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Upper Tribunal refuses to suspend FCA's decision to refuse consumer credit permission pending a full hearing forcing closure of another business

Nationwide Debt Consultants Limited v. FCA
[2017] UKUT 142 TCC

Article by David Bowden

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Executive speed read summary

Nationwide targeted Bengali customers living in Britain who were not native English speakers and who had run into financial difficulties. It built up a portfolio of over 1000 clients and arranged debt management plans for them as well as providing advice about other insolvency options. Nationwide had been providing this service for 9 years without problem. Nationwide held a consumer credit licence from the Office of Fair Trading. When the OFT was abolished in April 2014, Nationwide transferred across to the FCA and gained interim permission. The FCA issued it in turn with a minded to refuse letter, warning notice and decision notice. The FCA carried out a slanted review of small sample of client files and claimed Nationwide's record keeping was not adequate. The Decision Notice was to refuse Nationwide full permission. Nationwide immediately applied to the Upper Tribunal to overturn this decision on a reference application and it also applied for an order suspending the Decision Notice pending the determination of that reference. Judge Sinfield has refused to suspend the Decision Notice applying the tests previously laid down by the Upper Tribunal in *Walker* and *PDHL*. Judge Sinfield sided with the FCA (even though its witnesses were not cross-examined) and ruled that Nationwide's record keeping was not adequate and he could not be satisfied that customers would not be prejudiced if he granted the suspension application. Although Nationwide had made many improvements in its process, record keeping and documentation, Judge Sinfield ruled that this was not enough. The effect of the ruling is that Nationwide is no longer able to provide debt counseling services to the Bengali community. On CONC 8.3.4R (which provides that a firm explains the reasons why it considers the available options suitable), Judge Sinfield ruled *obiter* that this was to be interpreted as '*whether the available solutions were fully explained during the initial telephone advice call and any subsequent telephone contact'*.

Nationwide Debt Consultants Limited v. Financial Conduct Authority
[2017] UKUT 142 TCC 10 April 2017
Upper Tribunal, Tax and Chancery Chamber (Judge Greg Sinfield)

What are the facts?

Nationwide Debt Consultants Limited ('Nationwide') was incorporated in May 2008. Its sole director is Mohabbat Ali. Nationwide is a debt management company and provides advice to indebted customers about possible solutions to their financial difficulties. These solutions include bankruptcy, individual voluntary arrangements (IVAs) and debt management plans (DMPs) which it negotiates with its customers' creditors. It administers debts on its customer's behalf by taking payments from them and distributing them to the creditors in return for a monthly fee. Nationwide has just over 1000 customers. Its niche is Bengali people living in Britain who are not native English speakers.

What did Nationwide Debt Consultants' website claim to offer?

Its website remains live and at the date of writing this piece this was the text displayed on the homepage of www.nationwidedebtconsultants.co.uk

> '***Welcome to NDC***
> *Through these difficult times people can get into debt from personal or secured loans, car financing or mortgages. Many people have mail order debt or are unable to keep up monthly payments on credit cards and loans and are being chased for late payments as a result. If this is the situation NDC can help provide accurate debt advice. Call us without obligation today.*
> *Call FREE 24 hours 0800 121 4733 you can also ring on 0208 519 1000 or Text DEBT (followed by Name) to 66777.*
> ***Debt Management***
> *Reduce your monthly outgoings with Debt Management How DMP works. If you can't afford your monthly payments to credit cards, store cards, loans and overdrafts, our debt management plan can replace them all with a single affordable payment.*
> ***IVA***
> *If you are committed to taking control of your personal debts, keeping your home and avoiding bankruptcy then an IVA, could be the best solution to your debt problems. An IVA is a simple, flexible and effective way of getting rid of all your debts. The amount of debt that you can write off with your IVA will depend on what you can afford to pay.*
> ***Bankruptcy***
> *What is Bankruptcy? Bankruptcy is often considered the last resort for people struggling with debt because there are other debt solutions to consider first. It is a legal declaration for people who cannot afford to pay their creditors.*
> ***Key Information and Fees***
> *We do not charge for our initial debt advice, fees are only payable if you take up one of our debt solution. See Key Information and Fees. To find out more about managing your debt and receiving free debt advice visit*

Money Advice Service or you can get more information about how to deal with creditors if you are struggling with debt by reading Insolvency Service Guide.'

What documents and information did Nationwide provide to new customers?
Nationwide sent new customers a pack which included the following:

- a welcome letter (recording what Nationwide will do for the customer),
- its standard terms and conditions of business,
- a written explanation of each debt solution potentially available,
- a booklet from the Insolvency Service explaining the various debt options, and
- a note of the written complaints procedure.

What regulatory approvals did Nationwide have?
Nationwide held a consumer credit licence from the Office of Fair Trading covering 'ancillary credit business' which covered it to conduct '*debt adjusting'* and '*debt counselling'* from 19 November 2008. When the OFT was abolished in April 2014, Nationwide carried over an interim permission to carry on these regulated activities from the FCA.

What happened with Nationwide's application for full permission from the FCA?
On 1 September 2014 Nationwide applied to the FCA for full permission to carry out the regulated activities of '*debt adjusting'* and '*debt counselling'.* The FCA asked to review 25 out of its 1102 client files (a sample base of 2.26%). Following this review, the FCA issued a 'minded to refuse' letter dated 1 September 2016. The FCA then issued a Warning Notice dated 5 October 2016.

What decision notice did the FCA issue to Nationwide?
On 24 January 2017 the FCA issued its Decision Notice to Nationwide 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 has not been published by the FCA on its website.
The FCA said it did not consider that Nationwide would satisfy 3 threshold conditions:

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

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

What were the FCA's reasons for refusing Nationwide full permission?
The FCA set out these 3 reasons in its Decision Notice for refusing permission. The FCA claimed that Nationwide:

- did not keep orderly records which were sufficient to enable the FCA to ascertain that it was complying with its obligations under the FCA's Consumer Credit Sourcebook ('CONC') when giving debt advice,
- did not include in its written advice to customers those matters stipulated in **CONC 8.3.4R**, and
- had a quality assurance process that the FCA could not be satisfied was adequate partly due to the claimed failings in Nationwide's record keeping.

What did Nationwide do when it received the FCA's Decision Notice?
Nationwide immediately issued a reference notice dated 25 January 2017 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,
- 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*.'

Who provided witness evidence to the Upper Tribunal?
On behalf of Nationwide, Mr Mohabbat Ali provided 2 witness statements but he was not cross-examined on them at the hearing of the suspension application.
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:

- James O'Connell, Manager, Authorisations Division,
- Garry Hunter, Senior Manager, Authorisations Division,
- Colin Kinloch, Debt Advice Strategy & Innovation Manager, Money Advice Service

What submissions did Nationwide make?
Nationwide's counsel made a concession that it did not submit that there was no reasonable prospect of the FCA succeeding on the reference which Judge Sinfield said was '*an important concession'*. Either this concession should not have been made or it should have been qualified in some way. In summary Nationwide submitted:

- It had improved its record keeping,
- It had engaged the services of a specialist firm of consumer credit compliance consultants, and
- No customers had suffered any prejudice.

What submissions did the FCA make?
Once again the FCA wheeled out all the artillery it could muster to ensure that Nationwide was crushed. It instructed specialist consumer credit barrister, Mark Fell from Radcliffe Chambers in Lincoln's Inn to represent it. The FCA submitted that:

- There remained deficiencies in Nationwide's record keeping of new client take ons,
- The FCA was unable to audit whether Nationwide had complied with CONC because of these record keeping failings,
- It was not satisfied that appropriate advice had been given, and
- There remained a real risk of consumer prejudice if the suspension application was granted pending the hearing of the full reference.

What assessment did the Upper Tribunal make of the witnesses?
Disappointingly, none of the FCA's witnesses were cross-examined at the hearing. It should be noted that **both** Mr Hunter and Mr Kinloch had given evidence in broadly similar terms in *Montana Debt Management* **[2016] UKUT 548 (TCC).** Astonishingly the Upper Tribunal does not pause to consider whether the evidence is jaded or based on a misguided vendetta by the FCA. Judge Sinfield merely limply notes that '*this places the Tribunal in a difficult position where there is conflicting evidence from the parties. Further,*

in an application of this sort, the evidence is often not evidence of fact but of untested and conflicting opinion.' It is clear from this that the Upper Tribunal has fallen into error in this case

What issues did the Upper Tribunal have to determine on suspension application?
Judge Sinfield said there were these 3 issues that remain outstanding from the FCA's Decision Notice:

- Nationwide's record keeping,
- Nationwide's compliance with CONC **8.3.4R**, and
- Nationwide's quality assurance process.

What does the FCA handbook say?
For all the blubber, fat and waffle that parades as the FCA Handbook, in this case the FCA homed in on only 2 things – 1 from the Senior Management Arrangements, Systems & Controls sourcebook (**SYSC**) and the other from CONC:

- **SYSC 9.1.1R** which requires an authorise firm to '*arrange for orderly records to be kept of its business and internal organisation, including all services and transactions undertaken by it, which must be sufficient to enable [the Authority] to monitor the firm's compliance with the requirements under the regulatory system, and in particular to ascertain that the firm has complied with all obligations with respect to clients*', and
- **CONC 8.3.2R** which says a firm must ensure that '*(1) all advice and action taken by the firm or its agent or its appointed representative: (a) has regard to the best interests of the customer, (b) is appropriate to the individual circumstances of the customer, (c) is based on a sufficiently full assessment of the financial circumstances of the customer (2) customers receive sufficient information about the available options identified as suitable for the customer's needs, and (3) it explains the reasons why the firm considers the available options suitable and other options unsuitable.*'

What ruling did the Upper Tribunal make on the suspension application?
The UT refused Nationwide's application to suspend the FCA's Decision Notice.

What determination did the Upper Tribunal make on Nationwide's record keeping?
Mr Ali said in his witness statement that when a prospect rang, either he or an employee would:

- go through a fact find exercise to establish the customer's financial situation,
- explain the options available to them, and
- make a recommendation.

He said Nationwide sent documents in English to the customer setting out the recommendation that had been given and leaving the final decision to the customer. If the customer returned the letter of authority then Nationwide sent out a welcome pack including a debt solutions guide and an insolvency guide.

Mr O'Connell immediately put the boot in on Nationwide (although some of his assertions are wrong or misguided). Mr O'Connell claimed that when customers said they had been made redundant Nationwide had not probed (or there was insufficient evidence that it had) as to any redundancy package. Despite a 2nd witness statement from Mr Ali to try and refute Mr O'Connell's assertions, Judge Sinfield said he did '*not find the explanation provided by Mr Ali satisfactory'*, that '*the notes were ambiguous'*, that Mr Ali's response '*merely serves to underline the unsatisfactory nature of the notes'* and that he accepted the FCA's evidence '*in relation to the shortcomings of the notes and records'*.

In paragraph 31 of the judgement Judge Sinfield clearly falls into error again where he states that '*in his statement Mr O'Connell stated that in his opinion the most recent files produced by Mr Ali'* showed that Nationwide '*was still falling short'*. However Mr O'Connell is only a lay witness. He is not an independent expert in data management. All Mr O'Connell can do is provide evidence from the FCA's systems and comment **factually** on what any audit has produced.

Nevertheless Judge Sinfield went on to examine 5 Nationwide files that had been volunteered by it to show that it had improved since the FCA issued its MTR letter. Nationwide's counsel stressed that these files showed that Nationwide had:

- a fact find recording the customer's information,
- a record of the customer's income and expenditure with notes,
- a statement of affairs,
- a letter of authority,
- a note of the written complaints procedure,
- a summary of the customer's financial situation,
- a compliance checklist, and

- records of communications with creditors.

The FCA said some files mentioned county court judgments but it is clear the FCA had mixed up judgments with claim forms. In paragraph 38 of the judgement both the FCA and Judge Sinfield get things badly wrong. It is clear that the target market of Nationwide were people towards the lower end of the social scale who were struggling to make ends meet. In many case a debt management plan would be the most appropriate solution even if these last many years. Mr O'Connell claims (but he does not appear to be a licensed insolvency practitioner) that '*an IVA would be a more suitable solution'* but this ignores the substantial upfront set-up cost for an IVA which will typically be around £3000 because a supervisor is required to hold sufficient funds in case he needs to progress to bankruptcy.

The FCA said they had no concerns whatsoever about 2 of the 5 files. On the 5th file examined, again it is clear from paragraph 39 that Judge Sinfield falls into error because he seems to think an individual's file at a credit reference agency will only be affected if a DMP fails. This is not the case and nor is the Mr O'Connell's evidence on this accurate but it is positively misleading. Again Mr O'Connell has no expertise as to how white and black data is recorded, updated or removed with credit reference agencies by their subscriber banks and other members.

Nationwide's counsel made what should have been a knock-out submission that '*in relation to the five most recent files, the FCA sought to challenge the advice given which showed that the FCA was able to determine NDCL's compliance'*. Nationwide also submitted that '*when considering customer prejudice, what mattered was the quality of the advice and not the record of that advice'*. Disappointingly Judge Sinfield says that he does '*not accept Mr Popplewell's submissions'*. Judge Sinfield sees a suspension application as a binary one with him ruling that '*the only issue which I must decide is whether I am satisfied that NDCL's customers will not be prejudiced if the effect of the Decision Notice is suspended*'. Judge Sinfield ruled that Nationwide '*must either satisfy me that it is now compliant with **SYSC 9.1R** or that it has taken steps to ensure that its existing and future customers will not be prejudiced by any failure to keep adequate records*'. On this he ruled that Nationwide had '*not satisfied me on either point*'.

Whilst Judge Sinfield noted that there had '*been some improvement'* he ruled that Nationwide was '*still not complying fully with **SYSC9.1R'*** which meant that ***'****the FCA's ability to monitor the advice'* had been compromised. Concluding on this issue Judge Sinfield ruled he was '*not satisfied that NDCL's existing and future customers will not be prejudiced if the effect of the Decision Notice is suspended*'.

What determination did the Upper Tribunal make on Nationwide's CONC compliance?
The UT said it had enough to determine the suspension application on the record keeping ground alone, so strictly what it goes on to rule in relation to CONC is *obiter*. Nationwide submitted that it complied with **CONC 8.3.4R** because it '*provided its advice in a durable medium, namely the Welcome Letter'* because it '*provided information about which debts were included in or excluded from a DMP in the statement of affairs'* and that even if there had been a breach '*no customer prejudice would be caused by it as information would be provided by the relevant solution provider*.'

Judge Sinfield had to resolve a dispute as to the scope of **CONC 8.3.4R.** On this he ruled that he considered that '*the risk of prejudice arises from a customer choosing an inappropriate and unsuitable debt solution because he or she has not been provided with sufficient information to make an informed choice*'. He ruled that this did not '*turn on whether a particular range of debt solutions was fully set out in writing and provided to the customer'* but rather '*whether the available solutions were fully explained during the initial telephone advice call and any subsequent telephone contact'*. Although Judge Sinfield observed that the FCA had '*not pointed to any files where a customer has been prejudiced by the absence of advice in a durable medium or a failure to comply with CONC 8.3.4R(1)*' he then ducked this issue by ruling that whether or not Nationwide '*complied with CONC 8.3.4R'* was '*for hearing of the reference'* but helpfully he ruled that he accepted that Nationwide '*provided advice to customers in writing, as well as orally'* and that an '*absence of an explanation of which debts are included or excluded' was 'not likely to prejudice the interests of customers'*.

What determination did the Upper Tribunal make on Nationwide's quality assurance process?
Judge Sinfield noted that Nationwide had now appointed Consumer Credit Compliance Limited to carry out a review of its process. Nevertheless he said this was not enough ruling:

> '*The appointment of a company specialising in compliance to carry out a review of two files each month does not address the fundamental difficulty which is that if NDCL's record keeping is inadequate, as I have found above, then the compliance company would find it difficult, if not impossible, to assess the quality of the advice given by NDCL to the customers. It may be that the compliance company is able to interrogate not only the files but also Mr Ali and his staff and verify that NDCL is giving suitable advice to customers. However, as the company had yet to begin its compliance role at the time of the hearing, I cannot be satisfied that is the case at this stage*.'

What ruling did the Upper Tribunal make on the privacy application?
As Nationwide's suspension order application failed, it accepted that its application to keep proceedings in the Upper Tribunal private until after the determination of the full reference hearing fell away.

Are there any other comments on this ruling?
This is a terrible decision.

The effect of this decision and *Montana Debt Management* is that it is now impossible (or seemingly impossible) for a business refused permission by the FCA to be able to successfully apply to suspend the effect of that decision pending the determination by an independent judicial body (the Upper Tribunal). This in effects shifts power absolutely to the FCA and renders the procedure in the UT rules on suspension applications worthless. This cannot be right.

Before the OFT was abolished, appeals of this nature went to the Consumer Credit Appeals Tribunal which heard the evidence and was of equivalent rank to the First Tier Tribunal. One of the lesser noted effects of the transfer of powers from the OFT to the FCA was the abolition of this layer of judiciary with the effect that appeals went to the Upper Tribunal which unusually exercised original jurisdiction (rather than appellate jurisdiction that it was set up to provide).

The UT in this case bases its decision on the earlier decisions in *Walker* and *PDHL*. Whilst it is right that the UT follows its earlier decisions, it has to be said that the Court of Appeal has not yet looked at this and ruled on whether the UT is correct or not.

In *Montana*, again the UT refused to grant a suspension order ruling that the issue is whether the firm had satisfied the UT that the '*interests of consumers will not be prejudiced'* if it granted the application. Judge Sinfield ruled that he had to **assume** for the purposes of this application but without deciding the point that the firm did '*not meet the threshold conditions'*. Judge Sinfield was also the judge in *Nationwide* and once again he has not decided the point. He has **assumed** that the FCA is correct even though its evidence is untested.

This is highly unsatisfactory. The evidence is only tested by cross-examination when the reference is heard usually by a full panel of 3 UT members. But this is too late if a suspension application has been refused, a privacy application has been refused and a firm's reputation and/or business destroyed.

The FCA in discharging its general functions is required to have regard to both '*the need to minimise the adverse effects on competition that may arise from anything done in the discharge of those functions'* and '*the desirability of facilitating competition'*. The effect of what the FCA has done in this case and others is to reduce competition in the market by taking out niche players one by one. This is highly unsatisfactory here because now the FCA needs to find another provider to look after this client base who is fluent in Bengali. It is also questionable whether what the FCA has done here crosses the line in relation to the public sector equality duty under the Equality Act 2010.

Finally there are a number of clear errors on the face of this judgment with Judge Sinfield wrongly treating FCA evidence as expert evidence when it is not. The evidence and findings in relation to both IVAs and the reporting of data at credit reference agencies is simply wrong.

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David Bowden is a solicitor-advocate and runs David Bowden Law 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.