



Reference number: FS/2013/0011

FINANCIAL SERVICES–Supervisory Notice –Application for direction to suspend effect of notice until reference disposed of –Notice varied Applicant’s permission by removing all regulated activities with immediate effect – Reason for notice being failure to satisfy Threshold Conditions- Respondent not satisfied that Applicant a fit and proper person because in its opinion Applicant conducting his affairs in an inappropriate manner and acted with a lack of integrity-whether Tribunal satisfied that the direction to suspend the effect of the notice would not prejudice the interests of consumers –No-Whether necessary for notice to take effect immediately- Yes-Application dismissed-Rule5(5) The Tribunal Procedure (Upper Tribunal) Rules 2008

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

NOEL NORBERT WALKER Applicant
TRADING AS WALKERS FINANCIAL PLANNING

- and -

THE FINANCIAL CONDUCT AUTHORITY Respondent

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

Sitting in public at 45 Bedford Square, London WC1 on 13 January 2013

The Applicant in person

Adrian Berrill-Cox, Counsel, instructed by the Financial Conduct Authority, for the Respondent

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DECISION

Introduction

1. By way of a Second Supervisory Notice issued on 19 September 2013 (“the Notice”) to the Applicant (“Mr Walker”) the Respondent (“the Authority”) decided, pursuant to s 55J of the Financial Services and Markets Act 2000 (“the Act”), to remove all of the regulated activities from Mr Walker’s permission with immediate effect.

2. Mr Walker referred the matter to the Tribunal, by a Reference Notice dated 18 October 2013. In his Reference Notice Mr Walker made an application for a direction that the decision contained in the Notice be suspended pending the determination of the reference pursuant to Rule 5(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008. I heard that application on 13 January 2013 and gave an oral decision dismissing the application. What follows are my reasons, based on the oral decision.

Background

3. The Authority’s decision to issue the Notice is based on the facts and circumstances described below. I should emphasise that at this stage I have made no definitive findings of fact on any of the matters that have not been accepted as common ground; it is clear that Mr Walker strongly challenges a number of the findings and evidence on which the decision to issue the Notice is based and those will be matters that will have to be resolved at the substantive hearing of the reference. I will therefore seek to indicate where matters which I describe are the subject of dispute.

4. Mr Walker, a sole trader, was authorised by the Authority on 1 December 2001 to advise on and arrange on certain investments. At that stage his permission was confined to carrying on those activities in respect of investments such as investment insurance, pensions products and collective investment schemes, the activities concerned in relation to those kinds of instruments being defined in the Authority’s Rules as “designated investment business.” As the scope of the activities regulated by the Authority was extended, Mr Walker’s permission was also extended so as to cover advising and arranging on regulated mortgage contracts in October 2004 and general insurance contracts in January 2005.

5. On 31 December 2012 the Authority’s Retail Distribution Review (“RDR”) came into effect. From that date, financial advisers were not permitted to provide retail investment advice in relation to designated investment business unless they had obtained “Level 4” professional qualification. Mr Walker has never held such a qualification and did not intend to try to acquire it.

6. Accordingly on 28 January 2013, having obtained advice from the Authority Mr Walker applied to the Authority to vary his permissions so as to exclude from its scope any activities amounting to designated investment business. This application was approved with effect from 19 February 2013 and from that time Mr Walker’s

permissions were confined to advising on and arranging regulated mortgage contracts and general insurance contracts.

5 7. Mr Walker was aware of a number of customers to whom he had given advice in the past on the possibility of those customers transferring their personal pensions contracts from their existing product provider to another provider who Mr Walker believed offered a better performing fund than the ones the customers were currently investing in. He told me he had provided this advice during 2010 but it had not been implemented because of a break Mr Walker then took from his business for health reasons. Mr Walker also told me that in respect of those customers he held the necessary application forms to complete the transfers. In some cases these were completed but undated forms signed by the customers concerned. In other cases he said he held forms signed in blank, that is where the customer had signed the necessary declaration but had left it to Mr Walker to complete the substantive information required on the form in accordance with information provided by the customer, the form then to be dated and submitted when authorised by the customer.

20 8. Mr Walker told me that in the autumn of 2012 he had identified that the funds in which the customers referred to above were invested were performing so badly that he would be doing them a disservice if he did not make an effort to get their business transferred before he was no longer able to conduct designated investment business. He was also mindful of the fact that if he were able to effect those transfers before the relevant provisions of the RDR came into effect he would be able to receive commission for his services out of the customer's investment, whereas if the transfer was effected after the relevant time the customer would have to pay the fees concerned directly to the adviser.

25 9. According to his account, in the autumn of 2012 Mr Walker made contact with Liverpool Victoria ("LV"), the product provider whose contracts he was minded to recommend the customers concerned should transfer to, about the transitional arrangements that applied to contracts being transferred after the date the RDR came into force. Mr Walker says that LV told him that they would continue to accept business on pre RDR terms, that is where commission could be paid out of the fund to the adviser, so long as the transfer was completed by 31 March 2013 and the relevant advice had been given by 31 December 2012. He also says he obtained advice from his compliance advisers to the same effect.

35 10. Therefore, Mr Walker made contact with ten customers during February and March 2013 with a view to transferring their pension contracts before the 31 March deadline. It is Mr Walker's case that he gave no advice to those customers and was merely implementing advice given back in 2010. In respect of seven of those customers duly completed transfer forms were submitted to LV with original signatures of those customers before the deadline. In respect of the remaining three customers Mr Walker was struggling to complete the transfers before the deadline and took the view that he may not have enough time to see them to obtain new original signatures on transfer forms. He therefore decided to use a copy of the signature that he had on the forms completed in 2010. Mr Walker could not explain why, but apparently he only held copies of forms with copy signatures for these three

customers rather than forms with original signatures. Mr Walker believed it was in order to proceed in this manner because as a matter of practice LV did not require original signatures; applications could be submitted online without a signature. He therefore believed that the requirement of a signature is not relevant. He also
5 maintained that he was acting in the best interests of the customers concerned as he was ensuring that the customers did not have to pay for advice following RDR coming into effect. Mr Walker has not produced any evidence of the documents signed in 2010 or notes of the discussions with customers which took place at that time.

10 11. It is Mr Walker's case that the three customers concerned authorised him to proceed in this way, although one of the customers later changed his mind and informed Mr Walker that he did not wish to proceed with the transfer.

12. Mr Walker explained the process by which he maintained that the three customers had given their consent for him to submit transfer applications in this way.

15 13. Mr Walker visited the first customer, Mr Workman, at his home on 30 March 2013. Mr Walker did not bring a new transfer form with him for Mr Workman to sign, but having discussed with Mr Workman whether he wished to proceed with a transfer obtained his oral consent to proceed on the basis of the existing copy signature. Mr Walker appreciated that Mr Workman was making a decision in a rush, so, he
20 maintains, he told Mr Workman that if he changed his mind he could withdraw from the transaction. On 31 March Mr Walker submitted Mr Workman's application but on 3 April Mr Workman left Mr Walker an answer phone message saying he did not wish to proceed.

25 14. With regard to the other two customers, Mr Ruff and Miss Hester, Mr Walker had telephone conversations with them in the latter part of March 2013 and obtained their oral authority to proceed on the basis of forms containing the copy signatures previously provided. Mr Walker maintained that he made appointments to see Mr Ruff and Miss Hester at a later date to give them copies of the documentation submitted but these meetings never took place because LV subsequently carried out
30 an investigation into the circumstances of the transfers which were not completed.

35 15. Mr Walker maintains that he gave the three customers concerned no advice on the merits of the transfers at that time, on the basis that all the necessary advice had been given back in 2010. He now accepts that the arrangements he made to submit the transfers did amount to designated investment business, namely the activity of
arranging deals in investments. He maintains that he made an honest mistake in thinking that because he gave no further advice he was not carrying on designated investment business and therefore was not in breach of his varied permission.

40 16. During the course of its investigation, the three customers gave written statements to a Mr Newell, an investigator employed by LV. In those statements they denied having given consent to Mr Walker to proceed with the transfers and denied signing the transfer documents. Mr Walker vehemently contests these denials; he maintains

that Mr Newell acted improperly in obtaining these statements and the evidence obtained is tainted.

Basis of the Notice

17. In essence the Authority has preferred the evidence of the three customers, based on the statements given to Mr Newell, to Mr Walker's account and has concluded that no consent to the transfers were given. They maintain that even if Mr Walker's account of the use of the copy signatures is correct such conduct amounted to acting without integrity, in breach of Principle 1 of the Principles for Businesses, because LV was given the false impression that the signatures on the forms were original signatures and the forms had been signed on the date inserted by Mr Walker. Neither do they accept that Mr Walker's contention that he was acting in the customers' best interests justifies proceeding in this manner. The Authority does not accept that Mr Walker did not give further advice to the customers when he contacted them in March 2013 nor do they accept that he acted under a mistake as to the extent of his permission when submitting the transfers.

18. On the basis of these findings the Authority has concluded that Mr Walker has acted without integrity in breach of Principle 1. The Authority has concluded that Mr Walker has failed to satisfy the Threshold Conditions for authorisation in that the Authority is not satisfied that Mr Walker is a fit and proper person having regard to all the circumstances because he has not been conducting his affairs in an appropriate manner. The Authority justifies the removal of all of Mr Walker's permissions with immediate effect as an appropriate response to the Authority's serious concerns about Mr Walker's behaviour because of the risk of loss or other adverse effect on consumers.

The Law

19. Pursuant to Rule 5(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008 the Upper Tribunal has the power to direct that the effect of the decision in respect of which the reference is made (in this case the issue of the Notice) is to be suspended pending the determination of the reference:

“...if it 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.”

It is common ground that I am only concerned with sub paragraph (a) in this case.

20. At this stage I am not concerned with the merits of the reference itself; the question as to whether the Authority was right in its conclusions on the facts and what is the appropriate action to take in the light of the facts ultimately found are matters to

be determined after the hearing of the reference and live evidence from the parties involved. At this stage the sole question for me is whether in all the circumstances, with the competing positions of the parties as described above, I can be satisfied that suspending the immediate effect of the Notice would not prejudice the interests of any relevant person. In this case, as the Notice itself states, the persons intended to be protected by the Notice are consumers so I approach the issue from the perspective of whether it is necessary not to suspend the effect of the Notice in order to protect the interests of consumers.

21. I stress the fact that the sole consideration is the question of consumer protection. It is not necessary for me to balance the consumer protection issue against the clear detriment to Mr Walker involved in the fact that he has been deprived of his livelihood since the Notice was issued; if I am not satisfied that suspending the Notice would not prejudice the interests of consumers I must not suspend its effect, regardless of the effect on Mr Walker's business. Parliament has given the Authority the power to vary an authorised person's permission with immediate effect because a delay in taking the action may be prejudicial. In so doing it has put the burden on the subject of the Notice to satisfy the Tribunal that consumer interests will not be prejudiced by its suspension and has essentially decided that clear priority must be given to the interests of consumers.

22. That is not to say that any risk to consumers will justify the restrictions not being suspended. Any financial services business, however well run, poses a risk that in at least some cases there will be a risk to consumers in the activities it carries on. The question is whether there is a significant risk which is beyond the normal risk of doing business in a broadly compliant manner.

23. It is also necessary to consider whether the circumstances on which the Authority has concluded that a Supervisory Notice imposing the restrictions concerned is justified are sufficient, if ultimately established, to justify such a Notice and if the circumstances prevailing at the time the application to suspend is considered demonstrate that the applicant has a serious case to answer on the reference. So, for instance, if in this case the Authority was relying purely on Mr Walker having honestly misunderstood the terms of his permission after it was varied but it was clear that customer consent had been given to the transfers the Tribunal may take the view that suspension would be justified.

24. I should emphasise that each case must be considered in the light of its own circumstances and I have not derived much assistance from the previous cases cited to me which have all been on largely different factual scenarios to the one I am faced with in this case.

25. It is against these principles that I turn to the decision to be made on this application in the light of the submissions of the parties.

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Submissions

26. Mr Walker relies on the fact that he no longer carries on designated investment business. The business that he would carry on if the Notice was suspended would be confined to mortgage and general insurance business and he submits such business, in respect of which he holds no client money, poses a much lower level of risk to consumers. He submits that in his career he has submitted well over 1,000 applications for financial products on behalf of customers over a period of 25 years and only in respect of the three applications at issue in this case have there been any concerns expressed. Those three applications were submitted in a unique situation of a “closing down sale” where misunderstandings occurred and he “cut corners” to achieve a result that was in the best interests of his customers and where the Authority’s evidence had been tainted by a biased and unlawful investigation. In those circumstances the maintenance of the restrictions is disproportionate.

27. The Authority essentially relies on the findings in the Notice as showing that there would be a serious risk that if the restrictions were suspended there would be further prejudice to consumers.

Conclusions

28. As I have indicated, there are significant matters in dispute which will have to be resolved following the hearing of the reference. The evidence may show that Mr Walker is correct in his position that the customers gave consent for their copy signatures to be used and I welcome the fact that the Authority will now be seeking to rely directly on the evidence of the three customers rather than as they have done to date on the statements given to Mr Newell. Mr Walker will then have the opportunity to cross examine those customers. The circumstances regarding the use of the signatures will have to be examined to see if their use really amounts to a lack of integrity as the Authority contends. The Tribunal will also have to assess Mr Walker’s assertions that his carrying on business after his permissions were varied was simply an honest mistake and did not involve him giving further advice. If Mr Walker is vindicated on all of these issues the case for the Notice will fall away.

29. On the other hand if the Authority is right in their interpretation of events the prospects of avoiding the continuation of the restrictions do not look good. In those circumstances there would be a clear risk to consumers if the restrictions were lifted. All the circumstances I have identified above demonstrate in my view that Mr Walker has a serious case to answer and on the basis of the principles I identified above Mr Walker is unable to satisfy me that there would not be a significant risk to consumers if the restrictions were suspended at this stage.

30. I do not accept the fact that Mr Walker only wishes to conduct mortgage and general insurance business makes a difference. There would be equal concerns if the behaviour complained about related to those types of business rather than designated investment business and consumers are entitled to the same level of protection for both.

31. I have carefully considered the fact of Mr Walker's unblemished record over a period of 25 years and his submission that what occurred was an isolated act which is unlikely to be repeated. However, if the allegations are ultimately made out the fact that they follow a long unblemished record is unlikely to prevent restrictions of some kind being imposed. As I have indicated that there are serious concerns that need to be answered I can not allow this factor to tip the balance in favour of the restrictions being suspended. The other points raised by Mr Walker are matters for the substantive hearing of the reference and I cannot give weight to them at this stage.

32. For these reasons I cannot suspend the effect of the Notice. I have now made directions designed to bring the reference to a substantive hearing as soon as practicable.

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TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE

RELEASE DATE: 03 FEBRUARY 2014

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