[2015 UKUT 0636 (TCC)
Reference number: FS/2014/0008

FINANCIAL SERVICES–general insurance broker -whether director failed to exercise due skill care and diligence in managing the business-whether he took reasonable steps to ensure compliance with relevant standards regarding the operation of client money accounts-Statements of Principle 6 and 7

Fitness and properness of approved person-prohibition order in relation to significant influence functions-s 56 FSMA

Financial penalty-appropriate level of penalty-s 66(3)FSMA

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

TERENCE ANDREW JOINT **Applicant**

- and –

THE FINANCIAL CONDUCT AUTHORITY

The Authority

TRIBUNAL: Judge Timothy Herrington
Ian Abrams (Tribunal Member)
Martin Fraenkel (Tribunal Member)

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 6 and 7 October 2015

The Applicant in person

Simon Pritchard, Counsel, instructed by the Financial Conduct Authority, for the Authority

DECISION

Introduction and decisions referred

1. This decision concerns a reference by Mr Terence Joint of the decision of the Authority to impose a financial penalty of £20,000 on Mr Joint pursuant to s 66 of the Financial Services and Markets Act 2000 ("FSMA") and the further decision to make an order prohibiting Mr Joint from performing any function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm, pursuant to s 56 FSMA.

2. The essence of the Authority's case against Mr Joint, who held the controlled function CF1 (director) at Joint Aviation Services Limited ("JASL"), is that he contravened Statements of Principle 6 and 7 of the Statements of Principle and Code of Practice for Approved Persons ("APER") by failing during the period between 1 April 2011 and 30 June 2012 ("the Relevant Period") :

(1) to exercise due skill, care and diligence in managing the business of JASL resulting in the misapplication of client insurance premiums that were in fact intended to be paid to insurers on behalf of JASL's various clients; and

(2) to take reasonable steps to ensure that JASL handled its client money accounts in accordance with the relevant standards and requirements of the regulatory system in that it mixed JASL's clients' insurance premiums with the funds of a separate entity.

3. The Authority no longer seeks a full prohibition order against Mr Joint. It now contends that Mr Joint is not fit and proper to perform any significant influence functions in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm. The Authority's case is that a partial prohibition on these terms is warranted by the fact that Mr Joint is not a fit and proper person because he lacks competence and capability to perform significant influence functions.

4. The Authority continues to ask the Tribunal to impose a financial penalty of £20,000 on Mr Joint pursuant to s 66 FSMA in respect of the above alleged breaches.

5. Mr Joint did not in the hearing of his reference contest the partial prohibition sought by the Authority. Mr Joint accepts that in certain respects his behaviour fell below the standard required when carrying out his functions as a director of JASL and does not in general terms dispute the facts and matters that the Authority relies on. He objects to the imposition of a financial penalty on the grounds that such an imposition would cause him serious financial hardship on the basis that he has no significant assets other than his house in Spain.

Applicable legal and regulatory provisions

General

6. 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

7. Pursuant to s 64 FSMA, the Authority has issued a number of Statements of Principle that are contained within the part of its Handbook entitled Statements of Principle and Code of Practice for Approved Persons ("APER"). APER sets out the fundamental obligations of approved persons and describes conduct, which in the opinion of the Authority, does not comply with the relevant Statement of Principle.

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

> (1) Statement of Principle 6 which provides that an approved person performing a significant influence function must exercise due skill, care and diligence in managing the business of the firm for which he is responsible in his controlled function; and
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> (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 requirements and standards of the regulatory system.

9. At the relevant time APER 3.1.3G provided that, when establishing compliance with, or a breach of, a Statement of Principle, account will be taken of the context in which a course of conduct was undertaken, including the precise circumstances of the individual case, the characteristics of a particular controlled function and the behaviour expected in that function.

10. At the relevant time APER 3.3.1E stated 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;
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> (2) whether he reached a reasonable conclusion which he acted on;
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> (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.

11. At the relevant time APER 4.6 set out examples of behaviours which the Authority considers do not comply with Statement of Principle 6, including:

(1) failing to take reasonable steps to adequately inform himself about the affairs of the business for which he is responsible (APER 4.6.3E);

(2) delegating the authority for dealing with a part of the business to an individual without reasonable grounds for believing that the delegate had the necessary capacity, competence, knowledge or skills to deal with the part of the business (APER 4.6.5E);

(3) failing to take reasonable steps to maintain an appropriate level of understanding about a part of a business that he has delegated to an individual (APER 4.6.6E); and

(4) failing to supervise and monitor adequately the individual to whom responsibility for dealing with a part of the business has been delegated (APER 4.6. 8E).

12. At the relevant time APER 4.6.10 provided that in determining whether or not the conduct of an approved person performing a significant influence function complies with Statement of Principle 6 the competence, knowledge or seniority of the delegate and past performance and record of the delegate are to be taken into account.

13. At the relevant time APER 4.6.14 provided that it is the responsibility of the person delegating authority for dealing with a part of the business to ensure that he receives reports on progress and questions those reports where appropriate.

14. At the relevant time APER 4.7 set out examples of behaviours which the Authority considered did not comply with Statement of Principle 7, including failing to take reasonable steps to implement (either personally or through a compliance department or other departments) adequate and appropriate systems of control to comply with the relevant requirements and standards of the regulatory system in respect of its regulated activities (APER 4.7.3E).

15. The section of the Authority's Handbook entitled FIT sets out the fit and proper test for approved persons. FIT 1.3 provides that the Authority will have regard to a number of factors when assessing the fitness and propriety of a person. The most important considerations will be the person's honesty, integrity and reputation, competence and capability, and financial soundness.

Client assets

16. Principle 10 of the Authority's Principles for Businesses provides that a firm must arrange adequate protection for clients' assets when it is responsible for them.

17. The section of the Authority's Handbook entitled CASS sets out the rules and guidance in relation to the handling of client money and assets by firms. CASS 5 sets out the specific rules and guidance for insurance intermediaries.

18. CASS 5.5.3 provides that a firm must hold client money separate from the firm's money.

19. CASS 5.5.4 provides that if a firm is liable to pay money to a client, it must as soon as possible, and no later than one business day after the money is due and payable, either pay it into a client bank account or pay it to, or to the order of, the client.

20. CASS 5.5.5 provides that a firm must segregate client money by paying it as soon as practicable into a client bank account.

21. CASS 5.5.9 provides that a firm must not hold money other than client money in a client bank account unless, inter alia, the money is temporarily in the account and includes sums payable to the firm.

22. CASS 5.5.16 provides that a firm may draw down commission from the client bank account if it has received the premium from the client and this is consistent with the firm's terms of business which are maintained with the relevant client and the insurance undertaking to whom the premium will become payable.

23. CASS 5.5.62 provides that in order that a firm may check that it has sufficient money segregated in its client bank account to meet its obligations to clients it is required periodically to calculate the amount which should be segregated and to compare this with the amount shown as its client money resource. A firm is required to make a payment into the client bank account if there is a shortfall or to remove any money which is not required to meet the firm's obligations.

24. CASS 5.5.63 provides that a firm must at least at intervals of not more than 25 business days check whether its client money resource meets its client money requirement and to ensure that any shortfall is paid into the client bank account by close of business on the day the calculation is performed.

Auditors report on client assets

25. The section of the Authority's Handbook entitled SUP sets out rules regarding the delivery of a client assets report by the auditor of a firm.

26. SUP 3.10.4 requires an auditor of a firm to submit a client assets report addressed to the Authority. As required by SUP 3.10.5 such a report must state whether in the auditor's opinion the firm has maintained systems adequate to comply

with the client money rules throughout the period of the report and whether the firm was in compliance with the client money rules as at the date at which the report has been made.

27. SUP 3.10.8D requires the auditor to deliver to the firm a draft of its report. SUP 3.11.1 provides that a firm should ensure that it considers the draft report in order to provide an explanation of the circumstances that gave rise to each of the breaches identified in the draft report and any remedial actions that it has undertaken or plans to undertake to correct those breaches.

Prohibition

28. Section 56 FSMA confers upon the Authority the power to make a prohibition order against an individual prohibiting that individual from performing a specified function, any function falling within a specified description, or any function, if it appears to the Authority that the individual is not a fit and proper person to perform functions in relation to a regulated activity by an authorised person.

Financial penalty

29. 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.

30. Misconduct includes failure, while an approved person, to comply with a Statement of Principle issued under s 64 FSMA.

31. 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 Authority's policy in relation to the imposition of financial penalties is set out in chapter 6 of the section of the Handbook entitled DEPP. We refer to these provisions later at [96] to [108] below when considering the question of the imposition of a financial penalty in this case.

Issues to be determined and the role of the Tribunal

32. Section 133(4) FSMA 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.

33. Section 133(5) to (7) FSMA, following amendments made by the Financial Services Act 2012, 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."

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

35. 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 impose a prohibition order under s 56. Thus this reference is effectively sub-divided. Mr Joint'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.

36. In relation to Mr Joint's reference of the Authority's decision to impose a prohibition order, which we shall refer to as the "non-disciplinary reference", 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 reference to have no merit and therefore dismisses it 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.

37. The position is more complex in relation to this particular reference in that the Authority was originally seeking a full prohibition to be imposed on Mr Joint but has

now, with the permission of the Tribunal and the consent of Mr Joint, amended its statement of case so that now only a prohibition order limited to the exercise of significant influence functions (such as acting as the director of an authorised firm) is sought. The question therefore arises as to whether if this Tribunal were to consider that the appropriate regulatory action for the Authority to take was to impose a partial prohibition then the appropriate determination under s 133 (6) FSMA would be to remit the matter to the Authority for it to reconsider its original decision to impose a full prohibition (which would necessitate the issue of a further decision notice pursuant to s 390(2A) FSMA) or whether the appropriate determination would be to dismiss the reference with the result that the Authority could then proceed to issue a final notice and a partial prohibition order without the need first to issue a further decision notice.

38. We have not heard full argument on this point and it is academic in this particular case because the Authority now considers that a partial rather than a full prohibition is appropriate so that it could not rationally impose a full prohibition were the reference to be dismissed. In these circumstances it is our view that where a statement of case in a non-disciplinary reference seeks a lesser sanction than that provided for in the decision notice then we should proceed on the basis that the applicant's reference notice is thereupon to be read as contesting the outcome sought by the Authority in its statement of case rather than the decision which is the subject of the decision notice. When the reference was made it was clear that the "subject matter of the reference", as referred to in s 133 (4) FSMA, was whether it was appropriate to make a prohibition order to the extent permitted by s 56 FSMA but the extent of the regulatory outcome being sought by the Authority is then defined by the pleadings: see *Stephen Allen v Financial Services Authority* (2012) on this point. Thus if we were to agree with the Authority that a partial prohibition was the appropriate regulatory outcome then we should dismiss the reference.

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

> (1) We shall first determine whether Mr Joint's conduct in relation to the matters referred to at [2] above demonstrate that he failed to act with due skill, care and diligence in breach of Statement of Principle 6 or failed to take the reasonable steps required of him pursuant to Statement of Principle 7;
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> (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; and
>
> (3) We shall then determine Mr Joint's reference in respect of the question as to whether a prohibition order is appropriate.

40. As is well-established in references in 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

41. The Authority filed witness statements from Mr Robert Kimbell of the Authority's CASS Department, Ms Makeda Watkinson, a chartered accountant formerly employed by Sheen Stickland, JASL's accountants, Mr Colin Matthissen, a partner at Sheen Stickland, and Mr Chris Keene, a compliance consultant who had provided services to JASL. Mr Joint did not wish to cross-examine any of these witnesses other than Mr Matthissen.

42. Mr Joint's reply to the Authority's statement of case was treated as his witness statement and he was cross-examined by Mr Pritchard.

43. We found Mr Matthissen to be an honest and straightforward witness although his evidence is of limited assistance as he did not take responsibility for JASL's affairs until 1 April 2011.

44. We found Mr Joint to be an honest and straightforward witness who did not hesitate to accept that as a director of JASL he failed to take the actions that he should have done in a number of respects. In mitigation he referred to his understandable preoccupation with dealing with his wife's illness and sad death and felt that Sheen Stickland should have approached him direct regarding the concerns with the business that they had identified. Mr Joint's memory and understanding as to what happened on particular occasions was not always reliable but it is only in respect of those instances that we have been unable to accept his evidence.

45. We have relied to a large extent on what the documentary material that has been submitted by the Authority shows as to the events which are the subject of this reference. This material was not challenged by Mr Joint in most respects.

Findings of fact

46. From the evidence that we heard and the documents that we saw we make the following findings of fact. The undisputed facts are largely taken from the Authority's statement of case and the preliminary findings letter issued to Mr Joint by the Authority on the conclusion of its investigation into the matters which are the subject of this reference.

47. JASL was a retail and commercial insurance broker firm, specialising in the aviation sector; Mr Joint was one of its two shareholders. Until 2007, there were two directors, Mr Joint and Mr David Innes. Mr Innes was non-executive and due to health issues had played no part in the running of JASL's business for a number of years.

48. From 14 January 2005, JASL was authorised by the Authority to conduct insurance mediation activities and Mr Joint was approved to perform the CF 1 (Director) controlled function by which time Mr Joint had moved to Spain. The Authority permitted JASL to hold client money but only in relation to its insurance mediation activities.

49. JASL, as an insurance broker, received insurance premiums directly from customers in relation to insurance policies. JASL would then hold those premiums on behalf of the insurers. JASL would generally be entitled to commission as remuneration in respect of the policies it sold and that commission would be calculated as a percentage of the gross premium paid. In accordance with the relevant provisions of CASS those premiums were required to be paid into JASL's client bank account but JASL would be entitled to withdraw the commission payable to itself in accordance with the provisions of CASS 5.5.16.

50. Following his move to Spain, Mr Joint was not involved in the day-to-day running of the business, and in particular did not become involved in accounting or compliance matters. He was very much the public face of the business, being responsible for getting in JASL's new business and the relationships with underwriters. This remained the position right up to the point at which JASL ceased to operate. Mr Joint was paid remuneration for acting as a director; during the Relevant Period he received a sum of €8500 per month and it transpired that these sums were funded out of JASL's Euro client account. We accept that Mr Joint was not aware of this and believe that there was a second general Euro bank account out of which these payments were made.

51. Initially after Mr Joint's move to Spain, a senior manager, Bernadette Pollard, was responsible for day-to-day management at JASL's premises in the UK. Mrs Pollard decided to leave JASL in 2007. By that time Mr Joint's wife had become seriously ill and he was not in a position to move back to England to become involved in the day-to-day management of JASL. The only option available to Mr Joint was either to sell the company or to find somebody else to take responsibility for day-to-day management.

52. Mr Joint took the latter course, and Mrs Vroni O'Brien, who had been an employee of JASL since 1999, agreed to become a director and to take responsibility for the day-to-day management of JASL, including the maintenance of accounting records and compliance, in particular the proper operation of JASL's client bank accounts in accordance with the provisions of CASS. It was clear that in practice Mr Joint had delegated his responsibilities as a director in respect of these matters to Mrs O'Brien. As a result, Mr Joint did not consider that he had responsibility for monitoring Mrs O'Brien's performance of her duties nor did he have responsibility for handling premiums.

53. Mrs O'Brien, who agreed to take on the role with some reluctance when told that the only alternative was to sell the company, which might have resulted in its employees losing their jobs, was duly approved by the Authority to perform the controlled functions of CF 1 (Director) and CF3 (Chief Executive). Mrs O'Brien had previously worked in the firm in a more junior, and in an administrative, role. She did not have any formal training or qualifications in business and financial management. Mrs O'Brien's professional experience was in book-keeping.

54. Whilst Mr Joint would have regular contact with Mrs O'Brien by telephone these discussions would rarely touch on accounting or compliance issues. He asked

for no detailed financial information and would simply ask *"how are we doing"... "Are we okay overall?"*. Mr Joint would not seek to challenge the invariable response that everything was fine. He said in his evidence that he did not wish to put Mrs O'Brien under any pressure. He also said that it was likely that, knowing the situation with Mrs Joint's health, Mrs O'Brien would keep any problems away from him knowing that Mr Joint was under considerable strain.

55. Mr Joint admitted that at no time did he ask Mrs O'Brien to see the client money calculations. Mrs O'Brien did not send Mr Joint any draft financial statements. Mr Joint did not seek to satisfy himself that the client bank accounts were being operated in accordance with the relevant regulatory provisions.

56. It is clear that Mr Joint, for understandable reasons, became less engaged with the business during his wife's illness and for a considerable time thereafter following her sad death in mid-2009, an event which left him emotionally devastated and burdened with family responsibilities. Nevertheless, it is clear that he was detached from the day-to-day running of the business and did not seek to monitor Mrs O'Brien's activities at any time after her appointment, including during the period after he began to become more engaged with the business in 2011.

57. Sheen Stickland were engaged by JASL as its accountants throughout the period that Mrs O'Brien was a Director. Mr Joint was of the view that it was part of the accountants' responsibilities to inform him if there had been issues with accounting matters that had come to their attention, including issues regarding the operation of the client bank accounts.

58. It is clear to us from the evidence that Sheen Stickland had at no time assumed such a general responsibility. We were shown their terms of engagement and the letter of responsibilities which they sent to JASL every year. The effect of these documents was that Sheen Stickland agreed to help JASL prepare its financial statements. Its responsibility was to compile the annual financial statements for JASL's approval based on the accounting records that JASL itself maintained and the information and explanations that JASL gave to them. The terms of engagement make it clear that Sheen Stickland would provide only those reports that they were told in writing were required by statute or regulation and that they would only carry out supplementary work if the full details had been confirmed in writing. Except in relation to client money, there was no obligation to carry out an audit or issue an auditors report.

59. As required by CASS, Sheen Stickland did carry out an annual client money audit and issued an audit report.

60. Sheen Stickland regarded Mrs O'Brien as their primary contact at JASL and it was only during the Relevant Period when the issues arising out of the Authority's investigation began to emerge that Mr Joint became involved. Mr Joint is critical of Sheen Stickland's failure to copy him in on any of its communications with Mrs O'Brien when they raised concerns, but in our view that criticism is misplaced. Sheen Stickland were entitled to regard Mrs O'Brien as their sole point of contact and either she could have informed Mr Joint of any issues or he himself could have taken the

initiative and sought to obtain comfort from Sheen Stickland directly which he never did. Mr Keene's firm was also engaged to give advice on the Authority's rules but it is clear that this was purely on an ad hoc basis and Mr Keene only gave advice on specific issues when he was asked to do so. There is no evidence that he was asked to give any advice during the Relevant Period.

61. Issues regarding JASL's compliance with the CASS rules first emerged in respect of the year ended 31 October 2007. On 28 February 2008 Sheen Strickland issued its auditors report to the Authority in accordance with SUP 3.10 in which it expressed its opinion that the firm did not maintain systems adequate to enable it to comply with the rules throughout the year. The report also stated that the firm was not in compliance with the rules in CASS 5 (except CASS 5.2) at the date of the report because the client money calculation was not being undertaken at least every 25 business days and commission due to the firm was not being transferred from the client account within 25 days of payment clearing the bank account.

62. Shortly before the issue of that report the Authority had conducted a supervisory visit to JASL on 16 November 2007. The Authority wrote to Mrs O'Brien on 2 January 2008 and expressed the following cause for concern in its letter:

> "Despite a desire by you and your staff to ensure customers are treated fairly, insufficient attention had been paid by you and Mr T Joint to the management of the business to ensure this objective was achieved. We found that management was almost entirely focused on day-to-day business activities at the expense of ensuring the business was complying with its regulatory obligations. As a consequence you were not aware that you had allowed business to be conducted in breach of FSA rules, a number of which have a direct impact on the fair treatment of customers, details of which are provided below."

63. Mrs O Brien responded to this letter on 30 January 2008 in which she addressed the Authority's concerns. In a letter of 8 February 2008 in reply the Authority said the following:

> "Our concern was not with the day-to-day management of insurance mediation but with the lack of senior management attention to regulatory issues. Although your response does not specifically address how this is to be remedied we can see from the actions taken and involvement of your compliance consultant that regulatory matters are now being given a more appropriate level of management attention. However you must ensure that adequate management resource continues to be focused on keeping abreast of regulatory developments and ensuring that actions are taken to ensure that the firm is compliant at all times."

64. Mr Joint could not recall having seen this correspondence at the time that it took place. In our view it is likely that Mrs O'Brien did not share it with him for the reasons referred to at [54] above.

65. The client money calculation as at 31 October 2007 included as client money resource a sum of £255,213 owed from JASL. In fact this sum arose as a result of dealings with JASL's sister company in Spain which Mr Joint ran. As Mr Joint explained, the practice was that JASL's Euro client money account was used to

receive the sums payable to underwriters in the UK in respect of business undertaken by JASL in Spain. This, as Mr Joint now recognises, was an improper use of the UK client bank account. The business was conducted in this way, Mr Joint says, because JASL had direct access to the relevant underwriters whereas JASL Spain did not.

66. As we shall see, it was only some years later that the true characterisation of this item emerged. The sum did not in fact represent monies due to pay underwriters. As Mr Joint observed, these sums would have to be passed on promptly and would not have remained outstanding as debtors for any length of time. The item, both in respect of this financial year and corresponding amounts in subsequent financial years, did in fact represent expenses that had been incurred by Mr Joint in Spain for the purpose of developing JASL's UK business. He had disbursed the sums himself and therefore they needed to be entered into JASL's books as expenses but this was never done. The item was therefore mistakenly recorded as a debt due from JASL Spain to JASL in the UK and therefore resulted in an understatement of the client money deficit for a number of years.

67. As we shall see, when later this item was drawn to Mr Joint's attention he was able to explain that the treatment of the relevant amount was incorrect. He accepted that had he seen the client money calculation carried out as at 31 October 2007 he would have been able to point out the error at that time and the mistake would therefore not have been carried forward to future years.

68. During 2011 Mr Joint began to give greater attention to JASL's business. On 26 August 2011 Mr Joint and Mrs O'Brien met Mr Matthissen and Mrs Dedman of Sheen Stickland at JASL's office in Alton. There is a note of that meeting prepared by Mrs Dedman which records that the main subject of the meeting was JASL's business accounts for the year ended 31 October 2010. The note records Mr Joint confirming that cash will be sent over from Spain before the end of October 2011. Mr Joint's recollection is that this money was requested in order to remedy the client money deficit and that Mr Matthissen had indicated that there was no rush to do this, hence the deadline of 31 October 2011. Mr Matthissen's recollection is different. He says, and this is consistent with the note of the meeting, that the money was required to clear the overdraft on Mr Joint's overdrawn director's loan account and did not relate to any client money deficit which was not the subject of discussion at the meeting in August 2011.

69. In our view Mr Joint is mistaken on this point. His mistake led him to believe that he had been told by the accountants that there was no requirement to rectify a client money deficit forthwith. However it is clear that the accountants did in fact say the opposite. When the client money calculation for the year ended 31 October 2011 was produced and showed a deficit of £36,880 Mrs Dedman emailed Mrs O'Brien on 12 December 2011 saying that the deficit should be cleared as soon as possible. Mrs O'Brien clearly understood this to be the case because in a letter to the Authority on 20 April 2012, answering questions that the Authority had raised following submission of the 2011 client money audit report, she stated that at no stage had Sheen Stickland suggested that rectifying a client money shortfall was not a matter of urgency.

70. As mentioned above, JASL's client money calculation for the year ended 31 October 2011 showed a deficit. Mr Matthissen, in the context of preparing the client money audit report, asked for a meeting with Mrs O'Brien to discuss the matter in more detail and that meeting took place on 28 February 2012. At that meeting Mrs O'Brien acknowledged that the debtor and creditor figures she had used for the calculation were not correct and had failed to identify the correct shortfall. The position on the monies showed as being due from JASL in Spain was also discussed.

71. This meeting was followed by another between Mr Joint and Mr Matthissen on 2 March 2012 and a further meeting between Mrs O'Brien and Sheen Stickland on 5 March 2012. Following those meetings and a subsequent telephone conversation with Mr Joint, the true nature of the entry relating to JASL Spain was established. By then Mr Joint was arranging for the sale of his house in Manchester, the proceeds of which would be used to clear the client money deficit.

72. Following these meetings and discussions, a revised client money calculation was undertaken which showed a shortfall of £162,765 on the client money account. Sheen Stickland finalised their client money audit report on 5 March 2012 which referred to this deficit as having arisen because of debtor and creditor balances used by the firm in the client money calculation not being checked to ensure that they were in accordance with the underlying records when performing the client money calculation.

73. The report also records Mr Joint's comment on this situation. He said that he accepted all parts of the accountants' findings. He said that because of the shortfall in JASL's systems he failed to completely evaluate the JASL client money account, especially as JASL was able to pay its creditors at any time from monies held. He went on to say that as soon as he was informed of the situation he had sold his house in Manchester and by the end of April 2012 the shortfall in the client bank account would be solved. Finally he stated that the error was his alone and his staff were not responsible in any way.

74. By June 2012, JASL owed £150,253.81 to insurers in relation to outstanding insurance premiums for policies arranged with those insurers. JASL did not have the necessary funds to pay these liabilities because some of the client money was being used to fund business expenses.

75. The Authority followed up the matters arising from the client money audit report and Mr Joint and Mrs O'Brien attended a meeting with the Authority on 28 June 2012. At that meeting the Authority indicated, given the current outstanding shortfall on the client account, the confirmation that the house sale had not yet completed and therefore no funds yet injected into the business and the client account had been incorrectly calculated for a significant period of time, that it was now concerned about the safety of client funds. As a result the Authority invited JASL to enter into a voluntary variation of permission which would have the effect of stopping the firm from conducting any regulated business in the future. JASL agreed to this course of action and the variation of permission was entered into on 6 July 2012.

76. On 9 July 2012 Sydney Charles Insurance Advisers Limited ("Sydney Charles"), an insurance intermediary licensed by the Guernsey Financial Services Commission, purchased JASL's client base and insurance book. The consideration for this sale was satisfied by Sydney Charles undertaking to pay the amounts outstanding to insurers in respect of net insurance premiums.

77. As JASL itself was not acquired, it was the responsibility of its directors to wind up its affairs. Mr Joint ensured, using his own resources, that all JASL's trade creditors were paid in full and accordingly no formal liquidation process was required.

78. On 29 October 2012 the Authority opened an investigation into Mr Joint's and Mrs O'Brien's conduct in relation to the client money shortfall issue.

79. The results of that investigation, as set out in the Authority's preliminary findings letter of 5 June 2013, and which Mr Joint does not dispute, show that during the Relevant Period JASL received £2,690,291.63 of client premiums into its sterling client account which included £460,433.14 in commission earned by JASL. In the same period it transferred £538,797 from the sterling client account to its business account. This meant that JASL transferred for its own benefit £78,363.86 more from client funds than it had earned by way of commission and was therefore entitled to transfer. This amount was used to pay JASL's business expenses, in clear breach of the CASS rules.

80. The results of the investigation also show that during the Relevant Period JASL received €72,986.85 of client premiums into its Euro client account which included £11,708.88 in commission earned by JASL. Mr Joint also transferred €270,000 into the euro client account from JASL Spain. JASL transferred €127,500 from the Euro client account to Mr Joint by way of director's remuneration during the Relevant Period.

Issue 1: whether Mr Joint's conduct demonstrates that he failed to act with due skill, care and diligence in breach of Statement of Principle 6 or failed to take reasonable steps required of him pursuant to Statement of Principle 7

81. We accept in their entirety Mr Pritchard's submissions on this issue. The matters described at [82] to [88] below demonstrate a clear breach of Statement of Principle 6 on Mr Joint's part.

82. The delegation of authority for the running of JASL's day-to-day business that Mr Joint gave to Mrs O'Brien did not absolve him from responsibility for taking adequate steps to inform himself regularly about the business and financial affairs of JASL and to monitor Mrs O'Brien's activities.

83. Mr Joint's practice of never asking for any financial information or taking any interest in the client money calculations and making no meaningful enquiries of Mrs O'Brien was unacceptable. Had he asked to review the financial statements and, in particular, the client money calculations he would have seen the problem with the accounting entries regarding JASL Spain at a much earlier stage, that is by early 2008.

As Mr Joint remained a director, and it is clear in any event that Mrs O'Brien regarded him as the senior director, he had an ongoing responsibility to monitor how Mrs O'Brien was performing and to identify any issues which required attention himself rather than leaving it to Mrs O'Brien to raise any issues with him. This was particularly important because of Mrs O'Brien's prior lack of experience in filling a senior position and she had nobody else within the firm to turn to for help.

84. Neither could Mr Joint reasonably have relied on Sheen Stickland or Mr Keene to monitor Mrs O'Brien's activities. As we have found, it was no part of their role to do so. Nor was it reasonable to expect that Sheen Strickland would contact Mr Joint directly with any issues that arose. Sheen Stickland quite reasonably regarded Mrs O'Brien as their point of contact and if they were to be given responsibility for keeping Mr Joint informed then this is something that either Mrs O'Brien or Mr Joint himself should have arranged. The onus was on Mr Joint to enquire of the accountants himself if he felt that there were issues of which he ought to be informed.

85. Mr Joint may have been unaware of the correspondence with the Authority in early 2008 and its concerns regarding the senior management arrangements but had he taken a more proactive role in monitoring Mrs O'Brien, as he should have done, in particular by asking whether there had been any contact with the Authority, then he would have been in a position to assess whether Mrs O'Brien was performing her role adequately and whether she required to be given further support.

86. We accept that Mr Joint was in a very difficult position for a large part of the period in question due to his wife's illness and subsequent death. This clearly is a mitigating factor to a degree, but in circumstances where for whatever reason a director cannot perform his duties adequately the point must come at which alternative arrangements have to be made in order that customers are treated fairly and their funds are not put at risk. That point was clearly passed in this case.

87. In fact it was clear that Mrs O'Brien did not have the necessary skills and competence to take responsibility for JASL's financial affairs and Mr Joint had no reasonable basis to consider otherwise. Mr Joint accepted that Mrs O'Brien was a bookkeeper as opposed to a qualified accountant but in circumstances where his ability to devote his attention to the business was limited it was inappropriate to leave her in day-to-day control of the business and restrict his monitoring activities to asking her from time to time as to how things were going.

88. Mr Joint failed to take steps to acquaint himself with any significant information regarding JASL's financial affairs. He did not request documentation so that he could review JASL's financial situation and, in particular, the position regarding the client money accounts. This is demonstrated by the fact that he did not realise that his monthly director's remuneration was being paid from one these accounts. He merely assumed it was coming from a current account.

89. In breach of Statement of Principle 7, Mr Joint failed to take reasonable steps to ensure that JASL's business complied with the relevant regulatory standards in the

manner in which he allowed JASL to handle client premiums that were being paid into its client money accounts.

90. This is demonstrated by the fact that CASS 5.9 was breached by reason of the transfer of funds from JASL Spain into JASL's client money account where those funds included the Spanish firm's clients' premiums. Mr Joint admitted that this was not an issue he ever thought about. It was incumbent upon Mr Joint to inform himself as to the essential elements of the client money rules, in particular the fundamental principle that a firm's client bank account may only receive sums in respect of the clients of that firm rather than any other firm. His failure to consider whether the client bank accounts were being used properly led him to receive monies personally from JASL's Euro client account for the purposes of his remuneration and is a further example of his failure to inform himself as to the basic requirements of CASS.

91. We therefore conclude that Mr Joint's conduct during the Relevant Period amounted to a serious breach of Statement of Principle 6 and Statement of Principle 7.

Issue 2: Financial Penalty

92. The purpose of a financial penalty is to deter persons who have committed serious breaches of the Authority's regulatory requirements from committing further breaches and in order to deter other persons from committing similar breaches.

93. The first purpose is not significant in this case. Mr Joint has now retired and it is clear that he has no further interest in working in the UK financial services industry. The second purpose, however, is important in a case such as this. The imposition of a financial penalty in this case will send a strong message to directors of similar firms that protection of client funds is an important issue to which they must pay careful attention.

94. In our view a financial penalty will invariably be justified where clients' funds are put significantly at risk through a serious failure of management, as has clearly been the case here. Fortunately, there was in the event no detriment to clients overall because Sydney Charles provided for any shortfall in premiums due to underwriters on acquiring JASL's client base.

95. Against that background, we turn to consider the appropriate level of penalty in this case.

96. At the time that the conduct which is the subject of this reference occurred, the Authority's policy for determining the amount of a financial penalty was set out in that part of the Authority's Handbook known as DEPP. As this Tribunal indicated in *Tariq Carrimjee v FCA* [2015] UKUT 0079 (TCC) the Tribunal is not bound by the Authority's policy when making an assessment of a financial penalty on a reference but it pays the policy due regard when carrying out its overriding objective of doing justice between the parties. In so doing the Tribunal looks at all the circumstances of the case.

97. This approach was recently followed by the High Court in *FCA v Da Vinci Invest Limited and others* [2015] EWHC 2401 where Snowden J said in the context of the imposition of a penalty for market abuse at [201]:

> "It was the FCA's submission, and I accept, that in determining any penalty under section 129, the starting point for the court should be to consider the relevant DEPP penalty framework that was in existence at the time of commission of the market abuse in question. To do otherwise would risk introducing an inequality of treatment of defendants depending upon whether the proceedings were taken against them under the regulatory route or the court route, and depending upon how long the proceedings had taken to come to a conclusion. By the same token, however, in common with the Upper Tribunal, the court is not bound by that framework, or by the FCA's view of how it should be applied. But if the court intends to depart from the framework in a particular case, it should explain why it considers it appropriate to do so. It occurred to me that in this regard there is some analogy with the approach of the criminal courts to the application of the sentencing guidelines produced by the Sentencing Council."

98. Accordingly, we will examine how the Authority, applying the policy in DEPP, arrived at the figure of £20,000 as the appropriate financial penalty and decide whether in all the circumstances we should accept that figure or depart from it in any respect.

99. Pursuant to DEPP 6.5B the Authority now applies a five-step framework to determine the appropriate level of financial penalty. In cases such as this the five-step framework operates as follows:

Step 1: *Disgorgement*

The Authority seeks to deprive an individual of the financial benefit derived directly from the breach where it is practical to quantify this.

Step 2: *The seriousness of the breach*

The Authority will determine a figure that reflects the seriousness of the breach which is based on the percentage of the individual's relevant income from the employment connected to the breach, being the relevant income earned by the individual in the twelve months preceding the end of the breach. The percentage to be applied depends on the seriousness of the breach which will be assessed on a scale of 1 (least serious) to 5 (most serious) depending on the impact and nature of the breach and whether it was committed deliberately or recklessly.

Step 3: *Mitigating and aggravating factors*

The Authority may increase or decrease the amount of financial penalty arrived at after step 2, to take into account factors which aggravate or mitigate the breach. Any such adjustment will be made by way of a percentage adjustment to the figure defined at step 2.

Step 4: *Adjustment for deterrence*

If the Authority considers that the figure arrived at after step 3 is insufficient to deter the individual who committed the breach, or others, from committing further or similar breaches then the Authority may increase the penalty through the application of a multiplier to the figure arrived at after step 3.

Step 5: *Settlement Discount*

This step is not relevant in this case as the matter has not been settled by agreement with the Authority.

100. In applying the four relevant steps in this case the conclusions of the Authority were as follows:

Step 1: The figure is nil as Mr Joint received no direct financial benefit from the breaches.

Step 2: The seriousness level of the breach is level 3 because a risk of loss to consumers arose since JASL misapplied insurance premiums and some customers were not covered by risk transfers, although the Authority recognised that no customers suffered any actual loss. In addition, Mr Joint acted negligently in the conduct of his role, as the only assurances he sought about the financial affairs of the business were general and oral, despite his knowledge that his delegate did not hold any formal qualifications or technical training.

During the Relevant Period, the gross amount of all benefits received by Mr Joint was £127,831 so that the penalty figure after Step 2 was 20% of that figure, namely £25,566.

Step 3: Mr Joint acted promptly and effectively after he was made aware of the client money shortfall. This, together with the fact that Mr Joint considered that he was able to rely upon his accountants (although such reliance was not reasonable), were considered sufficient mitigating circumstances to reduce the penalty figure after Step 3 to £20,000.

Step 4: A penalty of £20,000 is sufficient for the purpose of credible deterrence and therefore the penalty figure after Step 4 remains at £20,000.

101. We agree with the Authority that for the purposes of Step 2 this should be regarded as a level 3 breach. However in our view there should be a greater reduction at Step 3 for mitigating circumstances. The Authority's reasoning does not indicate that Mr Joint has been given credit for the substantial personal financial loss that he has suffered as a result of him acting in an entirely honourable fashion without any legal obligation to do so by ensuring not only that no client suffered a loss as a result of the breaches but also that the trade creditors of JASL all had their claims satisfied in full. There are many instances where the directors of a failed business hide behind the shield of limited liability but fortunately this is not one of them. The terms of the asset disposal to Sydney Charles were such that Mr Joint received no benefit for the undoubted valuable goodwill that was disposed of, the whole of the consideration being devoted to the clearing of the client money deficit. Had that not occurred, it was

clear that Mr Joint was willing to use the proceeds of the sale of his house in Manchester to meet the deficit but this was not necessary so he used those monies to ensure that the trade creditors were paid. This involved a saving of public resource in that there was no necessity for any kind of investigation into the circumstances in which JASL became insolvent which would have been the case had formal winding up proceedings been necessary.

102. In those circumstances, although we do not consider it appropriate to discount the financial penalty entirely, we consider that the mitigating circumstances we have described at [101] above merit a further reduction in the financial penalty to a sum of £10,000. Bearing in mind Mr Joint's financial circumstances, which we refer to later, this is still a significant sum which will have an impact on him but also signals that there is a clear incentive if similar circumstances were to occur in other firms for the subject concerned to take appropriate steps to ensure that consumers and creditors do not suffer as a result.

103. We now turn to the question as to whether the financial penalty should be reduced further or discounted entirely on the grounds that to impose it would cause Mr Joint serious financial hardship.

104. DEPP 6.5D sets out the Authority's policy regarding the reduction of penalties on the grounds of serious financial hardship. The Authority's starting point is that an individual will suffer serious financial hardship only if as a result of the imposition of the financial penalty his net annual income will fall below £14,000 and his capital will fall below £16,000.

105. Mr Joint's net income is now less than £14,000 but he does own a significant property in Spain in which he and his second wife reside. There is no mortgage on that property. It is difficult to put a realistic valuation on it because of the broken property market in Spain. Mr Joint recognises that the property is larger than he and his wife need and it has been marketed for sale for some time. The property is currently being marketed at a price of €300,000 and it has previously been for sale at a much higher figure. If a sale can be achieved then it is clear that there will be sufficient funds not only to provide a smaller property for Mr Joint and his wife but also to satisfy any financial penalty imposed.

106. Mr Joint also alluded to a potential liability in that he asserted that he had undertaken to indemnify Sydney Charles against the amount of the client money shortfall notwithstanding the terms of the acquisition agreement we referred to above. It is unclear to us how this liability has arisen, if it is in fact a liability at all, and Mr Joint has made it clear that he will resist any claim for payment of this sum if it is made. In the circumstances, in our view we should not treat this as a liability that should be deducted from the value of Mr Joint's assets.

107. In our view in these circumstances it would not be appropriate to conclude that Mr Joint would suffer serious financial hardship if a financial penalty of £10,000 was imposed. At present he does not have the cash resources to meet a penalty immediately but that position may change if the Spanish property were sold, although

the timing is undoubtedly uncertain. We therefore conclude that the appropriate financial penalty is £10,000.

108. We have considered whether we should address the uncertainty as to when Mr Joint will have the necessary funds to meet the financial penalty in our directions to the Authority on the determination of the reference, such as by directing payment by instalments or upon the Spanish property being sold. We have concluded that it would be inappropriate to do so. This issue was previously addressed by the Tribunal in *Nazia Bi and Qadeem Mohammed v FCA* (2012) and the Tribunal concluded, correctly in our view, that the question of whether "time-to-pay" arrangements should be made was not a matter for the Tribunal but should be a matter of negotiation between the Authority and the Applicant.

Issue 3: Prohibition

109. As we have found, Mr Joint's conduct fell well below the standard to be expected of somebody filling a significant influence function and demonstrates a serious lack of competence in such a role. In our view it was sufficiently serious to justify a finding that Mr Joint is not a fit and proper person to perform such a function and that there would be a potential risk to consumers were he to be permitted to do so. We can therefore find no reason to take any course other than to dismiss Mr Joint's non-disciplinary reference.

Conclusion

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

Directions

111. In relation to Mr Joint'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 6 and Statement of Principle 7.

112. In accordance with s 133 (6) FSMA we have dismissed the non-disciplinary reference. It is therefore open to the Authority to make a prohibition order against Mr Joint prohibiting him from performing significant influence functions.

113. We remit the references to the Authority with a direction that effect be given to our determinations.

TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE
RELEASE DATE: 26 NOVEMBER 2015