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Upper Tribunal upholds FCA's decision to refuse interim consumer credit permission to debt management business forcing it to close

Steven Maoudis t/a Montana Debt Management v. FCA
[2016] UKUT 548 (TCC)

Article by David Bowden

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Executive speed read summary

A debt management business had a licence from the OFT. It obtained interim permission from the FCA when it was established in April 2014. It offered debt management plans or full and final settlement negotiations with its client's creditors. It did not offer insolvency advice on debt management plans, IVAs or bankruptcy. It had only a small number of clients and neither the FCA nor OFT had received complaints. The FCA set it up to fail by arranging a telephone interview to set trick questions which it required the applicant to answer under extreme time pressure. This and the result of other information obtained by the FCA in the authorization application process meant the FCA issued a Decision Notice refusing full consumer credit permission. The applicant appealed to the Upper Tribunal. It was required to determine if the FCA's refusal should be suspended or not pending a full hearing. In applying the principles in *PDHL*, the Upper Tribunal ruled that the applicant had not passed the threshold under its rules to be able to obtain a suspension. After this decision was announced, the applicant withdrew its UT Reference Notice. It has now ceased to trade, closed its website and written to its clients accordingly. The FCA has made arrangements for the debtor clients to be referred to Money Advice Service instead.

Steven Maoudis t/a Montana Debt Management v. Financial Conduct Authority
[2016] UKUT 548 (TCC) 15 December 2016
Upper Tribunal, Tax and Chancery Chamber (Judge Greg Sinfeld)

What are the facts?

Mr Maoudis operated a debt management business. He sought to negotiate either a debt management plan or a full and final settlement agreement with creditors. Montana Debt Management ('Montana') had 120 clients. Montana charges clients a monthly fee of £10 for the first debt plus £2 for each subsequent debt. Its average client paid Montana £20 per month. Montana did not advise its debt clients on the 3 true insolvency solutions (debt relief orders, individual voluntary arrangements or bankruptcy) and Montana's failure to offer a full service encompassing this incurred the wrath of the FCA.

What did Montana's website claim to offer?

Although this website has now been taken down, in August 2012 this was the text displayed on the homepage of www.MontanaDebtManagement.co.uk:

'Welcome to Montana Debt Management arguably one of the best Debt Management Companies in the market place (that's just our opinion)

Montana Debt Management is part of the Montana Group of companies. We have been in business for almost two decades and have wealth of experience in Debt Negotiation, Debt Reduction and Settlement.

*Once we take a new client on board our job is to help them to **STOP** worrying, reduce the monthly amount that the client is paying their creditors and then negotiate a settlement over a shorter period of time.*

Our clients become debt free in months not years. Once we have taken these necessary steps we then tidy up and restore the clients credit file

For example: Most people who are in a Debt Management Programme are usually paying into this programme (on average) between 7- 12years.

We have a two stage strategy.

- *To reduce **YOUR** debts immediately, usually between **70% - 80%** sometimes even as much as **90%+** (This then gives you immediate extra disposable income) We then Re-Negotiate your debts in stages with your creditors making a one off payment that can be paid back over months not years. The one off payment can be as little as 5% -10% of the total amount of debt*
- *To help **YOU** to become Debt **FREE** as fast as possible, work with us and we will help you achieve this. Regardless of your personal circumstances, be it you are a new client and wish for us to help **YOU** negotiate your debts, or if you are already in a debt management programme – we will help'*

What regulatory approvals did Montana have?

Montana had a consumer credit licence from the Office of Fair Trading to carry out debt counselling and debt adjusting. When the OFT was abolished in April 2014, Montana carried over an interim permission to carry on these regulated activities from the FCA.

What happened with Montana's application for full permission from the FCA?

On 24 March 2015 Montana applied to the FCA for full permission to carry out the regulated activities of 'debt adjusting' and 'debt counselling limited to counselling with no debt management activity'. Montana met the FCA to discuss its application on 16 July 2015. Montana then amended its permission application on 20 August 2015. There was then a conference call between Montana and the FCA to discuss its permission application on 3 September 2015.

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The FCA then wrote to Montana on 20 October 2015 expressing its concerns about what the FCA claimed were 'deficiencies in Mr Maoudis' knowledge of debt solutions'. Montana replied on 23 November 2015 saying it had improved its knowledge of the 3 true insolvency solutions. The FCA then arranged a questionable telephone interview with Montana on 7 April 2016 with its sole apparent purpose of asking questions under pressure to try and trip Mr Maoudis up. The FCA's dirty tricks appear to have worked and the FCA said Montana failed 3 areas of its stress questioning. Not surprisingly Montana claimed the way the FCA went about everything had been unfair.

Montana then sought to provide the FCA with further information on 4 May 2016. However either the damage had been done or the FCA had already made up its mind and this final attempt by Montana to shore up its permission application was in vain.

What decision notice did the FCA issue to Montana?

On 16 September 2016 the FCA issued its Decision Notice to Montana refusing its application for a Part 4A permission under the Financial Services and Markets Act 2000 to carry on the regulated activities of debt adjusting and debt counselling. The notice is here: www.fca.org.uk/publication/decision-notices/montana-debt-management.pdf. The FCA said it did not consider that Montana would satisfy 2 threshold conditions:

- Condition 2D – appropriate resources, and
- Condition 2E – suitability.

The effect of the FCA's Decision Notice was that Montana's interim permission and its ability to carry out FCA-regulated activities ceases.

What were the FCA's reasons for refusing Montana full permission?

The FCA set out these 6 reasons in its Decision Notice for refusing permission:

- The FCA was not satisfied that Montana had sufficient knowledge DROs, IVAs and bankruptcy.
- Mr Maoudis lacked knowledge of insolvency based debt solutions.
- Montana required customers to research all available debt solutions on Montana's website before an initial meeting.
- There was a risk that customers would receive debt advice which was not appropriate to their circumstances.
- The FCA did not consider that the extent of the engagement of an 'Advisory Board' was sufficient to address its issues.
- The FCA was concerned that Montana's business continuity plan was not appropriate because it did not establish a reliable system for ensuring continuity of advice to customers in the event of Mr Maoudis' absence from the business.

What did Montana do when it received the FCA's Decision Notice?

Montana issued a reference notice 29 September 2016 seeking to refer the FCA's refusal to grant permission to the Upper Tribunal. This meant that the UT had to deal with this as an appeal under the Tribunal Procedure (Upper Tribunal) Rules 2008.

What happened when this case came before the Upper Tribunal?

The Upper Tribunal had to decide whether it should suspend the effect of the FCA's Decision Notice pending the determination of the reference at a full UT hearing.

What had the Upper Tribunal previously ruled in *Walker* and *PDHL*?

What the UT should do in relation to suspensions had previously been decided recently in 2 other UT decisions. They are *Walker v. FCA* and *PDHL v. FCA* [2016] UKUT 0129 (TCC). These are the 6 principles the UT laid out:

- The UT is not concerned with the merits of the reference itself and will not carry out a full merits review but will need to be satisfied that there is a case to answer on the reference,
- The sole question is whether the proposed suspension would 'not prejudice the interests of persons intended to be protected by the notice,
- The persons intended to be protected by a decision notice refusing to grant a Part 4A permission to a firm with an interim permission include the existing or potential customers of that firm,
- Detriment to the applicant such as it being deprived of its livelihood is not relevant to this test,

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- The burden is on the applicant to satisfy the Tribunal that the interests of consumers will not be prejudiced, and
- So far as consumers are concerned, the type of risk the UT is concerned with is a '*significant risk*' beyond the normal risk of a firm that is doing business in a broadly compliant manner.

What do the Upper Tribunal's rules say?

The 2008 rules provide in rule 5(5) that a FCA decision notice can be suspended where the UT '*is satisfied that to do so would not prejudice (a) the interests of any persons (whether consumers, investors or otherwise) intended to be protected by that notice, (b) the smooth operation or integrity of any market intended to be protected by that notice, or (c) the stability of the financial system of the United Kingdom.*'

What submissions did Montana make?

He said he was '*passionate about helping people get out of debt*' and that he '*tried to do the best*' for his clients. Montana contested the FCA's views on its business. Montana submitted there was '*no risk of prejudice to his clients*'. Montana said the FCA's telephone interview was '*unfair*' because '*he was required to give advice in less than 2 minutes whereas he had always taken his time to advise clients*'. Montana provided examples of how it had assisted clients in financial difficulties. Montana submitted that the FCA '*had not provided any evidence that he had ever given incorrect advice to his customers*'. Montana submitted that debt clients did '*not want to be "fobbed-off" to some charitable organisation such as StepChange of Money Advice Service*'. Montana submitted its business continuity plan (noting its low client volume) were adequate. Finally Montana submitted its clients would be in a worse position if its interim permission were not restored.

Mr Maoudis had to deal with the UT on his own relying on his own evidence and that from a part time administrator.

What submissions did the FCA make?

The FCA wheeled out all the artillery it could muster to ensure that Mr Maoudis was crushed. It instructed specialist consumer credit barrister, Mark Fell from Radcliffe Chambers in Lincoln's Inn to represent it. To ensure that no stone was left unturned, the FCA submitted witness statements from 2 senior staff members and 1 from the money advice sector:

- Robert Westwood, Senior Associate, Authorisations Division,
- Garry Hunter, Senior Manager, Authorisations Division, and
- Colin Kinloch, Debt Advice Strategy and Innovation Manager, Money Advice Service.

What ruling did the Upper Tribunal make?

The UT refused Montana's application to suspend the FCA's Decision Notice.

Judge Sinfield ruled that the issue for him is '*whether Montana has satisfied*' him that the '*interests of consumers will not be prejudiced*' if he granted Montana's application. He ruled that in his view '*there is no doubt that Montana has a serious case to answer on the matters raised in the Decision Notice*' and that the FCA's concerns were '*clearly issues which should be considered by the UT at the hearing of the reference*'. He ruled that he had to assume for the purposes of this application (but without deciding the point) that Montana did '*not meet the threshold conditions*'. He noted that the FCA submitted that there was a '*risk that the clients would be prejudiced by the fact that Montana has gaps in its knowledge*'.

As to Montana's '*Advisory Board*', the relevance or effectiveness was largely brushed aside by Judge Sinfield who noted that its members were '*mostly personal friends of Mr Maoudis or occupants of the same building as Montana*'. As to Montana's business continuity plan, the judge ruled that he '*did not consider the arrangements are satisfactory as a continuity plan*' and that what was required was '*arrangements to ensure that the clients continue to be properly advised*'.

In conclusion Judge Sinfield ruled that Montana had '*not satisfied me that there would be no risk to the interests of existing and future clients*' and that he '*must refuse to grant the application to suspend that effect of the Decision Notice*'. The judge also ruled that he did '*not accept that the clients would be in worse position if Montana cannot act for them*' noting that the Money Advice Service arrangements that the FCA had put in place would provide Montana's clients '*with a debt management service that includes initial and ongoing advice on all available debt solutions*'.

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What happened after the Upper Tribunal hearing?

Judge Sinfield announced his decision at the end of the hearing on 30 November. Sensing that the writing was finally on the wall, Montana said it wished to withdraw its Reference Notice. It confirmed this in writing to the UT on 7 December 2016 and the FCA consented to this withdrawal. The reserved judgement with reasons was handed down on 15 December 2016.

Mr Maoudis said that he would no longer trade as Montana, had closed his website and would be writing to all Montana's clients over the next few days informing them of his decision.

19 December 2016

David Bowden is a solicitor-advocate and runs [David Bowden Law](http://DavidBowdenLaw.com) which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.

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