the adverse marker
10 system in this case not being effective in respect of the Office of Fair
Trading's licensing data base. The erratum notices sought to "update" the
original notices to show the Appellant as a licensee and the notice sent to the
Appellant to read as "minded to revoke" rather than "minded to refuse".
- 15 7. On 31 January 2008 there was a hearing before the Adjudicator when the
Adjudicator recalls passing over a notice or notices to the directors of the
Appellant. The Adjudicator did not retain a copy or copies of what was given
to the Appellant's directors, the Adjudicator not being certain whether what he
passed over to the directors was the notice or notices received by him from the
20 investigation officer or a document or documents that he prepared.
- 25 8. There was no transcript available of the hearing before the Adjudicator on 31
January 2008 due to faulty recording equipment. The Appellant's directors
only required a licence for the Appellant. The notes of the hearing indicate
that the Appellant's directors were informed by the Adjudicator that the notice
issued to the Appellant was a minded to refuse notice whereas it should have
been a minded to revoke notice, with the licence having been issued by the
Office of Fair Trading to the Appellant in error. The notes of the hearing state
that the Adjudicator had brought an erratum note as a formal acknowledgment
30 of the mistake.
- 35 9. The Appellant's directors were not legally represented before the Adjudicator
and did not object to the hearing before the Adjudicator proceeding on the
basis of considering the substance of the Office of Fair Trading's contentions
as to the fitness of the Appellant to hold a licence.
- 40 10. The Adjudicator on 23 June 2008 made the determination to revoke the
licence issued to the Appellant. The first paragraph of the decision notice
referred to the minded to refuse notice dated 14 December 2007, that the
minded to refuse notice was issued in error since the Appellant had already
45 been issued with a licence on 30 November 2007 and that "The notice issued
has been considered as a minded to revoke notice".
11. By a notice of appeal dated 8 July 2008 and received by the Tribunal on 10
July 2008 the Appellant appealed the determination of the Adjudicator to
revoke its licence.
12. On 29 September 2008 directions were given by the Tribunal for the
determination of the preliminary issue whether or not the notice procedure

followed by the Office of Fair Trading in seeking to revoke the Appellant's licence complied with the provisions of the Consumer Credit Act 1974.

C. The contentions of the Office of Fair Trading

5

13. The Office of Fair Trading's contentions were primarily set out in a letter to the Tribunal dated 24 September 2008, supported by a number of statements of witnesses of fact from the Adjudicator and other employees of the Office of Fair Trading.

10

14. The Office of Fair Trading accepted that it was not appropriate to issue a minded to refuse notice to the Appellant two weeks after the Appellant had been issued with a consumer credit licence. However they submitted that the Appellant was validly given notice that the Office of Fair Trading was minded to revoke that licence within the meaning of the Consumer Credit Act 1974 by reason of the actions taken by the Adjudicator at the hearing on 31 January 2008 and that there was no or no material prejudice to the Appellant which had any impact on the substance of the appeal.

15

20

15. The Office of Fair Trading submitted that when the Adjudicator handed the Appellant an erratum note and explained to them that he was going to deal with the matter as a minded to revoke case that that constituted due notice under Section 32 of the 1974 Act, that in effect the Adjudicator was issuing a notice in person to the Appellant in accordance with Section 176 (2) of the Act that the Office of Fair Trading was minded to revoke the Appellant's licence for the reasons which had already been provided in the minded to refuse notice and that even if the correct interpretation of what was done by the Adjudicator was to treat the minded to refuse notice as if it was a minded to revoke notice there would be no substantive difference in this case.

25

30

16. The Office of Fair Trading submitted that in the event it was considered that Section 34 of the Act cannot be complied with unless a period of 21 days for representations to the Office of Fair Trading followed the issue of a minded to revoke notice by the Adjudicator there would be no merit to that argument since it would only have caused extra cost and unnecessary delay to have had to issue a minded to revoke notice with a further 21 days for representations. The Office of Fair Trading submitted that the Appellant was in no way prejudiced by the procedure adopted.

35

40

D. The case for the Appellant

17. There was a joint statement from the Appellant's directors Christopher Lake and Stephen Knight dated 9 October 2008. The Appellant alleged that on the basis they were issued with a consumer credit licence on 30 November 2007 the directors authorised the official launch of the Appellant company, they invested thousands of pounds in the knowledge that they had a licence and they informed their agents that they were up and running and to start sending them business. They stated that they invested in the business solely in the

45

knowledge that they had been granted a licence and that they had taken on new franchisees because of this, who had invested their monies in the Appellant company to assist with their new business venture.

- 5 18. In answer to a query from the Tribunal prior to the hearing as to whether the Appellant had retained the erratum note alleged to have been produced at the hearing before the Adjudicator, Mr Lake stated that he had no recollection of such a document and did not have it.

10 **E. The hearing of the Appeal**

- 15 19. In presenting the case for the Office of Fair Trading Mr Eldridge stated that it was a straightforward case, that the Appellant had been given notice that the Office of Fair Trading was minded to revoke its licence, that that notice was given at the hearing before the Adjudicator on 31 January 2008, that the Adjudicator made it clear that an error had been made and that the notice served was converted into a minded to revoke notice. It was thought likely that the erratum notice was in the form of the draft prepared. The Office of Fair Trading relied on what was said orally at the hearing before the Adjudicator. It was submitted that the giving of the erratum notice to the Appellant's directors at the hearing was effective to give to the Appellant a minded to revoke notice within the meaning of the 1974 Act, the absence of unfairness to the Appellant being underscored by what the Adjudicator said to the Appellant at the hearing. The grounds relied on by the Office of Fair Trading did not change from the minded to refuse notice.

20. Mr Eldridge submitted that the erratum notice constituted written notice in accordance with Section 189 of the Act. It was accepted by him that the erratum notice was not of itself a minded to revoke notice, but he maintained that it should be read in conjunction with the notice previously served.

21. Mr Eldridge accepted that there had been no communication between the Office of Fair Trading and the Appellant in the six week period between 18 December 2007 and 31 January 2008 to say that the notice served on 14 December 2007 was incorrect or that the licence issued on 30 November 2007 had been issued by mistake. It was said that the Office of Fair Trading had complied with Section 34 of the 1974 Act by issuing an invitation to answer the allegations, which remained the same. It was accepted that there was a separate notice procedure for minded to refuse notices and minded to revoke notices, which converged with Section 34 of the Act.

22. Mr Eldridge stated that he had no instructions as to why the Office of Fair Trading had dealt with the matter by way of an erratum notice and not by serving a fresh minded to revoke notice on or shortly after 18 December 2007 when it was appreciated that there had been an error by the Office of Fair Trading in issuing a licence to the Appellant. Similarly, Mr Eldridge did not know why nothing had been said to the Appellant between 18 December 2007

and 31 January 2008 with regard to an error having been made by the Office of Fair Trading.

- 5 23. Mr Eldridge stated that the Office of Fair Trading had not retained a copy of the actual erratum notice given to the Appellant at the hearing before the Adjudicator. Erratum notices for each applicant or licensee were forwarded to the Adjudicator by an investigation officer by email on 23 January 2008, there being copies of those notices which sought to explain the error that had been committed and the circumstances in which it had been committed with the adverse marker system in this case not being effective in respect of the Office of Fair Trading's licensing data base.
- 10
- 15 24. Mr Eldridge stated that the notes of the hearing before the Adjudicator referred to the Adjudicator having said that there was a complication in relation to the Appellant's notice in so far as it had been issued as a minded to refuse notice, that it should have been issued as a minded to revoke notice as the Office of Fair Trading had issued a licence in error and that the Adjudicator had brought an erratum note to the hearing as a formal acknowledgement of the mistake.
- 20 25. Mr Eldridge stated that it was not the Office of Fair Trading's case that the erratum notice retrospectively changed the minded to refuse notice to a minded to revoke notice as from the date of the notice of 14 December 2007, but that there was an effective minded to revoke notice as from 31 January 2008. He stated that the Appellant had not been prejudiced by the procedure followed and had not made any oral or written representations with regard to the procedure adopted.
- 25
- 30 26. In relation to the period of 21 days provided for representations under Section 34 of the 1974 Act, Mr Eldridge accepted that the Appellant had not expressly waived any defect in the Section 34 procedure or consented to foregoing the 21 day period for representations following service of the erratum notice. Mr Eldridge stated that any defect in the procedure adopted had not caused unfairness to the Appellant and that no point had been taken by the Appellant before the Adjudicator, though he accepted that the Appellant had not been legally represented.
- 35
- 40 27. Mr Eldridge submitted that it would be disproportionate for a further notice to have to be served. The consumer credit regime was concerned with consumer protection. The Office of Fair Trading was concerned if the Appellant continued to trade while a fresh minded to revoke notice was served. If the Appellant had spent monies following the issue of a licence, the Appellant would have been aware that there were concerns over its fitness to hold a licence.
- 45 28. The deponents of the Office of Fair Trading's witness statement were not present at the hearing to give oral evidence, there having been no request by the Appellant that they should attend pursuant to paragraph 4 of the Tribunal's directions of 29 September 2008.

29. Mr Lake in opening the case for the Appellant stated that it was difficult for them to understand the legal aspects of the hearing. He stated that the Appellant had incurred considerable expense in setting the business in motion following the grant of the licence. They had not objected to the procedure followed at the hearing before the Adjudicator on 31 January 2008 because they did not fully understand the legal implications.
30. Mr Lake gave oral evidence before the Tribunal. He stated that he was a director and company secretary of the Appellant company, that the company was purchased in about July 2007 and that it started trading in January – February 2008. The company had intended to run the business of finance brokerage and franchising, setting up others as brokers. Mr Knight was the other director. The company was owned equally by Mr Lake and Mr Knight. They had a previous company and had franchisees from that company which they took across to the Appellant company, keeping them on hold until the new licence arrived.
31. Mr Lake stated that the Appellant’s directors authorised advertising, the setting up of web sites, the employment of staff and the authorisation of agents to advertise for business on the basis that they had a licence. He estimated the running costs of the company at £7,000 per month. The rent on their building was £1,300 per month, the rates were £595 per month and advertising costs were £500 - £1,000 per week, the Appellant advertising in magazines such as Daltons Weekly and Exchange and Mart, on web sites and in national newspapers such as the Daily Mirror. He thought that the company’s expenditure was £10,000 – £15,000 in December 2007 – January 2008, ignoring the monies spent by their franchisees. He said that the expenditure in December 2007 – January 2008 would be wasted if they did not have a licence.
32. In relation to the hearing before the Adjudicator on 31 January 2008, Mr Lake stated that he did not remember whether the Appellant was given an erratum document. He was not saying that they were not given such a document, but it was not on their file.
33. Mr Lake was asked a number of questions by Mr Eldridge. He was referred to paragraph 41 of the notes of the hearing before the Adjudicator on 31 January 2008 where it was recorded that Mr Lake had said that nothing was actually trading at that time with the previous company Charter Financial Solutions Limited having been closed down and the new business being only at the planning stage, that the future of the business was dependent on the Office of Fair Trading and that once the Appellant company was up and running it was envisaged that the business would start to branch out. Mr Lake stated that they had not been trading in terms of making money but were incurring costs in setting up the business. They had started spending monies when the licence was issued. The first business they did in terms of taking in money was on 1 February 2008, the day after the hearing before the Adjudicator.

- 5 34. Mr Lake stated that at the time he did not know the difference between a minded to refuse notice and a minded to revoke notice. He understood that the Appellant still had a licence following the hearing before the Adjudicator on 31 January 2008. He stated that they would not have invested in a business knowing that they could lose their licence.
- 10 35. In relation to the minded to refuse notice, Mr Lake stated that he assumed the Office of Fair Trading had made a mistake in serving the notice since the Appellant had been issued with a licence. Mr Lake stated that until he was told differently he was going to carry on investing in the business.
- 15 36. Mr Lake stated that the hearing before the Adjudicator had taken place at the Appellant's offices. As far as they were concerned, he assumed that the Office of Fair Trading wanted to speak to them but did not think any more of it at the time. They had received notices in relation to other licences but were not concerned with those licences, only that of the Appellant. He stated that he would not have paid much attention to the other notices. Prior to the hearing before the Adjudicator, he was not worried by any concerns of the Office of Fair Trading as to the fitness of the Appellant to hold a licence.
- 20 37. In answer to questions from the Tribunal, Mr Lake stated that he had not brought any documents to the Tribunal to show the expenses that had been incurred by the Appellant following the issue of the licence. He stated that they had kept all receipts and accounts but had not been asked to produce them by the Office of Fair Trading prior to the hearing. They had lived on personal monies before they began trading. The official launch of the business was when they were issued with a consumer credit licence. They placed advertising, spoke to their agents with regard to getting in business and took on two members of staff in February and March 2008 that is, following the hearing before the Adjudicator.
- 25 38. Mr Knight was not required to give oral evidence, it not being thought that he could add anything to the evidence given by Mr Lake.
- 30 39. In his closing submissions, Mr Eldridge stated that it was not accepted there had been any abuse of process on the part of the Office of Fair Trading and that they had an obligation to issue a minded to revoke notice. The Appellant had all the grounds relied on by the Office of Fair Trading in the minded to refuse notice. He contended that the minded to refuse notice still existed as a notice and that the erratum notice cured any invalidity in the earlier notice and converted the notice into a minded to revoke notice as at 31 January 2008.
- 35 40. Mr Eldridge stated that there was no merit in any argument of estoppel or abuse of process on the part of the Office of Fair Trading on the facts but accepted that situations could arise where an argument based on estoppel or abuse of process might apply. At the time of the hearing before the Adjudicator on 31 January 2008, the Appellant knew that the Office of Fair
- 40 45

Trading was seeking to revoke the licence issued and was aware of the grounds relied on.

5 41. Mr Lake made no closing remarks. In answer to a question from the Tribunal, he confirmed that no legal costs had been incurred in relation to the appeal by the Appellant company. It had taken up considerable time in dealing with the case but the Appellant was not seeking any costs if the Tribunal decided that the Office of Fair Trading was wrong to make the determination under appeal.

10 **F. The Tribunal's conclusions and decision**

42. Section 27 of the Consumer Credit Act 1974 provides for the procedure to be followed if the Office of Fair Trading is minded to refuse a licence or to grant it in terms other than those sought. It provides in so far as material that:-
15 “(1) Unless the OFT determines to issue a licence in accordance with an application it shall, before determining the application by notice –
(a) inform the applicant, giving its reasons, that, as the case may be, it is minded to refuse the application, or to grant it in terms different from those applied for, describing them, and
20 (b) invite the applicant to submit to the OFT representations in support of his application in accordance with section 34”.

Section 32 of the Act deals with the suspension and revocation of licences. It provides in so far as material that:-
25 “(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 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 –
30 (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 representations as to the proposed revocation or suspension in accordance with section 34
35 (7) A revocation or suspension under this section shall not take effect before the end of the appeal period”.

Section 34 of the Act deals with representations to the Office of Fair Trading. It provides that:-
40 “(1) Where this section applies to an invitation by the OFT to any person to submit representations, the OFT shall invite that person, within 21 days after the notice containing the invitation is given to him or published, or such longer period as the OFT may allow:
(a) to submit his representations in writing to the OFT, and
45 (b) to give notice to the OFT, if he thinks fit, that he wishes to make representations orally,
and where notice is given under paragraph (b) the OFT shall arrange for the oral representations to be heard.

(2) In reaching its determination the OFT shall take into account any representations submitted or made under this section.

5 (3) The OFT shall give notice of its determination to the persons who were required to be invited to submit representations about it or, where the invitation to submit representations was required to be given by general notice, shall give general notice of the determination”.

Section 176 of the Act deals with service of documents. Section 176 (2) provides that:-

10 “The document may be delivered or sent by an appropriate method to the subject, or addressed to him by name and left at his proper address”.

Section 189 of the Act is the definition section. Section 189 (1) provides that:-

15 “In this Act, unless the context otherwise requires
‘notice’ means notice in writing”.

20 43. The hearing was to determine the preliminary issue whether or not the notice procedure followed by the Office of Fair Trading in seeking to revoke the Appellant’s licence complied with the provisions of the Consumer Credit Act 1974.

25 44. Sections 27 and 32 of the 1974 Act provide a separate notice procedure to be followed in a case where the Office of Fair Trading is minded to refuse a licence and where it is minded to revoke an existing licence, with Section 34 of the Act in each case providing for a 21 day period to make representations to the Office of Fair Trading.

30 45. At the time the minded to refuse notice was issued by the Office of Fair Trading on 14 December 2007, the Appellant had been granted a consumer credit licence some two weeks earlier on 30 November 2007. The minded to refuse notice could have had no effect in the circumstances since a licence had already been issued, albeit according to the Office of Fair Trading as a result of the breakdown in the advance marker warning system in respect of its licensing data base.

35 46. The subsequent erratum notice said to have been given to the Appellant by the Adjudicator at the hearing on 31 January 2008 was not a minded to revoke notice. It purported to “update” the minded to refuse notice and to change it to a minded to revoke notice. In the Tribunal’s view, the erratum notice was incapable in law of having such an effect.

40 47. The procedure for revocation of a licence under Section 32 of the Act requires the service of a minded to revoke notice. That notice by Section 189 (1) of the Act has to be in writing. The recipient of the notice by Section 34 of the Act then has a period of 21 days to make representations to the Office of Fair Trading.

48. The procedure followed by the Office of Fair Trading was not validated by what was said by the Adjudicator at the hearing on 31 January 2008, nor by any omission on the part of the Appellant to take any point before the Adjudicator as to the failure of the Office of Fair Trading to comply with the correct notice procedure. The Appellant was not legally represented and was not asked to consent to waiving compliance with the notice procedure under Section 32 of the Act or in respect of the period of 21 days for making representations under Section 34 of the Act.
49. The importance of compliance with the notice procedure under the Act and the period of 21 days for representations lies in the fact that Sections 27 and 32 empower the Office of Fair Trading to refuse or revoke a licence, a potentially very severe sanction since the result of its exercise may be to prevent an applicant or licensee from conducting a proposed business or an existing business if there is already a licence in force.
50. With regard to the need to protect consumers, the fact is that if a fresh notice had been served on or shortly after 18 December 2007 and a further period of 21 days given for representations the hearing before the Adjudicator on 31 January 2008 could still have gone ahead on the basis of a minded to revoke notice in the case of the Appellant. It is not clear to the Tribunal why the Office of Fair Trading decided not to serve a fresh minded to revoke notice as soon as it became aware of the error in issuing a licence. It knew on 18 December 2007 that the Appellant had been issued with a licence on 30 November 2007. The minded to refuse notice was only issued on 14 December 2007. It could have been replaced by a minded to revoke notice, yet no fresh notice was issued and nothing said to the Appellant until the hearing before the Adjudicator some six weeks later on 31 January 2008, that being the first occasion that the Appellant was told that the licence had been issued by mistake and that the Office of Fair Trading was seeking to revoke the licence.
51. In answer to the preliminary issue, the Tribunal therefore find that the notice procedure followed by the Office of Fair Trading in seeking to revoke the Appellant's licence failed to comply with the provisions of the Consumer Credit Act 1974.
52. The Tribunal are unwilling to express any concluded view on the evidence before it whether if a minded to revoke notice was now served there might be a valid argument open to the Appellant based on estoppel or abuse of process as a result of the issue of a licence and the expenditure of monies by the Appellant. No documents were sought by the Office of Fair Trading or produced by the Appellant before the Tribunal to show the expenditure incurred by the Appellant in the period 30 November 2007 – 31 January 2008. Again, on the basis of the evidence given at the hearing but without expressing any concluded view the Tribunal consider that there may be scope for the Office of Fair Trading to argue that even if a fresh minded to revoke notice had been served on or shortly after 18 December 2007 or if the Appellant had

otherwise been told at that time of the error in issuing the licence the Appellant would still have incurred the setting up costs of the business since as far as the Appellant was concerned it had a licence issued on 30 November 2007 and was not concerned that the licence might be at risk of being revoked.

5

53. In the light of what we were told by the Appellant at the hearing namely that they had not incurred any legal costs and were not seeking an order for costs if the Tribunal decided that the Office of Fair Trading was wrong to make the determination under appeal, we consider that there should be no order as to the costs of the appeal.

10

54. We accordingly decide unanimously as follows:-

(1) That the appeal by Finance Select (UK) Limited be allowed.

15

(2) That the determination made by the Office of Fair Trading on 23 June 2008 to revoke the Appellant's consumer credit standard licence number 609258 be quashed.

(3) That there be no order as to the costs of the appeal.

20

**HIS HONOUR JUDGE PETER WULWIK
CHAIRMAN**

25

30

35

40

CCA/2008/0002