[2018] UKUT 0246 (TCC)

Reference number: FS/2016/012

FINANCIAL SERVICES - independent financial adviser firm advising on suitability of transferring occupational pension and personal pension benefits into a self-invested pension scheme - whether director failed to take reasonable steps to manage firm's business so as to ensure that it complied with relevant requirements and standards of the regulatory system

Financial penalty - whether action to impose financial penalty time-barred- if not whether financial penalty appropriate and if so appropriate level of penalty - s 66 FSMA

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

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

ALISTAIR RAE BURNS **Applicant**

- and -

THE FINANCIAL CONDUCT AUTHORITY **The Authority**

TRIBUNAL: Judge Timothy Herrington
Member Cathy Farquharson
Member Sue Dale

Sitting in public at The Rolls Buildings, Royal Courts of Justice, London EC4 on May 15, 17, 18, 21, 22, 23, and 24 May 2018

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 Alistair Rae Burns ("Mr Burns") of the Decision of the Authority set out in a decision notice dated 22 July 2016 (the "Decision Notice") to impose a financial penalty on Mr Burns pursuant to s 66 of the Financial Services and Markets Act 2000 ("FSMA") and the further decision to make an order prohibiting Mr Burns from performing any senior management function and any significant influence function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm. In the Decision Notice the Authority decided to impose a financial penalty of £233,600 but, following the Authority's acceptance in the course of the case management proceedings relating to this reference that certain aspects of the Authority's case were time-barred pursuant to the provisions of s 66 (4) FSMA, it invited the Tribunal to impose a reduced penalty of £116,830.

2. The matters which are the subject of this reference relate to the conduct of Mr Burns in his capacity as a holder of the CF 1 (Director) controlled function at TailorMade Independent Limited ("TMI") during the period between 22 January 2010 and 20 January 2013 ("the Relevant Period"). TMI carried on business as an independent financial adviser ("IFA") specialising in the giving of advice to retail customers on the merits of their transferring their pension monies into Self Invested Personal Pension Schemes ("SIPPs").

3. TMI was one of a number of businesses operating under the "TailorMade" brand. All of those businesses were under common control, and Mr Burns had a substantial direct or indirect shareholding or other financial interest in each of them. For convenience, we will refer to these businesses collectively as the TailorMade Group (TMG"), although they were not a legal group for company law purposes. As well as TMI, which was authorised by the Authority to carry on business as an IFA, TMG included an unregulated company, TailorMade Alternative Investments Limited ("TMAI"), which promoted alternative investments to customers. Those investments did not purport to be investments subject to regulation under FSMA but were typically illiquid, esoteric, investments such as biofuel oil, farmland and overseas property.

4. As described in more detail below, TMG operated the following business model. Typically, agents of TMAI would introduce customers who had decided to purchase one or more alternative investments through TMAI to TMI for pension transfer advice, these introductions to TMI being effected via a network of introducing agents. It was envisaged that the customer's purchase of the alternative investments would be effected through a SIPP, that SIPP to be established through a SIPP provider if TMI recommended that a SIPP was suitable for the customer. The SIPP would be funded by a transfer of the proceeds of the customer's existing pension funds, which may have been in the form of either defined benefit or money purchase occupational pension schemes or personal pension schemes. TMAI was remunerated

by commission from the provider of the alternative investment product concerned, provided the customer subsequently invested in that alternative investment following a pension transfer. Typically, the customer was not informed either by TMI or TMAI of the payment of this commission or its amount.

5. TMG's business model was based around the idea of giving customers more control over their pensions and TMAI's belief as to the merits of alternative investments. TMG adopted an advice model whereby TMAI would not seek to advise on the merits of any particular customer acquiring alternative investments and TMI would advise on the merits of the customer transferring his pension funds into a SIPP. TMI would not advise on the merits of the alternative investments that were acquired by the SIPP or whether such investments were suitable for the customer as part of his pension funds, TMI proceeding on the basis that the customer himself, consistent with what it perceived to be the rationale of a SIPP as a self-invested product, had made his own independent choice as to whether he wished to acquire such an investment within his SIPP, the customer being advised to seek his own advice on the merits of the alternative investments elsewhere if he thought it necessary to do so.

6. The Authority contends that TMG's business model and TMI's advice model were inherently flawed in that TMI was advising retail customers on their retirement provision, yet its advice model failed to ensure that those customers were treated fairly and given appropriate advice. It contends that the outcome of this model was that, in practice, TMI merely facilitated the transfer of its customers' pensions into SIPPs so that those customers could invest in the high-risk and generally unsuitable investments that are being promoted by TMAI. In so doing, the Authority contends that TMI disregarded crucial aspects of its responsibilities as a financial adviser to retail customers concerning their pensions and that had proper advice been given many customers who in fact invested may not have done so and avoided the significant losses which they have in fact incurred.

7. The Authority also contends that during the Relevant Period and in his capacity as a shareholder and director, Mr Burns received significant financial benefit from TMAI which was paid to him either directly or through a remuneration trust linked to TMAI. The Authority contends that TMAI would only benefit financially from introducing a customer to TMI if TMI advised the customer to transfer their pension into a SIPP and accordingly Mr Burns had an interest in the outcome of the advice TMI was giving to customers referred by TMAI which was separate and distinct from the customer's interest in the same advice and that there was therefore an obvious conflict between the interests of Mr Burns and those of TMI's customers. Although TMI's client agreement contained an express provision that conflicts of interest will be disclosed to customers, the Authority contends that neither TMI nor Mr Burns informed customers about the financial interest of Mr Burns in the outcome of TMI's advice. Accordingly, the Authority contends that TMI failed to comply with its regulatory obligations to manage conflicts of interest fairly and, where appropriate, clearly to disclose them to its customers.

8. As regards Mr Burns, the Authority contends that during the Relevant Period Mr Burns, one of the four directors of TMI and who was also a director of TMAI,

failed to take any or any reasonable steps to ensure that TMI's personal recommendation process complied with the relevant regulatory requirements and also failed to ensure that TMI managed fairly, and disclosed clearly, Mr Burns's personal conflicts of interest and the conflicts of interest relating to other individuals at TMI, despite being aware of the respective roles of TMI and TMAI and how he and other individuals at TMI benefited financially from the relationship between the firms.

9. Consequently, the Authority contends that Mr Burns failed to ensure that TMI complied with the relevant requirements and standards of the regulatory system in breach of Statement of Principle 7.

10. Mr Burns denies that he is personally culpable for these alleged failings. He contends that the advice model and all processes, governance, systems and controls together with compliance oversight in the creation and the giving of personal recommendations to clients was devised, implemented, maintained and controlled by one of his co-directors, Mr Lloyd Pope, and that no other TMI director, including himself had the ability to do this. He contends that it was more than reasonable for him to rely on Mr Pope to ensure compliance with the regulatory regime.

11. As regards the conflict of interest issue, Mr Burns contends that he did inform customers about his financial interest in both TMI and TMAI, but only verbally, and that if he had done so in writing, he would have fulfilled his obligations. He contends that he did instigate, in order to mitigate the potential conflict, a measure whereby TMI advisers were remunerated regardless of whether the advice was to transfer or not to transfer and they were incentivised on the quality of their work, not on the number of customers that proceeded to buy alternative investments.

12. Mr Burns resists the imposition of a financial penalty in respect of the conflict of interest issue on the grounds that the limitation period set out in s 66(4) FSMA had expired by the time the Authority commenced regulatory proceedings against him by the issue of a Warning Notice. Alternatively, he does not accept that his failings on this issue merit the imposition of a financial penalty.

13. Mr Burns also resists the making of a prohibition order. He contends that he has a long and unblemished record and a prohibition order would be inappropriate in circumstances where he did not fail to act with integrity or abuse a position of trust, nor were his actions reckless or breaches deliberate. He also contends that he took immediate steps to address the issues the Authority had identified as regards the manner in which TMI carried on its business which demonstrate his competence and capability to carry out the CF1 function. Furthermore, he contends, he has acknowledged his mistakes, apologised for them, learned from them and believes that he has demonstrated that learning and contrition by his actions in the period after the Authority's intervention in TMI's business.

Applicable legal and regulatory provisions

General

14. 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.

Provisions relating to Approved Persons

15. 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.

16. The only Statement of Principle relevant to this reference is 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.

17. 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.

18. At the relevant time, APER 3.1.4 provided that an approved person will only be in breach of a Statement of Principle where he is personally culpable. Personal culpability arises where an approved person's conduct was deliberate or where the approved person's standard of conduct was below that which would be reasonable in all the circumstances.

19. 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;
>
> (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.

20. At the relevant time, APER 4.7 set out examples of behaviours which the Authority considers do not comply with Statement of Principle 7, including:

(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 regulated activities of the firm in question (APER 4.7.3 E);

(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 regulated activities of the firm in question (APER 4.7.4 E);

(3) Failing to take reasonable steps adequately to inform himself about the reason why significant breaches (whether suspected or actual) of the relevant requirements and standards of the regulatory system in respect of the regulated activities of the firm in question may have arisen (taking account of the systems and procedures in place) (APER 4.7.5 E)

21. As regards systems and controls, APER 4.7.12 G provides that an approved person performing a significant influence function need not himself put in place the systems of control in his business. The guidance goes on to say that whether he does this depends on his role and responsibilities. He should, however, take reasonable steps to ensure that the business for which he is responsible has operating procedures and systems which include well-defined steps for complying with the detail of relevant requirements and standards of the regulatory system and for ensuring that the business is run prudently. The nature and extent of the systems of control that are required will depend upon the relevant requirements and standards of the regulatory system, and the nature, scale and complexity of the business.

22. 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.

Relevant Principles and Conduct of Business Rules relating to TMI's advice model

23. The following provisions of the Authority's Principles for Businesses are relevant:

Principle 6 which provides that a firm must pay due regard to the interests of its customers and treat them fairly;

Principle 7 which provides that a firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading; and

Principle 9 which provides that a firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment.

24. The section of the Authority's Handbook entitled COBS sets out detailed rules relating to the conduct of business by the firms which the Authority regulates. We refer below to the conduct of business rules which are relevant to TMI in respect of this reference as they were in force at the relevant time.

25. COBS 2.1.1 provides that a firm must act honestly, fairly and professionally in accordance with the best interests of its client in relation to designated investment business carried on for a retail client.

26. COBS 9.2 places obligations on firms to assess the suitability of the recommendations that it makes. In particular:

(1) COBS 9.2.1 provides:

> "(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."

(2) COBS 9.2.2 provides:

> "(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 the client must include, where relevant, information on the length of time for which he wishes to hold investment, his preference regarding risk taking, his risk profile, and the purposes of the investment.

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

(3) COBS 9.2.7 provides:

"Although a firm may not be permitted to make a personal recommendation or take a decision to trade because it does not have the necessary information, its client may still ask the firm to provide another service such as, for example, to arrange a deal to deal as agent for client. If this happens, the firm should ensure that it receives written confirmation of the instructions. The firm should also bear in mind the client's best interests rule and any obligation may have under the rules relating to appropriateness when providing the different service."

27. COBS 19.1 sets out specific rules relating to pension transfers and opt-out. In particular:

(1) COBS 19.1.2R provides that:

"A firm must:

(1) compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme with the benefits afforded by a personal pension scheme or stakeholder pension scheme , before it advises a retail client to transfer out of a defined benefits pension scheme;

(2) ensure that that comparison includes enough information for the client to be able to make an informed decision;

(3) give the client a copy of the comparison, drawing the client's attention to the factors that do and do not support the firm's advice, no later than when the key features document is provided; and

(4) take reasonable steps to ensure that the client understands the firm's comparison and its advice".

(2) COBS 19.1.3G gives guidance on COBS 19.1.2R as follows:

"In particular, the comparison should:

(1) take into account all of the retail client's relevant circumstances;

(2) have regard to the benefits and options available under the ceding scheme and the effect of replacing them with the benefits and options under the proposed scheme;

(3) explain the assumptions on which it is based and the rates of return that would have to be achieved to replicate the benefits being given up; and

(4) be illustrated on rates of return which take into account the likely expected returns of the assets in which the retail client's funds will be invested."

(3) COBS 19.1.6G to 19.1.9G give guidance on the suitability of advising a retail client to transfer or opt out of a defined benefits occupational scheme as follows:

"19.1.6 When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme whether to transfer or opt-out, a firm should start by assuming that a transfer or opt-out will not be suitable. A firm should only then consider a transfer or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer or opt-out is in the client's best interests.

19.1.7 When a firm advises a retail client on a pension transfer or pension opt-out, it should consider the client's attitude to risk in relation to the rate of investment growth that would have to be achieved to replicate the benefits being given up.

19.1.7A When giving a personal recommendation about a pension transfer, a firm should clearly inform the retail client about the loss of the fixed benefits and the consequent transfer of risk from the defined benefits pension scheme to the retail client, including:

(1) the extent to which benefits may fall short of replicating those in the defined benefits pension scheme ;
(2) the uncertainty of the level of benefit that can be obtained from the purchase of a future annuity and the prior investment risk to which the retail client is exposed until an annuity is purchased with the proceeds of the proposed personal pension scheme or stakeholder pension scheme; and
(3) the potential lack of availability of annuity types (for instance, annuity increases linked to different indices) to replicate the benefits being given up in the defined benefits pension scheme.

19.1.7B In considering whether to make a personal recommendation, a firm should not regard a rate of return which may replicate the benefits being given up from the defined benefits pension scheme as sufficient in itself.

19.1.8 When a firm prepares a suitability report it should include:
(1) a summary of the advantages and disadvantages of its personal recommendation;
(2) an analysis of the financial implications (if the recommendation is to opt-out); and
(3) a summary of any other material information.

19.1.9 If a firm proposes to advise a retail client not to proceed with a pension transfer or pension opt-out, it should give that advice in writing."

Conflicts of Interest

28. Principle 8 of the Authority's Principles for Businesses provides that a firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client.

29. The section of the Authority's Handbook known as SYSC contains further provisions regarding conflicts of interest. By virtue of SYSC 10.1.1 those provisions applied to TMI as it provided services to clients in the course of carrying on activities regulated by the Authority and, in that context, TMI was a "common platform firm".

30. SYSC 10.1.3 provided at the relevant time:

> "A firm must take all reasonable steps to identify conflicts of interest between:
>
> (1) the firm, including its managers, employees and appointed representatives (or where applicable, tied agents), or any person directly or indirectly linked to them by control, and a client of the firm; or
>
> (2) one client of the firm and another client;
>
> that arise or may arise in the course of the firm providing any service referred to in SYSC 10.1.1R."

31. SYSC 10.1.4, so far as relevant, provided that the relevant time:

> "For the purposes of identifying the types of conflict of interest that arise, or may arise, in the course of providing a service and whose existence may entail a material risk of damage to the interests of a client, a common platform firm …must take into account, as a minimum, whether the firm or a relevant person, or a person directly or indirectly linked by control to the firm:
>
> (1) is likely to make a financial gain, or avoid a financial loss, at the expense of the client;
>
> (2) has an interest in the outcome of a service provided to the client or of a transaction carried out on behalf of the client, which is distinct from the client's interest in that outcome…
>
> (3) has a financial or other incentive to favour the interest of another client or group of clients over the interests of the client;
>
> (4) …
>
> (5) receives or will receive from a person other than the client an inducement in relation to a service provided to the client, in the form of monies, goods or services, other than the standard commission or fee for that service.
>
> The conflict of interest may result from the firm or person providing a service referred to in SYSC 10.1.1 R or engaging in any other activity…"

32. SYSC 10.1.5 provided at the relevant time:

> "The circumstances which should be treated as giving rise to a conflict of interest cover cases where there is a conflict between the interests of the firm or certain persons connected to the firm or the firm's group and the duty the firm owes to a client; or between the differing interests of two or more of its clients, to whom the firm owes in each case a duty. It is not enough that the firm may gain a benefit if there is not also a possible disadvantage to a client, or that one client to whom the firm owes a duty may make a gain or avoid a loss without there being a concomitant possible loss to another such client."

33. SYSC 10.1.7, at the relevant time made provision for the management of conflicts in the following terms:

> "A firm must maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps to prevent conflicts of interest as defined in SYSC 10.1.3R from constituting or giving rise to a material risk of damage to the interest of its clients."

34. SYSC 10.1.8, so far as relevant, made provision for disclosure of conflicts of interest at the relevant time in the following terms:

> "(1) If arrangements made by a firm under SYSC 10.1.7 R to manage conflicts of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to the interests of a client will be prevented, the firm must clearly disclose the general nature and/or sources of conflicts of interest to the client before undertaking business for the client.
>
> (2) The disclosure must:
>
> (a) be made in a durable medium; and
>
> (b) include sufficient detail, taking into account the nature of the client, to enable that client to take an informed decision with respect to the service in the context of which the conflict of interest arises.
>
> (3) …"

35. SYSC 10.1.10R at the relevant time made provision for a firm to maintain an effective conflicts of interest policy in the following terms:

> "(1) A common platform firm and a management company must establish, implement and maintain an effective conflicts of interest policy that is set out in writing and is appropriate to the size and organisation of the firm and the nature, scale and complexity of its business.
>
> (2) Where the common platform firm …is a member of a group, the policy must also take into account any circumstances, of which the firm is or should be aware, which may give rise to a conflict of interest arising as a

result of the structure and business activities of other members of the group."

36. SYSC 10.1.11R, so far as relevant, at the relevant time made provision for what the conflicts of interest policy must include in the following terms:

"(1) The conflicts of interest policy must include the following content:

(a) it must identify in accordance with SYSC 10.1.3 R and SYSC 10.1.4 R, by reference to the specific services and activities carried out by or on behalf of the common platform firm …the circumstances which constitute or may give rise to a conflict of interest entailing a material risk of damage to the interests of one or more clients; and

(b) it must specify procedures to be followed and measures to be adopted in order to manage such conflicts.

(2) The procedures and measures provided for in paragraph (1)(b) must:

(a) be designed to ensure that relevant persons engaged in different business activities involving a conflict of interest of the kind specified in paragraph (1)(a) carry on those activities at a level of independence appropriate to the size and activities of the common platform firm or the management company and of the group to which either of them respectively belongs, and to the materiality of the risk of damage to the interests of clients; and

(b) include such of the following as are necessary and appropriate for the common platform firm or the management company to ensure the requisite degree of independence:

(i) effective procedures to prevent or control the exchange of information between relevant persons engaged in activities involving a risk of a conflict of interest where the exchange of that information may harm the interests of one or more clients;

(ii) the separate supervision of relevant persons whose principal functions involve carrying out activities on behalf of, or providing services to, clients whose interests may conflict, or who otherwise represent different interests that may conflict, including those of the firm;

(iii) the removal of any direct link between the remuneration of relevant persons principally engaged in one activity and the remuneration of, or revenues generated by, different relevant persons principally engaged in another activity, where a conflict of interest may arise in relation to those activities;

(iv) measures to prevent or limit any person from exercising inappropriate influence over the way in which a relevant person carries out services or activities; and

(v) measures to prevent or control the simultaneous or sequential involvement of a relevant person in separate services or activities where such involvement may impair the proper management of conflicts of interest.

(3) If the adoption or the practice of one or more of those measures and procedures does not ensure the requisite level of independence, a common platform firm…must adopt such alternative or additional measures and procedures as are necessary and appropriate for the purposes of paragraph (1)(b)."

Prohibition

37. The power to make a prohibition order is contained in s 56 FSMA which so far as relevant provides as follows:

"(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-

(1) an authorised person,

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

(3) 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 that 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 a 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."

Fitness and Propriety

38. That part of the Authority's Handbook known as FIT sets out the factors to which the Authority will have regard when assessing the fitness and propriety of a person to perform a particular controlled function.

39. FIT 1.3.1B states that in the Authority's view, the most important considerations will be the person's:

(1) honesty, integrity and reputation;

(2) competence and capability; and

(3) financial soundness.

Clearly, in relation to this reference, because of the way in which the Authority presents its case, the relevant consideration is Mr Burns's competence and capability.

40. FIT 2.2.1 gives further guidance on the matters to which the Authority will have regard in determining a person's competence and capability. This provision states that among other things relevant matters will include but are not limited to:

(1) whether the person satisfies the relevant training and competence requirements in relation to the controlled function the person performs or is intended to perform; and

(2) whether the person has demonstrated by experience and training that they are suitable, or will be suitable if approved, to perform the controlled function.

41. At paragraph 9.2.2 of its Enforcement Guide the Authority makes it clear that it has the power to make a range of prohibition orders depending on the circumstances of each case and the range of regulated activities to which the individual's lack of fitness and propriety is relevant. Depending on the circumstances of each case, the Authority may seek to prohibit an individual from performing any class of function in relation to any class of regulated activity, or it may limit the prohibition order to specific functions in relation to specific regulated activities. In this case, the Authority

seeks a limited prohibition order, that is in relation only to significant influence and senior management functions.

42. At paragraph 9.2.3 of the Enforcement Guide the Authority states that the scope of the prohibition order will depend on the range of functions which the individual concerned performs in relation to regulated activities, the reasons why he is not fit and proper and the severity of risk which he poses to consumers or the market generally. At paragraph 9.3.5 of the Enforcement Guide the Authority gives a serious lack of competence as an example of the type of behaviour which has previously resulted in the Authority deciding to issue a prohibition order.

Financial penalty

43. 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.

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

45. 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 the relevant provisions of this section later when considering the question of the imposition of a financial penalty in this case. As we have previously indicated, s 66 (4) FSMA provides for a limitation on the period in which the Authority may take action under s 66 FSMA, in the form of issuing a Warning Notice. At the material time for the purposes of this reference, that period was three years from the first day on which the Authority knew of the misconduct. Knowledge for this purpose includes having information from which the misconduct can reasonably be inferred: see s 66 (5). Mr Burns contends that the limitation period had expired in this case before the Authority issued him with a Warning Notice. We consider the proper construction to be afforded to s 66 (4) and its application to the facts of this case later in this decision.

Issues to be determined and the role of the Tribunal

46. 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. 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 must determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter, and 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."

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

48. It can be seen that there is now a distinction between the 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 Burns'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. In relation to Mr Burns'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.

49. The Tribunal explained the extent of its powers on a non-disciplinary reference in *Carrimjee v FCA* [2016] UKUT 0447 (TCC) at [39] and [40] as follows:

> "39. If, having reviewed all the evidence and the factors taken into account by the Authority in making its decision, and having made findings of fact in relation to that evidence and such other findings of law that are relevant, the Tribunal

concludes that the decision to prohibit is one that is reasonably open to the Authority then the correct course is to dismiss the reference.

40. Alternatively, if the Tribunal is not satisfied that in the light of its findings that the decision is one that in all the circumstances is within the range of reasonable decisions open to the Authority, the correct course is to remit the matter with a direction to reconsider the decision in the light of those findings. For example, that course would also be necessary were the Tribunal to make findings of fact that were clearly at variance with the findings made by the Authority and which formed the basis of its decision. That course would also be necessary had there been a change of circumstance regarding the applicant which indicated that the original findings made on which the decision was based, for example as to his competence to undertake particular activities, had been overtaken by further developments, such as new evidence which clearly demonstrated the applicant's proficiency in relation to the relevant matters. Such a course would not usurp the Authority's role in making the overall assessment as to fitness and propriety but would ensure that it reconsidered its decision on a fully informed basis. In our view such a course is consistent with the policy referred to at [31] and [32] above as it leaves it to the Authority to make a judgment as to whether a prohibition order is appropriate."

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

(1) We shall first determine whether the Authority has made out its case that Mr Burns breached Statement of Principle 7 in carrying out his controlled function at TMI by failing to take any or any reasonable steps to ensure that TMI's personal recommendation process complied with the relevant regulatory requirements and by failing to ensure that TMI managed fairly, and disclosed clearly, Mr Burns's personal conflicts of interest and the conflicts of interest relating to other individuals at TMI;

(2) If the first issue is determined in favour of the Authority, we shall then determine whether the limitation period for the imposition of a financial penalty in relation to the conflict of interest issue had expired by the time the Authority issued its Warning Notice to Mr Burns;

(3) If the limitation issue is determined in favour of the Authority whether a financial penalty is appropriate in relation to the conflict of interest issue and, if so, the appropriate amount of the penalty; and

(4) We shall then determine Mr Burns's reference in respect of the question as to whether a prohibition order is appropriate.

51. In determining the first issue set out above, we first need to determine whether TMI's personal recommendation process and the manner in which it dealt with the conflicts of interest described at [7] above complied with the relevant regulatory requirements. If we so find, we then need to determine whether Mr Burns, in performing his functions as a director (CF1) of TMI, can be said to be personally culpable in any respect in relation to those failings.

52. 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 of the balance of probability, namely whether the alleged conduct more probably occurred than not.

Evidence

53. We had witness statements from four employees of the Authority as follows:

(1) *Jason Pope* – Mr Pope is a Technical Specialist, currently employed in the Insurance Policy team by the Authority. In his previous roles in the Authority, he has carried out work on the Authority's Pension Switching Advice Review in 2008 to 2009. Mr Pope's evidence related to his involvement in that Review, his involvement in the Authority's development of the Suitability Assessment Tool which was developed as part of that Review, his understanding of the Authority's policy and expectations regarding the provision of advice on the transfer of pre-existing pensions into SIPPs during the Relevant Period and his understanding of the Authority's policy and expectations regarding the management and disclosure to customers of potential and actual conflicts of interest in relation to pensions switching during the Relevant Period. Mr Pope also gave evidence regarding the communication of these issues to the industry by the Authority during the Relevant Period. Mr Pope was cross-examined by Mr Burns, primarily on the Authority's work in reviewing practices in the SIPP market following the Authority assuming responsibility for that area in 2007 and the Authority's communications with the IFA community on those issues. We found Mr Pope to be a knowledgeable witness as regards those matters, doing his best to assist the Tribunal.

(2) *Simone Ferreira* – Ms Ferreira is currently Head of Wholesale Banking within the Authority's Supervision Division. During the relevant period, she was employed as a manager in the Investment Intermediaries Department, dealing with cases where risks had crystallised, typically mis-selling of financial products by firms. In that regard, she did work on how Harlequin Property, one of the companies whose products were promoted by TMAI, was selling its products in the UK and then supervisory work on 1 Stop Financial Services, a firm with a similar business model to that of TMI. As a consequence of that work, Ms Ferreira approved the opening of a supervisory case into TMI and she attended the supervisory visit made to the firm on 24 and 25 January 2013. Ms Ferreira was cross-examined by Mr Burns on these matters, including on the timing of when certain information relating to the business of TMI came to the knowledge of the Authority, and on the drafting of the alerts that was sent to the industry in January 2013 as regards business models similar to that of TMI. Ms Ferreira's evidence was of limited assistance because she was unable to remember much of relevance that took place during the Relevant Period.

(3) *Anthony Monaghan* – Mr Monaghan is currently Head of Department for Retail and Regulatory Investigations (Group 2) in the Enforcement & Market Oversight Division, a position he has held since early 2015. Mr Monaghan gave evidence in response to Judge Herrington's case management decision released

on 1 November 2017 which stated that the Tribunal expected the Authority to file and serve witness evidence from a senior person in the Authority's Enforcement Division explaining in detail what information all relevant persons within the Authority had on the conflicts of interest issue and when it was obtained. This was prompted by the unsatisfactory experience as regards the question of limitation concerning the allegations against Mr Burns concerning TMI's business model and the Tribunal's concern to ensure that all possible steps were taken to ensure that all relevant information relating to the conflicts of interest issue had been disclosed. Mr Monaghan's witness statement dealt with that issue comprehensively and the discussions which he had had with other colleagues in the Authority on the issue. He was cross-examined by Mr Burns on those issues, doing his best to assist the Tribunal.

(4) Donato Gatto – Mr Gatto is an Associate in the Enforcement and Market Oversight Division of the Authority. He exhibited to his witness statement evidence received from the Serious Fraud Office relating to the commission arrangements which existed between TMAI and Harlequin Property during the Relevant Period. Mr Gatto's evidence was unchallenged.

54. Evidence was also given in support of the Authority's case by Mr Simon Wilson, a Claims Manager at the Financial Services Compensation Scheme ("FSCS"). Mr Wilson made two witness statements on which he was cross-examined. His evidence covered statistics of claims made against the FSCS in respect of advice to consumers given by TMI and other firms providing personal recommendations in relation to SIPPs which invested in alternative investments, which was useful as background to this reference.

55. Finally, on behalf of the Authority, a number of former customers of TMI made witness statements concerning the advice they were given by TMI to transfer their pensions into a SIPP into which alternative investments promoted by TMAI and which they had purchased were placed. A number of these witnesses were cross-examined, namely Mr Alan Feetenby, Mr Thomas Shaw, Ms Susan Kearney and Mr Robert Baker. We were impressed with the dignity shown by these witnesses and the measured way in which they gave their evidence, bearing in mind the severe financial loss that each had suffered as a result of their decisions to transfer their pensions. We found all these witnesses to be honest and have accepted their evidence.

56. Mr Burns provided a witness statement on which he was cross-examined. We have found Mr Burns to be a thoroughly honest and at times candid witness, willing to accept what he described as "his part" in the failings at TMI. To his credit, he apologised to each of the Authority's consumer witnesses who gave evidence for the failings which have caused them considerable loss, notwithstanding the payments each of them has received from the Financial Services Compensation Scheme, as we describe later. Documentary evidence as to TMI's policies, checks and processes was rather scant but in a number of respects Mr Burns suggested that there were such policies, checks and processes which were not reflected in the documentation we saw. We have not generally been able to accept Mr Burns's evidence on those matters, not because of any concerns about his honesty, but because in a number of respects he

made assumptions as to what might have been the position without any evidence to back up those assertions.

57. In addition, we had witness statements from other witnesses for Mr Burns as follows:

(1) *Mr Robert Shaw* – Mr Shaw was a fellow director with Mr Burns at TMI and TMAI. Mr Shaw was cross-examined and was an honest witness. His evidence was helpful in giving a picture of the corporate governance arrangements at TMI but in common with Mr Burns, he made a number of assumptions as to what might have been the position as regards policy and procedures without any evidence to back up his assertions.

(2) *Mr Timothy Hughes and Mr Andrew Rees* – Mr Hughes and Mr Rees were directors of 1 Stop Financial Services, a firm which operated a similar business and advice model to that of TMI and which was also the subject of enforcement action by the Authority. We did not find their evidence to be of much assistance in determining the issues in dispute on this reference.

(3) *Mrs Victoria Burns* – Mrs Burns is Mr Burns's wife. We did not find her evidence to be of relevance to the issues in dispute on this reference.

58. Finally, for Mr Burns a number of former customers of TMI, including one who was a former employee of TMG, made witness statements concerning the advice given to them by TMI to transfer their pensions into a SIPP. These witnesses were not offered for cross examination and therefore we have not placed any weight on their evidence. We note, however, that the profile of these customers did not appear to be that dissimilar to those consumers who gave evidence on behalf of the Authority and they had similar experiences in terms of incurring significant losses as a result of having transferred their pensions into a SIPP which then invested in alternative investments.

59. In addition to the witness evidence we had a large number of bundles of documents provided by the parties in electronic form, much of it derived from the Authority's investigation. As indicated in this decision, we have relied on a significant amount of this documentation in our findings, even where they were not specifically drawn to our attention by the parties during the hearing.

Findings of fact

60. From the evidence that we heard, and the documents we saw, we make the following findings of fact.

The establishment of TMG and the development of the TailorMade brand

61. Mr Burns has a long background in financial services, having held a variety of different financial services roles over the past 23 years and a number of different significant influence controlled functions. He began his career as an appointed

representative, and subsequently became an adviser at Lloyds TSB, Allied Dunbar and the Zurich Advice Network.

62. The first company to use the TailorMade brand was a partnership called TailorMade Financial Solutions, of which Mr Burns and Mr Shaw were the partners and, in that capacity, held the partner significant influence function (CF 4). That firm operated as an appointed representative of the Zurich Advice Network from 2001 and subsequently from 2005 of Openwork Limited. Although Mr Burns was rather vague in his recollection of the regulatory approvals he held during this period, maintaining that he was never required to follow the Authority's advice rules directly but only the rules laid down by his firm's principal, Openwork, the evidence shows that he was in fact approved as an investment adviser (originally CF 21 and subsequently CF 30), which he was required to do as a representative of an appointed representative firm which gave investment advice. In that capacity Mr Burns was required to comply with the Authority's rules, although Mr Burns maintained that during that period he had little concept of the regulatory regime, following the specific rules laid down by Openwork and relying on them to conform to the regulatory standards. During that period, Mr Burns gave advice on packaged products such as collective investment schemes and ISAs.

63. From about 2006 Mr Burns started to become involved in the promotion of overseas property through the next company to operate under the TailorMade brand, TailorMade Overseas Properties Limited. This company became involved with the promotion of a property development in Cyprus called Alpha Panareti which ran into difficulties during 2009, including problems with the developer getting sufficient funds to complete the building work. Investors also experienced difficulty because although their investment was made in sterling, they had taken out mortgages in Swiss francs to fund the acquisition and it appeared investors had not been warned about the risk of currency fluctuations, which resulted in these loans becoming much more expensive. Mr Burns acknowledged that he should have spotted the currency risk in these investments.

64. One customer who invested in this development through TailorMade Overseas Properties complained, having seen TailorMade's logo, which was in the form of different pieces of a jigsaw, that it was unreasonable to expect a consumer to differentiate between what was a regulated or unregulated part of the business. Mr Burns said that he took from the Cyprus experience that more due diligence needed to be done on the products that were being promoted and that he now accepted that it was not clear to consumers which part of the logo represented which particular company and this caused confusion. He said he did not think at the time that there was a risk that consumers would be confused as to precisely who within TMG was advising them. Mr Burns did not accept that the opportunity to invest in Cypriot property was high risk because traditionally investment in property is seen as a medium risk.

65. TMG then diversified into promoting properties in the Caribbean through another company, TailorMade Overseas Properties Caribbean, promoting primarily properties developed by Harlequin Properties ("Harlequin") in resorts in the

Caribbean. Following the success of that promotion, it was decided to promote to customers a wider range of properties and accordingly in 2010 another company was formed, TMAI, which ultimately absorbed the other companies in the group promoting overseas properties.

66. The idea of TMG promoting overseas properties as SIPP investments to customers through TMAI as an unregulated company whilst at the same time advising customers on the merits of a SIPP through a regulated IFA developed out of Mr Burns's own experience in investing his pension monies.

67. Mr Burns and Mr Shaw attended a workshop in January 2007 which explained the virtues of having a pension fund which, as Mr Burns put it, "you controlled yourself", that pension fund being a SIPP. Mr Burns and Mr Shaw were already investing in property and bought into the idea of using what they considered to be their dormant and stagnant pension funds to invest in property. With the help of the pension transfer specialist IFA firm which was recommended to them, called Kingsway Wealth Management Ltd ("Kingsway"), Mr Shaw and Mr Burns arranged to transfer a number of pensions funds that they had each accumulated over the years, into their own SIPPS which, in turn, then bought the premises from where their businesses traded, commercial property being a class of investment that could be held within a SIPP. Kingsway did not advise Mr Burns or Mr Shaw on the merits of investing in the underlying, unregulated investment, that is the business premises, only giving advice on whether they should transfer the funds to a SIPP or not. It would appear that most of Kingsway's clients were high net worth business owners.

68. As a consequence, and against the background of an unfavourable investment climate which led Mr Burns to believe that there was little value in having a pension pot invested in traditional investments because of the high charges and poor performance, Mr Burns had conversations with Kingsway with a view to introducing clients who felt the same way. Accordingly, a joint venture was started with Kingsway in 2008, the basis of which was that TMG and its agents would make client introductions to Kingsway, who would give the clients the required advice on the merits, or otherwise, of transferring their pension funds into a SIPP, clients being able to use their pension funds to self-invest in investment vehicles of their own choice.

69. These introductions carried on until early 2009 when they ceased because it was perceived that Kingsway did not have the required systems in place to cope with the demand, nor the desire to start to do so.

70. Accordingly, Mr Burns and Mr Shaw then approached Mr Lloyd Pope, who they had known for a number of years and who was an authorised pension transfer specialist who ran an IFA firm called Total Wealth Management Limited ("TWM"). In addition to his director function (CF1), Mr Pope also held the financial adviser function (CF 30) and the compliance officer and money-laundering reporting officer functions (CF10 and CF11). Mr Burns was aware that Mr Pope had been successfully operating in the pension transfer space for many years and that he used an experienced compliance firm, Compliance First, to assist with regulatory responsibilities. Mr Burns was told that TWM had had visits from the Authority since

he had been involved in transferring pensions, with no resulting issues. Both Mr Pope and the firm had clean disciplinary records.

71. It appeared that TWM was operating an advice model whereby it advised clients on the merits of transferring their frozen pension funds to a SIPP but did not advise clients on the unregulated, underlying investment.

72. At first, TMG introduced clients to TWM, but within a few months it was decided to create another, separate IFA firm within TMG and an application for authorisation was made to the Authority for the company that was subsequently named TailorMade Independent Limited ("TMI")

73. The Board of TMI consisted of four directors, Mr Burns, Mr Shaw, Mr Pope and Mr Peter Legerton.

74. On 28 August 2009 TMI made an application to the Authority for authorisation to act as an independent financial adviser. The following description of the business of the new company, which was then called TailorMade SIPP Limited, was contained in the application:

> "Tailormade SIPP Ltd is a new company established by four highly skilled and experienced professionals. One the directors [sic] of Tailormade SIPP Ltd, Mr Lloyd Pope also runs a successful directly authorised independent financial advice practice, Total Wealth Management Limited. Mr Alistair Burns & Mr Robert Shaw who are applying to be directors of Tailormade SIPP Ltd also run Tailormade Overseas Properties Ltd.
>
> Total Wealth Management Ltd is currently receiving introductions from Tailormade overseas Properties Ltd who have a distribution of advisers. Tailormade feel that it is only fair to share in the income generated by pension business and both parties feel that it is better to have this under one directly authorised company Tailor-made SIPP Ltd
>
> The company will offer a comprehensive service for clients requiring pension transfer advice and also for clients establishing SIPPs for specific products e.g. overseas properties.
>
> The business will continue to expand by running training sessions for overseas investment opportunities for its clients, and will strengthen its distribution in the overseas properties. Introductions from non-qualified pension advisers whose existing clients want pension transfer advice will also be referred to the new company."

75. TMI also stated in the application that it intended to obtain clients through introductions from IFAs and mortgage brokers and also from "Tailormade". Mr Burns was unclear in his evidence as to what was meant by "Tailormade" in this context but in view of the earlier reference to overseas properties in the application it is likely that the term would have meant Tailormade Overseas Properties Limited.

76. The responsibility for preparing and submitting the application lay with Mr Pope, working in conjunction with external compliance consultants. Mr Burns said in his evidence that he did not review the application and saw no reason why he, as a director, should do so when responsibility for the application had been given to Mr Pope. He agreed that there were some inaccuracies in the application. In particular, he did not agree with the description of himself as a "highly skilled and experienced" financial services professional, bearing in mind his previous experience as an appointed representative. He also said that Mr Pope was mistaken in saying that TMI would be running training sessions about overseas investment opportunities for its clients and would be involved in the distribution of overseas properties; that was the responsibility of Tailormade Overseas Properties and later TMAI.

77. Mr Burns was also unsure what was meant by the use of the term "comprehensive service"; he believed Mr Pope was referring to the advice that would be given to clients in respect of the transfer of their pensions.

78. It is clear to us from the application that certain elements of TMG's business model were apparent from this application, namely that the group was involved in the promotion of overseas properties to clients and that those clients may well be introduced to TMI for the purpose of establishing a SIPP, if recommended, and that the SIPP may include overseas properties amongst its investments. However, the use of the term "comprehensive service" could be construed as indicating that TMI itself would give advice on the merits of those investments. We have no evidence as to the extent to which the Authority probed these issues during the course of the application, but in view of the lack of clarity in the explanation given we would have expected that the Authority would have needed to have clarified these issues before approving the application, bearing in mind the inherent risks of investing in overseas property.

79. Upon authorisation on 22 January 2010, the four directors held the CF1 function. In addition, Mr Pope held both the CF 10 and CF 11 (Compliance Oversight and Money Laundering Reporting) functions until 6 August 2011 whereupon Mr Legerton assumed those functions.

80. TMAI was incorporated on 9 September 2010 and, as mentioned above, thereafter carried on TMG's operations in relation to the promotion of overseas properties to customers.

81. Later, TMG decided to establish a separate SIPP provider so that TMI could refer customers to whom it decided to recommend a SIPP to that company, rather than having to refer them to external providers. That company became known as TailorMade SIPP Limited shortly after its authorisation by the Authority as a SIPP provider, having undertaken a name swap with TMI and later changed its name to Cambridge May Limited. We refer to that company, which was authorised by the Authority on 21 August 2012, as "TM SIPP" in this decision and deal in more detail with its application for authorisation later.

82. Therefore, once TMG had been fully established with the entities referred to above, the basic corporate structure was as follows. TMI's shares were held as to 30%

by Mr Burns, 30% by Mr Shaw, 30% by Mr Pope and 10% by Mr Legerton. TMAI was held by a separate holding company, in which each of Mr Burns, Mrs Burns, Mr Shaw and Mr Shaw's wife, Claire Shaw, held 25% of the shares. That holding company also held 50% of TM SIPP, the other shareholders being Mr Pope as to 25%, Mr Legerton as to 15.5% and The IW Shaw SIPP as to 9.5%.

83. As well as being directors of TMI, Mr Burns and Mr Shaw were also directors of TMAI and Mr Burns was also a director of TM SIPP.

The Authority's activities in relation to pensions switching before and during the Relevant Period

84. Before turning to examine TMG's business model it is helpful to set out the regulatory background against which it was developed. Much of this is drawn from Mr Jason Pope's evidence.

85. On 6 April 2006, which was known as "A-Day", pension legislation was updated in a process known as "pensions simplification". The aim was to introduce a clear single set of requirements for pensions, to simplify the way they operate.

86. The result of this simplification was that there was more scope for retail customers to use SIPPs as a vehicle for the holding of their pension investments. In that context, in 2005, HM Treasury consulted on proposals to bring the operation of SIPPs within the scope of FSMA. Following this consultation, on 6 April 2007 the Regulated Activities Order 2001 was amended so as to bring within its scope, and hence within the scope of regulation by the Authority, a new regulated activity of establishing, operating or winding up a personal pension scheme (which would include a SIPP).

87. HM Treasury's paper observed that as a result of this change the rights that persons attain by virtue of being members of a personal pension scheme would include the right to receive sums determined by reference to the value or performance of the underlying property but those investments that would be permitted to be held in a pension scheme pursuant to HMRC's requirements, such as real property, would not as a result themselves be brought within the scope of the Authority's regulation.

88. The paper stated that advice to contribute to a particular pension scheme would be advice to acquire rights under that scheme and would therefore be regulated advice and dealing in, managing, safeguarding and administering or arranging for a person to acquire those rights would become a regulated activity. The paper was therefore not explicit as to whether advice on the merits of any particular investment proposed to be held within a personal pension scheme would in itself be covered by the scope of the Authority's regulation.

89. It is clear that from the outset of SIPPs coming within the Authority's regulatory scope that it was alive to the possibilities of poor quality advice in this area. According to Mr Jason Pope, a substantial increase in pension switching was reported after A-Day. This led to concerns about the quality of advice provided to consumers and the potential for mis-selling of personal pension plans (PPPs) and SIPPs,

particularly where consumers were advised to move to higher-charging pensions with features or additional flexibility they did not need.

90. As Mr Pope explained, the Authority regularly conducts thematic reviews to assess the operation of the financial services markets. As the Authority had recently become fully responsible for the regulation of SIPPs, it was particularly important to review the quality of the advice in this area which the Authority decided to undertake in a thematic review in 2008. There were also historical reasons for the Authority to have concerns here. Many people received unsuitable advice between 1988 and 1994 to leave, or not to join, occupational pension schemes. Instead, they were advised to invest in PPPs which, generally, could not provide the same benefits as their employer's scheme. As a result, during the late 1990s and early 2000s the Authority required the industry to review all such advice (in what is known as 'the Pensions Review') and redress to be paid where the advice was found to be unsuitable.

91. Where an occupational pension is moved to a personal pension, this is referred to by the Authority as a 'pension transfer' and is subject to additional rules introduced as a result of the advice failings between 1988 and 1994. The scope of the 2008 review was broader, including pension transfers and advice to move from one PPP or SIPP to another. The Authority used the term "pension switching" to recognise this wider scope.

92. In December 2008 the Authority published its report on the findings of its thematic review entitled "Quality of advice on pension switching". One part of the review had been to assess the quality of advice given to customers since A-Day to switch existing pensions into PPPs or SIPPs and the systems and controls of firms relating to this advice. The review found that many firms were giving advice which the Authority assessed as being unsuitable in a high proportion of the cases sampled. In many cases this was because the funds recommended were not suitable for the customer's attitude to risk (ATR) and personal circumstances. This statement seemed to assume, without stating it specifically, that part of the adviser's task was to advise on the suitability of the underlying investments within a SIPP, at least when these were regulated investments but said nothing about duties in relation to assets held within a SIPP which were not themselves regulated investments.

93. The report referred to the processes that the Authority believed were necessary in this regard, including compliance monitoring of files, the provision of management information in the form of a report to the Board of the firm as regards the results of that monitoring and action by the Board where necessary.

94. Mr Pope made it clear in his evidence that whilst customers may choose to select their own investments to hold within a pension, in order to assess the suitability of a pension switch, it is necessary for firms to consider the recommended product as a whole, including the choice of the underlying investments. In his view, advice on a pension switch must take account of the investment strategy to be employed within the recommended SIPP.

95. On 9 December 2008 the Authority wrote to all firms involved in giving pension switching advice reporting the key findings from the thematic review and explaining the action that firms should take in response. The letter noted that in many cases funds recommended were not suitable for the customer's ATR and personal circumstances. It asked firms to consider past and future sales and take remedial action. In February 2009 the Authority published a suitability assessment template in relation to pension switching advice which Mr Jason Pope helped to develop.

96. The notes to the template explained that the ultimate investment choice may have an impact on the total charges of the new scheme, advice to move a pension cannot be considered separately from the underlying investments and it would be impossible to provide suitable advice to leave a scheme without knowing if it offered a more suitable investment choice, on an objective basis, than the new scheme. As Mr Pope explained, SIPPs tend to offer greater flexibility and more investment choice than other personal pensions, but the greater flexibility and wider investment choice can come at higher cost which means that SIPPs are more likely to be suitable for clients with a higher risk tolerance and more sophisticated planning needs.

97. Mr Pope's view was that a customer with a low or medium attitude to risk is likely to be better advised to use other PPPs which can offer mainstream investments at lower cost. Therefore, in his view, to recommend a suitable pension, a firm needs to know the client's attitude to risk and the likely investment strategy to be followed (if they are not responsible for advising on the underlying investments). Where the investment strategy proposed by the client is incompatible with their attitude to risk, the adviser must take this into account in any recommendation for a pension switch. Advice to proceed with a switch is unsuitable if the firm knew that the proposed underlying investments do not match the client's attitude to risk and other needs. In this case, the firm should have recommended suitable underlying investments or provided no advice at all. Mr Pope clarified in his oral evidence that he did not mean that a firm advising on a pension switch into a SIPP needed to provide separate advice on the underlying investments if the customer chose their own investments but that the adviser should have looked at the SIPP as a whole for determining whether it met the customer's requirements.

98. In the notes to using the template, the Authority asks file reviewers to consider:

> "how well the adviser has assessed the customer's needs and whether the needs appear to be genuine. If the suitability report cites customer requests (e.g. that the customer "wants to move to gain access to externally-managed funds"), has the adviser provided an objective assessment of the suitability of this? If the right advice is not to switch to another scheme, this should be the advice that is provided to the customer even if they have asked to move scheme."

99. In the Annex to the 8 December 2008 letter to firms it was stated:

> "Advisers must consider the needs of their customer to make sure that the recommendation is suitable. The reasons for the switch should be clearly identified and based on the genuine needs of the individual customer. A customer will not always have a clear view of their needs before seeing an

> adviser, and it can be part of the adviser's role to discuss and clarify needs for customers. This should be a balanced, educative process and should not involve the adviser leading a customer toward a pre-determined course of action."

100. We return to these statements later when considering the extent to which TMI's business model was consistent with the relevant regulatory requirements.

101. There were further communications to the industry on this issue. On 9 April 2010 the Authority, as part of its follow-up work to improve the quality of pension switching advice, issued a paper entitled "Delivering higher standards through intensive supervision". The paper said that results continued to show high levels of unsuitable advice. In January 2011, in its Retail Conduct Risk Outlook the Authority observed that, when purchasing a SIPP, customers need to consider the cost of the product compared to alternatives; the match between the underlying investments in their attitude to risk; and whether they intend to use the additional flexibility offered by the SIPP. It was clear that by this time the Authority was also aware that less traditional investments were being held in SIPPs. In the same publication it noted that SIPPs have been used as wrappers for "exotic, risky and potentially poor value products, such as Unregulated Collective Investment Schemes."

102. In January 2013, following its supervisory work into firms such as 1 Stop and TMI and its scrutiny of those firms' business models, the Authority published an alert to adviser firms on its website. In that alert it said:

> "Financial advisers using this advice model are under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.
>
> The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes. It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating.
>
> For example, where a financial adviser recommends a SIPP knowing that the customer will transfer out of a current pension arrangement to release funds to invest in an overseas property investment under a SIPP, then the suitability of the overseas property investment must form part of the advice about whether the customer should transfer into the SIPP. If, taking into account the individual circumstances of the customer, the original pension product, including its underlying holdings, is more suitable for the customer, then the SIPP is not suitable.
>
> This is because if you give regulated advice on the recommendation will enable investment in unregulated items you cannot separate out the unregulated elements from the regulated elements."

103. Mr Jason Pope and Ms Ferreira were involved in the drafting and publication of this alert.

TMG's business model

104. A customer who was seeking advice from TMI on moving their pension was typically considering investing their pension into an underlying alternative investment product such as overseas property. Such customers were typically introduced to the underlying investment product by an "introducer" who was engaged by TMAI who, on behalf of the relevant product provider, presented marketing materials or provided presentations to the customer as a result of which the customer decided to invest. Once that decision had been made, the introducer would then introduce the customer to TMI to advise the customer on whether it was appropriate for that customer to transfer their existing pension into a SIPP, with a view to that SIPP then using the proceeds of the transfer to acquire the alternative investment promoted by TMAI. It would appear that the vast majority of TMI's customers were acquired as a result of such introductions.

105. TMAI had a panel of product providers whose investments were promoted to customers by introducers. TMAI was remunerated by commission paid by the relevant product provider, a large part of which was shared with the introducer pursuant to the terms of the introducer agreement between TMAI and the introducer. The introducer would also have an introducer's agreement with TMI and would be paid commission by TMI if the customer established a SIPP through TMI. Typically, TMAI received commission of up to 10% of the value of the investment made once payment for the investment was made through the customer's SIPP.

106. We were shown an example of the brochure that TMAI used to promote the products on its panel. The first point to note is that under TMG's logo and the name "Tailor Made Group" the brochure said that the "Company Objective" was:

> "To inform, encourage and assist clients to take control of, and responsibility for, their savings and retirement planning needs, by providing products and services they want, in a fair and transparent manner."

107. The brochure stated that TMAI was launched to cater for the "growing demand for alternative investments to play an increasing part in…. retirement planning strategies…." And observed that due to the perceived lack of value for money and the prospect of low interest rates for the foreseeable future, classic fund-based pension investments were fast becoming "a thing of the past". It stated that all of the products dealt with in the brochure can be accessed using pension funds via a SIPP.

108. Six specific products were promoted as follows:

> – Investment in luxury resort properties developed by Harlequin Property in the Caribbean. Reasons to invest given included that there would be "Guaranteed Returns" in that income of 10% of the initial purchase price was guaranteed for 2, 5 or 10 years, followed in subsequent years by an equal share with the management company of room revenues received. It

should be noted that the amount invested by the customer from his pension monies represented only a deposit of 30% of the ultimate purchase price for the property chosen, the balance being funded by a mortgage loan arranged by Harlequin for the investor.

– Investment in self-storage facilities operated by Store First Limited in Lancashire pursuant to which the investor purchased a long leasehold on a storage unit which the investor could lease back to Store First giving rise to a fixed annual return, guaranteed at 8% for years 1 and 2 and forecast be fixed at 10% for years 3 and 4 and 12% for years 5 and 6

– Purchase of farmland in Argentina from the Argentinian owner of that land through various alternative structures each of which purported to guarantee fixed investment returns of between 9% and 14% per annum

– Investment in the Rimondi Grand Resort & Spa in Crete whereby the investor would purchase a proportion of a suite and benefit from the income generated from the unit and any potential capital appreciation. Again, there was an option to receive fixed investment returns of 8% for the first 2 years of the investment.

– Investment in the development of a renewable energy project based in Australia through a company based there called Green Oil Plantations whereby investors could purchase leasehold plots of land through a SIPP which again offered fixed investment returns of between 4% and 17% per annum over the period of the investment

– Investment into gold bars or coins through a SIPP through a company called Physical Gold Limited with returns to be achieved through what the brochure represented was the likely increase in the price of gold.

109. At the end of the brochure there was a Disclaimer which disclosed that TMAI was part of the TailorMade Group of companies but was not regulated by the Authority and was not authorised to provide investment, tax or legal advice. The disclaimer recommended that the customers seek independent advice on all of the information contained within the brochure and within any documentation provided by the investment providers. It stated that the onus was on the customer to satisfy himself that the investment was "right for you".

110. The brochure concluded with a short description of the essentials of a SIPP which were described as “Arguably the most prominent pension success story in recent years” and a short description of TMI with its contact details. TMI was described as an independent financial advisory company whose sole purpose was to offer advice on the merits of moving preserved pension schemes into a SIPP

111. We were shown typical examples of the Introducer Agreements used by TMAI and TMI, entered into in 2012.

112. The TMAI agreement was entitled "Agency Agreement". The individual agent was appointed as a non-exclusive agent for the promotion of the investment products set out in a Schedule, which in the case of the particular agreement we saw were all six of the products described at [107] above. The Introducer's role was described as using reasonable endeavours to introduce potential investors to the relevant product provider with a view to the product provider selling the relevant product to the potential investor. The Introducer was prohibited from giving advice on the products. The Introducer was remunerated by the payment of commission once the investor had entered into a purchase contract with the product provider and paid for the investment, which could only be effected once the investor had the funds available in a SIPP following the transfer of his pension.

113. The commission rates payable in respect of the products varied from between 5 and 6% of the value of the investment in the case of Harlequin, 5% in the case of the Argentinian farmland, Green Oil and Physical Gold, 8% in the case of Rimondi and 12% in the case of Store First, where the rate of commission paid to TMAI was up to 25%. The commission payable to the Introducer was typically one half of the total commission paid by the product provider to TMAI, so for example if a customer invested £30,000 in Harlequin, £10,000 of that would be payable by Harlequin to TMAI, half of which would be shared with the Introducer.

114. The Introducer Agreement used by TMI, the example that we saw being with the same individual who also acted as an introducer to TMAI, was entitled "Introducer Fee Agreement".

115. The Introducer's role was described as being to introduce pension arrangements and preserved pension transfer business to TMI. The Introducer was paid a fee if the pension business introduced to TMI resulted in the customer commencing a SIPP, the amount payable being ½ % of the net asset value of the SIPP annually provided the Introducer had introduced to TMI in excess of £500,000 to be held in SIPPs and also provided that TMI was receiving the ongoing annual fees payable to it under its own customer agreement with the customer.

116. It was therefore clear from these arrangements that the Introducer acted in a dual capacity; as agent for TMAI he promoted the alternative investments to potential investors and, if the potential investor decided to acquire such an investment, he then made the necessary introduction to TMI with a view to the customer receiving advice on the merits of transferring his existing pension funds into a SIPP. If such a transfer took place, then the customer completed his investment in the relevant alternative investment or investments chosen and the Introducer was then paid commission out of the commission payable by the product provider to TMAI as well as ongoing commission from TMI in respect of the SIPP. It is therefore clear that investment in the chosen alternative investment product and the transfer of the investor's pension into a SIPP were mutually dependent; one could not take place without the other. Mr Burns accepted that in relation to those customers who wished to invest in an alternative investment promoted by TMAI but where the only funds available to make that investment would come through the transfer of their pension funds to a SIPP then

the customer's implementation of his decision to buy the investment was contingent on him funding it through the funds realised through such transfer.

117. Therefore, as far as TMG was concerned, the business objective was to promote an alternative investment to the customer and then, if a SIPP was recommended as being suitable for that customer, securing that the investment was made through the SIPP. The relevant companies in TMG were remunerated, in the case of TMAI from commission received from the product provider and in the case of TMI, by fees payable by the customer.

118. Mr Burns in his evidence sought to distance the introducers from TMAI on the basis that they were self-employed and acting on their own behalf in promoting the alternative investment products. However, it is clear from the Introducer Agreement, which is described as an Agency Agreement, that in fact those introducers were acting as agents for TMAI and promoting those products in that capacity, notwithstanding that for tax and employment purposes they may be classified as self-employed. Because the introducers were acting in their capacity as agents for TMAI the legal effect is that TMAI is the legal entity which made the introductions to TMI.

119. Mr Burns accepted that responsibility for the development and establishment of the business model rested with him and Mr Shaw. He said that the business model was developed because of the experience of Mr Shaw and himself in transferring their pensions into a SIPP through Kingsway, as referred to above, which then invested in commercial property. This gave them the idea that SIPPs can be a vehicle for investment in overseas property and other alternative investments of the types promoted by TMG. Mr Burns was keen that ordinary retail investors, not just those with a high net worth, should have this opportunity.

TMI's advice model

120. It is helpful at this point to explain a little more about the characteristics of a SIPP, which is a form of personal pension scheme designed to provide benefits on retirement to the investor who establishes the SIPP. A SIPP is a trust-based wrapper for an individual's personal pension investment. It gives tax relief on an individual's contributions and tax-free growth and offers a wider range of investments and options for extracting benefits than are ordinarily available in a typical insurance based personal pension scheme. The type of investments that may be included in a SIPP are determined by regulations made by HMRC. In addition, as a SIPP gives its beneficiary power to direct how some or all of the contributions made to it are invested, it offers a greater degree of control over where and when funds are invested or moved than is permitted by traditional personal pension arrangements run by life assurance companies.

121. As we have seen, COBS 19.1.6 sets out rules and guidance on how an authorised firm must provide suitable advice in relation to pensions, the starting point being that a firm should assume that a transfer, conversion or opt-out from an occupational pension scheme or other scheme with safeguarded benefits will not be suitable for a retail client. As we have seen, there is a dispute as to the extent to which

COBS 9.2.1, which requires a firm to take reasonable steps to ensure that a personal recommendation is suitable for its customer, applies to as to include, in relation to a recommendation to establish a SIPP and effect a pension transfer into such a SIPP, consideration of the suitability of the underlying investments that it is contemplated will be held within the SIPP, an issue that we return to later.

122. The essence of TMI's business model was that its three advisers who held the controlled function of CF30, and were therefore approved by the Authority to give investment advice on pension transfers, that is Mr Lloyd Pope, Mr Paul Elliott, and Mr Rodney Morton, provided advice only on the suitability of a SIPP for a customer and, if it determined that such a product was suitable, on the suitable SIPP wrapper to choose. It was a specific feature of the advice model that TMI's advisers did not provide any advice on the suitability of the underlying investment product which was proposed to be acquired within the SIPP. As Mr Burns said in his witness statement, TMI's predominant consideration, when advising customers whether or not to transfer to a SIPP, was whether or not the customer wanted to self-invest in alternative investments. The advice model essentially followed a 2-stage process: (i) should the customer transfer to a SIPP or not; and (ii) if the customer was advised to transfer to a SIPP, then which SIPP operator should the fund be transferred to?

123. Mr Burns's evidence was that although no advice was given in relation to the underlying investment there was nevertheless an obligation on the part of the adviser to "consider it" or "bear it in mind" when making his recommendation. Mr Burns was unable to elaborate on what that meant in practice but that the adviser might warn the customer that the investment chosen was illiquid and that there may be risks involved bearing in mind that the investment was to be used to support a pension. However, Mr Burns confirmed that the general standpoint was that TMI did not advise the customer about what he or she was going to self-invest in and took the position that it was the customer's own decision as to what he or she chose to invest in. Mr Burns had previously said in his interview with the Authority that TMI did not advise customers on the underlying investments, one of the reasons being that it did not have any personal indemnity insurance cover to do so.

124. As regards responsibility for the development and adoption of the advice model, Mr Burns's evidence, which we accept, was that this was left by the other directors to Mr Lloyd Pope and it followed on from the same model that Mr Pope was operating at TWM, as explained at [70] above.

125. Mr Burns's position was that given Mr Pope's credentials, Mr Burns's experience with Kingsway and his knowledge of how they operated he and his co-directors felt it was more than reasonable for them to have the right to rely on Mr Pope, to ensure compliance with the regulatory regime in the way that the advice model was developed. We therefore find that Mr Burns made no challenge to Mr Pope as to the basis on which the advice model was designed or operated. As explained in more detail later, the four directors of TMI operated on the basis that each had their own sphere of responsibility, Mr Burns spending the majority of his time on the alternative investment side of the business, and Mr Pope was left with sole responsibility for all matters to do with the giving of advice to clients, as that was his

perceived area of expertise. In essence, as Mr Burns stated in his witness statement, the advice model and all processes, governance, systems and controls, together with compliance oversight and the creation and the giving of personal recommendations to customers was devised, implemented, maintained and controlled by the agreed, designated director and CF 10, Lloyd Pope. Mr Burns stated that no other TMI director, including himself, had the ability or authority to become involved in this aspect of the business. He said in his witness statement that he lacked the qualifications, expertise and knowledge to fully understand TMI's personal recommendation process.

126. Consistent with this approach, TMI's advice process was carried out from TWM's offices in Sale, where Mr Lloyd Pope was based as he continued to operate his own business, TWM, from those offices.

127. It would appear that there were three specific requirements that had to be met before TMI would recommend that a SIPP was suitable for a customer. First, if the customer's pension pot was less than £20,000 it was felt that a SIPP would be unsuitable, bearing in mind the increased operating costs that apply to a SIPP compared to other personal pension schemes. Secondly, TMI needed to be satisfied that there was a realistic possibility of the critical yield from the chosen alternative investment exceeding that that might be expected from the existing pension pot. Although there was no hard and fast rule, it would appear that a SIPP would not be recommended as suitable where the critical yield that had to be achieved from the investments in the SIPP exceeded 12% per annum. Finally, if the customer's attitude to risk, measured on a scale of 1 to 10, where 10 demonstrated the highest appetite for risk, was 3 or less then a SIPP would not be recommended.

128. There is a suggestion that there was another policy, namely that a SIPP would not be recommended if the customer was within 5 to 10 years of retirement. That point was made to the Authority in the course of TM SIPP's application for authorisation. Mr Burns was unable to say whether there was such a policy, although he imagined that there would be.

129. It would appear that a considerable number of potential customers were recommended not to transfer their pensions into a SIPP; we have seen a number of examples in the documentation provided to us and Mr Lloyd Pope told the Authority at a meeting held in January 2013 that over the preceding 6 months out of 156 potential transactions relating to final salary schemes 26% did not proceed.

TMI's advice process in practice

130. As previously mentioned, the introduction to TMI typically took place following alternative investments having previously been marketed to the potential customer by agents or introducers of TMAI and the customer having expressed an interest in acquiring such products. That experience is typical of the consumers who gave evidence to the Tribunal in this case. The marketing exercise carried out by TMAI and its agents typically included seminars attended by potential investors at which Mr Burns was often present. Mr Burns would explain what he regarded as the

merits of investors including alternative investments within a SIPP. Some investors would choose one or more of the alternative investments promoted by TMAI, others would invest all of their available funds in one product.

131. A number of investors were clearly unable to appreciate that two different entities within TMG were involved performing different roles. As far as they were concerned, they were dealing with "TailorMade" and would not necessarily understand why, after having decided to acquire the investment, they were being referred to another adviser to complete the process. From the evidence given by the consumer witnesses we saw, we infer that this was a common perception by investors who believed they were dealing with a single organisation with a seamless process by which they were advised to invest their pension funds into alternative investments on the basis that such investments were suitable for their needs. Mr Burns agreed in his evidence that customers generally did not take advice outside TMG on the merits and risks of the alternative investments, although the TMAI brochure we have seen suggested that they should do so. In practice, such advice was not readily available, and Mr Burns accepted that it was difficult to obtain.

132. Upon referral to TMI, the customer was contacted by an administrator in order that a fact find could be completed so as to establish the customer's investment needs and objectives. This process would also include the completion of an attitude to risk questionnaire in which the customer indicated what he felt his risk profile was and questions about the customer's knowledge and experience of financial products.

133. The customer was asked to provide details about their existing pension providers so that TMI could gather information on those existing pensions.

134. Subsequent to that, an appointment was made with one of TMI's pension transfer advisers (either Mr Lloyd Pope, Mr Morton or Mr Elliott) following which a suitability report was prepared and discussed with the customer alongside the relevant SIPP provider's key features document. This included an explanation to the customer of TMI's recommendation for the most suitable SIPP for the customer. In that context, TMI assessed, among other things, whether the SIPP was able to invest in the underlying investment chosen by the customer as well as the set-up and ongoing fees charged by the SIPP provider. The suitability report did not refer to the suitability of the underlying investment product. Assuming a SIPP was recommended, the customer completed a SIPP application which was submitted to the SIPP provider on the customer's behalf.

135. We have taken the suitability reports given to Mr Feetenby and Ms Kearney, both of whom gave evidence, as typical of the kind of reports that were generated. These customers also appear to be typical of TMI's client base, being retail investors with modest pension pots, either in the form of deferred benefits in occupational pension schemes or holdings in personal pensions. Values of those pots were in the region of £30,000 to £150,000. In Mr Feetenby's case the value of the funds transferred was £109,101.87, most of which was comprised in personal pensions with the remainder in a defined benefit scheme. In Ms Kearney's case the total value transferred was approximately £73,000, all of which was held in occupational pension

schemes. These investors were quite typical as regards the impact of their decisions to transfer their pension benefits into a SIPP which invested in alternative investments. Generally, they have lost the entirety of their investments because of the failure of the investments concerned but have made successful claims against the FSCS, up to the maximum amount that can be awarded, £50,000. Both customers were within 5 to 10 years of reaching retirement.

136. The structure and content of a typical suitability report was as follows.

137. Assuming a SIPP was to be recommended, the report would start with a recommendation that the customer transfer their existing pensions benefits to a named SIPP provider. There then followed a detailed description of the customer's current financial and other relevant circumstances. Reference would be made to the customer's interest in using his or her pension fund to invest in an alternative investment where that was the case.

138. The customer's attitude to risk was then described. In Mr Feetenby's case, it was recorded as being Profile 6, that was a high medium risk. The report said that such profile indicated that Mr Feetenby was about average in how much risk he wished to take in his investments. On the basis of that assessment, an analysis was made of how a portfolio of assets closely aligned to this risk profile might perform over a period of 1, 5, 10 and 20 years. The report then stated that Mr Feetenby's attitude to accepting risk was such that he would probably prefer his investment to go up and down less and make more modest returns than risk losing money for higher returns but was prepared to accept some falls in order to make higher returns than just investing in low-risk investments. It stated that an investment portfolio appropriate for this risk level may contain, for example, mainly higher risk investments such as shares, with some low and medium risk investments such as cash, bonds and property.

139. The report then set out a typical asset allocation that would be applied to an investor with such a risk profile, which indicated some 39% of the portfolio invested in UK equities, some exposure to overseas equities, and an exposure of 16% to corporate bonds, with the remainder (8%) being invested in property.

140. The report then contains a detailed analysis of Mr Feetenby's existing pensions benefits, including a warning that transferring the benefits under his occupational pension scheme would mean the loss of the guarantees that currently applied.

141. There was a reference to the alternative investments that Mr Feetenby was contemplating in the following terms:

> "We are aware that you have shown specific interest in Harlequin overseas commercial property, Crete overseas commercial property, Storefirst UK commercial property, Green Oil Plantations in Australia, SCS Farmland in Argentina and Physical Gold. None of these products have been risked [sic] assessed and therefore may not match your risk assessment discussed earlier in the report. Furthermore, these products are not regulated by the Financial Services Authority and as such not covered by the Financial Services Compensation Scheme.

> In addition it is important to bear in mind that these assets can be classed as "illiquid" which means they may not be readily saleable."

The report stated that investment growth required to meet Mr Feetenby's future income or annuity requirements indicated a critical yield of between 7 and 6.90% per year, depending on the age at which Mr Feetenby took his benefits.

142. The report ended with a reference to the possibility of annual reviews of Mr Feetenby's portfolio in the following terms:

> "[TMI] firmly believes it is prudent to regularly review a portfolio. The aim of such a review would be to ensure that both the funds and asset allocation model meet with your stated objectives and assessed risk profile on an ongoing basis and rebalance the portfolio if necessary. You agree that you would require this and we will review your financial situation on an annual basis."

143. We observe from this report that the alternative investments that it was indicated that Mr Feetenby was likely to acquire were not consistent with his assessed risk profile, which indicated that equities, some corporate bonds and some property were likely to meet that risk profile. As there was no suggestion that as a result, a SIPP should not be recommended, it was clearly left for Mr Feetenby to consider whether despite that assessment, he wished to proceed with the recommendation.

144. Ms Kearney's suitability report was in similar terms. There was a reference to Ms Kearney having expressed an interest in using her pension fund to purchase alternative investments.

145. As regards attitude to risk, this was recorded as being Profile 3, that is low-risk. The report said that such profile indicated that Ms Kearney's attitude to accepting risk was below average. It stated that as her attitude to accepting risk was low, whilst she was likely to be concerned with not getting as much back from her investments as she put in she may also want to make higher returns and her preferred investments are likely to be mainly low and medium risk investments such as cash, bonds and property, with a few higher risk investments such as shares.

146. The report then set out a typical asset allocation that would be applied to an investor with such a risk profile, which indicated that 23% would be invested in UK gilts, 22% in UK corporate bonds, 15% in international corporate bonds, 15% in UK equities, a small amount in overseas equities and 5% in cash.

147. However, beneath that asset allocation statement the following statement appeared in bold:

> "Although you have agreed that your overall attitude to risk is as above you would prefer to adopt a more self select approach as to where your money is invested. For example, you have indicated that more of your available fund may go into purchasing alternative investments."

148. As with Mr Feetenby, alternative investments were not consistent with Ms Kearney's assessed risk profile and so by investing in such assets she would be acting

inconsistently with her attitude to risk. As with Mr Feetenby, there was a statement that the alternative investments in which Ms Kearney had expressed an interest had not been risk assessed and therefore may not match her risk assessment and that such investments can be classed as "illiquid". As with Mr Feetenby, there was no suggestion that as a result a SIPP should not be recommended, it being left to Ms Kearney to consider whether in spite of that assessment, she wish to proceed with the recommendation.

149. The report stated that the investment growth required to meet Ms Kearney's future income or annuity requirements indicated a critical yield of between 8 and 8.4%, depending on the age at which she took her benefits. However, Ms Kearney's separate pensions transfer report indicated that she would need to obtain an estimated annual investment return or critical yield of over 18% per annum in order to provide benefits of equal value to the estimated benefits provided by her existing scheme, in respect of one of her defined benefit schemes, and a critical yield of over 25% in respect of the other.

150. The report ended with the same reference to the possibility of annual reviews as was contained in Mr Feetenby's report.

151. The customer was also given a client agreement, setting out TMI's terms of business. The version of that document that was in force in September 2012 stated to customers, under the title "restrictions", that TMI did not offer advice on alternative investments. It said:

> "We will on occasion make you aware of products which are commonly known as Alternative Investments, we do not offer specific recommendations about the suitability of these investments however we can facilitate these should you feel they are suitable for your needs. Alternative Investments are not regulated by the FSA under the Financial Services and Markets Act 2000. The Financial Services Compensation Scheme does not apply to any of these products."

152. A similar disclosure was made in the document describing TMI's advice process which it gave to all of its customers. In bold type this said:

> "The TailorMade Independent pension transfer process does not include advice on the products or the investments that you can make within your SIPP. We recommend that you seek advice before making your investments to ensure that these are suitable for your attitude to risk profile established [during the process]. Details of your risk profile are included in your suitability report for your reference."

153. Customers were also asked to sign a declaration acknowledging that the suitability of utilising pension funds to facilitate their purchase of alternative investments had been deemed to be appropriate by their own choice and confirming that TMI's responsibility lay only with the merits of transferring the customer's preserved pensions into the SIPP and assisting with the provision of a suitable SIPP provider.

154. Despite the terms of the client agreement and these other documents and, as we have found, TMI's advice model pursuant to which its advisers were not permitted to advise on the merits of the alternative investments which were proposed to be held within the customer's SIPP, there is clear evidence that advice on these products was given to customers.

155. For example, in the case of Mr Feetenby, his evidence, which we accept, was that when he asked Mr Morton at the end of his meeting for the results of the suitability assessment he also asked him whether, in his opinion, investing in Harlequin, SCS Farmland and Green Oil would be a good idea for him. Mr Morton replied that these investments would be suitable for the level of risk identified by his risk assessment. Mr Feetenby said that he would not have gone ahead with the investments without that opinion because he believed that the purpose of the meeting with Mr Morton was to find out whether those investments were suitable for him.

156. Similarly, Ms Kearney pointed out to Mr Elliott at her meeting that she wanted a low risk investment and Mr Elliott reassured her not to worry and that "you will be fine", confirming that Harlequin and SCS Farmland would guarantee her more money at retirement than the pension plans she already had.

157. Mr Thomas Shaw's evidence, which was not challenged, was that Mr Lloyd Pope was keen for him to invest all of his pension funds in Harlequin, insisting that the more he invested in Harlequin, the more he would get back. Similarly, in the case of Mr Robert Baker, whose attitude to risk was one of a cautious investor, Mr Lloyd Pope assured Mr Baker that any risk associated with his investment in Harlequin was minimal, that his money was safe, and that the investment was suitable for his aims. Mr Baker's evidence was that whilst the adviser who introduced him to TMI initially raised the idea of investing in Harlequin, Mr Pope appeared to be keen to ensure that he did so.

158. We think it unlikely that these are isolated cases, involving as they do all three of TMI's advisers and we expect that there are other occasions where TMI's policy was not followed.

159. The client agreement dealt with conflicts of interest in the following terms:

> "We will act honestly, fairly and professionally known as conducting business in "Client's best interest" regulations. Occasionally situations may arise where we or one of our other clients have some form of interest in business transacted for you. If this happens or we become aware that our interests or those of one of our other clients conflict with your interest, we will write to you and obtain your consent before we carry out your instructions, and detail the steps we will take to ensure fair treatment."

160. It was common ground that at no point during the Relevant Period did TMI disclose to customers the common shareholdings between TMI and TMAI or the fact that TMAI was remunerated by commission from the relevant product provider if the customer purchased one of the investments promoted by TMAI which was subsequently included within a SIPP, the establishment of which had been

recommended by TMI to the customer. Mr Burns accepts that he did not realise that this relationship and the commission arrangements were such that they should have been disclosed and managed according to the terms of the client agreement set out above. He said that he did inform those clients who he personally introduced to TMI about his financial interest in both TMI and TMAI albeit only verbally. As far as the question of disclosure by TMI more generally, Mr Burns's position was that the management of conflicts of interest was a matter that fell within the scope of Mr Lloyd Pope's responsibility. He believes that Mr Pope may have had an ulterior motive for not managing them because, unbeknown to Mr Burns and his codirectors, Mr Pope had entered into an improper arrangement with one of the SIPP operators that TMI recommended whereby Mr Pope received a payment from that provider every time he recommended a customer transfer their pension to a SIPP operated by that provider. In any event, Mr Burns points out that any conflict was mitigated by a measure he instigated, namely that TMI advisers were indifferent to the outcome of the advice process insomuch as they were incentivised on the quality of their work, not on the number of customers that proceeded to buy alternative investments.

161. As far as fees were concerned, for TMI's initial advice service a customer paid a fee which was typically £1,000 per personal pension being transferred. However, if a final salary pension was being transferred, the amount was 3% of the total transfer value or £1,500 (whichever was the greater). These amounts were usually deducted from the funds being transferred into the SIPP.

162. The client agreement referred to the fact that the customer could have an annual review of his portfolio, stating that typical charges were between 1 and 1.25% of the value of the customer's portfolio, and, as mentioned at [142] above, the suitability report would indicate whether the customer had agreed to take up the service. The evidence shows that over 90% of TMI's customers opted to receive this annual review service.

163. It was not clear what the service in fact entailed; Mr Robert Shaw described it as giving the customer an opportunity for a review but clearly if it was intended that advice would be given annually on the continuing suitability of investments in the SIPP portfolio (including whether the portfolio matched the customer's attitude to risk) that conflicted with TMI's position that it did not give advice on the underlying investments, and therefore might lead customers to believe that they were receiving such advice. In his evidence, Mr Burns stated that the risk of customers believing that was a low one.

164. We have seen amongst the evidence a copy of a template for an annual review pack, which appears to give details of the customer's investments and asset allocation over the last 12 months and then asked a series of questions for the investor to ask himself, among which was whether he needed a financial review with a financial adviser and to contact TMI if he had any questions.

Governance and systems and controls

165. In summary, the evidence shows that TMI had little by way of formal systems and controls and its governing body, its board, did not in practice review in a structured fashion the way that TMI's business was operating or how individual directors were performing their functions. Mr Burns did not seek to contend otherwise. He did, however, accept in his cross examination that he took his share of the responsibility for ensuring that there were appropriate systems in place and that they were effective.

166. As Mr Burns described it, there was a "silo" approach to management by the four directors. Each of the directors had their own area of responsibility and in general terms the other directors, either individually or as a board, did not seek to play any significant role in relation to matters which did not fall within their own individual sphere of responsibility. Mr Burns's evidence was that policy decisions and decisions in general were usually discussed and then taken by the four directors, each of whom had an equal voice when matters were discussed and decided upon. However, decisions were influenced by the director who was responsible for the matter in question. So, for example, in relation to compliance matters, which initially came under the responsibility of Mr Lloyd Pope and later Mr Legerton, the directors would rely on the director with the knowledge and overall responsibility for those matters to inform the others so that they were able to come to an informed decision about a particular matter. He gave the example of wording of documents such as the suitability letter which needed to be amended from time to time and the directors would to a great extent rely on the relevant director's knowledge and experience when the matter was discussed and decided upon. Mr Burns in relation to such matters regarded his role as merely providing a form of "sense check".

167. Later, as the business expanded and a separate compliance officer, operations manager, director of finance and HR specialist were appointed, as Mr Burns put it, the directors relied on the knowledge and previous experience of these persons to make more informed decisions.

168. Mr Burns's attitude was that since he was not a compliance expert and did not hold the CF 10, 11 or 30 controlled functions or other relevant qualifications he was not in a position to provide direction on such matters. As he accepted during the course of his cross examination, Mr Burns did not consider that his role required him to understand pensions and pensions switching, saying that he knew little about critical yields and had not studied the subject and, as far as suitability reports were concerned, he said that his interest was confined to commenting on the length of them, the English that was used and the punctuation. He described himself as a "relative layman" so he simply assessed whether the suitability reports made sense to him, saying that in many cases they did not.

169. Therefore, in terms of the roles performed by the individual directors, Mr Burns and Mr Robert Shaw, who developed the business model, they spent the majority of their time on alternative investments and would also recruit and organise appropriate training for introducers of clients to TMI. Mr Shaw also had responsibility for marketing and sales. Mr Lloyd Pope was responsible for the advice process and, initially, for compliance as well. Mr Legerton had responsibility for the administrative

flow of documentation through the advice process, helping Mr Pope where required and, as we mentioned, succeeded Mr Pope as CF 10 and CF 11 in 2011.

170. Whilst there was a compliance manual, it does not appear that the policies laid down in the advice model as to when it would not be suitable to recommend a SIPP, as described at [127] and [128] were ever documented. Neither was there any formal documenting of the respective roles and responsibilities of the directors until a formal business plan was developed towards the end of 2011.

171. Board meetings were very informal. There was a lack of regular and minuted board meetings before April 2012, whereupon it appeared that board meetings were held monthly. Mr Burns explained that in the early days, because TMI was a small IFA, formality was not considered to be necessary. It was only when an HR specialist was engaged that it was suggested, given the rapid growth of the business, that there be more structure and professionalism to the business. Indeed, Mr Burns did not even describe the meetings before 2012 as board meetings but as "get-togethers", which he accepted was naïve.

172. It would appear that at the time formal board meetings commenced in April 2012, 900 customers had been given pension switching advice, the total number of customers in 2010 and 2011 was said to be 954 and the sums transferred for the same period exceeded £112 million.

173. It follows that there was no formal mechanism in place to ensure that the board were provided with information to allow it to identify, measure and control any risk of unfair treatment to customers. There is no evidence, for example, that there were procedures in place to ensure that the board received information regarding the extent to which TMI was complying with the terms of its own advice model and no statistics were kept as to the sources of new business for TMI. No information was made available as to the extent to which recommendations to transfer out of defined benefit schemes were made. Information was received informally from various individuals, in particular Mr Lloyd Pope in relation to advice on compliance matters. Mr Burns accepted that there was no structured reporting process and that he would deal with things on an ad hoc basis and did not receive regular briefings.

174. It appears that there was no substantial change to this informal process after the institution of regular board meetings. We have reviewed the board minutes that were made available to us and they tend to be a discursive description of points made by those who were present. We accept Mr Pritchard's description of these minutes as "unimpressive" and Mr Burns himself apologised for their quality. It is often not clear whether they were minutes of meetings of TMG as opposed to TMI as an individual company, sometimes attendees are not recorded, there was no formal allocation of the role of chairman and no clear record of who chaired particular meetings, although board minutes tended to be signed off by Mr Lloyd Pope.

175. The primary focus of the matters discussed appeared to be on income and expenditure, funds under management and new business. For example, the minutes of the meeting held on 3 April 2012 (described as minutes of a management meeting

rather than a board meeting) record that funds under management at that stage were in excess of £28 million, with a target to reach £100 million by the end of 2012. The November 2012 minutes record a funds under management target of £200 million by the end of 2013. The April 2012 minutes record TMI's outside compliance consultant, Mr Keith Wilkinson, highlighting a number of compliance issues, including the fact that his compliance report had never been put to the board.

176. Mr Burns's own focus is seen to be very much on financial issues. For example, the minutes for the August 2012 board meeting record Mr Burns raising concerns that the business generated from annual management charges, which was described as the most profitable part of the business, was suffering from attrition because, for example, there was not enough money in the SIPP to pay the annual fee, prompting Mr Burns to ask for data to be prepared about how much was invoiced for management charges each month, what amounts had not been paid and what was to be done about it.

177. The board minutes for May 2012 record Mr Pope explaining that TMI would cease using Mr Wilkinson's services and move to an in-house compliance function with an external checking and monitoring arrangement, the rapid growth of TMI being given as the reason for the change and which would lead to a more proactive approach to compliance requirements.

178. The new in-house compliance officer, Mr Neil Horrabin, was introduced to the board at its meeting held in June 2012. Compliance issues were discussed at the August 2012 meeting; there is no evidence that a formal written report was tabled, Mr Horrabin simply reporting on a number of ad hoc issues, one of which was that he had created a file tracking form and a due diligence procedure. There is also no evidence of any probing by members of the board of Mr Horrabin or being otherwise substantively engaged in dealing with compliance matters. Subsequent minutes appear to confirm this pattern. In December 2012, Mr Horrabin did not attend the board meeting, and the minutes record that therefore compliance matters were not discussed. We accept, however, that after Mr Horrabin arrived he was proactive in raising issues related to compliance with all the directors and seeking their views. Mr Burns did in fact reply to some of those requests, but again there was no structure to the way in which the board became involved.

179. In terms of the actual work done on compliance matters, initially under the leadership of Mr Lloyd Pope, and subsequently Mr Legerton, as we have mentioned, compliance monitoring was initially delegated to an outside consultant, Mr Wilkinson. It would appear that Mr Wilkinson attended TMI's offices to undertake file reviews and we have seen a report of his findings for the month of March 2011. This report sets out the conclusions of the review, and in particular, whether each of the files reviewed did or did not meet suitability standards. Even where the recommendation is passed as suitable, a comment is made that the suitability report for the customer referred to the fact that although the proposed investment does not match the customer's attitude to risk, it is still suitable as it is the client's wish to invest predominantly in overseas property, so that it is clear that the consultant's review focused purely on suitability from the perspective of whether the recommendation of a SIPP was suitable.

180. This report, however, in its summary and overview of the visit, contained a table listing various aspects of management, governance, culture and systems and controls. In relation to management, governance and culture it records that this was an immediate priority and urgent action was required. The same assessment was made in respect of control functions, such as compliance, and training and competence. The report observed that despite the last visit report highlighting some areas where systems and processes needed either implementing or improving, there was still work to be done in some areas, such as training competence and treating customers fairly. The report referred to the need for the firm to have systems and control in place to comply with its obligations to treat customers fairly, and in particular the need for there to be appropriate management information which is described as being invaluable in helping identify areas for improvement. The report recommended that management information was formally reviewed and documented on a six monthly basis.

181. We were referred to another of Mr Wilkinson's reports which was issued in November 2011. This report referred to the Authority's thematic review on the quality of advice on pension switching and highlighted, among other things, one of the areas of concern was that the funds recommended were not suitable for the customer's attitude to risk or personal circumstances. The report said that in the light of this review consideration of these findings should be borne in mind in all future sales.

182. The report also referred to the need to have in place arrangements to identify, manage and mitigate risks arising from conflicts of interest. Therefore, it recommended completion of a conflicts of interest questionnaire to be retained on file. The April 2012 report mentioned that this questionnaire had not yet been fully completed.

183. Mr Burns was unable to confirm that the November 2011 report was presented to the board and discussed; all he could say was that he would imagine that it was. In our view, there is insufficient evidence to demonstrate that it was in fact discussed. In any event, there is no evidence of any follow-up action having been taken in relation to the implications of the thematic review referred to in the report.

184. Mr Wilkinson's annual compliance report for the year 2011, which was sent to Mr Legerton on 25 January 2012, was in very general terms. Although it reported that the results on the quality of the advice overall showed it to be suitable, it noted that improvement was required in the quality of the sales process and the quality of fact finding.

185. Mr Horrabin appeared to be very active on compliance matters, although, as mentioned, not working within a formal framework.

186. A compliance plan for TMI for 2012 was prepared by Mr Horrabin. In relation to conflicts of interest, the report recorded that the firm currently had no conflicts of interest.

187. It would appear, however, that Mr Horrabin was responsible for a conflicts of interest policy being adopted, which finally happened in October 2012. The policy refers, among other things, to a conflict arising where a firm recommends the use of a sister company in order to generate extra income. It states that when dealing with customers, TMG will disclose any conflict where it arises and becomes apparent to a customer prior to undertaking business, or in the event the disclosure is not appropriate, to manage the conflict. No further detail on how such management might take place was provided in the document. A separate conflicts register was maintained which disclosed details of the directors' shareholdings in the various companies within TMG, the only action being recorded against those items was "maintain review".

188. In November 2012 Mr Horrabin prepared a note which he circulated to all board members on the question of critical yields. The paper observed at its outset that the starting point for pension transfer advice in relation to occupational pension schemes is that a transfer will not be in the member's best interests.

189. Mr Horrabin stated that in view of the increasing interest of the Authority in this area, TMI's policy of not accepting a transfer where the critical yield exceeded 12% needed to be revisited. Mr Horrabin referred to a report following a review carried out by TMI's solicitors Regulatory Legal, which indicated that if there was a high percentage of pension transfers with a high percentage of SIPPs being taken up, this would raise alarm bells with the Authority. Mr Horrabin went on to say that the concern here would be that clients were being advised to set up a SIPP and transfer their pension in order to purchase alternative investments. Mr Horrabin concluded by saying that he would like to be in a position where any concerns the Authority may have could be mitigated but he wished to discuss the matter first. Mr Burns said that his reaction to this note was that he realised that the business model had risks associated with it, but he felt that TMI was doing everything correctly. He said he was content to wait and see whether the Authority made a visit and looked into the matter. He did not believe that Regulatory Legal was stating explicitly that there was an advice gap that needed to be addressed. The full report from Regulatory Legal, which of course is subject to legal advice privilege, has not been disclosed.

TMG's dealings with the Authority during the Relevant Period

190. Following TMI's authorisation by the Authority early in 2010, TMG's next significant contact with the Authority came when TM SIPP applied for authorisation. Those dealings are relevant in the context of Mr Burns's contention that the Authority had knowledge of his alleged misconduct regarding the management of conflicts of interest prior to 9 December 2012.

191. TM SIPP's application was received by the Authority on 12 September 2011. The application was open about the structure of TMG and the business of each of the companies within the group. In relation to TMAI the application said:

> "[TMAI] is not FSA authorised. Instead it researches, agrees terms and promotes a variety of alternative, non-regulated, investments. The company acquires clients by means of seminar presentations, referrals from existing clients and

> introductions from both regulated and non-regulated third parties. Again this company may introduce prospective clients to [TMI] who in turn, and if appropriate, may recommend the use of [TM SIPP]."

192. The Authority sought further information in relation to this application, and a meeting to discuss the application was held on 16 January 2012 at which Mr Legerton, Mr Burns, Mr Ian Shaw and Mr Paul Grainger, a compliance consultant, represented TM SIPP and Mr Peter Kesic, of the Authority's Permissions Department and Ms Ilene McIvor, from the Authority's Small Firm's Division, represented the Authority.

193. The agenda for the meeting, prepared by the Authority, indicates that one of the questions to be asked was what procedures the firm would have in place to deal with conflicts of interest, giving as examples other firms that the directors are connected with recommending that its clients take out a SIPP with TMI SIPP, and other companies which the directors are associated with which appear to be involved in real estate recommending that clients invest in real estate assets through a SIPP set up with TM SIPP.

194. A note of this meeting, prepared by the Authority, records at paragraphs 19 to 21 the following regarding the discussion as to conflicts of interest that took place:

> "19. [TM SIPP] would disclose in its suitability letter details of the other firms it was connected with so that a client of [TMI] (the financial adviser) would know that it was connected to [TM SIPP].
>
> 20. The advisers of [TMI] would also be required to give customers best advice and to disregard the connection with [TM SIPP] when providing best advice. If the client was advised to open a SIPP with [TM SIPP], the client would be made aware of its connection with [TM SIIP] and [TMI] would need to keep records of the reason for its choice of SIPP operator.
>
> 21. The same principle of disclosure would apply in relation to [TMAI] in relation to any investment that involved this company. [TMAI] provides services in relation to non-regulated investments such as overseas commercial property and renewable energy projects."

195. Mr Burns accepted in his cross examination that at the time of this meeting, he was not aware that there was a conflict between TMI and TMAI and accordingly he did not mention at the meeting that TMAI were receiving commissions in relation to alternative investments which it marketed. Mr Burns also accepted that the management of any such conflict of interest was not discussed because it was not identified that there was a conflict of interest. He therefore accepted that the management of conflicts of interest that might arise because of the relationship between TMI and TM SIPP was the only potential conflict that was discussed because that had been identified as a conflict. His position was that given Ms McIvor's background and knowledge of conflicts he would have expected her to have picked up from what was said about the conflict between TMI and TM SIPP that there was a conflict between TMI and TMAI and that such conflict clearly was not being managed because at that stage TMI had not identified it.

196. In his evidence, Mr Monaghan says that Ms McIvor, with whom, following Judge Herrington's direction in November 2017 referred to above, the Authority's Enforcement Team discussed the 16 January 2012 meeting, cannot exclude the possibility that Mr Burns informed her and Mr Kesic that TMI would not advise SIPP clients on the suitability of the underlying investment to be placed in the SIPP. Mr Burns says that he did inform Ms McIvor at that meeting that TMI did not advise on the underlying investments held within a SIPP which it recommended. In an email that Ms McIvor sent to the Enforcement Team during its investigation on 28 September 2015 she said that she did think the Authority knew in January 2012 that TMI did not give advice on the esoteric investments within the SIPP if the customer was referred by TMAI and that "we did tell them that it was the responsibility of the IFA to ensure that the underlying investment was suitable for the client."

197. Accordingly, we accept Mr Burns's evidence that he did inform Ms McIvor and Mr Kesic that TMI would not advise SIPP clients on the suitability of the underlying investments which is consistent with what Ms McIvor was saying in September 2015. However, it was not until after the visit of the Authority to TMI in January 2013, discussed in further detail below, that the Authority raised this as an issue of concern with TMI.

198. Ms McIvor said to the Enforcement Team that had she understood as a result of discussions during the meeting in January 2012 that TMI would not be disclosing to its customers its links to the firm which was marketing the products which ultimately went into the SIPP she believes that she would have challenged this, even though it related to the conduct of the IFA firm rather than the SIPP operator.

199. The issue of conflicts was further addressed by TM SIPP in further information regarding its application that it submitted to the Authority on 23 March 2012. It said the following:

> "Whilst the subject of Conflicts of Interest was briefly discussed in our initial application, we have given considerable further thought to the subject. We are aware that given the "close links" of the applicant company [TM SIPP] with [TMI] and also [TMAI] a conflict of interest might arise and will need to be managed in the correct and proper way (not least to ensure there is no consumer detriment)
>
> The section of this document relating to due diligence carried out on a) the suitability of the SIPP product itself and b) the suitability of the subsequent underlying investment(s) is a case in point.
>
> As far as that particular issue is concerned we are confident that the extensive due diligence carried out by [TMAI] (primarily by Alistair Burns) and that to be carried out by [TMI] (primarily by Peter Legerton and Ian Shaw) will result in prudent decisions being taken."

200. Again, this passage does not discuss any potential conflict between TMI and TMAI.

201. TM SIPP was finally granted authorisation on 21 August 2012.

202. The information that the Authority obtained from a number of other firms ultimately led it to decide to conduct a supervision visit in relation to TMI at the end of 2012. It is therefore relevant to review that information with a view to ascertaining whether it can be of relevance to the conflict of interest issue in respect of TMI.

203. Ms Ferreira was asked at the beginning of 2012 to do some work on a property development investment offered by Harlequin in response to intelligence that the Authority had received suggesting that the properties being sold in the Caribbean by Harlequin were not being built. Ms Ferreira sought to obtain an understanding as to how Harlequin was selling investments in the UK. The Authority discovered, through obtaining the business register of a SIPP operator called Guardian SIPP during 2012, that an IFA firm called 1 Stop Financial Services appeared to be one of the largest distributors of Harlequin investments to UK consumers. The Authority therefore decided to visit 1 Stop to understand their business model and the distribution of Harlequin products. The contact with Guardian came about because the Authority was undertaking a separate project in relation to SIPP operators through a separate team.

204. Ms Ferreira and other colleagues visited 1 Stop on 21 September 2012. During the visit, Ms Ferreira, among other things, explored whether 1 Stop was managing conflicts properly as it did not disclose to customers its connection with the distributor of Harlequin products and whether it received a commission on the purchase of the unregulated investment, which was subsequently acquired through a SIPP recommended by 1 Stop, a model very similar to that operated by TMG.

205. The minutes of the visit to 1 Stop do not contain any discussion of any specific IFA firms that might have been operating a similar model, and Mr Hughes's evidence demonstrates that TMI was not mentioned by name. Ms Ferreira does not rule out the possibility that she was told at the meeting by 1 Stop that their business model was the same as every other firm engaging in similar business, and we think it more likely than not that this was said at the meeting.

206. It does, however, appear that the Authority had some information regarding TMI's activities as early as December 2010. In the context of the Authority's supervision enquiries into a SIPP operator, Montpelier, an attendance note of a conference call between the Authority and Montpelier records that Montpelier no longer allowed within the SIPPs it operated investments promoted by Harlequin due to the concern about the quality of investment, mentioning that TMI was the introducer and that some IFAs submit little business other than "hotel rooms". Further information received from Montpelier was exchanged between various employees of the Authority on 5 April 2011. The relevant emails disclose that an alert had been created as the Authority had received from Montpelier the names of four IFA firms that they have ceased to transact business with owing to their belief that the SIPP sales being passed to them and subsequent instructions to invest were unlikely to be suitable for their clients. Montpelier's view that a high proportion of total sales were esoteric, illiquid investments such as partial ownership of hotel rooms and that the proportion of sales being put into such investments led Montpelier to conclude that they were unlikely to be offering proper independent whole of market advice was noted. TMI was one of the four firms named.

207. An employee of the Authority considering this information expressed a view that there may be merit investigating the matter further, but nothing was taken forward at that stage. It would appear that once it was identified that TMI was an IFA firm rather than a SIPP operator and were therefore not within the scope of the thematic SIPP operator work then being carried on by the Authority the matter was not pursued.

208. The information obtained from Montpelier did, however, come to Ms McIvor's attention during the course of her consideration of TMI SIPP's application for authorisation.

209. On 8 February 2012 an email was sent by an employee of the Authority to Ms McIvor, informing her that the Authority had received information about TMI's activities from Montpelier, namely that a large amount of Harlequin business was being referred from TMI to Montpellier and it was suggested that Ms McIvor could ask the firm how it assures itself that it is acting in the best interest of its customers. This email was forwarded to Ms Ferreira on 2 March 2012. In addition, another email dated 17 February 2012 circulated within the Authority shows that the Authority had been informed in some detail about TMI's business model in the context of concerns that the Authority had about SIPPs investing in unregulated collective investment schemes. That email was forwarded to Ms McIvor on 20 March 2012 from Mr McNicholas in the Authority's unauthorised business department who commented that the information concerned "some dodgy SIPP investments" and mentioned "TailorMade." That email was forwarded to Ms Ferreira on 20 March 2012. The information was sent to Ms Ferreira because of her interest in Harlequin but she did not take any action at that time.

210. Therefore, although this again demonstrates information that the Authority had in its possession regarding TMI's business model, there was no specific mention of whether it had conflicts of interest and how they were managed. There was a brief mention of conflicts of interest in an exchange of emails between Mr Kesic and Ms McIvor on 14 June 2012 where Mr Kesic said:

> "As you say, the business model is not one we are particularly comfortable with, in relation to illiquid assets and non-regulated investments and a lot will depend on the due diligence they do into these investments and how well they manage conflicts of interest between the connected IFA and non-regulated company that is involved with alternative investments."

211. At the same time, a separate piece of work was going on in another department within the Authority regarding SIPP Operators. The Authority wanted to understand whether SIPP operators, prior to accepting investments by consumers into the SIPP, ensured these investments were compliant with HMRC rules and also whether they were viable. The Authority was also trying to understand how SIPP operators valued the underlying investments. It was through that work that Ms Ferreira became aware of the connection between Guardian and TMI, as described at [203] above.

212. On 22 November 2012 the Authority received intelligence provided by an individual who attended one of the seminars run by TMG which was described by that

individual as a sales exercise in relation to unregulated collective investment schemes and that TMG are one of the top introducers of Harlequin investments.

213. It was on 30 November 2012 that the Authority decided to look further into TMI's activities. On that day Mr Franks of the Authority had sent an email to Ms Ferreira giving her information regarding the new business register for Guardian which included the names of various IFAs, including TMI. Ms Ferreira forwarded this email to her colleague Jonathan Smart, who had accompanied her on the 1 Stop visit. On receiving this email Mr Smart emailed Ms Ferreira asking her the following question:

> "Would it be sensible for us to raise a case/remedy alert against TailorMade? The precedent of the action we took against 1 Stop might enable quicker intervention with TailorMade, if further work demonstrated that they had similar failings."

214. On the same day Ms Ferreira approved the opening of a case on TMI as soon as possible. This meant that TMI would become the subject of focused supervisory activity from the Authority, resulting in the visit that was made in January 2013. Ms Ferreira confirmed in her cross examination that the reason for raising the case was of the concern about the distribution of Harlequin products and from the information they now had it would appear that the second largest distributor of the product after 1 Stop was TMI.

215. It is clear from Mr Smart's email that he at least, had no knowledge at that stage as to the manner in which TMI operated and, in particular, addressed conflicts of interest. It was clear, however, that Mr Smart had noted similarities in the group structure of TMG and 1 Stop and that by a study of TMG's website that the combination of unregulated regulated business was openly shown.

216. On 10 December 2012 Mr Smart prepared a note recording a conversation he had with Ms McIvor in which he had sought further information regarding TMG in the knowledge that Ms McIvor had dealt with the authorisation application for TMI SIPP. In particular, the note records that Ms McIvor informed Mr Smart that within the group, TMAI did the direct marketing and promotion of alternative investments and refers clients direct to TMI and that TMI would advise on the SIPP but not on the underlying investment. There was no mention in this note about whether there were conflicts of interest or how they were managed.

217. On 20 December 2012 the email of 22 November 2012 referred to at [212] above was forwarded to Mr Smart and on the same day the Authority wrote to TMI setting out the purpose of their visit. The letter said this about conflicts of interest:

> "Further to the FSA's authorisation of TM SIPP in August 2012, we are seeking to establish how conflicts of interest are managed and how suitability of advice is delivered by TM Independent, particularly given the higher risk nature of some of the investments shown on your group's website."

218. The letter also contained requests for certain information to be provided ahead of the visit; amongst the information asked for were "details of advice procedures and sales processes" and TMI's "conflicts of interest policy and register."

219. On 4 January 2013 Mr Legerton provided copies of TMI's conflicts of interest register and its conflicts of interest policy to the Authority and, as we have indicated above, the register showed that the conflicts of interest arising from the common directorships and ownership of different TMG entities by the various directors of TMI had been identified on 16 October 2012.

220. On 18 January 2013 the Authority published the industry alert referred to at [102] above. As a result, the directors of TMI took the view that they could no longer operate their existing advice model and immediately ceased taking on new pension transfer business.

221. The Authority's visit to TMI took place on 24 and 25 January 2013. By this time, having received information regarding conflicts of interest referred to at [219] above, the Authority had concerns that conflicts may not be being properly managed but nevertheless were seeking considerably more detailed information at the meeting itself. The agenda prepared by the Authority in advance of the meeting indicated that one of the topics to be discussed was the potential risks posed by the structure of TMG, including conflicts of interest and suitability, indicating that the Authority wished to establish how the firm is dealing with those risks.

222. The agenda indicated that amongst the questions the Authority wished to ask was how introducers were remunerated, whether the firm received commission from investment providers, when conflicts of interest would be raised with the customer, examples of when conflicts have been disclosed and what work had been done to identify conflicts within the group and challenge identified conflicts, depending on findings made earlier during the visit.

223. As shown by the minutes of the meeting, Mr Burns informed the Authority during the meeting that TMI had identified a potential conflict which was not being properly managed. He was referring to the potential conflict arising from the common directors and ownerships, including his own, of TMI and TMAI and that the remuneration received by TMAI from product providers was not being disclosed to investors. The impression taken from the meeting by the Authority, as recorded in the minutes, was that Mr Burns did not understand that disclosure of the relationship in the relevant published documents was not enough to manage the conflict. However, the Authority made a positive observation at the end of the visit that the directors had acknowledged the existence of the unmanaged conflicts of interest.

224. On 5 February 2013 the Authority wrote a lengthy letter to TMI giving feedback from the visit. TMI was commended for the open and cooperative approach it followed with the Authority both prior to and during the visit and for the fact that it had made disclosure of the conflicts of interest issue. The letter expressed the Authority's severe concerns with the way TMI facilitated the transfer of pensions of retail investors into alternative investments without considering the suitability of the

overall transaction to customers. The letter said that the Authority's other concerns were primarily around unmanaged conflicts of interest, poor systems and controls, the way the firm communicates with investors, and most significantly, the firm's sales process which it said was not compliant with the Authority's regulatory requirements.

225. The letter concluded with a request that TMI agree to apply for a voluntary variation of its permission preventing the firm from carrying on regulated activities until the Authority was satisfied that the firm's business model no longer posed a risk to consumers.

226. On 13 March 2013 TMI entered into a voluntary variation of its permission along the lines requested by the Authority. Mr Burns cooperated with the Authority and proactively created a remediation plan to deal with the pipeline of TMI's customers who were affected by the variation permissions. This plan included undertaking training on improving director competence and suitability, conflicts of interest, suitability of advice, financial promotions, alternative investments and due diligence, governance and risk, systems and controls, and valuation and loss assessment. All but the assessment of valuation and loss were completed in February and March 2013 and between April and October 2013 Mr Burns implemented the rest of the remediation plan, which was subsidised by Mr Burns at considerable personal cost.

227. On 29 July 2014 the FSCS announced that it had declared TMI to be in default as a result of which it investigated claims made by TMI's customers who, as we have found, have received compensation where appropriate. TMI ultimately went into liquidation.

The impact of TMI's default and that of other firms undertaking pension transfer business

228. As Mr Wilson explained in his evidence, where a firm authorised by the Authority is declared to be in default, that is where it is unable, or likely to be unable to meet claims against it because it has insufficient assets to meet its liabilities, the FSCS will provide compensation for losses suffered by customers of that firm where, among other things, they have a claim against the firm in respect of advice given by the firm which turns out to be unsuitable.

229. As Mr Wilson explained, the FSCS will generally try to put claimants back in the position that they would have been in had the event that gave rise to the claim not occurred. By way of example, SIPP related claims might involve claimants who lost the entirety of their pension savings as a result of having received advice to transfer their existing pension plans into a SIPP to facilitate the investment in high-risk products. The value of FSCS compensation in such cases would be the value that the claimants would have had, had they chosen to remain invested in the original pension plans.

230. There are no charges made by FSCS to claimants applying for compensation. Having examined the form that a claimant needs to complete to obtain compensation,

it can clearly be adequately completed without the assistance of a legal representative. If claimants appoint lawyers, their costs will not be reimbursed by the FSCS. It is a matter of concern that in the case of claims made by a number of consumers against TMI, including some of those who gave evidence in these proceedings, those consumers had appointed a firm of solicitors, Regulatory Legal, who had previously advised both TMAI and TMI, but subsequently marketed their services to those consumers when it became apparent that due to the failure of the alternative investments in which their pension monies were invested they may have claims in respect of unsuitable advice. It would appear that in a number of these cases Regulatory Legal charged £8,000 for their work in assisting the claimant in completing the application form to the FSCS, and, although we have not seen any evidence of this, subsequently dealing with any matters arising out of the application. These fees were payable out of the compensation received by the consumer. We understand that these are matters that the Authority may take up with the Solicitors Regulation Authority.

231. There are limits to the amount of compensation payable, which depend on the nature of the claim. In relation to advice on investments, including SIPP advice, this is set at £50,000 per claimant per firm.

232. As demonstrated by Mr Wilson's evidence, there has been an increase in the number and complexity of claims by consumers who have been wrongly advised to move their retirement savings into risky assets held in SIPPs in recent years. This has led to an increase in FSCS costs, which have to be funded by the industry.

233. For the period up to 31 March 2014 the FSCS has received 1,054 SIPP related claims. From 1 April 2014 to date the FSCS has received 13,183 SIPP related claims. The total amount of compensation in relation to SIPP related claims paid out after 1 April 2014 is £297,539,167.99.

234. As of 25 April 2018, the FSCS had received SIPP related claims against a total of 495 firms, four of which accounted for 51% of the total compensation paid up to that date, which was around £164.7 million.

235. 1 Stop was at the top of that list of four firms, followed by TMI. In relation to TMI, FSCS has received and accepted 1,371 claims, of which 1,245 have been upheld and 126 rejected, while 45 claims are still waiting for final decision. Compensation totalling over £55.6 million has been paid to claimants as a result of the claims which have so far been upheld. Because of the £50,000 limit mentioned above, the sums paid did not cover all the losses suffered by these investors; the sum total of actual losses sustained by former customers whose claims have been accepted, as assessed by the FSCS, was more than £106.5 million.

236. Mr Wilson's evidence, which we accept, was that claims against TMI were accepted on the basis that TMI had sought to distance itself from responsibility for the investments purchased within the SIPP on the basis that the client had already or would "self-select" their investment of choice. Once pension transfers are completed,

almost all pension monies were then invested in one or more of the alternative investments that had been previously presented to the customer by the introducer.

237. The FSCS endorses the Authority's view, as set out in its industry alert published on 18 January 2013, that where a financial adviser recommends a SIPP knowing that the customer will transfer or switch from a current pension arrangement to release funds to invest through a SIPP, then the suitability of the underlying investment forms part of the advice given to the customer. If the underlying investment is not suitable for the customer, then the overall advice should be that the transfer or switch is not suitable. In each case where the FSCS accepted a claim it was because on the above basis it had determined that TMI was liable for the losses suffered.

238. The statistics provided by FSCS are shocking. They appear to demonstrate widespread miss-selling of pensions transfers by a large number of firms operating in the IFA sector, many of whom it appears have followed the same business model as the four firms referred to at [234] above. It therefore appears that there has been a widespread misunderstanding in the industry as to the obligations of firms who advise on pension transfers into SIPPs involving the acquisition of alternative investments, if the Authority and the FSCS are correct in their analysis of the relevant regulatory requirements, a matter to which we now turn.

Issue 1: Whether Mr Burns breached Statement of Principle 7

239. The Authority's case on this issue is based primarily on two contentions as follows:

(1) That Mr Burns failed to take any or any reasonable steps to ensure that TMI's personal recommendation process complied with the relevant regulatory requirements; and

(2) That Mr Burns failed to ensure that TMI managed fairly, and disclosed clearly, his personal conflicts of interest and the conflicts of interest relating to other individuals at TMI, despite being aware of the respective roles of TMI and TMAI and how he and other individuals at TMI benefited financially from the relationship between the firms.

Mr Burns's responsibility for the personal recommendation process

240. The first stage in the consideration of this issue is to determine whether TMI's personal recommendations complied with the relevant regulatory requirements.

241. This in turn primarily depends on the extent to which COBS 9.2.1R requires a firm, such as TMI, when considering the question of the suitability of a SIPP as a product for a client also had to consider the suitability of the underlying investments in which it was envisaged the SIPP would invest. As we have summarised at [122] and [123] above, TMI's advice model proceeded on the basis that there was no such obligation, a view which the Authority challenged during its supervision visit to TMI in January 2013 and on which the Authority had given clarification to the market in the form of the alert which it issued on 18 January 2013.

242. Although Mr Burns accepted that many of TMI's customers had received unsuitable advice, he did not necessarily accept the Authority's interpretation of COBS 9.2.1R. We shall therefore examine in detail how COBS 9.2.1R is to be interpreted in the context of a retail firm recommending to a retail customer that he transfer his existing pension funds into a SIPP.

243. We start by analysing the nature of the rights and interests in a SIPP which are to be regarded as an "investment" specified by the Financial Services and Markets Act 2000 (Regulated Activities) 2001 ("RAO") and therefore, pursuant to s 22 FSMA, subject to regulation by the Authority's regulatory requirements.

244. Article 82 (2) of the RAO provides that "Rights under a personal pension scheme" is a specified investment. "Personal pension scheme" is defined by Article 3 of the RAO as:

> "a scheme or arrangement which is not an occupational scheme or a stakeholder pension scheme and which is comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of people –
>
> (a) on retirement,
>
> (b) on having reached a particular age, or
>
> (c) on termination of service in an employment"

245. A SIPP, the essential characteristics of which we describe at [120] above, clearly falls within the scope of this definition and therefore the rights that the beneficiary of a SIPP has under the trust arrangements that establish the SIPP constitute a "specified investment".

246. Those rights are also a "security" for the purposes of the RAO. Article 3 of the RAO defines "security" as "an investment of the kind specified by any of Articles 76 to 82" of the RAO. The investments that fall within the scope of that definition are, generally speaking, shares, debentures, government securities, interests in securities and units in a collective investment scheme as well as rights under a pension scheme which falls within the scope of Article 82. It is worth mentioning at this point that in relation to collective investment schemes, which are often similar in structure to SIPPs, that "units" are defined as "the rights or interests (however described) of the participants in a collective investment scheme": see s 237 (2) FSMA. The significance of these rights being a "security" will become apparent when we examine the terms of COBS 9.2.1 R.

247. The Authority has given guidance as to the scope of its regulation of rights in a personal pension scheme in that part of its Handbook known as PERG. It does so in the form of questions and answers and the giving of examples as to the type of activity which is covered.

248. PERG 12.3 gives guidance as to what in the Authority's view constitute rights under a personal pension scheme that are specified investments and securities in the following terms:

> **"Q16. What are the rights under a personal pension scheme that are specified investments and securities?**
>
> These are all the rights that membership of the scheme confers on a member. This may vary (for example, where the scheme is a SIPP) but is likely to include some or all of the following rights:
>
> to make payments to the scheme;
>
> to withdraw sums from the scheme in certain circumstances;
>
> to transfer value to another pension scheme;
>
> to receive benefits arising from the capital value of or income derived from particular assets or from the performance of a unitised fund;
>
> to place certain types of property (for example, commercial property) in the scheme;
>
> to instruct the operator which assets to buy or sell for the purposes of the scheme;
>
> to instruct the operator to switch funds from one managed or unitised fund to another;
>
> to appoint a person to manage the assets or to give instructions to the operator about which assets to buy or sell on behalf of the member; and
>
> to instruct the operator to borrow money to purchase assets (for example, to take out a mortgage on a commercial property)."

249. We accept the list set out above as an accurate, but not necessarily exhaustive, description of the principal rights arising under a personal pension scheme, such as a SIPP, which constitute "rights" for the purposes of Article 82 of the RAO. In particular, we note the right to receive benefits arising from the capital value of or income derived from particular assets, regardless of the nature of those assets and, in particular, whether or not the assets are themselves specified investments for the purposes of the RAO. Once again, we draw the analogy with units in a collective investment scheme; one of the rights conferred by a unit in a collective investment scheme is the right to realise the unit by reference to the value of the underlying assets of the scheme.

250. The consequence of rights under a SIPP being a specified investment is that they are subject to regulation by the Authority if an authorised person conducts any of the regulated activities specified by the RAO in relation to them. As the Authority correctly identifies in PERG 12.3 (in its answer to its Question 15), that includes the

regulated activities of dealing in investments as principal or agent, arranging deals in investments, or advising on investments, all of which are activities specified as regulated activities for the purposes of FSMA by virtue of Articles 14, 21, 25 and 53 of the RAO respectively.

251. Continuing the analogy with collective investment schemes, it is also worth noting that pursuant to Article 52 (b) of the RAO, establishing, operating or winding up a personal pension scheme is a specified activity for the purposes of FSMA and is therefore a regulated activity. This mirrors the provisions of Article 51ZE of the RAO which provides that establishing, operating or winding up a collective investment scheme is a specified activity. This analogy, as well as those described at [246] and [249] above lead us to conclude that Parliament intended the regulatory regime to be applied to specified activities relating to SIPPs to apply in the same way as it does to activities in relation to specified activities relating to collective investment schemes.

252. Turning now to how the regulated activities of dealing, arranging and advising can apply to rights in a SIPP, as the Authority states in PERG 12.3 (in its answer to its Question 17), among other things a member will be dealing in rights in the scheme when he acquires them by joining the scheme, makes payments into the scheme or contributes assets to the scheme and the operator of the scheme will be dealing in investments when he grants rights to the member under the scheme. When an IFA on its customer's behalf assists the customer with establishing the scheme with a SIPP provider the IFA is likely to be arranging deals in investments.

253. However, the most pertinent specified activity in relation to the matters with which this reference is concerned is the activity of advising on investments.

254. Article 53 (1) of the RAO, so far as relevant, provided during the Relevant Period:

"(1) Advising a person is a specified kind of activity if the advice is—

> (a) given to the person in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor; and
>
> (b) advice on the merits of his doing any of the following (whether as principal or agent)—
>
> > (i) buying, selling, subscribing for, exchanging, redeeming, holding or underwriting a particular investment which is a security… , or
> >
> > (ii) exercising or not exercising any right conferred by such an investment to buy, sell, subscribe for, exchange or redeem such an investment."

255. The concepts of "buying, selling or subscribing" for an investment include any acquisition for valuable consideration. Accordingly, an IFA firm which advises a client on the merits of establishing a SIPP with a particular provider will be carrying

on a regulated activity and that activity will be subject to the relevant Principles and Conduct of Business Rules.

256. It is common ground that in this case, TMI was carrying out the regulated activity of advising on an investment when it recommended to one of its customers that the customer establish a SIPP and transfer his existing pension rights into that SIPP. The area of debate is whether the regulated activity goes any further than that and extends to advice on the merits of acquiring particular investments to be held within that SIPP, whether or not those investments are in themselves specified investments, such as shares, debentures or units in collective investment schemes.

257. On that key point, we find the relevant guidance in PERG to be unclear and that particular issue is not in fact engaged with directly. In PERG 12.3 (in its answer to its Question 19) the Authority states that advice to a prospective member on the merits of buying particular assets at a stage where there are no particular rights under a personal pension scheme, such advice is likely to be regulated where the assets are securities or other investments which are regulated under the RAO on the basis that the advice given would be advice on the merits of buying rights to or interest in those investments. The guidance then says that such advice will not be regulated where the assets are not investments of that kind (such as commercial property). The Authority then says:

> "A person may be asked to advise a client on the merits of his acquiring a commercial property for holding it under a SIPP in circumstances where the client has an existing SIPP of which the adviser may or may not be aware. Provided the adviser has not been asked to, and it is reasonable for him to believe that he would not be expected to, advise his client on the merits of his holding the property under the particular SIPP, the advice may remain generic as respects rights under a personal pension scheme and so would not be subject to regulation."

258. The guidance, however, does not go on to deal explicitly with the situation with which we are concerned in this case, namely where there is a recommendation to establish a particular SIPP with a particular provider and either the adviser recommends, or it is reasonable to believe that he is expected to recommend, the suitability of commercial property (which is not itself a regulated investment) for inclusion in the SIPP. It may be implied that in that situation giving advice on the merits of the acquisition of commercial property to be held within the SIPP was itself a regulated activity, but the guidance does not say so. It may be that the absence of such explicit guidance has led some IFA firms to believe that the effect of the guidance is that there is no regulated activity in relation to an asset which is not itself a specified investment as long as no recommendation is made about the merits of acquiring that asset.

259. The guidance goes on (in its answers to its Question 20) to give examples of when the regulated activities of advising on and arranging deals in investments are likely to arise in typical situations involving rights under a personal pension scheme. It does give an example of advice given to a member or prospective member of a personal pension scheme on the merits of acquiring a particular property for the

purpose of holding it in a particular SIPP where the advice to be given is limited to the tax or legal consequences of doing so, stating that such advice is not regulated where it may reasonably be regarded as a necessary part of the service providing tax or legal advice. Again, no example is given of where advice is given on the merits of acquiring a particular property which is not in itself a regulated investment.

260. In our view it is clear from our analysis of the way in which the relevant provisions of the RAO are constructed that where a firm advises on the merits of establishing a particular SIPP in circumstances where it knows that the customer's intention is that the SIPP will invest in particular assets which are not themselves specified investments for the purposes of the RAO, then advice on the merits of the underlying investments to be held within the SIPP is a component of the advice on the merits of establishing the SIPP and is therefore a regulated activity. The reason for this conclusion is that the particular investment that is being advised on includes the rights of the customer that he will acquire upon the establishment of the SIPP and, as we have found, those rights includes the right to receive benefits arising from the capital value or income derived from the particular assets to be held within the SIPP. In other words, the customer is being advised on an indivisible package of rights which includes the rights arising out of the acquisition of the particular assets to be included within the scheme.

261. Returning to the collective investment scheme analogy, when a firm advises a customer on the merits of acquiring units in a particular collective investment scheme, the advice necessarily must embrace advice as to the merits of the underlying assets in which the scheme invests. The whole rationale for investing in a particular scheme is because of its investment objectives and the likely results to be achieved by the performance of the particular type of asset in which the scheme invests. It is impossible to give advice on the merits of investing in the scheme without thereby giving advice on the merits of investing in a scheme which contains the particular investments in which the scheme invests. Therefore, since Parliament intended that units in collective investment schemes would be specified investments even where the underlying investments of those schemes were not themselves regulated investments, it must be presumed to have taken the same policy decision in relation to SIPPs which only invested in assets which are not themselves regulated investments. The SIPP, like the collective investment scheme, may only be a wrapper around particular investments but Parliament has effectively decided that where such assets are held within the wrapper they become regulated by reason of the fact that the rights that the investor acquires in the scheme are specified investments.

262. In his submissions, Mr Pritchard sought to persuade us to achieve the same result through a different route. He relied on the case of *Martin v Britannia Life Ltd* [2000] Lloyds Rep 412. The subject matter of that case was a claim for damages for allegedly negligent financial advice given by a representative of an insurance group. The advice had been to enter into a package of transactions consisting of a re-mortgage of the claimant's home, the surrender of a number of life policies which had been charged as collateral security with existing mortgage, the taking out of a new endowment policy and the new pension policy, and the charging of the endowment policy as security for the re-mortgage. The point was made by the defendant that

advice as to the re-mortgage was not "investment advice" for the purposes of the predecessor legislation of FSMA. In rejecting that submission, the judge held that "investment advice" comprehended all financial advice given to a prospective client, not only on an "investment" as defined, but also as to any ancillary or associated transaction, notwithstanding that that transaction was itself outside the definition of "investment business" for the purposes of the legislation. Accordingly, it was held that the representative's advice in relation to the re-mortgage was investment advice within the meaning of the statutory definition. Mr Burns submitted that the situation in *Martin* was quite different and did not establish a principle that could be applied in the present case.

263. We agree with Mr Burns that *Martin* does not assist us in this case, but unfortunately that does not help him. *Martin* was concerned with a situation involving the recommendation of both regulated and unregulated products and the case decided that the definition of "investment advice" extended to advice on any ancillary transaction. The situation here is different in that on our analysis, the advice given was purely on the merits of a single investment which was a regulated investment, namely the rights arising under a SIPP, and included within those rights were the benefits arising from the particular assets held within the SIPP whether or not they were investments subject to regulation under FSMA.

264. Therefore, for reasons which are different to those advanced by the Authority, we conclude that where a firm gives advice on the merits of a customer establishing a SIPP, then advice given on the merits of the underlying assets to be held within the SIPP, whether or not those assets were themselves specified investments, is also advice falling within the scope of Article 53.

265. Against that legal background, we now need to examine the scope of COBS 9.2.1. In the light of our analysis, subject to what we say at [267] below, sub-paragraph (1) of that rule must be construed as requiring a firm which makes a personal recommendation to a retail customer to establish a SIPP to consider whether that recommendation is suitable, not only in the sense that a SIPP is a suitable vehicle for the customer in the light of his personal circumstances, but also that it is suitable in the light of the investments which are proposed to be held within the SIPP. "Personal recommendation" is defined in the Authority's rules in this context as being a recommendation to acquire an investment (in this case the rights in the SIPP) that is presented as suitable for the person to whom it is made or based on a consideration of the circumstances of that person. There can be no question that in this case the recommendations that TMI made to its customers to establish SIPPs were personal recommendations as defined in the rules.

266. The requirement in sub-paragraph (2) of COBS 9.2.1 to make the recommendation on the basis of the client's knowledge and experience relevant to the type of service concerned, the customer's financial situation and his investment objectives means that the firm must assess whether the underlying investments proposed to be held within the SIPP match the customer's attitude to risk as well as his knowledge and experience. If the proposed investments do not match the

customer's attitude to risk, then it would not be suitable advice to recommend the SIPP.

267. Having said that, due account must be taken of the fact that one of the features of a SIPP is that it makes provision for the customer to select his own investments. This is where the analogy with the position under a collective investment scheme, discussed at [261] above, does not fully apply. In the case of a typical collective investment scheme, the investor has no say in how the underlying investments are selected.

268. Therefore, if a customer has genuinely made a decision without advice from the IFA firm which arranges for the establishment of the SIPP to acquire particular investments to be held within the SIPP, then the obligations of the IFA firm under COB 9.2 may be more limited. Let us take the example of Mr Burns himself and the establishment of his SIPP. He had decided that he wished the existing benefits of all his pension plans to be transferred into a SIPP and that the underlying investments of that SIPP should consist entirely of the commercial property in which Mr Burns's businesses' activities were carried on. In those circumstances, assuming the IFA firm making the arrangements for Mr Burns made a personal recommendation as to the suitability of the SIPP, it would be the duty of the IFA firm who advised Mr Burns to advise on the suitability of the SIPP as an investment vehicle and in making that assessment it would have to consider whether the underlying investments proposed were consistent with Mr Burns's attitude to risk, as established through the fact find carried out pursuant to the requirements of COBS 9.2.1. and 9.2.2.

269. The firm would also have to consider, as required by COBS 9.2.2 whether Mr Burns had the necessary experience and knowledge in order to understand the risks involved in the transaction, which would include the risks inherent in the underlying investments proposed to be acquired. If the firm was of the view that Mr Burns understood all of those risks and was prepared to accept them and that he was able financially to bear any related investment risks consistent with his investment objectives, then it could reasonably take the view that recommendation to establish the SIPP with Mr Burns's chosen investments were suitable for him. If the firm felt that it was not suitable having taken account of all those matters, it would have the duty to advise him of that view, but it would still be open to Mr Burns to decide that notwithstanding that advice, he nevertheless wish to proceed with the transaction.

270. That analysis is consistent with the view that Mr Pope expressed in his oral evidence, as recorded at [96] above, that is that a firm advising on a pension switch into a SIPP did not have to provide separate advice on the underlying investments if the customer chose their own investments, but would still need to look at the SIPP as a whole for determining whether it met the customer's requirements.

271. The position of Mr Burns and his pension arrangements were, however, quite different to those of the typical TMI customer, as represented by those of the consumers who gave evidence in this case.

272. In all the situations we examined, whether they were consumers who gave evidence on behalf of the Authority, or consumers who gave witness statements in support of Mr Burns's case, the proposed investments to be held within the SIPP which TMI in each case advised them to establish were incompatible with the relevant customer's attitude to risk and TMI could not have been satisfied that the relevant customers had the necessary experience and knowledge to understand the risks that were inherent in the investments they had chosen. Mr Burns contended that the overseas property investments were not high risk because the relevant investment providers had offered "guaranteed returns". However, such guarantees were no more than a promise by the providers themselves rather than any third party guarantee and the value of the "guarantee" was therefore dependent upon the creditworthiness of the relevant provider and it completing the property development in question, which, as proved to be the case, carried a significant risk of failure.

273. It would be readily apparent to any competent financial adviser that for an unsophisticated retail investor with a relatively small pension pot represented either by interests in a defined benefit scheme or in a personal pension invested in a spread of traditional investments, to switch his benefits into a SIPP which was to be wholly invested in either a single or very small number of inherently risky overseas property investments was a wholly unsuitable course of action for that investor to take. It was quite clear from the evidence given by the consumers that those investors were relying on TMI to advise them as to whether the course of action that they were proposing to take was appropriate. They, not unreasonably, made no distinction between TMAI's activities and those of TMI, particularly as it was often the case that the same introducer was involved in the introduction to the product provider of the alternative investment and the subsequent introduction to TMI for the purpose of obtaining advice on the establishment of a SIPP. As far as the consumers were concerned, the process was a seamless one through which they were advised by "TailorMade". The idea that these investors would obtain independent advice on the underlying investments promoted by TMAI was totally unrealistic, and it is clear to us that such advice would not have been readily available in any event.

274. As we record at [122] above, Mr Burns said that there was an obligation on the part of the adviser to "consider" or "bear in mind" the nature of the proposed underlying investment when advising on the establishment of a SIPP, but we have seen no evidence as to how that was done in practice. All the evidence from the suitability reports we have seen and the evidence from the consumers, is that there was no reference to the suitability of the underlying investment product.

275. We therefore conclude that TMI's advice model was flawed and its personal recommendation process did not therefore in practice comply with the Authority's relevant regulatory requirements.

276. We must now consider Mr Burns's personal culpability in relation to that failure.

277. The responsibility for the adoption of the advice model laid with TMI's Board of Directors as TMI's governing body. All four of those directors approved the advice model and knew how it was intended to operate.

278. Mr Burns's position was that he was not to be regarded as being personally responsible for the failings of the advice model, either because it was flawed from the outset or because of the way that it operated in practice.

279. Aside from the flaws in the model, the evidence shows that there were wholly inadequate systems and controls around TMI's advice process. Again, it is the responsibility of the governing body of a firm to take reasonable steps to ensure that there are appropriate systems and controls in place.

280. The failings, taken from our findings at [164] to [188] above, can be summarised as follows:

(1) The failure on the part of the Board to review in a structured fashion the way that TMI's business was operating or how individual directors were performing their functions and put in place arrangements whereby the Board would receive adequate management information as to how the firm was complying with its regulatory obligations;

(2) The reliance of the Board entirely on the knowledge and experience of, at the outset, its external compliance consultants, and latterly Mr Horrabin, in relation to compliance issues without any process of challenge or formal reporting being put in place;

(3) The failure to document the policies laid down in the advice model and adopt a process whereby it could be tested whether those policies were being complied with;

(4) The failure to put in place a formal mechanism to ensure that the Board were provided with information to allow it to identify, measure and control any risk of unfair treatment to customers;

(5) The failure to address the conflicts of interest issue in a timely fashion; and

(6) The failure to address emerging issues raised by Mr Horrabin, particularly the question of the appropriate critical yield to be use as a benchmark for deciding whether pension transfers should be recommended.

281. As a result of these failings, there was no adequate monitoring of whether the advice model was being complied with in practice. As we have found, in a number of cases it was not, with customers being given advice on the underlying investments even though it was TMI's policy not to do so.

282. The same is true as to the question as to whether COBS 19.1 was in practice being complied with; there are a number of cases which we have identified where the recommendation to effect a pension transfer could not have been suitable because of the high levels of returns that would have to have been achieved within the SIPP to match the existing benefits. Information on these issues was not readily made

available to the Board so that it could decide what action should be taken in response. Consequently, there was no opportunity for the Board to consider regularly whether the numbers of recommendations to transfer out of defined benefit schemes gave rise to concerns that the requirements of COBS 19.1.6 were being complied with which could then be addressed.

283. These failings follow inevitably from the "silo" approach that the directors of TMI operated. As we have found at [165] to [168] above, Mr Burns did not seek to play any significant role in relation to matters which did not fall within his own individual sphere of responsibility and did not consider that his role required him to understand pensions and pensions switching nor whether the advice model and the suitability process was compliant with the Authority's requirements. In effect responsibility for those matters was delegated to Mr Lloyd Pope without any of the other directors seeking to understand the relevant issues themselves or put themselves into a position where they could properly challenge and understand the basis on which Mr Pope had structured the advice model and the processes which were operated pursuant to that model.

284. It was not open to Mr Burns to delegate his responsibility in that manner and therefore satisfy his own individual responsibility as a director. Principle 7 makes it clear that it is incumbent upon any person who accepts the appointment to a significant influence function to 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. As the board of a regulated firm is the governing body responsible for ensuring that the firm does comply with these requirements, there is responsibility on individual directors to take reasonable steps to ensure that these obligations are discharged.

285. That does not mean that it is not permissible for a board to vest prime responsibility for matters such as compliance in one of their number who is more expert than the others on such matters. However, that does not absolve the other members of the board from obtaining a sufficient understanding of the business of the firm which they are ultimately responsible for managing, the key issues that are likely to arise out of its business model, and the manner in which they are being addressed. There is a clear obligation on the part of the board as a whole to provide a challenge to the actions of individual directors performing particular functions and to ensure that there are processes in place whereby they can receive the necessary information to enable them to discharge that function. If an individual board member is not able to acquire the necessary expertise to undertake that task within a regulated firm, then he should not accept the appointment. We therefore reject Mr Burns's submissions that it was acceptable for him to rely entirely on Mr Pope having undertaken the necessary work to be satisfied that the advice model was compliant with the Authority's regulatory requirements and to leave him to take responsibility for the way that it operated in practice, without himself taking a close interest in the manner in which those functions were being discharged.

286. We endorse in this respect the guidance set out in the relevant provisions of APER 4.7, which we set out at [20] and [21] above. That guidance indicates that it is

the responsibility of an individual director to take reasonable steps to monitor compliance with the relevant requirements and standards of the regulatory system and to inform himself about the reason why significant breaches of the relevant requirements may have arisen. It is apparent from our findings, that Mr Burns did not take such reasonable steps. The guidance also indicates that even if the director had not himself undertaken responsibility for putting the necessary systems and controls in place, he nevertheless should take reasonable steps to ensure that those systems and controls are reasonably robust. Again, Mr Burns failed to take those steps.

287. Mr Burns did in his skeleton argument set out a list of the matters that he said he personally undertook and which he regarded as constituting reasonable steps to comply with Principle 7 including:

> (1) Ensuring that pension transfer business was only conducted by suitably qualified and authorised experienced pension transfer specialists;
>
> (2) Ensuring that the due diligence conducted on Mr Lloyd Pope, prior to starting activity, was comprehensive enough for him to be able to rely on in to perform the functions for which he was accountable;
>
> (3) Allocating relevant roles and responsibilities to the right people according to their existing qualifications and previous experience;
>
> (4) Informing the Authority of TMI's business model during the application process in 2009 and of its advice model in January 2012;
>
> (5) Ensuring that Mr Lloyd Pope attended the Authority's compliance workshops;
>
> (6) Ensuring that TMI had an established and recognised, external compliance resource in place;
>
> (7) Engaging legal and further external compliance support to comment on the advice model;
>
> (8) Instructing a root and branch report to be carried out on TMAI and TMI by legal advisers, including as regards the advice model;
>
> (9) Putting clients at the heart of the business;
>
> (10) Introducing a quality-control questionnaire to gain client feedback so as to help insure TMI was treating clients fairly;
>
> (11) Ensuring compliance and treating customers fairly issues were on the agenda for board meetings and discussed at length;
>
> (12) Discussing the advice model and processes with suitably qualified individuals who raised no concerns;
>
> (13) Challenging Mr Pope, as far as his knowledge allowed, often verbally, occasionally by email and sometimes during board meetings;
>
> (14) Ensuring a full-time, internal compliance department was established and that compliance had extra staff when more was required;

(15) Latterly employing the services of another IFA pensions specialist to improve the quality of compliance outputs, including managing conflicts, the content of suitability report and client outcomes in general.

288. We accept that all of the matters enumerated above were useful, but by and large they go to points of detail rather than fundamental issues regarding the establishment of comprehensive systems and controls and a process of continuous challenge that we have identified above. Furthermore, there was very little evidence to demonstrate how effective these matters had been. For example, the report by legal advisers on the advice model has never been made available. Although that report is covered by legal privilege, it would have been open to Mr Burns to have disclosed it to demonstrate what steps were taken to satisfy himself as regards the efficacy of the advice model. The matters enumerated above do not come close to satisfying Mr Burns's obligations in this regard.

289. Mr Burns also sought to place some responsibility on the Authority for the failures that happened. In particular, he criticises the Authority for not making its rules clear and informing TMI and the other firms operating similar business and advice models that those models were flawed, until the alerts were issued in January 2013. He also said that the Authority should have pointed out the existence of the various conflicts of interest to TMG.

290. The Authority's approach to the regulation of small firms which are not subject to constant and intrusive supervision appears to be very much reliant upon market intelligence about problems that are emerging with the way in which advice is being delivered coming to the attention of the Authority, either in the form of customer complaints or whistle-blowing, or from what it deduces from the regulatory returns the firm is required to make. In her witness statement, Ms Ferreira said that the Authority would deal with issues only when they arose. Whilst there is some limited guidance on its website in relation to a firm's responsibilities when advising on SIPPs, for example PERG, firms are very much left to work out for themselves how, for example, the rules on personal recommendations apply in the context of SIPPs which invested in alternative investments. As we have mentioned above, in our view the guidance contained in PERG was not particularly clear.

291. We are very conscious of the need not to look at matters which occurred during the Relevant Period with the benefit of hindsight. However, during 2008 when following the financial crash there was an increasing activity on the part of IFA firms in recommending alternative investments, both in the context of unregulated collective investment schemes and in SIPPs, and in a context where the Authority had identified some issues which related to SIPPs which led it to undertake a thematic review, it is perhaps surprising that the particular problem that arose out of the business model of TMI and other firms operating in a similar fashion was not detected earlier. As our findings in respect of TMG's dealings with the Authority during the Relevant Period demonstrate, there were snippets of information coming into various parts of the Authority both involving TMI and other firms which, if they had all been drawn together, might have led to the Authority identifying the issues earlier than it did. For example, we record at [207] above that information received regarding TMI

was not acted upon because it did not relate to the particular project that the person within the Authority who received it was working on. There is therefore a hint of a degree of a "silo" approach within the Authority itself.

292. However, none of these matters can help Mr Burns. Ultimately it was TMI's responsibility to make sure it complied with the rules. Even if there was some doubt about how COB 9.2 should apply in relation to TMI's own particular advice model, as we have indicated above, it must have been readily apparent to any reasonably competent financial adviser or a non-specialist director who had properly informed himself as to the issues relating to the firm's business that there must be questions as to whether a customer was being treated fairly, as required by Principle 6, where the ultimate result of the advice given was that a customer ended up being reliant upon the performance of a limited number of highly risky investments for a decent pension, in circumstances where his attitude to risk was clearly incompatible with the proposed investments. In our view, Mr Burns himself, although no longer acting as an investment adviser, had sufficient knowledge and experience of the industry to have made that assessment himself.

293. In the case of TMI, consideration of these issues was left entirely to Mr Lloyd Pope. The appropriate course of action for Mr Burns to have taken would have been to have asked Mr Pope to explain the basis on which he had formed the view that the advice model was compliant with the Authority's rules. It is unlikely that Mr Pope could have given an adequate explanation himself, and in those circumstances the appropriate action would be for the Board to take further steps to satisfy itself on the issue, which may entail taking appropriate professional advice.

294. It is clear that TMI had regularly engaged legal advisers who held themselves out as being experts on the regulatory field so that it is clear that this opportunity was open to TMI. Mr Burns suggested that such advice may well have been given in the reports from Regulatory Legal that he commissioned, but as we have mentioned above, those reports have not been disclosed. Had TMI had advice from a competent firm of lawyers that its advice model was compliant, then there would be the case for saying that reasonable steps to ensure compliance with the regulatory system had been taken. However, bearing in mind how the advice model looks from the perspective of the customer, as explained at [292] above, it is likely that at the very least a competent firm of lawyers would have said that they had some concerns about the model and seek further specific guidance from the Authority, in the event that they took the view that the position was uncertain. Therefore, through that process, it is likely that it would have been established that the advice model was not one that could be safely adopted by a firm seeking to comply with its regulatory obligations.

295. We therefore conclude that in relation to the establishment of the advice model, the operation of the advice processes and the systems and controls around that model and processes, Mr Burns failed to take reasonable steps to ensure that the business of TMI for which he was responsible as a director complied with the relevant requirements and standards of the regulatory system, in breach of Statement of Principle 7.

Mr Burns's responsibility in relation to conflicts of interest

296. The first stage in the consideration of this issue is to determine whether TMI's arrangements for the identification and management of conflicts of interest complied with the relevant regulatory requirements.

297. Mr Burns did not seek to dispute that the fact that he received a significant financial benefit from TMAI due to his position as a shareholder and director, which was paid to him either directly or through a remuneration trust linked to TMAI, gave rise to a conflict of interest because of the manner in which TMG's business model operated. As the Authority contended, TMAI would only benefit financially from the fact that it had promoted an alternative investment to a customer (through the payment of a significant amount of commission from the relevant product provider) if that customer was advised by TMI to transfer their pension into a SIPP in which that alternative investment would be held. The acquisition of the alternative investment, and accordingly the payment of the commission to TMAI could only proceed if the customer was recommended to establish a SIPP. Accordingly, as the Authority contended, Mr Burns had an interest in the outcome of the advice TMI was giving to customers referred to TMI by TMAI which was separate and distinct from the customer's interest in the same advice and there was therefore an obvious conflict between the interest of Mr Burns and TMI's customers. That was a conflict that needed to be managed in accordance with the Authority's relevant regulatory requirements.

298. As we have found at [160] above, Mr Burns was not aware that the circumstances gave rise to a conflict of interest which required to be managed, although he did say that the conflict was disclosed verbally by himself to those customers which he introduced to TMI. As we found at [159] above, TMI's client agreement did deal with conflicts of interest and provided that if TMI became aware that their interests conflicted with the customer's interest it would write to the customer and obtain his consent before it carried out the customer's instructions.

299. Therefore, there were two principal breaches on the part of TMI. First, it failed to identify the conflict of interest and secondly, since it had failed to identify it, it failed to manage it in the manner provided for in the customer agreement.

300. Furthermore, when a conflict of interest policy was ultimately adopted in October 2012, at the instigation of Mr Horrabin, it did not deal with this particular conflict satisfactorily, merely recording it as a conflict and saying that it was a matter that had to be kept under review.

301. It follows from the foregoing, that during the Relevant Period TMI was in breach of both Principle 8 and the relevant provisions of SYSC 10.1 in relation to the manner in which it identified and managed conflicts of interest.

302. We must now consider Mr Burns's personal culpability in relation to that failure.

303. The conflict of interest was one that concerned Mr Burns personally. The matter was therefore entirely within his own knowledge. In our view, this was an obvious conflict that any reasonably competent director of a regulated firm should have identified, even if he was not an expert in compliance. However, this again was a matter that Mr Burns had determined fell properly within the scope of Mr Lloyd Pope's responsibility as the director initially responsible for compliance issues. For the reasons that we have stated above in relation to the advice model, Mr Burns cannot delegate his responsibility in this way.

304. Therefore, in failing to identify the conflict which was a matter for which he was personally responsible as it was a conflict that related to him personally, such failure also inevitably led to the consequence that the necessary steps to manage that conflict were not taken, Mr Burns failed to take reasonable steps to ensure that the business of TMI for which he was responsible as a director complied with the relevant requirements and standards of the regulatory system, in breach of Statement of Principle 7.

305. We therefore find that the Authority has made out its case on Issue 1.

Issue 2: Limitation

306. We have found that Mr Burns acted in breach of Statement of Principle 7 in failing to take reasonable steps to ensure that TMI identified and managed the conflict of interest referred to above.

307. Therefore, if we consider appropriate, we can direct that a financial penalty be imposed upon Mr Burns in respect of such failure pursuant to s 66 FSMA, provided Mr Burns was issued with a Warning Notice within 3 years from the first day on which the Authority knew of Mr Burns's misconduct in that regard: see s 66 (4) FSMA. As we have stated at [44] above, "knowledge" for this purpose includes having information from which the misconduct can reasonably be inferred: see s 66 (5) FSMA.

308. It was common ground that the principles to be applied in determining whether the Authority has the requisite knowledge for this purpose are those laid down by this Tribunal in its decision in *Andrew Jeffrey v FCA* (2013). In that case, having referred to s 66 laying down two tests, namely the "knowledge" test in s 66 (4) and the "reasonable inference" test in s 66 (5) the Tribunal said this at [333] to [338]:

> "332. The first of these is a subjective test which looks at the actual knowledge of the Authority. It relates to actual knowledge of the misconduct. That has to be construed by reference to s 66(1). For time to start running in this respect the Authority must have actual knowledge that the particular person against whom action is to be taken has either failed to comply with a statement of principle issued under s 64, or has otherwise contravened as provided by s 66(2)(b).
>
> 333. The second test – the inference test – is an objective test. It is whether, absent actual knowledge, the Authority ought, on the basis of the information available to it, and applying a test of reasonableness, to have inferred that the

relevant person had failed to comply with a statement of principle or had otherwise contravened.

334. There is a particularity to each of these tests. It is not sufficient that the Authority has information in its hands that would give rise to a mere suspicion. Nor is it enough that the information might suggest that there was misconduct, but that the person in question has not been identified as the apparently guilty party. The Authority must either know or be treated, by reasonable inference, as knowing of the misconduct by a particular person. The reference in s 66(4) to "the misconduct" (our emphasis) clearly refers to the particular misconduct in respect of which action is to be taken against a particular person, and not to conduct of a similar nature in respect of which information may have been obtained earlier.

335. Questions will arise as to the degree of certainty required before time can be regarded as running. There is a clear purpose in s 66 that the Authority should be allowed a reasonable period to investigate before being required to issue a Warning Notice. Consistent with that purpose, and to provide a balance for the affected person, the time at which the limitation clock is set cannot be when the case has been fully investigated and the Authority is ready to proceed. Time must start running at an earlier stage in the process.

336. Some assistance on the correct approach can here be derived from the cases on s 14A of the Limitation Act 1980. In *Haward v Fawcetts*, Lord Nicholls (at [9] and [10]) referred to the degree of certainty required before knowledge can be said to exist, and the degree of detail required before a person can be said to have knowledge of a particular matter. Referring to the guidance of Lord Donaldson in *Halford v Brookes* [1991] 1 WLR 428, 443, it was noted that knowledge does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence; suspicion, particularly if it is vague or unsupported, will indeed not be enough, but reasonable belief will normally suffice. In other words, the claimant must know enough for it to be reasonable to investigate further. As to the degree of detail required, what is necessary is not a full appreciation of all the relevant facts, but a "broad knowledge of the essence" of the relevant acts and omissions (*Spargo v North Essex District Health Authority* [1997] PIQR P235, per Brooke LJ).

337. These principles are instructive, but not in our view determinative, of the construction of s 66(4). That construction must have regard to the context and the evident purpose of s 66. On that basis, for time to start running it is not necessary that the Authority has the full picture that would justify the issue at that stage of a Warning Notice. Although the Authority may only take action under s 66(1) if it appears to it that the relevant person is guilty of misconduct, the limitation period starts to run from an earlier time, when the Authority knows or has information from which the misconduct can reasonably be inferred. The Authority must, however, have sufficient knowledge of the particular misconduct, or such knowledge must be capable of being reasonably inferred, to justify an investigation. Mere suspicion is not enough, nor is any general impression that misconduct may have taken place.

> 338. There will be cases where information about possible misconduct will be received by the Authority piecemeal and over an extended period. At an early stage in the process such information may be inadequate for the Authority to know of a particular misconduct by a particular person, or to be able to infer such misconduct. A mere allegation or assertion unsupported by evidence would be unlikely to be regarded as sufficient to amount to knowledge of misconduct or as information from which it would be reasonable for the Authority to have inferred misconduct, although it might be expected to give rise to further enquiry. Knowledge of an allegation of misconduct is not the same as knowledge of the misconduct. As an investigation progresses more information may come to light as a result of which there comes a time when the Authority either knows, or it can reasonably be inferred from information which the Authority has, that there is substance to an allegation of misconduct in relation to a particular person. It is only at the latter stage that the time limitation begins to run in respect of that misconduct. Provided a Warning Notice is issued in respect of the misconduct within two (now three) years from the earliest time when the Authority knew of the misconduct or the misconduct could be reasonably inferred, the Authority may rely on all the information it is obtained both before and after that time."

309. Mr Burns's Warning Notice was issued by the Authority on 7 December 2015. The key date for the purposes of s 66 (4) was the second day after posting, which is 9 December 2015. Therefore, as Mr Pritchard submitted, as regards the misconduct in relation to management and disclosure of conflicts of interest, the question is whether or not the Authority had the information to satisfy the requirements of s 66 (4) on or before 9 December 2012.

310. Mr Burns relies on the following matters to support his contention that the limitation period had expired by 9 December 2015:

(1) The information obtained as a result of the Montpelier investigation, as summarised at [206] and [207] above;

(2) The information obtained by the Authority during the course of TMI SIPP's application for authorisation, and in particular at the meeting held on 16 January 2012 referred to at [193] to [198] above and the further information obtained following that meeting, as detailed at [199] and [209] above; and

(3) The information received from the visit to 1 Stop as referred to at [203] to [205] above.

311. Mr Burns does not contend that the Authority had actual knowledge that TMI had conflicts of interest that were not being disclosed to customers and consequently which were not being properly managed as a result of the receipt of this information. However, he does contend that such misconduct could reasonably have been inferred from that information.

312. Mr Burns has been persistent and assiduous in his pursuit of the limitation issues in this case. As we have mentioned, he was fully justified in that pursuit as regards the Authority's knowledge as regards the advice model and in light of what

we regard as the inexplicable failure of the Authority to recognise the limitation issue as regards the advice model until proceedings were well advanced in this Tribunal, for which Mr Monaghan apologised, we can understand why he would be sceptical about the Authority's contentions that there is no limitation issue in relation to the conflict of interest issue.

313. As regards the failings in respect of the advice model, Mr Monaghan sought to explain it in terms of there having been in the past a less rigorous approach as regards settled cases, but that does not apply in this case because the Authority persisted before the RDC in its contention that there was no limitation issue despite having had extensive discussions with Ms McIvor on the issue in September 2015 in the context of the RDC proceedings, as referred to at [196] above. This is the second occasion in recent times that the Tribunal has had cause to be troubled by the Authority's approach to limitation and disclosure: see *Arif Hussein v FCA* [2018] UKUT 0186 and the earlier interlocutory decision at [2016] UKUT 0549 and it is also a matter that has concerned the Complaints Commissioner, who observed that the approach to the limitation issue in that case was suggestive of a closed-minded attitude.

314. However, we have concluded that the evidence on which Mr Burns relies is insufficient to lead to a conclusion that it could have reasonably been inferred by the Authority prior to 9 December 2015 that Mr Burns had been guilty of misconduct as regards the conflict of interest issue for the following reasons.

315. The information which was known by the Authority on 9 December 2015, when taken together, amounts to the following.

316. As a result of the information it obtained during the Montpelier investigation it was alerted to the possibility that TMI may be giving unsuitable advice to its customers because of the fact that a high proportion of the SIPPs which were referred to Montpelier contained esoteric and illiquid investments.

317. By 16 January 2012, as a result of the meeting held with the Authority on TM SIPP's authorisation application, as recorded at [192] to [195] above and the information provided in the application itself, the Authority had information about the TMG group structure and the roles of the various companies within the group, from which it might reasonably be inferred that issues regarding conflicts of interest may be of concern in relation to TMI bearing in mind its business model. As we have found, and Mr Burns does not dispute, there was no disclosure at that meeting as regards conflicts so far as they concerned TMI and the only discussion regarding conflicts centred around the potential conflict with customer's interests that could arise because of the relationship between TMI and TM SIPP.

318. Mr Burns submits that the Authority ought to have inferred from what Ms McIvor learned from the meeting as regards conflicts concerning the relationship between TMI and TM SIPP that there were conflicts elsewhere in the group that also needed to be managed. We accept that bearing in mind the totality of the information in the possession of the Authority as a whole at that point it could reasonably be inferred that as a result of what the Authority knew about the TMG group as a whole

and the roles of the various companies within it, that there was a wider conflict of interest issue that merited further investigation. However, the key question is whether it could be inferred from that information that TMI had failed to appreciate there was a conflict arising out of its relationship with TMAI and consequently that that conflict was not being managed, an issue which we return to shortly.

319. The further information that had been obtained by June 2012, in our view, does not take matters further as regards the key question identified at [317] above. Indeed, Mr Kesic's email, referred to at [210] above indicates that how conflicts of interest were managed within TMG was a matter that the Authority might need to consider, but it had no further information on that issue at that point.

320. Likewise, in our view information that the Authority obtained as a result of the 1 Stop visit in September 2012 did not take matters further as regards the key question identified at [317] above. The Authority had concerns at that point about how 1 Stop managed conflicts of interest but, in our view, that information could not be extrapolated to say that as a result of TMI operating a similar business model which inevitably involved conflicts of interest, it was not managing those conflicts.

321. It is also clear from Mr Smart's email of 30 November 2012, referred to at [213] above, that the Authority was of the view that it needed to do further work on TMI to demonstrate that they had similar failings. In the context of the conflict of interest issue, this would mean establishing whether there were conflicts that were not being appropriately managed. This is reinforced by the Authority's letter of 20 December 2012, which was the first time it was indicated that the Authority was seeking to establish how conflicts of interest were managed.

322. The decision in *Jeffrey* indicates that in order for the limitation period to start running the Authority must know enough for it to be reasonable to investigate further, and that what is necessary is not a full appreciation of all the relevant facts but "a broad knowledge of the essence": see [336] of the decision. However, these principles need to be applied in the context of the particular misconduct that is being alleged. In this case, the relevant misconduct is Mr Burns's failure to appreciate that there was a conflict, and consequently the failure on the part of TMI to manage that conflict. It is apparent from our findings on the facts that the Authority had no knowledge of those matters until its further investigations that commence with its letter of 20 December 2012. As the Tribunal in *Jeffrey* said at [337] of its decision, the Authority must have sufficient knowledge of the **particular misconduct,** [emphasis added] or such knowledge must be capable of being reasonably inferred, to justify an investigation.

323. Clearly the Authority had no knowledge of the particular misconduct in this case. Neither in our view was such knowledge capable of being reasonably inferred from the information that it did have. It certainly had enough information on which it could take steps to find out whether the conflicts of interest which it had identified by 9 December 2012 were being properly managed, but, in our view, it could not be inferred from the information it had that they were not being managed. We therefore characterise the information that the Authority did have before 9 December 2012 as

giving rise to no more than mere suspicion, and, as explained by the Tribunal in *Jeffrey* at [337] of its decision, that is not enough.

324. We therefore determine the limitation issue in favour of the Authority and conclude that we have jurisdiction to direct that a financial penalty be imposed on Mr Burns in respect of his failings regarding the conflicts of interest issue.

Issue 3: Financial Penalty

325. Mr Burns submits that were we to find, as we have, that we have the power to impose a financial penalty, nevertheless we should not impose a penalty in this case. Mr Burns observes that the minutes of the Authority's meeting with 1 Stop record the Authority's assessment that if its concerns in that case were confined to conflicts of interest and systems and controls then it would ask the firm to address those. He therefore questions whether it is appropriate to deal with his failings in this case as regards conflicts of interest on the basis that a financial penalty is appropriate.

326. The Authority contends that the financial penalty which it proposes, that is £116,830, being one half of the financial penalty that it sought when it believed that it was open to it to impose a penalty in respect of the failings as regards the advice model as well, is proportionate in the circumstances. The Authority submits that its proposed penalty is appropriate because TMI is at the heart of huge, crystallised consumer detriment. It submits that that detriment is directly attributable to Mr Burns's conflict failings because had TMI disclosed the conflict of interest customers would have been unlikely to agree to transfer their pensions to invest in the alternative investments.

327. In our view the imposition of a significant financial penalty in this case is justified and appropriate. As the Authority's penalty policy states, the principal purpose of imposing a financial penalty is to promote high standards of regulatory conduct by deterring persons who have committed breaches from committing further breaches and helping to deter other persons from committing similar breaches and demonstrating generally the benefits of compliant behaviour.

328. In this case, the failure to identify and manage the conflict of interest was a serious matter. We have no doubt that it did contribute significantly to the very significant consumer detriment, detriment which is illustrated by the evidence from the FSCS in this case. It was, as we have said, an obvious conflict that should have been apparent to a reasonably competent director of a financial services firm carrying on business of the type with which TMI was concerned. It is therefore important that a clear message is given to the industry at large that such behaviour is serious and requires adequate deterrence.

329. We also accept, as a number of the consumer witnesses said, if they had known about the conflict and the commissions being paid, they would not have made the investments they did. Undoubtedly that would not be a universal view and we cannot say that every consumer would have taken the same view. Their views, expressed

with hindsight, are likely to have been coloured by the fact that they will have lost money in any event.

330. However, we do not accept that the failings in relation to the conflicts of interest issue are as serious as those related to the advice model and the manner in which it was established without proper scrutiny and then operated with an absence of proper systems and controls. Those failings are the primary reason why the consumer detriment has occurred, and the conflict of interest failings are secondary to those concerns.

331. We therefore consider that a reduction of more than 50% should be applied to the original penalty. We have concluded that an appropriate and proportionate figure in this case is £60,000. That is a considerable penalty in relation to misconduct by an officer of a comparatively small firm, although in this case the firm's business was expanding rapidly before it had to cease business and, as we have said, the impact on consumers has been very significant.

Issue 4: Prohibition

332. Mr Burns submits that it would be disproportionate in this case to impose a prohibition order. He submits that any prohibition would all but end his ability to earn a livelihood within financial services, a sector in which he spent most of his professional life and that even though the proposed prohibition order would only extend to significant influence and senior management functions, it would restrict his ability to find any suitable employment in the industry.

333. He also submits that he has learned lessons from the events that have led to these proceedings, and, in particular, took immediate steps to address the issues highlighted by the Authority following the issue of its alerts in January 2013. He cooperated with the Authority and proactively created and implemented a remediation plan, which he subsidised at considerable personal cost. The Authority had accepted that what he did were the steps to be expected of any director of an authorised firm. Mr Burns also refers to the further training he has undertaken, and the courses he has taken as regards the duties of a director. He therefore submits that he is competent to perform a CF 1 role and would not represent a risk to the public in the event that he was approved to exercise such a function in the future.

334. The Authority contends that Mr Burns's evidence and submissions in this case demonstrate a fundamental lack of understanding of the responsibilities of an authorised firm, responsibilities of approved persons and the relationship that must exist between the Authority and regulated persons. In those circumstances, a prohibition order to the extent sought in this case is appropriate and not disproportionate.

335. As this Tribunal said in *Palmer v FCA* [2017] UKUT 0313 (TCC) at [266], in the case of a lack of competence, it would be irrational to impose a prohibition order except where the lack of competence demonstrated was such that the person concerned is likely to represent a risk to the public in future.

336. However, our view is in this case that Mr Burns has demonstrated a fundamental lack of competence and capability to perform significant influence and senior management functions in a regulated firm through the manner in which he performed his functions as CF1 at TMI.

337. It is quite clear that during his time at TMI, he had no appreciation of the functions of the governing body of a regulated firm, as opposed to the role of individual directors. It is apparent from the submissions that he made to the Tribunal, as regards his view that it was reasonable for him to have relied entirely on Mr Lloyd Pope, that despite his subsequent training courses he still does not understand the respective roles of the board and its individual directors. We have also referred to the fact that he did not recognise an obvious conflict of interest and one of his answers to a question from the Tribunal illustrates that he may not even now see the significance of such a conflict. He was asked about a complaint made by a customer, Mr Perriam, about the fact that TMAI had received £8,000 of commission from Harlequin which he had not been informed about. Mr Burns said that the complaint was being pursued not because Mr Perriam was not happy that £8,000 of his investment was not working for him but because he wanted a share of that commission, which would not have been legal. Mr Burns failed to appreciate the fundamental point that Mr Perriam wanted Mr Burns to comply with TMG's obligation not to profit from his customer without his specific consent, as was provided for in TMI's own terms of business.

338. Mr Burns emphasised many times that he regarded himself as a relative layman in relation to TMI's business, despite his lengthy period of work within the financial services industry. In his answers to questions from the Tribunal, he did not appear to appreciate the need for a director of a regulated firm to familiarise himself with the essentials of the firm's business before taking on the role. Mr Burns was asked what he would do now if he was asked to take up an appointment of a similar firm to TMI in the future before he accepted the appointment and failed to come up with any credible suggestions as to how he might assess the current state of the firm's business and the issues facing it. He still seems attracted to the "silo" concept, saying that he would do more of a risk analysis in his own particular "silo", and in relation to areas outside of that he would do a "sense check". He said he would seek advice where he had knowledge gaps but was unable to be more particular about what that advice would cover.

339. Therefore, we are seriously concerned that Mr Burns shows limited insight into the duties of a director and the board of a regulated firm and has given no serious thought to what he would need to do to address his failings. We therefore have no confidence that he would not make similar mistakes again were he able to exercise senior management functions in a regulated firm in the foreseeable future.

340. On the credit side, Mr Burns is clearly a man of some ability with good business acumen. If he wishes to lead a business, maybe he needs to look at another sector for the time being and reflect more seriously on what has happened in the past. We fear that the understandable sense of injustice he feels at the manner in which he has been dealt with by the Authority as regards the disclosure and limitation issues that arose in this case may have coloured his judgment and prevented him from moving on to

address his own failings. Hopefully, that will diminish with time. There is also no reason why he cannot act in another role with a financial services firm, such as providing consultancy services. He is to be given credit for the steps he took to deal with the issues at TMI in the aftermath of the Authority's alerts in January 2013. We therefore do not accept that the imposition of a prohibition order necessarily means the end of his ability to earn a living. It is always open to him to seek revocation of the prohibition order, either on a partial or complete basis, once he has demonstrated that he is in a position to perform competently any relevant role he wishes to undertake.

341. We are therefore not satisfied that it would be disproportionate or irrational to make a full prohibition order against Mr Burns in respect of senior management and significant influence functions. Mr Burns's failings and his failure at the present time to demonstrate that he has learned from them are of such a nature that in our view there is a clear risk that they would be repeated were he in the foreseeable future to perform a senior management or significant influence function within a regulated firm.

342. We therefore see no basis on which we should interfere with the Authority's decision to prohibit Mr Burns from performing any senior management or significant influence function.

Conclusion

343. The references are dismissed, except insofar as we have determined a lower level of financial penalty to that sought by the Authority. Our decision is unanimous.

Directions

344. In relation to Mr Burns's disciplinary reference we determine that the appropriate action for the Authority to take is to impose on him a financial penalty of £60,000 pursuant to s 66 (3)(a) FSMA for failure to comply with the requirements of Statement of Principle 7 in carrying out his functions as a director of TMI as regards the manner in which conflicts of interest were managed.

345. 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 Burns prohibiting him from performing senior management and significant influence functions.

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

JUDGE TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE
RELEASE DATE: 31 July 2018