[2015] UKUT 0265 (TCC)

Reference number: FS/2013/0004 & 0005

FINANCIAL SERVICES – independent financial adviser-whether approved person able to demonstrate that he provided suitable advice-whether he took reasonable steps to ensure compliance with regulatory standards-Statements of Principle 2 and 7
Financial Penalty-whether action precluded by limitation-s66(4), (5) FSMA-appropriate level of penalty-s66(3) FSMA
Fitness and properness of approved person-withdrawal of approvals and prohibition order in relation to significant influence functions-s56 and 63 FSMA
Cancellation of firm's permission-s55J FSMA

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BAYLISS & CO (FINANCIAL SERVICES) LIMITED
CLIVE JOHN ROSIER

The Applicants

- and -

THE FINANCIAL CONDUCT AUTHORITY

The Authority

TRIBUNAL: Judge Timothy Herrington
Jo Neill (Tribunal Member)
Mark White (Tribunal Member)

Sitting in public at 45 Bedford Square, London WC1 on 27, 28 and 29 October 2014.

Mr Clive Rosier, Director, Bayliss & Co (Financial Services) Limited for the Applicants

Ms Sarah Clarke, Counsel, instructed by the Financial Conduct Authority, for the Authority

DECISION

Introduction and decisions referred

1. This decision concerns two references which have been consolidated. The first is a reference by Bayliss & Co (Financial Services) Limited ("Bayliss") of the Authority's decision to cancel its permission pursuant to s 55J of the Financial Services and Markets Act 2000 ("FSMA"). The second is a reference by Mr Clive Rosier ("Mr Rosier") of the Authority's decision to impose a financial penalty of £10,000 on him pursuant to s 66 FSMA and the further decisions to withdraw Mr Rosier's approval to perform significant influence functions in relation to Bayliss pursuant to s 63 FSMA and to prohibit him from performing any significant influence functions in relation to any regulated activity pursuant to s 56 FSMA.

2. The essence of the Authority's case against Mr Rosier is that he contravened Statements of Principle 2 and 7 of the Statements of Principle and Code of Practice for Approved Persons ("APER") by failing:

   (1) to act with due skill, care and diligence when recording customer information and customers' attitude to risk;

   (2) to act with due skill, care and diligence when producing suitability reports for customers in respect of investment recommendations;

   (3) to take reasonable steps to ensure Bayliss promoted, and could demonstrate that it promoted, unregulated collective investment schemes ("UCIS") to customers to whom an exception under s 238 (1) FSMA applied;

   (4) to take reasonable steps to ensure that he or Bayliss responded appropriately to customer complaints;

   (5) to take reasonable steps to ensure that Bayliss could demonstrate the adequacy of the compliance procedures it had in place;

   (6) to take reasonable steps to ensure that Bayliss notified the Authority of its inability to complete a past business review that the Authority had requested it to undertake; and

   (7) to demonstrate that Bayliss had taken reasonable steps to deal with issues raised by the Authority following a supervision visit.

3. The Authority asks the Tribunal to "affirm and uphold its decision" to impose a financial penalty of £10,000 on Mr Rosier pursuant to s 66 FSMA in respect of the above alleged breaches.

4. The Authority also asks the Tribunal to "affirm and uphold" its decisions:

   (1) to withdraw, pursuant to s 63 FSMA, the approvals given to Mr Rosier under s 59 FSMA to perform significant influence functions in relation to regulated activity carried out by Bayliss; and

   (2) To prohibit Mr Rosier under s 56 FSMA, from performing any significant influence function in relation to any regulated activity carried out by any authorised person, exempt person or exempt professional firm.

5. The case against Bayliss is that it is failing to meet the Threshold Conditions for authorisation because:

   (1) It has failed to pay Financial Services Compensation Scheme ("FSCS") levies which fell due on 23 February 2011; and

   (2) If Mr Rosier is found not to be a fit and proper person to perform significant influence functions, Bayliss will not have adequate human resources because it will have no individuals performing the significant influence functions of CF1 (Director) CF10 (Compliance Oversight) and CF11 (Money Laundering reporting.)

6. Mr Rosier and Bayliss dispute all of the allegations of the Authority. Their reply to the contentions of the Authority as set out as set out in paragraphs 4 and 5 above can be summarised as follows:

   (1) Mr Rosier denies that he did not maintain sufficient customer records;

   (2) Whilst not accepting that he failed to act with due, skill care and diligence Mr Rosier accepts that some of the suitability reports he produced did not meet the then "contemporary format";

   (3) Whilst denying that he failed to take reasonable steps, Mr Rosier accepts that he and Bayliss were unable to demonstrate by any of the currently prescribed text and/or procedures that only customers to whom a relevant exemption applied had been promoted UCIS. Mr Rosier does not accept that UCIS were promoted to any customers for whom such products were unsuitable;

   (4) Mr Rosier denies that he failed to deal appropriately with complaints. He maintains that Bayliss's insurers advised him how

to respond and deal with the complaints and he followed their advice;

(5) Mr Rosier denies that he failed to ensure that Bayliss could demonstrate the adequacy of its compliance procedures, or that he did not deal with the past business review appropriately, although he does accept that it is likely, in common with other firms, that not all of Bayliss's compliance systems may have met current standards;

(6) Mr Rosier contends that the reason Bayliss did not address the issues raised following the Authority's Supervision Division's visit was because of the intervention of the Authority's Enforcement Division;

(7) Bayliss did not pay the FSCS levies because it believed that they were not due;

(8) Mr Rosier denies a lack of competence to perform significant influence functions, save that he accepts that he may be unsuitable to continue in the compliance function;

(9) Mr Rosier contends that any failings are the responsibility of Bayliss and not him personally and therefore any financial penalty should be imposed on Bayliss not him; and

(10) In any event Mr Rosier contends that the regulatory proceedings were not commenced against him within the limitation period prescribed by s 66(4) FSMA and therefore no financial penalty can be imposed on him under s 66.

Applicable legal and regulatory provisions

General

7. The Authority's regulatory objectives are set out in s 1B FSMA and include securing an appropriate degree of protection for consumers and protecting and enhancing the integrity of the UK financial system (and, specifically, ensuring that it is not being used for the purposes of financial crime).

Provisions Relating to Approved Persons

8. That part of the Authority's handbook known as APER sets out the Statements of Principle as they relate to approved persons and descriptions of conduct which, in the opinion of the Authority, do not comply with a Statement of Principle. APER further describes factors which, in the opinion of the

Authority, are to be taken into account in determining whether or not an approved person's conduct complies with a Statement of Principle.

9. The Statements of Principle relevant to this reference are:

   (1) Statement of Principle 2 which provides that an approved person must act with due skill, care and diligence in carrying out his controlled function; and

   (2) Statement of Principle 7, which provides that 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 standards of the regulatory system.

10. APER. 3.1.8G provides, in relation to applying Statements of Principles 5 and 7, that the nature, scale and complexity of the business under management and the role and responsibility of the individual performing a significant influence function within the firm will be relevant in assessing whether an approved person's conduct was reasonable.

11. APER 3.3.1E states that in determining whether or not the conduct of an approved person performing a significant influence function complies with Statements of Principles 5 to 7, the following are factors which, in the opinion of the Authority, are to be taken into account:

   (1) whether he exercised reasonable care when considering the information available to him;

   (2) whether he reached a reasonable conclusion which he acted on;

   (3) the nature, scale and complexity of the firm's business;

   (4) his role and responsibility as an approved person performing a significant influence function; and

   (5) the knowledge he had, or should have had, of regulatory concerns, if any, arising in the business under his control.

12. APER 4.7.2E to 4.7.10E provide examples of the types of behaviour that, in the opinion of the Authority, do not comply with Statement of Principle 7. These include:

   (1) 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 the relevant firm's regulated activities (APER 4.7.3E);

(2) 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 the relevant firm's regulated activities (APER 4.7.4E); and

(3) in the case of an approved person performing a significant influence function responsible for compliance, failing to take reasonable steps to ensure that appropriate compliance systems and procedures are in place (APER 4.7.10 E).

Conduct of Business

13. Prior to 1 November 2007, that part of the Authority's Handbook known as COB contained provisions relating to the requirement to "know your customer." By virtue of COB 5.2.1 those provisions applied to a firm which gives a personal recommendation concerning designated investments, such as life policies and regulated collective investment schemes.

14. COB 5.2.5 and 5.2.6 provided as follows:

> "COB 5.2.5R Before a firm gives a personal recommendation concerning a designated investment to a private customer, or acts as an investment manager for a private customer, it must take reasonable steps to ensure that it is in possession of sufficient personal and financial information about that customer relevant to the services that the firm has agreed to provide.
>
> COB 5.2.6G A firm that advises a private customer, or exercises discretion for a private customer, on a continuing basis should keep its information about that customer under regular review. A firm that acts for a private customer on an occasional basis should undertake such a review whenever that customer seeks advice."

15. COB 5.2.11G provided guidance on the collection of information about a private customer, describing the process as "fact-finding" and the document recording the information as a "fact-find." The guidance provided, inter alia, that:

> " (a) Information collected from a private customer should, at a minimum provide an analysis of a customer's personal and financial circumstances leading to a clear identification of his needs and priorities so that, combined with attitude to risk, a suitable investment can be recommended.
>
> (b) A customer information record can be electronic or paper based and it should be readily available and accessible at all times."

16. COB 5.2.9 required a firm to retain a record of the fact-find, generally for at least three years, but in respect of life polices and certain pension schemes, six years.

17. COB 5.3.14 required a firm making a personal recommendation to provide the customer concerned with a suitability letter.

18. COB 5.3.16 required a suitability letter, inter alia, to:

> (1) explain why the firm has concluded that the transaction is suitable for the customer, having regard to his personal and financial circumstances; and
>
> (2) contain a summary of the main consequences and any possible disadvantages of the transaction.

19. COB 5.3.30G provided guidance on the contents of suitability letters. It provided, inter alia, that a suitability letter, to be successful, should explain simply and clearly why the recommendation is viewed as suitable having regard to the customer's

> (a) personal and financial circumstances;
> (b) needs and priorities identified through the fact finding process; and
> (c) attitude to risk in the area of need to which the recommendation relates.

20. The guidance also provided that the letter should explain why the customer's needs, priorities, attitude to risk and financial situation all combine to make the recommended product suitable for the customer. It should not merely state what product is being recommended with no link to the customer's personal circumstances.

21. From 1 November 2007 the provisions in COB referred to above were replaced by corresponding provisions in that part of the Authority's Handbook known as COBS to the following effect.

22. With regard to "know your customer" obligations, now referred to as "Assessing Suitability", COBS 9.2.1 provides as follows:

> "(1) A firm must take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client.
>
> (2) When making the personal recommendation or managing his investments, the firm must obtain the necessary information regarding the client's:
>
> (a) knowledge and experience in the investment field relevant to the specific type of designated investment or service;

(b) financial situation; and

(c) investment objectives;

so as to enable the firm to make the recommendation, or take the decision, which is suitable for him."

23. COBS 9.2.2 and 9.2.3 make provision for the collection of information from a client in order to comply with COBS 9.2.1 as follows:

"9.2.2 (1) A firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of managing:

(a) meets his investment objectives;

(b) is such that he is able financially to bear any related investment risks consistent with his investment objectives; and

(c) is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of the portfolio.

(2) The information regarding the investment objectives of a client must include, where relevant, information on the length of time for which he wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment.

(3) The information regarding the financial situation of a client must include, where relevant, information on the source and extent of his regular income, his assets, including liquid assets, investment and real property, and his regular financial commitments.

9.2.3 The information regarding a client's knowledge and experience in the investment field includes, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved, information on:

(1) the types of service, transaction and designated investment with which the client is familiar;

(2) the nature, volume, frequency of the client's transactions in designated investments and the period over which they have been carried out;

(3) The level of education, profession or relevant former profession of the client."

24. COBS 9.4 sets out requirements for the provision of a suitability report to a retail client if the firm makes a personal recommendation to the client in respect of certain investments, including regulated collective investment schemes, life policies and certain pension products.

25. COBS 9.4.7 provides that the suitability report must, at least:

"(1) specify the client's demands and needs;

(2) explain why the firm has concluded that the recommended transaction is suitable for the client having regard to the information provided by the client, and

(3) explain any possible disadvantages of the transaction for the client."

26. Record keeping in relation to customer information and suitability reports is now covered by the general record keeping requirements contained in that part of the Authority's Handbook known as SYSC. In that regard SYSC 9.1.1 to 9.1.3 provide as follows:

" 9.1.1 A firm must arrange for orderly records to be kept of its business and internal organisation, including all services and transactions undertaken by it, which must be sufficient to enable the Authority to monitor the firm's compliance with the requirements under the regulatory system, and in particular to ascertain that the firm has complied with all obligations with respect to clients.

9.1.2 A firm must retain all records kept by it under this chapter for a period of at least five years.

9.1.3 A firm must retain records in a medium that allows the storage of information in a way accessible for future reference by the [Authority] and so that the following conditions are met:

(1) the [Authority] must be able to access them readily and to reconstitute each key stage of the processing of each transaction;

(2) it must be possible for any corrections or other amendments, and the contents of the records prior to such corrections and amendments, to be easily ascertained;

(3) it must not be possible for the records otherwise to be manipulated or altered."

Promotion of collective investment schemes

27. Section 238 (1) FSMA provides that an authorised person must not communicate an invitation or inducement to participate in a collective investment scheme ("CIS").

28. Section 238 provides for circumstances where this prohibition will not apply. These include:

    (1) Where the CIS in question is an authorised unit trust or open ended investment company;

    (2) Where one of the exemptions set out in the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (the "PCIS Order") applies;

    (3) Where one of the exemptions listed in the table at Annex 5R referred to at COB 3.11.2R applies, or after 1 November 2007, in COBS 4.12.1. In COB there was an exemption in a case where the person to whom the scheme is promoted is a person for whom the firm has taken reasonable steps to ensure that investment in the scheme is suitable and who is an established client of the firm. In COBS there is an exemption where the authorised person promoting the scheme has undertaken an adequate assessment of the client's expertise, experience and knowledge and that assessment gives reasonable assurance, in the light of the nature of the transactions or services envisaged, that the person is capable of making his own investment decisions and understanding the risks involved.

29. One of the exemptions set out in the PCIS Order (and the only one that is capable of applying in this case) permits a firm to promote a UCIS to individuals classed as certified sophisticated investors (Article 23 of the PCIS Order). The latter provision requires, inter alia, the person falling within the exemption to hold a certificate signed by an authorised person in a prescribed form to the effect that the investor is sufficiently knowledgeable to understand the risks in investing in UCIS for the exemption to apply. The investor must also have signed a statement in the prescribed form to the effect that he qualifies as a certified sophisticated investor and that he was aware that it was open to him to seek advice from an authorised person who specialises in advising on this kind of investment. The communication promoting the scheme must be accompanied by an indication that, inter alia, buying the units to which the communication relates may expose the investor to a significant risk of losing all the property invested.

Complaints handling rules

30. DISP 1 is in the part of the Authority's Handbook entitled Dispute Resolution: Complaints ("DISP"). DISP 1.2.1 requires a firm to make consumers aware of its complaints procedure as follows:

> "To aid consumer awareness of the protections offered by the provisions in this chapter, respondents must:
>
> (1) publish appropriate summary details of their internal process for dealing with complaints promptly and fairly;
>
> (2) refer eligible complaints in writing to the availability of these summary details at, or immediately after, the point of sale; and
>
> (3) provide such summary details in writing to eligible complainants:
>
> (a) on request; and
>
> (b) when acknowledging a complaint."

31. DISP 1.2.3 makes provision for the content of the summary details regarding complaints procedures as follows:

> "These summary details should cover at least:
>
> (1) how the respondent fulfils its obligation to handle and seek to resolve relevant complaints; and
>
> (2) that, if the complaint is not resolved, the complainant may be entitled to refer it to the Financial Ombudsman Service."

32. DISP 1.2.4 provides that the summary details may be set out in a leaflet, and their availability, may be referred to in contractual documentation. DISP 1.3 contains the complaints handling rules. DISP 1.3.1R requires that effective and transparent procedures for the reasonable and prompt handling of complaints must be established, implemented and maintained by the respondent (which includes an authorised firm).

33. DISP 1.4 contains the complaints resolution rules. DISP 1.4.1R requires that once a complaint has been received by a respondent, it must:

> (1) investigate the complaint competently, diligently and impartially,
>
> (2) assess fairly, consistently and promptly the subject matter of the complaint, whether the complaint should be upheld, what remedial action or redress (or both) may be appropriate and, if appropriate, whether it has reasonable grounds to be satisfied that another

respondent may be solely or jointly responsible for the matter alleged in the complaint.

34. DISP 1.6.1R requires that on receipt of a complaint:

> (1) a respondent must send the complainant a prompt written acknowledgement providing early reassurance that it has received the complaint and is dealing with it, and
>
> (2) ensure the complainant is kept informed thereafter of the progress of the measures being taken for the complaint's resolution.

35. DISP 1.6.2R requires that the respondent must, by the end of eight weeks after its receipt of the complaint, send the complainant:

> (1) a final response; or
>
> (2) a written response which explains why it is not in a position to make a final response and indicate when it expects to be able to provide one, inform the complainant that he may now refer the complaint to the Financial Ombudsman Scheme ("FOS") and enclose a copy of the FOS standard explanatory leaflet.

36. DISP 3.7.12R requires that the respondent must comply promptly with:

> (1) any award or direction made by the FOS: and
>
> (2) any settlement which it agrees at an earlier stage of the procedures.

Financial Penalties

37. Section 66 FSMA provides that the Authority may take action to impose a penalty on an individual of such amount as it considers appropriate where it appears to the Authority that the individual is guilty of misconduct and it is satisfied that it is appropriate in all the circumstances to take action.

38. Misconduct includes failure, while an approved person, to comply with a statement of principle issued under s 64 FSMA or to have been knowingly concerned in a contravention by the relevant authorised person of a requirement imposed on that authorised person by or under FSMA.

39. Section 66(4) FSMA now provides that the Authority may not take action under s 66 after the end of the period of three years beginning with the first day on which the Authority knew of the misconduct, unless proceedings in respect of the misconduct were begun against the relevant person before the end of that period. By virtue of s 12(1) and (4) of the Financial Services Act 2010 the period referred

to in s 66(4) was increased from two years to three years on 8 June 2010 which was shortly before Mr Rosier and Bayliss were referred to the Authority's Enforcement and Financial Crime Division ("Enforcement") for investigation and therefore prior to regulatory proceedings being issued. Mr Rosier contends that the correct limitation period in his case is two years and on the basis that regulatory proceedings were not commenced against him by the issue of a Warning Notice within that period no financial penalty can be imposed on him under s 66.

40. In exercising its power to impose a financial penalty, the Authority must have regard to relevant provisions in the Authority's Handbook of rules and guidance. The main provisions relevant to the action specified above are set out below.

Guidance on the imposition of financial penalties

41. The Authority has determined the financial penalty that is the subject of this reference by having regard to the guidance on the imposition and amount of penalties set out in Chapter 6 of the version of the Authority's Decisions Procedures and Penalties Manual ("DEPP") as in place between 28 August 2007 and 5 March 2010, as the behaviour concerned occurred during that period.

42.DEPP.6.1.2G at the relevant time provided that the principal purpose of imposing a financial penalty is to promote high standards of regulatory and/or market conduct by deterring persons who have committed breaches from committing further breaches, helping to deter other persons from committing similar breaches, and demonstrating generally the benefits of compliant behaviour. Financial penalties and public censures are therefore tools that the Authority may employ to help it to achieve its regulatory objectives.

43. DEPP 6.5.2G provided more detail on the relevant factors to be taken into account including the following:

(1) When determining the appropriate level of financial penalty, the Authority has regard to the principal purpose for which it imposes sanctions, namely to promote high standards of regulatory and/or market conduct by deterring persons who have committed breaches from committing further breaches and helping to deter other persons from committing similar breaches, as well as demonstrating generally the benefits of compliant business;

(2) The Authority will consider the seriousness of the breach in relation to the nature of the rule, requirement or provision breached, which can include considerations such as the duration and frequency of the breach, whether the breach revealed serious or systemic weaknesses in the person's procedures or of the management systems or internal controls relating to all or part of a person's business, the nature and extent of any financial crime facilitated, occasioned or otherwise attributable to the breach and the loss or risk of loss caused to consumers, investors or other market users;

(3) The Authority will regard as more serious a breach which is deliberately or recklessly committed, giving consideration to factors such as whether the person has given no apparent consideration to the consequences of the behaviour that constitutes the breach. If the Authority decides that the breach was deliberate or reckless, it is more like to impose a higher penalty on a person than would otherwise be the case;

(4) When determining the amount of penalty to be imposed on an individual, the Authority will take into account that individuals will not always have the resources of a body cooperate, that enforcement action may have a greater impact on an individual, and further, that it may be possible to achieve effective deterrence by imposing a smaller penalty on an individual than on a body corporate. The Authority will also consider whether the status, position and/or responsibilities of the individual are such as to make the breach committed by the individual more serious and whether the penalty should therefore be set at a higher level;

(5) The Authority may take into account the degree of co-operation the person showed during the investigation of the breach by the Authority; and

(6) The Authority seeks to apply a consistent approach to determining the appropriate level of penalty. The Authority may take into account previous decisions made in relation to similar misconduct.

Prohibition

44. The power to make a Prohibition Order is contained in s 56 FSMA which is set out in full in Appendix 1 to this Decision.

45. The question of limitation does not arise in relation to the making of a Prohibition Order under s 56.

46. Guidance on the question whether an individual is a fit and proper person is given in FIT: The Fit and Proper Test for Approved Persons. According to FIT 1.3.1G, the Authority will have regard to a number of factors when assessing the fitness and proprietary of a person to perform a particular controlled function. The most important considerations will be the person's:

(1) honesty, integrity and reputation;

(2) competence and capability; and

(3) financial soundness.

47. In this case, as appears from the Authority's statement of case, the focus is whether Mr Rosier acted without competence and capability in relation to the matters which are the subject of this reference.

48. Pursuant to section 63 FSMA, the Authority may withdraw an approval given to a person under section 59 FSMA if the Authority considers that the approved person is not a fit and proper person to perform the controlled function to which the approval relates.

Threshold conditions and related provisions

49. Section 55B and Schedule 6 FSMA set out the Threshold Conditions, which are conditions that the Authority must ensure that an authorised person will satisfy, and continue to satisfy, in relation to regulated activities for which it has permission.

50. The Authority has the power under s 55J FSMA to cancel an authorised person's permission, where it appears to the Authority that he is failing to satisfy the Threshold Conditions.

51. Paragraph 2D of Schedule 6 FSMA (appropriate resources) states that the resources of the person concerned must, in the opinion of the Authority, be appropriate in relation to the regulated activities that he carries on or seeks to carry on.

52. Paragraph 2E of Schedule 6 FSMA (suitability) states that the person concerned must satisfy the Authority that he is a fit and proper person having regard to all the circumstances, including whether his business is being, or is to be, managed in such a way as to ensure that his affairs will be conducted in a sound and prudent way.

53.The Authority's Handbook includes guidance as to the Threshold Conditions ("COND"). COND 2.4.2G(2) states that the Authority will interpret the term "appropriate" in relation to the appropriate resources Threshold Condition as meaning sufficient in terms of quantity, quality and availability, and "resources" as including all financial resources, non financial resources and means of managing resources; for example, capital, provisions against liabilities, holdings of or access to cash and other liquid assets, human resources and effective means by which to manage risks.

54. COND 2.4.4G(2)(c) states that the Authority may have regard in this context to whether there are any implications for the adequacy of the firm's resources arising from the history of the firm; for example whether the firm has been adjudged insolvent.

55. COND 2.5.4G and COND 2.5.6G give guidance as to whether a firm satisfies the suitability Threshold Condition. They state that the Authority may have regard to

whether, among other things, the firm has contravened, or is connected with any person who has contravened, any provision of FSMA or the regulatory system (COND 2.5.6G(4).

Issues to be determined and the role of the Tribunal

56. This is one of the first cases that the Tribunal has had to consider since its powers were restricted by the amendments made to FSMA by the Financial Services Act 2012. The restricted powers apply to these references because they were made after 1 April 2013 when the new limited jurisdiction came into effect.

57. Section 133(4) FSMA has not been amended. It provides that, on a reference, the Tribunal may consider any evidence relating to the subject matter of the reference whether or not it was available to the decision-maker at the material time. This is not an appeal against the Authority's decision but a complete rehearing of the issues which give rise to the decision.

58. Section 133(5) to (7) FSMA now provide as follows:

> " (5) In the case of a disciplinary reference or a reference under section 393(11), the Tribunal-
>
> (a) must determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter, and
>
> (b) on determining the reference, must remit the matter to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination.
>
> (6) In any other case, the Tribunal must determine the reference or appeal by either-
>
> (a) dismissing it; or
>
> (b) remitting the matter to the decision-maker with a direction to reconsider and reach a decision in accordance with findings of the Tribunal.
>
> (6A) The findings mentioned in subsection (6) (b) are limited to findings as to-
>
> (a) issues of fact or law;
>
> (b) the matters to be, or not to be, taken into account in making the decision; and
>
> (c) the procedural or other steps to be taken in connection with the making of the decision.
>
> (7) The decision-maker must act in accordance with the determination of, and any direction given by, the Tribunal"

59. "The decision-maker" in relation to this reference is the Authority.

60. It can be seen that there is now a distinction between powers of the Tribunal on what is described as a "disciplinary reference" and other references. Pursuant to s 133(7A) FSMA "disciplinary reference" includes a decision to take action under s 66 FSMA, that is to impose a financial penalty on an approved person. The term does not include a reference to withdraw approval under s 63 or impose a prohibition order under s 56.

61. Thus these references are effectively sub-divided. Mr Rosier's reference of the decision to impose a financial penalty is a "disciplinary reference" and accordingly, as was the case in relation to all references made before 1 April 2013, the Tribunal has power to determine at its discretion what (if any) is the appropriate action for the Authority to take.

62. In relation to the other references, which we shall refer to as "non-disciplinary references," the powers of the Tribunal as set out in s 133(6) are more limited. The jurisdiction may now be characterised as a supervisory rather than a full jurisdiction; in that unless the Tribunal believes the references to have no merit and therefore dismisses them its powers are limited to remitting the matter to the Authority with a direction to reconsider its decision in accordance with the findings of the Tribunal.

63. There is some looseness of language on the Authority's part in relation to the way it has in its statement of case expressed the outcome that it is seeking from the Tribunal. Somewhat surprisingly, it does not appear to have appreciated the difference in the powers of the Tribunal with regard to disciplinary and non-disciplinary references as it asks the Tribunal to "affirm and uphold" all the decisions which have been referred without distinction. Secondly the use of terminology such as "affirm and uphold" is inappropriate in any event and is not to be found in FSMA. These proceedings are not appeals from the Authority's decisions but, as has been indicated above, de novo proceedings. Therefore, the Authority should, as the legislation makes clear, be asking for directions from the Tribunal that it should impose a financial penalty in relation to the disciplinary reference, and for the Tribunal to dismiss the non-disciplinary references. We therefore proceed to consider the references on the basis that is the outcome that the Authority seeks from the Tribunal.

64. We should for completeness refer to the proceedings that took place prior to the substantive hearing of the reference and which related to the publication of the Decision Notices which are the subject of these references (" the Decision Notices"). Mr Rosier applied for a direction prohibiting the publication of the Decision Notices pending the determinations of these references. This application was refused by Judge Herrington following a hearing of the application on 30 September 2013. Subsequently, the Decision Notices were published and Mr Rosier complained that the press release issued by the Authority at the time was wholly misleading and damaging to him and Bayliss.

65. The Tribunal on its own initiative convened another hearing to consider what action, if any, was appropriate in relation to the press release, this hearing taking place

on 19 March 2014. The decision in relation to that hearing is set out in Appendix 2 to this decision.

66. We should emphasise, and this formed the main thrust of Mr Rosier's complaint about the press release, that it is no part of the Authority's case that either Bayliss or Mr Rosier in fact provided any unsuitable advice. The case on suitability is confined to the question as to whether Mr Rosier and Bayliss could demonstrate that the advice given was suitable.

67. We shall therefore approach the issues in these references as follows:

(1) We shall first determine whether Mr Rosier's conduct in relation to the seven matters referred to in Paragraph 2 above demonstrate that he failed to act with due skill, care and diligence in breach of Statement of Principle 2 or, where relevant, failed to take the reasonable steps required of him pursuant to Statement of Principle 7;

(2) If any of the matters relating to the first issue are determined in favour of the Authority we shall then determine whether a financial penalty is appropriate and, if so, the appropriate amount of the penalty;

(3) We shall then determine Mr Rosier's reference in respect of the decisions to withdraw his approvals in respect of significant influence functions and to prohibit him from exercising such functions; and

(4) We shall then determine Bayliss's reference in respect of the Authority's decision to cancel its permission.

68. As is well established in references of this nature, the burden of proof lies with the Authority and the standard of proof to be applied is the ordinary standard on the balance of probability, namely whether the alleged conduct more probably occurred than not.

Evidence

69. We had witness statements from Mr Rosier and Ms Kate Tuckley, a solicitor and manager in Enforcement. Both witnesses were cross-examined.

70. Generally, we did not find Mr Rosier's evidence convincing, not because of any concerns regarding his honesty, but because he made numerous assertions which he had, perhaps through wishful thinking, convinced himself were true but which either could not be backed up with evidence or were plainly contradicted by the available evidence. On his own admission, Mr Rosier was not good at record keeping and the administrative side of his business. It is probably the case that a number of the matters which he asserted he had done, such as communicating with and providing information to the Authority, were matters which he convinced himself he had done when the evidence showed that not to be the case.

71. Ms Tuckley's evidence was of limited assistance because she had no first hand experience of the investigation into the Applicants, having taken responsibility for the investigation in January 2012. By this time most of the work on which the Authority's investigation report was based had been completed. Those who had previously been responsible for the investigation had left the Authority's employment, notably Mr Gareth Ackrill who had emigrated to New Zealand and was not therefore in a position to give witness evidence.

72. Consequently, we have relied to a large extent on what the extensive documentary material that has been submitted by the Authority shows as to the events which are the subject of this reference. In that regard, the principal documents, all of which we have reviewed, are as follows:

(1) The Authority's investigation report dated October 2012;

(2) All of the client files which have been reviewed either by Enforcement during its investigation or the Authority's Small Firms and Contacts Division ("SFCD") following its supervision visit to Bayliss on 1 April 2010;

(3) The transcript of the interview that Mr Rosier gave to the Authority on 9 February 2011;

(4) The correspondence and other information relating to the complaints made to Bayliss by customers of GTEP products; and

(5)The prospectuses for the two UCIS promoted by Bayliss to its clients;

73. We make considerable reference to the affairs of a number of Bayliss's clients in the course of this decision, which inevitably discloses personal information regarding their investments. We see no reason why the clients concerned should be identified by name; the Authority helpfully provided a schedule which included a list of the clients in respect of whom information was obtained during the investigation and on that list each client was given a number against his or her name. We will therefore refer to each client simply by reference to the relevant number on that list. We use the term "client" and "customer" in this decision interchangeably.

74. We should say something about the unsatisfactory manner in which the Authority has dealt with certain aspects of the evidence.

75. As the Authority is well aware the subject of the reference is entitled to know the case he is going to face from the Authority's Statement of Case and the list of documents which accompanies it, being the documents on which the Authority seeks to rely, copies of which are provided in the trial bundle. It is accepted that there can be developments after the filing of the Statement of Case, either through a change of

circumstances, new events or in response to the Applicants' Reply and witness statements which mean that it is appropriate for further material to be provided and the list of documents amended. Nevertheless, it is absolutely clear both from the Tribunal Rules and the directions given in this case for the filing of witness evidence that if the Authority wished to add to the material envisaged by its Statement of Case or filed witness statements then it must obtain prior permission from the Tribunal in the form of a direction permitting it to amend its Statement of Case or to file further witness evidence.

76. The proper course for the Authority to take, which is a matter of common courtesy if nothing else, is to inform the Applicants of its desire to rely on further material and to disclose to the Applicants what additional material it is proposing to rely on, in good time before the hearing to enable it to be properly considered. This will enable the matter in most cases to be dealt with by the Tribunal making further directions by consent on the basis of an application. Naturally if the application is opposed then the Tribunal may need to obtain representations from the Applicants before deciding the application.

77. Following this course is particularly important where, as in this case, the Applicants are representing themselves and are consequently likely to be less familiar with the Tribunal's rules and procedures. There should be no suggestion that the Authority is seeking to take advantage of that lack of familiarity.

78. In this case, the directions Judge Herrington made envisaged that after the filing of a first witness statement of Ms Tuckley the Authority would have leave to file a witness statement in response to Mr Rosier's statement as well as a further statement regarding the Authority's policy with respect to the imposition of financial penalties and its application in this case. Ms Tuckley's second witness statement, dealing with the financial penalty issue, and her third witness statement, by way of response to Mr Rosier's statement, accordingly were filed as envisaged by Judge Herrington's directions.

79. However, Ms Tuckley's third witness statement referred to various documents which were not previously relied on by the Authority, copies of which were duly provided to Mr Rosier. Mr Rosier objected to the service of the extra material. Judge Herrington gave permission for it to be admitted, on the basis that it was relevant material in the context of the response to points made by Mr Rosier in his witness statement, but observed that properly the Authority should have applied to the Tribunal to amend its list of documents rather than simply assume that the material would be admitted. An unnecessary dispute with Mr Rosier might have been avoided had it taken that course of action. Alternatively, if the Authority had explained the basis on which it was seeking consent in advance to Mr Rosier, it might have resulted in Mr Rosier consenting to the application.

80. Despite Judge Herrington's observation, a fourth witness statement by Ms Tuckley was submitted on 17 October 2014, just ten days before the substantive hearing of these references. The purpose of the statement was expressed to be to

"update the Tribunal on recent developments and to provide clarification in relation to the issues pleaded in the Authority's statement of case….."

81. No permission was sought from the Tribunal to file this additional statement. Various documents, not in the Authority's filed list of documents, were referred to in the statement, copied to Mr Rosier, and, without permission from the Tribunal, inserted into the trial bundle.

82. Unsurprisingly, Mr Rosier objected to the admission of this additional material and his objection was dealt with at the outset of the substantive hearing. In the event, with some reluctance the Tribunal agreed to admit some extra material regarding a consumer alert that had been issued regarding one of the UCIS that Bayliss promoted and which is relevant to these references. There was other material that the Tribunal declined to admit because of its dubious relevance and the lateness of its submission. There was other material potentially prejudicial to Bayliss, which initially the Tribunal was inclined to admit. The Tribunal retreated from that position when in the course of the hearing it was apparent that the material was incomplete and was in part still being investigated. At that point the Tribunal made it clear that it would not place any weight on that material and made its displeasure known at what appeared to be an attempt to introduce material which had not been adequately verified by the Authority's investigation team.

83. Ms Clarke was not herself responsible for this situation having arisen but could offer no explanation was to why it was sought to introduce this material in this unsatisfactory manner. The answer is that it was inexplicable and unacceptable. This was compounded by the fact that when Mr Rosier sought to object to the introduction of the material in correspondence with the Authority shortly before the hearing, rather than taking the obvious course of putting the matter before the Tribunal for its determination, the Authority sought to justify its position on the grounds that the material had been seen before (which was not entirely correct) and in any event Mr Rosier would not be prejudiced by its late omission. We regret to say that this approach shows an unacceptable degree of arrogance on the part of the Authority and we trust that nothing similar will happen again.

Background findings of fact

84. Bayliss was established by Mr Rosier as a business in Oxford in 1983 and registered as a limited company shortly thereafter. Previously, Mr Rosier had held positions as an in-house lawyer and company secretary in both the US and the UK, including in relation to a small public group of companies. Mr Rosier was engaged in corporate acquisition work when he was introduced to financial services, initially building up a client base of small businesses and self-made businessmen together with some chief executive officers of large companies.

85. Mr Rosier's evidence, which is consistent with what we have seen from the tone of his correspondence with his clients, is that the client base has remained relatively

small and long term with a good personal relationship between Mr Rosier and his clients leading to a large degree of personal loyalty. We accept that to be the case.

86. Bayliss, having previously been regulated by the Personal Investment Authority, became authorised by the Authority on the coming into force of FSMA on 1 December 2001. It has at all times since then operated as an independent financial adviser (IFA) advising on and making arrangements in respect of all types of investment, although from the client files we have seen, which we take to be representative of Mr Rosier's client base and the products he recommends, the investments advised on are predominately regulated collective investment schemes and investment linked insurance products. As we shall see, Bayliss also advised a number of clients on two UCIS and, as discussed below, for a while advised on financial products known as Geared Traded Endowment Plans ("GTEPs").

87. At the beginning of 2000 Mr Rosier was approached by long-term associates of his, Mr Philip Clegg and Mr Mark Lankester, who proposed, under the auspices of Bayliss, that they establish a business in North London, to be initially funded by Bayliss but later gradually acquired by them from Bayliss.

88. Mr Clegg and Mr Lankester brought with them their own client base who were advised under the name Money Matters, which efficiently operated as a separate division of Bayliss. This arrangement lasted for a period of approximately four years following which Mr Clegg and Mr Lankester, who were approved persons holding the controlled function CF21 (Investment Adviser) at Bayliss, left Bayliss taking the entire Money Matters business with them, including it seems, all records and client files and future income streams from commissions etc.

89. During the period that Money Matters operated within Bayliss, it advised clients on GTEPs. Mr Rosier approved that happening, on the basis that among other things a full-time compliance officer, Mr Thomas, be taken on to monitor the business.

90. Ms Tuckley provided a description of GTEPs in her witness statement which was unchallenged and which we accept as accurate.

91. Ms Tuckley stated that traded endowment policies ("TEPs") form the basis of a typical GTEP plan. TEPs are with-profits endowment policies (long-term, regular premium savings plans with a life policy attached, which may be associated with an interest-only mortgage) which are no longer required by their original holders and have been sold on the secondary market. The purchaser of such a policy agrees to pay the remaining premiums on the policy and in return receives the value of the policy at maturity or when the original owner dies, depending on which occurs first.

92. Investment in GTEPs involves gearing and is typically funded by the client using cash savings, funds raised through a mortgage on the investor's home or a charge on an investment already owned by the investor. These funds are used together with a GTEP loan facility taken out by the investor to purchase a portfolio of TEPs. The

TEPs are then used as security for the loan facility, and part of the loan facility is used to fund the TEP premiums.

93. The investment rationale is that by the time the final TEP matures, the loan and mortgage will be repaid and any additional capital remaining can be taken as profit by the holder of the GTEP product or used to pay any mortgage that remains outstanding.

94. The gearing element introduces an interest rate risk and increased exposure to the usual risks of investment (such as fluctuations in the performance of underlying TEPs and secondary market demand). These varying levels of gearing are effectively using the strategy of borrowing to invest, which can be a high risk strategy, particularly where clients have no other means to repay the mortgage or loan facility if the investment return is insufficient. In order for the investor to make a profit, the product has to outperform the interest rate payable on the loan/mortgage. Consequently, it is the Authority's view that GTEPs are generally only suitable for investors who have a high risk tolerance and are able to bear the losses that may occur.

95. Most of the clients of Bayliss advised on GTEPs were clients of Money Matters, advised by either Mr Clegg or Mr Lankester, although we are aware of two clients who were advised on these products by Mr Rosier.

96. According to Mr Rosier's unchallenged evidence, which we accept, the distance between Bayliss' main office and that of Money Matters was such that it was difficult for Mr Rosier to ensure that regulatory requirements could be met and therefore the business was disbanded, in the manner described in paragraph 88 above. It appears in practice Mr Rosier did not get involved personally in supervising Money Matters and had little knowledge of the client base and the details of the advice given. This is apparent from the fact that Mr Rosier's starting position when complaints were subsequently being received by Bayliss in relation to advice given by Money Matters was that he had no knowledge of the client concerned or the advice given.

97. Mr Thomas left when Money Matters was disbanded in August 2004 and subsequent to that Mr Rosier, having previously been the sole director of Bayliss and thus holding the significant influence function of director (CF1), also became the holder of the compliance oversight and money laundering reporting significant influence functions (CF10 and 11). He also became Bayliss' sole investment adviser (CF21), and sole investment manager (CF 22). These functions were merged to form the controlled function of customer function (CF30) on 1 November 2007 following changes to the Authority's rules. This position continues to the present day.

98. As a small firm, Bayliss had little direct contact with the Authority's supervisors, the Authority generally relying on the firm's reporting obligations and on any customer complaints coming to its attention to pick up any matters that might merit further investigation.

99. According to Ms Tuckley's witness statement, the Authority has developed in recent years various strategies aimed at contacting and visiting as many small firms as

possible. One such strategy was to identify a regulatory theme, such as the sale of a particular product which may be of potential concern to the Authority, and to conduct focussed visits to a sample of small firms that may have recommended this product to its clients.

100. In that context, on 3 August 2007, at the conclusion of a thematic project into small firms which sold GTEPs, the Authority wrote to all small firms which are known to have sold GTEPs, including Bayliss, and requested that it complete a past business review of the files of all customers who invested in GTEPs. Bayliss was given four weeks to complete the review.

101. The letter explained that the Authority had carried out visits to six firms which were active in selling GTEPs and had found that when providing advice to clients to invest in GTEPs firms did not obtain sufficient know your customer information, demonstrate suitability of the advice and clearly explain and disclose the risks of the recommendation in a way that clients are likely to understand. The letter continued on to explain that as a result of the above findings, the Authority was concerned that clients had invested in a product without knowing how the associated risks could impact their personal and financial circumstances, and therefore Bayliss would be required to take action based on the findings of the review.

102. The letter went on to state "*The [Authority] may visit your Firm in future* (sic) *to verify that your firm has carried out the review. Details of the remedial work carried out should therefore be documented and retained."*

103. In fact, this was not the first time the Authority had contacted Bayliss regarding the sales of GTEPs. As a result of a referral by the FOS to the Authority in respect of the non payment of an award made in respect of advice given to a Money Matters client, the Authority's Small Firms Division had written to Mr Rosier over a year earlier, on 31 July 2006, asking Bayliss to *"carry out a suitability review of any advice given to customers regarding [GTEPs]"* with a request that Mr Rosier confirm how he intended to undertake the review and when it was likely to be completed.

104. It does not appear that the division who sent the letter requesting a review to be undertaken in August 2007 could have been aware of this previous identical request. It also appeared that no response was given by Mr Rosier to the 31 July 2006 letter other than a letter he sent on 1 August 2006 in which he stated that the relevant files had been retained by Mr Clegg and Mr Lankester and he would need to speak to them. The Authority did not follow the matter up. We deal with later events concerning the review requests when considering below Mr Rosier's conduct in relation to the review and the client complaints received in respect of the advice given by Bayliss on GTEPs.

105. In August 2008 the Authority published a report entitled "Investment Quality of Advice Processes II" which set out the results of its review of the quality of the advice process of a number of advisory firms, a review which the report says was undertaken as part of the Authority's "thematic" work on improving the quality of advice. In

relation to a number of key areas the report identified common failings amongst the firms reviewed and the key messages the Authority wished to get across as a result. We quote a number of the relevant passages as follows:

"*Assessment of Customer Needs*

Just over half of the firms visited (29 out of 50) could demonstrate that they consistently gathered sufficient Know Your Customer information (KYC). There were a number of reasons for poor KYC identified in firms, where the most common weaknesses were:

-Identifying and recording the customer's needs and objectives-less than half of the reviewed customer files that demonstrated inadequate KYC failed to provide adequate evidence of identifying and recording the customers' needs and objectives.

-Establishing and recording customers' attitude to risk-less than two-fifths of the reviewed files with inadequate KYC failed to provide evidence of this.

-Exploring all areas of financial needs when giving full advice-just over two-fifths of the files where full advice was given did not adequately explore all relevant areas.

Recommendations to customers

Less than half of firms visited (22 out of 50) could consistently demonstrate a fair and adequate recommendation process. There were a number of reasons for unclear recommendations identified in firms, with the most common weaknesses being:

-Insufficient KYC-customers' relevant needs and objectives and attitude to risk were not adequately recorded.

-Poor research-insufficient evidence of research was kept on file to support the choice of provider/funds.

-Suitability letters-lack of explanation as to how the recommendation would meet the customer's needs and objectives.

Key Messages

Firms need to gather and record sufficient information on file to be able to demonstrate adequate consideration of KYC information, research to support why a particular provider and product has been recommended, and a balanced reflection of how the recommendation addresses a customer's needs and objectives in the suitability letter.

Communication

Over two-thirds of the firms visited (35 out of 50) failed to consistently produce adequate suitability letters; the main reasons for suitability letters being deemed inadequate was due to them not being clear, fair and not misleading, in particular:

-there was no explanation of the reasons for switching products/funds;
-the letters were insufficiently personalised and often contained jargon; and

-the risks and charges associated with the recommendation were not specified.

Just under a third of the customer files reviewed (136 out of 456) were on a "full advice" basis; over two-thirds (315 out of 456) were on a "focused advice" basis, where nearly four-fifths of the firms (40 out of 49) that provided "focused advice" to customers failed to make their customers adequately aware of the implications and consequences of receiving such advice.

Key messages

The findings above and those in 2006 suggest that the production of a suitability letter (now known as "suitability report") in particular remains an area which requires significant improvement. In confirming their recommendations to customers, advisers must ensure that their suitability letter is adequately personalised to the customer's needs, explains the reasons for the recommendation and highlights the risks and charges involved, whilst giving a balanced view.

Management Information and Systems and controls

The vast majority of the firms visited (45 out of 50) gathered relevant Management Information (MI) about their businesses, but just over a third of these firms (16 out of 45) were not actively analysing and using that information to review their processes and to demonstrate whether they were treating their customers fairly.

In some cases, the monitoring of customer files appeared to only concentrate on the completeness of the files rather than reviewing the quality of the information gathered from, and provided to, customers as recorded in the files. In other cases, where issues were picked up, they were not followed up by remedial actions or learning and development requirements being put in place."

106. In his cross-examination, Mr Rosier confirmed that he was aware of the contents of this report and the Authority's views as to what was required of advisory firms to meet the necessary regulatory standards with regard to demonstrating suitability and gathering customer and management information. Mr Rosier confirmed that he

attended seminars organised by the Authority where these requirements were discussed.

107. In early 2010 SFCD was engaged in a process of telephone assessments of small firms as to their fair treatment of customers as part of the Authority's Treating Customers Fairly (TCF) assessment programme. A telephone assessment of Bayliss through a conversation with Mr Rosier took place on 26 January 2010.

108. It appears that this call raised concerns as to Bayliss's ability to demonstrate fair treatment of its customers and accordingly Bayliss was visited by SFCD staff on 1 April 2010.

109. Following that visit on 24 June 2010 SFCD wrote to Mr Rosier with the results of the Authority's findings consequent upon the visit.

110. The Authority's letter demonstrates its clear dissatisfaction with Bayliss in a number of areas. The letter started by stating that SFCD's overall assessment of the firm was that it was not satisfied that the firm was in a position to demonstrate the consistent fair treatment of customers. The letter continued:

> "Due to the weaknesses identified you will need to undertake substantial remedial action to address these. You agreed that these changes would need to be made to the Firm's practices. You gave your commitment to undertake this action in a timely manner and therefore you are now expected to implement this."

111. The letter then set out a number of detailed findings which can be summarised as follows in so far as they are relevant to the subject matter of these references:

> (1) Bayliss did not have adequate procedures and provisions in place to ensure that suitable advice was given to clients and was recorded in the relevant customer files;
>
> (2) Bayliss was ineffective in monitoring its advisers and there was little record of any monitoring having been done;
>
> (3) There was no written complaints procedure to handle complaints received; and
>
> (4) The review of the GTEP sales requested by the Authority had not been completed.

112. Consequently, in the letter SFCD requested that Bayliss take various steps to address the issues identified within specified time frames, including:

> (1) the implementation of risk-based monitoring procedures;

(2) the introduction of a systematic method of collecting and analysing client information and a new method for producing suitability reports which met the Authority's requirements; and

(3) a review of the restrictions and exceptions regarding UCIS promotion to ensure that all future sales are compliant.

113. The letter also included as an Appendix the results of a review of six client files that SFCD undertook after the visit. This review related to clients numbered 3, 5, 8, 11, 13 and 17. The review identified what SFCD regarded as deficiencies in Bayliss being able to demonstrate that the clients concerned had been given suitable advice in respect of the transactions recorded on the files.

114. The letter concluded with clear implications that complying with the requests to implement the specific steps identified would not necessarily be the end of the matter. It recorded discussions that had taken place with Mr Rosier regarding a request the Authority made that Bayliss consider suspending all regulated activity and voluntarily varying its permission to add a restriction not to use its regulatory permissions, a course of action which at that stage Bayliss resisted but which SFCD now asked Bayliss to reconsider in the light of the findings in the letter.

115. The letter also warned of a possible referral for enforcement action in the light of the serious concerns set out in the letter in the following terms:

> "You should be aware that given the range and nature of issues identified we have discussed the visit findings with colleagues in the Enforcement. [sic] Discussions are ongoing and should a decision be taken to refer your firm to Enforcement we will write to you before a referral is made."

116. Mr Rosier gave the impression in his evidence that he had expected that following this letter he and the Authority would work together to address the issues in a co-operative spirit and that the referral to Enforcement which followed on 29 July 2010 with the appointment of investigators represented a "dramatic and totally unnecessary action."

117. In our view, however, Mr Rosier should have been left in no doubt that enforcement action was distinctly likely as a result of the warning in SFCD's letter, although he may not have appreciated that to be the case at the time.

118. Mr Rosier's response to SFCD's letter was measured and co-operative in tone. It was set out in a letter dated 6 July 2010. In that letter Mr Rosier regretted but accepted that Bayliss had been unable to demonstrate the consistent fair treatment of customers. We emphasise again at this point that there has never been an allegation from the Authority that clients have actually been treated unfairly or that specific unsuitable advice has been given.

119. In his letter Mr Rosier made it clear that as an alternative to the steps requested by SFCD that in his view the best way forward was to join a network, that is where Bayliss would give up its own authorisation and become an appointed representative

firm of a larger organisation, thus being subject to that firm's compliance procedures. Mr Rosier disclosed that he had undertaken negotiations to that end with one such organisation and would like to join them at the earliest opportunity. It is therefore clear that Mr Rosier never intended to implement the changes requested by the Authority through Bayliss continuing with its current status as an authorised firm outside a network.

120. Mr Rosier's evidence, which we accept, was that the referral to Enforcement meant that it would not be possible for Bayliss to join a network until the enforcement proceedings were resolved, no network firm being willing to take on responsibility until the outcome of the enforcement proceedings was known.

121. It appears that this fact has coloured Mr Rosier's attitude to the Authority and his relationship with the Authority subsequently became fractious.

122. This is well illustrated by the process that led to Bayliss agreeing to vary its permissions voluntarily and the appointment of a skilled person pursuant to s 166 FSMA to review its past business.

123. Mr Rosier had resisted the invitation to vary Bayliss's permissions on the basis that he would undertake to devote his attention to addressing the Authority's concerns *"whilst retaining his ability to undertake regulated activities which will also enable us to maintain the commercial activities of the businesses…"* In fact, as we have seen, Mr Rosier's strategy to deal with the concerns raised as later set out in SFCD's letter of 24 June 2010 was not to take the remedial action required within Bayliss as an authorised person but to join a network as an appointed representative.

124. In the event, after protracted discussions and correspondence, Bayliss agreed voluntarily to vary its permission on 23 September 2010. The Authority agreed that this could be effected on terms that Bayliss could continue to carry out regulated activities on condition that an independent person approved by the Authority would review and approve any advice offered or arrangement made. It was also a condition that no advice or arrangements were made in relation to UCIS or GTEPs.

125. Mr Rosier contended that in effect he was misled into agreeing the variation of permission because he had been given to understand by Mr Ackrill, who was then conducting the investigation, that the suspension would be temporary and business could be conducted as it had been before, but for a very limited period it would need to be signed off by another registered individual. With regard to the latter point Mr Rosier also asserted that Mr Ackrill had indicated that Mr Rosier's proposal that a good friend of his who was an accountant and IFA perform the role of signing off new business would be acceptable.

126. Mr Ackrill is not available to give his version of these events. There are no notes of any conversations with Mr Rosier in the records of the Authority that have been disclosed relating to these issues and Mr Rosier made no notes of his own. We are therefore unable to make any finding on whether Mr Rosier's assertion on the issue of the independent person is correct or not, although in our view it is not relevant to the

issues which we have to determine. In relation to the alleged temporary nature of the variation, it is not expressed in those terms but in an email dated 9 April 2010 when the Authority first invited Bayliss to vary its permission the Authority explained that Bayliss would be able to apply for the requirement to be removed once the firm was in a position to demonstrate that effective remedial action had been taken.

127. Our conclusion is that Mr Rosier interpreted this statement as an indication that the variation would be temporary, but did not focus on the fact that how long it would remain in place depended on when the remedial action sought had been implemented rather than by reference to a specific time period, which was clearly never specified. It is an example of Mr Rosier engaging in wishful thinking and hearing from Mr Ackrill what he wanted to hear.

128. In parallel with this process, a process was being undertaken to appoint a skilled person pursuant to s166 FSMA. This provision enables the Authority to appoint a person nominated or approved by the Authority and who appears to the Authority to have the necessary skills to provide a report to the Authority on specified matters. It is a process commonly used by the Authority as an alternative to a past business review by the firm itself, whereby an independent person with skills in the relevant area provides a report to the Authority on areas of the firm's business which are of concern to the Authority. The findings of the report can be used by the Authority in the context of any ongoing supervisory or enforcement action, as has been the case here.

129. The possibility of the appointment of a skilled person was mentioned in SFCD's letter of 24 June 2010 in the context of the Authority considering whether further action was necessary in relation to Bayliss' activities regarding the promotion of UCIS. It would appear, however, that subsequently the proposal was widened and the Authority decided that a skilled person should be appointed to review and provide a report on the last 20 pieces of regulated business conducted by Bayliss (which were in relation to 12 customers advised by Mr Rosier during 2009 and 2010) in order to assess the suitability of that business for the client in question. It also appeared that the Authority envisaged that the skilled person appointed would also perform the role of the independent person signing off new business envisaged in the terms of Bayliss' variation of permission. This may explain why Mr Rosier's proposal that the accountant friend of his perform this role became overtaken by events.

130. Mr Rosier understandably found the process of appointing a skilled person frustrating. It was not until 26 January 2011 that Accord Limited, a firm of compliance consultants, were appointed to perform the role.

131. As is apparent from s 166 , it is envisaged that the appointment of a skilled person can come about by two routes, either a person nominated by the Authority or a person nominated by the firm concerned and approved by the Authority. In this case the Authority invited Mr Rosier to propose names, which Mr Rosier did on a number of occasions all to no avail because for varying reasons the names were not acceptable to the Authority. In one case the firm suggested was rejected because the Authority did not believe the firm had sufficient experience of UCIS, but it does not appear that

it had been clearly stipulated to Mr Rosier at the outset that such experience was a prequisite. Eventually, Accord were appointed following the Authority providing Mr Rosier a list of names which it deemed suitable for the task in question, a course of action which bearing in mind Mr Rosier's unfamiliarity with the process, the experience of the firms concerned and any views the Authority might have on their suitability, should probably have been taken at the outset.

132. Accord were also acceptable to the Authority as the person to sign off Bayliss' new business as the independent person referred to in the variation of permission. In fact no new business constituting regulated activity was transacted by Bayliss after 3 August 2010. Mr Rosier's evidence was that the fees that Accord would have charged for undertaking the necessary review and giving approval did not make it economic to undertake the business in this way.

133. On 31 March 2011 Accord issued an interim report on the past business review. For each of the 20 transactions reviewed Accord found that the customer files contained insufficient information to enable it to assess the suitability of the advice provided.

134. Accord had particular concerns with what was in its view:

(1) the lack of adequate fact find documentation;

(2) the process used for establishing customers' attitude to risk; and

(3) suitability reports, which were not sufficiently personalised and therefore did not provide an adequate explanation as to the suitability of the recommendation for each customer given their circumstances and objectives.

135. No final report was ever issued as there was a dispute between Bayliss and Accord regarding the latter's fees and consequently no further material was provided to Accord with regard to customer information which would enable it to take its work any further.

136. Mr Rosier was critical of Accord's work saying that rather expensively they had merely replicated SFCD's work and come up with the same conclusions. We reject that evidence in that Accord were asked to review twelve client files whereas SFCD in its report had only reviewed six so clearly Accord's work was more extensive. If, as appears to be the case, no further client information that would enable it to assess the suitability of particular transactions was made available to Accord by Bayliss it is of no surprise that, in common with SFCD, Accord concluded that Bayliss had been unable to demonstrate that the advice on the merits of the transactions concerned had been suitable. Also in common with SFCD, Accord could not conclude whether the advice given was in fact suitable or not because of the paucity of information available.

137. As is clear from the Authority's Investigation Report, the approach taken by the Authority in the investigation was to:

(1) conduct a review of the documents and files held by SFCD, including six partial client files, and ten further client files requested from Bayliss by the investigation team, some of which were incomplete;

(2) review the suitability documents of three investors who invested in a UCIS;

(3) review 13 files relating to customer complaints regarding the sale of GSTPs;

(4) carry out an interview with Mr Rosier on 9 February 2011; and

(5) review Accord's report.

138. That is the material that we have reviewed in coming to our conclusions on whether Mr Rosier acted with due skill, care and diligence in relation to the matters complained of by the Authority, no further material being provided by Mr Rosier, despite requests to that effect being made from time to time.

139. We therefore now turn to consider the specific matters on which the Authority relies to make its case on these references. We consider each matter separately, making additional findings of fact in relation to each issue.

Issue 1: Whether Mr Rosier's conduct in relation to the specified matters demonstrates that he failed to act with due skill, care and diligence in breach of Statement of Principle 2.

Recording of customer information and customers' attitude to risk.

140. The Authority's case on this matter is that from 7 August 2004 to 3 August 2010 Mr Rosier:

(1) did not complete fact finds or maintain sufficient customer records in a number of cases;

(2) did not assess or record customers' attitude to risk in a number of cases; and

(3) where he did make such records, in a number of instances they contained insufficient information to enable him to recommend products and/or contained information that was out of date.

As a consequence, the Authority contends, Mr Rosier was unable to demonstrate that the advice he provided to customers was suitable.

141. As we have identified in paragraphs 13 to 26 above, throughout the relevant period the Authority has had rules requiring an authorised person to gather sufficient personal and financial information regarding its clients in order that it may assess the

suitability of the transactions it recommends. The firm is also required to keep a readily accessible record of that information.

142. The rules changed during the relevant period but we do not see that their effect is materially different. We have therefore based our consideration of this issue on the most recent set of rules in force, that is COBS 9.2.2 and 9.2.3 as set out in paragraph 23 above.

143. In our view the views expressed by the Authority in the report it issued on Quality of Advice Processes in August 2008, as referred to in paragraph 105 above, encapsulate well the standards to be expected in order to comply with the requirements of the relevant COBS Rules. In particular, the key messages given by the Authority in this report regarding the need to explore all areas of the client's financial needs and to be clear about his attitude to risk, the need to gather and record sufficient information on file to demonstrate the firm has adequately considered the client information it has obtained, backed up by research to support why a particular provider and product has been recommended, give clear signposts as to what is expected. We therefore measure the documentation and information produced by Mr Rosier from his client files against these standards.

144. We are satisfied that the files available to us represent a satisfactory sample from Bayliss' client base so as to make an overall assessment of Mr Rosier's compliance with the relevant rules. According to Ms Tuckley's unchallenged evidence which we accept, of the files produced in addition to the six received by SFCD, Enforcement randomly chose three from among nine clients who had invested in UCIS through Bayliss while the remaining three were randomly chosen from customers who had transacted business with Bayliss after 1 January 2009. These twelve files represented 12% of the clients of the firm. In addition, documentation other than the full files made available were looked at in the Enforcement investigation in respect of three other clients where Enforcement had requested more limited information than the full file.

145. In his interview, Mr Rosier stated that Bayliss used a five page Financial Information Form to gather information for new clients. This was a standard form prepared by a trade association for its members and if properly completed would in our view have provided the firm with the relevant client information it needed before making personal recommendations. The document contained detailed questions about the client's financial goals and the proposed period over which he wished to invest, and a ten point scale (from one ("little risk") to ten ("very speculative")) on which the relevant point on the scale would be circled to indicate the client's attitude to risk.

146. Mr Rosier recognised that information on the Financial Information Form would need to be updated. Mr Rosier stated in interview that he would seek to do this *"not very often, may be every five years or something."* He used a two page form described as a "Confidential Fact-Find Questionnaire" for this purpose, but although it replicated the scale on attitude to risk contained in the Financial Information Form, rather confusingly it also contained a four point scale headed "Attitude to Risk" described as high/medium, medium, medium/low and low, with no indication as to

how that related to the original ten point scale. In practice we do not think this is a concern because in none of the Fact Finds we reviewed was this four point scale completed. There was no evidence that Bayliss used the indicators from the scale to extrapolate the kind of products and funds that would be appropriate for the level of risk accepted.

147. Of the twelve complete files reviewed six contained no Financial Information Form or Fact Find, (clients numbered 1, 7, 10, 19, 21, 24) although in respect of client 24 some information was contained in other documents. In respect of the remaining six the information available can be summarised as follows:

Client 3: An undated Fact Find (no Financial Information Form) was supplied which was only partially completed with no details of existing investments held. It describes the client as being at level 6 on the attitude to risk scale but indicates an appetite for "some funds having greater exposure to risk than 6." This statement is not informative on its own without there being a reference to what type of funds fall within level 6 on the scale.

Client 5: An undated Fact Find (no Financial Information Form) was supplied which was only partially completed. Whilst it gave some details of assets it only indicated the total value held in each category (for example £1 million in unit trusts and pensions and similar assets) without including the actual (or even type) of fund held. The financial goals section was left blank. At the bottom of the first page of the document Mr Rosier had written:

> "Since I have been dealing with your investments for over 20 years, I believe that I do have a complete picture of your financial situation requirements but if this is not the case or there is any further information you believe I need or would be helpful please notify me."

Client 8: A partially completed Financial Information Form dated 23 February 2007 was supplied together with an undated partially completed Fact Find. On the Financial Information Form no details are given as to monthly personal expenditure and liabilities. In relation to the section for details of assets held it is left blank with the comment "Detailed Elsewhere". The customer has ticked a box indicating he is an experienced investor. The Fact Find is likewise left blank in most material respects with the comment "Details recorded on file", but there is no evidence of any of the missing information that we can see elsewhere on the file.

Client 13: A largely complete Financial Information Form dated 16 March 2006 was supplied together with a virtually blank undated Fact Find, on which Mr Rosier had made an annotation to the effect that the only advice being sought at the time was consolidation of a small pension fund with other funds.

Client 17: An undated Fact Find (no Financial Information Form) was supplied which contained little detail regarding the client's existing assets and liabilities. Mr Rosier has annotated the document with the comment "These notes are supplemental to completed [sic] in 2006."

Client 11: An undated Fact Find (no Financial Information Form) was supplied which contained little detail regarding the client's assets and liabilities and had not been completed with regard to the client's attitude to risk.

148. Thus it can be seen that in no case was anything like complete personal and financial information of the quality envisaged by the Authority's rules and guidance apparent from the documents on the file.

149. Mr Rosier has from the outset of his engagement with the Authority on these issues accepted that the documentation to be found was incomplete. In his interview with the Authority he stated the following:

> "I think I have no alternative but to concede that the documentation as you view it is not as it's required in the text of (the Authority's) regulations. What I would not accept is that in practical terms I do not have the information on the clients because I would submit that I have much more detailed information that most others would because it's a small and well-known client bank. … So I think maybe I can save time by saying if the documentation I have doesn't properly record it, I don't, then I don't argue with you. What I do say is that I do have the information on these people and if you would like to ask me any particular questions on any of them, I'm pretty confident that I can answer it fully."

150. Both the passage quoted in paragraph 149 above and the notes made on some of the Fact Finds to the effect that the necessary information was held elsewhere, support the consistent line that Mr Rosier has taken in defence of his position which is that although he accepts the documentation does not meet the Authority's standards in being able to demonstrate that sufficient information has been gathered, he has met the necessary standard because either the information is to be found on other files which the Authority has not seen or he is sufficiently familiar with his clients' affairs through a long association with them.

151. As far as the first point is concerned, when it was first made the Authority asked Mr Rosier to provide the other files to which he referred but he did not do so. Despite repeated requests (including a compelled request on 11 October 2012) the files were not forthcoming .

152. Mr Rosier finally gave his reasons why these files had not been provided during his cross-examination. He stated that Bayliss' terms of business only requires files to be held for six years (implying that some of them would have been destroyed under this policy), some of them were not kept or were difficult to find, and whilst there was information in those earlier files it will have been dated information and therefore would not have complied with the contemporary regulations. This answer rather defeats his own argument; Mr Rosier at this point had recognised that what the rules

required was up to date client personal and financial information to be readily apparent from the records he kept and even if those earlier files had been provided such information would not be forthcoming.

153. On the second point, the rules are absolutely clear. Information should be recorded in a readily accessible form. What the rules envisage is that the "know your customer record" should be a living document constantly updated to take account of the transactions effected for a client and any change in his personal and financial circumstances. Mr Rosier may well have felt that when he made the recommendations that he did to his clients he had sufficient information from his previous dealings to be satisfied that the recommendations concerned were suitable. He may be right on that, but the rules envisage that he needs to be in a position to demonstrate that and if the information is simply not recorded or readily available then that obligation cannot be complied with.

154. The overall impression when the files are reviewed as a whole is that they record a series of transactions being effected for clients over, in some cases, a significant period. This indicates that Mr Rosier was actively engaged with his clients, but no overall picture emerges as to how the transactions recommended fitted in with the client's objectives and his attitude to risk, and why the investments chosen were appropriate in the light of his existing portfolio. The whole purpose of obtaining the type of information which Mr Rosier had through the Financial Information Form and the Fact Find set himself up to gather, but which in practice he did not follow through, was to enable the firm to demonstrate why a particular provider and product has been recommended, how the product addresses the client's needs and objectives and how it fits in with his declared attitude to risk.

155. We agree with the Authority's assessment that proper record keeping is essential to ensure compliance with the Authority's rules and that without adequate records firms are unable to demonstrate the suitability of their advice. As a result, in such cases there is a significant risk of actual or potential customer detriment.

156. We therefore conclude that the Authority's case on this matter, as set out in paragraph 140 above, has been made out. As a consequence in relation to this matter we conclude that Mr Rosier has failed to act with due skill, care and diligence in breach of Statement of Principle 2.

Suitability Reports

157. The Authority's case in this matter is that between 30 January 2009 and 31 December 2009 Mr Rosier failed to act with due skill, care and diligence when producing suitability reports to customers in respect of investment recommendations in that he:

> (1) failed, when drafting the suitability reports, to tailor the section of the report dealing with attitude to risk to the customer's situation, objectives and/or risk tolerance;

(2) failed adequately to record the reasons for recommendations in the suitability reports;

(3) failed, in the majority of cases, to provide adequate particulars of the recommendation, such as the total amount to be invested or how the sum was to be apportioned between individual investments; and

(4) in one instance, omitted the reasons for the recommendation entirely.

As a result, the Authority contends, the suitability reports prepared and provided to clients by Mr Rosier did not, in a number of instances, explain in a way that was clear, fair and not misleading, the reasons why the recommended investment was suitable for the client's personal situation.

158. In this regard we have reviewed ten client files in respect of which the Authority requested Mr Rosier to provide suitability reports issued to the client concerned within the relevant period.

159. A typical example of a suitability letter that Bayliss issued was one we saw on the file of Client 8 which was sent in respect of a particular transaction in an insurance bond for the client arranged by Mr Rosier.

160. We observe from this particular letter:

(1) The aim and objectives section is very short and focuses entirely on what Mr Rosier has been instructed to effect rather than linking the transaction to the more specific aims and objectives of the client (for example whether the investment is in the context of preparing for retirement) or to any other information provided by the client in his Fact Find.

(2) The "Definition of Attitude to Risk" section merely describes the concept of risk and what would dictate a lower rather than higher risk investment being chosen such as whether ready access to the money in question would be needed, but again does not link the description to the client's own risk appetite and explain how the investment chosen is consistent with that appetite. The five point scale in the letter does not reflect the ten point scale used on Financial Information Forms and Fact Finds and the letter does not indicate where on the scale the client's own risk tolerance stands. In fact all of the suitability reports that we have seen, contain the same section on risk in the form as it appears in this sample, none of which have therefore been tailored to the individual client's situation. It is therefore impossible to obtain from the letter any indication of how the investment recommended is consistent with the client's attitude to risk and his overall investment aims and objectives.

(3) The letter is not self contained. In the recommendations paragraph there is a reference to further details being contained in past

correspondence. This is also the position in a considerable number of the other suitability reports we reviewed.

161. We have found the features described above to be typical of all of the suitability reports that we reviewed. On some client files (in particular those relating to Clients 7, 8 and 21) we found evidence of transactions having been arranged but no suitability report appears to have been provided in respect of the transactions.

162. Mr Rosier did not challenge these findings in his own cross-examination of Ms Tuckley. He maintained that the necessary information was to be found in other files. He also contended that if the Authority was concerned as to the advice provided in any particular case they could have questioned him on it and asked for details of any or all of the clients reviewed and reasons why the advice had been given.

163. It is clear to us that when measured against the specific requirements of COBS 9.4.7 and the observations made by the Authority in its Investment Quality of Advice Processes Report the contents of the suitability reports we reviewed were grossly inadequate. In particular:

(1) The attitude to risk section was not personalised in any respect and there were no details of the client's attitude to risk or tolerance to loss;

(2) There was no evidence as to how the transaction recommended was consistent with the customer's aims and objectives as gathered from the fact finding exercise or with the client's risk profile and there was no adequate description of the client's demands or needs; and

(3) It was unclear how Mr Rosier concluded that the recommended transaction was suitable for the client having regard to the information obtained from the client during the fact finding process.

164. With regard to Mr Rosier's first contention, the letters reviewed related to the most recent period of Bayliss' trading, that is from 2009 onwards. It is therefore difficult to see how a review of files from earlier periods would produce documentation the form of compliant suitability reports in respect of transactions recommended in 2009 and 2010, and in the end in his cross-examination Mr Rosier appeared to accept that to be the case.

165. In respect of his second contention, Mr Rosier entirely misses the point. The issue at stake is not whether the advice was suitable but whether Mr Rosier had been able to produce documentation which, in compliance with COBS 9.4, demonstrated that the advice was suitable. Quite clearly he was not in a position to do that.

166. We therefore conclude on this matter that the Authority's case has been made out. As a consequence, in relation to this matter we conclude that Mr Rosier has failed to act with due skill, care and diligence in breach of Statement of Principle 2.

Promotion of UCIS

167. The Authority's case on this matter is that between 5 November 2004 and 4 December 2009 Mr Rosier failed to take reasonable steps to ensure that Bayliss promoted, and could demonstrate that it promoted, UCIS only to customers to whom an exemption from s 238(1) FSMA applied. The Authority also contends that Mr Rosier failed adequately to demonstrate or record which exemption applied for each client to whom a UCIS was promoted.

168. As long as financial services have been regulated, even in the rudimentary form in which it existed when the Prevention of Fraud (Investments) Act was first passed in 1939, there have been restrictions on promoting to the public collective investment schemes which have not been authorised by the relevant regulator. Collective investment schemes are unique amongst the many financial products that are available to retail investors in that as well as regulation of the manner in which the product is sold and advised on, there is detailed regulation of the product itself.

169. "Collective Investment Scheme" is defined very widely in s 235 FSMA but is still largely based on the wording first enacted in 1939. Paraphrasing what is a very complex provision somewhat, the essential elements are:

> (1) It must be an arrangement with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangement to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income;
>
> (2) The participants must not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions about the arrangements;
>
> (3) The arrangements must also have either or both the following characteristics:
>
> i. the contributions of the participants and the profits or income out of which payments are to be made to them are pooled; and/or
>
> ii. the property is managed as a whole by on behalf of the operator of the scheme.

170. It can be seen from the width of this provision that a collective investment scheme could be formed to invest in highly speculative and illiquid assets, such as real estate or unquoted securities in undeveloped locations anywhere in the world, derivatives, or exotic financial instruments. There could be a concentration of risk in a limited spread of assets, heightening the risk of loss, and restrictions in the ability of an investor to realise his investment, either in respect of how long he is locked in and on what terms he can realise his investment. There may be no guarantees that his investment will be independently and fairly valued. There may be limited controls

over conflicts of interest affecting the operator of the scheme in relation to the management and acquisition and disposal of assets which the investor, with no right to participate in the management of the scheme, will not be in a position to monitor. There may be no guarantee that the assets of the scheme would be adequately segregated from the operator's own assets if no independent custodian was appointed.

171. Of course many such schemes may be promoted to sophisticated, experienced or professional investors who are familiar with the types of investment and are capable of managing the risks involved. However, from the description given above of the wide range of schemes and limited protections that may be available, it is easy to see why product regulation is considered essential in respect of those schemes that are available to the public.

172. In order to be promoted to the public, a collective investment scheme must be regulated unless one of the exceptions to the general prohibition of promotion in s 238 FSMA is available. The effect of s 238(4) FSMA is that schemes that have been authorised by the Authority as authorised trust schemes, authorised contractual schemes or authorised open-ended investment companies, as well as corresponding regulated schemes from overseas jurisdictions (such as schemes constituted in other EU member states which meet the EU harmonised requirements laid down pursuant to the UCITs directive) are capable of being promoted to the public.

173. The Authority has laid down detailed product rules for the schemes which it authorises, consistent with the minimum requirements of the UCITS directive, which aim to protect customers by ensuring that the scheme meets certain requirements. These include standards about spread of investments, the type of investment the scheme may invest in, exposure to derivatives, valuation of assets and pricing of units held by investors in the scheme, the ability for investors to redeem their units at net asset value and supervision of the operator of the scheme by an independent person (either known as a trustee or depository depending on the structure of the scheme) who also acts as custodian of the scheme's assets.

174. There are exemptions to the prohibition on promotion of unregulated collective investment schemes, or UCIS. We have referred in paragraph 29 above to a number of exemptions that were potentially relevant in this case in respect of the two particular UCIS that Mr Rosier promoted to a number of his clients.

175. The essence of the exemptions is that they closely circumscribe the circumstances in which they apply and they require the firm that wishes to take advantage of them to behave proactively and ensure that the precise terms of the exception apply. Where, as is often the case, further documentation is required from the investor confirming his eligibility to come within the scope of the exemption, the firm must ensure that it is obtained.

176. The emphasis is on the firm taking active steps to assess the suitability of the scheme for the client in question; it could be said that when recommending a UCIS there is in effect an extra level of assessment of suitability beyond the requirements in COBS 9.2. The firm must assess the scheme itself and determine whether it is going

to be suitable for the investor and it goes without saying that in order to undertake that exercise the adviser will need to understand clearly how the scheme operates and the particular risks it involves.

177. UCIS usually have prospectuses or other offering documents which are often provided to the adviser who is considering promoting the scheme. Obviously, bearing in mind the prohibition on promoting UCIS to the public, these prospectuses usually contain rubric confirming that promotion of the scheme to the public is prohibited. On that basis if an adviser were to promote the scheme by providing the prospectus to his retail clients that would result in a breach of the prohibition on promotion unless one of the exemptions applied. Bayliss, through Mr Rosier, promoted two UCIS to a number of its clients, the salient details of which were as follows.

178. The First Scheme was EEA Life Settlement Fund PCC Limited ("EEA Life"). EEA Life was an unregulated collective investment scheme incorporated, registered and operating from Guernsey which invested in traded life insurance policies ("TLPIs"). EEA Life used investors' funds to acquire a pool of life insurance policies on a secondary market which have been forfeited or otherwise disposed of by the original holder of the policy. EEA Life would then service the ongoing premiums until the policy matures (i.e. until the insured individual dies). The Authority has taken the view even where acquired through a UCIS TLPIs are complicated products that are generally unsuitable for the mass retail market because in its view:

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(1) They use complex investment strategies based on calculations about how long people will live. With medical advancements, and people living longer, these calculations can easily be proven wrong, meaning that the strategy may not work as promised and returns may be lower than expected.

(2) If the investment manager needs to raise extra funds by selling some of the life assurance policies before the death of the original policyholder, they may struggle to do so. It might not be possible to sell them at all or they may only be sold at a significantly reduced value. This may happen at any time because it is important for TLPIs to maintain a certain amount in cash to keep the investment running. Where this becomes a problem, it can place significant strain on the investment and might mean that investors are prevented from withdrawing money for a time or face significant falls in the value of their investment.

(3) They often involve several firms in different countries working together and taking responsibility for different aspects of the product. This makes it difficult for firms to manage the product in a way that ensures customers are treated fairly, and it is generally difficult for investors (and even those selling the products) to fully understand how these products work and what the risks are.

(4) The products can fail entirely and customers can lose a significant amount of money.

179. EEA Life's promotional literature, issued to IFAs to assist them when considering whether to recommend the scheme to their clients, identified the following risks associated with the fund:

> (1) Returns can be significantly adversely affected by underlying insureds living longer than expected;
>
> (2) EEA Life may not have access to liquid assets to make any payments to shareholders until the life policies have matured or until it sells policies in the secondary market, but this market may be illiquid;
>
> (3) An underlying insured may go missing or there may be a delay in ascertaining that an insured has died or in obtaining the required documentation needed to claim the insured's death benefit; and
>
> (4) There is counterparty risk in respect of the solvency of insurance companies and therefore no guarantee that the insurance companies will meet their obligations to make payments on maturity of the life policies.

180. Mr Rosier disputes the Authority's analysis that EEA Life was a high risk fund but he gave no reasons why he felt that the fund was relatively low risk. From our review of the marketing material, prospectus and the Authority's analysis we are satisfied that EEA Life is a high risk product and should only have been promoted to retail investors after very careful consideration as to the features of the scheme that make it suitable for the investor concerned. Regardless of whether it was high risk or not since the scheme was a UCIS it was incumbent for Mr Rosier to satisfy himself that a relevant exemption was available before he recommended the scheme to any of his clients.

181. The second scheme was Protected Asset TEP Fund Plc ("PATF"). PATF is incorporated in and operating from the Isle of Man. It operates two groups of funds: PATF1 and PATF2 which are both invested in a portfolio of traded with-profit endowment policies, acquired on secondary markets. With-profit endowment policies acquired in this way are a class of TLPIs, although in our view the class of assets invested in by PATF, being confined to endowment policies issued by UK Life offices appeared to be less risky than the TLPIs invested in by EEA Life.

182. PATF was classified by the Isle of Man Financial Supervision Commission as an "experienced investor fund" which meant that it was only open to persons who were sufficiently experienced to understand the risks associated with an investment in the scheme. The prospectus for the scheme states that no subscription would be accepted unless the investor had arranged for the delivery of a signed declaration acknowledging that the investor is an experienced investor and has read and understood the scheme's prospectus.

183. According to the promotional literature relating to the scheme, specific risks were identified as the following:

(1) Returns on investments were not guaranteed;

(2) TLPIs do not provide income and hence may not be suitable for persons who require regular income from their investments;

(3) Maturity values depend on the investment performance of the underlying life office, and hence may vary over time;

(4) The value of an investment may go down as well as up over time;

(5) The directors of PATF may impose a discretionary redemption penalty in response to unforeseen events;

(6) Investment decisions made in respect of PATF may not prove to have been successful or correct;

(7) None of the sub-funds or any combination thereof is intended to be a complete investment programme;

(8) There is no guarantee against the default of a counterparty;

(9) PATF may invest in other funds, which may result in exposure to other risks;

(10) The ability to redeem shares may be restricted in some circumstances;

(11) There are potential conflicts of interests; and

(12) An investment in PATF is not protected against inflation.

184. In addition, we note from the prospectus that dealings in shares only took place once a month, redemptions were generally not permitted in the first year and, if permitted, would incur a redemption penalty of 8%, which tapered down the longer the investment was held. The scheme was therefore not suitable for investors who might require immediate access to their funds.

185. Again Mr Rosier disputed that this scheme was high risk. The risks we have referred to above in our view lead to the conclusion that it was high risk, as also demonstrated by the fact that it was only open to experienced investors. Again, regardless of its risk profile, as the scheme was a UCIS it was incumbent on Mr Rosier to satisfy himself that a relevant exemption was available before he recommended the scheme to any of his clients.

186. We have been provided with evidence showing Mr Rosier advised eight clients to invest in either EEA Life or PATF, that is Clients 5,7,8,9,10,13,19 and 20.

187. The process undertaken by Bayliss for advising clients on the sale of a UCIS were the same as that used for other products, with two additional features.

These findings are taken from the answers Mr Rosier gave in interview to the Authority, which were not materially challenged during cross-examination. Mr Rosier would first form the view that the client's status, level of sophistication and understanding of such products led to a conclusion that he may be suitable as an investor. Having formed that view, he would send the client the relevant fund literature and then spend a considerable period of time watching the performance of the fund, and updating the client with these performance details, before making any recommendations. Mr Rosier confirmed in interview that he did not require clients to whom the funds were promoted to sign documents acknowledging that they were sophisticated investors and he did not record which exemptions, if any, to s 238(1) FSMA he relied on in promoting the UCIS to these clients.

188. In cross-examination Mr Rosier admitted that he was aware in general terms that there were rules restricting the promotion of UCIS but not of the detail of those rules. Nevertheless, he admitted that he was aware that if the sophisticated investor exemption in the PCIS Order was to be relied on the client needed to sign a declaration that he met the terms of the exemption. Mr Rosier stated that he took no steps to ensure that was the case. His reason for omitting to do so was that he was not clear whether the rules applied where the product was to be sold within the wrapper of an authorised insurance bond (which they were in all the cases we examined). Mr Rosier accepted that was a point he should have checked before proceeding to make the recommendations. He did however, emphasise that in his view no customer who invested in either EEA Life or PATF had been given unsuitable advice and he maintained that the recommendation to invest was suitable for the customers concerned.

189. In the light of these findings, it follows that in none of the suitability letters that were sent in relation to recommendations to invest in either of the UCIS did the letter set out the exemption from s 238 FSMA that was being relied on.

190. It may have been the case that either the sophisticated investor exemption pursuant to the PCIS order or one of the exemptions provided for in COB 3.11 or COBS 4.12.1, as the case may be, may have been applicable to each of the clients concerned, but in the absence of any evidence to that effect it is impossible to say. As far as the sophisticated investor exemption is concerned, it is clear that it was not applicable in any case because no attempt was made to ask any client to sign the relevant certificate.

191. In a letter written by Mr Rosier to Client 10, Mr Rosier records in relation to a recommendation to invest in EEA Life:

> "As we discussed such funds are only intended for "sophisticated investors" and we have discussed the various implications and ramifications of the investment."

192. This of course is no substitute for tangible evidence that the client was a sophisticated investor, and no details are given as to why Mr Rosier came to that view and, as we have observed, the client did not sign a certificate to that effect.

193. There is evidence in the case of one investor, Client 7, who had substantial investments in excess of £2 million on which Mr Rosier had advised for many years that he was positively not a sophisticated investor. Mr Rosier in his cross-examination equated sophistication with the fact that the client had substantial assets and had retired from a *"very responsible job",* although he admitted that this customer was *"not one of the more sophisticated ones but I am convinced that we had discussions and he knew of the nature of the matter."* This lack of sophistication is demonstrated by a comment the client made in a letter to Mr Rosier's secretary as to his *"limited expertise"* when questioning why an investment had been made in a particular bond fund.

194. In none of the letters we have seen recommending investment in either of the UCIS was there any satisfactory evidence of the necessary information having been gathered in order to assess the suitability of the particular fund for the customer, as would have been required by either COB 5.2.5 or COBS 9.2.2. Neither did we find any evidence as to why the fund was considered suitable for the investor in any of the documents we have reviewed.

195. Such information that we saw was completely inadequate. For example in relation to Clients 9 and 20 Mr Rosier simply wrote:

> "It is very important that you understand the status of the fund."

There is however, no evidence that Mr Rosier recorded the basis on which he was satisfied that the customer concerned did understand the fund, which, as we have observed above, was essential if it was to be recommended.

196. In relation to Client 5 Mr Rosier simply wrote:

> "We have chosen [EEA Life] because you liked the structure of the fund and its reliable performance to date although I reminded you that past performance is not an indication of future performance."

197. In relation to Client 8 Mr Rosier simply wrote:

> "With regard to [EEA Life] that is different to the others as you know and I have provided full details to you. If you do require a further explanation please let me know."

This indicates Mr Rosier's approach of providing the fund literature to the customer and then leaving it to the customer to assess whether it is suitable for him and he understands the structure. That is clearly inconsistent with the purpose of the exemptions regarding UCIS which is that the firm

advising on the product must satisfy itself that the customer understands the product and that the product is suitable for him.

198. We therefore conclude that Mr Rosier's approach to the promotion of UCIS was totally inadequate. He made no meaningful attempt to comply with the necessarily strict restrictions on promotion of such schemes to retail investors despite being aware in general terms of the requirements. We do not accept that the wrapping of the scheme in an insurance product removes the product from the scope of the restriction; despite the wrapper in essence what is being marketed is the underlying fund. If Mr Rosier was unclear about this he should have taken specialist advice before proceeding with his recommendations. We have outlined in some detail the reason why UCIS are different to other investment products and why a rigorous process undertaken by advisers who are sufficiently knowledgeable about the restrictions is essential if they are to be recommended. Mr Rosier's attitude of simply forming his own view as to the sophistication of his client and the reason it was suitable without obtaining the necessary documentation and recording the reasons for his view is unacceptable. Once again, Mr Rosier misses the point when he contends that the advice given to invest in the UCIS concerned was suitable. That is not the issue in this case. The question is whether Mr Rosier has taken reasonable steps to demonstrate that the advice given was suitable and he has clearly failed in that respect. We regard that failing as serious.

199. For these reasons we conclude on this matter that the Authority's case has been made out. As a consequence in relation to this issue we conclude that Mr Rosier has failed to take reasonable steps to ensure that Bayliss promoted, and could demonstrate that it promoted, UCIS to customers to whom an exemption under s 238(1) FSMA applied, in breach of Statement of Principle 7.

Dealing with Customer Complaints

200. The Authority's case on this matter is that from 29 July 2005 to 25 September 2012 Mr Rosier failed to take reasonable steps to ensure that he or Bayliss responded appropriately to complaints. In particular the Authority contends:

(1) Bayliss did not have a written complaints handling policy and instead relied on the provisions in DISP;

(2) When handling complaints, Bayliss did not comply with the requirements of DISP or treat its customers fairly in that it did not:

i. provide or retain initial responses to complainants which set out how the complaint was going to be investigated;

ii. provide final responses to complainants; or

iii. adopt an appropriate tone in communications with complainants, in that the initial responses sought to distance Bayliss from the advice given, blame the client for not having contacted Bayliss earlier, and distance Bayliss from liability for the advice given; and

(3) As a result of Mr Rosier's failure to ensure that Bayliss complied with the regulatory requirements for handling complaints, 13 complainants subsequently approached FOS for adjudication of complaints relating to advice given by Bayliss to clients concerning GTEPs and in each instance, FOS upheld the complaint and awarded redress to the customer concerned.

201. In relation to the Authority's first complaint, the requirement that firms have a written complaint procedure is derived from DISP 1.2.1 which is set out in paragraph 30 above. It is quite clear that this rule is more focused on how large firms deal with complaints, as it refers to obligation of the firm to "publish" summary details of its complaints procedure, which can be expected when a firm has a large number of branches to which the public has access but fits less easily with a firm with only one adviser. The Rules are not prescriptive about how the firm's procedure is to be published. DISP 1.2.4 referred to in paragraph 39 above indicates that it "may" be set out in a leaflet and the availability of the procedure "may" be referred to in contractual documentation.

202. Bayliss' terms of business did in fact contain a statement that written details of their complaints procedure were available on request. However, as Mr Rosier admitted that a written procedure had not been produced it was not in a position to comply with this provision if a client made a request. It could presumably have sent a document setting out the steps it would take in compliance with DISP to investigate the complaint.

203. Bearing in mind the terms of its contractual documentation, in our view Bayliss should have reduced its complaints procedure to writing in the form of a leaflet. Being a small firm with only Mr Rosier to undertake the investigation of a complaint, it seems to us that such a leaflet would, in order to be compliant, contain no more than a description of the steps that would be taken in compliance with DISP 1.4 and 1.6.

204. We therefore find that Bayliss was in breach of DISP 1.2.1 by not producing such a leaflet but, bearing in mind the nature of the firm, we do not regard such breach as being serious. Consequently Mr Rosier was in breach of Statement of Principle 7 by failing to take reasonable steps to ensure that Bayliss had a written complaints procedure.

205. Except in respect of one complaint relating to advice given by Mr Rosier, all of the complaints which are the subject of this reference were complaints made by former customers of Money Matters in relation to advised sales of

GTEPs advised on by Mr Clegg and Mr Lankester at the time that Money Matters operated as a division of Bayliss.

206. These complaints, twelve in total, started to be made during 2005 and further complaints were made sporadically until 2010. They all relate to advice given on GTEPs between 2001 and 2004. The essence of the complaints is that the clients were not given adequate risk warnings and that the products had been sold as low risk investments when it was clear that they were relatively high risk.

207. With regard to the contentions of the Authority with regard to the handling of complaints, Mr Rosier's position was that taking account of all of the circumstances, his approach was reasonable for the following reasons:

(1) It was difficult for him to deal with the complaints expeditiously because all the client files had been retained by Mr Clegg and Mr Lankester when they left Bayliss. As a consequence he had to seek information from the complainants themselves, because the product providers concerned would only provide the information concerned to Mr Clegg and Mr Lankester in accordance with the authority given in respect of the clients concerned;

(2) Although he accepted that this was not the case in relation to the initial responses given on the receipt of a complaint, he followed the instructions of his insurers and their lawyers as compelled to do by the terms of Bayliss' professional indemnity insurance policy so that the wording used in letters sent to complainants was that of Bayliss' insurers and their lawyers and not Bayliss itself;

(3) With regard to the delay calculating the amounts payable under awards made by the FOS, the insurers were of the view that the best way forward was to allow the FOS to make the calculation of loss because none of the complainants knew the quantum of their claim;

(4) The FOS in fact made amounts by reference to a formula and the delay in producing calculations was caused by the need to obtain information from the product providers through the complainants in order to carry out the calculation;

(5) Mr Clegg and Mr Lankester encouraged the customers concerned to complain to Bayliss notwithstanding the fact that they continued to have an ongoing advisory relationship with the clients concerned;

(6) He was given legal advice that some claims were invalid, although he accepted he had no record of that advice; and

(7) He denied that his approach was simply to sit back and wait for a complaint to be determined by FOS without taking any steps himself to resolve the complaint as required by DISP.

208. In respect of this issue we have examined such correspondence as is available from Bayliss's files on the complaints in question. Many of the files are incomplete and reference is made in some letters we have reviewed to previous correspondence which is not on the file.

209. As Mr Rosier maintained in his evidence before the Tribunal that the terms of his professional indemnity policy required him to write to his customers in the terms that he did, the Tribunal indicated to him that it would be willing to admit such policy in evidence, notwithstanding the fact that it had not previously been provided by Mr Rosier as one of the documents that he wished to rely on. Mr Rosier had previously also maintained that the policy required there to be a FOS award before a claim would be settled but he withdrew that assertion during his cross-examination.

210. Mr Rosier did, shortly after the hearing had concluded, produce what appeared to be a policy schedule relating to a policy in force with QBE (Insurance (Europe) Limited ("QBE") between 21 October 2007 to 20 October 2008 and another relating to a policy in force with QBE between 21 October 2008 and 20 October 2009 and extracts from a policy issued by QBE in favour of Bayliss, which we presume relate to the policy schedule. He also provided two pages from a policy issued by Collegiate Underwriting Limited to Bayliss for the period 20 October 2009 to 19 October 2010. These documents were also provided to the Authority.

211. From the policies extracts we were provided from the QBE policies we note the following provision:

> "The insured agrees not to incur any Defence Costs and Expenses, admit liability for or attempt to settle, make any admission, offer any payment or otherwise assume any contractual obligation with respect of any Claim or loss without QBE's written consent. QBE shall not be liable for any Defence Costs and Expenses, settlement, admission, offer payment or assumed obligation to which it has not consented. In any event no action shall be taken which might prejudice QBE."

212. A similar provision is to be found in the material relating to the Collegiate policy as follows:

> "In the event of a Claim or the discovery of any Circumstances the Assured shall not admit liability and no admissions, offer promise or payment shall be made by the Assured without Underwriters' prior written consent."

213. In the absence of any further material, we assume these are the only provisions relating to how Bayliss was to conduct itself as regards the manner in which it dealt with claims in accordance with the instructions of the insurers.

214. As we shall see, there is evidence of correspondence consistent with Bayliss' obligations under these provisions not to settle any claim without the insurer's consent.

215. There is no question that Mr Rosier resented the fact that he had to address the complaints that were made in respect of the advice given by Mr Clegg and Mr Lankester. We understand his frustration about having been put in a position where Bayliss had to deal with the matters when the advisers concerned had left the firm, taken the relevant client files and, it appears offered Mr Rosier no co-operation or assistance in resolving the complaints notwithstanding the fact that they continued to have an ongoing relationship with the client concerned. We have seen a number of letters written by Mr Rosier to Mr Clegg and Mr Lankester asking for the relevant files but there was no evidence of a response. We therefore accept that Mr Rosier did attempt to obtain information to enable him to deal with the matter and that inevitably matters would be more difficult for him in the absence of this co-operation.

216. As we understand it, Mr Clegg and Mr Lankester were approved persons with their new employers so it would have been open to Mr Rosier to explain his difficulties to the Authority and ask them to assist in putting pressure on Mr Lankester and Mr Clegg, but we have seen no evidence that Mr Rosier did at any time take this course of action when dealing with the complaints.

217. We suspect that Mr Rosier is correct in his assumption that the customers were encouraged to complain to Bayliss by Mr Clegg and Mr Lankester, although we cannot be satisfied that the complaints were orchestrated and that Mr Clegg and Mr Lankester drafted the customers' letters for them as Mr Rosier alleged. The complaints all came at different times and in our view it is more likely that the customers initially complained to Mr Clegg or Mr Lankester as their ongoing advisers, who told the customer, correctly, that responsibility for dealing with the complaint rested with Bayliss.

218. Nevertheless, Mr Rosier's approach does not demonstrate that he fully understood and accepted that despite these difficulties legal and regulatory responsibility for the advice originally given, investigating the complaints and meeting any FOS awards rested with Bayliss and it could not pass responsibility on to Mr Lankester and Mr Clegg.

219. There is clear evidence, as contended by the Authority, that Mr Rosier attempted to distance himself from the complaints. For instance:

(1) In writing to the FOS in respect of the complaint made by Client 18 Mr Rosier wrote:

> "I do believe that this matter should be directed against a different firm since Mr Philip Clegg of The Sunday Group has been continuing to provide advice in respect of the investment.

> I enclose herewith a letter from Mr Clegg's past employers, The Sunday Group, dated 23 June 2008 from which you will see that they, on behalf of Mr Clegg and, indeed, on behalf of themselves, are refusing to supply information in respect of the advice given by Mr Clegg.
>
> This being the case we fail to see how we can be held responsible, not only for advice given on behalf of another company but in respect of which the company, in turn, refuses to provide any details.
>
> Again, it does not seem appropriate, proper nor equitable that we should be held responsible for advice given by another company when that company refuses to provide us with any details."

(2) In responding to Client 22 on receipt of his complaint Mr Rosier starts the letter with the comment:

> "I note that you dealt six years ago with Mr Philip Clegg of Moneymatters."

And later on he comments:

> "Again I would refer to my earlier comments herein, i.e. until receiving your letter I had no idea that you considered yourself a client of Bayliss & Co.
>
> Your penultimate paragraph advises that you have enquired as to the status of your investment but, again, if you considered Bayliss & Co to be advising you can you confirm why you did not seek the information from ourselves rather than from wherever the information was sought?
>
> Finally, you conclude by asking what we, as a company, intend to do about the situation.
>
> Until we are able to be clear as to what the situation is, in addition to the other matters I raise herein, I am afraid I am unable to answer this.
>
> If you would perhaps provide the further information I seek herein I will take the matter forward."

(3) In responding to Client 14 on receipt of his complaint he writes:

> "It is the case that at the present time many investments are not performing as expected and, with respect, my first inclination is that it is difficult to see how my company can be responsible for an investment made seven years ago, any connection with which current updates, advice or anything else were specifically directed away from us."

(4) In responding to Client 28 on receipt of her complaint, after apologising for a delay in replying he writes:

> "One of the reasons for the delay is that your name and details were not known to me, my understanding being that when Mark Lankester ceased to be associated with my company in late 2004 (he was a self-employed adviser) at that time you assigned conduct of your affairs to Mr Lankester and his new employers."

220. There is also evidence to support the Authority's contention that Mr Rosier adopted an inappropriate tone from time to time when communicating with complainants. For example:

(1) In the same letter to Client 22 referred to in paragraph 219(2) above Mr Rosier writes:

> "You go on to suggest that you feel that you have been mis-sold the investment because it was not properly explained to you. Perhaps you would explain how you were sold the investment and what was explained to you and why, since you have a concern that you did not understand the scheme, you have waited six years to enquire as to detail in respect of it?"

(2) In a letter to the same customer he writes:

> "You ask what the hell I expect someone in your situation to do when confronted with a potential shortfall, such shortfall incidentally would have only been in respect of the encashment values at that time, not sale values on the traded endowment market – such market at the present time is very buoyant.
>
> It is always difficult to answer such a question however, what I would expect someone in your situation to do when they have a long term investment and they have heard nothing in respect of it for years is to contact whoever they believe is responsible for handling their affairs – in this case, I imagine, Mr Clegg, and ask what the situation is and why you have received no updates."

(3) In a letter to Client 29 Mr Rosier attempts to disassociate himself from liability based on an inappropriate argument as follows:

> "It must however, clearly be the case that if an investment/financial undertaking freely entered into does not materialise to the investors expected advantage I cannot commit the resources of my company to making ex gratia or any other type of payments in respect of advice given openly sanctioned by a compliance officer and provided in good faith."

(4) In an email to the financial adviser of Client 23 he writes:

> "This is a matter which as you note in your opening paragraph appears to be seven years old and I understand it at this time relates to Bonds already held by [Client 23].
>
> The advisor involved was a self-employed representative and that again as I understand the matter the client had been long term clients of this representative Mr Lankester for some time before he joined the company and I assume he then advised via a different practice in respect of the Bonds to which you refer and the clients continued to be clients of his following his leaving this practice in late 2004.
>
> Indeed no communications of any kind have been directed to Bayliss & Co in respect of [Client 23], no commissions of any kind indeed at this stage it appears nothing whatsoever."

221. In terms of the correspondence with insurers and their agents, notably Mr Rory Macaskill of the loss adjusters appointed to intermediate on the claims, it appears to be the case that Mr Rosier kept Mr Macaskill informed as to the progress of complaints and Mr Macaskill gave Mr Rosier guidance as to how he should deal with them. There is also evidence of Mr Macaskill drafting offers of settlement and draft letters to FOS. However, most letters, particularly those written to clients, were drafted by Mr Rosier himself and sent for approval to Mr Macaskill. There is no evidence that Mr Macaskill was dictating the precise terms of letters to be sent to clients and in particular, the tone that was adopted in the letters we have referred to in paragraphs 219 and 220 above.

222. The whole tenor of the correspondence with Mr Macaskill was of the latter taking a measured approach to communication, consistent simply with the right of the insurer to approve any admission of liability or settlement under the terms of the policy in that respect that we have seen. The picture that Mr Rosier painted of him being dictated to as to what he should write to complainants is therefore not borne out by the reality of the documentation and we therefore reject Mr Rosier's account.

223. There is no evidence that Mr Macaskill was in any way obstructive when it came to the payment of FOS Awards. Mr Macaskill sent an email to Mr Rosier on 21 August 2009 setting out his suggested course of action for each outstanding complaint. In the case of two of the complaints, Mr Macaskill records that the matters were the subject of a FOS Final Decision and therefore that Bayliss *"has no alternative but to comply with the Final Decision."*

224. Nor is there any evidence of Mr Macaskill being obstructive with regard to the calculations of the amount of the award in line with the formula determined by the FOS. Mr Macaskill sets out clearly what Mr Rosier should do to obtain the necessary information from the complainant which will enable the calculation to be made.

225. All of the complaints were eventually the subject of an award by the FOS; none were settled by Bayliss as a result of its own investigations. That in itself is not to be held against Mr Rosier, but DISP does require the firm to do its best to investigate the matters itself and when it has got as far as it can, issue a final letter to the complainant in accordance with DISP 1.6.2R.

226. In none of the correspondence we have seen did Mr Rosier, as required by DISP 1.6.1R, send a response which clearly showed that Mr Rosier was going to deal with it. His usual response was to refer to the difficulty of obtaining the necessary files from Mr Clegg and Mr Lankester. We think it is likely that Mr Rosier, having been unsuccessful in obtaining the information from Mr Clegg or Mr Lankester, was unable himself to progress the matter further and simply gave up dealing with it, allowing the complainant then to take the matter to the FOS.

227. We therefore find, as contended by the Authority, that Mr Rosier did not issue any final response letters as required by DISP. We do not find this to be the case as a result of a deliberate strategy on Mr Rosier's part. There were genuine difficulties in obtaining the necessary information which would enable him to complete the investigation of the complaint but as a result of his inertia the matters eventually ended up with the FOS, and probably at a much later point than would have been the case had Mr Rosier indicated to the complainant that he was unable to take the matter further and should therefore take the complaint to the FOS.

228. Therefore in response to the justifications put forward by Mr Rosier as to his approach to complaints handling, as set out in paragraph 207 above our findings are:

(1) Whilst accepting the difficulties he had in the absence of the files, he could have taken other steps to obtain the information, such as by seeking assistance from the Authority. Where the difficulties in obtaining the information meant the complaint could not be adequately investigated he should have informed the customer and advised him of his right to take the complaint to the FOS;

(2) We reject Mr Rosier's contention that the contents of his letters, and in particular the tone of them, was dictated by his insurers or the loss adjusters. The insurers acted within the terms of the various policies which did not require Mr Rosier only to write on the basis of wording provided by the insurers. There was also no evidence that the insurers would only pay a claim if there was a FOS award, although this was not tested as all complaints were eventually resolved through the FOS;

(3) And (4) We accept that in practice the amount of the awards had to be calculated by reference to a formula provided by FOS and that this meant that information had to be obtained from the complainants to enable that to be done. It is clear that the insurers encouraged Mr

Rosier to deal with such matters expeditiously. There is evidence that Mr Rosier prolonged the process longer than necessary in a number of cases through his correspondence with the FOS but we accept he was in a difficult situation and make no overall criticism of his behaviour on this point;

(5) We do not think there was an orchestrated campaign by Mr Clegg and Mr Lankester against Bayliss, but Mr Rosier was obliged to deal with the complaints regardless of the circumstances by which they arose;

(6) There was no evidence to support Mr Rosier's assertion that certain claims were invalid; and

(7) We find that Mr Rosier did allow matters to take their course with the FOS after he was unable to conclude the matters himself without keeping the complainants properly informed.

229. Overall except in the one minor respect referred to in paragraph 228 above, we find that the Authority has proved its case on the approach that Mr Rosier took to the handling of complaints. The tone of his correspondence was often unhelpful, which he accepted to a degree in his interview, and in certain respects was unnecessarily hostile and unsympathetic. His approach was coloured by his resentment as having been left with the problem by Mr Clegg and Mr Lankester but he should have "gritted his teeth" and got on with dealing with the complaints and, where he could not resolve them, issuing final letters. As a consequence, in relation to this issue we conclude that Mr Rosier has failed to take reasonable steps to ensure that Bayliss responded appropriately to customer complaints in breach of Statement of Principle 7.

Management information and compliance procedures

230. The Authority's case on this matter is that from 7 August 2004 to 3 August 2010, Mr Rosier failed to take reasonable steps to ensure that Bayliss could demonstrate the adequacy of its compliance procedures in that:

(1) After the departure of Bayliss' compliance officer on or around 7 August 2004, Mr Rosier failed to ensure that Bayliss could demonstrate that it had undertaken any monitoring of his own performance, either by use of training needs assessments, assessments of his own competence or by gathering and analysing management information;

(2) Further Mr Rosier failed to ensure that Bayliss appointed any other person to undertake compliance functions or to review advice given;

(3) From 7 August 2004, Bayliss had no formal procedures in place to review the quality of advice given; and

(4) Mr Rosier also failed to maintain a formal record of training that he received.

231. There are no specific detailed rules that the Authority contends have been breached in this regard. The Authority referred us to no guidance which demonstrates how the management of a firm such as Bayliss, which has one approved person who performs all the significant influence functions and who also is the only person who gives advice to clients and therefore also constitutes the entirety of the customer facing function, is to comply with the obligation under Statement of Principle 7 to take reasonable steps to ensure that the business of the firm complies with the relevant standards of the regulatory system. APER 3.1.8G recognises that the nature, scale and complexity of the business is relevant in making an assessment to whether the approved person's conduct was reasonable.

232. The Authority did not suggest that it was incumbent upon Mr Rosier to have had the transactions he advised on to be reviewed externally or for the adequacy of his training needs assessments or record of training undertaken to be assessed externally. It did, however, indicate that it was incumbent for Mr Rosier to have undertaken a self-assessment, once Bayliss' separate compliance officer left the firm, both as to the quality of the advice given and as to the training needs that he might have in the context of the evolving regulatory requirements. The Authority also contended that a new business register is an important piece of management information for a small firm. Such a register would be used to indicate clearly the nature of the business undertaken, for example if it was the recommendation of a UCIS or a GTEP. The register would be a useful reference source if such a transaction had to be reviewed and could also be used to check whether, for example, a suitability report needed to be produced for a transaction recorded on the register.

233. We accept that a properly completed new business register would be a useful tool for a small firm as a starting point for the carrying out of a review of transactions for compliance with relevant regulatory requirements.

234. If a firm relied on self assessment to monitor compliance with matters such as quality of advice and training requirements then we would expect that a record of such monitoring should be kept and be available for review.

235. Bayliss did mention a new business register, both in relation to its main business and also in relation to Money Matters. In relation to the former, there were some inaccuracies in the information recorded when compared to the underlying documentation. In relation to the latter, this was missing for a long period of time and was eventually discovered by Mr Rosier shortly before the hearing of these references.

236. We also accept that a periodic review of client files would have enabled Mr Rosier to have picked up some of the omissions we have referred to earlier in

this decision regarding know your customer information and suitability reports.

237. Although Mr Rosier asserted in his witness statement he did keep records of his training, that he did monitor his own performance and did gather and analyse management information, there is no record in that regard that he was able to produce. If he did do these things, he could only have kept a record mentally and that clearly would be inadequate. The failings in documentation that we have found, and which Mr Rosier has in many respects acknowledged, would have been picked up by a proper review. This leads us to conclude that either a review was not carried out as insisted by Mr Rosier, or if it was, it was done inadequately.

238. Mr Rosier acknowledged in his cross-examination that he was not very good at performing compliance functions. That is borne out by the lack of proper records and management information. We therefore conclude that the Authority has made out its case on this issue and consequently, in relation to this issue, we conclude that Mr Rosier has failed to take reasonable steps to ensure that Bayliss gathered and maintained appropriate management information and records of compliance monitoring and thus failed to take reasonable steps to ensure that Bayliss complied in this respect with the relevant standards of the regulatory system in breach of Statement of Principle 7.

GTEP past business review

239. The Authority's case on this matter is that Mr Rosier failed to take reasonable steps to ensure that Bayliss notified the Authority of its inability to carry out the past business review of its advice to clients in respect of GTEPs which the Authority had requested Bayliss to undertake on 3 August 2007.

240. We start by observing that the Authority has demonstrated a lack of diligence in relation to this issue. As we observed in paragraphs 100 and 103 above, there were two requests to undertake a review, one in July 2006 and another in August 2007, but neither was followed up by the Authority until SFCD's visit in 2010. We find it surprising (and Ms Tuckley agreed at least that it was "unusual") that these requests could have been made but never followed up and, in particular, that the second request was written apparently in blissful ignorance of the fact that a review had been requested a year earlier.

241. Mr Rosier asserted that he informed the Authority not only that he could not undertake the review without the files concerned and he would have to obtain them from Mr Clegg and Mr Lankester but also that he had been unable to obtain the files and therefore could not complete the review.

242. As far as the first point is concerned as we have found in paragraph 103 above, Mr Rosier did inform the Authority on 1 August 2006 that he would need to contact Mr Clegg and Mr Lankester. When responding to the further

request for a review in August 2007, in a letter dated 7 August 2007, Mr Rosier made no mention of needing to obtain the files but he did say that *"I have undertaken some considerable amount of work into investigating the* [*GTEP matter] to date"* and confirming that he would implement the requirements for the review set out in the Authority's letter *"within the time scale you prescribe."*

243. The implication from the latter letter was that any difficulties that had arisen through the lack of files had been overcome and in our view had there been an outstanding request to the Authority to assist him Mr Rosier would have mentioned it in this letter.

244. Mr Rosier was unable to say when he requested the Authority for assistance and in what form. He asserted that the request was made when informing the Authority of the circumstances regarding Mr Clegg's and Mr Lankester's departure in the context of their application to join new employers. In fact the only relevant document in that respect simply contained the following observations:

> "There are outstanding matters, principally of a financial nature, extant between ourselves and Mr Clegg – these matters may or may not have led directly to Mr Clegg's resignation.
>
> I mention this herein however since, dependant upon how these matters may develop, they may or may not influence my declaration as to the continued suitability of the approved person, vis-à-vis regulation."

Nothing was said about the files being removed and no request was made for assistance.

245. Neither in our view was it the case, as Mr Rosier's letter of 7 August 2007 seemed to indicate, that any substantive review had been carried out in response to the request in 2006. Mr Rosier seemed to accept that in his cross-examination; in our view what he was referring to was the work he had been undertaking in relation to the complaints from Money Matters clients which had started to appear sporadically over the past two years.

246. As Mr Rosier himself finally conceded in his cross-examination, the Authority did not chase him for a progress report after their initial request. He therefore assumed the matter had gone away and took no further action.

247. In our view the same is true in respect of the second request to undertake the review. We accept Mr Rosier's position that he could not undertake the review without the files so that it was never undertaken. He took advantage of the Authority's own inertia and simply assumed the matter had gone away. We do not say that he deliberately misled the Authority or took a deliberate decision not to undertake the review. He did also make attempts without success to retrieve the files. It may be the case that he believed he

had at some point told the Authority he could not undertake the review without the files and asked for their assistance.

248. Our finding is that he took no such steps. In our view, despite the Authority's own inertia, having been asked to conduct a review, and having told the Authority in writing that he would undertake it within the specified time frame, he should have informed the Authority when it became apparent to him that he could not conduct the review because he could not retrieve the files. We therefore conclude that the Authority has made out its case on this issue and consequently in failing to inform the Authority of his inability to conduct the review Mr Rosier failed to act with due skill, care and diligence in breach of Statement of Principle 2.

Failure to address issues raised by supervision visit

249. The Authority's case on this matter is that Mr Rosier failed to take reasonable steps to ensure that Bayliss dealt with the issues identified in SFCD's letter of 24 June 2010. In particular, although Mr Rosier indicated that the best way to deal with the issues would be to join a network, by 21 April 2011 Bayliss had failed to do so and had taken no other steps, such as engaging a third party compliance consultant.

250. Ms Clarke made no submissions on this issue and Ms Tuckley provided no evidence on it in any of her witness statements, although the Authority did not withdraw the pleading from its statement of case.

251. In our view Mr Rosier's response that he would address the issues through exploring the possibilities of joining a network was a reasonable one and he should have been given a reasonable time to work out arrangements in that regard before turning to other courses of action.

252. We are not sure why the Authority attached importance to the date of 21 April 2011 in its pleadings, but in any event on 23 September 2010, Bayliss had applied to vary its permission. In those circumstances, and with the Enforcement Investigation well underway which had stymied Bayliss' plans to join a network, in our view it was not unreasonable for Bayliss to have put on hold any response to SFCD's findings until the outcome of the investigation was known. Although it would have been possible for Bayliss to have undertaken further business if signed off by an independent person, no such business was undertaken and if it had been, it could have been expected that the independent person would have ensured that any potential detriment that might be caused by the outstanding matters arising from the supervision visit would be addressed in relation to the business concerned, such as by ensuring that the transaction was supported by adequate know your customer information and an appropriate suitability report. We therefore conclude that the Authority has not made out its case on this issue.

Issue 2: Financial Penalty

Limitation

253. The statutory provisions regarding the limitation period for proceedings in respect of the imposition of financial penalties on an approved person and the extension of that period effected in June 2010 are summarised in paragraph 39 above.

254. Mr Rosier argues that in so far as he was guilty of misconduct the Authority knew of that misconduct in April 2010 at the time of SFCD's visit. At that time s 66(4) FSMA imposed a two-year time limit on the Authority to issue a Warning Notice if it proposed to impose a financial penalty and since the Warning Notice was issued on 17 January 2013 the Authority was accordingly out of time to impose a financial penalty on him. Section 66(4) was amended on 8 June 2010 at which time the Authority was not time-barred from taking action against Mr Rosier under s 66. As a consequence, the Authority contends, the relevant time limit was then three years rather than two and on the basis that the Warning Notice was issued before April 2013 it is lawful to impose a financial penalty in this case.

255. The Tribunal had to consider this very issue in *Arch Financial Products LLP, Robert Farrell, Robert Addison v Financial Conduct Authority* [2015] UKUT 0013 (TCC) a case which had been heard by the time of the substantive hearing in these references but had not yet been decided.

256. The Tribunal in *Arch* held that the authorities demonstrate that a statute will not be found to be retrospective so as to take away a substantive as opposed to a procedural right unless such a conclusion is unavoidable and the question as to whether a right is substantive is to be determined by examining whether the right in question is an accrued right: see paragraph 463 of the Decision.

257. The key issue to determine, on this test, is whether when the law changed on 8 June 2010 so as to extend the limitation period from two years to three, Mr Rosier had an accrued right to have the investigation against him concluded within a period of two years.

258. The Tribunal in *Arch* analysed the authorities which Ms Clarke relies on in this reference to submit that Mr Rosier had no accrued right, namely *Yew Bon Tew v Kenderan Bas Mara* [1983] 1 AC 553, *R v Chandra* [1905] 2 KB 335 and *Maxwell v Murphy* (1957) 96 CLR 261.

259. The Tribunal in *Arch* accepted the arguments of the Authority that it was not time-barred from imposing a financial penalty where the relevant Warning Notice had been issued prior to the expiry of the extended three year period notwithstanding the fact that at the time the investigation commenced the law then provided for a two year limitation period. Ms Clarke made submissions on this issue which in substance were the same as those made in *Arch*.

260. The Tribunal's analysis of these cases in paragraphs 464 to 471 of the decision in *Arch*, led it to conclude that the extension to a statutory limitation period that had not expired (as was the case in *Chandra*), as opposed to one that had already expired (as was the case in *Yew Bon Tew*) did not amount to the taking away of an accrued right. The correct principle was summarised in this passage from *Maxwell v Murphy,* quoted in paragraph 471 of the decision in *Arch*:

> "Statutes of limitation are often classed as procedural statutes. But it would be unwise to attribute a prima facie retrospective effect to all statutes of limitation. Two classes of case can be considered. An existing statute of limitation may be altered by enlarging or abridging the time within which proceedings may be instituted. If the time is enlarged whilst a person is still within time under existing law to institute a cause of action the statute might well be classed as procedural. Similarly if the time is abridged whilst such person is still left with time within which to institute a cause of action the statute might well be classed as procedural. But if the time is enlarged when a person is out of time to institute a cause of action so as to enable the action to be brought within the new time or is abridged so as to deprive him of time within which to institute it whilst he still has time to do so, very different considerations could arise. A cause of action which can be enforced is a very different thing to a cause of action the remedy for which is barred by lapse of time. Statutes which enable a person to enforce a cause of action which was then barred or provide a bar to an existing cause of action by abridging the time of its institution could hardly be described as merely procedural. They would affect substantive rights."

261. Consequently, the Tribunal concluded in paragraph 472 of *Arch*:

> "The reasoning from these cases is clear and persuasive in the current case. It leads to the inevitable conclusion that the two year limitation period originally enacted in section 66(4) was not an accrued right at the time the period was extended to three years on 8 June 2010. Accordingly, as the Warning Notices were issued to Mr Farrell and Mr Addison within the new three year limitation period the Tribunal has jurisdiction to impose financial penalties on them in respect of our findings against them on this reference."

262. Mr Rosier submitted that the cases cited above can be distinguished because of the different subject matter they were dealing with.

263. We reject that submission. In our view the principle identified from the authorities in *Arch*, as formulated in paragraph 257 above, is clearly applicable in this case and leads to the inevitable conclusion that the Authority was in time when it issued a Warning Notice to Mr Rosier in January 2013.

264. We should, however, observe as Mr Rosier did, that to use almost the entire three year period to complete its investigation appears to be excessive for a case of this nature, including as it did the review of documentary material relating to a relatively small number of clients and including only one

interview. It is not clear to us why from having interviewed Mr Rosier on 9 February 2011 and having received Accord's interim report on 31 March 2011 it was not until 24 October 2012 that the Authority's investigation was concluded with the sending of the Final Investigation Report to Mr Rosier. There appears to be a danger that as a matter of course, the time for completion of investigations will extend simply to fit the time available to complete them.

The appropriate financial penalty

265. We have made a considerable number of findings that Mr Rosier failed to comply with his regulatory obligations. These failings are to be found across all aspects of Bayliss' business, covering both its client facing and back office activities, namely:

    (1) Serious failings in respect of the process of gathering client information and producing suitability reports such that Bayliss was unable to demonstrate the suitability of the personal recommendations it made to its clients. These failings were apparent in respect of all the client files that were reviewed and which we take to be a representative example of Bayliss' business. This was despite the fact that Mr Rosier was aware of the standards expected at the relevant time;

    (2) Consistent failure to respond to client complaints appropriately;

    (3) A failure to demonstrate adequacy of compliance procedures and monitoring which in our view led directly to the continued failings in respect of item(1) above;

    (4) A serious failure to have any regard to the statutory and regulatory provisions regarding the promotion of unregulated collective investment schemes, despite being aware in general terms of these restrictions; and

    (5) Failure to inform the Authority of his inability to conduct the GTEP review.

266. Mr Rosier's main response was to seek to minimise the importance of any of these breaches. He regarded them as minor and of no real consequence because the Authority had not been able to demonstrate that any client had been given unsuitable advice.

267. We cannot agree that these breaches are minor. They demonstrate serious systemic and cultural failings in the way Mr Rosier managed Bayliss' business and dealt with its clients as well as a dismissive approach to the importance of compliance with the Authority's regulatory standards. In those circumstances the imposition of a significant financial penalty is fully justified and is inevitable.

268. In this case the Authority invites the Tribunal to direct it to impose a financial penalty on Mr Rosier in respect of the failings we have found.

269. Mr Rosier submits that if a penalty is to be imposed it should be imposed on Bayliss rather than him personally as the findings should be regarded as corporate findings rather than of him personally. He submits that the Authority's penalty guidance indicates that financial penalties should only be imposed on an individual approved person where he has been guilty of misconduct, which he interprets as meaning where the conduct concerned has been deliberate or reckless. In his view, the breaches were merely technical breaches and therefore if a financial penalty was to be imposed it should fall on the firm rather than him personally.

270. Mr Rosier also submits that any financial penalty should also be reduced to reflect the fact that in relation to the Money Matters complaints he has had to meet the excess of the amounts of the claims that have not been covered by Bayliss' professional indemnity insurance. These sums have been provided by him personally due to insufficient financial resources being available within Bayliss for that purpose.

271. Finally, Mr Rosier submits that any deterrent effect that the imposition of a financial penalty might have on him or any other person has been so diluted by the effect of the inaccurate press release that the Authority issued when publishing the Decision Notices which are the subject of these references, that it will not achieve its intended purpose. In his submission, what the outside world will remember from this case is the inaccurate press release and not the subsequent outcome from the substantive hearing of the references.

272. We reject all of Mr Rosier's submissions on this issue.

273. Where breaches of its requirements are found FSMA gives the Authority the power to impose a financial penalty on the firm itself. There is no question that Bayliss itself was culpable in relation to many of the findings which have been attributed to Mr Rosier's conduct because his conduct, as the controlling mind of Bayliss being its sole director and adviser, was under normal and long settled company law principles attributable to Bayliss.

274. It is also clear that FSMA gives the Authority to impose financial penalties on approved persons where it appears to it that the approved person is "guilty of misconduct" and the Authority is satisfied that it is appropriate in all the circumstances to take action against him.

275. FSMA gives no suggestion that the two penalty powers should be regarded as mutually exclusive in relation to any particular behaviour. In our view it is obvious that if the conduct that the Authority has investigated demonstrates that the firm has committed breaches which are attributable to the conduct of a individual who is also an approved person then the

Authority can choose to take action not only against the firm but, if the conduct amounts to behaviour on the part of the individual concerned which constitutes "misconduct" within the meaning of s 66 FSMA, against that individual as well. Alternatively the Authority could decide to take action against the individual alone, provided that it is satisfied that it is appropriate to do so.

276. Section 66 FSMA defines misconduct. As far as is relevant to Mr Rosier's reference he is guilty of misconduct if he has at any time failed to comply with the rules made by the Authority under s 64 FSMA or has at any time been "knowingly concerned" in a contravention of the rules by an authorised person in respect of which he is an approved person. The relevant rules for the purpose of s 64 are the provisions of APER and on this reference we have found Mr Rosier to have been in breach of Statements of Principle 2 and 7 of APER. He has also clearly been knowingly concerned in Bayliss' contraventions of the relevant regulatory standards we have referred to. He is therefore "guilty of misconduct" and contrary to his submissions such a finding does not depend upon any finding of deliberate or reckless behaviour. These Statements of Principle require the subject to meet a standard of having taken reasonable care.

277. The question therefore arises as to whether it is appropriate to impose a financial penalty on Mr Rosier. As Ms Clarke submitted, in our view the correct starting point is whether there is personal culpability on the part of the individual concerned.

278. There can be corporate failings which cannot be shown to be due to personal culpability of any particular individual and in those cases it is appropriate to impose a financial penalty solely at the corporate level.

279. This is not one of those cases. It is quite clear, because Mr Rosier has at all relevant times been the controlling mind of Bayliss and its only approved person, that he was directly responsible for the failings of Bayliss and is therefore personally culpable. We understand the Authority's policy to be that there should be personal accountability on the part of holders of significant influence functions when there have been corporate failings in respect of issues which they are responsible in their controlled functions for dealing with. In our view it is clearly appropriate for the Authority to seek to impose a financial penalty on the holder of a significant influence function in these circumstances and Mr Rosier's behaviour has been such that it clearly falls within the ambit of that policy. We therefore have no doubt that it is appropriate to impose a financial penalty on Mr Rosier.

280. Clearly there is a balance to be struck where there are both corporate and individual failings and if the Authority seeks to impose financial penalties on both the firm and an approved person for the same failings it must be careful to avoid double jeopardy. There is no question of that arising in this case; where all the failings concerned are clearly attributable to the personal

culpability of one approved person, as is the case here, it is appropriate to impose a financial penalty on the individual alone.

281. With regard to the size of the financial penalty, in our view a sum of £10,000 is appropriate. We note that originally the Authority had sought a financial penalty from the RDC of £25,000. Despite the fact that Bayliss is a small firm, bearing in mind the breadth of the regulatory failings and the period over which they persisted a smaller penalty would not act as a sufficient deterrence.

282. We reject Mr Rosier's submission on deterrence. The press release issue is being treated as a completely separate matter. The Tribunal's decision on that issue is being released simultaneously with this decision so the correct impression of the nature of Mr Rosier's conduct will be in the public domain and the deterrent effect of the financial penalty will be clearly seen in the context of a decision which also clearly corrects the erroneous impression given by the Authority's press release with respect to the Decision Notices.

283. Neither do we believe that a reduction is justified as a result of Mr Rosier's personal expenditure, although he is to be given credit for funding the obligations in question. For the reasons we have given a financial penalty of £10,000 is in our view in all the circumstances the minimum amount that should be imposed.

Issue 3: Withdrawal of approvals and prohibition

284. We have found that in carrying out his functions as a director of Bayliss, as the person responsible for the processes and procedures that Bayliss followed in its dealings with its clients Mr Rosier fell below the standards to be expected of a person performing those functions. Mr Rosier accepts that he is unsuited to carrying out the functions of a compliance officer and on that basis does not contest the withdrawal of his approval to carry out that function or an order prohibiting him from performing the function for any other firm.

285. In relation to the significant influence function of director, Mr Rosier submits that since all the criticisms that have been directed at him relate to compliance failings he should be allowed to continue as a director, presumably on the basis that another suitably qualified person would be recruited as a compliance officer.

286. In our view it would not be appropriate to withdraw Mr Rosier's approval to act in a significant influence function or to prohibit him from performing such functions if we were satisfied that he had learned lessons from his failures and would not make the same mistakes were he to continue in such a role.

287. Regrettably, we are not satisfied that Mr Rosier has demonstrated that he has learned any lessons from the matters which we have considered in this

decision. He continues to maintain that such breaches that occurred were minor and technical. He was invited by the Tribunal to indicate what he would do differently if he were to continue to hold significant influence functions and offered no explanation. It is not enough for the principal of a firm to say he will rely on a suitably qualified compliance officer. The tone and culture of the firm must be set from the top and we are not satisfied that Mr Rosier would set the right tone or that the culture of the firm would change. We are therefore satisfied that there would be a risk to consumers were Mr Rosier permitted to perform a significant influence function and therefore, in the light of our findings on these references we can find no reason to take any course other than to dismiss Mr Rosier's non-disciplinary references.

Issue 4: Cancellation of Bayliss's Permission

288. We can deal with this very briefly. As set out in paragraphs 49 to 55 above, the Threshold Conditions which must be satisfied in order for a firm to continue to maintain its permission to carry out regulated activities include a requirement to have appropriate resources. This term includes human resources. Clearly if a firm had no suitably qualified person available to it to perform the required significant influence functions of director, compliance oversight and money laundering reporting it would fail to meet the Threshold Conditions.

289. That will be the position if Mr Rosier's approval is withdrawn and he is made the subject of a prohibition order in the terms set out in his Decision Notice as there is no other person connected with Bayliss who can perform these functions.

290. We assume that in the light of our decision to dismiss Mr Rosier's reference that the Authority will proceed to implement its decisions to withdraw Mr Rosier's approvals to perform significant influence functions and make a prohibition order in relation to such functions. On that basis, as Bayliss will not have adequate human resources to satisfy the Threshold Conditions we have no alternative but to dismiss Bayliss's reference.

291. Accordingly, we do not need to consider the Authority's contentions that Bayliss's failure to pay the outstanding levies to the FSCS amount to sufficient grounds to cancel its permission.

Conclusion

292. The references are dismissed. Our decision is unanimous.

Directions

293. In relation to Mr Rosier's disciplinary reference we determine that the appropriate action for the Authority to take is to impose on him a financial

penalty of £10,000 pursuant to s 66(3)(a) FSMA for failure to comply with Statement of Principle 2 and Statement of Principle 7.

294. In accordance with s 133(6) FSMA we have dismissed the non-disciplinary references. It is therefore open to the Authority to implement the decisions it has set out in the Decision Notices with respect to the withdrawal of Mr Rosier's approvals to perform significant influence functions, the making of a prohibition order against him and the cancellation of Bayliss's permission to carry out regulated activities.

295. We remit these references to the Authority with the direction that effect be given to our determinations.

TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE
RELEASE DATE:

APPENDIX 1

Relevant provisions of Section 56 FSMA

(1) The FCA may make a prohibition order if it appears to it that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by-

(a) an authorised person,

(b) a person who is an exempt person in relation to that activity, or

(c) a person to whom, as a result of Part 20, the general prohibition does not apply in relation to that activity.

(1A) ……

(2) A "prohibition order" is an order prohibiting the individual from performing a specified function, any function falling within a specified description or any function.

(3) A prohibition order may relate to-

(a) a specified regulated activity, any regulated activity falling within a specified description or all regulated activities;

(b) all persons falling within subsection (3A) or a particular paragraph of that subsection or all persons within a specified class of person falling within a particular paragraph of that subsection.

(3A) A person falls within this subsection if the person is-

(a) an authorised person,

(b) an exempt person, or

(c) a person to whom, as a result of Part 20, the general prohibition does not apply in relation to a regulated activity,

(4) An individual who performs or agrees to perform a function in breach of a prohibition order is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(5) In proceedings for an offence under subsection (4) it is defence for the accused to show that he took all reasonable precautions and exercised all due diligence to avoid committing the offence.

(6) A person falling within subsection (3A) must take reasonable care to ensure that no function of his, in relation to the carrying on of a regulated activity, is performed by a person who is prohibited from performing that function by a prohibition order.

…..(9) "Specified" means specified in the prohibition order.

APPENDIX 2

DECISION OF JUDGE HERRINGTON IN RELATION TO THE HEARING OF 19 MARCH 2014

Introduction

1. This decision relates to a hearing held on 19 March 2014 to consider what action, if any, the Tribunal should take in response to the contents of a press release publicising the Decision Notices relating to these references issued by the Authority in the form of an email to selected media outlets on 4 November 2013. Mr Rosier contended that this communication was wholly misleading and damaging to him and Bayliss.

2. The Authority does not itself describe this email as a press release. As we shall see it has a different process for approving communications that are sent to selected media outlets as opposed to press releases which are published more widely and posted on the Authority's website, but for convenience I shall in this decision refer to the email as "the press release".

3. Mr Adrian Berrill-Cox, Counsel, represented the Authority at the hearing. Mr Rosier represented himself and Bayliss.

Background

4. When the Applicants made their references to the Tribunal they applied for a direction suspending the publication of the Decision Notices pending the hearing of the references "*because of the commercial and other impact [publication] would have"*.

5. The application was heard before me on 30 September 2013. I gave an oral decision dismissing the application because I was not satisfied that there was cogent and compelling evidence of disproportionate harm to the Applicants if publication were not refused.

6. I did, however, direct that publication be delayed for a month to enable Mr Rosier to inform the product providers Bayliss dealt with and from whom it was still in receipt of trail commissions, of the impending publication in order to help Mr Rosier manage the impact of the publication on those relationships.

7. In previously released written decisions on privacy applications since FSMA was amended to permit publication of Decision Notices the Tribunal has made it clear that the dismissal of the application is conditional upon any publicity issued by the Authority making clear the provisional nature of the Decision Notices pending the determination of the references by the Tribunal. In

particular, in *Arch Financial Products and others v The Financial Services Authority* [2012] FS/2012/20 the Tribunal stated at paragraph 63 of the decision:

> "….any press release issued by the FSA should state prominently at its beginning that the Applicants have referred the matter to the Upper Tribunal where each will present their case and the Tribunal will then determine the appropriate action to take, which may be to uphold, vary or cancel the FSA's decision. I understand this formulation to have been used in previous cases of publication. Likewise, in referring to findings made, rather than give any suggestion of finality they should be prefaced with a statement to the effect that they reflect the FSA's belief as to what occurred and how the behaviour is to be characterised. The dismissal of the applications is therefore conditional upon compliance with these principles and both parties have liberty to apply for further directions if, which I hope not to be the case, there is any doubt on what is expected."

8. This formulation was repeated in the Tribunal's decision dismissing the privacy application made in the case of *Angela Burns v The Financial Conduct Authority* [2013] FS/2012/24.

9. As referred to below this protocol has been incorporated into the Authority's procedures for publishing Decision Notices in respect of matters which have been referred to the Tribunal and, assuming that to be the case, I did not make a specific direction to that effect when delivering my oral decision on Mr Rosier's application, although the Authority accepts that it anticipated that in publicising the Decision Notices it would comply with this protocol.

10. The Authority decided to publish the Decision Notices after the expiry of the one month period referred to in paragraph 6 above. As well as publishing the Decision Notices on its website, which were legended to the effect that they had been referred to the Tribunal in order to determine the appropriate action for the Authority to take, the Authority decided to publicise the Decision Notices by sending an email to certain selected media outlets. The outlets chosen were five trade publications whose readership was primarily independent financial advisers and other financial services industry professionals. The email as sent to these publications on 4 November 2013 read as follows:

> **"FCA publishes a Decision notice to ban and fine IFA £10,000 for poor advice**
>
> The Financial Conduct Authority has published a Decision Notice against financial adviser Clive Rosier fining him £10,000. Rosier, the sole approved person and director at Bayliss & Co (Financial Services) Limited (Bayliss), was found to have lacked skill, care and diligence and did not communicate properly with his clients. As a result, the FCA has ruled that Rosier is not a fit and proper person and so has banned him from holding a senior position at a

financial firm. Following intervention by the FCA, Rosier has not offered financial advice since September 2010.

Mr Rosier gave investment advice to clients, including on high risk products such as unregulated collective investment schemes (UCIS) and failed to collect and record the necessary information about his clients before recommending these products, which meant they may not have been suitable products for his clients.

Mr Rosier also failed to communicate properly with the FCA following a request to conduct a review of some products sold by Bayliss.

Bill Sillett, head of FCA retail enforcement at the FCA said:
"When people go for financial advice the minimum they should be able to expect from the adviser is that they are competent. Unable to demonstrate that the advice he gave was suitable for his clients, Rosier failed to live up to this standard. We will always act as strongly as we are able where we find that consumers are put at risk as a result of substandard financial advice."

Mr Rosier has referred the matter to the Upper Tribunal, which will make a final decision on the case. Rosier's previous application to the Tribunal for an order preventing the FCA from publishing the Decision Notice was unsuccessful."

11. The email also attached a link to the Decision Notices as published on the Authority's website. This link was erroneously referred to as a link to the "final" notices for Mr Rosier and Bayliss rather than, as should have been the case, decision notices.

12. Four of the publications concerned published articles the content of which largely replicated the contents of the Authority's email. Two of the publications, however, picked up the fact that the Authority's decision was not final pending the reference to the Tribunal. One of these used the headline:

"FCA plans ban and £10k fine for IFA over unsuitable UCIS advice"

This publication referred to the fact that references had been made to the Tribunal. The second publication used the headline:

"FCA seeks to ban and fine IFA £10k over UCIS advice"

The other two articles carried the headlines:

"FCA bans IFA for poor advice and fines him £10k"

and

"FCA bans and fines adviser £10,000 over UCIS advice"

Both of these articles repeated the essence of the headline in the text of the article the first stating:

> "The FCA has banned an IFA and fined him £10,000 for giving poor advice, including on high risk products"

13. I deal in more detail later with the essence of the complaint that Mr Rosier made to the Authority regarding the content of the Authority's email and the Authority's initial response to that complaint, but record at this point that on 3 January 2014 Mr Rosier drew the matter to the attention of the Tribunal, stating he was unsure as to whether the Tribunal had any standing to look at the matter.

14. The matter was referred to me and in directions released on 16 January 2014 I indicated that I had concerns about the email (which I described as a press release). In particular, I noted that the protocol referred to in paragraph 7 above had not been followed. By this stage the Authority had written to the Tribunal apologising for the fact that the press release wrongly refers to Mr Rosier having been "banned" and I observed in my directions that I had seen no evidence of an apology having been given to Mr Rosier.

15. I therefore decided that the Tribunal should look further into Mr Rosier's concerns and that a hearing should be held to consider whether further directions to deal with the situation were appropriate. I directed that Mr Bill Sillett, the Authority's official whose quotation appeared in the press release and who was Head of the Enforcement Department handling the references, provide a witness statement explaining how the press release was drafted and released in the form it was. Mr Rosier was given permission to file a witness statement as to the effect of the publication of the press release and the press reports derived from it.

16. In his witness statement and oral evidence Mr Sillett acknowledged omissions and errors in the press release, deficiencies in the way its drafting and internal approval was dealt with and the manner in which Mr Rosier was dealt with when he complained initially. Mr Sillett accepted responsibility for these failings. In view of this acceptance I have not in this decision referred to any of the other more junior employees of the Authority involved personally.

17. The question arose as to how these failings were to be addressed. The Authority was willing to notify the publications concerned of the errors, but at that time Mr Rosier indicated that he did not wish there to be any further publicity regarding the matter pending determination of the references, which at that time had been listed for hearing in April 2014.

18. In the light of that indication from Mr Rosier and following the taking of evidence from Mr Sillett and Mr Rosier, I decided that the appropriate course to take was to defer issuing any decision in relation to the matter pending determination of the reference when, in accordance with s 133A (5) FSMA,

the Tribunal may make recommendations as to the Authority's regulating procedures. I was also mindful of the fact that the usual channel for consideration of complaints as to the conduct of the Authority is through the Authority's separate complaints team and the independent Complaints Commissioner, who has power to recommend ex gratia payments if he finds a complaint to be justified. I was also aware that Mr Rosier's complaint was unlikely to be investigated pending the determination of the proceedings relating to his reference. It would also be the case that any findings of fact I make on the issue would be helpful in the context of any subsequent investigation of Mr Rosier's complaint that is undertaken through the Authority's complaints scheme.

19. The hearing of the references was, at Mr Rosier's request, postponed from April to the end of October 2014. Mr Rosier then requested that I issue my decision on the press release issue in advance of the substantive hearing but I decided not to do so on the basis of the reasons given in paragraph 18 above.

20. The reason I decided it was appropriate for the Tribunal to examine the issue is that it has a clear interest that no misleading impression is given by a party as to the status of the proceedings before it, and in particular, when a decision notice is referred to the Tribunal it cannot be implemented until the reference has been determined, the proceedings concerned providing for a fresh hearing of the issues rather than an appeal.

21. Until 2010, when s 391 FSMA was changed in this respect, decision notices could not be published. There was a presumption of privacy as to the prior regulatory proceedings. There is now a presumption the other way; the normal course is for the Authority to publish decision notices that have been referred to the Tribunal unless publication would be prejudicial and unfair.

22. The publication of a decision notice may cause the subject of it to suffer reputational damage. That is not normally sufficient to cause the Tribunal to exercise its discretion to prohibit publication, but bearing in mind the detriment that can be caused to the subject by publication it is important that the Authority considers carefully the text of the communications it proposes to publicise the notice and properly verifies them as being true, fair and not misleading. This is the standard the Authority rightly expects from those it regulates when issuing promotional material and the regulated should expect the same standard from their regulator. The Tribunal has an interest in holding the Authority to account if it fails to meet this standard in relation to how the Authority describes the nature of proceedings before the Tribunal. Hence the Tribunal expects the provisional nature of a decision notice to be clearly demonstrated in any publicity material, which it will impose as a condition when dismissing any application that a decision notice not be published.

23. In an extreme case the Tribunal, as a superior court of record, could take action for contempt of court if it found that the conduct concerned created a

substantial risk that the course of justice in the proceedings would be seriously impeded or prejudiced. Although, as I find later, the Authority's conduct demonstrates serious failings in the manner in which it handled the publicity regarding the Decision Notices, in my view those failings have not affected the proper consideration of the issues arising under the substantive references.

Findings of Fact

24. Against that background, I make the following findings as to the manner in which the Authority publicised the Decision Notices, the procedure it followed in drafting and approving them and the manner in which it dealt with Mr Rosier's complaint in respect of the matter.

25. Following the Authority's decision to publish the Decision Notices following Mr Rosier's unsuccessful application for privacy, the Authority considered what further publicity may be appropriate. Mr Sillett explained that this may take the form of a full press release or an email to selected media outlets. A full press release would also be published on the Authority's website.

26. In this case besides publishing the Decision Notices themselves on its website the Authority decided to send an email (which would not be made public on its website) to selected media outlets which the Authority considered would be interested in the matter.

27. Mr Sillett explained that any email to media outlets or public press release issued by the Authority is generally a summary of the decision notice which should accurately reflect the content of the notice issued by the Authority, but may also contain additional information in relation to the context of the Authority's actions and more general regulatory messages, for example regulatory lessons to be learned or information for consumers. It often includes a quote by a Head of Department (if it is an email to media) or the Director of Enforcement and Financial Crime Division (if it is a full press release).

28. Mr Sillett confirmed that the Authority's internal policy requires that any email to media or press release should contain the following statement:

> "[name of applicant] has referred the case to the Upper Tribunal at which the FCA and [name of applicant] will be able to present their case. The Upper Tribunal will then determine the appropriate action for the FCA to take. The Upper Tribunal's decision will be made public on its website."

Mr Sillett also confirmed that any person drafting an email or public press release should be mindful of the protocol set out in paragraph 7 above.

29. Mr Sillett explained that the procedure for the approval of an email to media or press release is that it is drafted and agreed jointly by the Authority's press office and the investigation team responsible for the conduct of the

investigation into the Applicants. The email should then be sent for approval by the Head of Department of the relevant investigation team and, in a case that has been considered by the RDC, the Chairman or Deputy Chairman of the RDC for approval prior to publication. He described it as good practice (although not a formal requirement) also to seek approval from the Enforcement Legal Group.

30. It appears that in this case the press office was responsible for preparing the first draft of the proposed email to media. This it did having received from the investigation team an email which set out brief information regarding the background to the Decision Notices and which also recorded accurately the essence of the findings against the Applicants.

31. The press office prepared a first draft of the proposed email to media which was sent to the investigation team on 30 October 2013. It got off on the wrong foot as it was drafted on the basis that final as opposed to decision notices were being publicised and that there had been references to the Upper Tribunal which had been dismissed. The investigation team's email referred to in paragraph 30 above did refer clearly to the fact that decision notices were to be publicised and that the matters concerned had been referred to the Tribunal. It is not therefore clear why the press office made the fundamental error it did in its first draft, which infected the later drafts.

32. The press office's first draft included a quote that was attributed to Mr Sillett. This quote appeared unaltered in the final version.

33. A member of the investigation team recognised the press office's error and commented to a colleague on the team that the press office "had got the wrong end of the stick" and asked his colleague to prepare a new draft for his approval.

34. The investigation team's redraft was much longer than the press office's initial draft but it was factually accurate in all material respects. The quote now attributed to Mr Sillett had been changed to reflect more accurately the terms of the Decision Notice. The redraft also reflected the Authority's policy on making it clear that the Decision Notice was provisional in the light of the reference to the Tribunal. The full text of the redraft is as follows:

> "The Financial Conduct Authority has today published a Decision Notice against Clive Rosier and his company, Bayliss & Co Financial Services.
>
> Mr Rosier has referred the matter to the Upper Tribunal (the Tribunal) where he and the FCA will each present their case. The Tribunal will then determine the appropriate action for the FCA to take. The Tribunal may uphold, vary or cancel the FCA's decision. The Tribunal's decision will be made public on its website.

> The Decision Notice, which reflects the FCA's view of what occurred and how the behaviour is to be characterised, states that the FCA has decided to fine Mr Rosier £10,000, withdraw his approvals at Bayliss and ban him from performing any significant influence function in relation to any regulated financial activity. The FCA has also decided to cancel the permissions of Bayliss.
>
> Mr Rosier was the sole owner of and adviser at Bayliss from 7 August 2004 to 25 September 2012. Mr Rosier gave investment advice to clients, including on high risk products such as unregulated collective investment schemes (UCIS) and failed to collect and record the necessary information about his clients before recommending these products which meant they may not have been suitable products for his clients.
>
> Mr Rosier also failed to communicate properly with the FCA following a request to conduct a review of some products sold by Bayliss.
>
> In September 2010, Bayliss voluntarily agreed to vary its permissions so that it gave investment advice only with the prior approval of an independent skilled person. However, Mr Rosier has chosen not to provide any investment advice to customers since the date of that variation.
>
> Bill Sillett, head of FCA retail enforcement said:
>
> "When people go for financial advice the minimum they should be able to expect from the adviser is that they are competent. Since he was unable to demonstrate that the advice he gave was suitable for his clients, Mr Rosier failed to live up to this standard. We will always act strongly as we are able where we find that consumers are put at risk as a result of potentially unsuitable financial advice."
>
> Mr Rosier applied to the Tribunal for an order preventing the FCA from publishing the Decision Notice. This application was unsuccessful.
>
> In June this year the FCA published final rules to ban the promotion of UCIS and certain close substitutes to the vast majority of retail investors in the UK."

The one factual inaccuracy was that the draft referred to Mr Rosier having failed to "collect and record" the necessary client information whereas the Decision Notice records that he failed to "establish and record" the information. Whilst it would have been better to use the same wording as the actual notice, in my view nothing turns on this point.

35. On 31 October 2013 Mr Sillett approved this draft, including the quote that was attributed to him. The investigation team sent the new draft to the press office on 1 November, saying that it had been redrafted because Mr Sillett wanted it to contain more detail. The press office was also reminded that a reference to the Tribunal had been made and that the power to publish Decision Notices pending the Tribunal hearing was being used.

36. The press office was not content with the redraft. They said that it had been agreed that there would simply be a short note and quote, along the lines of the original draft. They referred to the fact that a full press release would have to be approved by the Director of Communications according to press office procedures and said that "*on this occasion we didn't think the size of the fine justified the full press office treatment."*

37. Mr Sillett was at this stage unaware of this communication; his evidence, which I accept, was that he was told about it on 23 January 2014, after Mr Rosier had referred the matter to the Tribunal following his initial complaint to the Authority.

38. On 1 November 2013 the press office emailed the investigation team as follows:

> "From a structure point of view I would prioritise the fine and the ban and put that up front, as this is what will grab the journalists' attention. I'd also prefer to keep mention of the challenge at the Tribunal short, undetailed and right at the bottom. I have rejigged what I'd written below using some extra detail from your note."

39. A redraft was attached to this email which was substantially in the form of the final version that was released. The investigation team reviewed it on the same day and the only changes it made were to change the heading from "FCA fines IFA £10,000 for poor advice" to "FCA publishes a Decision Notice to ban and fine IFA for poor advice" and to change the first line from "The Financial Conduct Authority has fined financial adviser Clive Rosier £10,000" to "The Financial Conduct Authority has published a Decision Notice against financial adviser Clive Rosier, fining him £10,000."

40. Consequently, it is apparent that the final version that the investigation team approved :

(1) In contrast to the team's redraft in response to the press office's original draft, did not comply with the Authority's internal policy regarding disclosure of the status of the Decision Notice and the proceedings before the Tribunal, as described by Mr Sillett and recorded in paragraph 28 above;

(2) Indicated in its heading that it was proposed to fine Mr Rosier for "poor advice";

(3) Included a quote attributed to Mr Sillett which was different to the one he had approved; and

(4) Erroneously described the links to the Decision Notices as being links to the "final notices" for the Applicants.

41. The email was sent to the selected media outlets on 4 November 2013 in the form approved by the investigation team on 1 November 2013. Mr Sillett confirmed in his evidence that, contrary to the correct internal process, the investigation team did not send the final version to either himself or the RDC for approval. Nor did the team consult Enforcement's Legal Group.

42. Following the publication of the Decision Notices, the RDC contacted Enforcement's Legal Group who contacted the investigation team to ask for a copy of the "press release" as they had not seen it. Surprisingly, it seems that the team member receiving this email was not aware of the requirement for RDC approval. He emailed Enforcement Legal on 6 November 2013 saying:

> "Please find below the content of the email sent to selected media, attaching links to the Decision Notices. Would the RDC expect to see this email?"

43. Enforcement Legal replied:

> "Yes, I'm afraid they would expect normally to see these before they go out on RDC cases (as would I for info if nothing else). So we should probably send them a copy with apologies as…suggested."

44. The investigation team accordingly sent a copy of the press release to the RDC's legal adviser a few minutes later, with apologies. The RDC confirmed in their reply that it should have been asked to review it and observed that they would have had comments on it, which it was obviously then too late to deal with.

45. On 10 December 2013 Mr Rosier emailed the investigation team, having become aware from the editor of one of the publications to whom the press release was sent that the Authority had provided a "press update". Mr Rosier asked for a copy of the "press update/release" and also for confirmation that it included information to the effect that the matter had been referred to the Tribunal. Next day the investigation team sent Mr Rosier a copy of the email as sent to the selected media outlets.

46. On 23 December 2013 Mr Rosier emailed the investigation team stating, among other things, that what had been sent to the press was a "*deeply flawed /inaccurate representation of the Decision Notices …which appears designed to be as defamatory and self serving as possible."* He contended that the Authority's purpose had been to thwart his reference to the Tribunal. Mr Rosier took issue with the headline, which indicated he had been banned for poor advice, and the quote attributed to Mr Sillett which, he contended heavily inferred that Mr Rosier had been penalised for lack of competence as an investment adviser. Finally, Mr Rosier stated:

> "Whilst it does not appear in the Judge's Directions it was also my impression that Judge Herrington thought it important that the Notice was accompanied by a clear reference to the fact that the matter had not yet been heard before the Tribunal to which it has been referred. As herein, this was not given prominence and the reference in any event was presented in the most prejudicial manner possible."

47. On 3 January 2014 Mr Rosier drew the matter to the attention of the Tribunal, as described in paragraph 13 above.

48. On 7 January 2014 the investigation team replied to Mr Rosier. It maintained that the Authority had *"complied fully with Judge Herrington's directions on publication*" and denied that the press release was inaccurate and defamatory.

49. Mr Sillett's evidence was that this reply, which was reviewed by Enforcement's Legal Group before it was sent, should have been provided to him along with Mr Rosier's initial complaint.

50. On 9 January 2014 the Tribunal indicated to Mr Rosier and the Authority that it would look into the matter. On the same day the Authority, through Enforcement Legal, emailed the Tribunal reiterating that the Authority believed that it had complied with the Tribunal's directions regarding publication, but it did say in relation to the links in the press release to the Decision Notices :

> "We apologise for the fact that, in error, this made reference to Mr Rosier having been "banned", when in fact any prohibition against him will not take effect unless or until such time as a final notice is issued."

The Authority also repeated the investigation team's denial that the contents of the press release were *"untrue and/or defamatory"*.

51. On 16 January 2014 the Tribunal released directions for a hearing to consider the matter, observing that an apology had now been given to the Tribunal for certain aspects of the press release, but not to Mr Rosier.

52. On 22 January 2014 the Authority altered its position on the accuracy of the press release in the light of the Tribunal's directions. The investigation team wrote to Mr Rosier in the following terms:

> "Having reviewed its email to media dated 4 November 2013 (a copy of which was sent to you on 11 December 2013), the Authority fully accepts that it contains omissions and inaccuracies. We wish to offer our sincere apology for this and propose to take steps to address the matter by asking the four media outlets (Citywire, Moneymarketing, FT Adviser and IFAOnline) to remove the articles from their websites. We will also correct the errors and omissions contained in our original email to media. We hope this proposal will address your concerns. This is not in any way intended to cut short the

inquiry the Tribunal wishes to make into the matter, but to address any issues that the 4 November email may have caused without further delay.

We will explain further the circumstances that led to this publication to Mr Rosier and the Tribunal as directed by the Tribunal however, in summary, the omissions and inaccuracies were the result of an unfortunate error by the Enforcement team dealing with the publication."

53. As it transpired, Mr Rosier rejected the Authority's proposal of a further email to the media outlets, primarily because he felt that a further email might generate increased media interest.

54. Mr Sillett finally became aware of Mr Rosier's complaint and its escalation to the Tribunal on 23 January 2014, after the release of the Tribunal's directions for a hearing to consider the matter. Inevitably, he was now involved as he had been directed by the Tribunal to produce a witness statement as to what had occurred.

Discussion

55. Both Mr Sillett and Mr Berrill-Cox, to their credit, were extremely contrite at the hearing on 19 March 2014 as to what had happened. Mr Sillett adopted a similar tone in his witness statement. The Authority admitted unreservedly to the following failings:

(1) Mr Berrill-Cox accepted that the Authority had failed to adhere to the guidance set out by the Tribunal in previous cases as to how Decision Notices should be publicised and having done so makes clear its regret and its commitment, as far as possible, to make amends;

(2) In particular, the press release failed at its beginning to emphasise the provisional nature of the Decision Notices and the last paragraph, which referred to the fact of references having been made to the Tribunal, was not in the form that the Authority's policy required;

(3) The heading to the press release, with its reference to "poor advice" did not reflect the findings of the Mr Rosier's Decision Notice, where his failings were characterised as a failure to demonstrate suitability of advice, there being no reference as such to "poor advice";

(4) The reference to Mr Rosier having been "banned…from holding a senior position at a financial firm" was inaccurate. The Authority should have referred to its "decision to ban" Mr Rosier in conjunction with the fact that he had referred the matter to the Tribunal;

(5) The press release refers to Mr Rosier having failed to "collect and record the necessary information about his clients before recommending… products whereas the Decision Notice uses the phrase "establish and record";

(6) The investigation team did not pick up the inconsistencies with the Decision Notice or that that there were omissions from the press release;

(7) The quote attributed to Mr Sillett was not approved by him in its final form and the last sentence was inaccurate, implying as it did, that Mr Rosier had provided "substandard advice";

(8) The investigation team should have escalated the matter to Mr Sillett when Mr Rosier complained on 23 December 2013;

(9) The terms of the response to Mr Rosier on 7 January 2013 were inappropriate. The investigation team should have realised that there were errors and inaccuracies in the press release for which they should have apologised promptly.

56. Mr Rosier complained of other matters concerning the press release. I am satisfied that none of these other complaints are justified except in two respects:

(1) The reference in the last line of the first paragraph to Mr Rosier not having offered financial advice since September 2010 "following intervention by the FCA." I agree with Mr Rosier that it should have been made clear that Bayliss voluntarily agreed to vary its permission. The published wording implies that the Authority used its own initiative powers to vary Bayliss's permission which was not the case;

(2) The removal of Mr Rosier's courtesy title of "Mr" in a number of places. Mr Rosier complains that it was omitted "for prejudicial effect" and "in order to infer nefariousness". The Authority says that it is their usual practice in press releases to refer to the subject without his or her title. In my view the Authority's approach is inappropriate, at least in relation to the publicising of a decision notice. The practice of dropping a courtesy title is adopted by the police in relation to convicted criminals and it is associated with the criminal justice system. It is questionable whether it is appropriate in relation to civil regulatory proceedings and I agree with Mr Rosier that it is prejudicial in the context of the publication of

a decision notice. In my view it is unnecessarily disrespectful at the very least.

57. I turn to consider the question as to how the failures that have been identified came about. Mr Sillett said in his witness statement that they were a regrettable series of events which occurred due to the failure of the investigation team to follow the Authority's processes. He said that the fact that the email was not a full press release did not mean that it called for a less rigorous approach, but this might not have been as clear as it should be to those involved. Mr Sillett did not put the failings down to individuals with limited experience of how to deal with the matter. He said he would have expected the individuals involved to have been able to deal with the issue appropriately in line with the Authority's internal processes. Mr Berrill-Cox referred to the role of the press office. He characterised what had happened was that two parts of the organisation, attempting to do their job, came into conflict with each other. Unfortunately, in this instance the press office prevailed and the safeguards in place to prevent such occurrences were not triggered. Mr Berrill-Cox agreed that in effect the investigation team had allowed the press office to produce a document which was not in line with Enforcement's agreed processes for publications of this kind. Mr Sillett admitted that it was not unusual for the press office to "get the wrong end of the stick" and that had happened in this case. He sought to explain the misleading headline, drafted by the press office, on the grounds that it was an attempt to make the piece more interesting to journalists.

58. Mr Rosier offers a more sinister explanation. He submits that the press release was deliberately designed to damage him and to frustrate his reference. He submits that the Authority was frustrated that he felt it appropriate to take the matter to the Tribunal rather than settle it. In his view the investigation team and Enforcement Legal were fully aware of what was in the Decision Notices and would have known that what was being written was clearly inaccurate. He submits that that the Authority has clearly acted in bad faith. It must have been known to the investigation team, when they stood by what had been written when he raised the complaint, that what had been written was inaccurate.

59. Were Mr Rosier right in his view then if he were to maintain that through its actions the Authority had caused him or Bayliss loss then the statutory immunity for liability in damages provided in paragraph 25 of schedule 1ZA FSMA may not be available to the Authority. This is because of the exception set out in paragraph 25(3)(a) of that schedule which applies where the act or omission concerned is shown to have been in bad faith.

60. It would be inappropriate for me to come to any conclusions on Mr Rosier's contentions that the Authority has acted in bad faith; that is not a matter which falls within the jurisdiction of this Tribunal and if Mr Rosier is of the view that he has a case on that point he will need to pursue it through the courts. In any event, his contentions involve serious allegations of misconduct attributable to

the acts of individual members of the Authority's staff who have not had the opportunity of giving evidence and being cross-examined in respect of the allegations. It would clearly be unfair of me to come to any conclusion on these allegations without the staff members concerned having had that opportunity.

61. I should, however, make one observation on Mr Rosier's contentions. It is clear following the press office's defective first draft of the press release, the investigation team produced a revised version which I have found in paragraph 34 above to be substantially factually accurate in the manner in which it reflected the content of the Decision Notices. This is inconsistent with a deliberate attempt to paint a misleading picture. For Mr Rosier to succeed with his contentions he will have to show that either the press office and the investigation team conspired to produce a revised draft that was deliberately misleading, that being the version that emerged following the press office's redraft on 1 November 2013 and the investigation team's comments thereon, or the investigation team, in full knowledge that the press office's version was inaccurate, decided to go along with it, subject to the minor amendments which it made, which in themselves are inconsistent with a deliberate intention to mislead.

62. What I can conclude from the evidence I have seen and heard is as follows:

    (1) The press office appeared to be unaware of the Authority's policy that due prominence be given to the provisional nature of decision notices and the proceedings in the Tribunal as described in paragraph 28 above. This is demonstrated by its comment to the investigation team, recorded in paragraph 38 above, that the reference to the Tribunal proceedings should be at the bottom of the message. It also seemed to have confused decision notices and final notices which indicated that it had not been adequately trained as to the importance of the distinction and how they are to be reported.

    (2) The investigation team were either unaware of the need to give due prominence to the matters referred to in paragraph 28 above or overlooked them when they reviewed the press office's redraft of 1 November 2013;

    (3) As recorded in paragraph 40 above, the investigation team approved the final version which had a misleading heading, an inaccurate quote attributed to Mr Sillett which had not been approved by him and included links that were erroneously described as links to final notices;

    (4) The investigation team appeared to be unaware of the internal policy that press communications regarding RDC decisions

be approved by the RDC, as evidenced by their exchange with Enforcement Legal recorded in paragraphs 42 and 43 above;

(5) The investigation team's comment in its email of 7 January 2014, responding to Mr Rosier's complaint, that the Authority "had complied fully with Judge Herrington's directions" and a comment to the same effect in Enforcement Legal's email to the Tribunal on 9 January 2014 were somewhat disingenuous. Although it was technically correct that there had been no formal direction to the same effect as those made previously in the *Arch* and *Angela Burns* decisions, both the Tribunal and the Authority had proceeded on the basis that it was understood that the content of relevant press communications would reflect the position as if such directions had been made. It was the Authority's policy that the relevant content in the form and with the prominence described in paragraph 28 above would be included in the relevant communication;

(6) Neither the investigation team in its initial response to Mr Rosier on 7 January 2014 nor Enforcement Legal in reviewing that response appeared to have seriously reviewed the accuracy of the press release before responding to Mr Rosier with a blanket denial that it was inaccurate. It was only when the Tribunal expressed concerns as to its accuracy following Mr Rosier having referred the matter to it and Mr Sillett being made aware of the issue following the release of the Tribunal's directions on 16 January 2014 that the Authority abruptly changed course, admitting that the press release contained omissions and inaccuracies and apologising to Mr Rosier, having previously only apologised to the Tribunal. We understand from Mr Sillett that the matter was being handled by experienced members of the Enforcement Division. In the light of that and the obvious errors that were apparent to Mr Sillett and Mr Berrill-Cox when they became involved, I conclude that before that point the investigation team and Enforcement Legal simply adopted a policy of blanket denial without investigating the merits of Mr Rosier's complaint; and

(7) Mr Rosier's complaint was not escalated to Mr Sillett when, as Mr Sillett indicated in his evidence, it should have been.

63. In my assessment all the failings I have identified in paragraph 62 above are deeply disappointing and troubling. They demonstrate a standard of care in drafting and approving an important public communication, publicising as it did ongoing proceedings in the Tribunal, which fell well below the standard the Authority would find acceptable on the part of the firms it regulates in relation to the approval of financial promotions. Similarly, the initial attitude the Authority demonstrated in response to Mr Rosier's complaint fell well below what the Authority would expect from firms it regulates when handling customer complaints. Whilst it is accepted that human error can result in matters being overlooked when a communication is drafted and approved, disappointing though that might be, the problem is compounded where there is not a swift recognition of a mistake and a clear commitment to put it right. Such an approach can be an indication of a cultural failing and if so it needs to be urgently addressed, although as I have indicated both Mr Sillett and Mr Berrill-Cox have been exemplary in the manner in which they candidly admitted to the Tribunal the failings that had occurred and expressed a desire to put things right.

Recommendations

64. Mr Sillett indicated in the course of his evidence that Enforcement Division of had laid down internal policies and processes to be followed in relation to the publication of decision notices. He did not, however, indicate whether there is a single document which sets these policies and processes clearly, easily available to investigation teams and, importantly, whether these policies and processes have been shared with the press office so that when it prepares a draft communication to the press publicising a decision notice that office is fully aware of what the communication must contain and what the approval process is.

65. The following matters arising from this issue indicate the need to strengthen the Authority's procedures relating to publicity for decision notices:

(1) The press office's apparent lack of awareness of the need to deal with decision notices differently to final notices and Mr Sillett's observation that it was not unusual for the press office to get "the wrong end of the stick";

(2) The investigation team's lack of awareness of the need for RDC approval;

(3) The lack of a formal role for the Enforcement Legal Group in the approval process;

(4) The failure to obtain Mr Sillett's approval of the final version of the press release, including a quote attributable to him;

(5) The failure to escalate Mr Rosier's complaint to Mr Sillett until the Tribunal expressed its concerns; and

(6) The dropping of Mr Rosier's courtesy title in the press release.

66. It should go without saying that particular care should be taken when the Authority drafts publicity material relating to one of its decisions which is still subject to judicial proceedings. I have considered whether the importance of the issue is such that Enforcement should take the lead on the drafting rather than leaving it to the press office to prepare the first draft, which in this case led to an unfortunate result. I have, however, concluded that provided Enforcement mount a robust challenge process to material produced by the press office, whose natural inclination is to make the subject matter more interesting to journalists, and there are clear guidelines within which the drafting process must operate, the current allocation of responsibility is acceptable.

67. However, in my view Enforcement should take the lead in developing clear guidance for the press office to follow in drafting such material. In particular, the guidance should explain clearly why the publicity relating to decision notices has to be dealt with differently to that relating to final notices and the importance of adhering to the guidance laid down in the *Arch* and *Angela Burns* cases. It should be made clear that any attempt to make the disclosures that the guidance requires less prominent is non-negotiable.

68. Although Mr Sillett indicated that emails to selected media outlets should under the current arrangements be prepared to the same rigorous standards as full press releases, it appears to me that position may not have been readily apparent to the staff concerned in this case. The guidance should therefore make it clear that exactly the same considerations apply as to form and content whether the communication is a full press release or not.

69. My understanding is that the members of the investigation team involved on any case may not be lawyers. In my view it is essential, bearing in mind that the publicity concerned relates to ongoing legal proceedings, that the publicity concerned should be approved by an experienced member of the Enforcement Legal Group before it is presented to the RDC and the relevant Enforcement Head of Department or, in the case of a full press release, the Director of Enforcement, for approval. It goes without saying that what should be presented to these persons for approval is a final version of what is proposed to be published, including the text of any quote attributed to the Head of Department or Director. If any of those who need to approve the relevant text suggest amendments, they should be shown the final version incorporating those amendments before it is released.

70. Should a press communication relating to a decision notice be subject to a complaint as to its accuracy or appropriateness by an interested party, in particular one who is a party to the ongoing proceedings in the Tribunal, that complaint should be escalated immediately to the relevant Head of Department who should approve the approach to be taken in responding to the complaint. This is particularly important, as generally the complainant will not have his complaint investigated through the Authority's complaints procedure where it relates to proceedings in the Tribunal until those proceedings have been concluded. It is of course open to the complainant or the Authority to draw the matter to the attention of the Tribunal which will consider whether it is appropriate to become involved in the issue.

71. In my view the reference in publicity material to the subject of a decision notice who has referred his matter to the Tribunal by his surname only is unnecessarily disrespectful and is inconsistent with the provisional nature of the decision notice.

72. In summary I therefore make the following recommendations as to the Authority's procedures relating to the publication of decision notices which have been referred to this Tribunal as follows:

(1) There should be detailed but clear written guidance, prepared by Enforcement having consulted the press office, as to the tone and content of material publicising decision notices. This guidance should adequately explain the difference between decision notices and final notices and set out the prescribed material that must be included and the prominence that is to be given to that material, in line with the guidance previously given in this Tribunal;

(2) All publicity material regardless of whether it is a full press release or not should be prepared to the same rigorous standard;

(3) After a draft of the relevant material has been prepared by the press office and approved by the investigation team it should be approved by the Enforcement Legal Group;

(4) Following approval by the Enforcement Legal Group the draft should be approved by the RDC and then the relevant Head of department or the Director of Enforcement, as appropriate;

(5) Any complaint received from an interested party after publication should be escalated immediately to the relevant Head of Department and the Tribunal informed when and where appropriate; and

(6) The practice of referring to subjects of decision notices in relevant publicity by their surname only should cease.

TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE

RELEASE DATE: 21 MAY 2015