

*APPEALS FROM THE TRIBUNAL – Application for permission –
Decision as to permission – Whether appeal raises point of law – Whether
Tribunal considers appeal to have real prospect of success – Whether any
other compelling reason why appeal be heard – Application refused –
FS&MT Rules 2001 r.24*

FINANCIAL SERVICES AND MARKETS TRIBUNAL

HEATHER, MOOR & EDGECOMB LIMITED

Applicant

- and -

FINANCIAL SERVICES AUTHORITY

The Authority

(Application for Leave to Appeal to Court of Appeal)

Tribunal: SIR STEPHEN OLIVER QC

Sitting in Chambers in London on 1 July 2008

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DECISION

1. The decision of the Authority, referred by the Applicant to the Tribunal, was that the Applicant's Part IV Permission should be cancelled. The reason for the decision was that the Applicant had failed to pay "the Crofts' FOS Award", made in October 2003. On that basis the Authority could not be satisfied that the Applicant was a fit and proper person having regard to all the circumstances and the Applicant was therefore failing and likely to fail to satisfy Threshold Condition 5.

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2. The Tribunal held that unless the Applicant paid the Crofts' FOS Award (plus interest) within 28 days, its Part IV Permission should be cancelled. The Tribunal's decision was released on 5 June 2008. On 17 June the Applicant applied, pursuant to rule 23(1) of the Financial Services and Markets Tribunal Rules 2001, for permission to appeal to the Court of Appeal under section 137(1) of the Financial Services and Markets Act 2000.

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The Tribunal's decision

3. The Tribunal noted that the Applicant had failed since November 2004 to comply with "the Crofts' FOS Award". The Tribunal concluded that the outcome of "the Crofts Enforcement Action" (in which the Crofts had taken enforcement action before the County Court but had withdrawn their claim prior to any form of determination by the County Court) in no way displaced the Crofts' FOS Award and the Applicant's obligation to comply with it.

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4. The Tribunal further decided that, on the assumption that there was no register and that the Crofts' FOS Award was not therefore entered on a register, the only consequence was that the Crofts' FOS Award was not enforceable at the instance of the Crofts. The Crofts' FOS Award nonetheless remained binding on the Applicant.

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5. In the result, the Tribunal concluded, the appropriate action for the Authority to take was to cancel the Applicant's Part IV Permission on the grounds that the Applicant could not be regarded as a fit and proper person. The Tribunal nonetheless directed that the proper course was for the Authority to direct that unless the Applicant paid the Crofts' FOS Award (plus interest) within 28 days, its Part IV Permission should be cancelled.

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The criteria for granting permission

6. A party to a reference to the Tribunal may with permission appeal to the Court of Appeal on a point of law from a decision of the Tribunal disposing of the reference.
5 That is the effect of section 137(1).

7. Permission to appeal may be given in two circumstances. The first is where the court (or tribunal) considers that the appeal would have a real prospect of success. The question here is whether the appeal has a realistic, as opposed to a fanciful,
10 prospect of success. The second condition is that there is some other compelling reason why the appeal should be heard. I refer in this connection to CPR 52.3(6) (which applies to appeals from the tribunal to the court of appeal: see paragraph 17.2 Practice Direction – Appeals, 52 PD.78 and the notes at paragraph 52.3.7 of Volume 1 of the White Book (2008 edition) at pages 1395 and 1396). Permission will be
15 granted more sparingly for appeals from specialists tribunals (see the notes at paragraph 52.3.11 of the White Book). Under CPR 52.3(7), an order giving permission may limit the issues to be heard and may be subject to conditions.

The Applicant's proposed grounds of appeal

8. The Applicant refers to the outcome of the Crofts' Enforcement Proceedings in the County Court. The Applicant said that this should be treated as the same as if the Applicant had successfully applied for judicial review. This is particularly the case as the Applicant had properly advanced a public law defence and had invited the Authority and FOS to participate. In consequence, so the argument relating to the
20 point of law and the prospect of success are concerned, the Tribunal had been wrong in law in concluding that the outcome of the County Court proceedings left the lawfulness of the Crofts' FOS Award unaffected.

9. In that connection it is argued for the Applicant that the use by the Authority of its regulatory powers to compel the Applicant to pay the award, in the teeth of the outcome of the Crofts' Enforcement Proceedings, is incompatible with the Rule of Law and a denial of the Applicant's common law right to property and an infringement of Article 1P of the Convention on Human Rights.
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10. Moreover, it is argued, the use by the Authority of its regulatory powers to compel the Applicant to pay the Crofts' FOS Award is wrong in principle and is barred by section 229(10) of the Financial Services and Markets Act.
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Conclusions

11. I am against the application for leave to appeal.
- 5 12. Essentially the reference referred to the Tribunal raised an issue of fact, i.e. fitness and propriety of the Applicant. The Tribunal has dealt with this and was given the Applicant a last chance to comply before being deprived of their Part IV Permission.
- 10 13. To the extent that there is an underlying issue of law, this is identified in the Applicant's grounds of appeal that I have summarised above.
14. The Tribunal's conclusion that the Authority is neither estopped nor prevented from taking whatever action is appropriate in the circumstances does not, I think, raise
15 a point of law that has a reasonable prospect of success. The reason for my view on this is that the principles of res judicata and collateral attack of courts' decisions are well established and have been considered frequently by the higher courts. Moreover, it is beyond argument that the Authority is not bound by the proceedings to which it was not a party. It follows that in these proceedings, the outcome of the County Court
20 action brought by the Crofts can have no effect on the lawfulness of the Crofts' FOS Award. On the basis of those points it must follow that the appeal has no realistic prospect of success.
15. But does the argument relating to the Rule of Law, the Applicant's Article 1P
25 rights and its common law property rights affect the outcome (i.e. the appropriate course for the Authority to take)? The answer in my view must be "No". The Authority have a statutory obligation which is in no way affected by the Crofts Enforcement Proceedings and the circumstances in which they were withdrawn.
- 30 16. I turn now to the section 229(10) argument. This in my view has no realistic prospect of success. Section 229 provides that "only the complainant may bring proceedings for an injunction or proceedings for an order." The Authority's action was for cancellation of Part IV Permission on the basis of the Applicant's failure to satisfy Threshold Condition 5. It was not seeking to bring proceedings for an
35 injunction or proceedings for an order. For that reason I consider that the appeal, so far as it relates to the section 229(10) point, has no realistic prospect of success.

Summary

17. I do not give leave to appeal. To the extent that the proceedings before the Tribunal raised matters of law, the appeal has no real prospect of success and there is
5 no other compelling reason why the appeal should be heard.

18. As required by rule 24(5) I direct that the Applicant, if it wishes to seek permission from the Court of Appeal to appeal, must do so within 14 days of the
10 release of this Decision.

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**SIR STEPHEN OLIVER QC
CHAIRMAN**

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