Reference number FS/2010/0018

PERMISSION – Cancellation – Suitability/fitness and proprietary – Threshold Condition 5 – Inability or unwillingness to comply with requirements and standards under the regulatory system – Principle 11 of Principles for Business – Whether a failure on Applicant's part to deal with Regulator in an open and co-operative way – Reference dismissed

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
FINANCIAL SERVICES

JAMES PERMAN & COMPANY **Applicant**

- and -

THE FINANCIAL SERVICES AUTHORITY **Authority**

TRIBUNAL: SIR STEPHEN OLIVER QC (Judge)
W RUTHVEN GEMMELL
ANDREW LUND

Sitting in public in Edinburgh on 14 July 2011

James Perman for the Applicant

Nicholas Vineall QC, for the Authority

DECISION

1. The Applicant, James Perman & Company, is an unlimited company that was authorised on 1 December 2001 as an authorised professional firm to carry on designated investment business. On 31 December 2005 the Applicant was further permitted to conduct mortgage mediation business. By a Decision Notice dated 29 June 2010 the FSA decided to cancel the Applicant's permission to carry on regulated activity. The Applicant referred this decision to the Upper Tribunal. The Applicant was represented by Mr James Perman who is its sole director.

Reasons for the FSA's Decision

2. The FSA took its decision because section 45 of the Financial Services and Markets Act 2000 ("FSMA") states that the Authority may cancel a firm's permission if it appears to it that the firm is failing or is likely to fail the Threshold Conditions. The FSA says that the Applicant has failed and will continue to fail Threshold Condition 5 (Suitability/Fitness and Proprietary) due principally to its inability (or unwillingness) to comply with the requirements and standards under the regulatory system. In addition the Applicant has failed to comply with Principle 11 of the Principles for Business in that it has failed to deal with the FSA in an open and co-operative way.

3. In summary, the basis for the FSA's referred decision is that during a period of in excess of seven months the Applicant failed to co-operate with repeated requests from the FSA for the Applicant to accept a supervisory visit on terms set by the FSA.

This supervisory visit arose out of the FSA's Small Firms Assessment Programme, being one of the key ways in which the FSA supervises small firms.

The issue for the Tribunal

4. The issue for this Tribunal is to determine whether the FSA has satisfied us (the tribunal) that the Applicant has failed, and is failing and/or is likely to fail Threshold Condition 5. To determine this we need to give a narrative account of our findings of the facts starting on 20 October 2009, being the date on which the process began with a telephone call (lasting for some one hour and forty minutes) between the FSA and Mr Perman and ending with the Decision referred to us. We start by summarising the context in which those events arose. For this purpose we draw on the evidence provided by Linda Woodall who is currently head of the Investments Intermediary Department of the FSA.

Context

5. Almost all the data the FSA receives from small firms (such as the Applicant), derives from the firms themselves and the FSA therefore relies on such firms to be open and co-operative with it. Small firms do not have designated supervisors. Consequently the FSA relies on openness and co-operation from the firms themselves. In the absence of this, the FSA's ability to supervise small firms such as the Applicant effectively and adequately is significantly impaired.

6. At the material time the Assessment Programme started with the small firm being contacted by the FSA's Small Firms and Contact Division ("SFCD"). The firm

is told that the FSA intends to conduct an assessment of its ability to demonstrate fair outcomes for consumers. The firm is required to provide the FSA with certain documentation in advance. An interview, either by telephone or in person and which lasts for 1 to 1½ hours, takes place. The firm is questioned on its practices and procedures in respect of a number of areas. At the end the firm is given a verbal feedback based on the information it provides. Within ten days of the interview the FSA writes to the firm concerning its findings and setting out whether remedial action is necessary. If the outcome of the interview gives rise to concerns of a sufficiently serous nature, the FSA will state that it intends to conduct a follow-up or supervisory visit. In this case, the firm will be required to provide any additional documentation and information as the FSA deems appropriate.

7. A supervisory visit involves the FSA attending the firm's premises for a full day. The purpose of the visit is to undertake a more detailed review of the firm's business then is carried out through the interview. At the conclusion of the visit, and with the benefit of a wider range of information than was available during the initial "assessment", the FSA provides verbal feedback through the firm which is subsequently confirmed in writing. The supervisory visit provides an opportunity for the Applicant to present further evidence that it considers relevant and to raise any other matters. Should concerns raised at the initial assessment prove to be unfounded, then this will become apparent during the follow-up visit and will be confirmed by the FSA.

A preliminary point

8. A key part of the Applicant's case is that the "assessment" is a discrete exercise that comprises only the telephone or in person visit that lasts for an hour to an hour and a half. The supervisory or follow-up visit is a separate part of the regulatory procedure. If an assessment is flawed, the correct and only way of proceeding is to put it right by restarting the assessment before any supervisory visit can take place. This was what the Applicant sought to do.

9. We do not agree with the Applicant's assertion that the "assessment" is confined to the initial in person visit or telephone call. There is no statutory basis for that assertion. The assessment process, explained above, is part of the way the FSA carries out its regulatory functions. We do not read the material published for the benefit of potential applicants as limiting the "assessment" to that initial visit or telephone call. Such published material, found on the website explanation of "Treating Customers Fairly" states that the "programme" comprises three stages namely a roadshow, assessments and follow-up visits. "Assessments" are described as covering an initial interview. But one day follow-up visits are said to be for firms whose main assessment has raised concerns and to "verify our assessments". It is true that the officer of the FSA conducting the initial interview uses an "Assessment Tool", being a paper that scripts the basic structure of the initial interview. However, in the context of an exercise whose functions is to determine the suitability of an applicant to treat customers fairly it is unreal to assume that the initial interview can in all cases produce a reliable assessment. The FSA would not, we think, be carrying

out its regulatory functions properly unless it reserved the right to conduct a further longer interview to confirm or displace the findings produced at the initial interview.

10. For those reasons we think that it is correct to refer to the 1-1½ hour interview carried out with the FSA's officer's agenda in the Assessment Tool as "the initial assessment". We turn now to examine the relevant events.

Summary of relevant events

11. On 20 October 2009 "Officer A" of SFCD conducted an initial assessment of the Applicant. This, according to the Assessment Tool, is focussed on the FSA's priority of "upping the pace of compliance in Treating Customers Fairly". The initial assessment took place by telephone with Mr Perman. A letter of 22 October followed in which Officer A wrote to the Applicant summarising the results of the initial assessment. That letter noted that the FSA "was not satisfied adequate action had been taken to ensure all areas offering business are delivering fair outcomes for customers or that you are in a position to demonstrate that customers can be confident that they are dealing with a firm where the fair treatment of customers is central to its culture". In particular the FSA noted that the Applicant needed to define what "TCF means to your firm and to be clear what needs to be done to deliver fair outcomes for customers"; it observed that the Applicant's "initial disclosure document" was not providing its clients with a clear presentation of the firm's services. The letter also raised a query in relation to the adequacy of the Applicant's Professional Indemnity Insurance ("PII"). (Since then the FSA has accepted, namely in a letter of 30 November 2009, that the basis for that query was not in fact correct.) The FSA's

letter concluded by noting that, in the light of the areas of concern that have been identified by the initial interview, the Applicant might be "subjected to further supervisory action in the form of either a desk-based review or a supervisory visit."

12. The Applicant replied by letter of 26 October 2009. The letter states that "This firm did not consider it necessary to make any material changes to the way it operates as a result of the TCF initiative by the FSA". The letter pointed out that the Firm was already complying with the Fundamental Principles set out in the Guide to Professional Ethics of The Institute of Chartered Accountants of Scotland ("ICAS") that "members should behave with integrity in all professional and business relationships …". The letter went on to suggest that the FSA had not clearly understood the nature of the services that the Applicant provided and, as regards management information, the letter states that the Applicant "considered that the information already available from these sources is adequate to identify the spread of business and providers, persistency, and to obtain feedback from customers." Referring back to a suggestion in the Authority's letter of 22 October 2009, the Applicant's response is that "I accept that you inform me that you thought on-line testing tools would be of benefit" and stated that it had already complied with ICAS requirements on training. The Applicant concluded by stating that, "based on the contents of your letter of 22 October 2009, I do not feel that you have sufficient grasp of the regulatory environment in which this firm operates in and complies with in addition to that defined by the FSA." The Applicant stated that he would "welcome [the FSA's] considered thoughts on each of the above points".

13. The Authority responded on 2 November 2009 through Officer B. The letter expressly acknowledged the limitations of the initial assessment and stated – "As previously mentioned the supervisory visit will not only give you another opportunity to tell us about what you have done in relation to TCF … but also provides us with the opportunity to find out more about your firm and to gain a more accurate view." The letter concludes by saying that Officer C of the FSA would contact the Applicant to arrange a convenient date for the visit. The Applicant's letter in response of 5 November 2009 states – "I do not think that Officer A has a sufficient grasp of the scope and nature of the activities of the accountancy profession and I take the view that her comments should be viewed in light of this". The letter goes on to "require a full and detailed response to each of the matters referred to within my letter of 26 October … . Officer C may subsequently arrange a visit at a mutually convenient time and date with unwarranted points of contention eliminated beforehand and so with a more focussed agenda."

14. On 6 November 2009 Officer C both telephoned and e-mailed the Applicant with a view to arranging a supervisory visit. Officer C proposed a meeting on 10 December 2009 and specified the 18 classes of information/documents that the FSA requested to be made available (i) in advance of the visit and (ii) during the visit. As regards the information sought in advance of the visit the letter states – "We will be requesting the following information". The letter goes on to say that "all information should be sent to us electronically (where possible) by 24 November 2009". The Applicant has argued that as this request was never actually made by the FSA, how could he be accused of non-compliance and non-cooperation. That, we think, has no

merit. The FSA's letter makes it clear that these will be wanted and should be provided by 24 November.

15. On 24 November 2009 Mr Perman e-mailed the FSA to say that he had returned from a two week holiday and had not received any response to the Applicant's letters of 26 October and 5 November 2009. Further, the Applicant stated that he still required "full responses" to its previous letters. The message goes on to say – "As a customer of the FSA, am I not entitled to be treated fairly by the FSA? I consider that part of fair treatment is to provide full answers to questions and full explanations when requested to do so. I also feel that four weeks elapsed time from 26 October is adequate time to provide this." The letter further stated that – "As I stated in my letter of 5 November 2009, that when the above issues are concluded, [Officer C] may subsequently arrange a visit at a mutually convenient time and date … . As these matters are not yet concluded [Officer C] has been premature in his e-mail of 6 November 2009".

16. On 26 November 2009 the FSA sent an e-mail and made a telephone call to the Applicant. The FSA, through "Officer D", proposed that it would be better to address any outstanding concerns during the supervisory visit given that the Applicant's detailed business records would be available. Further, the FSA noted that the e-mail of 24 November 2009 was the first occasion on which the Applicant had objected to 10 December 2009 as the date of the supervisory visit and asked that the advance information requested on 6 November 2009 be provided. The FSA through Officer D followed that e-mail with a telephone call later that day during which Mr

Perman refused to allow the visit to take place on 10 December 2009 and stated that he would not be available until February 2010 (save on one of the three business days between Christmas and the New Year); and when told by the FSA that the visit could not be delayed for that long a time, Mr Perman did not offer any alternative dates.

17. On 27 November the Applicant made the following statements in an e-mail in response:

> "As you state, I have raised a number of specific issues, and have requested replies to these points. I am not aware of any reason why I should not be provided with replies … . It is entirely inappropriate to use a report containing factual inaccuracies and statements made without basis in fact as a "Trojan Horse" for a visit. As [Officer A] is initially responsible for the issues raised, I do not feel that it is up to anyone else to answer the questions relating thereto. … When the matters contained within these letters have been addressed, Officer C may then schedule a visit at a mutually convenient date and time".

The letter states that no time in the next two months would be convenient in terms of a visit (save for the three days between Christmas and the New Year). The letter requires clarification on whether, due to the wording used, Officer C's e-mail of 6 November 2009 was the formal request for documentation to be provided in advance of the follow-up visit or whether this would be sent separately. The e-mail concluded by – "suggesting that you take such steps as you feel necessary to have [Officer A] and [Officer B] provide answers to the letters sent to them, and by doing so bring about the resolution of the issues contained therein. In that way matters may then be progressed."

18. On 1 December 2009 the FSA wrote to the Applicant addressing the substance of each of Mr Perman's outstanding questions. The letter accepted that his comments in relation to PII cover were correct. The letter concluded as follows:

> "While we accept that there may have been some misunderstandings during the assessment process, it remains our view that the firm was not able to demonstrate that it had taken the necessary steps to ensure that it consistently treated its customers fairly. As we have said before this is a provisional assessment based on a limited discussion and we now need to visit the firm to establish if it is accurate."

Those responses did not satisfy the Applicant and on 4 December 2009 Mr Perman responded by e-mail stating that he continued to note that Officer A and Officer B have "so far failed to provide any responses whatsoever in the letters sent them on 26 October and 5 November. I continued to be dissatisfied with this prolonged procrastination." The letter noted that the query as to PII cover had effectively been withdrawn and that this suggested it had been due to Officer A's comments being "fabricated, factually incorrect and unwarranted". The letter concludes as follows- "[Officer C] may subsequently arrange a visit at a mutually convenient time and date with unwarranted points of contention eliminated beforehand and so with a more focussed agenda … . I again suggest that you take such steps as you feel necessary to have [Officer A] and [Officer B] provide answers to the letters sent to them and by doing so bring about the resolution of the issues contained therein."

19. On7 January 2010 the FSA wrote to the Applicant restating its request for a supervisory visit and noting that if such a visit did not occur by the end of January the matter would be referred to the FSA's Enforcement and Financial Crime Division.

20. In a letter of 11 January 2010 from the Applicant it is stated that Officer D was no longer sufficiently objective to conduct any follow-up visit and that this meant that "it would be fair and equitable if the follow-up visit is conducted by another individual". The letter went on to say that if Officer A and Officer B were unwilling or unable to explain matters contained within letters of 26 October, 2 November and 4 December, then Mr Perman suggested that Officer A's letter of 22 October be formally withdrawn in its entirety. "On this basis we can start this whole thing again from scratch and that the visit should be undertaken by other than [Officer D] and may take place on a mutually convenient date on or after 1 February 2010.

21. On 18 January 2010 the FSA wrote to the Applicant stating that it required that a supervisory visit be arranged for no later than 5 February failing which the matter would be referred to Enforcement with a view to cancelling the Applicant's Part IV permission. The letter notes that – "It is for the FSA to determine how it will supervise firms and if a supervisory visit is required we expect firms to co-operate. It is not appropriate for you to state that replies to your letters should be from specific members of staff or that specific individuals should not be involved in the visit."

22. By now we are into the fourth month since the programme started. On 21 January 2010 the Applicant wrote demanding a response to its earlier letter of 26 October 2009 requiring details of the regulatory requirement that PII cover extend to all permitted activities. (This was notwithstanding that the FSA had already withdrawn this query as acknowledged by the Applicant in its letter of 4 December 2009.) The letter stated that although it was for the FSA to determine the scope and

nature of the supervisory functions, where a letter had been issued by an identifiable member of staff then "it is not unreasonable to expect the same member of staff to provide the answer" in relation to a subsequent query therein. The letter reiterates that Mr Perman is and always has been prepared to accept a supervisory visit once matters of factual inaccuracy have been resolved. It proposes that the matter be progressed on the basis that Officers A and B respond to Mr Perman's letters and that the visit be conducted by someone unconnected with the matter to date.

23. The next letter to the Applicant came from "Enforcement". The letter notes the Applicant's non-compliance with Threshold Conditions and Principle 11 and it concludes that Enforcement will recommend withdrawal of Mr Perman's individual approval and that the Applicant's Part IV permission be cancelled on the basis that it will not then have a competent and prudent management.

24. In a letter of 16 February 2010 the Applicant replied to Enforcement suggesting that Enforcement had not considered the substantive content of the correspondence to date. The letter made specific references to the Applicant's allegedly unanswered demand for a reference in the Authority's Handbook to a "prudential" requirement requiring that PII cover extend to all of a business's permitted activities (notwithstanding this issue having been closed on 30 November 2009). The letter sought to suggest that the Applicant had attempted to comply with the FSA's request for a supervisory visit, contending that his letter of 21 January proposing a meeting in February 2010 was sufficient in this regard. On 23 February Enforcement replied by letter proposing that a supervisory visit take place on

Wednesday 10 March. Enforcement's letter stated that the Applicant would not be allowed to dictate the personnel who would conduct the visit, who for the proposed supervisory visit would be staff from SFCD. This brought a response from the Applicant on 23 February arguing that the FSA have now agreed to conduct a repeat of the initial assessment (as distinct from a full day supervisory visit) it states that the length of the visit be limited to no more than 1½ hours and that the number of personnel be limited to a single individual from SFCD. It insisted that the initial assessment conducted on 20 October 2009 be disregarded and required that the only documents to be used during the assessment would be those in the FSA's possession as at 6 August 2009.

25. The FSA's reply to the Applicant's letter of 25 February 2010 was made on 8 March. This noted that the Applicant had refused the Authority's request for a supervisory visit and that instead was seeking to set its own conditions for the visit (effectively seeking a re-run of the initial assessment of 20 October 2009). The letter stated that a retraction of the FSA's letter of 22 November 2009 was neither necessary nor reasonable. It stated that the initial assessment acted as a "filter", with the supervisory visit being a "fresh assessment of the Applicant's compliance was regulatory requirements." The FSA's letter stated that as a result of the Applicant's continuing unwillingness to undergo a supervisory visit, Enforcement would be recommending withdrawal of Mr Perman's individual approval and cancellation of the Applicant's Part IV permission.

26. On 10 March 2010 the Applicant wrote asserting that the Authority had failed to attend its premises to conduct the "arranged" visit earlier that day. It went on to argue that at no stage prior to 8 March 2010 had the authority suggested that the supervisory visit constituted a "fresh" assessment and that, if the information had not been captured properly, "it will be incapable to [sic] verification by any follow-up visit". On 12 March the FSA responded by letter disputing the Applicant's assertion that the FSA had agreed to attend upon the Applicant's terms. The letter noted that the Applicant had failed to accept the supervisory visit on the terms of the FSA's letter of 23 February and it instead sought to impose its own terms on the visit. The letter went on to dispute the Applicant's suggestion that the supervisory visit constituted anything other than a fresh assessment of the relevant information and documentation.

Cancellation process

27. On 1 April 2010 the FSA's Regulatory Decisions Committee issued a Warning Notice proposing to cancel the Applicant's Part IV permission. The Applicant elected to make both written and oral representations to the RDC.

Observations by the Tribunal

28. We comment now on the points taken by the FSA. We have already observed that the assessment does not stop with the conclusion of the initial interview. Where the FSA decides that a supervisory visit is required, that visit and its outcome are inseverable parts of the assessment process.

29. The thrust of the Applicant's case, as we understand it, is that the assessment comprised in the initial visit was flawed because the factual bases were inaccurate. Officer A had failed to understand the implications of the answers given by the Applicant and consequently had reached unsustainable conclusions resulting in adverse markings. Only Officer A, it was argued by the Applicant, could give an account of and correct the inaccurate bases underpinning the conclusion expressed in the letter of 22 October 2009.

30. We, in common with the FSA, acknowledge that the conclusion on PII cover (the fifth item raised in Officer A's letter of 22 October 2009) was wrong. The Applicant through Mr Perman went to some length to explain the insurance history and the significance of the error. We do not think that this factor in any way impairs the validity of the initial assessment. Nor in our view is it capable of doing so. The whole point of the supervisory visit is to have a second and more intensive look at the circumstances (and particularly those that relate to TCF) of the Applicant and its business. There is, as we have noted, a two way advantage in holding such a visit if there is any doubt in the mind of the FSA. The Applicant has the opportunity to put the record straight: the FSA has the opportunity to explore any areas of doubt. The reasoning behind the decision to hold a supervisory visit is the Regulator's responsibility. It is not for an applicant to apply its own standards and to rely on its own conclusions. That, we think, is what the Applicant is seeking to do here. Mr Perman's own views, however strongly he believes in their correctness, are no answer to the FSA's allegations that he has failed to deal with the FSA, as regulator, in an

open and co-operative way. The letters show an obstructive rather than a co-operative dealing on its part.

31. We have three further points to make at this stage. First, it is not enough for the Applicant to rely (as he did in his letter of 26 October 2009) on the fact that he has satisfied the criteria contained in the Guide to Professional Ethics published by the ICAS. The FSA have the responsibility for regulating the financial services industry and they are entitled to demand their own standards, Second, we have examined the correspondence and are satisfied that the FSA has indeed provided an acceptable response to the Applicant's queries in its letter of 26 October 2009. We refer to the FSA's letter of 1 December 2009. Thirdly, we cannot see the relevance to the present issues of the history of the dispute as to the regulatory obligations applicable to the Applicant during the years 2001 to 2005. Whatever the rights and wrongs of the parties to that dispute were, the circumstances have no bearing on the question of whether the Applicant has failed to deal in an open and co-operative way in relation to the TCF assessment.

17 June 2010 – Applicant's oral representation to the RDC

32. We note from the transcript of the hearing before the RDC that Mr Perman for the Applicant was sticking to the position that he had maintained from the start. At no point did he engage with the FSA's complaint that he had failed to deal with the FSA in an open and co-operative way.

Conclusions

33. The evidence and the assertions made by Mr Perman in the course of the hearing show that the Applicant has failed, and is likely to continue to fail Threshold Condition 5 for the reasons that we now summarise. The Applicant has failed to deal with the FSA in an open and co-operative manner in that it has failed to conduct its business with integrity and compliance with proper standards. The evidence shows that over a period in excess of seven months the Applicant failed to permit the FSA to conduct a supervisory visit on terms set out by the FSA and notwithstanding the fact that the FSA had made it clear that it had a number of serious concerns in relation to the Applicant's business. Moreover, throughout that period the Applicant had sought to dictate the process by which the FSA was to supervise the Applicant. In particular the Applicant made it clear that it would not permit a supervisory visit unless the FSA first agreed to a number of restrictive conditions as to the nature and format of any such visit. It follows we think that the Applicant's conduct throughout this matter has demonstrated that it is not fit and proper. It has not conducted its business and has not been ready, willing or organised to comply with the requirements and standards under the regulatory system. In particular it has contravened the requirements of the regulatory system which includes Threshold Condition 5 and Principles for Business.

34. We therefore dismiss the reference and direct that the Applicant's Part IV permission be cancelled and that final notices be given to that effect.

35. We add that there is no hint of concealment on the Applicant's part. Sadly, we think, Mr Perman, who is clearly an able man, is the author of his own misfortune.

He has demonstrated an unshakeable conviction in its own rectitude and this has led to his evident inability to co-operate with the FSA.

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SIR STEPHEN OLIVER QC
JUDGE OF THE UPPER TRIBUNAL
RELEASE DATE: