MISCONDUCT –fit and proper person-Limitation-Payment Protection Insurance-alleged pressure to sell unsuitable products and to favour a particular lender-allegedly inadequate compliance-failure to provide Authority with information- misleading Authority- financial penalty.

Reference numbers: FS/2010/0026
FS/2010/0028

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

CHRISTOPHER OLLERENSHAW and THOMAS REEH

Applicants

- and -

THE FINANCIAL SERVICES AUTHORITY

The Authority

Tribunal: His Honour Judge Mackie CBE QC
Ms Sandi O'Neill
Mrs Catherine Farquharson

Sitting in public in London on 6, 11,12,13,20 and 21 June 2012

The first Applicant appeared in person

Mr John Virgo, counsel instructed by Michelmores for the second Applicant

Mr Andrew George, counsel, for the Authority

DECISION

1. In this reference Mr Ollerenshaw, the former Chairman, and Mr Reeh, the former Chief Executive Officer, of Black and White Group Ltd ("Black and White"), a Company which specialised in arranging mortgages and associated insurance, challenge decisions of the Financial Services Authority ("the Authority") making prohibition orders against them and imposing financial penalties.

The positions of the parties in brief.

2. The Authority says that the Applicants pressured advisers to sell payment protection insurance ("PPI") products without due regard to their suitability and to recommend products from a particular lender without due regard to their suitability. The Authority says that the Applicants failed to maintain adequate compliance systems and created a culture focused on maximising sales without due regard to the need to treat customers fairly. The Applicants respond that there is no reliable evidence of any risk or detriment to customers as regards PPI, that encouragement to use the particular lender was legitimate in a market where the lender's particular strength, speed to completion, was important. They say that any shortcomings in compliance should be viewed against major achievements in this area. They deny that they placed undue emphasis on maximising sales. The Authority also alleges that the Applicants were responsible for Black and White's failure promptly to inform the Authority of a shortfall in its capital adequacy requirement and of then misleading the Authority about the Company's financial position. The Applicants admit that the

Company delayed for a short period in reporting an unexpected and in some ways artificial capital adequacy breach. If, which they deny, the Authority was misled the Applicants say that this was not their direct responsibility or fault.

The Decision Notices

3. These, both dated 13 August 2010, record that Mr Ollerenshaw, was Chairman of the firm and approved to perform the Director function (CF1 of the controlled functions), and that Mr Reeh, was Chief Executive Officer approved to perform the Chief Executive function (CF3), the Director function (CF1) and the Apportionment and Oversight function (CF8). The Notices impose:

- prohibition orders pursuant to section 56 of the Financial Services and Markets Act 2000 ("the Act"), prohibiting the Applicants from performing regulated activities on the grounds that they are not 'fit and proper' persons; and

- a financial penalty of £70,000 in respect of Mr Ollerenshaw and £50,000 in respect of Mr Reeh pursuant to section 66 of the Act on the grounds of misconduct. But for evidence of financial hardship the fines would have been £250,000 and £170,000 respectively.

4. By Referral Notices, dated 19 September 2010, the Applicants referred their cases to the Tribunal.

Background

5. The Black and White Group Limited was incorporated on 26 November 1998 and traded under that name from 15 August 2002. Its main business was mortgage broking – especially in the sub-prime market. When the Authority became responsible for regulating this area of business the company was granted a Part IV Permission to carry on mortgage broking as from 31 October 2004 with permission to advise on and arrange regulated mortgage contracts and ancillary products, including PPI; also known as Accident, Sickness and Unemployment ("ASU") insurance[1].

6. The company was almost entirely owned by Christopher Ollerenshaw with remaining shares held by a family member. Mr Ollerenshaw has considerable entrepreneurial skills but, like many successful businessmen, recognised that as the company grew it would need more professional management. He also identified that his own strengths included neither attention to detail nor patience. In 2003 he recruited Mr Reeh, an Australian citizen, as Marketing director. Mr Reeh became Chief Executive of the company in April 2004 and remained in that post until the firm closed on 4 February 2008.

7. Mr Reeh was 35 when he joined. He is a well educated and experienced professional who joined from AMP Group Limited, one of Australia's largest wealth management firms. Before joining the

[1] PPI is an insurance policy that will pay out a sum of money to cover monthly repayments on a mortgage for a set period in the event that a customer is unable to work through accident or sickness or becomes unemployed, subject to the customer meeting certain qualifying conditions.

company he had been working in related areas of business in the UK. He is currently again employed by AMP as Head of Financial Planning Victoria/Tasmania Region.

8. Mr Reeh, with Mr Ollerenshaw's support, recruited compliance, finance and other staff and the company flourished. Black and White's success was such that by September 2006 serious interest was being expressed to acquire the business for what might have been as much as £12 million. An AIM flotation was also being considered. The company was balance sheet solvent and had shown revenue from 2003 to 2007 of between £7.5m and £11.4m.

9. Between September 2006 and November 2007, the "Relevant Period" in the Decision Notices, the company transacted 1,855 mortgage sales and generated turnover of £11 million from residential mortgages, re-mortgages and associated PPI sales. The majority of Black and White's mortgage business (82% during the Relevant Period) involved advising on and arranging remortgages. Many of the mortgages advised on or arranged by the company, and most in 2007, were for 'sub-prime' customers, people with a below average credit rating.

10. In providing this advice to its customers, the firm used a panel of between 20 and 25 mortgage lenders and held itself out as providing advice across its panel products. Black and White had a financial relationship with one of the lenders on the panel, Money Partners ,which had granted it a £1 million loan facility.

11. The PPI insurance products sold by Black and White took two forms: 'Regular Premium PPI' for which premiums were paid monthly and 'Single Premium PPI' for which customers paid the premium as a lump sum at the outset of the contract usually added to the mortgage loan.

12. In October 2005, the Authority conducted a visit to Black and White. Following this visit, on 9 December 2005, the Authority wrote to the Board of Directors, including the Applicants, indicating its concern regarding the company's *"lack of commitment to good corporate governance practice and regulatory compliance"*. In the letter, the Authority referred to the fact that the *"compliance culture is weak"*, expressed concern that Black and White's incentive scheme gave preference to the sale of Money Partners' products, as opposed to those of other lenders and drew their attention to the widely circulated CEO letter sent by the Authority of 4 November 2005 regarding the proper sale of PPI.

13. Following a further visit in June 2006, the Authority wrote to Mr Reeh indicating that while there had been some improvement in compliance *"a healthy culture of compliance throughout the organisation would take longer to embed. This needs to be led by senior management"*. The Authority indicated that it expected not to carry out another full risk assessment for 48 months.

14. Mr Reeh wrote to the Authority on 26 July 2006 assuring that the company *"was committed to getting everything right"* and further that *"there certainly won't be any complacency tolerated"*. Mr Reeh points to substantial and solid achievements in response to the visit by the Authority.

15. Black and White appointed its first Compliance Director, Mr Carl Higgins, in July 2005. Mr Higgins left at short notice in July 2007 in fact to join a competitor but claiming to the company that he was suffering from a very grave illness and needed to spend his last days with his daughter. Fortunately it seems that Mr Higgins is alive and well today although the Authority did not call him as a witness.

16. On 4 October 2006 the Authority wrote to the firm about the PPI thematic review identifying four areas of relative weakness (staff training on understanding the needs of customers, sales processes and the giving of advice, compliance checks on advice and poor management information) although *"none caused us great concern"* and the Authority was *"reasonably comfortable"* with what it saw. The Company brought in various changes following the Authority's recommendations.

17. The Company's revenue fell in the course of 2007 and HMRC pressed for payment of more than £500,000. In July 2007 the company learned from accountants advising on the sale of the business that commission in the pipeline had to be valued differently from before

and that as a result there was a breach of capital adequacy requirements which should be reported to the Authority immediately. Black and White did not report the matter for almost three weeks and the Authority says that the information provided was misleading.

18. Mr Ollerenshaw said that the prospects for the sale fell away with the financial crisis in the autumn of 2007 and the end of Lehman Brothers. There may have been other factors. The company made a payment proposal to HMRC in July which was accepted in September but which it then failed to meet.

19. The Authority was contacted in August 2007 by a former employee who made serious allegations about the conduct of business at Black and White.

20. The Authority applied on 23 November 2007 to the City of Westminster Magistrates Court for a search and seizure warrant on the basis of information that the company had been perpetrating mortgage fraud on a grand scale. This included allegations of falsifying documents, systematic inflation of mortgage applicants' income data, shredding of documents to cover up the fraud, cold calling to force home-owners into re-mortgage transactions and arranging – against the interests of its customers, without their knowledge and to their prejudice – 'the placement of the vast majority of mortgages with one lender – Money Partners Ltd'. Based on the above, on 28 November 2007 the Authority executed a dawn raid of the Black and White

headquarters in Rugeley, accompanied by 8 police officers in protective clothing. The raid attracted wide press coverage and given the police attendance, the Applicants reasonably contend, engendered a public perception that the business was dubious. No criminal proceedings were brought and the case now advanced by the Authority is of very much lower gravity than the claims made at the time of the raid.

21. The Applicants say that there was an immediate and disastrous loss of confidence about the company which caused or at least accelerated its demise. Black and White went into administration on 15 February 2008 and into liquidation on 23 June 2008.

The Authority's Case

22. The Authority's case has two separate limbs. First it claims that, between September 2006 and November 2007, the Relevant Period, the Applicants created a sales-driven culture within Black and White which sought to encourage advisers to adopt sales procedures that focused on the maximization of revenue without regard to whether the products in question were suitable for the customers to whom they were being sold. These practices increased and intensified towards the end of the Relevant Period as the Applicants sought, in the event unsuccessfully, to achieve a lucrative sale and/or listing of Black and White. The Applicants are said to have:

- pressurised Black and White advisers to sell single premium Payment Protection Insurance ("PPI") without due regard to the suitability of the product for individual customers.

- pressurised advisers to sell products provided by a particular lender, Money Partners Limited ("Money Partners"), without due regard to their suitability for the customer.

- failed in their duty to take reasonable steps to ensure that Black and White had in place adequate compliance systems to ensure the suitability of advice given to its customers.

- set a *"tone from the top"* at Black and White that relentlessly focused on profit, cash flow and the increase of sales at the expense of the fair treatment of its customers and implementing and maintaining proper compliance procedures.

23. The second theme is that the Applicants failed in their duty promptly to provide the Authority with accurate information regarding the firm's financial position and, on one occasion, positively misled it about these matters. The Authority says that the Applicants:

- failed to disclose to the Authority Black and White's position in relation to capital adequacy.

- misled the Authority as to Black and White's financial position and the true extent of its liabilities.

24. In acting in the above manner, the Applicants breached Principles 1 and 7 of the Authority's Statements of Principle for Approved Persons and were knowingly concerned in Black and White's breach of Principle 6 of the Authority's Principles for Businesses.

The Financial Services and Markets Act 2000

25. The legal framework is not in dispute but as it is complex we need to set it out and do so by adopting and amending part of the Authority's skeleton argument.

26. Section 2 of the Act provides that, in discharging its functions, the Authority must, so far as is reasonably possible, act in a way which is compatible with its regulatory objectives which, as set out in section 2(2) of the Act, includes the protection of consumers.

27. Section 56(1) of the Act provides that the Authority has power to make a prohibition order where:

> *"it appears to the Authority that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person"*.

28. Section 66(1) of the Act provides that the Authority may impose a financial penalty on an individual where:

> *"(a) it appears to the Authority that he is guilty of misconduct; and*

(b) the Authority is satisfied that it is appropriate in all the circumstances to take action against him".

29. Section 66(2) of the Act provides that:

"A person is guilty of misconduct if, while an approved person, (a) he has failed to comply with a statement of principle issued under section 64 or (b) he has been knowingly concerned in a contravention by the relevant authorised person of a requirement imposed on that authorised person by or under this Act".

FSA Guidance

Statement of Principles and Code of Conduct for Approved Persons ("APER")

30. Under section 64 of the Act, the Authority has issued Statements of Principle for the conduct expected of approved persons. These are contained in the section of the Authority's Handbook entitled the Statement of Principles and Code of Conduct for Approved Persons ("APER").

31. Principle 1 says:

"An approved person must act with integrity in carrying out his controlled function"

32. APER contains, as guidance, examples of behaviour which fails to comply with this requirement, including the following:

(i) Deliberately misleading (or attempting to mislead) by act or omission a client, or the Authority by, for example, providing false or inaccurate information.

(ii) Deliberately failing to inform, without reasonable cause, the Authority of the fact that their understanding of a material issue is incorrect, despite being aware of their misunderstanding.

(iii) Deliberately recommending an investment to a customer…where the approved person knows that he is unable to justify its suitability for that customer.

(iv) Deliberately failing to disclose the existence of a conflict of interest in connection with dealings with a client.

(v) Deliberately not paying due regard to the interests of a customer.

(vi) Deliberate acts, omissions or business practices that could be reasonably expected to cause consumer detriment.

33. Principle 7 states:

"An approved person performing a significant influence function must take reasonable steps to ensure that the business of the firm for which he is responsible in his controlled function complies with the relevant requirements and standards of the regulatory system".

34. APER contains examples of behaviour which fails to comply with this requirement, including the following:

(i) Failing to take reasonable steps to implement (either personally or through a compliance department or other departments) adequate and appropriate systems of control to comply with the relevant requirements and standards of the regulatory system in respect of its regulated activities.

(ii) Failing to take reasonable care to oversee the establishment and maintenance of appropriate systems and controls.

(iii) Failing to take reasonable steps to monitor (either personally or through a compliance department or other departments) compliance with the relevant requirements and standards of the regulatory system in respect of its regulated activities.

(iv) Failing to take reasonable steps to ensure that appropriate compliance systems and procedures are in place.

35. APER also includes the following further guidance:

(i) the Authority expects approved persons to "*ensure that all staff are aware of the need for compliance*".

(ii) further:

"An approved person performing a significant influence function need not himself put in place the systems of control in his business. Whether he does this depends on his role and responsibilities. He should, however, take reasonable steps to ensure that the business for which he is responsible has operating procedures and systems which include

well-defined steps for complying with the detail of relevant requirements and standards of the regulatory system and for ensuring that the business is run prudently. The nature and extent of the systems of control that are required will depend upon the relevant requirements and standards of the regulatory system, and the nature, scale and complexity of the business".

Principles for Businesses ("PRIN")

36. Principle 6 states:

"A firm must pay due regard to the interests of its customers and treat them fairly".

The test of "fit and proper" ("FIT")

37. The Authority's Handbook contains guidance on the factors relevant to the assessment of an individual's fitness and propriety. As this guidance states, important considerations in this assessment will be the person's honesty, integrity and reputation and his competence and capability.

38. **FIT 2.1.3G(13)** provides that a relevant factor in determining a person's honesty, integrity and reputation is:

"*whether, in the past the person has been candid and truthful in all his dealings with any regulatory body and whether the person demonstrates a readiness and willingness to comply with the*

requirements and standards of the regulatory system and with other legal, regulatory and professional requirements and standards"

Limitation

39. Mr Virgo for Mr Reeh argues that this claim is brought out of time. He has two separate points. Section 66(4) of the Financial Services and Markets Act 2000 provides that the Authority '*may not take [such] action … after the end of the period of two years beginning with the first day on which the Authority knew of the misconduct unless proceedings in respect of it against the person concerned were begun before the end of that period*'. Section 66(5) (a) of the 2000 Act provides that '*the Authority is to be treated as knowing of the misconduct if it has information from which the misconduct can reasonably be inferred*'.

40. Mr Virgo first argues that the conduct about which the complaint is made is in substance identical to that observed by the Authority at the time of the 2005 Supervision Visit and 2006 Risk Assessment Visit. It is not open to the Authority to allege and now rely on a continuation of the same conduct in the period of two years preceding the Warning Notice dated 5 August 2009. If there was evidence of misconduct in 2005 and 2006 then time began to run against the Authority in relation to the exercise of its disciplinary powers under section 66 of the 2000 Act from those dates.

41. Mr Reeh makes the further submission that the fact that, as a result of these previous visits, the Authority was aware of previous compliance failings at the firm, means that it is now time-barred under section 66 of the Act from imposing a financial penalty in relation to the subsequent conduct during the Relevant Period.

42. Mr George for the Authority says that that contention is misconceived. The misconduct that forms the basis of the Authority's case took place during the Relevant Period from September 2006 to November 2007. The allegations do not relate to the situation that prevailed at the time of the Authority's visits in 2005 and 2006. The decision not to bring a case for misconduct based on the situation that prevailed at that time clearly cannot bar the Authority from bringing a case based on subsequent misconduct. It cannot credibly be suggested that the Authority was aware, as at 26 July 2006, that Mr Reeh would act contrary to the representations made by him in the letter of that date.

43. We indicated before Counsel made their final submissions that Mr Virgo's argument was an unpromising one which would not succeed without further development. As we see it whether one applies a literal or purposive approach to Section 66(4) the same result is reached. The "*misconduct*" is that specified in the Warning notice. It is not previous alleged misconduct carried out at a different time. We prefer Mr George's submissions on this point. Further there are many reasons why it would be illogical, undesirable and also unfair to regulated firms and persons for the Authority to have to proceed

within two years of the first sign of potential misconduct or not at all. The Authority would then have to take action against potential offenders at a very early stage without for example giving them an opportunity to put right minor infringements for fear that if they became major or repeated it would be unable to take action. On reconsideration Mr Virgo did not proceed further with that argument.

44. Mr Virgo had a more substantial limitation point which might well have had substance had the Applicants' suspicions that the Authority had been informed of the alleged misconduct specified in the Warning notices before August 2007 been correct. Mr Virgo argues that the Authority must have relied upon undisclosed 'whistle blowing' information supplied before 9 August 2007, the 'start date' for knowledge from which to infer misconduct within section 66(5) (a) of the Act. The interview with this individual which took place on 2 October 2008 indicates that information started to flow well before August. Mr Virgo sought disclosure of the documents, redacted as it was accepted that the Authority cannot be required to disclose the identity of a whistle-blower. We refused this application. The documents were very few. We read their substance out to the parties. They showed plainly that the Authority's evidence about the dates it received information was true so the second limitation point fell away. The Tribunal, having seen the relevant material was satisfied that no relevant knowledge would have come to the Authority's attention before any informer provided information in August 2007.

The Evidence

45. The Authority called three witnesses.

46. Mr John Sutherland is a Senior Advisor who has worked for the Authority for a short time and had no personal involvement in the investigation or the events leading up to it. Mr Sutherland gave evidence about the approved person's regime, and some background industry matters. We accepted an application by the Applicants that those portions of Mr Sutherland's original statement which amounted to expert evidence be deleted. Mr Sutherland's statement particularly drew our attention to the following.

47. PPI is an insurance policy that will pay out a sum of money to cover monthly repayments on a mortgage for a stated period in the event that a customer is unable to work through accident or sickness or becomes unemployed, subject to the customer meeting certain qualifying conditions. The policies, particularly the single premium policies, do not necessarily continue in force for the life of the mortgages. The Authority has concerns that poor mortgage and insurance advice in this area could lead to the lender repossessing the buyer's home and insurance policies not turning out to be applicable.

48. The Authority's concerns were communicated to lenders and brokers in a series of bulletins and messages which it says should have come

to the attention of the Applicants. Examples of these publications in the relevant period are as follows:

a) "*FSA update on payment protection insurance*" 4 November 2005– which summarised the findings of the thematic review publication "*The sale of payment protection insurance – results of thematic work*"

b) Dear CEO letter "*SALE OF PAYMENT PROTECTION INSURANCE*" dated 4 November 2005 – published on 10 November 2005

c) "*Some PPI sellers still not treating customers fairly says FSA report*" which complemented the wider document "*The Sale of Payment Protection Insurance – results of follow-up thematic work*" published on 19 October 2006

d) "*FSA determined to see better practice in PPI sales*" dated 11 January 2007

e) "*Payment Protection Insurance: Latest developments from the FSA*" speech by Stuart King dated 14 March 2007

f) "*The Sale of Payment Protection Insurance – Thematic update*" dated September 2007

49. The Authority issued similar guidance encouraging the implementation of the policy of Treating Customers Fairly ("TCF").

50. Mr Gregory Sachrajda a Solicitor and a Manager working in the Enforcement and Financial Crime Division of the Authority gave evidence about a file review of 42 customer files conducted at some point after it seized files in November 2007. The Authority reviewed 42 files where Black and White advised the customer to remortgage with Money Partners Ltd ("MPL"). It did this to attempt to assess the risk posed to customers of mortgages being placed with MPL where more suitable mortgage products were offered by other lenders on the Black and White panel. It was never the Authority's case that these files demonstrated widespread mis-selling of mortgage products. This review and the problems it created required Mr Sachrajda to submit four witness statements. For reasons we will explain we did not find this review to be reliable or of probative value. It is to Mr Sachrajda's credit that he himself identified, in the period leading up to the hearing that there were or might be flaws in this exercise and he caused a re-review to be carried out. That is an exercise which the Authority should have conducted, given the position adopted by the Applicants, long before Mr Sachrajda's involvement in the case.

51. Mr Giles Lee joined Black and White in April 2003 and six months later moved to the Compliance Department. He was then a recent graduate seeking to progress his career and had no prior experience of Compliance. Like Mr Higgins, the Compliance Director he left the company abruptly in July 2007 to progress his career in the same company as Mr Higgins. His witness statement indicated that

although in broad terms the Compliance Department operated efficiently and to required standards there were some areas where it did not. He said that between September 2006 and July 2007 the Compliance Department priorities had changed and Compliance staff were required to help with mortgage processing. But it emerged that this additional work had affected him only during the last month of his employment at a point where he would understandably have other matters on his mind. Further there is no contemporaneous written evidence of the Compliance Department being adversely affected by this additional work, the volume of which is unclear. Indeed the documents available to us indicate that Mr Higgins, the Compliance Director, volunteered to carry out this additional work or happily cooperated with it. Mr Lee in his witness statement states that by 2007 *"there was a culture against the Compliance Department and the Board's focus was on completing the cases and making money"*. He says that the Compliance Department had to try and battle against the Board to convince them that the changes needed to take effect. It was pointed out to Mr Lee however that there was no written evidence to support the existence of this alleged battle. He was, as he accepted, in his first Compliance post and in no position to appraise this "*battle*". Indeed he frankly accepted that what he saw as pressure from advisors to get their business through was no greater at Black and White than it had been at the Company he joined next. It was clear from Mr Lee's evidence that Black and White was, as he put it, very much in business to make money but there was nothing in his

evidence to establish that the Black and White Compliance Department was not treated seriously enough by the Applicants or the Board. This is not a criticism of Mr Lee who was an admirably clear and honest witness but the result of his limited role in these events.

52. Both Mr Ollerenshaw and Mr Reeh gave evidence and since their evidence covered all matters we will refer to it when dealing with each issue but at this point make some general observations.

53. In fairness to all witnesses we should point out they were giving evidence in June 2012 about the Relevant Period between September 2006 and November 2007. It is understandable that any witness, after such a length of time can have no recollection of some detailed matters and an honest mis-recollection of others.

54. Mr Ollerenshaw was an honest and straightforward witness but as he pointed out he is not good on detail. When he gave unsatisfactory answers in cross-examination this was not because he was knowingly mis-stating facts but because he was expressing a view of matters which seemed unrealistic or untenable given his position in a regulated company. These however are matters of judgment about undisputed facts and not questions of honesty.

55. Mr Reeh was also an honest witness whose recollection of detail was much better than that of Mr Ollerenshaw, as one might expect. The areas of his evidence which seemed least convincing were those involving the making of judgments, assumptions or speculation such as on how advisors or customers would have reacted to particular documents or events. The

unsatisfactory aspects of Mr Reeh's evidence arose from our judgment that he was arguing an unconvincing case rather than from lack of honesty or integrity. His answers about the capital adequacy problem in July 2006 seemed to us particularly unconvincing but again given that these matters took place five years ago and Mr Reeh has been busy since, his answers seemed to us to be honest misrecollection combined with bitterness and anger about how this case has unfolded and the time which it has taken.

56. Mr Reeh also submitted a statement from Mr Ian Middleton, now living in Australia who was Director of Affinity and Alliance Programmes at Black and White between June 2004 and January 2008. His statement was not referred to by either party during the hearing but we have considered it. Mr Middleton deals with various background matters. He refers to Black and White having carved out a particular niche in the treatment of customers in credit difficulties. He says the Company received awards for its work in this area. The single most important factor in dealing with this type of customer was speed as most were "*already well down the path*" to repossession or other court action. Mr Middleton did not give live evidence and was not cross-examined so we give his evidence less weight than that of those who did.

57. We now turn to deal with the Authority's allegations and the response of the Applicant. We will deal with these one by one and having reached conclusions will apply these to the legal framework.

Pressure to Sell PPI

58. The Authority says that the Applicants applied pressure on advisors to sell these products without due regard to their suitability. PPI accounted for 20 to 25% of Black and White's revenue. Single premium PPI was better for the company, and its cash flow, than that paid by monthly premiums. The Applicants suggested that single premium PPI was in some ways better for the customer than monthly premiums because Black and White's sub-prime customers often lacked the ability to keep up monthly payments. It would often be unfair to advise them to take on a regular commitment which they would be unlikely to meet. We find that, in general terms, unconvincing since so many customers had to borrow the money for the single premium and pay it off as part of monthly payments.

59. Whatever the difference it is clear that sales advisors were encouraged to sell PPI very vigorously. The Authority relies on emails. On 12 July 2007 Mr Reeh encouraged all sales advisors "*a simple message. If you can't fit a lump sum into the frame or it's not appropriate … then get a monthly policy at the very least. Every little helps and we are missing dozens of these every month …*" On 5 October 2007 there was another message regretting the absence of single premium sales on that day "*no ASU … costly JUMP on it*". Messages to individual sales advisors on 24 September and 3 November 2007 stated "*guys not a bad number, but a very poor retention, very poor! We need to address this now and take action. £5K in ASU over nine deals and we call ourselves salesmen?"* and

> "*you are costing yourself and the business revenue income and I am not happy about it. Your conversion rate is the lowest in the Company*

and it can't continue. YTD you have sold just four policies at a conversion rate of 7.7% - as I said this is the lowest ratio in the business. The average for all sales is 42.2% so your result is 6 times worse than the average salesman".

Mr Reeh goes on to say that the average premium per ASU sale is £2,200 and that this salesman should have sold £56,000 of premium to be *"just average"*. *"Not good enough my friend. You need to speak to some of the guys who can sell it as a matter of priority-because I won't stomach that type of revenue loss on B&W generated leads and appointments."*

60. The Authority also points to incentives. Cash prizes were offered for the most PPI sold and commission for single premium PPI was higher than that for regular premiums. On 5 July 2007 Mr Childs, a Black and White Director, sent an email to Mr Reeh about the ASU incentive results asking "*should we be publishing a printable ASU incentive update or am I just being paranoid"*. Mr Childs was the Chief Operations Officer, and the Authority says that that must have been an indication that he knew that the incentive scheme was inappropriate. On 12 October 2007 Mr Ollerenshaw sent an email to Mr Reeh about the proposed Christmas 2007 incentive referring to the third prize £1,000 in cash for the greatest number of ASU policies sold in a period. He adds ("*Thomas – this is lump sum only but clearly we cannot confirm this in writing")*. On 14 December 2006 Mr Reeh emailed the sales force "*we need to keep the hammer down on ASU sales*".

61. In their emails Mr Ollerenshaw and Mr Reeh refer to "*very poor*" ASU penetration. Mr Reeh appears to have set a target of 50%. Mr Reeh responds on this point by referring to a government policy known as "Sustainable Home Ownership Initiative". But this scheme ended in February 2003. For our part we see no objection to the company taking a view as to what the average percentage in the industry is and using that as a benchmark and a limited target, but not one which should be aimed at without proper regard to advice and instruction concerning suitability for customers.

62. The Authority places reliance on an email dated 1 December 2006 which in evidence both Mr Ollerenshaw and Mr Reeh agreed was unacceptable. The email, from a Sales Manager to his team states "*chaps I'm coming under pressure to deliver ASU sales. I know I can count on you to take every opportunity to get single premium on every occasion, it's money in our pockets as well as the Company…*". This message received considerable emphasis in the presentation slides for sales meetings attended by the employed and self-employed sales teams. A feature of these was that ASU issues were generally addressed by Mr Ollerenshaw, the Chairman himself.

63. The Authority points out that Black and White were told in October 2005 that it was in breach of Authority guidance in relation to PPI. The Applicants accepted that PPI was not suitable for everyone and circumstances needed to be considered very carefully when weighing up whether single premiums or monthly payments were appropriate. The Applicants also knew that concerns about Compliance standards were being raised repeatedly and regularly by the Authority. These fundamental points were accepted in

evidence by the Applicants. The Authority says that the Applicants were fully aware that the approach being adopted was non-compliant and indeed that it might be necessary to conceal this.

64. Mr Virgo for Mr Reeh points first to the profile of the funds. He says that Mr Reeh had fashioned new PPI policies to address clients' needs, targets were shared with the Authority and not subject to criticism. There is no evidence from the Authority about the income generated from these policies. There is no evidence that any mis-selling took place. Furthermore the Authority reviewed over 35,000 emails of which almost 13,000 involved Mr Reeh. It is not fair to place emphasis on a handful of emails.

65. Mr Ollerenshaw adopts the submissions put forward by Mr Virgo. He also criticises what he says was the unfairness of the Authority and the incompleteness of the file review. He emphasises that the customer was always 'king', an approach that led to a very low level of customer complaints. He delegated compliance to experienced and committed staff, accepting that the responsibility was his but concentrating on carrying out an ambassadorial role for the Company.

66. As we see it the Authority's case is clearly made out. In managing its sales force the Company was entitled to have regard to evidence of "*penetration*" in the market generally and to set a broad target to see how it was doing. The Applicants knew full well first that their approach had been criticised by the Authority in 2005, secondly that there was frequent warning from the Authority to member firms generally about the need for caution and

thirdly of the clear and crucial obligation upon them to have regard to the suitability of products for each customer. While in some contexts it might fairly be suggested that a small selection of emails is unrepresentative that response is unconvincing here. There has been no suggestion that emails exist running counter to the messages presented by those relied upon by the Authority. Whatever other emails may or may not have been sent the ones that were relied upon present a clear and disturbing pattern. Moreover the picture presented by the sales presentations is graphic and corroborates the picture presented by the emails. It is correct that there is no evidence of actual mis-selling in this regard, subject to the question of the file review to which we refer later, but that is not the allegation which the Authority makes. The pressure to sell is part of the picture presented by the Authority in support of its case about the Compliance culture. It is unnecessary for the Authority to establish actual mis-selling for this purpose. The fact that mis-selling has not been proved makes the conclusion we draw less serious than it would otherwise have been but it does not excuse the conduct of business in this way.

Pressure to sell Money Partners' Products

67. One of the members of the panel of lenders operated by Black and White whose quotations and terms were available on screen to the Company's advisors was Money Partners Ltd. This Company was apparently linked to Goldman Sachs. Mr Ollerenshaw had a 1% shareholding. Money Partners had granted a £1,000,000 loan facility to Black and White and loan repayments were offset against commission due. The Authority says that this

created a significant conflict of interest particularly during 2007 as Black and White fell into arrears with repayment of the loan. The conflict is said to be illustrated by an email dated 6 March 2007 between Black and White and Money Partners which states that the Company was "*two payments down on (its) loan with Money Partners*" but then goes on to refer to the good news that 51% of the 289 cases received in February, about 51% of Black and White's mortgage business, was being written for Money Partners.

68. The Authority relies on emails written or seen by the Applicants which appeared to encourage advisors to use Money Partners rather than other lenders. An email in February 2007 under the "*Lender*" heading states "*Money Partners (Full Marks!)*". The message was also conveyed at meetings of sales advisors, a power point slide used on 10 January 2007 and repeated in later meetings stated "*repeat after me … Money Partners!!!*". The Authority point out that the commission structure provided for advisors to receive an extra £40 per Money Partners case once the first ten had been processed but did not give this incentive for loans made by other lenders. It seems that Mr Ollerenshaw also promised advisors that a pay out of commission on Money Partners products would be five days from receipt of the funds compared with the maximum of ten for other lenders' products.

69. The Authority also alleges that Mr Reeh went as far as encouraging sales advisors to ignore the "*TriGold*" database system used to compare lenders and also to manipulate the Key Facts Information to indicate that a customer particularly valued speed of completion since this would result in Money Partners being identified as the most suitable lender. Money Partners

had an underwriter permanently on site (some other lenders sometimes did) and could make a decision in one to two weeks, apparently much faster than other lenders. The Authority placed emphasis on an email dated 27 February 2007 to all customer advisors which included:-

> "*With sub-prime clients speed is king. Forget rate. Forget TriGold … Don't let your hard work go to waste by chasing a rate! … Record on your KFI … customer needed money ASAP … the evidence below backs up why that's good advice. Quicker comps, less cancellations, less declines, less time for the local pub expert to cost you a deal*".

Mr Reeh points out that the information referred to "*below*" is not available and the context may have been a reason why an otherwise apparently unacceptable message was sent out. Mr Reeh also suggested that TriGold had limitations as a system because it did not show which lender was best on speed of service. The Authority responds that it was not acceptable to instruct advisors to make assumptions of that kind.

70. Further emails to advisors include one from Mr Reeh in October 2006, copied to Mr Ollerenshaw, setting out four lenders including Money Partners stating "*PLEASE ENSURE YOUR TEAMS USE THESE LENDERS EVERY TIME*". There are also numerous emails with headings such as "*Deal of the Day*" or "*Super Star*" indicating particular praise for Money Partners' sales. An email from an advisor to Mr Ollerenshaw in February 2007 states "*you may recall at a sales meeting last quarter when you were urging the advisors to offer Money Partners …*". The Applicants were present at a Board meeting

on 5 October 2006 which recorded "*62% of employed business was MPL. Will keep the propaganda burning for employed advisors*".

71. During its visit in 2005 leading to the letter of 9 December the Authority had expressed concerns about the potential sales bias as at that point 35% of Black and White's mortgage business was with Money Partners. The letter said that the Authority would expect the Company to have a system in place to help senior management ensure that recommendations were being made on the basis of suitability. Following the Authority's visit the percentage of Money Partners' products sold by the firm dropped below 35% but then rose steadily and steeply until the middle of 2007 (in April 2007 it was 64% of loans made) when it fell away.

72. Mr Virgo for Mr Reeh said that the use of Money Partners was justified on grounds of speed a matter which, given the profile of the customer base, was likely to be crucial because of the need to avoid County Court judgments, repossessions of properties and other unpleasant consequences. In evidence Mr Reeh suggested that the problem arose because the Authority had limited its computer search to "*Money Partners*" rather than other lenders. In evidence Mr Reeh suggested that Black and White would push whatever was "*the flavour of the month*". The Authority responds that even if that were true bias towards other lenders indicated in emails would be no more acceptable than that shown towards Money Partners. Further not every sub-prime customer would wish to pay a higher rate in return for speed of completion which he did not need. This is not an area for generalities but for careful examination of each customer's individual needs.

73. The Applicants had been warned in 2005 about the need to avoid bias towards one lender Money Partners. The evidence of the emails and sales presentations is that the warnings were ignored and it is unlikely to be a coincidence that the percentage of Black and White's business going to Money Partners in 2007, when the Company was under pressure on its loan, increased. There could have been no legitimate reason for urging advisors in effect to replace their obligations to consider each mortgage application in relation to its particular needs with an assumption that, because a borrower is sub-prime he or she will need a speedy completion, and therefore that Money Partners should be the lender. That is clearly the result intended by the emails and the sales presentations.

74. Mr Ollerenshaw included in his written submissions, and in the bundles, materials showing that what is said in an email, compared with, for example, a letter may be misleading if taken out of context. That is undoubtedly the case and we bear in mind that in this case we had seen only a very small proportion of the emails generated during the life of the business in the Relevant Period. The messages relied upon by the Authority are however perfectly clear communications sent in a business context. We have no doubt that advisors would draw conclusions from emails and sales presentations that priority was to be given to Money Partners. In our judgment that was improper and something that the Applicants both would have known to be wrong.

The file review

75. The Authority contended not only that the matters relied upon would be likely to cause Black and White advisors to recommend Money Partners' loans but that in practice they committed customers to Money Partners when more suitable mortgage products were offered by other lenders on the Black and White panel. The Authority sought to do this by relying on a review of files which it had carried out.

76. The review apparently involved identifying approximately 100 files where customers had self-certified their income and obtained the remortgages from Money Partners. 42 of these files were reviewed and formed the basis for submission to the Regulatory Decisions Committee ("RDC") in 2010. The contents of the review were understandably accepted by the RDC.

77. The Authority called Mr Sachrajda to give evidence about the methodology and findings of the review. Mr Sachrajda had had no involvement with the original review and the Authority was unable to present clear evidence about how the files came to be selected and a particular number reviewed. When Mr Sachrajda took over responsibility for this case and had some doubts about some aspects of the review he commendably caused the original 42 files to be re-examined. He also had eleven extra files reviewed thus making 53 in all. The findings which the Authority said that we should draw from the "re-*review*" are that in 64% of the files there were no clear reasons for recommending Money Partners, in 40% there was insufficient information about the customer gathered and recorded to support a recommendation and in 11% the customer was in a worse financial position on the basis of the recommendation as his or her committed outgoings did not

decrease as a result of the deal. If these findings could be sustained by the Authority the matter would have been serious.

78. Unfortunately the review has flaws and we believe that it would be unjust for the Tribunal to rely upon it in any way. First the burden of proof in this area lies on the Authority. Secondly any review of this kind must be demonstrably reliable. It is not for the Tribunal to conduct an examination of each file one by one and it is dependent upon the assessment of the reviews. The first review was by employees of the Authority. Those conducting the second review were an accountant, a solicitor and a trainee solicitor. The second file review disagrees, at least in some respects, with the first one in 22 cases out of 42 and Mr Virgo has identified this in more detail in his written closing submissions. No-one suggests that the reviews were not conscientiously carried out but the conclusions show, even within the Authority, a degree of a disagreement indicative that the exercise is subject to error and subjective.

79. Mr Reeh and Mr Ollerenshaw place considerable weight on the fact that this was an exercise conducted on the available paper without access to the computerised CMS system which would have recorded the management of each case. From the available material it seems to us unlikely that the CMS system, concerned as it was with day-to-day progress of the case, would cast much light on suitability. Furthermore that factor is one which would have been, or should have been clear from the letter sent by Black and White to the client making the operative recommendations explaining why the product recommended to him or her was the most suitable.

80. It follows that the Authority has proved its case as regards Money Partners but not to the extent which it would have done had the file review been accepted by us as reliable evidence.

Compliance systems and culture

81. The Authority alleges that the Applicants failed to take reasonable steps to ensure that Black and White complied with the relevant requirements and standards of the regulatory system and broke Principle 7 of APER. The Authority claims that there was a failure to put in place adequate systems of control to ensure the suitability of advice given to customers.

82. The Authority alleges that the Suitability Audits carried out were inadequate. The Authority says that no Suitability Audits were carried out for sales of PPI policies and there was therefore no independent check of Suitability.

83. There were Suitability Audits for mortgages but these were carried out ever less frequently during the Relevant Period. In September 2006 22% of files were subject to audits. By March 2007 only 5% of files were audited. After that there were no Suitability Audits at all. This decline was despite compliance audits identifying concerns for about a third of cases reviewed before March 2007.

84. The Authority complains about a dismissive attitude shown by the Applicants to Compliance issues in emails. Whilst on 27 February 2007 a Director Mr Childs reports to senior colleagues about the progress he and Mr

Higgins have made towards obtaining Compliance related qualifications, Mr Ollerenshaw replies to all *"Good news! Tell me, what will it do for this month's completions and monies in????"*. On 26 March 2007 Mr Childs alerts the Compliance Team, with copies to Mr Reeh and Mr Ollerenshaw of what he saw as a very useful website. This produced a reply from Mr Ollerenshaw, only to Mr Childs and not to the other recipients of *"SADO!"* to which Mr Childs responded "*just covering both our arses*".

85. The Authority relies on the evidence of Mr Lee to establish that the Compliance Department was held in low regard by the Applicants that the department was increasingly required to do non-compliance work and that attempts to ensure that breaches of Compliance requirements were effectively followed up were ignored. For reasons we have already given we do not think that Mr Lee's evidence, honest and straightforward though it was, provides material support for the Authority's case.

86. Mr Virgo submitted that these criticisms were misconceived. Mr Reeh accepted in evidence that some short lived cash incentives had been introduced and that these had been inappropriate. He also accepted the inappropriateness of a number of emails. However the Suitability letter that has now been criticised had not been subject to criticism either by the Compliance Department or the Authority when looking at matters in the past. Mr Virgo points to the interviews by the Authority of six members of the former Back and White sales force indicating that targets were not rigorously enforced, managers did not want advisors to force deals through that were not suitable, staff were told to give the clients the best deal, not to place

mortgages with particular lenders and that there was no undue pressure. He points out that there was no evidence of actual mis-selling. The extra work which the Compliance Department had taken on had been volunteered by Mr Higgins and had the benefit as Mr Ollerenshaw pointed out of helping Compliance staff understand the business by seeing operations at first hand. Indeed Mr Ollerenshaw said that he sometimes took a turn at this for the same reason.

87. Mr Virgo submitted that in practice Compliance was adequate. The required stages and processes were in place and, Mr Lee conceded, proportionate and adequate.

88. Mr Virgo and Mr Ollerenshaw both submit that the criticisms made by the Authority, some of which are admitted at least to a degree, need to be seen in the context first that Black and White had only very recently become subject to regulation by the Authority and was feeling its way and secondly had achieved a great deal in a short period. There had been a "*steep learning curve*". The Authority had made its criticisms. These had been taken on board. Mr Reeh, subject to supervision by Mr Ollerenshaw, or at least with his approval, made a considerable number of substantial improvements. Telephone sales of insurance products by frontline staff had been prohibited, the former managing director, a one time double glazing salesman, had been removed. The sales force was redesigned so that employed advisors gradually replaced the self-employed. More experienced Compliance staff were recruited and Mr Lee was made FSA Policy Officer to ensure the business was kept up-to-date with the Authority's publications. A properly qualified

Finance Officer Mr Stead replaced the unqualified former wife of Mr Ollerenshaw. Advisors were encouraged to obtain qualifications and to undertake training. More formal Board procedures were introduced. Compliance was introduced as a subject in weekly and monthly meetings. Treating Customers Fairly ("TCF") was given to a Senior Director to implement and was not left with the Compliance Department. Further a detailed Compliance plan was designed and introduced as was a sophisticated computer system the CMS. Detailed written procedures were introduced in all compliance areas.

89. Mr Reeh was responsible for some unwise and ill-considered messages to staff. When taken to an email showing pressure on an advisor to switch a policy to Money Partners Mr Reeh's answer was that it was known that the advisor did not get into the detail of Suitability at the client level. While there are only a few emails in evidence it seems to us likely that they are an indication of the message sent and impression created. To the extent that he made rash remarks Mr Reeh trusted the advisors, the system and the compliance audit process to ensure that his high level sales message did not result in a customer receiving an unsuitable product. This was a defence he put forward in evidence several times when taken to emails which he now regrets having sent. We accept that Mr Reeh was telling the truth about that but it was an attitude which was, as he now accepts, quite wrong. It was the job of Mr Reeh and Mr Ollerenshaw as the senior directors to ensure that the attitude to Compliance was appropriate throughout the Company and not to feel free to take a more aggressive sales oriented approach safe in the belief

that the systems would prevent abuse. They should have been part of the company's approach to compliance rather than seeing the compliance function as a separate and sometimes irritating check on sales activity. There is force in the Authority's submission that the tone set by senior management has considerable influence on the behaviour and attitudes of those further down the line. These criticisms come together when one takes an instance of the attitude of mind of middle management identified by the Authority, an email, from a regional sales manager to her staff copied to Mr Reeh which stated "*every B&W lead should have single premium 'ASU' written on it … Guys and Gals everything is in place for another storming month, just remember SPASU and Money Partners*".

90. But this criticism needs to be seen in context. The minutes of the meetings of the Board and of Management Team show no inappropriate attitude to Compliance. Despite the fact that the Compliance Director may have claimed to have resigned because of the company's attitude to his function there is no evidence of his having drawn his alleged concerns to the attention of his colleagues. Mr Lee's evidence does not prove anything against the Applicants. Black and White was new to regulation. Mr Reeh achieved a considerable amount in bringing in a coherent regime of Compliance.

91. We therefore conclude that while there were these shortcomings in relation to Compliance the case established by the Authority is less serious than that for which it contends and which was accepted by the RDC.

Responsibility between the Applicants

92. In dealing with the allegations made by the Authority we have tended to address the defences of the Applicants together. This is partly because each is alleged to have shared responsibility with the other but also because the defences are similar. It is also because submissions have been put forward very skilfully by Mr Virgo for Mr Reeh and then adopted by Mr Ollerenshaw (who represents himself but has added important points of his own). Further there is no "*cut throat*" defence in this case, neither applicant has sought to blame the other in this area of the case.

93. Mr Ollerenshaw had built the business and was the owner of it. He recognised that he lacked some of the talents needed to run an expanding, regulated, financial services business and appointed Mr Reeh who was more familiar with up to date business methods and regulatory requirements. A lot was delegated to Mr Reeh. Although Mr Ollerenshaw's role was said to be merely ambassadorial, developing the connections of the business, he clearly kept in close touch with the business. He alone owned it. Further and unusually for a CEO Mr Reeh had little to do with the Company's finances in the sense of its capitalisation and debts, as opposed to its immediate financial performance, until at least the summer of 2007. It was an error of Mr Ollerenshaw not to devolve some responsibility for finance to Mr Reeh and of Mr Reeh to hold the position of CEO without being able to keep a grip of financial matters. Mr Ollerenshaw's salary was twice that of Mr Reeh and he was very much the boss of what was after all his business.

Financial Reporting - failure to inform promptly

94. The Authority alleges that both Applicants acted without integrity in breach of Principle 1 of APER by deliberately attempting to conceal the true nature of B&W's financial position. Before turning to the allegations and to the response of the Applicants we need to identify the relevant facts.

95. Historically the finances of Black and White were closely linked to those of Mr Ollerenshaw who, for example, owned the company's building. The accounting function had been carried out by Mr Ollerenshaw's former wife who is not a qualified accountant. The company was audited by an appropriate professional firm. Matters started to change and Mr Mike Stead, who had come from Laura Ashley, was appointed Chief Financial Officer with effect from 16 July 2007.

96. On 31 March 2007 Black and White submitted a financial report to the Authority, a RMAR, showing a capital of £211,796 which was above the regulatory requirement. By July 2007 due diligence was still being conducted about the proposed purchase of the shares in Black and White under plans which, if successful, would have led to a purchase price of up to £12 million, depending upon the Company's future performance, a listing on AIM and some equity participation for management including Mr Reeh. Grant Thornton had been appointed accountants for the purposes of due diligence and Beachcroft as solicitors. On 6 July Mr Tobin of Grant Thornton reported to Mr Jay of Beachcroft that on the previous day he had spoken to the audit partner at Bentleys, Black and White's auditors. The partner had told him that

the December 2006 draft accounts for Black and White showed a negative balance sheet and that it was approximately £1,000,000 short of the minimum FSA capital requirements. This indicates that by that point any debate between the two firms of accountants about the proper accounting treatment of work in progress (and hence the capital requirements) had been resolved. Mr Tobin continued:

> "*I am informed by our Financial Services Department that if they had not already done so that it is a requirement of the Company to notify the FSA of this shortfall and provide them with details on how they intend to make this good. I am advised that the FSA take this very seriously and the operating licence depends on maintaining the required minimum capital. I hope you are already aware of this but thought it best to confirm"*.

Mr Jay was not aware of it and he undertook to take this up with Mr Reeh immediately but added that the shortfall would be addressed in part by the profit declared to the end of June 2007 and also by the working capital that would be raised on the listing. On that day, 6 July, Mr Jay forwarded the message to Mr Reeh stating "*this is something that we need to discuss*".

97. On 5 July the audit partner at Bentleys had written to Mr Ollerenshaw enclosing a draft letter for submission to the FSA reporting on a capital shortfall. That letter from the auditors would have been sent to the FSA in early July if Mr Ollerenshaw had given his consent.

98. There is thus no doubt that Mr Reeh and Mr Ollerenshaw knew of the shortfall and of its significance by no later than 6 July. The shortfall appears to have arisen at least in part as a result of a change in the accounting treatment of work in progress which had resulted from earlier dialogue between accountants about the proposed listing.

99. On 26 July 2007 Mr Reeh wrote to the FSA in terms very different from the letter proposed by the auditors. The email begins *"I thought it pertinent to update you on progress here at Black and White"*. The message discusses the proposed replacement of Carl Higgins the Compliance Director and then discloses the breach of capital adequacy requirements as at the end of 2006. The message identifies various extraordinary items which had contributed to this position and adds "*we have agreed to sell our business to a private entrepreneur for a consideration of £12M, and we expect the sale to be finalised in October this year*".

100. The Authority points out that the Applicants failed to inform them promptly of this shortfall. The Applicants accept that notification was not prompt. Mr Reeh initially said that he took a little time against the background where he had been reassured by Mr Ollerenshaw that there was nothing to worry about and that the shortfall would be met by the sale of the Black & White group and the listing on AIM.

101. Mr Reeh and Mr Ollerenshaw both accept in hindsight that they ought to have acted more swiftly. Mr Ollerenshaw had the opportunity to notify the Authority around 6 July but did not take it. We appreciate however that this

was a point at which the responsibility for the Company's finances was about to move to the newly arriving Mr Stead. Mr Ollerenshaw was more relaxed than he should have been, first because this was a field with which he was personally unfamiliar but secondly because he saw the problem as a technicality since he had agreed to pay off from his own resources the Money Partners' loan and subordinate the debt thereby created to other creditors. This would result in the accounts being adjusted to restore the necessary capital adequacy. Mr Ollerenshaw did indeed do this. Mr Reeh had a similar confidence based on what Mr Ollerenshaw had told him he was going to do. It is also pointed out that this was a busy time for Black and White. The Compliance Director followed by an assistant Mr Lee had left without notice in the middle of July. Mr Stead took over finance in the middle of July but had a great deal to get on top of and, coming from Laura Ashley, was not familiar with the Authority or its requirements.

102. This failure to act promptly was regrettable and a breach of duty. There are the mitigating factors we have referred to and the matter was both reported and put right. The Authority has not shown a lack of integrity by the Applicants in this aspect of the case. However the quality of the information subsequently provided to the Authority is a more serious matter.

Financial Reporting - misleading information

103. Black and White had fallen behind in its payments to HMRC in 2006. By October 2006 the outstanding debt was approximately £98,000. By the end of May 2007 past debts had been cleared but new ones had built up to

some £400,000. It seems from an email of 2 July 2007 from Mr Ollerenshaw's PA that HMRC had obtained a judgment against the company at some recent point. On 20 July 2007 in a letter to HMRC Mr Stead, the new Chief Financial Officer, proposed a repayment schedule of £109,795 for current liabilities and £57,000 per month for prior year debts. Similar proposals had been accepted by HMRC before. After correspondence that proposal was accepted but not until 10 September 2007. (On 3 October 2007 Black and White informed HMRC it could not meet the repayment schedule).

104. Correspondence with HMRC was conducted by Mr Ollerenshaw. Mr Reeh recalled that he knew nothing of the HMRC debt until the first day of Mr Stead's appointment on 16 July but it is clear from an email exchange that he knew on 10 July as he asked the accounts department for detail and received it. By 31 July 2007 the total unpaid amount was £515,006.53.

105. On 1 August 2007 HMRC wrote to Mr Stead acknowledging the 20 July proposal and enclosing a questionnaire to be completed and returned so that the proposal "*can be properly considered*". Mr Reeh said that Mr Ollerenshaw's attitude was "*don't worry about the money, I will sort that, just get on and run the business*". As the business debts were secured by the premises and the company belonged to Mr Ollerenshaw, Mr Reeh accepted the position but said that finance was a constant source of tension between the two until Mr Stead took up his post.

106. In response to an immediate request for clarification and further information from the Authority about the capital adequacy shortfall Mr Stead

sent on 3 August what was described as attached documentation to support the Black and White Group position. This was done by an email from Mr Stead to Mr Holder of the Authority copied to the Applicants. In the course of an apparently thorough, professional and wide ranging response the letter attached to the email had a short section entitled "*Comfort that the Black and White Group are not Trading while Insolvent*" (this being an aspect on which the Authority had sought specific information). The second and main paragraph in this section stated:

> "*Black and White is in receipt of no winding up orders, and payment schedules are in place and have been met for all major creditors. The trade creditor position at the end of December 2006 was £364K, and as at the end of June 2007 the figure was £362K – a very credible performance given the Company has processed significantly higher volumes of business in 2007 …*"

107. Although the letter was assembled by Mr Stead it was signed by Mr Reeh in response to an email from the Authority on 27 July copied to both Applicants. The Authority says that this means that the Applicants knew when the letter was sent and that it gave a misleading picture of the Company's finances. Only two days before on 1 August HMRC had notified Black and White that the amount owed had increased to £505,006. While Mr Stead had proposed a repayment plan it had not yet been accepted. Previous demands from HMRC as recently as July had not been met. There were also other debts, overdue commission payments to advisors of £50,000 as at 25 July 2007 and the overdraft was substantial and at its limit.

108. Since the Authority was not informed of the HMRC debt until January 2008 it submits that the Applicants were knowingly in breach of their duties and that the statement "*payment schedules are in place and have been met for all major creditors*" was plainly false and known to be so by the Applicants.

109. Mr Ollerenshaw saw the extent of the obligation to report to the Authority and the carrying out of that obligation as being a matter for Mr Reeh and Mr Stead and said that he did not concern himself with the detail. Mr Ollerenshaw accepted that he had not given his fellow directors information about the HMRC liabilities as he had, until Mr Stead took over, dealt with these himself. The position of the Applicants appears to be that Mr Ollerenshaw did not concern himself with the detail of the letter and it did not occur to him to check that the HMRC debt was mentioned in it. Mr Reeh did not know about the HMRC debt until July and then in no great detail, he had very limited involvement with the finance function and the detail of the letter was primarily a matter for Mr Stead.

110. Mr Ollerenshaw should have taken more responsibility for this important document than he did, although having seen and heard him, we believe that he was telling the truth when he said he had left it to the others and had not considered the detail. He did not seem to us to be the sort of person who would study closely documents like that submitted by Mr Stead to the Authority. Mr Reeh knew about the debt before Mr Stead arrived at the Company. It was a very large debt and as CEO he should have got on top of it. He should certainly have been in control by the beginning of August. He must have appreciated the need for full and accurate information to be given

to the Authority. He must have known that the Authority would not have had a fair or complete picture of the Company's finances unless they were told about the HMRC debt. To some extent this lapse was due to Mr Reeh's inexperience in this aspect of Regulation and to his apparent assumption that these were technicalities which would be overtaken by the action of Mr Ollerenshaw in paying off the Money Partners loan and debt, by the sale of the business and the listing and by accommodation from HMRC. However both Mr Ollerenshaw and Mr Reeh had a motive for presenting the Company's financial position in the best possible light and for ensuring that regulatory problems did not spring up before completion of the imminent sale of the business and a possible listing which would have greatly benefited them both. We do not say that this was a direct motive for the lapses in reporting the financial position to the Authority but this consideration may have been at the back of their minds.

111. As we see it both Mr Ollerenshaw and Mr Reeh were at best reckless in failing to ensure that Black and White's true financial position was disclosed to the Authority.

Summary of our findings about the Authority's allegations

112. As we see it both Applicants:

- pressurised Black and White advisers to sell single premium Payment Protection Insurance without due regard to the suitability of the product for individual customers.

- pressurised advisers to sell products provided by a particular lender, Money Partners Limited, without due regard to their suitability for the customer.
- failed, but only to some degree, in their duty to take reasonable steps to ensure that Black and White had in place adequate compliance systems to ensure the suitability of advice given to its customers.
- set a *"tone from the top"* at Black and White that focused on profit, cash flow and the increase of sales potentially at the expense of the fair treatment of its customers.
- failed in their duty promptly to provide the Authority with accurate information regarding the firm's capital adequacy position and, on one occasion, misled the Authority about these matters.

113. In these respects, which fall short of all the allegations made by the Authority, the Applicants breached Principles 1 and 7 of the Authority's Statements of Principle for Approved Persons and were knowingly concerned in Black and White's breach of Principle 6 of the Authority's Principles for Businesses. They both lacked integrity in these breaches because while not dishonest their conduct was reckless. If they had applied their minds to the first four of these matters as they should have done they would have known that their conduct was not appropriate particularly given the advice and warning they had received from the Authority following its visit. If they had applied their minds to the fifth matter and acted on the advice they received they would have reported the matter more promptly but the mitigating factors mean that we do not find there to be absence of integrity in this respect. If

they had considered their report on the company's financial position with the seriousness and attention which any reasonable approved persons would have devoted to it they would not have misled the Authority.

114. We next consider the question of what penalties should be imposed which in this case. The relevant penalties are a Prohibition Order and a financial penalty.

Prohibition Order

115. We have set out at Paragraph 27 above the circumstances in which the Authority may make a Prohibition Order. The Authority contends that Orders should be made as neither Applicant is a fit and proper person as defined. We have had regard to the entire 'fit and proper' guidance in the Handbook not just that cited to us by Mr George.

116. Mr Virgo argues that Mr Reeh should not be the subject of an Order. He is fundamentally honest and no danger to markets. He has learned from this experience and, just as he had never been in a regulatory difficulty before this case, he has been in no trouble since. Four and a half years have gone by and Mr Reeh has built a new financial services career in Australia. If an Order is made he will probably lose his job and pointless distress will be caused to his family. The Authority points to the severity of the breaches, the absence of integrity and the risk to customers.

117. Having considered these and all the other submissions made by the parties we are persuaded, just, that an Order against Mr Reeh is not necessary

in this case. We do not repeat our earlier findings. In short while we take a serious view of the Applicant's failings we do not consider that he is currently not a fit and proper person to perform regulated functions. We were concerned that Mr Reeh, when giving evidence, seemed to misunderstand his responsibilities and failed to appreciate what was obvious about his duties to notify the Authority. We conclude however that this needs to be seen in the context of years of dispute with the Authority and of understandable, if not always fully justified, feelings of injustice about various matters beginning with the raid on Black and White. Further the matter has been hanging over Mr Reeh for years and in this long period he has been satisfactorily engaged in financial services working for a large and reputable employer.

118. Many of the mitigation points put forward for Mr Reeh apply equally to Mr Ollerenshaw. Mr Ollerenshaw's position is however different in two ways. First he was the man in charge of what was in substance his company. He shaped the company and took the important decisions. Secondly Mr Ollerenshaw is out of his depth in modern financial services regulation. Regulation by the FSA came late in Mr Ollerenshaw's professional life and it seemed to us, observing his evidence and the submissions he made on his own behalf and appraising all the materials before us, that it is a world in which he is not comfortable and where there are rules which he finds difficult to comprehend and implement. He has a well developed sense of duty to his customers but it is not one which sits comfortably with current financial services regulation. There are good grounds for imposing a Prohibition Order. Since, however, Mr Ollerenshaw has said that he will not return to the

financial services sector, and we believed his evidence to this effect, we stated in our draft decision, as part of the process of reaching a consensus between ourselves, that we would be prepared not to make such an Order provided that he gave undertakings acceptable to the Authority. This was not a suggestion that had been made by Mr Ollerenshaw or therefore put to the parties to consider at the hearing. In response to our draft Decision we have had representations from both the Authority and Mr Ollerenshaw. In the light of these we conclude that we should impose a Prohibition Order given the impracticalities of an undertaking, including the difficulties of monitoring, the wider implications and the fact that an Order, unlike an undertaking, enables an applicant to apply to vary or revoke it.

119. As Mr Ollerenshaw objects to this course and is not at present represented we should explain the legal structure behind it. The Tribunal retains jurisdiction over a case until it has given a decision and this has been formally issued. Changes are sometimes made following comments by parties on the draft - that is one reason why the draft is sent out in confidence. Until the point of issue the Tribunal may change its decisions and reasons – typically following representations from one party about an issue not raised at the hearing- see for example Tribunal Practice and Procedure, Jacobs, 2nd edition 2007at 14.257 and following. That is what has happened in this case.

120. The Chair of the Tribunal apologises to the parties for not giving them a chance to comment on the undertaking question at an earlier stage, and in

particular to Mr Ollerenshaw who is naturally disappointed by the development.

Financial Penalty

121. The Authority contends that the penalty imposed by the Regulatory Decisions Committee ('RDC') was appropriate, £250,000 for Mr Ollerenshaw reduced to £70,000 on grounds of severe financial hardship with corresponding figures of £170,000 and £50,000 for Mr Reeh.

122. The Authority's published Guidance on the approach to penalty contains a non-exhaustive list of criteria which include the nature, seriousness and impact of the breach, the extent to which the breach was deliberate or reckless, whether the person on whom the penalty is imposed is an individual, the size, financial resources and other circumstances of the person on whom the penalty is to be imposed and the amount of benefit gained or loss avoided. Examples of comparables in other cases, invoked by the Applicants, (but not by the Authority except on the issue of hardship) have their uses, and we keep prevailing levels of penalty generally in mind, but each exercise is different. The Guidance rightly requires all the circumstances to be considered.

123. If the Authority's case as put to the RDC had been established before us then those penalties, subject to issues of hardship, might have been appropriate. But the Authority's case before us has fallen short in the ways we have described. There are also it seems to us further matters of mitigation. We are not concerned with the raid on Black and White directly, this being a matter to be investigated by Sir Anthony Holland. Nonetheless the raid was a

major event which caused immediate and permanent damage not reflected only in the financial consequences which, Mr George submits, are adequately recognised in any allowance for financial hardship. The raid was carried out to deal with alleged conduct of a very much more serious kind than has been established and resulted, regardless of where if at all any responsibility for this should lie, in a degree of injustice to both Applicants. This factor should be reflected to a degree, in the penalty. So should the fact that neither Applicant has benefited much from these rule breaches. Black and White, the company which both Applicants had expected to be sold to their financial advantage, went into administration and liquidation and yielded nothing permanent for either of them. Before that their salaries reflected the fact that this was a company in the Midlands not the City of London. Also relevant is the time it has taken to complete the investigative and disciplinary process, the absence of complaint from or direct proof of loss by customers and the realities of the personal positions of each Applicant.

124. The form of the Decision Notice may give the inaccurate impression that the Authority should first establish what the relevant figure should be and then make adjustments for potential hardship to arrive at a final figure. We recognise that it is helpful for the Authority to establish a level of fine appropriate to the breaches, leaving aside personal factors, as an example to others and a guide in future cases. But the fixing of the penalty is not a two stage process but a composite exercise evaluating all the relevant factors some of which may not be easy to reconcile. It is not a process of establishing simply the rate for the contraventions and then considering personal hardship.

The Guidance makes clear that other circumstances may be relevant and these include some of those mentioned above.

125. The first step, as we see it having regard to all the circumstances other than potential hardship and the general level of penalties, is to reduce the starting point for the proposed penalty to £100,000 for Mr Ollerenshaw and £75,000 for Mr Reeh. That then leads to the issue of whether, and if so to what extent, the figure should be reduced on grounds of hardship. As neither party was legally represented after the time the hearing finished and the issue had not been fully debated, we sought further submissions and information from the Authority about the question of hardship and gave the Applicants the opportunity to respond. That is why it has taken longer than usual for us to deliver this Decision.

126. The Authority's Guidance states that it may take into account verifiable evidence that serious financial hardship would be caused if the person were to pay the level of penalty appropriate to the breach. It is for the person affected to show hardship not for the Authority to have to prove a negative.

127. We have received further submissions from Mr Ollerenshaw and updated financial information. We repeat that it is for Mr Ollerenshaw to establish hardship not for the Authority to have to disprove it. On the face of it his liabilities are greater than his assets but he has existed in an apparently insolvent position for some time. Much of his assets consist of buy to let and other properties the valuation of which is imprecise. There is a lack of

transparency about his true income and the extent to which he receives benefits within the operation of his property businesses. He was at times less than candid with the Authority on these matters, for example the disclosure of jointly owned properties. If, as Mr Ollerenshaw says, this was due to legal advice, that advice is surprising. He has been able to survive for a number of years despite his apparent difficulties. The lay members of the Tribunal have particular experience of accounting in this area. He has not proved to us that he is unable to pay a penalty. We consider that the Authority's approach to his circumstances was correct in principle.

128. It would be logical in one sense, as the Authority argues, to make no reduction in the sum payable despite having reduced the starting point for the financial penalty since £100,000 is above the £70,000 imposed by the RDC. That is too mechanistic a view and we have to stand back and look at all the circumstances. As we see it, broad justice requires some actual reduction in the sum which Mr Ollerenshaw should have to pay when our findings are less serious than those of the RDC and we have identified points of mitigation which were not before that body. So his penalty will be reduced from £70,000 to £50,000.

129. We have received further detailed submissions from Mr Reeh in which he addresses not just hardship but comparable penalties in other cases and the treatment of another colleague who did not contest the findings of the Authority. At one point the Authority considered that a penalty of £50,000 would have been appropriate for the company's former Chief Operating Officer. He also sets out up to date detail about his domestic commitments

and very limited resources. While the Authority complains about Mr Reeh's disclosure, he has met the standard imposed by the Family courts in Australia. He has also spent substantial sums on his legal representation in this case. Further he has provided information about the way in which he has built a promising new career in financial services in Australia working for a large institution and also doing charitable service in his community. While the delays in bringing this case on are regrettable they have given Mr Reeh an opportunity to rehabilitate himself to a degree not common in similar cases before this Tribunal. It would be wrong for us to impose a penalty which would have the effect of bringing this fresh start to an end. Having regard to his circumstances and the potential hardship which a higher penalty would impose on his young family, Mr Reeh will pay the sum of £10,000.

Conclusion

130. These applications fail on the issue of liability but the Decision Notices will be varied as to penalty. There will be a Prohibition Order against Mr Ollerenshaw but not against Mr Reeh. References in the Decision Notices to £250,000 and £170,000 will be changed to £100,000 and £75,000. The financial penalty imposed on Mr Ollerenshaw will be reduced from £70,000 to £50,000 and that of Mr Reeh from £50,000 to £10,000.

His Honour Judge Mackie CBE QC

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