[2018] UKUT 0358 (TCC)

Reference numbers: FS/2014/005
FS/2014/006

FINANCIAL SERVICES – distribution by Keydata Investment Services Limited of bonds issued by SLS Capital S.A. and Lifemark S.A. backed by US life settlements – conduct of Mr Ford and Mr Owen – whether breach of Statement of Principle 1 (integrity) and Statement of Principle 4 (relations with regulators) – whether "fit and proper" – prohibition orders – FSMA, s 56 – financial penalties – FSMA, s 66 – disgorgement

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
FINANCIAL SERVICES

(1) STEWART OWEN FORD
(2) MARK JOHN OWEN **Applicants**

- and -

THE FINANCIAL CONDUCT AUTHORITY **Respondent**

TRIBUNAL: JUDGE ROGER BERNER
MS SUE DALE
MR PETER FREEMAN

Sitting in public at The Royal Courts of Justice, The Rolls Building, Fetter Lane, London EC4 on 5 October to 8 November 2017 and following further written submissions completed on 30 April 2018

The Applicants, Mr Ford and Mr Owen, in person

Andrew George QC and Daniel Burgess, instructed by the Financial Conduct Authority, for the Respondent

DECISION

Contents

Introduction

1. By Decision Notices issued by the Financial Conduct Authority ("the Authority")[1] to the Applicants, Mr Ford and Mr Owen, respectively on 7 November 2014, the Authority decided to impose:

(1) Prohibition Orders on both Mr Ford and Mr Owen pursuant to section 56 of the Financial Services and Markets Act 2000 ("FSMA"), prohibiting each of them from performing any function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm; and

(2) financial penalties, pursuant to s 66 FSMA, of £75 million against Mr Ford and £4 million against Mr Owen, for breaches of Statement of Principle 1 (integrity) and Statement of Principle 4 (relations with regulators).

2. On 4 December 2014, Mr Ford referred the Decision Notice relating to him to the Tribunal. Mr Owen did likewise on 5 December 2014. By a permitted

[1] The Decision Notices were in relation to decisions of the Financial Conduct Authority ("FCA") which was created with effect from 1 April 2013 by the Financial Services Act 2012. Much of the investigation which led to the issue of the Decision Notices was carried out by the predecessor body, the Financial Services Authority ("FSA"), and the Authority's case with respect to Statement of Principle 4 in particular concerns alleged breaches in relation to the FSA. For ease of reference, we shall refer throughout to the Authority, and that expression will include the FSA for all periods up to 1 April 2013 and from that date the FCA.

amendment to its statement of case in the course of these proceedings, and in the light of further evidence said to have been uncovered by the Authority since the Decision Notice, the Authority now seeks a financial penalty against Mr Ford of £76 million.

Glossary of terms

3. We set out at Appendix A a non-exhaustive glossary of terms. Many individuals, companies and other entities feature in this decision, most often in abbreviated terms. We hope that the addition of a glossary may be of some assistance to a reader, particularly when reviewing individual sections of this decision.

Outline of the parties' cases

4. Mr Ford was formerly the chief executive officer of Keydata Investment Services Limited ("Keydata"). Mr Owen was formerly the sales director. Between 26 July 2005 and 8 June 2009 ("the Relevant Period"), Keydata was engaged in the distribution (at least; the nature of Keydata's precise role is a matter of dispute), through independent financial advisers ("IFAs"), of four particular structured products, namely the Secure Income Bond ("SIB"), the Secure Income Plan ("SIP"), the Income Plan and the Defined Income Plan ("DIP") (these are together referred to as "the Products"). In each case, Keydata was issued with bonds by a special purpose vehicle incorporated in Luxembourg, which bonds were held for Keydata's retail investors. In relation to the first three issues (which were described as SIB1, SIB2 and SIB3 – "the SLS Products"), the issuing vehicle was SLS Capital SA ("SLS"); all other issues (SIB4, SIP1 to SIP14 and DIP1 to DIP8 – "the Lifemark Products") related to bonds issued by Lifemark SA ("Lifemark"). Each of SLS and Lifemark purchased second-hand US life insurance policies ("life settlements"). During the Relevant Period, more than £475 million was invested in the Products by over 37,000 retail investors.

5. Although there is a dispute about the role played by Mr Ford with Keydata during part of the Relevant Period, there is no dispute that throughout that period Mr Ford was an approved person with respect to Controlled Function 1 ("CF1") (Director function) and CF3 (Chief Executive function), and from the beginning of the Relevant Period to 31 October 2007 with respect to CF8 (Apportionment and Oversight function). Mr Owen was, throughout the Relevant Period, an approved person with respect to CF1, CF16 (Significant Management, Designated Investment Business, function) and CF29 (Significant Management function).

The Authority's case in outline

6. We shall examine the respective cases of the Authority and Mr Ford and Mr Owen in detail, but by way of overview the Authority's case may be summarised in the following way:

(1) Mr Ford and Mr Owen caused Keydata initially to begin marketing and selling the SLS Products despite failing to ensure that Keydata had carried out sufficient due diligence in respect of the viability of the financial model or the

third parties involved in the SLS structure, including its main promoter, one Mr David Elias. In fact, the financial model, to the extent it existed at all, was fundamentally flawed and incomplete. Moreover, important features of the purported structure, including a credit facility and hedging arrangements in respect of the US/UK currency risk, simply did not exist.

(2) As a consequence, the financial promotions for the SLS Products were substantially misleading, indicating wrongly that the SLS Products could be held in a tax-free Individual Savings Account ("ISA"), which required the underlying bonds to be listed on a recognised stock exchange, that they were supported by a credit facility and that they were created and managed in part by major institutions such as KPMG and HSBC.

(3) Almost immediately after sales of the SLS Products began, substantial flaws in the SLS Products became apparent and in December 2005 the SLS investment manager refused to accept further tranches of SLS Products. In particular, KPMG and HSBC entirely disavowed the claims made in Keydata's marketing material with respect to the work they had allegedly done or were to perform. As time went on, it became clear to Mr Ford and Mr Owen, as information requested from and promised by SLS repeatedly failed to be provided, that there was no workable financial model, no credit facility and no currency hedge, and that none of the SLS bonds had been listed.

(4) However, rather than halt sales, Mr Ford and Mr Owen simply rushed to replicate the flawed SLS Products through Lifemark. Lifemark was not, like SLS, a third-party organisation. It was established and beneficially owned by Mr Ford, who was also a director of Lifemark, ostensibly for the purpose of monitoring Lifemark's activities for the benefit of Keydata and its investors.

(5) Again, no sufficient due diligence was carried out in respect of the viability of the financial model for the Lifemark Products (which, to the extent it existed at all, effectively replicated that of the SLS Products) or the third parties involved in the Lifemark structure.

(6) Moreover, Mr Ford, as the beneficial owner and a director of Lifemark, was able to procure Lifemark (or other entities within the Lifemark structure) to enter into service agreements with offshore companies beneficially owned by him to extract exorbitant "fees" from Lifemark totalling £73.3 million. Mr Ford concealed those fees from Keydata's Compliance Officer (Mr Peter Johnson), the Authority (and the equivalent regulator in Luxembourg ("the CSSF")), investors, IFAs and professional advisers tasked by Keydata and others with attempting to model the cash flows of the Lifemark Products. These "fees" effectively crippled the already flawed Lifemark structure and, in light of the concealment, removed any possibility of accurately modelling the likely returns on the Lifemark Products.

(7) Mr Ford then personally paid Mr Owen undisclosed "commissions", totalling more than £2.5 million, based on the volume of sales of the Lifemark Products. Both Mr Ford and Mr Owen were thus incentivised to keep selling the Lifemark Products regardless of their flaws.

(8) During the course of 2007-09, both Mr Ford and Mr Owen became increasingly aware of the poor performance of and dire prognosis for both the SLS and Lifemark Products.

(9) In respect of SLS:

(a) Both Mr Ford and Mr Owen were aware that, despite the supposed financial model and credit facility, SLS was unable to pay its debts (including the promised returns to Keydata's investors) as they fell due and that this fact was being concealed from investors, the Authority and other stakeholders by means of Keydata funding payments which SLS was obliged to make on the bonds from Keydata's (or Mr Ford's) own resources.

(b) Mr Ford became aware that in fact the SLS business model had completely collapsed, its life settlements assets had been liquidated and, to the extent it had any remaining assets at all, they were vague guarantees provided by shadowy third-party entities controlled by Mr Elias with no connection at all to life insurance assets.

(10) In respect of Lifemark:

(a) Both Mr Ford and Mr Owen were aware that detailed analysis by experienced professional advisers, Grant Thornton and Deloitte, had revealed fundamental flaws in the design and performance of the Lifemark Products. Rather than cease sales and investigate the relevant issues, and in complete disregard of the professional advice Keydata had commissioned and received, Mr Ford and Mr Owen caused Keydata to conceal the issues from investors and the Authority and to keep selling the relevant Products.

(b) Mr Ford was aware that the advice of those professional advisers (negative though it was) in fact proceeded on a false and overly-optimistic basis as the fees which Mr Ford was extracting from the Lifemark structure through the purported service agreements had been concealed from the relevant analysts.

(11) Despite these matters, Mr Ford and Mr Owen took no substantive remedial action and specifically failed to notify the Authority, investors or IFAs of the (or of any of the) relevant risks. To the contrary, they continued issuing further tranches of Lifemark Products throughout the Relevant Period.

(12) Moreover, when the Authority began a focussed investigation of Keydata on 14 December 2007, Mr Ford and Mr Owen took concerted and deliberate steps to conceal from the Authority the true dire state of the Products and the substantial losses faced by investors in those Products.

(13) In relation to the proposed financial penalties:

(a) The amount of the penalty against Mr Ford (£76 million), while plainly substantial, is justified in light of the £73.3 million in undisclosed and unjustified "fees" extracted by Mr Ford from the Lifemark structure.

(b) The amount of the penalty against Mr Owen (£4 million) reflects the fact that he was a director of Keydata and, rather than exposing the fact that Mr Ford was acting improperly and holding him to account, he received "private" commission payments of more than £2.5 million from Mr Ford which he must have known were improper. It is not the Authority's case that Mr Owen knew everything that Mr Ford knew or was doing, but that what he did know should plainly have alerted him to the need for sales to be halted, the Authority to be informed, and immediate further investigations to be commissioned.

The cases of Mr Ford and Mr Owen in outline

7. Mr Ford and Mr Owen each deny any misconduct as alleged by the Authority or at all. They submit that the facts and matters relied on by the Authority do not evidence any failure on their part to act with integrity or any failure to deal with the Authority in an open and cooperative way. They deny that they are, as the Authority seeks to show, not fit and proper persons. Again, we shall examine the cases of Mr Ford and Mr Owen in detail, but by way of introduction we set out the following non-exhaustive summary:

(1) The Authority has misrepresented the nature of Keydata's business, which in regard to the Products was as a distributor of financial products designed, developed and issued by third-party producers. Consequently, Keydata's due diligence was commensurate with its role, and indeed was extensive and thorough.

(2) As distributor of the Products, Keydata was dependent upon the producer (SLS and Lifemark respectively) and upon the associated service providers to meet their respective obligations. It was the obligation of the payment administrator, the custodian, the investment manager, other advisers and the financial regulator in the producer's home jurisdiction to manage the bonds and supervise the underlying portfolio upon which the bonds were based. Keydata, as distributor, was dependent on those entities to ensure that there were no administrative risks, that there was enough liquidity to meet the obligations to bondholders and to prevent fraud. Furthermore, Keydata's distribution business was conducted through FSA-regulated IFAs, and not marketed directly to retail investors.

(3) Mr Ford resigned as chief executive officer of Keydata in April 2007. From that date, Mr Ford's day-to-day involvement in the management of Keydata changed fundamentally, as did his state of mind with respect to his role at Keydata. Mr Ford ceased to be resident in the UK. He specifically requested Mr Johnson, as compliance officer, to attend to the removal of his name from the Authority's register as CF3 and CF8, and the failure to do this was a compliance omission, in part due to the frustrated steps to recruit a new CEO in circumstances where candidates of the required calibre were deterred by the ongoing investigation by the Authority.

(4) It is denied that the financial promotions for the SLS Products were substantially misleading. In particular, as regards the ISA status of the bonds,

Mr Ford and Mr Owen relied upon the understanding of Mr Johnson, as compliance officer, that in order to qualify for ISA status the bonds issued in relation to the Products needed to be of five years' duration (which they were) and that the bonds had to be listed at some time during that five-year term. Mr Ford and Keydata were continually assured by Mr Elias and others associated with SLS on whom Keydata was entitled to rely that the bonds would be listed; those assurances were accepted in good faith. It was not known that the bonds would fail to qualify if not listed upon issue. Any breach of the ISA Regulations was inadvertent and should have been capable of remedy through the process of "simplified voiding" with HMRC, a remedy that was frustrated by the Authority's intervention in the process.

(5) Had Mr Elias and others not been intent on fraud and/or had the various SLS counterparties and servicing agents performed their roles, there would have been no difficulties with SLS's performance and solvency, nor with the listing of the SLS bonds. There was no deliberate concealment or anything reckless in the conduct of Mr Ford or Mr Owen or Keydata.

(6) On occasion there were delays in the timing of payments by SLS to Keydata, and on occasion Keydata did fund the interest payments on the SLS bonds. However, there was a mismatch in the contractual obligations in that the obligation on Keydata to make interest payments to bondholders was often earlier than the obligation on SLS to make payments to Keydata, which allowed a "cure period". Payments made to investors by Keydata in these circumstances reflected Keydata's culture of ensuring that investors did not suffer, and there was no deliberate concealment or reckless conduct. Mr Johnson was the point of contact with the Authority; he was aware that Keydata had provided funding for bond interest payments. The officers of Keydata relied upon Mr Johnson to collate all information to be provided to the Authority.

(7) Mr Ford was aware in or around October 2008 that SLS was experiencing a short-term liquidity problem. Given the global credit crisis, that was not a cause of extraordinary concern. Mr Ford made a secured loan to Mr Elias. However, by a deliberate and sophisticated fraud, Mr Ford and Keydata were misled by Mr Elias and others as to the true reason for the untimely and/or irregular payments by SLS and the true reasons for its lack of liquidity.

(8) Mr Ford had been reassured by Mr Elias that the SLS bonds would be redeemed by late 2008 or the first quarter of 2009. Mr Ford was wholly unaware, as it subsequently transpired, that in fact there was a much more serious problem with SLS in that Mr Elias, facilitated by others, had used the SLS funds for his own purposes.

(9) Mr Ford and Mr Owen deny that they caused Keydata to market and sell the Lifemark Products when they were aware that Keydata's due diligence had not been adequate, fell below regulatory standards or failed to uncover risks, including Mr Ford's alleged conflict of interest, or that they were reckless in any of those respects. The business model and financial viability of Lifemark was sound, and prior to the ill-advised interventions of the Authority in June

2009 the Lifemark business was performing satisfactorily and was on course to fulfil all its obligations to the Keydata investors.

(10) Keydata management fundamentally disagreed in good faith with several of the conclusions reached by Grant Thornton in the March 2008 Due Diligence Report. Grant Thornton's knowledge of the life settlement business was unconvincing. Keydata considered that they did not fully appreciate (i) the similarity between the SLS and Lifemark financial models; (ii) the fact that all SLS and Lifemark Products were performing perfectly well; or (iii) the responsibilities of Keydata as a distributor rather than as a product producer. The fact that the Products were produced by SLS and Lifemark and serviced by others appeared to be ignored by Grant Thornton.

(11) Mr Ford denies that he allowed a personal interest in Lifemark to constitute an actual or a "clear and acute Conflict of Interest" as alleged by the Authority or at all. He denies that the beneficial interest of his family acted to the detriment of the Keydata investors in the Lifemark Products. He believed at all material times that his fiduciary duties as a director of Keydata and Lifemark were coextensive and compatible with his family's beneficial interest in the trust structure. Mr Ford further denies that he was aware from 15 June 2008 of the Authority's concern that any potential conflict of interest should be properly managed and denies that it was not properly managed or that he failed to disclose to the Authority, the other Keydata directors or Mr Johnson as compliance officer the true extent of his involvement with Lifemark or the offshore companies. Mr Ford considered that his dual role provided material advantages for Keydata investors.

(12) It is denied that there was any risk of the Lifemark portfolio not performing and that Keydata had failed to take adequate steps to ensure that the risk (which is denied) was being effectively managed and that investors and IFAs were aware of the risk. The Lifemark financial model was based on the model developed by the original investment manager of SLS, an SEC-regulated entity [CRT] in conjunction with KPMG. Lifemark was advised by Linklaters Loesch, Luxembourg and audited by PwC. Other organisations involved in the setting up of the original business model on which Lifemark was based included CRT, Fortis Bank and Mees Pierson. At all material times prior to the Authority's intervention all Lifemark Products had performed as planned and Lifemark had discharged all its obligations to Lifemark bondholders in full and on time.

(13) Keydata, Lifemark, Lifemark's investment manager, Meditron, and adviser, Tandem Partners, all understood the Grant Thornton report as simply validating Lifemark's existing strategy of building the size of its portfolio in order to reduce the risk for investors.

(14) Lifemark enjoyed ample liquidity. The 2007 "stress testing" of the portfolio suggested one possible "worst case" scenario that, in the period to 2012, Lifemark might face a short-term deficit of up to US$35 million. The sensible response was to undertake contingency planning, and it was believed that, based on discussions with Credit Suisse and other financial institutions,

such a facility would have been available to Lifemark should the need arise. An alternative option would have been to sell policies in the secondary market. However, the real source of credit was the availability of capital from IFAs, and retail and offshore investors. Prior to the ill-advised intervention of the Authority in June 2009, Lifemark was a stable, well-run, business that was performing satisfactorily and on course to fulfil all its obligations to bondholders.

(15) It is denied that Keydata's financial promotions contained unclear, incorrect and misleading statements, in particular as regards the issues raised by the Grant Thornton report (as to which there was good faith disagreement). Advice was sought from Norton Rose on the specific issue of financial promotions and that advice was followed by Mr Johnson.

(16) It is denied that Mr Ford and Mr Owen recklessly permitted Keydata to continue marketing and selling the Lifemark Products as fulfilling the conditions set out in the ISA Regulations when aware that it was highly likely that they did not do so. Mr Ford and Mr Owen relied on Mr Jonnson's understanding of the listing requirements in those Regulations. Any breach was inadvertent and should have been capable of remedy in cooperation with HMRC but for the unusual intervention of the Authority.

(17) Mr Ford and Mr Owen deny that they deliberately misled the Authority or deliberately failed to instruct Mr Johnson not to mislead the Authority at a meeting. They deny that they failed to ensure that the Authority was made aware of the solvency issues with respect to SLS, any problems with the due diligence on the Lifemark Products, or any risks associated with the Lifemark portfolio (which are themselves denied).

(18) Mr Ford and Mr Owen deny that the cause of the significant level of consumer detriment and the negative impact on the financial services sector was the sale and distribution of the Products by Keydata. The primary cause of any consumer detriment arising out of the SLS bonds was the commission of a sophisticated fraud by Mr Elias and others. Notwithstanding that fraud, Mr Ford believes he would have provided a practical, market-based solution to ensure that all obligations were met to the Keydata investors in the SLS Products, but for the intervention of the Authority. As regards the Lifemark bonds, the sole cause of any consumer detriment was the misguided, ill-judged and pre-determined regulatory-based solution provided by the Authority in their draconian intervention in placing Keydata into administration (and their subsequent intervention regarding Lifemark with the CSSF).

(19) Mr Ford denies that the various companies (characterised as "the Ford Companies"), namely Orietex, LAS Global and LAS International, took over £73.3 million from the Lifemark structure in undisclosed fees. That grossly exaggerates the alleged "financial burden" on Lifemark in support of the Authority's case against Mr Ford and in support of the imposition of a vexatious and oppressive financial penalty against him.

(20) Orietex and LAS Global earned fees of approximately £40 million from Lifemark. Those fees were primarily global arrangement and distribution fees

earned for successfully establishing a global network for Lifemark and other sophisticated proprietary models of investment. LAS Global earned an arrangement fee of 10% of the value of bonds issued by Lifemark. Those fees were calculated at 2% per annum earned through the IRR of the portfolio using a 5-year basis of calculation capped at 10% over the lifetime of the investments.

(21) It is denied that the fees taken from the Lifemark structure increased the risk to investors. The fees were, amongst other things (i) industry standard commission; (ii) consistent with the KPMG financial model; (iii) fully considered by Lifemark investment management when assessing the requisite IRR for policy acquisition as net of all Lifemark costs; (iv) entirely lawful; (v) audited (by PwC); and (vi) disclosed to the extent required by applicable law and practice pursuant to advice of Linklaters.

(22) LAS International received a share of broker commissions which were not a cost to Lifemark. Mr Ford made available the LAS International fees as a contingent fund for the benefit of Keydata investors in both the SLS and Lifemark Products. Indeed, the LAS International fees would have been available to the investment manager of Lifemark and used to redeem bonds at maturity or otherwise provide liquidity support to Lifemark if such was necessary.

(23) Mr Owen denies that the sums alleged to have been received by him as undisclosed commission payments were commission payments at all. Those sums were loans from Mr Ford to enable Mr Owen to invest in a number of projects with which he was personally involved, including in the renewables sector, and those loans were, and remain, repayable.

The law

8. By s 1B FSMA, in discharging its general functions the Authority must, so far as is reasonably possible, act in a way which is compatible with its statutory objective of ensuring that the relevant markets, including those for regulated financial services, function well, and its operational objectives, including the consumer protection objective and the integrity objective. The consumer protection objective is described by s 1C FSMA as securing an appropriate degree of protection for consumers; the integrity objective (s 1D) is protecting and enhancing the integrity of the UK financial system.

9. By s 1B(5) FSMA, the Authority must have regard to the regulatory principles in s 3B of that Act. Section 3B includes amongst those regulatory principles "the responsibilities of the senior management of persons subject to requirements imposed by or under [FSMA], including those affecting consumers, in relation to compliance with those requirements".

10. As applicable during the Relevant Period, s 64 FSMA permitted the Authority to issue statements of principle with respect to the conduct expected of persons to whom the authority had given approval under s 59 FSMA (approval for performance of controlled functions), and codes of practice for the purpose of helping to determine whether or not a person's conduct complies with a statement of principle. As

described below, Statement of Principle 1 and Statement of Principle 4 were issued under s 64.

11. The Authority has the power under s 56 FSMA to make an order prohibiting an individual from performing regulated functions. Section 56 relevantly provides:

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

12. At the material time, the power of the Authority to impose financial penalties in appropriate circumstances was governed by s 66 FSMA. As applicable at the time of the Decision Notices in relation to Mr Ford and Mr Owen (7 November 2014), s 66 relevantly provided:

> "(1) A regulator may take action against a person under this section (whether or not it has given its approval in relation to the person) if—
>
> (a) it appears to the regulator that he is guilty of misconduct; and
>
> (b) the regulator is satisfied that it is appropriate in all the circumstances to take action against him.
>
> (2) For the purposes of action by the FCA, a person is guilty of misconduct if, while an approved person —
>
> (a) the person has failed to comply with a statement of principle issued by the FCA under section 64 …
>
> (3) If the regulator is entitled to take action under this section against a person, it may do one or more of the following—
>
> (a) impose a penalty on him of such amount as it considers appropriate …"

Statements of Principle

13. The statements of principle at issue in these references are Statement of Principle 1 and Statement of Principle 4.

14. At the material time Statement of Principle 1 was:

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

15. Statement of Principle 4 was:

> "An *approved person* must deal with the *FSA* and with other regulators in an open and cooperative way and must disclose appropriately any information of which the *FSA* would reasonably expect notice."

16. The meaning of integrity, for the purpose of Statement of Principle 1, has been considered in a number of decisions of the Upper Tribunal (and its predecessor, the Financial Services and Markets Tribunal) on references to it of decisions of the Authority. It has been described, in *Vukelic v Financial Services Authority* (FS/2009/067), at [23], as a concept which is "elusive to define in a vacuum but still readily recognisable by those with specialist knowledge and/or experience in a particular market." That recognises that what is at issue is not the integrity of an individual as a general matter, but integrity in the particular sphere of the carrying out of that individual's controlled functions in the regulatory environment. A person may be thought of as having impeccable integrity in other areas of life, but integrity may nonetheless be brought into question as regards the conduct of that individual in the performance of the controlled functions.

17. In a formulation adopted since by a number of tribunals, it was said in *Hoodless and Blackwell v Financial Services Authority* [2003] UKFTT FSM007, at [19]:

> "In our view 'integrity' connotes moral soundness, rectitude and steady adherence to an ethical code. A person lacks integrity if unable to appreciate the distinction between what is honest or dishonest by ordinary standards. (This presupposes, of course, circumstances where ordinary standards are clear. Where there are genuinely grey areas, a finding of lack of integrity would not be appropriate.)"

18. It is not, however, necessary for a person to have been dishonest in order that a finding of lack of integrity can be made (see *Vukelic*, at [16]). As the Tribunal in *First Financial Advisers v Financial Services Authority* (FS/2010/0038), at [119], "[e]ven though a person might not have been dishonest, if they either lack an ethical compass, or their ethical compass to a material extent points them in the wrong direction, that person will lack integrity."

19. Reckless behaviour may also be found to connote a lack of integrity (see *Roberts and Wilkins v Financial Conduct Authority* [2015] UKUT 0408 (TCC), at [47]). That Tribunal referred, at [48], to the observations of Lord Bingham in *R v G* [2004] 1 AC, at [41], where, in the context of the Criminal Damage Act 1971, he referred to clause 18(c) of the Criminal Code Bill annexed by the Law Commission to its Report on Criminal Law: A Criminal Code for England and Wales and Draft Criminal Code Bill (Law Com No 177, April 1989) and said:

> "A person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to-(i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk."

20. Recklessness in this context may, however, consist of the turning of a blind eye to something that, objectively speaking, is obvious or ought to have given rise to reasonable suspicion. In *Batra v Financial Conduct Authority* [2014] UKUT 0214 (TCC), at [15], the Tribunal gave the following example:

> "One example of a lack of integrity not involving dishonesty is recklessness as to the truth of statements made to others who will or may rely on them or wilful disregard of information contradicting the truth of such statements."

Further, in *Vukelic,* the Tribunal found, at [119]:

> "It may be that Mr Vukelic was not dishonest on this transaction in the sense of deliberately participating in a scheme to deceive and we are prepared to accept that he was not. But he turned a blind eye to what was obvious and failed to follow up obviously suspicious signs. We do not believe that an educated professional in a senior position could have been oblivious to the signs that the transaction depended on concealment for its success. It is possible, but unlikely, that Mr Vukelic simply failed to spot what should have been obvious to a person in his position. But if that had been so it would have resulted from an inexcusable failure to ask obvious questions."

21. The various authorities on the meaning of integrity, and in particular the appropriate test in the case of recklessness, were considered by the Tribunal in *Burns v Financial Conduct Authority* [2014] UKUT 509 (TCC). Rejecting a submission by counsel for the applicant in that case that what had to be found was knowledge that the conduct in question might breach ethical standards and a deliberate decision to proceed regardless, or recklessness in the sense of a deliberate decision to ignore a known risk, in part founded upon the formulation adopted, in a different context, in *R v G*, the Tribunal said, at [113]:

> "We accept, of course, that mere negligence is not the same thing as recklessness or as lack of integrity, but we do not consider that [counsel for the applicant's] submission is a helpful gloss on the applicable law. We do not consider it appropriate to import into the test of integrity in the present field all the nuances of the term 'recklessness' in other branches of the law. We do not consider that the Authority is required to prove that the applicant consciously intended to breach ethical standards or thought about the applicable standards and made a conscious decision to take the risk of breaching them. For example, an habitual liar would give no thought to ethical standards, but would not thereby be acting with integrity."

22. We agree with the Tribunal in *Burns*. Reckless behaviour is capable of being characterised as a lack of integrity, and in determining whether behaviour is reckless regard must be had to what would reasonably have been appreciated or understood by persons in the same position as the individual in question. The standard to be applied is an objective one and does not depend on the particular knowledge the individual may, or may not have, of the risk in question. In the regulatory context with which we are concerned, a reckless failure to consider whether something is a risk may

equally be found to amount to lack of integrity, as could be a reckless disregard of a known risk.

Regulatory guidance

23. Under s 56 FSMA (noted above), the criterion for the making of a prohibition order is whether a person is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person. Guidance in this respect is given in the FIT section of the Authority's Handbook. Section 1.3 of FIT sets out some general guidance on assessing fitness and propriety. At FIT 1.3.1B, the Authority's view is stated that one of the most important considerations will be the person's honesty, integrity and reputation.

24. The factors are more particularly described in FIT 2 (main assessment criteria). At FIT 2.1.1, in determining a person's honesty, integrity and reputation, the Authority will have regard to all relevant matters including, but not limited to, those set out in FIT 2.1.3 which may have arisen in the United Kingdom or elsewhere, where relevant to the requirements and standards of the regulatory system. FIT 2.1.3(13) includes, as one of the non-exhaustive relevant matters to be considered, whether a person demonstrates a readiness and willingness to comply with the requirements and standards of the regulatory system and with other legal, regulatory and professional requirements and standards.

Guidance on prohibition orders

25. Chapter 9 of the Authority's Enforcement Guide (EG 9) contains guidance with respect to prohibition orders. EG 9.1.1 states that the Authority may exercise its power to make a prohibition order where it considers that, to achieve any of its statutory objectives, it is appropriate either to prevent an individual from performing any function in relation to regulated activities, or to restrict the functions which he may perform.

26. All relevant circumstances are considered (EG 9.2.1). In the case of approved persons, further guidance is contained in EG 9.3. EG 9.3.1 states:

> "When the *FCA* has concerns about the fitness and propriety of an *approved person*, it may consider whether it should prohibit that person from performing functions in relation to *regulated activities*, withdraw its approval, or both. In deciding whether to withdraw its approval and/or make a *prohibition order*, the *FCA* will consider in each case whether its *statutory objectives* can be achieved adequately by imposing disciplinary sanctions, for example, *public censures* or financial penalties, or by issuing a private warning."

27. EG 9.3.2 sets out a non-exhaustive list of relevant circumstances to be taken into account. They include:

> "…

> (2) Whether the individual is fit and proper to perform functions in relation to *regulated activities*. The criteria for assessing the fitness and propriety of approved persons are set out in FIT 2.1 (Honesty, integrity and reputation) …
>
> (3) Whether, and to what extent, the approved person has:
>
> > (a) failed to comply with the *Statements of Principle* … issued by the *FCA* with respect to the conduct of *approved persons* …
>
> …
>
> (5) The relevance and materiality of any matters indicating unfitness.
>
> (6) The length of time since the occurrence of any matters indicating unfitness.
>
> (7) The particular *controlled function* the *approved person* is (or was) performing, the nature and activities of the firm concerned and the markets in which he operates.
>
> (8) The severity of the risk which the individual poses to consumers and to confidence in the *financial system*.
>
> (9) The previous disciplinary record and general compliance history of the individual including whether the *FCA*, any *previous regulator*, *designated professional body* or other domestic or international regulator has previously imposed a disciplinary sanction on the individual.
>
> …"

28. EG 9.3.3 makes clear that it may be the cumulative effect of a number of factors, and not the individual effect of each factor, which is material:

> The *FCA* may have regard to the cumulative effect of a number of factors which, when considered in isolation, may not be sufficient to show that the individual is not fit and proper to continue to perform a *controlled function* or other function in relation to *regulated activities*. It may also take account of the particular *controlled function* which an *approved person* is performing for a *firm*, the nature and activities of the *firm* concerned and the markets within which it operates."

29. EG 9.3.5 provides a non-exhaustive list of examples of behaviour which have previously resulted in a prohibition order. Those include:

> (1) Providing false or misleading information to the FCA; including information relating to identity, ability to work in the United Kingdom, and business arrangements;
>
> …
>
> (3) Severe acts of dishonesty, e.g. which may have resulted in financial crime;
>
> (4) Serious lack of competence; and
>
> (5) Serious breaches of the *Statements of Principle* for *approved persons*, such as failing to make terms of business regarding fees clear

or actively misleading clients about fees; acting without regard to instructions; providing misleading information to clients; consumers or third parties; giving clients poor or inaccurate advice; using intimidating or threatening behaviour towards clients and former clients; failing to remedy breaches of the general prohibition or to ensure that a firm acted within the scope of its permissions.

Guidance on financial penalties

30. The Authority's general approach to determining a financial penalty and the appropriate level of any such penalty is set out in the Authority's Decision Procedure and Penalties (DEPP) manual. We set out at Appendix B the material elements of the DEPP manual (taken from the version as at 8 June 2009) which was applicable at the time of the alleged misconduct. In summary:

(1) The principal purpose of imposing a financial penalty is to promote high standards of regulatory conduct by deterring persons who have breached regulatory requirements from committing further contraventions, helping to deter others from committing similar breaches and demonstrating generally the benefits of compliant behaviour (DEPP 6.1.2G).

(2) DEPP 6.2 sets out a non-exhaustive list of factors that may be relevant to determining whether to impose a financial penalty.

(3) DEPP 6.5.2G sets out a non-exhaustive list of factors that may be relevant to determining the appropriate level of financial penalty. These include:

(a) the need to "deter other persons from committing similar beaches, as well as demonstrating generally the benefits of compliant business;

(b) the "nature, seriousness and impact of the breach in question" including "the duration and frequency of the breach", whether the breach "revealed serious or systemic weaknesses in the person's procedures or of the management systems or internal controls relating to all or part of a person's business", and "the loss or risk of loss caused to consumers, investors or other market users";

(c) the "extent to which the breach was deliberate or reckless", where a finding that the breach was deliberate or reckless means the Authority is "more likely to impose a higher penalty on a person than would otherwise be the case";

(d) the "amount of benefit gained or loss avoided … consistent with the principle that a person should not benefit from the breach";

(e) the "difficulty of detecting the breach" and specifically whether the individual "committed a breach in such a way as to avoid or reduce the risk that the breach would be discovered"; and

(f) the conduct of the individual following the breach, including "the conduct of the person in bringing (or failing to bring) quickly, effectively and completely the breach to the [Authority's] attention (or the attention of other regulatory authorities (where relevant)".

31. Similar guidance as to the factors relevant to determining the appropriate level of financial penalty in an applicable case were at the material time set out in the Enforcement Manual at ENF13.3.

The Tribunal's jurisdiction

32. The Decision Notices which are the subject of the references by Mr Ford and Mr Owen seek to impose on each of them both Prohibition Orders and financial penalties. As regards the jurisdiction of the Tribunal on those references, a distinction is drawn by s 133 FSMA between a "disciplinary reference", which includes a reference in relation to a financial penalty imposed by virtue of s 66, and a reference in respect of other matters, which in this case includes a Prohibition Order made under s 56.

33. The material provisions of s 133 are as follows:

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

34. In the case of the references in respect of the proposed financial penalties, therefore, the Tribunal has the power, subject to s 133A, to determine the appropriate action, which will include finding that no financial penalty should be imposed or, if the Tribunal considers a financial penalty appropriate, the amount of such penalty. By contrast, as regards the references in relation to the proposed Prohibition Orders, the Tribunal's jurisdiction is limited to either dismissing the reference (in which event the decision of the Authority will stand) or making the findings referred to in s

133(6A), and on the basis of those findings remitting the matter to the Authority for it to reach a fresh decision on the basis of those findings.

35. For completeness, in relation to the references on the financial penalties, it is provided by s 133A FSMA that in determining a reference under s 133(5), the Tribunal may not direct the Authority to take action which it would not, as a result of s 388(2), have had power to take when giving the Decision Notice. Thus, the Tribunal cannot direct the Authority to take action under any Part of FSMA other than the same Part as the action proposed under the warning notice which preceded the relevant Decision Notice.

Burden and standard of proof

36. It was common ground that the burden of proof is on the Authority and that the standard of proof is the civil standard, namely on the balance of probabilities.

37. In their written closing submissions, however, Mr Ford and Mr Owen submitted that this was not the end of the matter, and that the more serious the allegation, the stronger in quality the evidence will need to be. In support of that submission, Mr Ford and Mr Owen referred to the judgment of Richards LJ (giving the judgment of the Court) in *R (N) v Mental Health Review Tribunal (Northern Region) and others* [2005] EWCA Civ 1605, [2006] QB 468, at [62]:

> "Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."

38. The Court in *R (N)* went on, at [64], to consider *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, identifying that the focus in that case had been on the seriousness of the allegation rather than the seriousness of the consequences if the allegation is proved. It identified that the reasoning was that the more serious the allegation the less likely it is that the event occurred, and that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The flexibility of approach identified from the authorities up to that time, and referred to by the Court at [62], led the Court to say, at [69], in a passage relied upon by Mr Ford and Mr Owen, that although there remained a distinction in principle between the civil standard and the criminal standard, the practical application of the flexible approach meant that they were likely in certain contexts to produce the same or similar results.

39. Mr Ford and Mr Owen also referred us to the recent financial services case of *Angela Burns v The Financial Conduct Authority* [2017] EWCA Civ 2140, and the references in that case, in particular at [184] – [185], to the requirement, where an allegation is of a particularly serious nature, for there to be evidence of commensurate cogency to make it good.

40. The submissions of Mr Ford and Mr Owen in this respect have echoes of the nostrum "the more serious the allegation the more cogent the evidence needed to prove it" which, although it had become commonplace following the judgment of Lord Nicholls in *In re H*, was rejected by the House of Lords in *In re B (Children) Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2009] AC 11 as a misinterpretation of what Lord Nicholls had in fact said (*see In re S-B (Children) (Care Proceedings: Standard of Proof)* [2010] 1 AC 678, at [13]).

41. It is clear from *In re B* that the standard of proof of past facts is the simple balance of probabilities, no more and no less. The standard of proof does not vary with the gravity of the misconduct alleged or the seriousness of the consequences for the person concerned. As Lord Hoffman put it in *In re B,* at [13], "the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not". We observe that this Tribunal, in *Tariq Carrimjee v Financial Conduct Authority* [2015] UKUT 79 (TCC), at [47], has adopted the same approach in saying that "the time has come to say once and for all that the civil standard of proof applies in relation to all disciplinary and non-disciplinary references made to this Tribunal pursuant to FSMA".

42. It is nonetheless the case that regard must be had to the quality of the evidence. As the Court said in *In re S-B,* if an event is inherently improbable, it may take better quality evidence to persuade a court or tribunal that it has happened than would be required if the event were commonplace. There is, however, as Lord Hoffman in *In re B* had pointed out, at [15], no necessary connection between seriousness and inherent probability.

43. Mr Ford and Mr Owen have asked this Tribunal to consider how likely it is that they, as respected, successful and wealthy businessmen, would risk everything in the manner suggested by the Authority's case, and to consider that acting in such a way was inherently unlikely. In assessing the evidence, we have had regard to the need to consider questions of inherent improbability. We have taken into account the submissions of Mr Ford and Mr Owen in this regard, including as to their otherwise unblemished regulatory records, and our own assessment of the quality of the evidence required in all the circumstances.

44. Having regard to the burden of proof being on the Authority, we have structured our analysis in this decision in large part around the submissions, particularly the closing submissions, made by the Authority. In doing so we have addressed, in the relevant context, all the submissions made by Mr Ford and Mr Owen, the factual evidence given both by them and all the witnesses and the documents before us. In view of the fact that Mr Ford and Mr Owen represented themselves, albeit with some legal assistance, we have been especially careful to consider the evidence as a whole,

including documents to which no party referred us in the course of argument, although we have not found it necessary to refer to every element of the evidence, oral or documentary, in detail. We also took steps in the hearing to facilitate, first, the making of submissions separately by Mr Ford and Mr Owen, and secondly the giving of evidence in re-examination by each of them by way of written factual statements following the hearing. We also directed that final closing submissions should be made in writing by all parties after the hearing, and we allowed a number of extensions of time to facilitate that process.

The evidence

Evidence of fact

45. For the Authority, the following witnesses of fact provided witness statements and gave oral evidence to the Tribunal:

(1) William McCall. Mr McCall was the non-executive Chairman of Keydata UK Limited ("KDUK"), the parent company of which Keydata was a subsidiary, between 22 January 2002 and 12 December 2006, when notice of his resignation was filed at the Companies Registration Office. He had ceased to have an active role with KDUK from July or August 2006.

(2) Simon Turner. Mr Turner was formerly, and up to his retirement in July 2016, a lead Technical adviser at HMRC. In that role he was involved in the technical interpretation of the Individual Savings Account Regulations 1998 (SI 1998/1870) ("the ISA Regulations"), writing and editing the ISA Guidance Notes for Managers and ISA Bulletins, drafting instructions for amendments to the ISA Regulations and providing help and guidance to policy colleagues in HMRC and HM Treasury and to the ISA industry.

(3) Andrew McDonald. At the material time, Mr McDonald was working in the derivatives business of KBC Bank NV, which was known as KBC Financial Products ("KBC FP"), and more specifically from January 2006 in the insurance derivatives team of KBC Financial Holdings Inc.

(4) Patrick Storey. Mr Storey was at the material time a partner in Grant Thornton UK LLP, and the Chair of its Financial Services Group. He adopted as his witness statement a letter to the Authority dated 28 September 2016 in response to a requirement to provide information under s 165 FSMA. In the period in question Mr Storey was head of Grant Thornton's Financial Services Group's Regulatory Team. Mr Storey appeared as a witness under a witness summons issued by the Tribunal on account of confidentiality concerns which Mr Storey had raised.

(5) Zsolt Szollosi. Mr Szollosi is an employee of Credit Suisse Securities (Europe) Limited ("CSSEL"). From 2007 he was a part of the Life Finance Group, a part of Credit Suisse established several years earlier to trade and structure life insurance policies, annuities and other life contingent instruments.

46. One of the Authority's witnesses, Mr Michael Crane, provided a witness statement but was not called for cross-examination by either Mr Ford or Mr Owen. Mr Crane was at the material time working for the Global Markets division of Deutsche Bank, where his role was as a structurer of investment products and transactions involving life settlements. As his witness statement was unchallenged, we have accepted the evidence contained in it.

47. Mr Ford produced a witness statement and gave oral evidence on his own behalf. His Amended Reply and certain of his Opening Submissions also included evidence of fact, and that evidence was also received as part of his evidence-in-chief. Other witnesses for Mr Ford, who made witness statements and gave oral evidence were:

(1) David Stuff. Mr Stuff is a financial services professional with 30 years' experience in retail structured products. Mr Stuff worked with Keydata from the end of 2003 in his capacity as an employee of Barclays Bank, as an issuer of structured products which were distributed by Keydata.

(2) Paul Grainger. Mr Grainger is the Chief Executive Officer of Complyport Limited, a regulatory and compliance consultancy firm advising in the financial services sector. Formerly, as part of Grainger Consulting Limited, Compliance Consultants Limited and Compliance Solutions Limited, and latterly Resources Compliance UK Limited ("Resources Compliance") he provided advice to Keydata on general regulatory and compliance developments and specific compliance questions and carried out quarterly compliance review of the compliance procedures and standards carried out by Keydata's own compliance officer and team.

(3) Rob Briginshaw. Mr Briginshaw worked for Keydata in a sales capacity between 2003 and 2009, apart from a short period when he left the company in 2008 and returned later that year as UK sales director of Keydata International.

(4) Todd C Jorn. Mr Jorn, who gave evidence from the United States via a Skype link, is a managing partner of Doonberg Group Inc, a merchant bank and advisory firm. At the material time Mr Jorn was employed by the Seaport Group in New York, where he led the insurance products trading desk and managed Seaport's in-house life settlements fund, Seabern.

(5) Colm Smith. Mr Smith is the managing partner of Tandem Partners, through which at the material times he provided services to Lifemark, including as chairman of the board of directors of that company from 28 July 2006 to 13 May 2011. Prior to that Mr Smith worked for MeesPierson Intertrust ("MPI"), the international trust company which was part of the European banking group, Fortis Bank, as part of a team providing services to SLS in Luxembourg, and which assisted in the incorporation of Lifemark.

(6) Adrian Neave. Mr Neave worked for Keydata in a full-time consultancy capacity between 2005 and 2009. His role included exploring potential demand for products based on life settlements in the professional investment management arena (such as discretionary managers) and responsibility for the

pricing and distribution of structured products issued in the form of notes by major investment banks.

(7) Zerina Bagwell. Ms Bagwell worked for Keydata from November 2005 to August 2009 in the capacity of Mr Ford's personal assistant.

48. One of Mr Ford's witnesses, Mr Douglas Ferrans, who was a member of the board of the Investment Management Association (IMA) between 2007 and 2014, and chairman between 2010 and 2014, provided a witness statement which was not challenged by the Authority. We have accordingly accepted Mr Ferrans' evidence of fact as contained in that statement.

49. Another witness for Mr Ford, Mr Tom Williams, was unavoidably unable to attend to give evidence, having unfortunately had a heart attack. Mr Williams was at the material time the chief executive officer of Innova Insurance Limited ("Innova"), a Bermuda-domiciled reinsurance company which was acquired by Mr Ford, through Innova Cayman Limited, in July 2007. Although Mr Williams' evidence could not be subject to cross-examination by the Authority, we have had regard to it. But we did not consider it to be of material import.

50. Mr Owen produced a witness statement and gave oral evidence on his own behalf. He adopted Mr Ford's Amended Reply, and confirmed the evidence of fact contained within it, in so far as that evidence was within his own knowledge. He too made Opening Submissions which included evidence of fact. All that evidence was received as part of his evidence-in-chief.

51. We also had evidence of Mr Peter Johnson who appeared as a witness on a witness summons which had been issued on the application of Mr Ford. Mr Owen associated himself with that application, and in the event it was Mr Owen who primarily asked questions of Mr Johnson by way of examination-in-chief. Mr Johnson was the compliance officer of Keydata at the material times. Although not obliged to do so, he prepared a helpful statement in response to written questions prepared by Mr Ford and Mr Owen. He also gave supplementary evidence-in-chief and answered questions from Mr George for the Authority in cross-examination.

52. We should finally record that, having considered Mr Ford's Amended Reply prior to the commencement of the hearing, and Mr Ford and Mr Owen having renewed their application for a witness summons to be issued to Mr Tim Harrop of Allen & Overy LLP (the original application of Mr Ford in that respect having been refused in Judge Berner's decision of 7 April 2017, [2017] UKUT 0147 (TCC)), we decided on the opening day of the hearing that such a summons should be issued. The summons as issued on 6 October 2017 required Mr Harrop to give evidence in relation to the Relevant Period in respect of:

(a) communications between Allen & Overy and Keydata and any of its officers or employees concerning the requirements of the ISA Regulations with respect to bonds ("the Bonds") issued by SLS and Lifemark; and

(b) communications between Allen & Overy and HMRC, Keydata and any of its officers and employees regarding the "simplified voiding process" or any other course of action, whether or not undertaken or proposed or recommended, in relation to breaches of the ISA Regulations with respect to the Bonds.

53. Mr Harrop made an application for the summons to be set aside. That application was heard by the Tribunal on the morning of 18 October 2017, when Mr Harrop appeared by Toby Brown of counsel, instructed by Allen & Overy. On completion of Mr Brown's submissions, and after hearing from Mr Ford and Mr Owen, we announced our decision refusing the application. An approved version of the transcript recording of our decision is set out in Appendix C.

54. Mr Harrop applied, through Allen & Overy, for permission to appeal our decision in that respect to the Court of Appeal. We gave permission to appeal. Shortly thereafter Mr Ford and Mr Owen informed the Tribunal that they wished to withdraw their application for a witness summons in respect of Mr Harrop. As a result, we made an order setting aside the summons. Mr Harrop did not therefore provide evidence to the Tribunal.

Expert evidence

55. Expert evidence was provided from suitably qualified experts in the field of life settlements with reference to the construction, structure (including fee structure), marketing, operation, modelling, funding and risks of traded life policy investments, including the SLS and Lifemark Products.

56. There were two such experts instructed by the Authority, Ms Ann Marie Juliano and Mr Steve Boger. Ms Juliano was a Founding Partner and Director of Demeter Capital Limited ("Demeter"), a financial consulting company specialising in longevity markets. Since 2006, Demeter has traded over US$20 billion of longevity-based swaps, notes, and securitizations. Prior to 2006, Ms Juliano was a Managing Director at Fortress Investment group, and was there responsible for the risk exit of a life settlement position of over US$7 billion in notional. Earlier, at Credit Suisse, which in that period had one of the largest origination platforms within the life settlement market, Ms Juliano had been responsible for origination and distribution of life risk, and had worked with investors in the life settlements markets throughout the US and Europe.

57. Mr Boger is an actuary. Since 2012 he has been the Managing Director of Maple Life Analytics LLC ("Maple Life"). Maple Life's business is in the management and analysis of life settlement portfolios, including valuation methodology, buyer/seller portfolio cash flow projections and analysis, and risk mitigation and measurement. Prior to that Mr Boger was a consulting actuary at Boger & Associates LLC, performing similar activities, and earlier, from 2004 to 2007, he ran the life settlement practice for the Chicago office of Millman Inc.

58. Mr Ford and Mr Owen jointly instructed one expert, Mr Richard A Gallo. Mr Gallo has approximately 20 years of financial services experience, including all aspects of life settlements with a number of organisations. Between 2000 and 2009, Mr Gallo oversaw Babcock & Brown's life settlement activities, where he was

responsible for the various transactions undertaken to buy, sell and finance policies and portfolios. He was also responsible for the day to day operations of the business including the approval process, reporting, pricing of policies and development of the origination procedures and structures. In 2009, Mr Gallo was the co-founder and Chief Investment Officer of Longevity Asset Management in New York, an SEC-registered asset management firm which focused, until it was wound up in 2012, on life settlements and longevity-related assets.

59. Each of Ms Juliano, Mr Boger and Mr Gallo submitted expert reports and two supplemental reports. Joint expert reports were helpfully provided by Ms Juliano and Mr Gallo and by Mr Boger and Mr Gallo. Those joint reports summarised areas where the respective experts had identified common ground and noted differences between them. Each expert gave oral evidence to the Tribunal.

60. Expert evidence was also provided by Mr Mark Hunt, instructed by the Authority. Mr Hunt provided an expert opinion as to whether the findings and conclusions in the Authority's "Financial Benefit Report" are accurate and reasonable on the basis of the evidence exhibited to that report. The Financial Benefit Report, put very broadly, considered sums received from the Lifemark structure to LAS Global, LAS International and Orietex, the tracing of those sums to bank accounts in Mr Ford's name or in the names of companies over which Mr Ford had control and the direction by Mr Ford of payments from those accounts to non-Keydata or Lifemark-related recipients. He also provided a supplemental report which reviewed commission payments made from Lifemark to Keydata between 17 March 2006 to 8 June 2009.

61. Mr Hunt is not an expert in the life settlements business. His expertise lies in the analysis and interpretation of financial and accounting data. He is a Fellow of the Institute of Chartered Accountants in England and Wales and has 32 years' experience in accounting, at various firms including as a partner in KPMG LLP and BDO LLP. Mr Hunt is a Senior Managing Director in the Forensic and Litigation Consulting Group at FTI Consulting LLP. He also gave oral evidence to the Tribunal.

Life settlements

62. Before moving to our findings of fact, we believe it would be helpful if we summarise, in an uncontroversial way, certain material features of the life settlements market. We should emphasise, however, that what follows is not an exhaustive description of all aspects of life settlements and the markets in which they operate, but is in order to provide context for our findings in these references.

63. Under United States law, it is generally permissible for the holder of a life insurance policy to sell the policy to an unconnected third party. This can be an attractive option for a holder of such a policy who for any reason no longer wishes to maintain it, but who wishes to realise a value from it greater than would apply if the policy simply lapsed (when the value of the policy would be lost) or on a surrender of the policy to the insurance carrier (when the cash value of the policy would be reduced by a cash surrender penalty). By selling the policy, a holder may obtain a

value greater than the surrender value. Once it is sold, the life insurance policy is said to have become "settled" and becomes a "life settlement" (or "traded life policy investment" or "TLPI").

64. Although regulations differ between various US states, traditionally life insurance policies are sold to individuals through locally-based brokers. Close ties may be maintained, and consequently most insured persons who wish to settle a policy approach the market initially through such a broker. From 2006, however, with greater regulation in the US, licensed providers were increasingly required to be used in order to settle policies.

65. Brokers would typically work with providers to settle a policy. The broker would ensure that the relevant documentation was in place and arrange a medical review of the insured for the purpose of obtaining an estimated life expectancy (or "LE") quote. The LE quote, which was provided by a third party known as an LE provider, along with the premium schedule, are the main factors investors use to determine price. The process of obtaining the LE quote is frequently referred to in the market as "underwriting" the policy. Once the policy has been underwritten a broker would market the policy to investors through providers. Investors frequently contract with providers to source (or "originate") life settlements.

66. Once a price has been agreed with the insured, the provider would work with the broker to settle the policy, including arrangement of the transfer documentation. On transfer, the investor becomes entitled to receive the policy payment on the death of the insured and assumes responsibility for payment of premiums under the policy. The process of payment from the investor to the insured involves the placing of funds with an escrow agent which are released on confirmation of change of ownership.

67. In essence, provided the investor maintains premium payments on the policy, the investor will be entitled to the death benefit paid on the policy on the death of the insured. If the death benefit exceeds the price paid for the policy plus the premiums paid, the investor will realise a profit. By modelling the expected premium payments and the timing of the death benefit on the basis of the LE quote, investors would price life settlements according to the return (the internal rate of return or "IRR") they wished to achieve.

68. Life settlement servicers are generally used by investors to carry out administration and maintenance on the policies in the portfolio. That includes management of the premium payments, cash flow analysis and portfolio valuation. Securitization vehicles sometimes engaged a separate investment manager to manage the portfolio. A custodian would retain physical custody of the policy documentation and be able to confirm legal ownership of the policies.

Background

69. Before we move to consider the events in the Relevant Period, we outline by way of background some personal historical information concerning Mr Ford and Mr Owen. We do so, first, because it does provide context for the particular matters in

issue which took place in the Relevant Period, and secondly because each of Mr Ford and Mr Owen placed considerable emphasis upon their respective backgrounds and the corporate ethos at Keydata in directing our understanding of the matters that are the subject of these references.

70. Mr Ford had a difficult and challenging upbringing. Born into a working-class background in Scotland he was, as he explained to us, abandoned as a boy into children's homes until he was 18 years' old. At that time there were few opportunities in Edinburgh and Mr Ford travelled south to London, sleeping at first on a floor, wrapped in a curtain, in a building close to the Old Kent Road. He got a job in the printing industry and trained at the London College of Printing. After three years he returned to Edinburgh, working for a small printing company until he took an opportunity to set up and manage his own business. That business grew from nothing to soon employing some 70 people.

71. Mr Ford was struck by family tragedy when his young daughter, then six years old, developed severe epilepsy, and was subsequently diagnosed in New York with Ring Chromosome 20 syndrome, a very rare chromosome anomaly. Mr Ford used all his energy and resources in seeking a cure, including taking the family to New York where specialised treatment was available. Happily, the health of Mr Ford's daughter improved. Later on Mr Ford established the Ring Chromosome 20 foundation in New York with the aim of providing help to individuals with r(20) syndrome.

72. On his return from New York, Mr Ford's focus was on the development of the Keydata business. In that he had the support of 3i Investment plc, through which Mr McCall was on 22 January 2002 appointed non-executive chairman of KDUK. KDUK carried on the original publishing business and was the parent company of Keydata, the investment services subsidiary.

73. Mr Owen began working in the financial services industry in 1985, when he joined Johnson Fry. He has always worked in smaller companies, the key being, as he told us, to offer a better service and better administration than the bigger companies. Whilst at Johnson Fry Mr Owen was a colleague of Mr Johnson, who in due course became head of administration at Johnson Fry and later head of compliance at Keydata.

74. Whilst Mr Owen was at Johnson Fry, the company developed its business of distributing structured products with guaranteed returns. Mr Owen then moved to Eurolife, another company specialising in structured products, where he set up a new division undertaking ISA and PEP consolidation. The service required excellent administration, and Mr Owen brought Mr Johnson in to assist in that area.

75. From Eurolife Mr Owen joined Keydata, having been "head-hunted" by Mr Ford. Keydata's business had three principal areas: (i) distribution of bonds packaged up as what the investment banks and others called structured products, venture capital trusts created by third parties and others, as Mr Owen described them "slightly more interesting and esoteric" products, (ii) plan management of ISA products created and issued by third parties, but marketed under the Keydata name and (iii) the

administration of products issued by third parties such as HSBC and Morgan Stanley. Both Mr Ford and Mr Owen emphasised that Keydata's philosophy had always been to look after people, namely the customers and intermediaries, properly.

76. In the structured products line of business, Keydata worked with major banks such as Barclays, Citicorp and Morgan Stanley. We were shown summaries of a number of products. Those included an Extra Income Plan, with regular fixed income and full return of capital unless the FTSE 100 index had fallen by 50% or more; a Defined Income Plan, with regular income or growth; and a Dynamic Growth Plan offering returns of 10 times the growth in the FTSE 100 index, subject to a capped level. The products were structured by the banks but distributed as generic products without reference to the underlying mechanics. The sums invested passed to the banks, and Keydata could exercise no oversight or control over the structure or the funds invested. All the products were described as being available within ISA, SIPP or SSAS pension arrangements.

77. Keydata was a successful company, which was well-known and appeared to be highly regarded in the IFA community as a distributor of leading income and growth products. It won a number of industry awards. It had a substantial staff, numbering some 140 people. We accept, as Mr Owen in particular urged upon us, that Keydata was, as a general matter, a well-run organisation and that its personnel were well-appraised of the regulatory requirements affecting its business and in particular the promotion of the financial products with which Keydata was typically associated. Mr Owen drew our attention to the review conducted by Grant Thornton, dated 29 January 2009 (and thus close to the end of the Relevant Period), of Keydata's Systems and Controls, which stated (at page 4):

> "… The firm demonstrated to us a clear commitment to develop and maintain an adequate structure of systems and controls.
>
> We found that in most respects the firm's systems and controls are appropriate for the size and nature of its business and it has staff with appropriate skills and experience to operate them."

The report noted, however, that in some areas, such as the vetting of financial promotions, the systems needed to be more prescriptive and robust; it was said that the recommendations made by Grant Thornton in that respect had been well-received and that it was understood that the firm intended to implement them. We note also that, in his evidence, Mr Grainger described Keydata's compliance as "robust and diligent".

Governance and senior roles at Keydata

78. There is no dispute that for the major part of the Relevant Period, the board of Keydata comprised Mr Ford, Mr Owen and Mr Craig McNeil, the finance director. At the start of January 2004, Keydata had five directors, namely Mr Ford, Mr Owen, Mr McNeil, Mr Les Gaw and Mr Colin Dickie. Mr Gaw was the head of operations and Mr Dickie the compliance director. KDUK had a board of six. Mr Dickie was not a member of that board, but it comprised Mr Ford, Mr Owen, Mr McNeil, Mr

Gaw, Mr McCall and a Mr David Hurst-Brown, an independent non-executive director. Mr Dickie resigned from Keydata on 30 January 2004. Mr Gaw resigned from Keydata and KDUK on 15 June 2005 and Mr Hurst-Brown resigned from KDUK on 17 August 2004. From 12 December 2006, the number of directors in both companies had reduced to three (Mr Ford, Mr Owen and Mr McNeil). Mr McCall told us that 3i had divested itself of its shareholding in KDUK in March 2006, and that he had ceased his active role as non-executive chairman from around July and August 2006; his resignation was filed at Companies House on 12 December 2006.

79. Despite assuming much of the roles of Mr Dickie and Mr Gaw, Mr Johnson was not at any time a member of the board of either Keydata or KDUK. He did, however, regularly attend board meetings of Keydata in part for the purpose of presenting a compliance report as an agenda item.

80. The position of Mr Ford was a matter of some dispute. It was common ground that at the start of the Relevant Period Mr Ford was the Chief Executive Officer of Keydata. Mr Ford accepted in evidence that his role as such included having "Absolute responsibility to ensure that the Chairman and other Board members are aware of the regulatory position at all times and that the Firm is always in compliance with its regulatory responsibilities" and "[Setting] the tone for the level of compliance standards within the business". His job description also included the allocation of senior individuals to manage the business areas and oversight of business operations including sales and compliance. Throughout the Relevant Period, Mr Ford held the Controlled Functions of CF1(Director) and CF3 (Chief Executive); until 31 October 2007 he also held CF8 (Apportionment and Oversight).

81. The dispute concerns the position from April 2007. Mr Ford's case is that he stepped down as CEO of Keydata and remained involved with the company only as Non-Executive Chairman, pursuant to an agreement dated 17 July 2007. The Authority submits that Mr Ford continued to operate as CEO but that, from April 2007, simply did so through a new arrangement with Tandem Marketing Partners pursuant to which he received payments substantially in excess of the salary he had previously received from Keydata.

82. The non-executive director agreement between Keydata and Mr Ford was expressed to be for a term of 12 months from 1 April 2007, and thereafter subject to three months' notice. Mr Ford was required by this agreement to devote sufficient of his time and attention (not expected to exceed 20 hours per calendar month) to the business of the Keydata Group as was reasonably required to carry out his functions as a Non-Executive Director and Chairman. His annual fee was expressed to be £60,000. The appointment was expressly made on the basis that Mr Ford had no other interests which might give rise to any conflict.

83. At around the same time, on 25 May 2007, Keydata entered into a contract with a Luxembourg entity, Tandem Marketing Partners S.a.r.l. ("Tandem Marketing"). Tandem Marketing was either a subsidiary of Tandem Partners S.a.r.l. or those entities were under common control. The agreement was expressed to set out the

terms and conditions pursuant to which Tandem Marketing was to manage and serve Keydata. The duties of Tandem Marketing were as follows:

> "i) to develop international product distribution for investment products distributed by [Keydata];
>
> ii) to engage personnel to establish distribution networks of financial intermediaries and financial institutions for the creation of an intermediary distribution network; iii) to provide marketing services to [Keydata];
>
> iv) [to] provide [Keydata] with reports and information as required from time to time."

84. Keydata was entitled to issue specific instructions or general guidelines to Tandem Marketing with regard to the provision of its services, so long as those were in accordance with Luxembourg law, the articles of association and any lawful resolution of Tandem Marketing. Tandem Marketing was entitled in turn not to comply with such instructions or guidelines, but only if the instruction or request would result in the violation of any law, regulation or good business practice or would otherwise be detrimental to Tandem Marketing or any of its agents or employees.

85. The fees charged by Tandem Marketing to Keydata were set out as follows:

> "The annual fixed fees for the company directors are GBP 2.000.000 per annum, invoiced on a pro rata basis each quarter tear at the end of each quarter year …"

It was accepted that between 30 July 2007 and 11 May 2009 Keydata paid Tandem Marketing £4.2 million in respect of Mr Ford's services under those arrangements.

86. Mr Ford confirmed in evidence that he was the individual who was retained to manage and serve Keydata through Tandem Marketing. That was confirmed by a consultancy agreement between Mr Ford and Tandem Marketing with effect from 1 April 2007 by which Mr Ford agreed to serve Tandem Marketing. At that time Mr Ford had resigned as CEO of Keydata and become resident in Switzerland with an international focus. Mr Ford emphasised that his role at this time was to work for Tandem Marketing full-time as group marketing director. In that role he was developing international projects. The contract was between Tandem Marketing and Keydata. Without that contract Keydata would not have been able to access the international distribution projects being developed by Mr Ford. Mr Ford denied that in effect he was simply carrying on the same role he had at Keydata as an executive CEO.

87. Mr Ford submitted that, from that time onwards, he had assumed a more limited role in the day to day management of Keydata. The existing directors, Mr Owen and Mr McNeil, assumed greater responsibility for the running of the business. However, although Grant Thornton's report in January 2009 acknowledged that, as Mr Ford had told them, Mr Ford's day to day involvement in running Keydata's business had reduced over the previous two years, and that the company intended to appoint a new managing director, Mr Ford continued to be described, without dispute at that time

from anyone at Keydata, as the managing director. Mr Ford was part of the management structure of Keydata that was considered by Grant Thornton at that time to satisfy the "four eyes" requirement under SYSC 4.2.2.

88. We accept that from April 2007 Mr Ford spent less time on the day to day activities of Keydata. He was engaged with other, more strategic, activities, a substantial part of which took place outside the UK. Mr Johnson, in his evidence to the Tribunal, which we accept, made the obvious point that Keydata's business was able to run without the managing director (who was Mr Ford) or the person in overall charge of the business (who we find was Mr Ford). But Mr Johnson was equally clear, and we find, that certain decisions would have to be made by Mr Ford, and that communication in those respects would be by way of email. Mr Johnson said, and we find, that although Mr Ford had less involvement, he was still seen as the "boss" and as the figurehead of Keydata. Although Mr Ford may have been engaged in a number of activities, not all of which were directly related to Keydata, it is clear, and we find, that both as a contractual matter and in practice Mr Ford continued to be engaged in the business of Keydata throughout the Relevant Period in a management capacity, and as *de facto* CEO.

89. It is not disputed that the Authority was not informed that there had been any change to Mr Ford's role within Keydata, and that Mr Ford had remained as CEO on the FSA register throughout the Relevant Period. We do not accept, as was claimed by Mr Ford, that Mr Ford told Mr Johnson to remove him from the register but that Mr Johnson had failed to do so. Mr Johnson's evidence, which we accept in this regard, was that he was not instructed to do so. The possibility of Mr Ford ceasing to occupy the CF3 role had been raised with Mr Johnson at one stage, but the advice of Keydata's compliance consultant, Mr Grainger of Resources Compliance, had been that if Mr Ford was considered as a matter of substance effectively to be continuing to exercise the control over Keydata expected of a CEO, he should remain as the CF3. Mr Johnson's view was that this was likely to have happened at that time. We find that it was likely, and that the contemporaneous view taken at that time is evidence of the true position in substance.

90. As submitted by the Authority, a number of documents created after April 2007 support a finding as to the continuing role of Mr Ford as managing director or CEO. These include:

(a) a letter from Mr Johnson to the Authority dated 18 October 2007 referred to Mr Ford as the "Managing Director" and made no reference to him having stepped down as CEO. At that time, Mr Ford was the person responsible for oversight (as CF8) and the reference to the managing director can, in the context, only have been to him;

(b) the notes of a meeting between Mr Ford and his tax advisers on 19 November 2007, which considered (amongst other things) Mr Ford's presence in the UK, state that Mr Ford "confirmed that Keydata are looking to recruit a managing director and a market (sic.) director. [Mr Ford] will then take a more hands-off role going forward, subject to resolution of the FSA regulatory issue.";

(c) Mr Ford was described as "Managing Director" in organograms acquired by Mr Johnson from the HR department within Keydata and sent by Keydata's lawyers, Irwin Mitchell, to the Authority on 3 March 2008. That accorded with Mr Johnson's understanding at the time. The organograms covered the years 2005, 2007 and 2008; they were updated to reflect changes over that period but each described Mr Ford as the managing director;

(d) the letter from Keydata to the Authority dated 25 April 2008 in response to the compelled information requirement from the Authority of 3 April 2008 explained the role carried out by the "Chief Executive". That, as the Authority submitted, can only be a reference to Mr Ford, as the letter refers to the three board members as the Chief Executive (Mr Ford), the Sales Director (Mr Owen) and the Finance Director (Mr McNeil). The letter describes both Mr Ford and Mr Owen at that time as being "primarily responsible for day to day conduct of business, product development and service development"; and

(e) Mr Ford also continued to refer to himself as "Managing Director" in his email signature.

91. We should record for completeness that we did not accept that the Authority's notes of meetings held with Keydata on 4 and 5 September 2007, which recorded Mr Ford as having attended in the position of CEO, assisted in this regard. Those notes were the Authority's records, and we did not see any evidence that Keydata had approved the description given to Mr Ford in those notes. There is nonetheless in our view overwhelming documentary support for Mr Ford having continued to perform the role of chief executive and managing director throughout the Relevant Period, notwithstanding an evolving change in the way he performed that role.

92. Support for that conclusion is also provided by a spreadsheet circulated by Mr Johnson internally to Mr Ford, Mr Owen and Mr McNeil setting out an "updated task list" for Grant Thornton. The spreadsheet set out two options: 3.3 "Mark Owen to become MD" and "Stewart Ford to become Non exec chairman", but recorded as at 28 February 2009, in each case, "Decided not to proceed, Stewart to reamin (sic.) as MD". That was evidently a decision taken by the board, and not a view of Mr Johnson; in a column headed "PJ's view" in each case the response is "Not apt to comment". Mr Ford could not offer an explanation as to why Mr Johnson had written this. Mr Johnson's evidence, which we accept, was that this was his understanding of the position at that time, and that no-one had taken issue with that description. Mr Grainger said, and again we accept his evidence, that although he was not aware of the logic and could not recall the spreadsheet itself, this was consistent with the advice and discussions at the time. No-one else assumed the role of managing director or chief executive during the Relevant Period.

93. We have considered the evidence of Mr Owen in this regard. Mr Owen saw Mr Ford as an offshore individual, but one who still played a role in Keydata. But from the time Mr Ford moved abroad, Mr Owen saw him in a different light, and not as chief executive or the day-to-day managing director. Mr Owen considered that Mr

Ford had influence because he was still the major shareholder in the company. As Mr Owen saw it, he and Mr McNeil had to agree things and Mr Ford came in for board meetings. In coming to that view, we consider that Mr Owen is paying too much regard to the reduction in Mr Ford's day-to-day activities at Keydata itself, and insufficient to the maintenance by Mr Ford of control and oversight which would typically be the province of a chief executive or managing director. That, we find, was Mr Ford's role throughout the Relevant Period, both as a matter of form, in the regulatory sense, and of substance.

94. There was no dispute as to the role of Mr Owen in the Relevant Period. Throughout that period Mr Owen was the Sales Director of Keydata and he held Controlled Function 1 (Director). He also held Controlled Function 16 (Significant Management, Designated Investment Business) until 31 October 2007 and Controlled Function 29 (Significant Management) thereafter. During his compelled interview with the Authority on 11 November 2008, Mr Owen explained his roles and responsibilities as Sales Director in the following way: "number 1, overseeing the sales team and making sure they understand the products they are selling … I will normally carry out most of the initial review work in relation to a new product and actually look at that product, does it apply, is it something that Keydata would be interested in". In evidence, Mr Owen accepted that, of the members of the Keydata board, it was he who had responsibility for understanding how products sold by Keydata worked.

95. It follows from these findings that we do not accept that the respective responsibilities of Mr Ford and Mr Owen in their respective roles are affected or diluted in any sense by the fact that Keydata had other employees, some in senior positions, on whom Mr Ford and Mr Owen submitted they had "reasonably relied to do their jobs properly". Mr Ford and Mr Owen provided a number of examples, namely:

(a) Mr McNeil, on whom it was said lay the responsibility for ensuring that a new investment product was economically viable and that the modelling of such a product was, so far as necessary to make a determination, sound;

(b) Mr Gaw, who was responsible for managing all aspects of the operational division of Keydata, in particular for assessing Keydata's due diligence exercise at an operational level. Mr Gaw was also Keydata's Controlled Function CF 14 (Risk Assessment) from 17 January 2003 to 16 September 2005, and the compliance function reported to him. Mr Gaw was responsible for overseeing the Brochure Production Department and the Marketing Department until he left the company, after which much of his role was assumed by Mr Johnson;

(c) Mr Johnson who was at the material times the compliance officer;

(d) Mr Nigel Darby who, after Mr Johnson, was the most senior individual involved with compliance, the ISA regulatory regime, literature review and sign-off;

(e) Mr Russell Hunter who assisted Mr Johnson and Mr Darby in dealing with the day-to-day functions of the Compliance Department;

(f) Mr Roddi Vaughan Thomas who, overseen by Mr Gaw (before Mr Gaw left the company), was head of the Marketing Department. It was submitted that it was Mr Vaughan Thomas who was responsible for drafting the brochures, drafting all press releases (as subsequently approved by Mr Johnson) and liaising with journalists;

(g) Mr Martin Meeks who assisted Mr Vaughan Thomas in the drafting of the SIB brochure in its key terms and conditions; and

(h) Ms Brenda Brown who was the head of the Brochure Production Department and as such was responsible for the production of the brochures. She too was overseen by Mr Gaw whilst he was with the company.

96. With the exception of Mr Johnson, whose evidence we shall consider later, none of these individuals provided evidence to the Tribunal. In any event, the fact that individual employees had roles within Keydata which carried specific responsibilities for certain aspects of the company's business cannot detract from the overall responsibilities of Mr Ford and Mr Owen according to their positions as we have found them to be. There was no evidence on which we could make any finding that actions or omissions of individual employees were of such a nature that Mr Ford or Mr Owen could not be held responsible in the carrying out of their own roles, or that their responsibilities could in any way be diminished. The evidence of an employee we did have, from Mr Briginshaw, was to the effect that in the marketing of the Products Mr Briginshaw would not conduct his own analysis of the bond structure, but would be reliant on others, particularly on training conducted by Mr Johnson and Compliance. On the question whether the SLS bonds were listed on the Luxembourg Stock Exchange, Mr Briginshaw confirmed that his understanding that they were so listed derived from Mr Ford and Mr Owen. However, Mr Owen in his evidence denied telling Mr Briginshaw that the SLS bonds *had been* listed. He said that he told Mr Briginshaw that the bonds were *going to be* listed. Given Mr Owen's knowledge at the time of the listing requirement for those bonds, we accept Mr Owen's evidence in this regard; and we have seen no evidence to suggest that Mr Ford did otherwise.

97. Nor, for the same reason, can the responsibilities of Mr Ford and Mr Owen be affected by reliance on the support which Mr Ford and Mr Owen submitted had been given by external advisers such as Resources Compliance (in the form of Mr Grainger), Allen & Overy, Norton Rose, Linklaters and Irwin Mitchell. Other than in some respects in the case of Resources Compliance, there was no evidence that any of those firms had provided comfort to either Mr Ford or Mr Owen as to the regulatory propriety of the matters that are the subject of these references. Indeed, advice was in some cases – and we shall particularly consider the issues around certain advice given by Norton Rose and Grant Thornton later - received by Mr Ford and Mr Owen to the contrary effect. Furthermore, no proper reliance could be placed on third-party commentary, such as the product review by Ms Debbie Harrison, at the relevant time a Senior Visiting Fellow at the Pensions Institute, Cass Business School, which

Keydata commissioned; that review was at a very high-level and did not consider the underlying risks in any detail.

98. We shall also consider the advisory role taken by Resources Compliance and Mr Grainger, in particular as regards the report of Grant Thornton on the due diligence on the SLS and Lifemark Products. However, in summary, Mr Grainger's evidence, which we accept, was to the effect that he was principally engaged in advising the investment and ISA administration arm of the business based in Reading and that he spent relatively little time – mainly dealing with specific queries from Mr Ford and Mr Owen – dealing with the product design and marketing side of the business. He was not at the relevant time involved in the cease and desist correspondence with KPMG; he was not aware of the 1.5% commission paid by Mr Elias to Mr Ford in respect of sums invested by Keydata investors into the SLS bonds; he was not involved, at the time it was carried out, in the due diligence on the Lifemark structure; he was not aware at the relevant time that Mr Ford was a director of Lifemark; he was not aware at the relevant time of the fee arrangements with Orietex or LAS Global; no conflict of interest issue had been raised with him by Keydata; he had not been asked to advise on the specifics of the arrangements between Montage and LAS International and had been unaware of those arrangements; he was not aware of any payments by Mr Ford to Mr Owen; he did not sign off any of Keydata's financial promotions (that would have been done by Keydata's own financial promotions team – it was the approval process that Resources Compliance supervised and oversaw); and he was not made aware of any specific problems with the SLS portfolio.

Creation of the SLS Products (May to December 2005)

99. Following the attendance in 2004 by Mr Owen at a SWAY conference, which brought together manufacturers and distributors of financial products, and at which Mr Owen had learnt of traded life settlements, Mr Owen was subsequently contacted, by email on 17 May 2005, by BWT Capital, a division of BWT Holdings Limited, a company owned by Mr David Elias, which was the holding company of BWT Capital S.a.r.l, the arranger of the issue of a Senior Life Settlement Asset-Backed Securitization Bond ("SLS ASB") through SLS Capital SA ("SLS"), with a view to a meeting in Luxembourg on 19 May 2005.

100. Attached to the email were a number of documents relating to the SLS ASB, including an Information Memorandum. Mr Ford and Mr Owen place considerable stress upon the Information Memorandum, relying on what appears to be a subsequent version of it (although dating from 2005) which formed part of a bible of documents produced by CRT Capital LLC ("CRT") and provided to Keydata. They point out that, at the time it was produced and circulated, the directors of SLS were companies owned by MeesPierson Intertrust (Luxembourg), which was ultimately owned by Fortis Group (MeesPierson also acted as custodian, bond registrar and payment administrator), and that the memorandum named CRT, an SEC-regulated firm, as adviser and asset manager.

101. Mr Ford and Mr Owen submit that the Tribunal should consider what a reasonable person in the position of Mr Ford and Mr Owen would have formed about the SLS bonds and CRT's asset management of those bonds after reading the SLS Information Memorandum.

102. The Information Memorandum described Tranche A of the SLS ASB. The Issuer, SLS, was a Luxembourg special purpose vehicle. The memorandum stated that SLS was only permitted to hold Eligible Assets, defined as:

(a) Cash;

(b) Marketable investment grade debt instruments rated A or above by Standard and Poor's or the equivalent (Cash Equivalent); and

(c) Senior Life Settlement Policies (life insurance policies relating to people over 65) issued by US and Canadian insurance companies rated A or above by Standard and Poor's or equivalent. It was noted that life settlements purchased by SLS related only to people with an average age of more than 75 years and an average life expectancy of less than seven years.

103. The ASB was said to be backed by Eligible Assets pursuant to a Required Asset Cover ("RAC") requirement whereby the Eligible Assets must exceed the ASB in issue, net of cash or Cash Equivalent, by a minimum of two times Death Benefit Value of the SLS. In fact, that formulation of the RAC made no sense. The true calculation, which appears later in the memorandum, was to compare (a) the outstanding principal of the bonds, less cash and Cash Equivalent, with (b) the face value of the death benefit of the eligible life settlements; the RAC requirement would be met only if (b) were more than two times (a). An asset cover certificate, certifying that the RAC had been met for the previous three months, would be issued by CRT, as adviser, and/or the auditor.

104. This security structure was controlled through MeesPierson Intertrust ("Mees Pierson" or "MPI"), as custodian, payment administrator and bond registrar. The US Trustee was HSBC Bank NA, a wholly-owned subsidiary of HSBC Group. Other organisations referred to are O'Melveny and Meyers, a major US and global law firm, as US legal and tax adviser, Linklaters Loesch, a major UK and global law firm, as Luxembourg legal adviser, Life Settlements Solutions Inc ("LSS"), one of the largest life settlements originators, as originator and servicer of the SLS policies, and Fortis Bank as the provider of general banking facilities to SLS.

105. The memorandum stated that US actuarial and statistical modelling consultancy was undertaken by KPMG Consulting ("KPMG"), "one of the largest providers of audit, tax and advisory services in the world". It also stated that the provider of a standby facility of up to 50% of the life settlements death benefit value would be "a Universal Bank".

106. Various maturity options, between one and seven years, were provided, with varying interest rates. The currency options were US dollar, euro, pounds sterling and Swedish krona. The memorandum later notes, in the section on the role of CRT, that

the death benefits are US $ denominated and that up to a point currency exposure can be eliminated by the weighting of cash or Cash Equivalent in non-US $ cash or Cash Equivalent. Beyond that, it was said that currency exposure would be eliminated in the forward foreign exchange or swap markets.

107. The roles of the various parties were described, including in particular that of CRT, in life settlement origination, Eligible Asset management, realisation options and cash and asset coverage. In relation to life settlement origination, the memorandum stated that CRT "works closely with LSS and KPMG. Not only has extensive actuarial, and statistical modelling been done by KPMG, but also 'stress-testing' of the variables". The following section, under the heading "Integrity of the KMPG Model" stated:

> "It is CRT's responsibility to ensure that the final output of the KPMG Model is statistically sound, has a low standard deviation, and has been validated against 'live' comparables.
>
> Live validation has taken place by comparison of the output of the model with actual performance of an equivalent portfolio of [life settlements] which is now 3 to 4 years into its life.
>
> Therefore, the conservative Cash and Asset Coverage assumptions set out in the Supplemental Information … have a very low downside statistical deviation."

108. Further information concerning the modelling was provided under "Life Expectancy Risk":

> KPMG, in consultation with CRT have done exclusive statistical modelling using actuarial and life expectancy data, and have applied significant 'stress testing' in terms of outcome.
>
> Factors within their modelling have been the following.
>
> - Average age of 78, actuarial life expectancy of 12 years 4 months, and health adjusted life expectancy of 6 years 9 months means that the initial risk is greatly reduced.
> - The most conservative third party Life Expectancy Evaluation have been used, and then made more conservative.
> - There has been a 'live' validation against an equivalent SLS portfolio held by LSS, now 3 to 4 years into its life.
> - The very low Standard Deviation of the SLS portfolio is a function of the above plus the minimum pool size of 150 lives, and the Individual Policy Characteristics and the Portfolio Characteristics."

109. It was also said that:

> Based upon the KPMG Model.
>
> - Death Benefit Value of SLS never falls below 3.6 x ASB net of Cash and Cash Equivalent.

- Realisation Valuation Cover at the end of year 5 is 1.7 x the ASB net of Cash and Cash Equivalent. (Based upon CRT's conservative assumption that the SLS will be sold for 40% of Death Benefit Value.)

110. The memorandum stated that, although ultimately the death benefit value of the life settlements would be received, there had to be "sufficient liquidity". This was to be achieved, first, by CRT allocating $50 million out of each $125 million tranche of bonds to cash or Cash Equivalent, and secondly by a "minimum of $60 M Standby Facility from a Universal Bank, and capable of being increased to a maximum of 50% of Death Benefit Value". The memorandum stated:

> "Through adopting a very conservative liquidity management strategy CRT has ensured that;
>
> - there is at the lowest point (year 2) there is (sic.) $173 M of cash and $60 M of undrawn Standby Facility.
> - even if run to a 5 year maturity the proceeds from a sale of policies at a very conservative 40% of death benefit value, plus surplus cash covers the ASB 1.7 times."

111. In relation to realisation options, the memorandum made it clear that, as regards Tranche A, the ASB was designed to be a "warehousing" ASB, in other words to enable a sufficient size of portfolio of life settlements to be accumulated, rated A or above by Standard and Poor's or equivalent, and then on-sold to a separate SPV which would list an ASB in Luxembourg or sell the securitised pool in the US debt markets. Accordingly, the memorandum stated, SLS would receive at least 100% cash on a regular basis and then repeat the exercise. There would also be an active secondary market in appropriate life settlements. It was the cash sale of the Eligible Assets in one of these ways that was the intended (or Primary) source of repayment; that was expected within 6 months, or if there were to be Secondary Repayment, most likely from a sale of the life settlements at the end of year 5 or repayment in full from cash flow; it was said that in each year the cash, Cash Equivalent and the Standby Facility (based upon 80% of Death Benefit Value) could repay the ASB.

112. The features of the ASB relative to other life settlements products were said to be:

> "Significantly lower risk based upon the Risk Analysis above, on a like for like risk element by risk element comparison.
>
> High returns which are fixed, not potential NAV returns.
>
> i.e. better risk/return ratio.
>
> Significantly better liquidity.
>
> SLS injected which on day one has a Death Benefit Value of over $400 M relative to $125 M of ASB i.e. there is 'equity cushion' ranking below ASB on day one.
>
> Significantly greater transparency.

Significantly lower risk based upon the Risk Analysis above on a like for like risk element by risk element comparison.

Better risk return ratio."

113. The memorandum concluded:

"The ASB is a product, which for easily explainable reasons, offers the Subscriber a unique combination of;

- Fixed returns of between 7.5% and 11% p.a.
- Maturities of between 1 and 7 years.
- Risk equivalent to Standard and Poor's or above or equivalent.
- A high degree of liquidity.
- A watertight security structure ensuring there is no Structural, administrative or Fraud risk.
- No market risk."

114. Mr Ford and Mr Owen submitted that these representations were made to Keydata by a major, SEC-regulated firm (namely, CRT) and that the list of counterparties named in the document was impressive. In those circumstances, it was submitted, Keydata management, including Mr Ford and Mr Owen, were entitled to rely (as it was argued they did) on those representations when assessing the SLS bond issue. It was submitted that this fact is instructive of the state of mind of Mr Ford and Mr Owen in 2005 and thereafter.

115. In this connection, Mr Ford and Mr Owen have referred to the following aspects of the role of CRT:

(a) It was CRT that produced all the factsheets and term sheets for SLS before Keydata decided to enter into any distribution agreement with SLS.

(b) It was CRT that provided much of the SLS documentation and supporting information to Keydata before any SLS Products were launched.

(c) It was CRT (Sheffield) that commissioned the KPMG model. It was CRT that performed the stress tests on that model and confirmed to Mr Johnson that they had carried out stress testing.

(d) It was CRT that prepared the purchase parameters for the purchase of policies. Those parameters included, amongst other things:

(i) that there were to be no contestable policies;

(ii) life expectancies had to be between 2 and 12 years;

(iii) policies were bought at the 85th percentile (in other words, at the given life expectancy date 85% of individuals were expected to die before this date – this, we accept, was more conservative that what Mr Ford and Mr Owen described as the "industry standard" where policies were purchased at the 50th percentile); and

(iv) policies had to have lives insured with a value of between $250,000 and $10 million. (Mr Ford and Mr Owen say that they believe that LSS, the US originator of the policies, complained to Mr Johnson about CRT's inflexible attitude to buying policies, as CRT were sticking rigidly to the purchase parameters. This, it is said, gave Keydata and Mr Ford and Mr Owen some confidence that those principles were being adhered to.)

(e) It was CRT who provided Mr Johnson with a letter confirming hedging policy and who confirmed that there would be a cash facility. It was CRT who provided the "SLS bible", which demonstrated the impressive list of counterparties involved with the SLS Products (including Fortis Bank, MeesPierson, HSBC (US custodian), Linklaters and O'Melveny and Myers).

116. We do not accept the submissions of Mr Ford and Mr Owen in this respect. The Information Memorandum could not reasonably have provided anything other than a starting point for enquiry. It related to a particular tranche of investment into bonds in SLS, and not to any offering of bonds through Keydata. Its focus was on a "warehousing operation" by which there were expected to be sales of its life settlements portfolio at six-month intervals. That could not have provided any comfort with respect to the issue of new, and different, five- or seven-year bonds. Mr Ford also submitted that, as a "distributor", the "rule" was that Keydata's due diligence would be confined to verifying the parties concerned with the producer or provider of the product, and that Keydata did not have the in-house skills of an investment bank such as CRT. Mr Owen made submissions to a similar effect. We acknowledge that Keydata was not an investment bank, but we do not accept that Keydata's responsibility could be so confined. It had a responsibility to satisfy itself that the description of the Products, their performance and the risks associated with them were accurately represented in the brochures it produced. It had a responsibility too to follow up on issues which arose in due diligence and which were not satisfactorily explained or resolved. That responsibility went well beyond verifying from a bible of documents that third parties had been contractually engaged.

117. Nor could the general description of the structure have enabled Mr Ford or Mr Owen reasonably to have had any state of mind other than one of enquiry. It is a fact that this was not an investment structure with which Keydata had any expertise, experience or even familiarity. It is not possible, in our judgment, as Mr Ford and Mr Owen submitted, to seek to equate the SLS Products with the structured products created by substantial banks and other institutions which Keydata had, prior to 2005, been distributing, and which it continued to distribute, even if those products were issued not by the institutions themselves but by special purpose vehicles (SPVs) as off-balance sheet financing. Whatever comfort Keydata, and Mr Ford and Mr Owen in particular, derived from materials provided by such institutions, and whatever the

appropriate level of due diligence which was, or ought to have been, conducted in those respects (as to which we make no findings), it should have been clear to any responsible person concerned with whether to distribute bonds backed by the very different asset class of life settlements that no reliance should be placed upon statements of the nature set out in the Information Memorandum without proper due diligence directed towards the actual offering that was to be made to Keydata investors.

118. None of this is affected by hindsight or the question whether, at this time or at any other time, any of the parties with which Keydata was dealing in this respect was engaged in fraud. The statements made in the Information Memorandum could not have provided, without more, a reasonable basis for an issue of bonds by Keydata, and neither Mr Ford nor Mr Owen could, at the material time, have properly supposed that they did.

119. As we have said, the initial version of the Information Memorandum was sent to Mr Owen (by Ms Douglas of BWT) on 17 May 2005. Mr Owen then attended a meeting in Luxembourg which was also attended by Mr Bennett, Mr Elias, Mr Smith (representing Fortis Bank) and a representative of Linklaters. Fortis Bank and Linklaters attended that meeting to provide legal and corporate compliance confirmations with respect to SLS, the investment vehicle. Mr Owen received a term sheet and there were further discussions, including as to Luxembourg securitisation law and the ability of Keydata to have a secured interest in the underlying assets through a bond subscription. Mr Elias confirmed at that time that any securities issued to Keydata would be listed on the Luxembourg Stock Exchange and cleared for subscription through a mainstream clearing system. Foreign currency exposure would be hedged. A report on the life settlement industry prepared by Bernstein & Company of the US was provided to Mr Owen.

120. A copy of the Information Memorandum was sent by Mr Gaw to Mr Ford on 26 May 2005 with a covering email in which Mr Gaw said that he liked the idea. But Mr Gaw also sent Mr Ford and Mr Owen a memorandum in which he identified a number of matters where further exploration was needed, and he counselled that feedback would be required from Mr Johnson to ensure that he was comfortable with the overall structure and the specifics of the scheme.

121. At this stage, therefore, it was clear to Keydata itself that the statements in the Information Memorandum could not be relied upon and that more checking was required. We agree with the Authority that an examination of the Information Memorandum shows that there were at least four particular features of the SLS product that would require particular attention:

(1) that the model on which the investment would be based had been produced in part by KPMG and that KPMG would continue to have a role in the product by providing "sophisticated actuarial and statistical modelling consulting" in respect of the product;

(2) that there was a need for a credit facility (the "Standby Facility" referred to in the Information Memorandum);

(3) that the life settlement policies were US based and would pay out in US dollars, thus giving rise to a currency risk for sterling-denominated bonds; and

(4) that the SLS bonds would be listed on a recognised stock exchange.

122. The questions raised by Mr Gaw were responded to initially by Mr Elias on 2 June 2005, in an email sent to Mr Owen and copied to Mr Ford. Mr Elias confirmed in that email that the Keydata tranches would be listed on the Luxembourg Stock Exchange, and that they would have ISIN numbers and be cleared through Euroclear. A Mr Peter Tommerup, the general manager of BWT in Luxembourg, would be handling that aspect. KPMG was identified as the auditor, and as the entity that would be auditing the RACs. As regards the modelling, Mr Elias said "CRT have worked closely with KPMG Consulting in the US to develop, validate and stress test the model, and KPMG will, in the next few days, be issuing a letter, which with their approval, I can show you."

123. On 7 June 2005, Mr Johnson sent an email to Mr Ford and Mr Owen, and others, to which there was attached, and headed Due Diligence Questions, a note of a meeting on that day attended by Mr Owen, Mr Johnson and Mr Elias. Included in that note was confirmation that KPMG were the auditors and an outstanding point for verification from KPMG that the target levels of income and return of original capital from the client's perspective could be achieved. In relation to currency risk, Mr Elias is reported as having explained that there would be a hedge in place; Mr Johnson noted that this needed to be checked as he wondered if this could be done through KPMG. It was also on 7 June 2005, at a Keydata marketing meeting attended in part by Mr Ford, that it was agreed that Mr Vaughan Thomas would produce a "sensible" draft of the SLS brochure and that Mr Johnson would continue due diligence and prepare the Terms and Conditions for the brochure; drafting was under way, and a Version 4 of the SIB brochure was sent by Mr Vaughan Thomas to Mr Owen and Mr Johnson on 16 June 2005.

124. On 23 June 2005, Mr Johnson wrote to Mr Ford, Mr Owen and Mr Gaw with details of a conference call with Mr Elias and others from BWT, representatives of CRT, and Mr Smith of MPI. That call had confirmed:

(a) that legal documentation as to the roles of each of the parties would be provided;

(b) that CRT would provide details of checks performed on the model and policies;

(c) that Keydata had seen the actuarial model prepared by KPMG;

(d) that CRT were the advisors and they had outsourced the actuarial requirements to KPMG to help assemble the cashflow model;

(e) the KPMG letter would be shown to Keydata so that a minute could be taken. It was not possible to copy this without KPMG approval, which Mr Alvord of CRT would arrange;

(f) certain problems associated with fraud were discussed, and Mr Alvord assured Mr Johnson that this would not arise as the policies were being checked by HSBC; and

(g) as regards foreign exchange risk, the product would be hedged on day one. (An email from Mr Elias on 20 June 2005 had confirmed this hedge, and that it would be arranged by MPI, through Fortis Bank and confirmed by them.)

125. On the same date, Mr Johnson sent to Mr Ford, Mr Owen and Mr Gaw a list of action points reflecting the points raised on the conference call. That day also, Mr Elias wrote to Mr Johnson (the email was not copied to Mr Ford or Mr Owen) to confirm, amongst other things, that he would agree the KPMG letter in the next few days, that in relation to foreign exchange the US $ exposure would be hedged forward and that the Deutsche Bank facility would be signed shortly and Keydata provided with a copy of the Term Sheet. There were follow up emails from Mr Elias to Mr Johnson on 28 June 2005 (copied to Mr Owen but not to Mr Ford), and 1 July 2005, also to Mr Johnson (not copied to Mr Ford and Mr Owen); in the latter Mr Elias said that he had spoken to KPMG on the previous day and that the KPMG letter would be "forthcoming shortly".

126. The first Secure Income Bond offering by Keydata (SIB 1) opened on 26 July 2005 with a closing date of 16 September 2005.

The KPMG Model and the ongoing role of KPMG

127. Although Mr Ford and Mr Owen argued that they were entitled to rely upon the representations Keydata had received in the form of the Information Memorandum, the reality is that Keydata itself had not relied upon representations of that nature. Keydata had, quite properly, engaged in a process of due diligence, and had asked relevant questions concerning the key features which would need to be in place to enable an offering to be made to UK retail investors. But in certain key respects, as the Authority submitted, Keydata failed adequately to follow up its questioning, or to properly satisfy itself as to certain material factors before marketing SIB 1.

128. One of the key elements, indeed that which was fundamental to the returns offered to investors, was the viability of the financial model. It was necessary for that model to reflect both the cash flows and servicing costs of the life settlement portfolio and the returns, both of interest and capital, on the bond financing. These twin features were referred to at the hearing as the "front end" and "back end" model.

129. We have referred above to the statements made in the Information Memorandum as to the involvement of KPMG in the construction and development of the financial model, and to the correspondence in relation to the due diligence questions raised by Keydata, in particular by Mr Johnson. Thus, as we have described, at the meeting on 7 June 2005 attended by Mr Owen, Mr Johnson and Mr Elias, it was agreed that enquiries would need to be made of KPMG directly to determine "that the target levels of income and return of original capital form (sic.) the client's perspective could be achieved". That, as the Authority submitted, was a

clear recognition by Keydata at that time that the model would have to address both the front and back end of the transaction.

130. Keydata did receive a document which purported to be the KPMG model as part of an SLS bible of documents on 4 July 2005. It is readily apparent that the document was of little value. It should have been clear that it did not address the very issue, whether target levels of income and return of principal from the investor's perspective could be achieved, which had been raised at the 7 June 2005 meeting. We had expert evidence from both Ms Juliano and Mr Gallo, which we accept, to the effect that the KPMG model as received by Keydata was of little use. Ms Juliano stated that "although described as a model, the document does not resemble the sort of detailed cash flow analysis document which I would consider to be an appropriate model for a life settlement structure". Mr Gallo did not analyse the KPMG model, but referred to it in evidence as "a piece of paper" and as "not very useful in my view".

131. We accept that evidence. Indeed, in our view no responsible person in the financial services industry could have properly had any different view of the KPMG model. It was self-evidently not fit for purpose, and it should not have been taken at face value. However, no attempt was made to analyse the model or to independently verify it. Both Mr Ford and Mr Owen accepted in evidence that they did not personally review the model.

132. There was at that stage no direct contact with KPMG. The promises made by Mr Elias in that respect, including as regards a letter from KPMG, albeit one that could not be copied without the approval of KPMG, came to nothing. But despite the modelling being the most fundamental factor in securing the advertised returns for investors, that omission did not deflect Mr Ford and Mr Owen from authorising the issue of SIB 1. The furthest Keydata came to checking the model was in email correspondence between Mr Johnson and Mr Rob Gibson of CRT. On 24 June 2005 Mr Johnson wrote to Mr Gibson:

> "… I think it would be useful to have a few sentences on the KPMG methodology for producing the model and then the internal checking process it employs. Then go on to say that KPMG set the criteria, which allows [LSS] to purchase the policy, HSBC to ensure that this is carried out appropriately. The biggest risk in this section is that the actuaries get their sums wrong, unlikely I know, but I need to be able to head this point off should it be raised."

133. That enquiry did not go further than the "back end" of the model, focused as it was on the criteria for the purchase of the life settlements. Nor was there evidence of anything other than acceptance of the response from CRT that it had "spent significant time with the model to check the 'math' in the model". Instead, Keydata's due diligence on the model, including its initial concerns to address both the back and front ends of the transaction and to speak directly with KPMG, simply evaporated.

134. Mr Ford accepted in evidence that in the case of SLS, a special purpose vehicle investing in life settlements, it was more important to ensure that the model was going to work. Mr Owen, on the other hand, sought to equate SLS with options or notes

issued by banks to underpin structured products which Keydata distributed. In such cases, as Mr Johnson said in evidence, little or no due diligence would have been undertaken; Keydata might receive little more than a term sheet. Mr Owen argued that in those cases Keydata would not normally concern itself with the use by the bank of the funds raised. The argument, as we understand it, is that it was not reasonable to expect Keydata to go behind the assurances given by CRT. We do not agree. Keydata itself, including Mr Owen, had identified the need to verify the KPMG model, including verifying it and the process. That was the reasonable course in the circumstances of SLS, which, as we have explained above, we regard as very different from those of the banks or other institutions for whom Keydata was accustomed to acting as distributor; a view which Keydata, appeared, as evidenced by its due diligence questioning, to have adopted at the time. It was not reasonable to fail to follow though on the due diligence in that respect.

135. The evidence of Mr Storey was relevant to this question. Asked whether it was sufficient, in terms of due diligence, that a distributor (such as Keydata), having made due and proper enquiries of the product manufacturer, is reasonably satisfied that the product manufacturer has modelled the product to demonstrate that it works, carried out test scenarios to establish the probability of returning investors' capital in full and carried out portfolio evaluations, reviewed the actuarial model and reviewed the currency hedging arrangement, Mr Storey confirmed that if comfort had been obtained in all those respects, that should be sufficient. What we find, however, is that despite the need for the KPMG model to be verified having been identified, that aspect was effectively passed over at the time of the bond issue. There was no effective review of the actuarial model, and so the premise on which Mr Storey gave his confirmation in evidence did not apply to the circumstances of this case.

136. The view of Grant Thornton was more fully expressed in their report of 3 March 2008 with respect to Keydata's due diligence in respect of Lifemark where under Recommendations they advised:

> "… it is not possible to be definitive, either about the quantity or the nature of the due diligence. However, Keydata is marketing and distributing this complex offshore product to UK investors who are generally unable to penetrate the product's structures. Therefore, as a high level indicator, its due diligence should be sufficient to
>
> - be assured that the product will, in the normal course of events, and within reasonable parameters, perform as intended
> - be able to describe those characteristics and risks to potential investors in terms that are clear, fair, not misleading and are likely to be understood by potential investors
> - enable the directors to explain the characteristics and risks and to describe and evidence the processes that have been put in place to manage those risks."

That, it seems to us, is an entirely appropriate generic description of the due diligence obligations of a distributor such as Keydata at all material times with respect to both the SLS and Lifemark Products.

137. It follows that we do not accept, in relation to the KPMG model, the arguments of Mr Ford and Mr Owen as to the adequacy of the due diligence undertaken. Whilst the due diligence questions that were initially raised were appropriate, there was a failure to ensure that those questions were appropriately answered before the product was launched. Those failures were, in part, the responsibility of Mr Ford and Mr Owen. We do not accept, as Mr Ford and Mr Owen submitted, that in the circumstances they and the Keydata management could fairly and reasonably have placed reliance solely on those who "came before [Keydata] in the supply chain", including the express representations and confirmations provided by CRT, an SEC regulated entity, that certain requirements had been met or complied with.

138. Nor, for the reasons we have given above, can any delegation of responsibility for "implementation of due diligence and points of detail regarding the SLS Products" provide Mr Ford or Mr Owen with any shield. Mr Ford and Mr Owen submitted that it was Mr Johnson who had omitted to "review previous emails" on the topic of KPMG, and "note that a letter from KPMG was an outstanding item that had been promised but not yet delivered". They characterise this as an inadvertent, good faith slip, and say that it is unfortunate and to be regretted. But, so far as Mr Ford and Mr Owen are concerned, their submission is that they relied on and were entitled to rely on "Mr Johnson's management of the minutiae of the due diligence exercise, overseen by his fellow director and Board member (sic. Mr Johnson was at no time a director), Les Gaw (Keydata's Head of Risk and Operations Director)". We do not accept this characterisation of the due diligence exercise, nor the attempt to delegate not only the task but also the responsibility. It ought to have been self-evident that the cash flow model was of fundamental importance, and not a mere detail or one of the "minutiae".

139. The failure to undertake any proper analysis, and in particular not to insist on the promised direct contact with KPMG, before the launch of SIB 1 were, in our judgment, serious regulatory failings, and they were failings for which Mr Ford and Mr Owen were ultimately responsible. We accept the submissions of the Authority in this regard that if such analysis had been undertaken, or if direct contact had been made with KPMG, it would have become clear that:

(1) KPMG had not in fact undertaken any modelling for SLS or for the SLS Bond. Rather the KPMG model had been produced for CRT (then called Sheffield Merchant Banking Group ("Sheffield")) in respect of an entirely different product which did not have any specified obligations in respect of returning funds to third parties.

The scope of KPMG's engagement with Sheffield was set out in an engagement letter dated 1 December 2004. The objectives and scope of work were described in the following way:

> "KPMG will assist Sheffield in projects related to the preparation and use of financial models of life settlement contracts. The scope of this assignment is expected to include:
>
> - Preparing the AVS mortality model;
> - Preparing a pricing model that incorporates the AVS mortality projection model;

- Preparing a cash flow projection model consistent with the pricing model;
- Providing any additional assistance that you request pertaining to other aspects of senior life settlements contracts.

The Deliverables were so described:

> "The deliverables for this engagement are expected to be Excel spreadsheets and supporting documentation describing the assumptions, methods, and analyses performed for the life settlement contracts. Spreadsheets will be prepared for pricing individual life settlement contracts, projecting cash flows from an existing block of life settlement contracts, and performing other types of analyses for the life settlement business, if requested. These spreadsheets will be in a form that can be used by LSS or Sheffield to test the sensitivity of various input assumptions and discount rates."

(2) The KPMG model was a "back-end" model only, meaning that the model presumed an existing fund for which no repayment obligations would apply, and did not map the impact of the need to make coupon and principal repayments to investors. As Ms Juliano noted, and we accept, indeed it is obvious, the model made no provision for the cost of investor funds nor did it provide for any other financing costs. The SLS bonds (and in due course the Lifemark bonds) had significant costs of funding and outgoing cash flow obligations which would have had a significant effect on the cash flow model. Those aspects were not reflected in the KPMG model.

(3) Even a very basic comparison of the repayment dates for the bonds and the life expectancy of the insured individuals would have shown that the requirement to make payments to bondholders would arise significantly earlier than the expected dates of death of the insured individuals. As Ms Juliano said, this was "a structural risk which would have been obvious at the time the portfolios were constructed". We are, on the other hand, unable to find, as we were invited to by the Authority, that had proper investigations been made by Keydata of the model and the third parties involved in the SLS structure, it would likely have identified that, as expressed in an internal memorandum dated 8 December 2005, Mr Alvord of CRT had "continually expressed concern over this issue [namely the mismatch between the acceptance by SLS of expensive short-dated paper and the assets being acquired in the structure] and recommended against accepting funds at these terms since Spring 2005". There was plenty of engagement with CRT, and it is clear that CRT did not express these doubts to Keydata; the opposite was the case.

(4) Even as a "back end" model, the KPMG model was of little use given that it assumed acquisition costs of just 3.25%, whereas, as Ms Juliano noted, the SLS acquisition costs were 9.6% of the death benefit.

140. Mr Ford and Mr Owen referred us to certain further correspondence, received after the launch of SIB 1, but before its closing date, which they argued demonstrated an abundance of support for the fact of KPMG's work, alongside CRT, in developing

the actuarial model to guide the profitable acquisition and management of the SLS portfolio of life settlements.

141. On 9 August 2005, Mr Vaughan Thomas sent an email to Mr Gary Douglas of BWT with a number of questions concerning the SLS portfolio. Mr Douglas replied on 15 August 2005 to Mr Owen as follows:

> "As stated to Mark last week, the existing portfolio already 4 years old actually belongs to LSS and Larry Simon (privately owned), hence why it is not warehoused as a Fund or Bond. Rob has made contact with Larry prior to his reply, and it seems he is not prepared to hand over the analysis of his portfolio to third parties i.e. Cash Flows etc. On the contrary both CRT and KPMG have had access to the benefit of analysing and comparing Larry's portfolio and expected cash flows etc with the criteria of SLS Capital S.A.'s intended portfolio under special arrangements."

142. On 7 September 2005, Mr Gibson of CRT wrote by email to Mr Owen to describe the stress testing of their model. He said:

> "We have spent a great deal of time working with LSS and KPMG in designing our portfolio. In many respects we have chosen to be more conservative than standard industry practices. As such, we are comfortable that the portfolio will be able to meet the debt service requirements of the bond."

143. On 8 November 2005, Mr McCarty of CRT wrote to Mr Ford regarding the involvement of KPMG:

> "My organisation, CRT Capital LLC, is the advisor to SLS SA related to the formation of their life settlements portfolio in the United States. As part of that advisory assignment for SLS SA, we were introduced to KPMG and their engagement manager David White a year ago by our policy originator, Life Settlement Solutions (LSS). … KPMG has been actively involved with CRT and LSS in the formation of the SLS model and design of the portfolio of life policies since December 2004.
>
> I have as of yesterday read your document describing your secure income bond. I can say that we did not view any of your descriptions about the portfolio, modelling (sic.) or industry to contain any material misstatements or inaccuracies. The process you describe specifically about portfolio formation is how SLS SA has agreed to proceed with assistance from KPMG and CRT using our combined industry specific skills …"

144. These and other statements made in correspondence do not, in our view, demonstrate that Keydata, and specifically Mr Ford and Mr Owen, did all that was reasonably required, before making an investment offering to retail investors, to clarify the validity of the KPMG model where the life settlements portfolio was to be funded through a bond issue. Whilst we accept that CRT had expressed the view, in Mr Gibson's email of 7 September 2005, that the performance of the portfolio would enable the bond's debt service requirements to be met, and that it was reasonable for Keydata, and Mr Ford and Mr Owen in particular, to have taken from that that the

CRT model included an element of financing, we do not consider that it could have been concluded, without further enquiry, that the KPMG model, which formed such a fundamental element of the marketing of the SLS Products by Keydata to its investors, provided any comfort in that respect. For the reasons we have given, it ought to have been readily apparent that the KPMG model as provided to Keydata was not fit for the purpose of such a funding structure.

Credit facility

145. The SLS bond fact sheet and the Information Memorandum promised a minimum of $60 million standby facility from "a Universal Bank" to ensure liquidity in the structure. Keydata were aware of the significance of such a facility in light of the essentially illiquid nature of the assets, and the need for those assets to be maintained by regular premium payments, as well as the timing mismatch between the expected maturities of the life settlements and the bond redemptions. However, in spite of the need for a credit facility having been part of the original due diligence enquiries, the only evidence of such a facility received by Keydata was a draft, unsigned and non-binding term sheet regarding a proposed loan structure from Deutsche Bank, which was received on 23 June 2005.

146. The draft term sheet was for a maximum facility of $60 million, for a 10-year period. The collateral was the pool of life settlements plus cash equal to three months' premiums. The interest rate was LIBOR plus 3%. Mr Johnson forwarded a copy to Mr Owen on 24 June 2005. Neither Mr Ford or Mr Owen received confirmation, before the launch of SIB 1, that this facility or any other credit facility was in place. In the event, no such credit facility was entered into during the life of the SLS bonds. Mr Seth Alvord of CRT, in an internal memorandum of 9 December 2005 to Mr McCarty and Mr Gibson, attributed the refusal of Deutsche Bank to provide a liquidity facility to the unauthorised use by Keydata of KPMG's name in the SIB offering documents.

Currency hedge

147. Despite Mr Elias having noted, in an email to Mr Johnson and Mr Owen on 20 June 2005, that currency hedging facilities would be needed at the outset, and that these would be put in place by Mees Pierson, Keydata did not ensure that prior to the launch of SIB 1 those facilities were in place.

148. On 12 October 2005, Mr Johnson wrote to Mr Elias to seek confirmation that hedging arrangements were in place for SIB 1. This was in the context of an IFA having requested such confirmation in order to place approximately £5 million in SIB 2. Mr Elias provided confirmation by email of 14 October 2005, copied to Mr Owen, saying that "all currency risk is hedged". However, Keydata did not seek any documentation to support that assertion, even though Keydata itself was aware of the materiality of currency hedging, and at least one IFA had raised this specifically. The mere statement by Mr Elias was thought sufficient.

Listing

149. Prior to the launch of SIB 1, each of Mr Ford and Mr Owen was aware that listing of the bonds was a necessary condition for the bonds to qualify for ISA treatment. They were both also aware that the SLS bonds were not listed prior to the launch of SIB 1, and they were not listed at any time.

150. We heard evidence as to the understanding of Mr Ford and Mr Owen, through Mr Johnson, that the SLS Products would comply with the ISA Regulations if the SLS bonds were listed at any stage within the bond term of five years from the date of issue. It is now not a matter of dispute that this understanding was incorrect, and that to qualify for ISA status the bonds had to be listed for the entire five-year term.

151. Although we found it difficult to understand how Mr Johnson could have come to this erroneous view, having regard to his experience of ISAs and PEPs, we found him to be a credible witness, and we accept that this was indeed his own understanding. We also accept that at this time Mr Ford and Mr Owen shared the erroneous view.

152. Nonetheless, as a listing was, even on the basis of this flawed understanding, a pre-requisite for eligibility within an ISA, Keydata was under a clear obligation, if the bonds were to be marketed (as they assuredly were) as suitable for inclusion within an ISA, to ensure that there were contractual obligations in place to ensure that SLS would list the bonds at some time within the five-year term. Keydata, and in particular Mr Ford and Mr Owen, failed to do this.

The marketing of the SLS Products

The SLS Brochures

153. The existence of three of the four key features (the KPMG model, the credit facility and the listing of the bonds) was included in the brochures for the SLS Products ("the SLS brochures"), as also was the eligibility of the SLS bonds for inclusion within an ISA. The currency hedge was not referred to in the SLS brochures; reference to a currency hedge first appeared in the SIP 12 brochure, whch related to the Lifemark Products.

154. The first of the SLS brochures was that for SIB 1. SIB 1 was launched on 26 July 2005, with a closing date of 16 September 2005. It included the following relevant references:

(1) *KPMG*. "… KPMG constructed the financial models used to structure the Bond. It also checks the credit ratings of the insurance companies issuing the contracts and monitors the credit rating of the portfolio of investments." "… the Secure Income Bond uses an actuarial model developed by KPMG …"

(2) *Listing*. "Securities" are defined as "Bonds listed on the Luxembourg stock exchange". Under Permitted Investments", it is stated that "The Securities

> available under the SIB is a Bond denominated in Sterling and qualifying for the purposes of ISA and PEP investments."

155. There was no reference to the credit facility or currency hedge in SIB 1. In SIB 2, launched on 19 September 2005 with a closing date of 4 November 2005, the references to KPMG remained in substance and were augmented by the following:

> "**KPMG**
>
> The actuarial models used to produce the investment criteria have been independently generated by KPMG. They also monitor the credit ratings of the contract issuers, manage the cash flow within the portfolio and ensure adherence to the investment criteria. Furthermore the models used have been checked against an existing portfolio that has been operating for 4 years."

The SIB 2 brochure also states: "If an issuer's rating drops below 'A' KPMG consider whether it is better value for the Bond to sell the relevant contracts or keep them to maturity if their value is significant."

156. The references to listing appearing in SIB 1 were also retained and augmented by the statement, under Key Features: "The Secure Income Bond is a sterling denominated bond listed on the Luxembourg stock exchange. This makes it eligible for direct, SIPP, SSAS, PEP and ISA investment." SIB 2 also made reference to a credit facility, stating: "… mechanisms have been put in place to mitigate other risk factors … Bank facility to generate cash payment if contracts have not matured. This has been created at the request of institutional investors." In the technical notes for SIB 2, produced for professional financial advisers only, the provider of the cash facility is identified as Deutsche Bank.

157. Those references, as Mr Ford and Mr Owen should have been aware, had not been adequately verified. The role of KPMG was mis-stated, the fact of listing of the bonds was untrue, and there was no credit facility and no provision by Deutsche Bank. In our judgment, given the fundamental importance of these features to an investment decision, the brochures were in these respects materially misleading to investors and IFAs alike, and Mr Ford and Mr Owen should have known that.

158. Mr Owen submitted that it was not he or Mr Ford who was primarily responsible for the production and sign-off of the marketing brochures. That responsibility, he argued, rested with Mr Gaw as the Operations Director. The sales team, of which Mr Owen was part, did not sign off documents.

159. We have concluded above that Mr Ford and Mr Owen cannot seek to rely on the roles performed by others to deflect from their own responsibilities. That is the case as regards the brochures. Mr Ford and Mr Owen were aware that the brochures did not reflect the true position. They, as part of their regulatory responsibilities, should have ensured that the brochures were not issued on a false and misleading basis. The involvement of others does not diminish the responsibility of Mr Ford and Mr Owen for that failure.

Mr Owen and the Press

160. We have found that Mr Owen, as Sales Director, had responsibility for the SLS brochures, and that this remained the case notwithstanding the responsibilities that Mr Gaw, as Operations Director, and Mr Johnson in compliance, had. It is clear that Mr Owen recognised the marketing benefit of being able to point to the involvement of well-known counterparties, and that he knew therefore that the investment community would place considerable reliance on those parties being concerned in the SLS Products.

161. In this connection, Mr Owen made a number of statements to the press. Specific statements were made as to the prominent role of KPMG, without (as we have described) there having been any direct contact with KPMG to verify what was being said, and without any confirmation, for example by way of a letter from KPMG, that the firm was involved with the SLS Products in any meaningful capacity.

162. Mr Owen's statements in relation to KPMG included:

(a) In an article in Investment Week on 25 July 2005, headed "Keydata offer is welcomed", Mr Owen was quoted as saying: "Using KPMG, HSBC and Deutsche Bank gave us the confidence in the structure to be able to promote it to intermediaries and their clients."

(b) In an email to a journalist dated 11 August 2005 in response to a negative article (which had described the Secure Income Bond as "too good to be true"): "The bond is not complex at all. – acquire a diverse pool of policies within set criteria – i.e. spread of Co's, sum assured limits; credit rating of issuer, cash reserve, standby line of credit etc etc all set out by KPMG no less and monitored on an ongoing basis". Mr Owen also referred to the KPMG model as having been included in a "bible", giving "a clear idea of what the bond aims to achieve and what the risk factors are".

(c) In an article dated 11 August 2005 directly quoting Mr Owen: "… in this product there is an element of active management based on a model developed by KPMG. They've been running that model for four years with excellent results."

163. Those statements, in our judgment, could not be justified by reference to the due diligence undertaken by Keydata. Because Keydata had failed to follow through its own enquiries as to the role of KPMG, Mr Owen was not in a position to make the positive assertions about KPMG's role that he made with a view to allaying concerns about the SLS Products.

164. We accept that the press release of 19 July 2005, in connection with the launch of SIB 1, was drafted by Mr Vaughan Thomas. That press release made a comparison, which was not based on anything provided by CRT in respect of SLS, between the risk of the bonds and the risk of equities. Mr Owen said in evidence that Keydata had its "knuckles rapped" in respect of the comparison with high yield corporate bond funds or high yield corporate bonds. Mr Owen was himself quoted in

the press release as saying that the product produced "higher income and a lower risk level". Mr Owen's evidence was that the belief was that the product produced a sensible level of risk for the income it was paying. It is not clear, however, that there was any support for this assessment of the level of risk.

165. We find also that Mr Owen made a number of unsubstantiated assertions about other elements of the SLS Products:

> (a) In the article in Investment Week of 25 July 2005 Mr Owen is quoted, and the statement is made, without contradiction by Mr Owen, that "… Deutsche Bank holds a gearing facility to ensure the cashflow". Mr Owen knew that there was no such facility in place; only a draft term sheet. As noted above, Mr Owen himself is quoted as referring to the use of Deutsche Bank, along with KPMG and HSBC, as giving confidence in the structure.

> (b) In the 11 August 2005 email, Mr Owen described policy risk as being "carried by HSBC in most instances", which was untrue, and unsubstantiated by any of the due diligence. Mr Owen, in re-examination questions, sought to explain what he had been intending to get across by this reference to HSBC and "policy risk". He said that he was not intending to characterise HSBC as an underwriter or guarantor of the policies, but was simply referring to the role of HSBC as the bond custodian, with responsibility for the safekeeping and security of the policies. However, even if that were the case, we find that Mr Owen must also have been aware that a reader of that email, who was not familiar with the structure and the role of HSBC, would have assumed that the statement, written as it was to counter some adverse comment on the SIB product, concerned the risk of non-performance rather than the prosaic matter of safe custody. Mr Owen himself accepted that this was an oversight on his part. We find that it was an oversight, but not a deliberate attempt to mislead. It was, however, reckless.

> (c) In the article dated 11 August 2005, Mr Owen is quoted as having said that "… the insurance contracts are largely commercial key man/shareholder protection contracts held by businesses that would otherwise lapse the contract on the retirement of the individual insured". This was incorrect, as Mr Gibson of CRT later made clear in a note to Mr Smith, dated 18 November 2005, regarding the SLS brochures CRT had reviewed – key man policies might be purchased, but would form a small percentage of the total pool of assets. Whatever the source of Mr Owen's understanding in this respect, it is apparent that the position could have been checked with CRT itself, and the misstatement would not then have been made.

166. The technical notes and IFA "Frequently Asked Questions" produced by Keydata specifically to assist IFAs when selling the Products to investors (and which were also referred to in press articles) also contained untrue and misleading information concerning the involvement of KPMG. Indeed, in answer to the FAQ:

"Have KPMG signed off the actuarial model used in the Bond?" it was said: "Yes. This has been verified during the due diligence process" and also includes the statement: "A great deal of time has been spent with the originator of the policies and KPMG in designing the Bond portfolio".

167. The Authority submitted that the only conclusion to be drawn from these repeated misstatements is that Mr Owen was willing simply to provide whatever information to the market he considered would drive sales of the SLS Products, without any concern for whether those statements were in fact true. We agree. We are ourselves compelled to that conclusion by the fact that we find that Mr Owen knowingly made, and permitted to be made, statements which were highly material to the decision-making process for investors and which Mr Owen either knew were untrue, or was reckless as to their veracity, or for which no full due diligence had been undertaken. Whilst we accept that certain information concerning the involvement of KPMG had been received, both from Mr Elias and from CRT, for the reasons we have given that was self-evidently not sufficient to enable statements of the kind made by Mr Owen to be substantiated. Keydata itself had been aware of the need to obtain direct confirmation from KPMG, but that had not been done. Mr Owen knew that there was no actual facility with Deutsche Bank. His statements concerning HSBC were misleading, and Mr Owen was reckless in making them, particularly in the context of seeking to dispel concerns that had been expressed.

168. Mr Ford is, in this respect, in our view equally culpable. We have expressed our view as to Mr Ford's continuing responsibility notwithstanding his having adopted a "helicopter view". It is also the case that, shortly after the launch of SIB 1, on 4 August 2005 Mr Ford and Mr Owen were informed (by a Mr John Bennett, who had been instrumental in establishing the relationship between Keydata and Mr Elias) that despite Mr Elias' initial enthusiasm to field questions he had "finally thrown his toys out of the pram" in relation to continued emails from several people (including Mr Johnson). It was suggested that only Mr Ford and Mr Owen contact Mr Elias and then only on matters of strategic importance.

169. We accept that the steps to be taken to enable Keydata to have direct confirmation from KPMG as to KPMG's role, and for the listing of the Bonds, the establishment of a credit facility and a currency hedge were matters of strategic importance. They were not in the nature of checking, but of actions required to be taken by BWT and CRT. Whereas questions of compliance issues remained the province of Mr Johnson, it is clear that, if anyone was to take steps with Mr Elias to ensure that the essential structural elements advertised in relation to the bonds were in fact put in place, it was Mr Ford and Mr Owen. Mr Ford's evidence, however, was that he did not regard that as his responsibility, and Mr Owen also confirmed that he did not take steps in this regard.

Mr Ford becomes entitled to a "fee" of 1.5% of sums invested in SLS bonds

170. It appears from the internal memorandum of 9 December 2005 from Mr Alvord of CRT to Mr McCarty and Mr Gibson, and it is in any event common ground, that in or around August or September 2005 it was agreed between Mr Elias and Mr Ford

that Mr Ford would receive, through his company SOF Services Limited ("SOF"), payment of 1.5% of the sums invested in the SLS bonds.

171. The Authority's case in this respect is that, consistently with other payments made to Mr Ford and his vehicles (which are discussed below), this was a simple "kick back" to Mr Ford from Mr Elias by which Mr Ford diverted funds that had come into Keydata from investors for his own benefit.

172. Mr Ford submits that this payment was a share of BWT's own commission and that it was made in consideration of Mr Ford entering into an international distribution venture with Mr Elias, separate and distinct from Keydata. Mr Ford submits that Mr Elias clearly represented that this fee was included within Mr Elias' costs and that it was not in addition to, or such as to place any additional burden upon the commerciality of the SLS structure.

173. Mr Ford refers in this respect to Mr Bennett having previously agreed with Mr Elias to distribute and sell BWT's products, including by way of international distribution. As this had not been satisfactorily progressed, Mr Elias had approached Mr Ford with the same opportunity. Mr Ford says that both Mr McNeil and Mr Owen were aware of this separate approach having been made following the rejection by the Keydata board of a proposal from Mr Elias formally to acquire a shareholding in Keydata.

174. Mr Ford's evidence was that the monies paid to him in this respect constituted "seed funding" for this new venture. The venture did not proceed because of the subsequent fracturing of the relationship with Mr Elias (which we shall describe later). None of the amount paid in this respect was repaid to Mr Elias or BWT. Mr Ford submitted that it was held on deposit until Mr Ford could identify a suitable Keydata investment project. According to the Authority's Financial Benefits Report, Miles Properties Inc, a real estate company which managed assets underpinning a separate Keydata project, the Keydata Property Income Bond, received approximately $1.5 million from the LGT account (Mr Ford's personal bank account held at LGT Bank in Liechtenstein, which was opened on 6 October 2005) on 30 June 2006 which was used to fund the acquisition and related property costs of the Madison Pointe Apartment project in Florida. Mr Ford submits that this was where the 1.5% fee was applied. Further to the Hometrack project, Miles Properties also received almost $2 million from the LGT account on 11 September 2006 which was used to fund the acquisition and related project costs of the Cambridge Commons Apartments project in Maryland.

175. In our judgment, the payment of this 1.5% fee was simply a payment to Mr Ford for the work carried out by Keydata. It was calculated by reference to the percentage of investment by Keydata investors in the SLS Products. The amount receivable by Mr Ford depended therefore on the success, not of any other "international" distribution undertaken by Mr Ford, but of the Keydata distribution. We do not accept that Mr Elias authorised this payment because he had been impressed with the work Mr Ford had done with Keydata. Keydata had not carried out any international distribution at that time. The submission is also inconsistent with Mr Ford's

argument, in support of his receipt of fees through Orietex/LAS Global, that Keydata was not in a position to undertake international distribution, as it had so many projects, including renewable energy projects.

176. That the fee was not for any venture to be undertaken by Mr Ford is also supported by the fact that, on Mr Ford's evidence, he did not carry out any work in relation to any such venture, but that Mr Elias did not seek to recover the monies paid. Mr Elias himself described Mr Ford as having taken his own "cut" through SOF. Mr Elias used that expression in an email to Mr Eber dated 19 October 2007 which referred generally to the Keydata fees and documentation. There was no reference to an international distribution venture. It is true that this email was sent at a time when Mr Elias, as he stated in the email, was seeking to put Mr Ford "well and truly on the back foot". There is, however, no reason to conclude that Mr Elias was not accurately summarising the fee structure for SLS, including the 1.5% payment to SOF.

177. Mr Ford referred to two pieces of correspondence which he submitted supported his case that the 1.5% fee was for a global distribution venture. The first is an email from Mr Elias to Mr Ford on 29 August 2005 entitled "Next Steps", which followed a meeting between Mr Ford and Mr Elias in Luxembourg. In that email, Mr Elias is outlining where the parties have reached in terms of Keydata exclusivity of distribution in the UK, but also in "other markets which we agree to work in", along with other issues, such as pricing. Mr Elias said: "Global distribution is very important to us and we need to discuss what we are doing and how we might work together".

178. We do not accept that this was a precursor to a global distribution venture with Mr Ford personally. It is clear from the email that Mr Elias was concerned with working together with Keydata in markets outside the UK. There is no suggestion that this is to be a venture with Mr Ford, separately from Keydata; indeed in the same email Mr Elias confirms an interest in BWT purchasing an equity stake in Keydata, which would be inconsistent with a separate payment to a vehicle controlled by Mr Ford, in which it was not proposed that BWT, or Mr Elias, would have any interest.

179. That analysis is further supported by the second email to which Mr Ford has referred in this respect. Mr Johnson wrote to Mr Elias on 20 October 2005 forwarding an earlier email from Mr Grainger to Mr Ford dated 21 September 2005 under the subject heading "Re: Keydata – Lux Offshore Fund", in which Mr Grainger provides advice concerning the structuring of a fund as a SICAV or UCITs, thus enabling (as Mr Ford had sought) the fund to be marketed through UK intermediaries to private customers and cross-border. There is no suggestion that this is a project outside of Keydata (there is no mention of Mr Ford undertaking global distribution himself or through SOF), and we find that the email supports only that Keydata was interested in promoting the establishment of an offshore fund at that time. A further email from Mr Johnson to Mr Elias dated 2 November 2005 also confirms that Keydata retained an interest in a SICAV structure and was willing to meet Mr Elias in that respect.

180. If Mr Ford's submissions based on the Financial Benefits Report are intended to show that the 1.5% fee in fact belonged to Keydata, or that Keydata was somehow the beneficiary of it, we reject that submission. We are satisfied that this fee, received as it was through a vehicle controlled by Mr Ford, was available to Mr Ford to do with as he chose. If he chose to invest it, or any part of it, in subsequent Keydata investment projects, that was entirely a matter for him. It does not demonstrate that Keydata had any interest in those funds, or that those funds represented a "reserve fund" for Keydata.

181. In our judgment, whatever the nature of the 1.5% fee, the fact that it was paid to a company controlled by Mr Ford and was calculated by reference to Keydata's product distribution means that it created a clear conflict of interest for Mr Ford with respect to Keydata. We accept, as submitted by the Authority, that Mr Ford was personally incentivised to sell the SLS Products regardless of the interests of Keydata and its customers.

182. There is no evidence, apart from the evidence given by Mr Ford and Mr Owen, that the arrangements concerning the 1.5% fee were properly disclosed to Keydata. There was certainly no disclosure to investors, whether by means of the SIB brochures or otherwise. Mr Owen confirmed in evidence that he was aware, through having been told by Mr Ford, that Mr Ford was "receiving some money", but he was not aware how much Mr Ford was receiving, and he had been told by Mr Ford that the sums would be taken from Mr Elias' own commission payments from SLS. Mr Ford also gave evidence that he had disclosed the arrangement orally to Mr McNeil, but there is nothing to support that.

183. Mr Johnson, on the other hand, was not informed, on the basis that, as Mr Ford put it, he "didn't think that Peter Johnson did need to know about this". Nor was Mr Grainger informed. Nor, although it was at that time an investor, and had the benefit of an agreement under which there was a cap on the remuneration Mr Ford could receive from Keydata, was there any disclosure to 3i, or any evidence of disclosure to Mr McCall.

184. The Authority submitted that the evidence indicated that Mr Ford had sought actively to conceal the 1.5% arrangement. We would not regard the mere fact that the payments were made into a new account opened by Mr Ford at a bank in Liechtenstein as evidence of concealment. Nor do we consider that Mr Ford can be taken to have intended concealment by the reference made by Mr McCarty, in an email to BWT dated 21 December 2005, to the fact that CRT had "signed off on the additional side agreement with Keydata on their 1.5% one-time fee to be paid to an offshore vehicle. This fee is in addition to the normal placement fee [payable to Keydata] described in our original agreement letter forming SLS and the two 1.5% one-time fees to CRT and BWT." Although the Authority submitted that this showed that CRT understood the payment to be an additional payment to Keydata, that was not the case. The 21 December 2005 email appears to have been prompted by the interoffice memorandum of 9 December 2005 from Mr Alvord to Mr McCarty, in which it is clearly stated that during a conference call on 29 September 2005 Mr Elias

had asked Mr McCarty to write a letter providing for an additional 1.5% to be paid to Mr Ford (and not Keydata).

185. In that memorandum, Mr Alvord expresses concern over the cost of funds at 13.5% (which we take to include the "one time fees" to CRT and BWT to which Mr McCarty referred on 21 December 2005, and the additional 1.5% payable to Mr Ford). That in our view demonstrates, first, that there was no concealment so far as CRT were concerned, and secondly that the payment to Mr Ford was not, as he argued, a payment out of BWT's own commissions, but was a cost of funds to SLS itself (albeit that it appears that payments had in practice been made to BWT by SLS and then paid on).

186. On the other hand, there is evidence of Mr Ford both being aware of, and himself taking, steps to conceal the payments to SOF. Mr Smith wrote to Mr Alvord on 20 December 2005 concerning commissions to be paid to Keydata and "the Keydata distribution network". It was noted by Mr Smith that usually those fees had been paid to BWT and then BWT had distributed the commission through the Keydata network. However, because of ongoing negotiations between CRT and BWT (as regards BWT's own commission), Mr Smith suggested that for the December tranche of funds raised by Keydata (amounting to £25 million) payment should in the first instance be made by SLS. The Keydata commissions included the 1.5% payable to SOF. Mr Smith's email forwarding this to Mr Ford was headed: "STEWART FORD ONLY".

187. With regard to the same payment, on 26 January 2006 Mr Smith sent (from his wife's email account) an email to Ms Maron of Mees Pierson concerning an instruction to pay the Keydata commission. Mr Smith said:

> "… There should be an instruction from Rob Gibson to pay 1.5% of Tranch (sic.) D to SOF Services. Stewart is currently traveling to the US, please confirm settlement to him by email asap. Do not give this confirmation to anyone else."

Mr Smith confirmed in his evidence that the instruction not to give the confirmation to anyone else had come from Mr Ford.

188. We find, therefore, that Mr Ford did not make any formal or meaningful disclosure of his interest in the 1.5% payments, and that he was aware of, and himself took, steps to prevent such disclosure. We also find that Mr Ford had a clear conflict of interest in this regard, and that there ought to have been proper disclosure to Keydata at least. We accept that, at the material time, the practice would not have been to disclose all fees that were provided for in a structured product. We accept that there was no requirement for disclosure to an investor of the fees charged, by reference to the SLS Products for example, by BWT, CRT or even Keydata itself. Standard practice at the material time was to disclose commissions, including trail commissions, to the intermediaries, namely the IFAs. But where the receipt of a fee might create a conflict of interest, as in the case of the fee to SOF in favour of Mr Ford, who was the chief executive of Keydata, in our view such a fee should have been disclosed to Keydata.

189. The fees to be extracted from the structure were a vital component of Keydata's due diligence and the decision to distribute the SLS Products. Mr Johnson accepted that as part of the due diligence it was necessary for Keydata to be satisfied that the fees were not excessive and unfair to customers. He also agreed, and we find, that in order to consider whether excessive fees were being charged, he would have to have been made aware of the fees being paid to SOF. Mr Johnson also explained to us, and again we find, that it was important in due diligence terms to understand all the parties involved and the contracts with those parties. Yet the contract with SOF was concealed from him.

The KPMG "cease and desist" letter

190. Very soon after the launch of the SLS Products by Keydata, issues concerning the KPMG model emerged. On 3 November 2005 Keydata received by fax a letter from Ms Vanessa Sharp, Solicitor and General Counsel of KPMG LLP in the UK, relating specifically to the SIB 2 brochure (the closing date for which was 4 November 2005). In that letter, KPMG stated that neither in the UK or the US had it been possible to identify anyone from KPMG who had approved the use of KPMG's name in the brochure. Furthermore, the description given of KPMG in the brochure was inaccurate and misleading. KPMG dissociated itself from the brochure and requested that the matter be brought to the attention of all third-party recipients of the brochure. The letter was stated to have been copied to the Authority.

191. Keydata took immediate action. On the same day, Mr Johnson sent a copy of the KPMG letter to BWT requesting that a call be made to Mr Ford. Mr Johnson also contacted Mr Smith, who advised the immediate removal of KPMG's name from "any publication documents". Mr Elias, who had also been contacted, agreed that a change of wording was required, but took a more belligerent stance, stating that KPMG should be told that their letter was defamatory, and that a retraction was required, including to all third parties.

192. In an email from Ms Sharp of KPMG to Mr Johnson dated 4 November 2005, she explained that KPMG US had reviewed what they considered to be the relevant engagement letter, which prohibited use of KPMG's work without their consent, and that the work called for by the engagement letter was not the work described in the offering materials. At this stage Ms Sharp confirmed that she was sending copies of the relevant letters to the Authority.

193. That was followed by a letter, sent by email, from Mr Donald W Rose, Associate General Counsel of KPMG in New York, on 11 November 2005 entitled "Unauthorized Use of KPMG Name – Cease and Desist Demand". That letter made it clear that KPMG did not consider that it had provided the actuarial services to which reference had been made in the brochures or other marketing material.

194. In the meantime, and notwithstanding the correspondence that had been received at that stage from KPMG, Keydata launched SIB 3 on 7 November 2005. The brochure for SIB 3 retained the same references to KPMG as had appeared in SIB 1 and SIB 2.

195. It was Mr Ford then who stepped in to deal with the KPMG issue. He wrote on 16 November 2005 to Mr Rose, with a copy to the Authority, in response to KPMG's letters of 3 and 11 November. In that letter Mr Ford said that Keydata did not accept the allegations that the brochures and marketing materials contained false statements and false assertions. Mr Ford explained that references to KPMG had been made "in good faith" and based upon information provided by SLS. Mr Ford said that a "validation exercise" had been commissioned by an external law firm, and that if as a result of that exercise any inaccuracies with respect to KPMG were identified, whether material or not, Keydata would correct them and take all necessary steps as regards the investors.

196. There appears then to have been something of a damage limitation exercise at Keydata. In a further letter from Mr Rose dated 15 December 2005, he states that he had been "unpleasantly surprised" to see an article in the 5 December 2005 edition of Investment Week ("FSA Looks Into Keydata") that Keydata's head of communications (Mr Vaughan Thomas) had stressed that since the initial letter, seen by Investment Week, "the dispute between the two groups has come close to amicable resolution". Mr Rose noted that this was not his understanding. Mr Rose reiterated that, in view of the imminent closing date for SIB 3 (16 December 2005), KPMG required corrective disclosure in Keydata's website and all investors who had received the incorrect materials to be contacted, "as failure to do so could result in a situation where investors are misled by earlier obtained materials".

197. Correspondence between Mr Ford and Mr Rose continued. Mr Ford's position, as appears from a letter from him to Mr Rose dated 11 January 2006 (mistakenly typed as 11 January 2005), was that the model had been created by KPMG, for SLS and LSS. Mr Ford said that Keydata did not accept that KPMG had never had any involvement with the product. Mr Ford's argument was based, at least in part, on the fact that, although KPMG's work had been performed for CRT/Sheffield and LSS, CRT was a part owner of SLS.

198. In that letter, Mr Ford proposed to Mr Rose that the following wording be sent to relevant investors:

> "We have been asked to clarify the fact that whilst the Bond was based originally on a model created by KPMG, the model was not produced for this specific Bond and KPMG have asked us to point out that they have never had any formal involvement with the product…"

199. That can only be described as an attempt by Mr Ford to put an optimistic spin on the reality of KPMG's involvement. In our judgment, it should have been immediately apparent, from a review of the engagement letter between KPMG (Atlanta, GA) and Sheffield Merchant Banking Group (CRT) dated 1 December 2004, that no bond, which would require a cash flow model to include both coupon payments and repayment of principal, could have been "based" on the model created by KPMG for Sheffield; the engagement letter made it clear that the actuarial services provided were connected with "the financial modelling and pricing of life settlement contracts in view of consummating a transaction with [LSS]". It could not properly

be deduced from that that the use of that model in relation to the SLS Products could have any validity.

200. Mr Ford and Mr Owen drew our attention to a letter from the Financial Services Compensation Scheme ("FSCS") to Mr Rose of KPMG dated 6 November 2009 which had been written in the context of the assessment of claims that might be made against Keydata in respect of its promotion of SIB 1 to 3. In that letter, referring to an Origination Agreement between SLS and LSS dated 14 March 2005, which referenced the "KPMG Cash Flow Model", and the KPMG engagement letter with Sheffield/CRT, the FSCS said:

> "It therefore appears that KPMG were involved in the creation of a cash flow and mortality model that was used in determining the investment parameters for insurance contracts to be purchased by or on behalf of SLS Capital, S.A. The statement [in the SIB brochures] "*KPMG constructed the financial models used to structure the Bond*" seems to us to essentially be true (even if, as we acknowledge appears to be the case, KPMG had no knowledge of the models it prepared for Sheffield Merchant being used in this way)."

201. With respect to the FSCS, we do not consider that the documents it had referred to could support a statement in a brochure inviting investment in a bond structure, that the KPMG model had been "used to structure the Bond". The model did not relate in any way to a bond structure; it was confined to life settlement contracts under certain parameters. Indeed, Mr Rose was quick to point that out. In a letter to the FSCS dated 20 November 2009, Mr Rose made the following points:

(1) To the extent that Keydata or SLS claimed to have received and utilised actuarial formulae derived as part of KPMG US's engagement with Sheffield/CRT, KPMG believed that the receipt and use of those formulae occurred in violation of the contractual terms of KPMG's understanding with Sheffield/CRT. KPMG therefore considered that the statements in the SIB promotional materials, which implied that KPMG knowingly and consensually participated in whatever process resulted in the securitisation of the life settlement contracts and the issuance of bonds to be false and misleading.

(2) There was no truth in the statement that KPMG "adjusted" the "model", "using four years data from it …". Once KPMG US had provided Sheffield/CRT with the mortality, pricing and cash flow models, KPMG had no involvement with Sheffield/CRT's use of those formulae, and at no time reviewed the inputs or results from their use, and did not adjust them. Thus, to the extent that the statement implied that it was KPMG US that had adjusted the formulae or validated the operation of the model, the statement was simply false. To the extent that the formulae were adjusted, then by definition the formulae used were not those "constructed" by KPMG.

(3) At most, the formulae provided to Sheffield/CRT, when properly utilised with appropriate inputs, were designed to calculate reasonable estimates of expected cash flow from individual life settlement contracts ("LSCs"). However, the securitisation of that cash flow into a structure that would support

the issuance of tranches of income bonds involves activities beyond those provided by KPMG US to Sheffield /CRT. Thus, financial issues associated with determining the number and terms of LSCs to be included in the securitisation pool to adequately collateralise the bonds, as well as the financial and legal issues associated with determining the various payment priorities and legal rights of holders of different tranches of bonds, and determining such other issues as are necessary to establish the degree of creditworthiness to secure the desired credit ratings for the structure, are all business and legal issues which typically impact a promoter's ability to structure a financial product, such as the SIBs. KPMG regarded as clear from the KPMG US engagement letter that KPMG US was never retained to perform services in connection with the "structuring" of the SIBs, and it never did so.

202. We agree with the analysis of KPMG, which is supported by the expert evidence we received. Although this correspondence took place some time after the events in question it is clear, for example from KPMG's more contemporaneous cease and desist correspondence, that if Keydata had made contact with KPMG, as it had intended to do as part of its due diligence, these were the messages it would have been given. Certainly, once KPMG's misgivings were known to Keydata it should have adopted a cautious approach to the SLS Products. But it did not do so.

203. Mr Ford and Mr Owen believe that the KPMG issue was confined to whether KPMG had consented to the use of its name, and that they had relied on Mr Johnson in the first instance to deal with the problem. Only when it had escalated did Mr Ford become involved, and Mr Ford and Mr Owen submitted that they believed that the matter was dealt with appropriately. We do not accept that Mr Ford or Mr Owen can have genuinely believed that the KPMG issue was simply one of the use of KPMG's name without consent. It is abundantly clear from the correspondence at that time that KPMG were saying that the statements concerning their involvement with SLS were false. To believe otherwise required "blind-eye" optimism inconsistent with the approach of a person of integrity.

204. The validation exercise promised by Mr Ford to KPMG took the form of a draft note of advice (headed for discussion purposes only) prepared by Norton Rose, Keydata's lawyers. The draft note was received by Mr Ford and Mr Johnson on 23 November 2005 and it was forwarded by Mr Johnson to Mr Owen on 28 November 2005. By way of executive summary, the draft note expressed Norton Rose's view that a number of the references to KPMG were inaccurate and likely to be misleading, and that others lacked the necessary clarity to comply with the Authority's financial promotion rules. It was recommended that the SIB brochures should not be used until certain amendments had been made.

205. In particular, with respect to the statement in SIB 1 that KPMG had constructed the financial models used to structure the bond, and the statement in SIB 2 and SIB 3 that the financial models constructed by KPMG were used to structure the existing portfolio and had been adjusted using four years data from it to increase its accuracy, Norton Rose advised Keydata that in the context of the passage as a whole these statements could be read as suggesting that KPMG had played a wider role in

developing the SIB than had been the case. Norton Rose considered that to be misleading. Norton Rose did, on the other hand, express the view that the statement, in SIB 2 and SIB 3, that "[t]he actuarial models used to produce the investment criteria have been independently generated by KPMG" to be broadly accurate. There was, however, no support for the statement that KPMG had monitored the credit ratings of the contract issuers, managed the cash flow within the portfolio and ensured adherence to the investment criteria.

206. Despite this advice, and the representations made by Mr Ford to KPMG as to disclosure, Keydata did not take any steps to communicate with investors or IFAs who may have relied on any of the SIB brochures (including SIB 3, the closing date for which, 23 December 2005, was still to arrive). No revised SIB brochure was produced.

207. The evidence given by Mr Johnson to the Serious Fraud Office (SFO) on 4 February 2010, which Mr Johnson confirmed as true in evidence before us, and which we accept, was that his view at the time was that Keydata should write to investors or IFAs to inform them of the errors, but that he had effectively been overridden by Mr Ford who took the view "that it didn't make any material difference to the product … in terms of, it's still the same arrangement etc" and that such information might cause a "run on the investment". In his evidence, Mr Ford accepted that he had taken the view that bondholders should not immediately be informed, but that he had done so to avoid loss to bondholders by giving them an option to decide what they wanted to do when they received their annual statements. He also claimed that he had been guided by Mr Johnson in that view. We do not accept that the responsibility lay with Mr Johnson. We find that it was Mr Ford who decided not to make an immediate disclosure to investors and IFAs. We agree with the submission of the Authority that, having regard to what was known at that time about KPMG's position, and having regard to the advice of Norton Rose, such concealment was entirely improper. In any event, no disclosure was provided to investors and IFAs at all, whether in the annual statements or otherwise.

More problems identified with SLS

208. On 19 December 2005, and thus in the midst of the debate with KPMG, Mr Larry Simon of LSS wrote by email to Mr Ford and Mr Smith of Mees Pierson concerning a call he had received from Mr Elias which, as he put it, "is bothering me very much". The email goes on to say that Mr Elias had indicated that he "did not like the KPMG underwriting" and wanted to adopt a completely different methodology. Mr Simon's concern was that Mr Elias "simply does not understand the asset" and that "our doing our own life expectancy work is like the fox watching the hen house".

209. The Authority submitted that Mr Elias' change of tack was because his lies concerning the KPMG model had been exposed. We do not, however, have evidence on which to make a finding as to Mr Elias' motivation in this respect.

210. Although Mr Simon, at the time, appears to have been very exercised by the proposal made by Mr Elias, Mr Ford's evidence was that he was not. He explained, and we accept, that Mr Elias had been very angry with KPMG, albeit that he himself had recognised the need to disclose the issue with KPMG. However, Mr Elias' emails do not demonstrate a reasonable attitude to the KPMG issue. They are belligerent, threatening on the one hand litigation, and on the other disclosure of KPMG's own "problems" including unspecified current and pending litigation against them. Mr Ford's own lack of concern stemmed from his having discussed the matter with CRT; it was CRT who, in Mr Ford's eyes, were "running the project", and what Mr Elias said was, according to Mr Ford, irrelevant. Mr Ford's evidence was that the actions of Mr Elias had not shaken Mr Ford's belief in the KPMG model.

211. At this time, however, CRT was itself identifying problems with SLS. An email of 16 November 2005 from Mr Gibson of CRT to Mr Elias, Mr Ford and Mr Smith amongst others set out CRT's position that, although funds raised by SIB 2 should be accepted, those to be raised in SIB 3 (scheduled to close on 23 December 2005) should not be accepted. A number of meetings and calls ensued, and then on 21 December 2005 Mr McCarty of CRT wrote to a Mr Lim of BWT to say that "the survival of the SLS fund is the principal concern", and that the fund could not continue to accept funds "particularly under the terms of the existing money and have a future that is bright". The reference, we find, to the terms of the existing money is a reference, at least in part, to the costs of raising those funds, including the various commissions paid to BWT, Keydata and Mr Ford, through SOF (see the CRT inter-office memorandum of 9 December 2005 referred to above).

212. The email painted a bleak picture. Having referred to the levels of commission on the SIB funds, Mr McCarty went on:

> "We continue to receive data from Mees Pierson on the actual flow of funds into and out of SLS. There are many questions we have about this data and how it conforms or doesn't to the model, the SLS agreements and our understanding of the process. We would very much like to resolve these issues immediately as they have a direct bearing on the viability of the SLS fund and the residual value held by all three parties [by this Mr McCarty was referring to the shareholders of SLS, namely CRT, BWT and LSS]. The cash leakage of the funding appears from current data to be excessive. I look forward to resolving those issues and preparing for a future for SLS."

213. Mr Elias sent a copy of that email to Mr Ford on 21 December 2005, principally so that Mr Ford could remind Mr McCarty that CRT had in fact agreed to accept the £25 million raised by SIB 3.

214. These concerns were in fact demonstrated in practice very shortly afterwards. The first income payment for SIB 1 had been due to be paid to Keydata on 31 December 2005, but it was paid late. It was paid on 9 January 2006, giving rise to what was described at the time by an administration manager in Keydata as "a large number of abusive clients" who had "expressed lack of confidence in the plan".

215. There were also concerns at the Keydata end as regards a number of unresolved issues. In March 2006, Mr Johnson summarised those in a document headed "report of SLS", which was sent to Mr Ford on 13 March 2006. Mr Owen also saw the report. Mr Johnson's conclusion was that Keydata needed to take control of the investment as soon as possible, possibly by replacing parties within the current structure.

216. Apart from this general lack of control, the list of issues was: lack of prospectus; bond not issued; disclosure of KPMG; disclosure of HSBC; bank facility not set up; no confirmation that hedging arrangements were in place; income payments paid to Keydata late; payments to Keydata [that is, commissions] paid late; lack of reporting; no confirmation that Required Asset Cover had been met; no certainty that CRT would keep the product running for five years; and BWT investments [this is a reference to the separate tranches run by BWT through SLS and the difficulties that might cause to Keydata investors].

217. These were serious issues. Mr Ford in evidence said that it had been he who had instructed Mr Johnson to write the report in these terms as he wanted to put a "rocket" under CRT; when put to him that he was not asking Mr Johnson to say anything that was not true, but simply to collate all the problems in one "hard hitting document", Mr Ford agreed that was correct. Furthermore, Mr Johnson confirmed that, whilst he had used strong language in order to ensure action was taken, everything written in the report was accurate and reflected his view at the time he wrote it.

218. None of this led to any disclosure to Keydata investors who had invested in SIBs 1 – 3. IFAs were not informed. No notification was given to the Authority (apart from in relation to the KPMG issue). Nor did any of these issues deflect Mr Ford in particular from moving ahead with a new venture, based on the SLS model, namely Lifemark.

219. The issues raised by Mr Johnson were, however, discussed at a meeting with CRT (at CRT's offices) on 11 May 2006. Mr Ford and Mr Johnson attended for Keydata. It is accepted by the Authority that the purpose of the meeting, so far as Mr Ford was concerned, was to discuss with CRT how they were to achieve those things which they had to date failed to achieve. The minutes of that meeting recorded, amongst other things, that the portfolio had a total face value of £160 million (sic. It is not clear if this should refer to a dollar amount) with a cost of $65 million, that the portfolio was 60% complete and it was expected that the remaining purchases would be completed by July or August. It was confirmed that there was no intention to run the portfolio for a shorter term than the five years required by Keydata. It was also recorded that, although the lawyers had been instructed by BWT to "down tools" as regards the listing of the SLS bonds in March 2006, CRT had given instructions for this to be progressed. CRT also stated that a $75 million facility was in place and this would be matched against life policies purchased, and that a hedging facility was set up and "ready to go". CRT concluded the meeting by "saying that the Portfolio was on target and that [they] expected some residual value in the portfolio at the end of the investment period".

The creation of the Lifemark structure

220. The first Lifemark offering was SIB 4, which was launched on 19 December 2005. That followed the same pattern with the fund-raising activities in relation to SLS, namely that the launch of the new tranche of bonds was three days after the close of the previous tranche (SIB 3 in fact closed on 16 December 2005).

221. We consider that the launch of SIB 4 at that time was extraordinary. Whereas it would be expected, not least by investors and IFAs advising them, that a bond issue would be marketed only once the underlying product was fully-fledged and all aspects had been confirmed by due diligence, SIB 4 displayed none of those attributes. Its timing appears to have been dictated solely by the programme established in relation to SLS, coupled with the fact that no further Keydata funds were to be accepted into SLS itself, so that, if bond issues were to continue to be made, an alternative vehicle would have to be established.

222. Although Mr Grainger expressed the view in evidence, from the compliance standpoint, that due diligence on a product might not need to be repeated in respect of a second product, he was there referring only to a case where it was reasonable for continued reliance to be placed on the earlier due diligence exercise. It was not in our view reasonable for Keydata to have placed any reliance on the due diligence that had been undertaken by it in respect of SLS when launching the Lifemark Products. We should also add that we do not agree with Mr Grainger when he expressed the view that Keydata's due diligence in respect of the SLS Products was adequate.

223. The result was that fundamental features of the Lifemark structure were not in place when SIB 4 was launched. Some of those features were absent even when SIB 4 closed on 24 February 2006:

(a) Lifemark itself was not incorporated until 12 January 2006;

(b) The selection and contractual commitment of Meditron as the investment manager for Lifemark was not confirmed until January 2006;

(c) The identification of an originator to source the policies for the Lifemark portfolio did not take place until Montage was engaged in May 2006;

(d) The counterparties (Meditron and Montage, and Bank of New York in relation to the Payment and Custody Agency Agreement) did not sign their respective service contracts in respect of the Lifemark structure until 11 July 2006. By that time there had been three Keydata offerings of Lifemark bonds, in SIB 4, SIP 1 and SIP 2, which had closed, and investors' funds had become committed.

224. We are also satisfied that, at the launch of SIB 4, and indeed until much later, there was no financial model in place which could have been capable of determining whether investors would receive the advertised returns. We accept that Mr Ford and Mr Owen placed reliance on the "adoption" by Lifemark of the KPMG model. But that was in in our judgment not something that any reasonable person, mindful of his or her regulatory responsibilities, could properly have done. Both Mr Ford and Mr

Owen were aware that KPMG had repudiated reliance on the model in the context of the SLS structure and the bond financings associated with it. It is in our view inconceivable how Mr Ford and Mr Owen could have come to the view that it was appropriate to place any reliance, in the context of an offering of bonds in an entirely new structure, on the KPMG model instead of seeking independent actuarial support for a Lifemark model.

225. We do not accept that, until June 2006 at the earliest, there was any form of financial and actuarial model in place for Lifemark which would have been capable of modelling both the portfolio cash flows and the financial characteristics of the bonds issued by Lifemark. We shall consider later the evolution of the Lifemark model and the extent to which such a model could have been considered as fit for purpose.

226. Nor do we accept that it was reasonable, as Mr Owen suggested in evidence, that the, at that stage putative, Lifemark Product could have been launched on what, so far as Keydata and Mr Ford and Mr Owen were concerned, was effectively a provisional basis so that, as Mr Own put it, if "everything [did] not come together in the right way, then the investors would need to have their money returned". In our view, that sentiment demonstrates two things. First, the Lifemark Product was bound to be launched deliberately on the basis of a fundamental lack of transparency to the investors and the wider investment community. Secondly, that evidently Mr Ford and Mr Owen considered that following the launch, and before the investors' funds had been committed in respect of SIB 4 (and indeed SIPs 1 and 2 as well), everything had come together in the right way, when self-evidently it had not.

227. As the Authority submitted, the result was that the brochure issued by Keydata, and for which as we have described above, both Mr Ford and Mr Owen bear responsibility, was full of groundless statements:

(a) "In order to create an immediate spread of contracts the Secure Income Bond will invest in an existing portfolio, creating the diversity required by the model" and "The Keydata Fund will integrate with an existing portfolio of contracts. This is an advantage since the required spread of contracts will be effectively achieved from inception thus providing full diversification at outset". There was no existing portfolio.

(b) "In addition mechanisms have been put in place to mitigate other risk factors … Bank facility to generate cash payment if contracts have not matured. This has been created at the request of institutional investors." There was no such facility (and there had been no such request, and there were no institutional investors who could have made such a request).

(c) "The Secure Income Bond is a sterling denominated Bond listed on the Luxembourg Stock Exchange. This makes it eligible for direct, SIPP, SSAS, PEP and ISA investment." The Lifemark bonds were not listed until 6 June 2007.

(d) "The Bond enters into a number of investment transactions in order to produce the advertised returns using a financial model. The model ensures that an appropriate level of cash and assets are maintained at any one time and that enough assets reach maturity to generate the advertised returns." Mr Ford and Mr Owen were aware, from the correspondence with KPMG, that the model on which they purported to rely was a "back end" model only, and that it could not support a "front end" bond issue.

228. Standing back from this, our finding is that both Mr Ford and Mr Owen knew that, at the time of the launch of SIB 4, there was no underlying structure to support a bond issue. They knew that the statements in the SIB 4 brochure were untrue, but decided to proceed regardless. They did so because, entirely contrary to what they had told investors about the existence of an existing portfolio (with the comfort they intended to give investors regarding spread and diversification at the outset) the purpose of SIB 4 was to fund the acquisition of the initial portfolio of life settlements. That they did not inform investors and the wider investment community that this was the case, and instead represented that investors would be putting their funds into an established structure, is reprehensible and, in our judgment, wholly incompatible with their regulatory responsibilities.

229. It was equally, if not more, reprehensible that the SIB 4 brochure did not disclose to investors that, as we shall describe below, they would be investing in a company that was owned by Mr Ford, the CEO of Keydata, or his associates, that had minimal equity (so that the bondholders would effectively be taking equity risk) and which would be paying substantial fees to companies owned or controlled by Mr Ford. The SIB 4 brochure simply explained that "Keydata will pay up-front 3% and 0.5% trail commissions to IFAs" and that "Keydata will receive a fee for administration and distribution. This will not affect the return. There are no other explicit charges". That, however, was by no means the whole story.

Mr Ford's ownership of Lifemark

230. It is clear, and not the subject of any dispute, that Mr Ford was instrumental in the establishment of Lifemark. Mr Smith, who at the outset of the Lifemark project was with Mees Pierson, at all times acted on the instruction of Mr Ford. Mr Smith resigned from Mees Pierson on 2 May 2006 and was officially on "garden leave" until 15 July 2006 but immediately began providing services to Lifemark on his own account. On 13 July 2006, Mr Ford terminated the services of Mees Pierson (Fortis Intertrust (Luxembourg) S.A.) as directors of Lifemark. The files were transferred to Equity Trust Co Luxembourg S.A. On 26 July 2006, Lifemark appointed Mr Smith's company, Tandem Partners S.a.r.l, to act as managers of Lifemark and to provide directors. Tandem Partners' fees were based on the value of the Lifemark Asset Backed Securitisation Bonds in issue.

231. The Lifemark project had been running since November 2005, and at the outset it was a Keydata project. Mr Smith had written to Mr Johnson on 29 November 2005 to request certain documents required for the incorporation of an SPV to be named (at that stage provisionally) "Lifemark S.A.". The documentation included a copy of Mr Ford's passport, but was otherwise related to Keydata itself (for example, Keydata's FSA licence and certificate of incorporation and Keydata's latest audited accounts).

Mr Ford accepted in evidence that his initial discussions with Mr Smith regarding the setting up of Lifemark were carried out by him in his capacity as CEO of Keydata.

232. At that stage the intention was that Lifemark should be a 50/50 joint venture between BWT and Keydata. An email from Mr Smith to Mr Elias and Mr Ford sought the share capital of €31,000 in equal shares. That joint venture proposal was subsequently abandoned.

233. The following day, 30 November 2005, Mr Smith wrote again to Mr Johnson, with copy to Mr Ford and Mr Elias, saying that Mr Ford had asked that Mr Johnson hold back on the share capital transfer for Lifemark until Mr Johnson had spoken to Mr Ford. Discussion of the creation of an orphan structure, such as using a Dutch foundation, was also mooted. Mr Smith confirmed in evidence that at that time the intention was that Mr Ford, rather than Keydata, would provide the 50% of the share capital. It was at that stage the intention that Mr Elias would own 50%. At a meeting on 8 December between Mr Smith and Mr Ford, with Ms Bagwell in attendance, it was confirmed that 50% of the shares in Lifemark would be owned by Mr Ford or an offshore company owned by him.

234. The actual structure involved 100% of the shares in Lifemark being owned by a Dutch "stichting". Although Mr Ford had no formal control over the actions of the trustees, in practice they would act in accordance with his instructions. It was accepted by Mr Ford (though not by Mr Owen) that in substance Mr Ford was the beneficial owner of Lifemark and as such would have benefited from any residual value in the assets of Lifemark once all holders of the Lifemark bonds had been paid in full. We do not accept the submission made by Mr Owen, in his written re-examination responses, that the interests of Mr Ford and the Lifemark bondholders were fully aligned. Mr Owen's submission is premised on Mr Ford's interest being confined to the ultimate equity in Lifemark, which was effectively subordinated to creditors including bondholders. But that was not the extent of Mr Ford's interest, nor indeed the primary benefit accruing to him. His benefit in terms of extraction of fees (to which we refer below) was the source of a clear conflict of interest; that benefit depended upon continuing bond issues being made, and was not aligned with the interests of the bondholders; it was a prior charge on the resources of Lifemark, and not in any way subordinated to the interests of bondholders.

235. It was Mr Ford and not Keydata who was in control of Lifemark's activities. Correspondence points clearly to Mr Smith, through Tandem Partners, seeking and accepting instructions in respect of Lifemark solely from Mr Ford. However, Mr Ford's position with respect to Lifemark was misrepresented to Mr Johnson. Mr Johnson continued to be led to believe that Lifemark was a Keydata project, and that Mr Ford's position on the board of Lifemark, rather than being – in light of his beneficial interest – a potential conflict of interest, was a strength in enabling Keydata to exercise oversight.

236. Thus, on 8 May 2006, Mr Smith sent a memo dated 7 May 2006 to Mr Ford and Mr Johnson entitled "Report and Action Plan". That memo described the parties

involved with Lifemark and contained the following statements relevant to ownership and control:

> "Colm [Mr Smith] has created the Lifemark structure together with Keydata"
>
> "Linklaters London … need to know the fiscal structure, Keydata is currently exploring that with Tandem."
>
> "… Keydata will appoint 3 new directors to Lifemark …"
>
> "**Control**
>
> Keydata has to control this whole process. Tandem is subcontracted to Keydata and they work as one, although the identity of Tandem is withheld from other parties until after July 15, parties have been requested to confine their comments to Keydata centrally … For any party with a concern, that party must address Keydata directly and solely."

237. The memo also spoke of the responsibility for the model. It explained that: "Tandem will … establish the model for funding management and IRR target establishment for the profitable and cash flow efficient operation of the investing model in rolling quarter review forecasting standards". By contrast, the role of Meditron (and its principal, Dr Walter Gerasimowicz) was limited to: "Walter will manage the liquid assets (Set at 30%, model to test adequacy) and review and report on the life settlement policy portfolio to the board and investors." It is also clear that at this stage (May 2006), by which time SIB 4 and SIP 1 had closed, there were no finalised arrangements for policy origination; it remained unclear at that time whether it would be LSS or Montage that would take the role of policy origination.

238. On 29 August 2006, Mr Smith sent to Ms Bagwell and to Mr Johnson a presentation described as the Tandem Introduction to Lifemark, intended, as Mr Smith explained in evidence, to provide information on Lifemark and the associated parties to the larger IFAs with whom Keydata was engaged. The email expressly requested that both Mr Ford and Mr Owen should be asked to provide their feedback. Under the heading Role of Tandem, the presentation stated:

> "Tandem has been engaged by Keydata to negotiate and control the activities of all parties to the Lifemark transaction. Tandem is based in Luxembourg and acts under the instruction, control and supervision of Keydata by providing the Luxembourg based directors and active management of Lifemark S.A. and operating Lifemark in Luxembourg on behalf of Keydata."

The accompanying diagrams all show Keydata as having a key role at the top of every illustrative structure for all relevant functions.

239. At the same time Mr Smith had produced a Directors Authorisation Protocol ("DAP") in order to "define the scope of activities within which the directors [of Lifemark] are empowered to perform and deny powers to perform any activities outside the empowered scope. The protocol has been established to ensure the funds held by Lifemark S.A. will only be put to use for the defined investing activity and

debt servicing activities …" In this connection, "This protocol has been established with Keydata for the benefit of their control of the Lifemark activities and for the protection of their investors at every level."

240. The DAP required, amongst other things, that directors' payment instructions should be countersigned by an authorised representative, "thus requiring an authorisation from Keydata". Mr Johnson's evidence was that such authorisations came from Mr Ford, and that Mr Johnson had understood that this had been in Mr Ford's capacity as a Lifemark director.

241. Although Mr Ford said in evidence that he thought that he had informed Mr Owen at least that he considered that Lifemark had become a personal venture of his and that this would mean that certain matters pertaining to Lifemark which may have been relevant to Keydata would not need to be disclosed, he conceded that Mr Johnson would not have been aware of any restriction on the flow of information. It is clear from the correspondence that Mr Johnson received that he was at all times given the impression that Keydata would have control of the process. Mr Johnson's understanding was that Keydata's involvement and that the protection for Keydata's investors would be strengthened by having Mr Ford on the board of Lifemark.

242. At a later stage, the same misleading impression was given to the Authority. On a visit to Keydata on 4 and 5 September 2007, as the Authority's meeting note confirms, the Authority's representatives met with Mr Ford, Mr Johnson and Mr Owen. It is recorded that Lifemark had been described as a joint venture, but that this had been clarified to Keydata having a place on Lifemark's board, and that the Authority was told that Keydata was instrumental in pulling the SIP product together and that it "therefore has greater control over it". The reality, we find, is that the extent of any control which Keydata had over Lifemark was wholly dependent on the information Mr Ford permitted to be made available to Keydata, in particular in the form of Mr Johnson, which was limited, and on the extent to which Keydata's interests might be aligned with the personal interests of Mr Ford. Mr Ford certainly knew that what the Authority was told at the meetings in September 2007 was not the whole truth, and on Mr Ford's evidence Mr Owen is likely also to have known. Mr Johnson, on the other hand, was misled in the same way that the Authority was misled.

243. That Mr Ford's interests did not always align with those of Keydata or of Keydata's investors is apparent from the fee structure which Mr Ford established in relation to Lifemark.

Lifemark fees paid for the benefit of Mr Ford

244. Mr Ford exercised his control of Lifemark to procure Lifemark and other entities within the Lifemark structure to enter into fee arrangements with three entities beneficially owned by him, namely Orietex, LAS Global and LAS International. Mr Ford's case is that these were bona fide, market-standard, arrangements for genuine services to be provided to Lifemark, and that the funds received were *de facto* reserves for the benefit of Lifemark and the Keydata investors. The Authority on the

other hand say that none of the entities provided any services in return for the fees they received. Each entity was incorporated in an offshore jurisdiction, was effectively an off-the-shelf company with no trading history and was established for the sole purpose of entering into agreements with, or by reference to, Lifemark. Their existence was not disclosed in any of the financial promotions, or to IFAs, Keydata's advisers, the Authority or even the board of directors of Keydata. Moreover, submits the Authority, Mr Ford took active steps to deliberately conceal the existence of the entities and the agreements.

Orietex/LAS Global

245. On 17 March 2006, Lifemark entered into an agreement with Orietex (incorporated in Panama) pursuant to which it was to receive a commission of 10% of the value of the Lifemark bonds issued by Lifemark in each tranche ("the Orietex Agreement"). On 16 October 2006, the Orietex Agreement was replaced by an agreement with LAS Global Limited ("LAS Global") (incorporated in the British Virgin Islands), which was at that stage called Sandbags Trading Limited ("the LAS Global Agreement").

246. Orietex received a total of £6,305,400 pursuant to the Orietex Agreement, including £1,021,661 due to Orietex but used as a balancing payment on the purchase of a house by Mr Ford in Blomfield Road, Maida Vale, London W9. LAS Global received a total of £36 million pursuant to the LAS Global Agreement.

247. There were, as Mr Ford and Mr Smith accepted in their evidence, no active employees or officers of either Orietex or LAS Global, apart from Mr Ford himself. Mr Ford had a consultancy agreement with LAS Global and, in reliance on this, charged fees and travel expenses to the company.

248. A comparison of the Promotion and Distribution Agreement between Lifemark and Orietex and the corresponding agreement entered into on the same day between Lifemark and Keydata is instructive. They are materially identical, save as to the levels of fees. Under the Keydata agreement, in return for fees of 5.5% (of which 2.5% would be retained by Keydata and 3% passed to IFAs), together with 2.5% annual trail commission, Keydata would "promote and distribute the asset backed securitisation bonds being issued from time to time by Lifemark". Under the Orietex Agreement, Orietex would provide precisely the same services, but for a commission of 10% of the value of the Lifemark bonds settled by Lifemark in each tranche. The commissions paid did not depend on what bonds had been distributed by Keydata and Orietex respectively; both sets of commissions would be calculated on the basis of all bonds issued.

249. The LAS Global Agreement was in materially the same terms as the Orietex Agreement, except that the description of the services was altered to include such matters as negotiation of contracts with "investment activity parties" and "administrative parties" and to advising on "distribution opportunities".

250. In written closing submissions, Mr Ford made a number of submissions with respect to the calculation of the fee, the disclosure requirements in respect of those fees and the services provided by those entities.

251. As regards the Orietex and LAS Global fee, Mr Ford says that his understanding was that this was fixed at 10% because it represented an annual fee of 2% over a five-year period. That period was conservatively set over a five-year period even though Lifemark bonds were issued for 5, 7 and 10 years. It was not entirely clear to us what significance this was thought to have. We assume that it is intended to show that, because the fees were at 2% per year over an extended period, the level of the fees should be regarded as commensurate with services provided over that period. However, in our judgment, such an argument could not be sustained. First, if an up-front fee were genuinely to reflect an annual fee over a future period, it would be expected that the up-front fee would be discounted to reflect that; in the case of Orietex/LAS Global, the fee was 10%, and not a discounted figure. Secondly, the fee was payable on each tranche of the bonds, and there was no evidence of any provision providing for a recapture of fees by Lifemark if services were not provided over the whole term of each tranche of the bonds. Thirdly, the agreements entitled either party to terminate the agreement on 30 days' notice, thereby enabling Orietex/LAS Global to receive an up-front fee of 10% without any continuing obligation to provide services for five years or more.

252. Mr Ford and Mr Owen sought to make a comparison between the fees earned by investment banks creating structured products of the kind marketed by Keydata at the relevant time and the fees received by Orietex/LAS Global. They argued that most investment banks were building in a margin of around 10% into their products, and that consequently the total fees charged by such investment banks would be in the order of 15% to 16%. In our view, such a comparison is inapt, because the situations are not comparable. The question is as to the propriety of the fees charged by Orietex/LAS Global; the propriety of those fees depends upon the circumstances relating to those fees and not any comparison with fees charged in other circumstances.

253. Mr Ford submitted that the fees to Orietex/LAS Global were disclosed in accordance with the law, and he referred in this connection to advice received from Linklaters, Luxembourg with regard to the content of the Lifemark prospectus, and to the involvement of the auditors and bankers, and the trustee, Equity Trust, none of whom, as Mr Smith confirmed in his evidence, had suggested that Lifemark was in breach of any disclosure requirement. That, however, does not assist as regards the relevant question which is: given Mr Ford's regulatory responsibility with respect to Keydata and its investors, was it acceptable for there to have been no disclosure of his personal fee arrangements with and in relation to Lifemark?

254. As regards the value provided by Orietex/LAS Global for the fees they received, Mr Ford submitted that he, and through him each of those entities, was the "global arranger". In order to expand the scope of Lifemark's market access and to complement existing Lifemark offerings to Keydata investors, LAS Global and its precursor, Orietex, had arranged and created a framework for global distribution

outside the UK and had designed a bond issuance programme such that, immediately prior to the intervention of the Authority in 2009, Lifemark had been approved by the CSSF to issue $3 billion of bonds for full subscription over a period of 18 to 24 months from June 2009.

255. In this connection, Mr Ford submitted that LAS Global had put in place distributors and partners prepared for subscription to Lifemark bonds in Austria, Belgium, the Netherlands, Germany, France, Italy, Switzerland, Sweden, South America and the United States. Mr Ford has referred, in general terms, to the Authority's Financial Benefit Report in support of this submission. We have reviewed that report in order to ascertain what support it could offer. We have been unable to identify any. Indeed, the opposite appears to be the case: for example, the report concludes that the evidence considered indicated that Orietex existed solely to transfer benefits received from Lifemark to Mr Ford's personal bank account in Liechtenstein.

256. Mr Ford submitted that, through this global framework, LAS Global had further arranged, created and negotiated a "Lifemark pipeline" which approximated to a committed investment of $5 billion on future asset "face" values of $14 billion. These were, Mr Ford argued, "institutional" life settlement portfolios with banks and investment houses in New York where each institutional portfolio had different characteristics and each was shaped into Lifemark investment offerings. Again, reference is made to the Financial Benefit Report, but we can find no support there.

257. Mr Ford submitted in addition that LAS Global identified investment opportunities in specialised asset classes and, using securitisation structuring methodology, then negotiated and agreed with international service providers how to construct the identified Lifemark investment product, how to bring it to market, how to provide proper management of the underlying asset pool and how to ensure end-investor value. Mr Ford has referred to these specialised projects as including Hybrod, White Label, Thom Schlip, Straight Acquisition, Mount Street 1, Synthetic, Capital Protected, Commerzbank and Cross Asset Collateral.

258. Mr Ford further submitted that at the time of the Authority's intervention LAS Global also had plans that were well-established with global wholesale brokers and country-level distributors for the development of other markets across Europe, USA, Scandinavia, South America and beyond and had applied to passport the 2009 Lifemark base prospectus into a further 10 European jurisdictions. The Lifemark prospectus had also been translated into a number of languages. LAS Global was, it was said, in a position to engage in local distribution across the EU, Dubai, other GCC (Gulf Cooperation Council) states and beyond. It is said that LAS Global and its precursor, Orietex, were uniquely enabling Lifemark's innovation and originality within the global market of life settlement backed investments.

259. Having considered the evidence, we are unable to accept the Authority's submission that the "global arranger" role is a retrospective contrivance intended to justify what was simply an extraction of fees by Mr Ford. We do not regard it as material that, as the Authority submitted, it might have been possible for Keydata

itself to undertake that role, nor that, at the very inception of the Lifemark project there was no evidence that a separate role of global arranger had been contemplated. It is evident to us that Mr Ford did work on establishing a more global reach for the Lifemark offering, and that he was engaged by Orietex and LAS Global in a consultancy capacity for the purpose of fulfilling the obligations to Lifemark. Indeed, as the Authority itself submitted, Mr Smith's evidence was that these arrangements were put forward by Mr Ford at an early stage, at a time when Mees Pierson were still engaged with Lifemark. Mr Ford had inherited the idea of the global arranger from the role played by Mr Elias and BWT with respect to SLS, and we accept that he considered that this was the role he would undertake.

260. We find that some services were provided by Mr Ford, through Orietex and LAS Global, in return for the commissions received from Lifemark. We do not consider therefore that those fee arrangements were a "sham" in the sense that no services were to be provided under the agreements. But we agree with the Authority that, even on that basis, the arrangement was improper as it provided no legitimate justification for the payment of fees out of the funds subscribed by Keydata investors and, despite amounting to a payment to the CEO of Keydata, was concealed from investors, Keydata's compliance officer and the Authority.

261. We accept that, by value, 95% of the Lifemark bonds were sold by way of marketing and distribution by Keydata. Some of the remaining 5% were provided and distributed by another entity controlled by Mr Ford, which described itself as a "sister company" to Keydata, namely Keydata International Limited, a company incorporated in the Cayman Islands which received its own commission from Lifemark for its distribution work.

262. Lifemark did not distribute any bonds through distributors introduced by LAS Global. We assume, in favour of Mr Ford, that there was a prospect of such investment in the future, had Lifemark continued in operation. But whilst it would have been legitimate on that hypothesis for LAS Global to be remunerated by reference to the bonds issued through a global network arranged by LAS Global (which would not include Keydata), we do not consider that, without disclosure to the Keydata investors, it can have been properly considered to be legitimate for a percentage of the sums subscribed by Keydata investors to be disbursed in favour of Orietex/LAS Global.

LAS International

263. LAS International Limited ("LAS International") was a company, incorporated in the British Virgin Islands and controlled by Mr Ford. An email from Mr Smith to Mr Ford's advisers, BDO, dated 3 November 2006, explained that the life settlement provider for Lifemark, Montage, would be entering into an agreement with a company (the original proposal had been Orietex, but this was later altered to LAS International) to share "excess fee income" earned by Montage in its "originating activities for Lifemark". The email stated that the excess revenue would be shared equally between Montage and Mr Ford with "reserve account provisions". The

proceeds were intended to be routed through an ESOP (employee share ownership plan).

264. Montage had provided a draft agreement, called a Settlement Agreement, with an effective date of 30 October 2006. The agreement made provision for "compensation to be received by Montage in excess of origination and servicing fees, stipulated in the Origination and Servicing Agreements between Montage and Lifemark…". A non-exhaustive description of how such an excess might arise included commissions and fees and "any spread between the amount Montage pays for a life insurance policy and the amount Montage sells such life insurance policy to Lifemark…". The excess was to be allocated in the following manner:

(1) sales commission payable by Montage to its underwriters;

(2) 20% of the net compensation after the sales commission was to be deposited in a Reserve Account governed by a Reserve Account Agreement, with provision for a shortfall in the Lifemark bonds to be funded out of that Reserve Account and the balance, after expiry of the terms of the Lifemark bonds, to be shared between Montage and LAS International; and

(3) The remaining proceeds to be shared equally between Montage and LAS.

265. An agreement in substantially that form, expressed to be effective from 11 December 2006, was signed by Montage on 20 March 2007 and by LAS International on 10 April 2007. However, on 12 June 2007, LAS International and Montage entered into an amendment agreement, which substantially changed the arrangements with regard to the compensation covered by the Settlement Agreement. The new arrangements were:

(1) LAS International was "permitted to set aside for its exclusive use" up to 97% of the gross compensation received (it was stated that for the avoidance of doubt this may include payments of dividends to its shareholders);

(2) after deduction from the balance of LAS International's expenses, the remaining balance was to be split equally between Montage and LAS International; and

(3) for the avoidance of doubt, Montage was to be solely responsible for payment of its sales commissions without recourse to LAS International.

266. In fact, according to Mr Ford's evidence, LAS International received 100% of the gross remuneration. As a result, LAS International received a total of $58 million (around £31 million) from these arrangements. In December 2007, Mr Ford made a personal payment of $1.5 million to Mr Blaine Cook of Montage and Mr Cook's wife. This, on Mr Ford's case, was the way in which it was agreed between him and Mr Cook that the excess remuneration should be shared.

267. Although Mr Ford's case, as set out in his Amended Reply, had been that LAS International had performed services in return for its remuneration, he accepted that no such services had been provided by LAS International. Mr Ford's case was that he had ascertained from Mr Cook that Montage would receive a share of the commission

from the brokers when negotiating the purchase of life settlements. According to Mr Ford, Mr Cook had said that this was a matter between Montage and the brokers because "the price is all factored into the purchase price". It was that share of the brokers' commissions that Mr Ford submitted was the subject of the Settlement Agreement, as amended. It came about because of the flow of business which Mr Ford could place with Montage.

268. We do not accept that the amounts which were the subject of the Settlement Agreement, as amended, were simply shares of broker commissions. Mr Ford confirmed in evidence that he had not sought independently to verify that this was the case, for example by contacting the brokers themselves. We find instead that the amounts were derived from the spreads between the price paid by Montage for a life settlement and the price at which it on-sold that life settlement to Lifemark. We do not make that finding by reference to the Settlement Agreement itself, which spoke of such a spread being merely one of a number of possible means whereby excess compensation could arise. However, it is apparent that the business of Montage operated by way of such a spread.

269. First, by way of example, a Senior Facilitation Agreement entered into by Montage in November 2007 with a seller of a life policy refers in its recitals to Montage as being "in the business of facilitating the purchase and sale of certain life insurance policy(ies) from owners such as the Seller to third parties, at a price higher than Montage is paying the Seller". There is no reference to a share of commission with a broker. A second example, with the same recital, is the Senior Facilitation Agreement drawn up later with respect to the proposed acquisition by Montage of the so-called Wagner policy.

270. Furthermore, although Mr Ford's case had been that it was the brokers which had remitted an agreed share of their remuneration to LAS International, the evidence of the payment mechanisms showed that this had not been the case. The authorisation in respect of the life settlement which was the subject of the first Senior Facilitation Agreement referred to in the preceding paragraph demonstrates that in respect of a policy (face value $8,640,424) which the seller sold for $1,850,000, Lifemark paid a total of $3,287,054.24, the additional costs being, first, the broker's commission of $485,000, none of which is remitted by the broker to LAS International or Montage, secondly Montage's provider fee of $84,404.24, thirdly the small fee of the escrow agent and finally payment of $865,000 to the account of LAS International. That payment to LAS International clearly represents a cost to the purchaser, Lifemark.

271. We do not accept therefore that this arrangement had no effect on Lifemark. It was not, as Mr Ford submitted, simply a matter of a broker's commission that would in any event have been part of Lifemark's acquisition cost of the life settlements. Nor was the arrangement simply that LAS International would receive the "spread" that Montage would otherwise have achieved by selling the policy to Lifemark at the "marked-up" price. We accept the Authority's case in this regard that the amount paid to LAS International was effectively designed to divert to LAS International (and thus to Mr Ford and his interests) the amount of additional cost to Lifemark of acquiring the policy which resulted in the IRR of that policy being in the region of

10%. Thus, we find that the system arranged with Montage was such that, even if a policy could be acquired in the open market at a higher IRR (which would benefit Lifemark and, indirectly, investors in the Lifemark bonds), the amount payable to LAS International would be set so that Lifemark would pay that additional amount for the policy (and thus indirectly make payment to LAS International) so that the policy would be acquired at the lower IRR.

272. Despite an originator such as Montage being under a duty to acquire policies at the best price, and thus the highest IRR available (such duty being confirmed in statements made by the Life Insurance Settlement Association), and Montage being obliged, under its agreement with Lifemark dated 11 July 2006, to exercise commercially reasonable and diligent efforts acting in good faith to calculate the pricing (which Mr Ford confirmed he understood to mean that Montage should aim to get the best price possible for Lifemark), the evidence shows that, in the vast majority of cases, Lifemark acquired policies from Montage at or just above the contractual minimum of 10%. Based on the data provided by Montage regarding the policies held within Lifemark, Ms Juliano calculated that, to December 2008, over 83% of policies were purchased on the basis of anticipated IRRs of between 10% and 11%, and more than 68% on the basis of IRRs of either 10.00% or 10.10%.

273. Referring to this pattern, in her expert report Ms Juliano said this:

> "In my view, a distribution of returns with such little variance would be extremely unlikely if Montage was purchasing policies at the best prices it was able to achieve. Moreover, I note that the fees and percentage of death benefit charged by other parties involved in the origination process, including brokers and LAS International, seem to fluctuate. This suggests to me that the total origination fees were back-solved to fit the maximum price Lifemark was prepared to pay to achieve its target IRR. These figures suggest that the originators knew Lifemark's purchasing model and used this knowledge to extract the highest amount of fees possible, while ensuring that Lifemark would be willing to purchase the policy."

274. We accept this evidence. Mr Ford suggested to Ms Juliano in cross-examination that, because neither the brokers nor LAS International had contracts with Lifemark, the fees payable to those entities would not be a cost to Lifemark that would be included in Lifemark's audited accounts. Mr Ford's case was that it was the seller and not the buyer which would pay the broker's commission. That, however, is contradicted by the evidence to which we have referred above. It is clear that the seller negotiates a price and that is the price the seller receives through the escrow arrangements. The gross sum paid by Lifemark went to meet the amount payable to the seller, but also the broker's commission, the fees to Montage and the escrow agent and, crucially, the amount payable to LAS International. That was a cost to Lifemark. It was not, as Mr Ford suggested in his evidence, an "off balance sheet arrangement that's got nothing to do with Lifemark".

275. Furthermore, even if we had accepted Mr Ford's case on this, we would have agreed with the submission of the Authority that an arrangement by which fees which

the brokers and/or Montage itself had agreed to forego were paid not for the benefit of Lifemark and the investors in the Lifemark bond, but to a vehicle for Mr Ford himself, without any disclosure of such an arrangement, would have been improper.

276. Nor do we accept Mr Ford's case that the fees paid to LAS International were available as any form of contingent fund for the benefit of Keydata investors in both the SLS and Lifemark Products. The Reserve Account concept was abandoned almost immediately it had been created. Whilst we accept that Mr Ford may have had it in mind to employ his own resources, including those derived through LAS International, in supporting his own business interests in maintaining Lifemark and SLS, that is very far from those funds being capable of being described as contingent funds for the benefit of investors. Those funds were not for the benefit of investors or Lifemark (whose interests in paying less for the policies acquired and in achieving higher IRRs, which would also have provided greater security for the investors, were effectively ignored). They were not for the benefit either of SLS or Keydata investors in SLS. They were for the benefit of Mr Ford.

Were the Lifemark fee arrangements concealed?

277. We find as a fact that there was no disclosure of the LAS Global or the LAS International fee arrangements to the Authority or to investors or IFAs. It was not suggested that there was any such disclosure. Mr Ford's case was that the LAS Global fees were disclosed in accordance with law and that he relied on the advice of Lifemark's lawyers, Linklaters and PwC and others to whom LAS Global's fees were known regarding the form and scope of disclosure. We do not accept that such wide-ranging advice was either given or sought. The only evidence in that respect was that of Mr Smith, who provided evidence as to the advice given to the board of Lifemark as to relevant disclosure in the prospectus. There was no disclosure of these fees in the Lifemark prospectus. We had no evidence as to precisely what Linklaters in particular were told with respect to the fees enuring for the benefit of Mr Ford, but we do not accept that, if Linklaters or other professional advisers had been given the full picture, they would have advised that it was unnecessary for these matters to be disclosed.

278. Mr Ford's argument is that there was disclosure in accordance with the European Prospectus Directive (2003/71/EC and 2001/34/EC) as implemented in Luxembourg by Article 7 of the Law of 10 July 2005 on the prospectuses for securities. He relies on entries in the 2007 and 2008 audited accounts of Lifemark, including the reference in those accounts to operating charges, and Mr Ford's belief that LAS Global was expressly referred to as a creditor of Lifemark in the 2008 accounts in the sum of €1.653 million. That does not amount, in our judgment, to relevant disclosure. The prospectus in question was published only in 2009. Even if a reference in audited accounts referred to in that prospectus could constitute adequate disclosure (we heard no evidence in that respect), it could not have been disclosure for the purposes of all preceding bond issues in respect of Lifemark.

279. There was no written disclosure of the LAS Global or the LAS International arrangements to the board of Keydata, and nothing in this respect is recorded in the

board minutes. There was no disclosure of the arrangements in the "Related Party Transactions" section of any of the Keydata accounts for the years ended September 2006, 2007 and 2008.

280. In his evidence, Mr Johnson confirmed that he did not know of these arrangements nor of the existence of Orietex, LAS Global or LAS International. He had not known that there was a role of global arranger, or that it was being performed by one or more of those companies. Mr Johnson explained in his evidence that if he had been aware that the sums in question were being paid to Mr Ford that would have raised serious concerns. His understanding at the material time was that Mr Ford was not benefitting financially from Lifemark. In respect of Orietex and LAS Global, Mr Ford's evidence was that Keydata was merely the distributor for the UK, so that "the bigger picture was really none of [Mr Johnson's business]". Mr Johnson's understanding of Mr Ford's role in Lifemark was set out in an email of 20 June 2008 from Mr Johnson to Mr Darby at Keydata, copied to Mr Smith (and which Mr Smith confirmed to Mr Johnson by email of the same date was true), namely that "Stewart Ford does not earn any fee income from Lifemark and sits on the board to represent Keydata and Keydata's investors and act in a monitoring capacity".

281. Equally, Mr Grainger did not know about these fees at any material time. He confirmed that in his evidence, which we accept, and also confirmed that no-one at Keydata had raised any potential conflict of interest concerns with him.

282. We find that, although it is clear that Mr Ford had a conversation with Mr McCall, then Keydata chairman, in March 2006 concerning Mr Ford's desire to pursue other business interests, Mr McCall's advice at that time was that Mr Ford "could not do both", meaning, as Mr McCall explained in his evidence, that Mr Ford "would have to manage any conflict of interest, choose where he wanted to be and that if he chose business interests that might be in conflict with [Keydata's] interests (or vice versa), he would have to act appropriately". Following that conversation, on 1 April 2006, Mr Ford entered into a new employment agreement with Keydata in which he agreed to "devote his whole time and attention to the business of the Group (save where otherwise agreed in writing by the Company or where [Mr Ford] is prevented from so doing by ill-health)". To the extent it was submitted by the Authority that Mr Ford's employment contract meant that he had "chosen" Keydata over any other business interest, or that there was something improper about Mr Ford having an interest in Lifemark given his contract with Keydata, we consider the contractual position to be immaterial. The question is not whether Mr Ford should have had such an interest, but whether having an interest to the extent we have found meant that Mr Ford should have disclosed the true nature of that interest to investors and others. We are clear that, irrespective of the contractual position, the answer is that he should, but that he did not.

283. Mr Ford was the author of the fee arrangements from which he benefitted. Mr Owen had little direct knowledge of those arrangements. At most, he was aware that Mr Ford and his trusts had interests in Lifemark and were earning fees. However, so far as Mr Owen was concerned, Mr Ford had confirmed that those fees had been disclosed. In his evidence to the Tribunal, Mr Owen explained that he had understood

Mr Ford to have disclosed the arrangements to Meditron, Tandem and Linklaters. The Authority submits that this contradicts the account given by Mr Owen to the RDC in his oral submissions on 24 July 2014: "I didn't know the level of fees that Stewart Ford was taking; I don't think anybody knew the level of fees. Probably the only person who knew that would have been Colm Smith." That may have been an error, but so far as Mr Owen is concerned, we do not regard it as a material one. We find that Mr Owen was aware that Mr Ford was receiving fees, but not aware of the amount of those fees. He had been assured that there had been relevant disclosure. There was nothing in Mr Owen's knowledge in this respect that would have led him to think that he should make any independent disclosure or require further investigation. Mr Owen confirmed that he "probably" did not inform Mr Johnson. We do not consider, in these circumstances, that there would have been any reason for him to have done so.

284. It is the Authority's case that in relation to Mr Ford there was not only non-disclosure of the material fact of the fee arrangements, but active concealment of those arrangements. The Authority says that Mr Ford, assisted by Mr Smith, took active and concerted steps to conceal the arrangements.

285. The Authority referred to an email dated 9 March 2006 from Mr Smith (via the email account of Mr Smith's wife as he was at that time still employed by Mees Pierson) referring to two contracts for commission, one with Keydata and the other with LAS Global (then intended to be called Lifemark Limited, incorporated in Panama). The email was addressed to Mr Ford. It outlined fee arrangements including a fee of 4.5% to Lifemark Limited. A second email dated 10 March 2006 (this time from Mr Smith's Mees Pierson email address) to Mr Ford, and copied to Mr Johnson, extracted only the information concerning Keydata (amended slightly). That information set out the proposed commissions and trail commissions for Keydata and to be passed on to IFAs.

286. There was no mention of Lifemark Limited or any other fee recipient apart from Keydata in the email copied to Mr Johnson. Mr Ford's explanation for this was that it had always been intended that there should be a global arranger commission of 10%. He was unable to explain the reference to a 4.5% fee payable to Lifemark Limited. He said that the global arranger structure replicated the similar role undertaken in relation to SLS by Mr Elias and BWT and that Mr Ford had assumed that role in relation to Lifemark. But he could not explain the absence of the reference in the email to Mr Johnson of the fees proposed at that stage to be paid to Lifemark Limited. Mr Smith, for his part, explained that because Keydata was not a party to the agreement with Lifemark Limited the information in that respect would be protected under client confidentiality laws, including under Luxembourg law, and that there had been no instruction from Mr Ford to disclose that information.

287. If that is the explanation, we regard it as disingenuous. The reality is that, as Mr Ford's evidence demonstrated, he knew that Mr Johnson was concerned to understand the overall fee structure. He knew, from the email of 9 March 2006, which was not copied to Mr Johnson, that there were fee proposals in relation to Lifemark Limited as well as for Keydata. He could see that when Mr Johnson was copied in, the

references to Lifemark Limited had been extracted. There was nothing, including obligations owed to Mr Ford himself as to confidentiality, that would have prevented Mr Ford from making full disclosure to Mr Johnson at the least. But it does not appear to have occurred to him that this would have been an appropriate step in the interests of full information being provided to investors.

288. Mr Ford was equally unconcerned when on 17 March 2006 Mr Smith sent an email to Mr Johnson attaching only the Keydata fee agreement for review and at the same time sent an email to Mr Ford alone which attached the corresponding fee agreement with Orietex along with the explanation: "Same type of agreement attached for Orietex, just not shown to Peter." This is evidence, we consider, of a deliberate policy of not informing Mr Johnson of the fee arrangements with Orietex. We find that Mr Smith's reference to the exclusion of Mr Johnson from sight of the Orietex agreement can only be explained by his wishing to reassure Mr Ford that these arrangements were being kept private.

289. This is reinforced by further examples of Orietex and LAS Global not appearing in documents which purported to set out all the entities involved in the Lifemark structure. It must have been obvious to Mr Ford (and to Mr Smith) that those documents were misleading and ought to have made reference to those entities. Examples include:

(1) Mr Smith's Status Report and Action Plan dated 7 May 2006 (which erroneously represented that Keydata was "in control of this whole process") which set out all "the firms currently involved with Lifemark", including those where contracts had not yet been finalised. The list is a long one, including advisers, service providers and regulators, and Keydata itself with reference to "Bond Distribution". But it significantly (and we find deliberately) omits any mention of Orietex and LAS Global. (There was also no reference to LAS International, but that company and the arrangements made with Montage did not arise until later.)

(2) Mr Smith wrote to Mr Johnson on 16 June 2006, with copy to Mr Ford, attaching a document for Linklaters to present to the CSSF explaining the organisation for the Lifemark transaction. The document purported to show all the parties involved in the securitisation transaction of Lifemark. It included Keydata as "Placement Agent" and "Investor" (subscribing for the bonds on behalf of UK investors), but made no mention of Orietex or LAS Global.

(3) On 30 August 2006, Mr Smith wrote to Mr Johnson attaching a presentation intended for the management of Lifemark. The presentation put Keydata (again, disingenuously) at the centre of all activities. But it signally failed to refer to Orietex and LAS Global. Mr Ford had not been copied directly into this document, but it had been sent (on 29 August 2006) to his PA, Ms Bagwell, with a note for her to arrange for Mr Ford and Mr Owen to provide comments. We should mention that Mr Smith refers in this email to the dangers of more information being included which might make it open to replication by a competitor, but that in our view could not have been a reason to omit the roles (and costs) of Orietex/LAS Global.

290. The manner in which questions on the fee structure were responded to is also instructive. Mr Edward Bruin of Fortis Intertrust wrote to Mr Johnson on 30 June 2006 with a number of queries, including "your overview of all costs, and when they are paid (no or minimization of up front payments)". Mr Smith's response to Mr Johnson (email dated 3 July 2006) was to say that were no up front charges other than those for raising funds through Keydata and the broker network. That was untrue. It omitted the 10% commission payable to Orietex/LAS Global. But Mr Smith represented that within the cost of fund raising was a "Reserve creation. 10% (FLEXIBLE FOR STRESSES ON THE ABOVE)". That explanation was then repeated by Mr Johnson to Mr Bruin in an email on the same day, which Mr Johnson copied to Mr Ford. Mr Ford must therefore have been aware of the misleading reference to the creation of a reserve. The Orietex/LAS Global fee structure was at no time a reserve, and there is no evidence that it was at any time intended to be a reserve. It was intended, on Mr Ford's evidence, to replicate the global arranger fee enjoyed by Mr Elias. At no time did Mr Ford seek to disabuse Mr Johnson of the misleading impression that had been given in this respect. Mr Johnson remained comforted by the reserve, which, as he explained in his evidence, he regarded as acting as a cushion, a surplus which was available in case of such matters as increased costs.

291. Mr Ford submitted that there had been no concealment, active or otherwise, of the Orietex/LAS Global arrangements from Mr Johnson. He pointed to an email which Mr Smith had sent to Mr Ford on 19 June 2006, which had been copied to Mr Johnson, which had attached a number of spreadsheets which included references (in two tabs, FIT and FIT Corrected) to the 10% of the bond issue proceeds payable to Orietex. We do not consider that this can be regarded in any sense as disclosure to Mr Johnson. Mr Johnson himself, in his evidence, said that he had not opened those tabs. But even if he had seen those references, he could not reasonably be assumed to have known that these were up front fees. We accept Mr Johnson's evidence in this respect and we reject the evidence of Mr Smith that he "imagined" that he would have discussed this model with Mr Johnson. Mr Smith's evidence in this respect we regard as equivocal. There is no evidence either of Mr Johnson or Mr Smith referring to each other in relation to the Orietex fees. All the specific information which was given to Mr Johnson in this respect was, we find, designed to conceal from Mr Johnson the true nature of the payments to Orietex/LAS Global and to lead him to believe (successfully) that this was the creation of a reserve for Lifemark.

292. It is also the case, and we find, that Mr Ford provided false information to the Authority in respect of these fees and commissions. On 7 May 2009, the Authority wrote to Mr Ford with a number of questions concerning the SIB and SIP products ("the Products"). Included was the following question:

> "Please provide details of any other income earned (or benefits) in respect of the Products, including but not limited to:
>
> a. any shares or beneficial interests in SLS, Lifemark, Tandem or any other third parties; and
>
> b. introductory bonuses."

293. Mr Ford's response, by letter dated 22 May 2009, having stated that a greater proportion of his time had been focused on his other business interests "outside of financial services" and having also stated that he had earned no commissions in respect of the Products in the years 2005 - 2009 was, in this respect, as follows:

> "a) No other income earned (or benefits) in respect of shares in beneficial interests in SLS, Lifemark, Tandem or any other third parties.
>
> b) No introductory bonuses earned."

294. The only explanation offered by Mr Ford in evidence for the omission of the benefits enjoyed by him through the sums received in respect of the SLS and Lifemark Products (through SOF, Orietex/LAS Global and LAS International) was that the payments were to those entities and not to him personally. But he accepted that he had benefitted, for example through his own consultancy arrangement with LAS Global. He denied, however, that he had been deliberately trying to conceal those arrangements, and that this was because he knew they were improper. Our conclusion is that Mr Ford was deliberately trying to conceal his own interests and the benefits he had received. The only possible reason for his doing so is that he knew that they were improper, and should have been disclosed at the outset and throughout the period of issuance of the bonds. All the evidence points to a studied course of conduct in keeping Mr Ford's arrangements outside of the purview of Mr Johnson, investors, IFAs and the Authority. In that Mr Ford was aided by Mr Smith and Mr Smith's own flawed reliance on confidentiality.

295. Mr Ford's deliberate non-disclosures cannot be excused by his own belief that, because he was now operating as the global arranger for Lifemark, anything he earned as a result was a matter for him (in the capacity of entrepreneur) and not of relevance to Keydata or the wider investment community. Mr Ford's conviction that his separate roles somehow eliminated his regulatory responsibilities in those respects is itself a clear demonstration of a lack of integrity. It is in our judgment not possible, consistently with the integrity expected of a regulated individual, to reach the view that the roles and responsibilities could be bifurcated in that manner.

Mr Ford's use of the extracted monies

296. It is beyond dispute that Mr Ford benefitted from the monies derived from the Lifemark structure in the manner outlined. Mr Ford did employ certain funds in ill-fated ventures with Mr Elias designed (at least in part) to seek to rescue SLS from the dire circumstances which later arose, but apart from that it is beyond dispute that the monies were used for Mr Ford's own purposes.

297. We accept in this respect the evidence provided by the Authority's Financial Benefit Report. The focus of that report was on Orietex, LAS Global and LAS International. The report concluded that, at that stage, those three companies had received £72.3 million of benefits from Lifemark between 2006 and 2009. An examination of bank accounts evidenced how that money had been transferred, within a relatively short period, through a chain of offshore bank accounts owned or

controlled by Mr Ford. The benefits were transferred to bank accounts either in Mr Ford's name or corporate bank accounts over which Mr Ford had control. From these bank accounts Mr Ford directed payments to non-Keydata or Lifemark related business investments, business associates, property, yacht and airplane transactions, as well as family members.

298. Mr Ford regarded himself as the "global custodian" of the Lifemark structure such that he would have put the money back into Lifemark had he "thought there was a problem with it". We accept that Mr Ford's view of himself in this way was a genuine one, and not a mere contrivance. We accept that he is a problem-solver. But that is not, in our judgment, the same as making proper provision, or creating a reserve, in Lifemark itself. Nor, for the reasons we have outlined, can it justify the extraction of fees in the manner that was undertaken without disclosure to any relevant party. In any event, there was no segregation of the extracted funds from Mr Ford's personal funds. No reserve was ever created in Lifemark.

299. Mr Ford asserted that his role as global custodian, and his concern for the Keydata investors, was demonstrated by efforts he had made, and expense he had incurred, to support SLS and Lifemark. We shall consider those arrangements later, but in our view none of the steps which Mr Ford took can detract from the conclusion that his extraction of funds from Lifemark was for his personal benefit, and it was a benefit that a person of integrity in Mr Ford's position would have disclosed. Irrespective of the manner in which Mr Ford chose to employ those funds, Mr Ford lacked integrity in not disclosing the benefits he was obtaining from Lifemark.

The Lifemark model

300. SIB 4, the first offering of Lifemark bonds, was launched before any specific financial modelling had been done in respect of the Lifemark portfolio. Reliance was placed on the KPMG model, which was flawed, as should have been apparent to Mr Ford and Mr Owen before SIB 4 was launched on 15 December 2005 (KPMG had first notified Keydata of the issues on 3 November 2005).

301. The Authority points to the period between December 2005 and June 2006 during which in addition SIPs 1-3 (relating to the Lifemark Products) were launched. The Authority submits that the question of which individual or entity would be responsible for the model remained uncertain.

302. At a meeting in New York on 16 January 2006, which was to discuss the Lifemark proposal, and which was attended by (amongst others) Mr Ford, Mr Johnson, Dr Gerasimowicz of Meditron, Mr Simon of LSS and Mr Smith, the first point to note is that, once more, the list of relevant entities set out in the note of meeting excludes Orietex/LAS Global. In relation to Meditron, the note records:

> "**Role of Meditron**
>
> This was clarified. They would deal with Supervision at the US end. This would include the model and ensuring that the investments were on track and include monitoring of LSS. Walter previously carried on

> similar roles whilst at JP Morgan & Lehman Bros. Walter was registered with SEC and used to dealing with allocation of assets.
>
> Meditron would carry out the hedging of currencies.
>
> Meditron would stress test the proposed model."

Mr Ford's evidence was that he believed that Mr Gerasimowicz would develop the model, a view that he considered was shared by Mr Johnson.

303. On 20 April 2006, Mr Smith produced a Reporting Memorandum addressed to Mr Ford as managing director of Keydata. That memorandum included the following description of Lifemark:

> "Lifemark S.A. has financed its investing activities through the issue of asset backed securitization bonds to Keydata Investment Nominees Ltd. The proceeds of the bond issues have been used to acquire a portfolio of senior life settlement insurance policies in the US. The portfolio has been structured to mature in time with bond maturities, the cash values of the portfolio have been structured to manage bond liquidity throughout bond durations."

Although the report stated that the financial model and supporting spreadsheets "as established by [Meditron]" were set out in Exhibit III, no model or speadsheets were included. The role of Meditron was described as including: "Establish and maintain the investment model to be utilised by Lifemark throughout its investing activities." The report also said;

> "Fortis Intertrust and Meditron worked together to develop a financial model to forecast investment performance over the projected investment term … Control of the financial modelling was delegated to Meditron by Fortis Intertrust.
>
> The financial model used by Lifemark was based upon the KPMG actuarial model used by SLS Capital S.A. Meditron received the KPMG actuarial model from LSS. Meditron further developed the actuarial model to change reserve levels from 40% to 30%, to update assumptions on asset acquisition rates and to incorporate in full cash flow modelling accounting for bond cash flows and service fee commitments."

304. The status report by Mr Smith to Mr Ford and Mr Johnson dated 7 May 2006 stated, first, that Dr Gerasimowicz would "manage the liquid assets … and review and report on the life settlement policy portfolio". There was no reference at that stage to a role for Meditron in the development of the model. Instead, the report stated that: "Tandem will also establish the model for funding management and IRR target establishment for the profitable and cash flow efficient operation of the investing model in rolling quarter forecasting standards."

305. We find from this that, although Meditron played a role in the modelling, most particularly on the portfolio or investment side, the critical financial modelling in respect of the bond issues was in fact largely undertaken at this stage by Mr Smith. It is evident that, whatever attributes Mr Smith had, financial modelling was not

obviously one. Mr Hoovenier, the director of Mees Pierson to whom the team at Mees Pierson dealing with SLS reported, made it clear in an email of 18 April 2006 which was copied to Mr Ford and Mr Johnson that Mr Smith "was/is only the business introducer and the actual work is done not by Colm Smith but in a client team (consisting of accounting, legal and fiscal specialists) which is headed by Mr Carl Speeke …". Mr Smith disagreed with Mr Hoovenier's description and described himself somewhat differently in his evidence as "head of client accounting". Mr Smith also claimed to have understood the SLS model. However, we do not accept Mr Smith's evidence in this regard. He accepted that the KPMG model itself, as described by KPMG, was nothing more than a mortality model, a pricing model and a cash flow model for the purpose of valuing individual life settlement contracts. He accepted also that as such it did not cover the servicing of a bond. But he was unable to recall the way in which the entire model worked. He could only say that Mees Pierson would not have accepted a client that was unable to demonstrate what its cashflow modelling would be. We find that, despite his claims as to how he was involved and what he understood, Mr Smith had no real understanding of the SLS model.

306. Despite the lack of clarity as to the role Meditron played in the financial modelling, it was in fact Meditron that was presented to the market as having created the financial and actuarial model. In a presentation for IFAs in relation to Lifemark produced in February 2007, that role was attributed to Meditron. No mention was made of Tandem.

307. It is difficult for us to understand why it was that Mr Ford vested so much faith in Mr Smith as regards the financial modelling. He was aware, first, that there were, at the very least, serious doubts over the veracity and reliability of the KPMG model for the purpose of modelling bond cash flows. He was aware of the rather limited role played by Meditron in developing that model, that was itself limited in its scope. He had been informed of what Mr Hoovenier's view was of Mr Smith's capacity in this regard. It would have been straightforward for the modelling to have been undertaken by an established actuarial firm or an actuary within a large financial services firm. Our conclusion is that Mr Ford was satisfied so long as there was something positive coming out of the work done by Mr Smith and Meditron which could enable bond sales to be made. The achievement of those sales was the real focus of Mr Ford's energies.

308. Mr Ford's evidence was that he had understood that Tandem (Mr Smith) and Meditron were working together on the model. That, we consider, was a reasonable assumption, even allowing for the limited role ascribed to Meditron in the documents. It was Mr Smith who, on 20 June 2006, sent an email to Mr Ford attaching a spreadsheet which "[c]ompared SLS costs to Lifemark Costs" and then modelled a $1 billion portfolio of policies (based on $400 million of investment). This model, as the Authority submitted, was the only one ever produced which included the 10% fee paid to Orietex/LAS Global. In respect of the costs comparison, Mr Smith noted that: "Lifemark fund raising costs are higher on the upfront side simply due to the percentage of the Orietex upfront element". We accept, as Mr Ford submitted, that the costs comparison produced by Mr Smith showed that overall the costs of the

Lifemark Products were expected to be lower than the aggregate costs associated with the SLS Products. That was not because of any reduction in up-front costs (those were, as noted, significantly higher for Lifemark than for SLS, largely as a result of the Orietex fees), but because of a reduction in the policy provider up-front and servicing costs.

309. One day earlier, on 19 June 2006, Mr Smith had sent an email to Mr Ford with a spreadsheet setting out an original analysis of bond cashflows, the FIT (Fortis Intertrust) analysis and a revised version of the FIT analysis (FIT Corrected) which took out non-upfront items and reset the upfront costs "correctly". That email was, as we have described, copied to Mr Johnson.

310. The bond cashflow analysis related to the SIP 1 and SIB 4 bond issues. It was not a financial model in the sense of modelling the expected performance of the Lifemark portfolio with reference to the costs and returns to investors. It is apparent from the commentary on the FIT analysis that there was to be a separate model, the "investor model", where non-upfront costs would be incorporated into the IRR targets of that model. That was the case for the "annual interest" of 2% payable to Keydata, even where (as had apparently been done in relation to SIB 4) that trail commission had been taken by Keydata up front, to be amortised over the life of the bond (5 years). The FIT analysis commentary also makes the point that the Orietex commission was not (contrary to Mr Ford's submission as to his understanding) a 2% annual charge, but a 10% up front charge according to the contract.

311. The FIT Corrected sheet accordingly excluded from the cash flow analysis all costs other than those regarded as "up front" costs. The costs in question included Keydata's up front commissions (including those payable to IFAs) and the 10% payment to Orietex. It excluded annual payments, such as the trail commissions, and certain other costs which, although borne at the outset, would be amortised over the length of the bond. All those excluded costs were referenced as "Contained in Investor Model IRR". The cashflow analysis indicated a required investment model cashflow return and the required IRRs in the case of each relevant bond. Those IRRs were between 11.75% and 15.2%. A comparison with what was described as the "Actual Investment Model return (Conservative)" indicated that the required return would be achieved with a small margin in each case. We did not, however, see the Investment Model referred to.

312. In a supplemental expert report, Ms Juliano concluded that the spreadsheet did take account of the commissions payable to Keydata and Orietex when determining the required IRRs to support Lifemark's repayment obligations, but that significant errors were made in calculating these required IRRs. Ms Juliano expressed the view that there were some fundamental weaknesses in these spreadsheet calculations that would, in her view, have had a significant effect on their accuracy. Increases to the required IRRs in respect of the bonds would be required, first, because the model did not properly take into account the timings of the cashflows on the bonds, such as by ignoring the early payment profile of the bond coupons. Standard discounting would increase the required IRRs in most cases. Secondly, an element of double-counting of up front commissions increased the required return by approximately 2%, and those

IRRs should accordingly be reduced. Finally, the calculated IRRs applied to the total funds and ignored the fact that only 70% of available funds would be allocated to the purchase of policies (the remaining 30% being held in cash). Since cash would have a lower return than investment assets (and certainly lower than the calculated required returns), the IRRs required on purchased life settlements would be significantly higher.

313. The net effect of making these adjustments, and assuming that the cash earned interest at 5%, according to Ms Juliano (and we accept her findings) was that the average required IRR on purchased policies would be at least 16.9%. Mr Ford's own submissions were to the effect that the policies needed to produce an IRR of 16.66%.

314. Although, on the calculations (ignoring their inadequacies) produced by Mr Smith, there was a requirement for an IRR of between 11.75% and 15.2%, on 11 July 2006 an agreement was entered into with Montage for the origination of policies with a target IRR of "at least 10%". Mr Ford's evidence was that he knew that there was a discrepancy in these numbers, but that the 10% was a minimum, or floor. Policies could be bought at higher IRRs, and policies bought at the minimum of 10% on the basis of the life expectancy could provide a higher IRR on earlier maturity. Mr Ford said that he was in this respect happy to let the experts (by which he meant Tandem – Mr Smith – and Meditron – Dr Gerasimowicz) get on with it. But we have found that the LAS International arrangement had the result in the event, and to the knowledge of Mr Ford, that policies were generally acquired for a price payable by Lifemark which gave rise to an IRR on each policy of around 10%. Even if contractually the 10% IRR was intended to be a floor, that provision was effectively exploited by Mr Ford to enable the extraction of Lifemark funds by means of LAS International, when absent the LAS International fee extractions the IRRs obtainable on the policies purchased could have been considerably higher than 10%.

315. Mr Ford's case was that he believed that at all material times Lifemark's portfolio of policies yielded IRRs of between 15% and 23% in the general market, "more than adequately providing for the LAS Global arranger fee". His understanding, he said, was based on information he received from Meditron and Mr Smith. This, however, is contradicted by a report from Meditron of 11 March 2008 which stated that the weighted average IRR of the portfolio (that is of the policies comprising the portfolio) was 10.909%. The evidence instead suggests that IRRs in the range put forward by Mr Ford were difficult to achieve in the Relevant Period. Thus, in the early stages of Lifemark, on 16 March 2006 Mr Simon of LSS proposed that he would be able to acquire policies for Lifemark in the range of 13% - 15% (that was before the LAS International arrangement). Later on, in an email of 8 January 2009, Mr Smith informed Mr Ford that Dr Gerasimowicz was looking for IRRs near 15% but that Montage were not able to source policies at that figure.

316. On 9 May 2009, Mr Ford received from Dr Gerasimowicz a Portfolio Summary and underlying data which set out details of the policies that had matured, and which showed actual IRRs between 18.35% and 865.42% (though in that latter case noted "not yet paid" and "litigation"). We accept that those numbers exceed both the minimum IRR of 10% in the Montage contract and the 16% or so which the

calculations suggest should have been the average IRR for the policies acquired for the portfolio. But the actual outturn does not explain either the limited contractual requirement placed on Montage at the outset, or the consistent purchases at around 10% IRR which resulted from the LAS International arrangement. We agree with the submission of the Authority that Mr Ford could not genuinely have believed that these figures demonstrated that, by reference to the life expectancies themselves, the IRRs of policies across the Lifemark portfolio (which at that time comprised 314 policies, whereas the matured policies comprised 23 policies only, which on average had matured considerably earlier than the life expectancies) were at this level.

317. A considerable area of contention was the submission by Mr Ford that the 10.909% IRR figure provided by Meditron in March 2008, the IRR figures provided by Montage and the 10% minimum IRR set out in the Montage agreement were all "net of costs". The genesis of this submission was the supplementary expert report of Mr Gallo dated 14 August 2017. In his report, at para 3.4, Mr Gallo said:

> "I have received new information related to the Portfolio IRR which is critical in my opinion as to the coupon on the notes. Mr Colm Smith, former chairman of Lifemark recently confirmed with Walter Gerasimowicz … that the portfolio IRR calculations which were provided to me were actually NET of all expenses, including the fund raising expenses of Keydata."

318. In his report, Mr Gallo explained the effect of this new information:

> "Given the materials that were provided to me prior to both my Expert Report and both Joint Expert Reports I assumed that the policy IRRs which were provided to me were gross IRRs that did not take the costs such as those paid to Keydata and LAS Global into account and therefore would need to fully support those costs. I have not been provided with any of Mr (sic) Gerasimowicz's calculations but if I assume that this statement provided to me by Mr Smith is true then I do NOT believe that the coupon of 7.5% was too high relative to the portfolio IRR of 10.55% or that the yield on the assets was too low to cover the liabilities. I still do believe that Lifemark would likely [have] had to refinance the notes at or prior to maturity but the return generated by the life settlement portfolio would have been adequate to service the 7.5% coupon in the scenario where the quote[d] IRRs were net of all expenses."

319. In his evidence to the Tribunal, Mr Gallo provided a further explanation. Essentially, he distinguished between a policy IRR that was for external purposes and one that was used internally. The former would be based on what would be regarded as the conventional methodology (as confirmed by Mr Gallo) for valuing the IRR of a policy, based on the death benefit, the life expectancy, the premiums payable to maintain the policy and the purchase price paid by the acquirer (which, as we have seen, would be the gross purchase price, including associated broker commissions and fees such as the escrow agent's fees). The latter would also, on Mr Gallo's evidence, take account of all costs including the costs of capital raising. Essentially, according to Mr Gallo, in arriving at this latter "portfolio IRR", a proportion of the costs of raising capital would be attributed to a particular individual policy's acquisition price.

320. We can understand that an internal calculation of this nature might be made, in the context of seeking to arrive at a measure of performance of the portfolio as a whole, and that the calculation of a portfolio IRR taking account of all costs would be a useful internal tool. But that would not reflect the IRRs required in relation to individual policies. The individual policy IRRs would have to be sufficient to enable the required portfolio IRR to be achieved, having regard not only to all costs but also to the fact that 30% of the assets would be retained in cash, which would generate a lower IRR than the policies could achieve.

321. Mr Gallo confirmed that he had not carried out any calculations to determine whether the policy IRRs had been calculated on this basis. On the other hand, in his own supplementary report, Mr Boger did make the relevant calculations. His conclusion is that, contrary to the assertion on which Mr Gallo had based his views, the IRR figures reported by Montage were simply an ordinary IRR based on the usual inputs of acquisition price, death benefit, premium and life expectancy. Mr Boger calculated the IRRs of a sample of policies appearing in the Excel file "Lifemark Policy Data EY" prepared by Montage in mid-2009 from the underlying data relating to those elements. His calculations demonstrate that, although there were differences on a policy by policy basis, the difference in the aggregate IRR of the policy sample (57 policies) was far less than the annual costs of the fees and expenses which were submitted to have been included in the IRRs.

322. That there was a portfolio IRR as distinct from the policy IRRs themselves is supported by an email from Mr Smith to Dr Gerasimowicz of 30 January 2006. In that email, Mr Smith refers to the "investing model" and the modelling of known costs over a five-year period of the bond. Attached to the email was a Lifemark forecast for 2006-2011. That forecast assumed distribution costs of 5.5%, without regard to trail commissions and premium payments. The model includes bond interest and repayments but there is no modelling of the policies themselves. Mr Smith's email notes that, in simple terms, the model illustrates (on the given assumptions) that the asset portfolio had to yield a surplus of £112 million by the end of year 5. The email noted that cash also had to be generated to pay the identified costs and interest charges as they fell due. The model also excluded any costs of the policy originator (LSS); it was assumed that the contribution of the policies would be net of those costs. It is evident therefore that the IRRs of the policies themselves would have to be sufficient such that after origination costs and all Lifemark costs were deducted the returns on the bonds would be met. The IRRs of the policies would therefore be gross, based on price, face value (or death benefit), life expectancy and premium obligations.

323. A further example is the Tandem Pricing Model sent by Mr Smith to Mr Johnson, and copied to Mr Ford, on 17 October 2006. That showed an IRR of 11% – 15%. That model took into account the cash inflow from bond issues SIB 4 and SIP 1, cash outflows from interest paid and bond redemptions, and upfront and trail commissions. The resulting IRR of 11%-15% is the portfolio IRR. Any life settlements would, after taking into account their own up-front costs and premium payments, and having regard to a cash retention of 30%, give rise to an IRR on

average sufficient to repay the bonds and meet all other net cash outflows. That average policy IRR would thus in all cases need to be higher than the portfolio IRR.

324. We note also that this understanding of the factors which were relevant in the calculation of the policy IRRs, both prospective (i.e. at the time of the purchase of the policies) and actual (on maturity) is reflected in Lifemark's own spreadsheet calculation of the IRRs of its policies on maturity. A spreadsheet from Dr Gerasimowicz to Mr Smith, Mr Johnson and Mr Ford on 9 May 2009 showed the actual policy IRRs on maturity calculated by reference to the conventional factors of face value (death benefit), sales (or acquisition) price, premiums paid and life expectancy date. No other Lifemark costs were included.

325. We do not accept that Mr Ford can ever have believed that the IRRs of the policies were calculated on anything other than the conventional basis and that such IRRs were "net of costs". Nor do we accept the evidence of Mr Smith in this regard.

326. Mr Smith's evidence was that Lifemark needed to "achieve a net net (sic.) IRR of 10% because it had a commitment of 7.5% coupon to investors and unsecured commitment to pay 2.5% to Keydata. So that is the IRR position." Mr Smith's evidence was that he relied upon discussions with Dr Gerasimowicz in this regard. However, Mr Smith was taken in cross-examination to the commentary in an example of a Meditron report (that of 11 March 2008), which stated:

> "The IRR is determined by measuring future cash flows on a policy at the forecast point of maturity set against the known annual costs of maintaining the policy and then applying an interest rate which will make the present value of the cash flows equal to the maturity value of the Policy. The policy qualification criteria established by the IRR guidelines and minimum levels of IRR for policies to be acquired [to] (sic). By using this IRR method to calculate an offer price for a Policy, Lifemark can determine an interest rate return on the investment in a policy based upon the acquisition price and policy funding to maturity."

327. Mr Smith suggested in his evidence that his understanding of the expression "known annual costs of maintaining the policy" was that it should be read as "known annual costs of maintaining the policy and all the costs of the entity". His evidence was that he had been orally told by Dr Gerasimowicz that the calculation of the IRRs included an element to represent the cost of capital raised and paying the coupon to the investors. He confirmed, however, that although such an exercise would have required an allocation of the relevant costs to each individual policy, he had not seen any such exercise carried out.

328. We regard the evidence of Mr Smith in this respect as unreliable. We do not believe it. Although we did not have evidence from Dr Gerasimowicz, there is no documentary support for the wholly implausible proposition that anyone thought that the IRRs on the policies sourced by Montage for Lifemark had been calculated with reference to the costs of capital for Lifemark itself, whether the costs of raising the funds through the bond issues or the costs of servicing the bonds. We do not accept

that Dr Gerasimowicz could plausibly have said any such thing, or that anyone, including Mr Smith and Mr Ford, could have believed that to be the case.

329. Our conclusion in this regard is reinforced by further reference to Dr Gerasimowicz's own reports, made with the assistance of Montage. For example, in the draft report issued by Meditron on 23 May 2007 (referred to as "the Meditron Report 1" – see below), the following explanation of the IRRs of individual life settlements appears under the heading Acquisition Methodology:

> "Risk is addressed through a straight-forward cash flow analysis technique using Internal Rate of Return (IRR). This is accomplished by taking the initial cost and subsequent annual cash flows (e.g. manifested as premium payments or payments for cost of insurance) and providing a forecast of IRR based upon policy face value being paid at the life expectancy date predicted by the LE provider."

There is no reference to the costs of capital, or any allocation of such costs to individual policies. The example included in this section of the report equally does not include any such items.

Issues with the SLS Products

330. It is not in dispute that, by late 2006, Keydata had not received any evidence that the SLS bonds had been listed (indeed, it was clear they had not been). The need for a listing was well understood. In an email of 17 April 2006 to Mr Ford, Mr Johnson had made clear how important it was, in the context of the SIB 4 issue, for the bonds to be listed. Referring to documents required to be signed in order to achieve a listing, Mr Johnson had warned that the cash raised for SIB 4 "cannot be invested until the documents are signed". He also warned that failure to list put the ISA, PEP and SIPP investments at risk. (Mr Johnson's email actually says "Failure to *risk*", rather than *list*, but the meaning would have been clear.) CRT had also, at the 11 May 2006 meeting, informed Mr Ford and Mr Johnson that the listing had been put back on track.

331. Furthermore, despite what CRT had said at the 11 May 2006 meeting, evidence had not been received that SLS had acquired a credit facility or that a currency hedge was in place.

332. On 13 November 2006, Mr Ford participated in a conference call with Mr Smith and CRT. On that date, Mr Smith commented on a number of points in an email to Mr Ford which was also copied to Mr Johnson. The call had discussed the establishment of a credit facility as a senior creditor (Mr Smith commented that this might not be permitted under Luxembourg security law, and that Luxembourg legal advice would be required). It was noted that "the prospectus is nearly ready", the outstanding items included the credit facility "which will be brought within the structure" and Mr Smith commented that it would be helpful to receive a draft prospectus and timetable. The Required Asset Cover (RAC), however, had been reported at 1.91, which was below the required level of 2.0; however, although this

was a default event, Mr Smith did not regard it as particularly significant, depending on the quality of the SLS portfolio, and it was “a get out opportunity” for Keydata.

333. In the same email, Mr Smith advised that the “notes are most likely not worth Par”. This was in the context of a suggestion made by CRT that Keydata pay off the other investors in SLS (who had invested in earlier tranches having been introduced by Mr Elias) at par.

334. Of itself, we do not consider that the 13 November 2006 call should have given rise to any particular concerns. First, it appeared that steps were being taken both with respect to a credit facility and the listing of the bonds. Secondly, the RAC was not a particularly significant measure. Indeed, in a report by Grant Thornton dated 18 June 2008, the “asset coverage” is regarded as a “red herring” and not a particularly useful statistic. We agree. Securitisations are not typically based on asset cover but on cash flows; the SLS bonds (at least those issued through Keydata) were unsecured. (We should add that, had the RAC had greater significance, we would not agree with Mr Ford’s submission that this would not have been of concern since there was a 30-day “cure period” before there would be an event of default; it would not have been reasonable for concerns to have been alleviated simply because there had been no technical event of default under the bond terms.) Thirdly, it is not surprising that, at this stage in the cycle, the bonds were regarded as worth less than par, given the impact of initial costs.

335. However, it was not long before something very much more significant became evident. It was the state of the SLS portfolio itself. On 13 December 2006 Mr Smith sent an email to Mr Ford to report on discussions he had had with Montage in relation to a review of the SLS portfolio. In colourful language, Mr Smith described the portfolio as “a bag of shite”. He said that “the portfolio is weak, 50 pct is on 12 lives all on 13+ years, nearly half of that is on only two lives”. This meant that the purchase parameters of the SLS bonds were, as the Authority submitted, being completely ignored. As 50% of the portfolio was made up of just 12 policies, those policies were prohibited “jumbo” policies (which limited diversification and thus increased the risk of the portfolio) and the life expectancies were far too long and the policies would mature long after the 5-year bonds issued through Keydata.

336. Mr Smith’s email of 13 December 2006 was followed the next day by a more sober assessment, but one which was equally concerning. As well as reiterating the concerns with the profile of the SLS portfolio, Mr Smith reported that LSS had purchased eight policies at IRRs below 10% and that certain policies did not seem to be cash positive at all when premium costs were factored in (though this was subject to confirmation). In addition, it had been observed that SLS would run out of cash in less than two years if a credit facility were not put in place. All this, however, required further information from CRT so that Montage could analyse it and inform Keydata on the ability of the portfolio to perform and allow Keydata to decide upon its next steps. That email was copied to Mr Johnson, but Mr Owen was not aware of it, nor of the email on the preceding day.

337. It is true, as Mr Ford argued, that the information Mr Smith was relaying in these respects had come out of Montage, which was neither the investment manager of SLS (that was CRT) nor the policy originator (that was LSS). Mr Ford said that he took the view that Montage was seeking to create a commercial opportunity, essentially by criticising the SLS portfolio and the way it had been put together and managed. He was relying on assurances from CRT that the portfolio was performing appropriately given the early stage of the project. However, in the context of investment by retail investors, and given the regulatory responsibilities owed by Keydata and Mr Ford, such reliance in the face of information of the nature available to Mr Ford was, we find, misplaced.

338. Mr Ford sought to explain his insouciance at the time by reference to the ability, as he saw it, of SLS to seek to cure a distressed portfolio by issuing further bonds and buying more policies. That amounted to pure speculation. It was not something over which Mr Ford or Keydata could have had any control and could not properly have been relied upon to alleviate concerns about the risks to Keydata's investors, and the need to consider whether those investors and the market and the Authority should be advised of those concerns and the action to be taken to reassure them.

339. By January 2007, indeed, there was consideration of matters being drawn to the attention of the Authority. On 6 January 2007, Mr Smith informed Mr Ford (with copy to Mr Johnson) that he had been told by Mees Pierson that "SLS will go into default in the next 20 days", meaning that "income payments will stop and capital will be recovered on a partial basis". Mr Smith also reported that Mees Pierson had suggested that available cash in SLS be applied in repaying non-Keydata investors, leaving the pool of policies to be applied to Keydata. This was clear warning of impending default. Mr Smith also noted in the same email that he relied on what he was being told by Mees Pierson and that it was Mees Pierson, and not CRT and Mr Elias, who were controlling matters. This suggested that neither CRT nor Mr Elias could be relied upon for reassurance. That prompted Mr Johnson to advise Mr Ford that it was only because he had confirmed with Mr Smith that this was a "rumour" and not fact, that he did not have to report the situation to the Authority. Mr Johnson also advised that Keydata should contact Mees Pierson independently of Mr Smith and also ask CRT for an update. Mr Johnson also informed Mr Owen that this was a "major issue" and asked how it should be taken forward. Mr Owen agreed that it was an issue and that Mr Johnson should obtain the information.

340. On 9 January 2007, Mr Johnson wrote to Mr Ford and Mr Owen with a number of matters which he described as "serious concerns". Mees Pierson had decided, without notice to Keydata, not to pay the December 2006 income payment for SIB 1. In the meantime, as Mr Johnson advised, those payments had been funded by Keydata from monies held in an income account. Mr Johnson stated: "The position needs an urgent solution and is very very concerning!" In addition, in relation to Lifemark, Mr Johnson also reported that Keydata had been funding SIP 4 income payments out of interest earned on the SIP 5 client account.

341. Later that day, Mr Johnson reported to Mr Ford and Mr Owen that Mees Pierson had refused to make the income payments for SIB 1 because the RAC certificate had

not been received from CRT. However, on 12 January 2007 CRT produced the RAC for 30 September 2006 (indicating that SLS maintained 2.1 times asset cover) such that interest payments for the period to December 2006 could be made. That email was copied to Mr Ford and Mr Johnson. The accompanying calculation showed SLS as having, at the relevant time, $284m face value in life settlements as against $138m, namely the outstanding principal of SLS bonds ($238m), less the account value of the policies ($10.8m) and cash balances ($91m).

342. On 19 January 2007, Mr Smith provided Mr Ford with an agenda for a meeting in New York on 24 January 2007. The agenda included an item headed "SLS – Planning the meeting with CRT" in which Mr Smith commented as follows:

> "I have been talking to MPI. It appears that David's investors will be repaid at par using all available funds. The Keydata funds have to be repackaged. There may be a loss to incur by Keydata. CRT should be liable for breaching policy purchase parameters to boost the required asset cover. We need to develop a rescue package for the portfolio through a liquidity facility."

343. There was no report by Mr Ford on these issues to the February 2007 board meeting of Keydata. Instead, the minutes for 6 February 2007 continued to record, consistently with earlier board minutes: "SF to procure quarterly reporting to Board on SIB/SIP investment funds."

344. It was nonetheless recognised that the position of SLS was serious. It is clear that radical solutions had been contemplated. In an email of 8 February 2007 to Mr Ford, Mr Smith referred to the difficulty of a takeover of SLS by Lifemark, in that Lifemark was regulated and "the CSSF would have to look into the [takeover] and could open a lot of trouble". What was equally clear, therefore, at the time was that a regulator would have a concern with respect to SLS. But that did not prompt Mr Ford to consider informing the Authority. Rather, from the tone of Mr Smith's email, the concern was to avoid any regulator involvement.

345. Mr Johnson remained equally concerned about the position of SLS. He wrote to both Mr Ford and Mr Owen on 12 February 2007 with reference to an FSA visit. At that time, despite Mr Smith's email to Mr Ford of 8 February 2007, Mr Johnson thought that a takeover of SLS by Lifemark was the preferred solution. He said: "I think we need to ensure that we put steps in place to rectify the position with SLS Capital asap."

346. By March 2007 there had clearly been discussions with CRT concerning a possible takeover of SLS, not by Lifemark but by a Keydata entity. There had been a conference call on or around 15 March 2007 between Mr Ford, Mr Smith and CRT, at which (amongst other things) a share transfer agreement was discussed. The evidence indicates that this was an agreement between CRT, a proposed Keydata affiliate, Stichting Lifemark I (a foundation incorporated in the Netherlands), and Keydata itself, under which CRT would sell its shares in SLS for $78,000 and Keydata would (amongst other things) indemnify CRT against any liabilities arising out of CRT's role as advisor and shareholder in respect of SLS.

347. Mr Smith wrote to Mr Ford on 19 March 2007 to express his reservations on the negotiations in this respect. He took the view that, based on CRT's demands, Keydata would be better off not making any takeover of SLS. He made the point that he "did not think CRT are telling the truth ("trust" as written by Mr Smith, but clearly intended to be "truth") each time we meet them". Mr Smith counselled against agreeing with CRT's proposals as that would be to allow "CRT a very easy exit and taking control of a fund in distress". Mr Smith advised that matters should be kept in place until certain issues had been resolved, including the outcome of the meeting with the Authority.

348. That meeting took place on 21 March 2007. It was specifically directed at the SIP. For Keydata the attendees were Mr Ford, Mr Owen and Mr Johnson. Despite everything that had taken place, no reference was made to the concerns that had been expressed with regard to SLS, or the steps that were being contemplated by Keydata in that regard. However, reference was made to an overdraft facility being in place in the event that there were "insufficient deaths", along with possible roll-overs of bond investments. The note of the meeting records that Keydata had been "unable to confirm the precise terms (or potential withdrawal) of the overdraft facility". This was not surprising. As Mr Ford and Mr Owen (and Mr Johnson) knew, there was no credit facility in place for that purpose. It appears from all this (and we so find) that the meeting with the Authority was not regarded by Mr Ford or Mr Owen as an opportunity to make candid disclosure to the Authority, as required by their regulated status, but as simply a hurdle to be overcome before attempting to rectify the SLS situation themselves without damaging disclosure.

349. Although it might have been expected that the Authority's interest in the SLS structure would have led Keydata to have been astute to any matters which arose and which ought to be disclosed to the Authority in that respect, no thought appears to have been given to such a course of action. Thus, no disclosure was made (to the Authority, investors or IFAs) when, on 17 April 2007, Mr Ford was copied in on an email from Mr Smith to CRT in which Mr Smith referred to (a) the resignation of Fortis Intertrust from their position within SLS; and (b) the fact that the "Keydata SIB 3, Tranche D coupon payment" due for April of £323,000 had not been paid (with the result, according to Mr Smith, that Keydata investors had not been paid).

350. As regards the credit facility, to which Mr Ford, Mr Owen and Mr Johnson had referred during the March meeting with the Authority, the correspondence shows that Mr Johnson had attempted to follow this up. An email from Mr Smith to Mr Gibson at CRT, copied to Ms Bagwell, on 29 March 2007 refers to the Authority having requested information on the facility and seeking an outline of progress. Ms Bagwell emailed Mr Smith on 17 April 2007 to say that Mr Johnson needed the credit facility document urgently. Mr Smith's reply on the same day indicated that his expectation was that there was no credit facility. That was, however, not disclosed to the Authority.

351. Notwithstanding these issues, it appears from an email sent on 15 May 2007 by Mr Smith to Mr Owen, and copied to Mr Ford and Mr Johnson, that CRT continued

to portray the position of SLS in a satisfactory light. Mr Smith summarised in that email a call he had had with CRT as confirming the following:

> "1. Per the end of April, the total face value was USD 538 Million based on a cost of USD 161 Million.
>
> 2. the latest RAC for March 31, 2007 was met at a rate of 2:1.
>
> 3. the portfolio is 100% built.
>
> 4. There have been 3 deaths which involved the maturing of 4 policies.
>
> 5. believes the portfolio remains on target to return the advertised interest rates and principal.
>
> 6. the list of insurance companies and their ratings will be compiled. CRT confirms all insurance companies ARE rated A or better.
>
> 7. based upon the above face value of USD 538 Million there are 148 policies.
>
> 8. CRT confirmed that SLS is almost on target for the number of lives in the portfolio, and adjustments will be done to reach the target level."

Issues with Lifemark

Meditron Report 1 and the rollover assumption

352. On 23 May 2007, Mr Ford received from Meditron the first draft (described by Dr Gerasimowicz as a "rough draft", but one which had resulted from input both from Meditron and Montage) of a report analysing the financial model of Lifemark ("the Meditron Report 1"). This was the first document since the inception of the Lifemark Products some 18 months earlier that had been produced describing how the Lifemark portfolio was performing. The email from Dr Gerasimowicz to Mr Johnson and Mr Ford makes clear that the purpose of the document was to respond to questions raised by the Authority. Further refinement was expected to be made.

353. The Authority has submitted that the projections in Meditron Report 1 were deeply troubling. It points to the predicted deficit faced by the Lifemark portfolio of $35 million in 2011, even on the assumption that 30% of investors (bondholders) had "rolled over" their investments at the end of the term of the bonds into new bonds. We do not accept that submission, which is based only on a partial picture. It is true that the report projected a deficit when comparing bond redemptions against assumed death benefits alone. But that was not the whole picture. When net cumulative interest earned on unused cash in the Lifemark portfolio was taken into account (assuming a 5.5% constant return), the deficit was converted into a positive cash balance in 2011, and it was further concluded that the portfolio would have a positive cash balance, with face value offsetting the bond maturities, in 2014.

354. Dr Gerasimowicz wrote to Mr Johnson and Mr Ford on 5 June 2007 with a revised analysis (dated 11 May 2007) based on incorporation of annualised figures for the coupon/interest payments due on the bonds. Additions had been made to indicate where a credit facility might come into play. There was also included a

"representation of 60% rollover … to illustrate the 'breakeven' point for our internal purposes". The "breakeven" point was that at which the Lifemark portfolio was "cash positive" in every year of its existence. Below that point, and assuming rollovers of less than 60%, the conclusion was that, at some period, either a credit facility would be required or a portion of Lifemark's investment reserve could be employed. In most cases a negative cash balance requiring such remedial action would arise only in 2011; the only exception was if it were assumed that there would be 0% rollover.

355. We do not therefore accept the Authority's submission that Meditron was indicating by these reports that the Lifemark Products were reliant upon 60% of investors rolling over their investment. We do not accept that there would need to be a break even position in every year. We find that a negative cash balance of the sort referred to in these Meditron reports could reasonably have been regarded as capable of being managed by cash flows in either of the ways suggested by Meditron. It follows therefore that we do not accept the criticism of Mr Ford in not taking steps in light of this information to ensure that Keydata managed the risk that the proportion of investors rolling over their investments would be insufficient to avoid the Lifemark portfolio facing a deficit. Mr Ford could in our view have reasonably assumed from these reports that this was a risk that was being managed. There was in our judgment nothing in these reports themselves which ought to have led to the abandonment of the bond issue (SIP 9) on 29 May 2007.

Developments with respect to SLS

356. In December 2005, CRT, as the investment manager of SLS, refused to accept further tranches of SLS Products from Keydata. Then, following the abortive takeover discussions with Keydata, on 17 September 2007 CRT removed itself from the SLS structure completely by selling its shares in SLS to Life Settlement Capital S.A. ("LSC"), a Luxembourg entity owned by Mr Elias, and by stepping down from its role as investment manager.

357. On 28 September 2007, Mr Smith sent an email to Mr Ford in which amongst other things he noted that Mr Elias now controlled SLS completely and that "The comments from CRT about the portfolio being turned sounds like it may be abused just for the parties to make money". Additionally, Mr Smith noted that there had been no update on the SLS bonds being listed. He commented that "the ideal scenario is that Keydata gets its money back, and should consider that being at a discount then see if we can take it over to Lifemark."

358. There was thus at that stage a concern that the SLS bonds would not be paid in full. Furthermore, there were further doubts about the then current state of the SLS portfolio. In another email on the same date from Mr Smith to Mr Ford, although generally positive about the departure of CRT, Mr Smith noted that, contrary to what he had been informed by CRT (and Mr Smith repeated the view he had formerly expressed about CRT not being honest), the RAC of SLS for 30 September 2007 would only be 1.81, lower than the required 2.0. Mr Smith understood that to become compliant, Mr Elias would lend $50 million of face value (of life settlement contracts)

to SLS "to allow SLS to pass the RAC test. This does show a commitment from David [Elias], but also some holes in the ability of SLS to survive".

359. None of this appears to have given Mr Ford any cause for concern, nor did it prompt any consideration of disclosure to the Authority or the investors. Mr Ford's case was that despite what he described as "a few hairy moments" up to September 2007 where Mr Smith had made some "inappropriate comments about certain things happening", Mr Ford had regarded the SLS Product as being in more or less good shape. In his evidence to the Tribunal, asked how he could have understood that a loan of life settlements could meet the requirements for the issue of an RAC certificate, Mr Ford replied that this was not something he had any experience in and that he had never really thought about it. It does not appear that any advice was sought, or further enquiry made in this respect, despite Mr Smith's warning about the prospective survival of SLS.

360. The new investment manager of SLS was CIB Partners Limited ("CIB"), whose CEO was Mr Arnold Eber. CIB was an FSA-regulated entity. In his evidence, Mr Johnson stated that he had not discovered that the investment manager had been replaced until months later, and then only because he had "discovered it on a website somewhere". The Authority submitted that this was a further piece of information that was deliberately withheld from Keydata's compliance officer. We find that this was so. In an email of 10 October 2007, in which Mr Smith updated Mr Ford on certain SLS matters, the introductory remarks included "I can't share this with Peter just now because he is not aware of the CIB replacement of CRT." We reach our conclusion notwithstanding Mr Owen's evidence that this information was not kept from Mr Johnson, and that it had been Mr Johnson who had informed Mr Owen about the change. Mr Owen could not, however, remember when he had been so informed.

361. In that email of 10 October 2007, Mr Smith confirmed that SLS still had no credit facility. According to CRT, however, one reason for the delay was that, in the takeover discussions with Keydata, it had been Mr Ford who had requested that it be held off, on the basis that he would be able to obtain better terms for the entire Lifemark programme (which was at that time contemplated to include SLS).

362. On 18 October 2007, Mr Johnson wrote to the Authority to respond to questions raised by the Authority in a letter of 2 October 2007, following a meeting held on 4 and 5 September 2007. In that letter, Mr Johnson said that Keydata monitored the operation of SLS effectively by Mr Ford meeting all the relevant parties at least quarterly, and that Mr Ford played a similar role with respect to Lifemark. In relation to the state of the SLS and Lifemark portfolios respectively, Mr Johnson (on the basis of information provided to him by Mr Ford) stated that the "Investment Managers have reported to Stewart that the portfolios are performing in line with expectations and there have been a number of early maturities" and that Mr Ford "had reported that the portfolios are currently in good shape". In this respect, although we accept that the information known to Mr Ford at the material time pointed clearly in the opposite direction in relation to the SLS portfolio, and that such a statement was false and misleading, and deliberately so, we do not accept, for the reasons we have given

above, the Authority's submission that the same was the case for Lifemark based upon the Meditron Report 1.

363. In a letter dated 14 November 2007 from Keydata to Mr Eber of CIB, Keydata asked for a number of confirmations concerning outstanding items with respect to SLS. The letter expressed as Keydata's "absolute concern" that the investments made in the SLS bonds would be fully redeemed at their scheduled maturity dates and the investors would receive their interest payments over the term of each bond. Keydata required confirmation with respect to the listing of the bonds on the Luxembourg Stock Exchange and confirmations with respect to the usual outstanding matters of a credit facility, the foreign currency hedge and the permitted status of the assets held by SLS for the calculation of the RAC. This letter evidences clearly the knowledge of Keydata with respect to the problems with the SLS portfolio, including the doubts about its assets.

364. The letter stated:

> "The modelling run by Keydata on the data provided by CRT has demonstrated that the majority of the policies in the portfolio are forecast to mature between one and six years AFTER the maturity of the Keydata Bonds and the maturities forecast to occur before the maturity of the Keydata Bonds will not generate sufficient funds to redeem the Keydata Bonds. Please note these observations have not yet considered the cash flow requirements for the servicing of the portfolio and the coupon payments of the Bonds."

365. We accept the submission of the Authority that it is clear that Keydata, and in particular Mr Ford, were aware by this stage that the SLS model was fundamentally flawed. We cannot, however make any such finding with respect to Mr Owen, as his role in these discussions and reports is unclear, and there is no evidence that he had the level of knowledge of the state of the SLS portfolio that was available to Mr Ford. We do not accept, on the other hand, that knowledge of the same flaws can, by reason of this correspondence, simply be attributed to the Lifemark model and the Lifemark portfolio. We shall discuss the alleged flaws in the Lifemark product, but at this stage our finding is that Mr Ford and Mr Owen did not know, by reference to knowledge of the issues with respect to SLS, that the Lifemark model was similarly flawed.

366. The issues set out in the letter of 14 November 2007 with respect to SLS should have given rise to disclosure to the investors, IFAs and the Authority. Whatever remedial action might have been taken, or was capable of being taken, there is no basis on which full disclosure of the issues, and the way in which those issues were proposed to be addressed, should have been avoided at that time. Given the knowledge of Mr Ford in these respects, we consider that his failure to make disclosure, which can only be because of concerns for the effect such disclosure might have on his interests in Keydata and Lifemark, displayed a clear lack of integrity on his part.

367. The concern regarding the position of SLS did not abate. On 22 November 2007, Mr Smith wrote to Mr Ford following a meeting with Mr Eber of CIB, the new

investment manager of SLS. Mr Smith graphically drew Mr Ford's attention to his understanding of the outcome of that meeting. He said:

> "The outcome I got to was that SLS is fairly fucked but David will save the day and you will get to meet him and set that to music.
>
> From a compliance standpoint the answers were not good. PJ would lose his reason.
>
> Let's chat between us to get something in writing to show a KEYDATA decision and follow through, then line up the steps and I will get them done (listing etc).
>
> What do you currently think about it? Tom is doing well with AIB in London and we have AIB Dublin ready to bite also, it could be that we offload SLS through AIB and run for the hills. We need to chat before I bring it to you."

368. The message from this email was clear. Mr Smith took the view from the meeting with Mr Eber that the SLS product had failed and that investors would either have to rely on Mr Elias doing something (which, as Mr Ford described in evidence, could include putting further funds into SLS) or SLS would somehow have to be offloaded to a third party. Furthermore, although there were clear compliance concerns for Keydata, no information was to be provided at this stage to Mr Johnson.

369. Mr Ford's evidence was, first, that he did not see the meeting with Mr Eber in the same way as Mr Smith. His understanding was that, having recently gone through the exercise of trying to buy the SLS portfolio, he did not believe there was a material problem. He had intended, through the letter to CIB of 14 November 2007, to push Mr Eber into action, and at the meeting Mr Eber was himself pushing Mr Elias to use his considerable wealth to redeem (or, as Mr Ford put it, "kick out") the bonds. Mr Ford believed that Mr Elias would take appropriate action, and he did not consider it was something that needed to be reported to the Authority. Mr Ford said in evidence that he had understood Mr Smith's colourful language to refer to the fact that SLS had not listed the bonds or put in place the currency hedge. We do not accept that evidence. It is simply not credible in light of the clear terms of Mr Smith's email, particularly when viewed in the context of the concerns expressed by Keydata (and by Mr Ford himself) as to the state of the SLS portfolio.

370. Secondly, Mr Ford said that he considered that Mr Johnson had been aware of the state of the SLS project at this time, although he had not been informed about these particular discussions. It is clear, however, and we find, that Mr Johnson was not privy to any of this information. Indeed, as Mr Smith said in his evidence, this was something that a compliance officer would not want to see. But, in our judgment, it was clearly something that the compliance officer should have seen, and any responsible regulated person of integrity would have ensured that the compliance officer did see. Mr Johnson himself confirmed in evidence that he had not been informed of the contents of Mr Smith's email and that if he had been he would have needed to write to the Authority to correct the information which he had set out in his letter of 18 October 2007. Mr Owen was equally unaware of Mr Smith's views. The Keydata board meeting on 19 December 2007 simply repeated that "SF to procure

quarterly reporting to Board on SIB/SIP investment funds". Mr Owen's evidence was that he did not think that the board was informed about the SLS portfolio not performing.

371. There can, in our judgment, be no legitimate reason for Mr Ford not to have taken all appropriate steps to disclose the issues with SLS other than his desire not to cast doubt on the continuing Lifemark issues which were being marketed to IFAs and Keydata investors. Throughout this period there was no let up in the programme of issue of Lifemark bonds to those investors. Thus, SIP 10 was issued on 19 July 2007, SIP 11 on 10 September 2007, SIP 12 on 29 October 2007 and SIP 14 on 5 January 2008. Although we accept that Mr Ford hoped that Mr Elias would rectify the situation, principally by procuring redemption of the SLS bonds held by Keydata investors, and that in default of that Mr Ford himself intended to do what he could to salvage the situation, none of that can excuse the failure to disclose. That can be explained, in our view, only by the fact that Mr Ford was concerned that disclosure of the SLS problems would give rise to concern over the Lifemark Products, which outwardly had the same features, and would interrupt the fund-raising activities for Lifemark through the issues of bonds to Keydata investors, and the income stream generated for the benefit of Mr Ford through Orietex/LAS Global and LAS International. (At 9 January 2008, LAS International had been paid $28.18 million, and a schedule of payments made to Orietex/LAS Global dated 18 December 2007 indicates that in respect of SIP 7 to SIP 14, Orietex had received £1 million and LAS Global was due a further £2.9 million.) But those concerns were the very reason why, if Mr Ford had had the requisite integrity with regard to the Keydata investors, the market and the Authority, he would have made the appropriate disclosures.

The Grant Thornton reports

372. The Authority's investigation of Keydata began on 18 December 2007. In early February 2008, Keydata, through its solicitors Irwin Mitchell, retained Grant Thornton to assist it with the investigation.

373. On 6 February 2008, Keydata received the first report from Grant Thornton ("the February 2008 Brochure Report"), which was a review of the contents of the brochure for SIP 14 (relating to a Lifemark bond issue). The primary conclusion of the report was summarised by Grant Thornton in an email to Irwin Mitchell of 6 February 2008 and reported by Irwin Mitchell the following day to Mr Ford, Mr Owen and Mr Johnson as follows:

> "FSA has commented on the substance of the information you use in your marketing materials. We need to finish our work on the due diligence exercise before we can comment on the substance, but we comment now on the presentation of the information in the brochure.
>
> We believe that the way this information is presented is not clear or fair enough and that it does not meet the standards applied by FSA or the industry generally.
>
> A number of the individual points we have raised may not seem that significant in isolation. Taken together though, the effect is

> sufficiently serious that you should consider suspending sales on the basis of this material."

374. Mr Ford and Mr Owen submitted that matters raised in the February 2008 Brochure Report were resolved in a telephone conference call between Mr Darby and Mr Johnson of Keydata, a representative of Resources Compliance and Ms Fiona Reddy of Grant Thornton. We accept that there were a number of points made by Grant Thornton that would not have themselves given rise to great concern, and which could either be readily explained or minor changes could be made to the documentation. Mr Grainger, in his evidence, described there as having been significant differences of opinion as regards what he termed "materiality versus pedantry"; it had appeared to him that some of the points made by Grant Thornton were not material to the outcome to the consumer and were a matter of interpretation. That was indeed implicitly recognised by Grant Thornton itself when it referred to individual points not being regarded as significant if viewed in isolation. We also accept that certain, fairly extensive, changes were made to the brochure as a result, although no revised brochure was provided to Grant Thornton for review.

375. It is only in respect of fees that the Authority relies upon the February 2008 Brochure Report. The report stated:

> "The section about charges only refers to one charge. COBs 4.2.4 requires that sufficient information should be provided for products with complex charging structures."

At that time, COBS 4.2.4 stated:

> "… a firm should ensure that a financial promotion that promotes an investment or service whose charging structure is complex, or in relation to which the firm will receive more than one element of remuneration contains the information necessary to ensure that it is clear, fair and not misleading."

376. The Authority submitted that this rule required that the fees being extracted by Mr Ford be recorded in the brochures and that, by the February 2008 Brochure Report, Mr Ford and Mr Owen were thus specifically made aware of that. We do not accept that submission. In our judgment, COBS 4.2.4 did not apply to the fees being extracted by Mr Ford through Orietex/LAS Global and LAS International. It was not, in our view, the rule which mandated disclosure of those matters in the brochures issued by Keydata, but the general requirement on regulated and approved persons to conduct themselves with integrity. We have found earlier that Mr Ford acted without integrity in failing to disclose the personal benefits he was obtaining through Lifemark while continuing to market the bonds to Keydata investors. The Grant Thornton report did not add anything in that respect in relation to Mr Ford. Nor, in our view, did it provide any specific indication to Mr Owen as to the need for those fees, of which he was only generally aware, to be disclosed in the brochures.

377. Grant Thornton were then instructed to consider the adequacy of the due diligence for the Lifemark Products. Mr Johnson sent an email to Mr Ford and Mr Owen (and Mr Smith) on 19 February 2008 following a meeting with an actuary from Grant Thornton. In that email he relayed concerns expressed by Grant Thornton as to

the lack of evidence of financial modelling, which it was said should ideally all be independently verified. The concerns included the potential mismatch between target yields of 11% and coupons of 7.5% along with other costs, the need to consider the "worst case scenario" and to stress test changes to life expectancies and other significant factors. Regular valuations of the portfolio were required. Mr Johnson's email concluded: "GT and Graingers [Keydata's compliance consultants] advised we should not issue SIP 15 until we receive the extra due diligence".

378. SIP 15 was not issued. Instead, with effect from 5 March 2008, a new product (DIP 1) was launched which was materially identical to the SIB 4 and SIP Products in relation to Lifemark bonds. An internal email from Mr Alexander of Keydata, to amongst others Mr Owen, Mr Ford, Mr Johnson and Mr Smith dated 25 July 2008 referred to a SIP Portfolio Update for that month, which included a report from Meditron, to be issued to IFAs. In that report the Defined Income Plan (DIP) was described as a replacement for the SIP, but "set up in exactly the same way and utilises the same robust investment processes and criteria as the SIP". The report also stated that assets in the SIP portfolio had been "ring-fenced and managed solely for the benefit of Keydata Investors". This was untrue, as Mr Ford certainly knew.

379. In cross-examination, Mr Ford was asked about the decision to go ahead with DIP 1 notwithstanding the advice from both Grant Thornton and Graingers not to make a further issue without additional due diligence, including the model itself. Mr Ford's reply is instructive of the state of mind of himself and Mr Owen:

> "I think Mark, myself and I think Peter discussed this and I think we said we believed what we were doing in relation to the project was good; it was right. The issue about due diligence was something that was back in 2006. We're in 2008. There was nothing that this due diligence bundle was going to do that was going to change anything from where we actually were, and we were concerned that if we suddenly just stopped it, that that might send out a negative message into the market. I think that's how we settled on that immediately at that point.

Mr Ford explained further that he and Mr Owen had not considered the advice they had been given was correct. They disagreed with that advice, he said, in good faith.

380. We do not consider that this was a good faith disagreement. The deficiencies in the due diligence had not just arisen; they were simply being pointed out by Grant Thornton. They could not properly be brushed aside by pointing to the existence of due diligence in 2006. It was evident that there was insufficient modelling evidence available to Keydata. The absence of good faith is demonstrated by the real reason why the marketing of the Lifemark Products continued, namely to avoid a negative message being given to the market. It was not appropriate in our judgment for Mr Ford and Mr Owen to have permitted further issues in respect of the Lifemark Products without first having satisfied themselves by the further due diligence they had been advised to undertake. By making those further issues, they were effectively making the positive case to the market that satisfactory modelling had been done,

including all stress testing, whereas that was not the case. To do so, in our view, displayed a lack of integrity.

Liquidity problems

381. On 7 February 2008, Mr Smith sent an email to Mr Ford which he headed "SLS Warning". In that email, Mr Smith referred to an "off the record" phone call he had received about SLS (and which Mr Smith told us he believed had been with someone at Equity Trust). Mr Smith's email said:

> "from what I have been told, SLS is out of cash NOW, it can not pay any more coupon and can not pay premiums on the portfolio. Apparently David is making all of the decisions (Not CIB/Arnie). There is no credit line in place and they have to sell off policies. The policies which David "Lent" to SLS, have actually been "Sold" to SLS (David got paid cash and probably profited). We need to have a call with Arnie and find out what is going on, and is he in control. If not, SLS will collapse within this month."

382. As the Authority submitted, this email can be read only as expressly informing Mr Ford that his understanding that Mr Elias would rectify the problems with SLS by putting further cash into SLS was wrong. What Mr Smith was being told, and which he relayed to Mr Ford, was that Mr Elias had instead extracted cash by selling policies to SLS, and that as a result SLS no longer had the cash resources to pay premiums on the policies or coupons on the SLS bonds. Neither Mr Owen nor Mr Johnson were made aware of the contents of Mr Smith's email.

383. Mr Smith called Mr Eber and spoke to his assistant Ms Renee Barker. Mr Smith asked about the performance of the SLS portfolio between 2006 and 2007 and enquired about the lending/sale of policies. Ms Bagwell (Mr Ford's PA) had also called regarding the RAC. This had apparently raised suspicions for Ms Barker, as she described in an email to Mr Eber of 7 February 2008. There was evidently something to hide: Ms Barker later emailed Mr Eber to say that she did not want to send Ms Bagwell the whole RAC calculation as it showed only $150,000 of cash.

384. On 8 February 2008, Mr Smith emailed Mr Ford to inform him of the conversation with Mr Eber. He described the conversation as constructive. On the one hand, he set out what he called "Cold Facts":

> - David claims that he has no obligation to list the Keydata bonds.
> - SLS is being managed by David, not by CIB.
> - The portfolio in SLS is not capable of delivering coupons and capital in its current form.
> - CIB want a mandate to be responsible for all management and to put David aside, and they are confident they can run SLS successfully.

- The previous Investment Strategy of meeting required asset cover has been pursued without regard for cash flow.
- David has established a deal with Dexia Bank to provide a credit facility, but he does not want to permit investor subordination.

Mr Smith explained in the email that one option was to lower the RAC from its required level of 2:1 to enable disposals of policies and the generation of cash to fund premiums and coupons. In addition, he suggested that the Keydata bonds be subordinated to allow a credit facility to be put in place. CIB would be given a full mandate to manage SLS without interference from Mr Elias. But all of this was subject to the cash flows being modelled by CIB to confirm that the portfolio could deliver. The alternative was that the portfolio would go bankrupt.

385. Liquidity issues were not unique to SLS. On 11 February 2008, Mr Smith sent an email to Mr Ford in which he referred to an email on the same day from SEB (the Luxembourg bank). That email noted that Lifemark's account with SEB had been "dried out", and that having regard to current and prospective payment requests, Lifemark did "not have enough cash to pay for everything". As well as being disturbing in itself, the email also demonstrated that Dr Gerasimowicz did not appear to have all the information he needed to manage Lifemark's cash flow. Mr Smith's email contrasted with that of Dr Gerasimowicz who on 11 February 2008 had emailed Mr Ford and Mr Smith saying, amongst other things, that the amount of monies at SEB (which Dr Gerasimowicz put at $14.5 million) was sufficient to fund policy purchases as well as premiums and coupons.

386. Mr Ford spoke to Mr Smith on 12 February 2008. Later that day, Mr Smith emailed Mr Ford with regard to the liquidity issues with Lifemark. He confirmed that "The liquidity view from [Dr Gerasimowicz] was not presented right." He recorded that spending had been halted, so far as possible, on Mr Ford's instruction. He expressed the view that, although a credit facility was a longer-term aim, Lifemark was backed up by $30 million of maturities and the SIP 14 closing (namely the receipt of funds from Keydata investors). That was the source relied upon also by Mr Ford, who told us in evidence that he did not regard there as having been a liquidity problem because he knew that funds were coming down the pipeline from Keydata. He took the view that there had been something of an over-commitment in terms of policy purchases.

387. We do not consider that the liquidity issues that arose in respect of Lifemark in February 2008 were of the same order as those in SLS, nor that at that stage they should have given rise to the same structural concerns as those in SLS. Although it was put to Mr Ford that the liquidity issues in both cases stemmed from the fact that the Lifemark model and the SLS model were essentially the same, we do not regard this correspondence as indicating that the Lifemark issues were of the same order as those in SLS, and we do not consider that Mr Ford ought to have concluded, from this correspondence, that they were.

388. Turning back to the SLS issues, the next step was a meeting with Mr Elias at the Dorchester Hotel on 22 February 2008. Two days prior to that meeting, on 20 February 2008, Mr Smith emailed Mr Ford with a list of points for him to raise at the meeting. The issues included:

(a) Keydata's primary concern being the receipt by Keydata investors of the principal amount of the bonds on their maturity dates and coupon payments over the term of each bond.

(b) Confirmation was required as to listing of the bonds, the credit facility, the foreign exchange currency hedge and the permitted status of assets held by SLS for the calculation of the RAC.

Concerns to be raised in these respects included that the majority of the policies in the portfolio were forecast to mature between one and six years after the maturity of the Keydata bonds and the policy maturities forecast to occur before the maturity of the Keydata bonds would not generate sufficient funds to redeem the Keydata bonds. Mr Smith also advised Mr Ford to seek written confirmation from SLS that the SLS bonds would be listed, explaining that this was required to ensure that the SLS Products were compliant and that representations made by Keydata in its financial promotions were correct.

389. Those attending the Dorchester meeting were: Mr Ford, Mr Smith, Mr Elias, Mr Eber and Ms Barker, and a Mr Lim and Mr Seah, who were listed as Mr Elias' assistants, although Mr Seah was the managing director of BWT. At that meeting, Mr Elias informed Mr Ford that:

(a) SLS would not list the Keydata bonds as it was not contractually obliged to do so (this view was also confirmed by Mr Eber). Nor would it honour commitments given by BWT during the promotion of the Keydata bonds in 2005.

(b) SLS would not take any measure to protect the foreign exchange exposure of the Keydata bonds (Mr Eber did not regard this as necessary).

(c) Mr Elias would ensure that SLS would meet all of its commitments to Keydata investors for interest payments and capital repayments up to maturity in accordance with the terms and conditions of the bonds (Mr Eber said that the assets could be managed to deliver full investor returns without a credit facility).

(d) Mr Elias considered Keydata to be a competitor and therefore refused to provide information to Keydata on the status or performance of assets within the portfolio held by SLS.

(e) Mr Elias invited Keydata to make an offer to SLS to acquire the entire portfolio of assets held by SLS (provided this made a profit for Mr Elias).

390. We find, as submitted by the Authority, that from the time of the Dorchester meeting, Mr Ford was aware that, first, the Keydata bonds would not be able to satisfy the requirements of the ISA Regulations, secondly that the bonds would be exposed to

currency risk, thirdly that no credit facility would be put in place and fourthly that Keydata would have no visibility on the SLS portfolio. Mr Ford himself considered (as was recorded in the minutes of the Dorchester meeting) that the result of the meeting had been in breach of commitments given by both SLS and BWT (although there was no contractual commitment obtained by Keydata). The statements made in these respects in the SIP offerings were demonstrably false. However, Mr Ford did not inform Mr Johnson of these matters or ensure that the Authority, IFAs and investors were made aware of them.

391. That Mr Johnson was not aware of these matters is apparent from his evidence to the Tribunal, which we accept, that he did not see the minutes of the Dorchester meeting which set them out until later on when he was engaging with Allen & Overy with regard to discussions with HMRC about the failure to list the bonds and he had requested from Mr Smith the entire history of the efforts to secure a listing. Mr Johnson confirmed in evidence that a statement that the bonds would not be listed at all would have had serious implications.

392. Nor was Mr Owen informed of these matters. The board meeting of Keydata which took place at the same time as the Dorchester meeting made no reference to them, and there was equally no reference in the board papers to the issues raised.

393. The professed reaction of Mr Ford to what he had been told by Mr Elias at the Dorchester meeting can be contrasted with his reliance on his avowed acceptance of the positive representations said to have been received from Mr Elias, BWT and others involved in SLS. Mr Ford essentially asks us to accept that he acted reasonably in placing reliance on all positive statements made to him concerning SLS, in spite of numerous indications that such statements might not reflect reality, but acted equally reasonably in placing no weight on more negative statements. We reject that submission.

394. Mr Ford refers to what he says were repeated promises since 2005 to effect or procure a listing of the SLS bonds. Mr Ford's case is that he did not see Mr Elias' assertion that he would not list the bonds as a threat, but that he believed that Mr Elias was engaging in some form of "grandstanding" at the meeting, and that this was nothing more than a robust negotiating position in respect of the sale of his interests in SLS (although the sale proposal was in relation to the assets of SLS, and not SLS itself). Mr Ford submitted that Mr Eber later telephoned him in April 2008 to apologise for Mr Elias' conduct at the Dorchester meeting and to confirm that SLS would discharge its obligation to list the bonds, and that in September 2008 Mr Elias also confirmed that the bonds would either be listed or redeemed in full prior to maturity. Those later indications cannot, however, detract from the clear expression of intention of both Mr Elias and Mr Eber at the Dorchester meeting, and the proper reaction to those indications of a regulated person of integrity. Such a person would immediately have informed the compliance officer and arranged for the Authority, IFAs and investors to be informed. Even if the attitude towards listing had changed by April or September 2008, that was several months after the Dorchester meeting. Furthermore, listing was not the only serious problem identified at that meeting, and

even in relation to listing, Mr Elias' approach of redeeming the bonds early instead of listing them would still have left Keydata investors investing through ISAs exposed.

395. Mr Ford's failure to inform the relevant persons of the outcome of the Dorchester meeting cannot be excused, in our judgment, by any intention or plan on the part of Mr Ford to adopt an alternative strategy to list the SLS bonds as a separate compartment within the existing Lifemark listing. Nor can it be excused by the fact that certain steps were taken, or purportedly taken, with regard to some form of listing in respect the bonds. Mr Ford has referred in this context to what he regards as confirmations by Mr Rakison, the lawyer acting for Mr Elias, that the listing of the SLS bonds was being progressed by him and his firm. The matters to which Mr Ford has referred are considered in the following paragraphs.

396. On 5 November 2008, Ms Bagwell sent an email to Ms Barker of CIB, copied to Mr Ford, requesting certain documents (service agreement between SLS and Equity Trust, custodian agreement between HSBC and SLS and originator service agreement with LSS and HSBC) required by the lawyers in relation to the preparation of a prospectus to list the SLS bonds. Ms Barker replied on 7 November 2008, with copy to Mr Ford and Mr Rakison, asking for more details as to why those documents were required for the prospectus. Mr Rakison also replied on the same day, this time with a copy to Mr Elias, to say that he had told Mr Ford that he would need to check that the documents did not contain confidentiality provisions. Mr Ford argues that this demonstrates that Mr Rakison was "playing along" with the idea that there could be a listing of the SLS bonds even though he knew that this could not happen because the bonds were no longer underpinned by assets.

397. We do not consider that such an inference can be drawn from this correspondence. It does not demonstrate that Mr Rakison was being disingenuous as regards the prospect for listing the SLS bonds. First, the focus of Mr Rakison at this stage is simply to ensure that there was no breach of any confidentiality obligation by release of the various agreements. Secondly, the prospectus in question was not one for the listing of the SLS bonds themselves, but new bonds to be issued by Lifemark in respect of a separate compartment (Compartment 2) to the holder of the SLS bonds, namely Keydata Investment Nominees Limited, in exchange for the acquisition by Lifemark of the SLS bonds. The prospectus was the responsibility of Lifemark, and Mr Rakison's references to confidentiality could not, in our view, be taken as any representation as to the state of the SLS portfolio.

398. On 20 November 2008, Mr Smith sent Mr Rakison a draft prospectus for Lifemark to issue bonds backed by the SLS bonds. This, we infer, was the Compartment 2 issue to which we have referred in the preceding paragraph. In that email, Mr Smith appears to have been labouring under the misapprehension that SLS was itself going to list the SLS bonds. In the chain of email correspondence that ensued, Mr Rakison disabused Mr Smith of that notion. Instead he said that his firm would be looking to "fill the gaps in" the Lifemark prospectus and to check that the references to SLS were correct. Again, in our view that falls well short of anything which could be relied upon as suggesting that the SLS bonds could be listed.

399. We also find that an email from Mr Smith to Mr Johnson, dated 17 November 2008 and copied to Ms Bagwell, which referred to “the prospectus for SLS Capital S.A. as provided to the listing agent” did not refer to the listing of the SLS bonds themselves. The draft prospectus which was attached was for the Lifemark bonds intended to be issued out of a separate Lifemark compartment (Compartment 2) for the purchase of the SLS bonds.

400. On the other hand, a letter from Mr Rakison to Mr Ford, Keydata, dated 16 December 2008 does appear on the face of it to relate to a proposed listing of the SLS bonds themselves. By contrast with the role of Mr Rakison and his firm in respect of the Lifemark Compartment 2 prospectus, in this letter Mr Rakison informed Mr Ford that his firm had been appointed by SLS, jointly with Luxembourg counsel, to assist SLS from a legal perspective with the listing of the SLS bonds, including verification. The letter went on to say that it was expected that the prospectus would be available and that verification and other matters would be capable of completion early in 2009.

401. That was followed on 16 January 2009 by an invoice sent by Mr Rakison to Mr Ford for legal fees incurred by his firm on behalf of SLS (which the email states Mr Ford had agreed to pay) “in connection with the proposed listing on the Luxembourg Stock Exchange of the Bonds issued by SLS to Keydata”. However, the invoice appears to relate to work on the Lifemark prospectus and not any separate prospectus for the listing of the SLS bonds. Significantly, the work description refers to a letter being drafted by Mr Rakison’s firm for Keydata to send to the Authority; that letter was the letter of 16 December 2008. We find therefore that there was no proposal for a separate prospectus for the listing of the SLS bonds themselves, and no proposal for such a listing. The only proposed listing was the Lifemark Compartment 2 listing. The letter intended to be addressed to the Authority was misleading, and it appears to have been deliberately drafted to mislead. We do not accept it as evidence either that there was any proposal at that stage to list the SLS bonds themselves, or as providing any indication from Mr Rakison that the SLS bonds could be listed. We reject Mr Ford’s submission that he had retained belief in the prospective listing of the SLS bonds up to 22 February 2008.

The Grant Thornton March 2008 due diligence report

402. On 3 March 2008, Mr Ford and Mr Owen received a further report from Grant Thornton “on the adequacy of Keydata’s due diligence records for SIP” (“the March 2008 Due Diligence Report”). This report was therefore aimed at the Lifemark Products. A few days earlier, on 26 February 2008, Mr Ford and Mr Owen had been copied in on an email from Irwin Mitchell to Mr Johnson setting out a “summary of advice from GT regarding further steps that you need to undertake”. Those steps included: “Model the product – showing all stages from the expected return calculated in the actuarial models to the return received by the investor allowing for all charges deducted by the various parties at each stage. This should prove, for a given set of assumptions, that the product works.”

403. The March 2008 Due Diligence Report concluded that Keydata’s due diligence in relation to the SIP was inadequate and incomplete in a number of respects,

including with respect to the lack of any evidence of a credit facility. Its central message, however, was on the need to model the product, taking into account all charges. The report noted that the papers did not contain any information about "the returns now expected after the initial purchase or once the various parties have deducted fees. Also there does not appear to be any information about the current actuarial model." In his evidence Mr Ford confirmed that this did not prompt him to make available to Grant Thornton information with respect to the LAS Global fees; he said that the report had been sent directly to Meditron.

404. Mr Ford pointed to the statement by Grant Thornton, at Section 3 of the Report, that "… we can see that Keydata has obtained details of the contractual relationships between Lifemark and the various US parties in the SIP arrangement". But he omitted to draw attention to the immediately following comment that "we have not seen any similar material in relation to the Luxembourg entities. Nor have we seen any records indicating that Keydata has carried out an adequate assessment of the risks posed by the various entities, or [an] assessment of the procedures by which Keydata can satisfy itself that the parties are performing effectively." Mr Ford also drew attention to the statement at paragraph 2.2 that stated: "The structure of the underlying security, as described in the papers we have reviewed, seems reasonable and legal agreements appear to have been drawn up between Lifemark and the various parties involved in the US." But in the same section Grant Thornton say: "Records are not available to demonstrate that Keydata has checked that the returns communicated to investors are achievable, nor the risk parameters within which they are achievable."

405. Mr Ford and Mr Owen's submissions in this respect focused very much on the agreements entered into with the various counterparties, in particular those in Luxembourg. We accept that such agreements were in place. We do not accept that details of a currency hedge were supplied by Keydata to Grant Thornton. The document produced to us which purported to evidence such a hedging arrangement by Lifemark consists merely of ideas for managing currency risk put forward in April 2007 by Dr Gerasimowicz which contains the statement that: "We do not believe that the benefits of hedging necessarily outweigh the current costs." But in any event, the critical advice in the March 2008 Due Diligence Report was in relation to the absence of an identifiable financial model demonstrating that the bonds would perform as advertised.

406. Mr Ford and Mr Owen submit that Keydata had relied upon the financial models prepared by Meditron and Mr Smith. That financial model, they argue, was an amended version of the SLS financial model (even though, as we have found, Keydata and Mr Ford were aware that the SLS model was fundamentally flawed). That reliance, they submit, was no different than the reliance that would be placed on others when distributing structured notes or venture capital trusts. We accept in this regard that certain work had been carried out by Mr Smith in seeking to analyse cash flows. We have referred earlier to various spreadsheets prepared by Mr Smith, including the Tandem Pricing Model which Mr Smith sent to Mr Johnson and Mr Ford on 26 May 2006. The email of that date from Mr Smith refers to the IRR detailed in the spreadsheets of 11% to 15%, and says "I need to kick that around with

Walter [Dr Gerasimowicz] a bit …". In his evidence Mr Smith said that at this time he had been in regular dialogue with Dr Gerasimowicz, who was "building the financial model". However, we conclude from that evidence that these spreadsheets were not produced or reviewed by Dr Gerasimowicz, but were the work of Mr Smith alone.

407. We reach the same conclusion with regard to the Bond cashflow summary report sent by Mr Smith to Mr Johnson and Mr Ford on 17 June 2006. In his email, Mr Smith explained that he had "calculated the returns expected per Walter's investment model on a pro rata basis" and "I will need to revise the plan from Walter to accommodate GBP/USD differences and also to accommodate Up front distribution and reserve issues." In his evidence Mr Smith said that he had had many discussions with Dr Gerasimowicz around this time. We accept that was the case. But we do not accept that at that stage there was a financial model for the bonds which had been prepared by Meditron. The reference in Mr Smith's email to "Walter's investment model" is, in our view, instructive. It confirms the view we have expressed earlier that, whilst Meditron did have a role in the financial modelling, at that stage it was confined to the modelling of the performance of the underlying portfolio of life settlements, and it was Mr Smith who was undertaking the investor modelling, such as it was. Although Dr Gerasimowicz had produced the Meditron 1 report in May 2007, that report was not itself a financial model.

408. Mr Ford and Mr Owen submit that Keydata was very satisfied that the Lifemark financial model demonstrated an achievable and positive rate of return for investors, net of costs. They refer in this regard to elements of Mr Smith's modelling, including the "reserve creation of 10%" which, they say "would discharge the fees earned by Orietex and later LAS Global". They refer also to RAC certificates and regular commentary they received from Meditron, supported by Mr Smith. The difficulty with the first, as we have described, is that the so-called reserve (as Mr Ford knew at the time, although we accept that Mr Owen did not) was not an asset, as it was portrayed to be, but an outflow of funds to Mr Ford.

409. Notwithstanding the flaws in the approach taken with respect to the modelling, we accept that Mr Ford took an optimistic view as to the achievability of the Lifemark rates of return, the Lifemark risk parameters and the Lifemark costs. That view was understandably shared by others in Keydata, and in particular by Mr Owen, who did not have the same visibility over Lifemark as did Mr Ford. Mr Ford's confidence was, however, in our view, based rather too much on what he regarded as the proven attractiveness of the Lifemark product to investors. He considered that the ability of Keydata (and putatively Keydata International and LAS Global) to raise further capital for Lifemark, through investors purchasing an interest in a growing asset pool, was the "ultimate credit solution". In our judgment it was not appropriate for the CEO of a regulated business marketing a product to retail investors to adopt such a credit solution without appropriate disclosure. It illustrates most starkly, in our view, the intractable conflict of interest in the respective roles of Mr Ford.

410. In any event, whatever view Mr Ford, Mr Owen and Keydata held, the March 2008 Due Diligence Report should have given them pause for thought. Mr Ford and

Mr Owen explained that Keydata management, led by Mr Johnson and Mr Darby of the compliance team, met Grant Thornton and, it is said, described to Grant Thornton the deficiencies and flaws in their report. Mr Ford and Mr Owen sought to contrast what they described as the extensive, practical experience of Keydata in this regard with what Mr Ford and Mr Owen submitted was the lack of that sort of substantive experience of Grant Thornton. Mr Ford and Mr Owen seek to characterise the interaction with Grant Thornton as good faith disagreements. It is said that these were normal challenges by parties in respect of the matters presented by Grant Thornton.

411. The March 2008 Due Diligence Report was an extensive document. We accept that it was intended to be compendious, as any review would be expected to be, and that as a result it would cover minor issues as well as more major ones. We accept therefore that there were areas where the practical experience of Keydata would have been able to resolve issues raised by Grant Thornton. We also accept that in certain respects, such as the earmarking of policies, Grant Thornton's understanding, based as it was on reports it had received, was imperfect. But we do not regard that it was feasible for the concerns which related to the modelling of a life settlement portfolio funded by the issuance of bonds to have been resolved through the practical experience of Keydata, in circumstances where Keydata had no relevant direct experience of its own. Any failure by Keydata properly to address the concerns raised by Grant Thornton with respect to the Lifemark model, or the absence of one, cannot in our view be explained by reference to good faith disagreements.

412. Indeed, it appears that even Mr Ford accepted at the time that a further review of the modelling was required. Keydata requested Lifemark to carry out further financial modelling (which Mr Ford says showed results that were consistent with forecasts and expectations). On the other hand, neither Mr Storey of Grant Thornton nor Mr Grainger reviewed a Lifemark model or approved the issue of further Lifemark Products. Notwithstanding the March 2008 Due Diligence Report, those Products continued to be issued.

Meditron 2 and Due Diligence advice from Grant Thornton

413. On 12 March 2008, Dr Gerasimowicz wrote to Mr Ford and Mr Smith attaching what was described as a Summary Analysis regarding Lifemark SA ("Meditron 2"). There were a number of iterations of Meditron 2, but the one provided on 12 March was a first draft. As with its predecessor, Meditron 1, the report was not itself a financial model, although it made reference to a Lifemark Summary Model.

414. The report included the following analysis:

(a) As at 11 March 2008, the portfolio comprised 309 policies with a total face value of $988,032,357 at an acquisition cost of $334,025,864, with a weighted average IRR of 10.909%.

(b) On the assumption that all investors were to seek return of their principal at maturity (a 0% rollover assumption), Lifemark would experience a cash deficit in every year from 2009 to 2020 peaking at a $460 million deficit in 2013.

(c) Under the heading "Value of Portfolio vs. Remaining Obligations", the report stated that "The first and foremost priority of the Lifemark portfolio is to ensure the repayment of all principal to bondholders". A table was produced, based on an assumed 6.5% discount rate (or IRR) (the most favourable rate applied in the report in terms of portfolio valuation), showing for each year from 2008 to 2017 the repayment obligations, the cumulative cash flow, the portfolio value and the credit facility needed. A best and worst case scenario was postulated, each assuming the sale of the entire portfolio. On a best case, if Lifemark were to liquidate the entire portfolio in 2008, a credit facility of $17.8 million would in addition be required. On the worst case, in 2013, the credit facility would need to be $150 million.

415. Under a heading "Action Needed", it was stated: "Obtain initial credit line of no less than $150 million." As the Authority submitted, such a proposal could not of itself conceivably have been achieved on the assumptions made in the report. There was, moreover, no modelling or analysis to show how, even if the portfolio had been continued, and further bond issues had been made (which Mr Ford regarded as the "ultimate credit solution"), there could in due course be full repayment of bondholders.

416. Meditron 2 concluded with a number of Recommendations, including:

> "1. **Regarding the immunization** of the portfolio and the repayment of funds to all of the investors in a timely fashion, a combination of solutions is necessary as the result of a shortfall with respect to various investor tranches within the portfolio and their due dates.
>
> A. Reestablish a reserve from new funds/bond tranches which could be utilized to mitigate some of the shortfall in the early stages of bond maturity and life policy seasoning.
>
> B. Obtain a credit line or credit facilities which can be drawn upon as needed at a low interest rate and with repayment terms appropriate to the asset/liability payment and mortality schedules.
>
> C. Obtain a credit facility at low interest rates and sell certain of the bonds which require a higher coupon taking advantage of current rates and spreads. Offer new, enhanced product to those bond investors willing to tender.
>
> D. Sell part or all of the current Lifemark portfolio to meet the cost of the early bond redemptions.
>
> E. Utilize our relationship with current banking partners to leverage their willingness to provide Lifemark with cost effective credit facilities.
>
> 2. **Test Scenarios** – Assess the probability of returning investors' capital in full by identifying the unfavorable scenarios that would result in a shortfall.
>
> A. We have established above that shortfalls will occur in the worst case scenarios, even if the entire portfolio is sold into the secondary

> market at a favorable discount. Very simply, a combination of 1A., 1B., 1C., 1D., and 1E. are required to mitigate these negative scenarios.

417. Judged from this distance, this report appears to us to be a document that would give a reader no confidence in the Lifemark product, and little confidence in the investment manager. The recommendations appear to us to consist of nothing more than a speculative wish-list and not a considered strategy.

418. Following the receipt of Meditron 2, Mr Smith wrote to Mr Ford on 12 March 2008 attaching a note with advice on how a report should be structured to "follow the format as directed by Grant Thornton so as to address the matters raised by Grant Thornton". A further report was produced by Meditron and provided to Mr Ford on 25 March 2008 ("Meditron 2a"). In this iteration of the report, following the recommendation of Mr Smith, Meditron included a section regarding the original Lifemark model which set out the assumptions on which that model had been based and which "were used as a fundamental basis for determining the viability of such an investment portfolio". Those assumptions included the cost of raising investor funds as being 7.5%. However, this figure was incorrect. The correct figure, which we find Mr Ford knew, was 15.5% up front, including 5.5% paid to Keydata and 10% extracted by LAS Global, as well as an annual trail of 2.5%.

419. As regards the portfolio, even on the basis of the incorrect cost of raising funds, Meditron 2a continued to conclude that if the portfolio were maintained on a "buy and hold" strategy, it would experience a negative cumulative cash flow at year end 2009 of $6.5 million and "would continue to be impacted negatively at an increasing rate until year 2014." In fact the charts showed the negative cash flow reaching $460 million in 2013 before reducing (though still being negative) through to 2020.

420. Mr Johnson provided his comments to Mr Ford and Mr Owen on 27 March 2008. He drew attention to the fact that, in his view, the report "Gave the reader the impression that … the product will not pay out … a credit facility is required but there are no assets to secure the loan against … there is significant forex risk and that the SEB method has not solved it … there is interest rate risk … there is cross subsidy risk … original model is not included". Referring, for example to p 48 of Meditron 2a, which set out the cash flow shortfalls based on a 6.5% discount rate, and the consequent need for credit facilities, Mr Johnson said:

> "The table and the summary are a disaster. It is stated that we need a credit facility, yet all the assets have been sold. What is the credit facility being secured on then? I would shut the product down on these assumptions … In conclusion, the report does not give me comfort that the Investment Manager is in control of the Investment Management process!"

421. In his evidence, Mr Johnson explained that, through meetings with Dr Gerasimowicz and through his receipt of regular investment manager reports, his view was in fact that Dr Gerasimowicz did in fact understand the Lifemark product, in spite of the reservations Mr Johnson had expressed in his note. He said that he had deliberately expressed himself in that way in order to try and get the issue dealt with. He was concerned that there were certain points of which he had been aware,

including $30 million of life settlements maturing early and other maturities in the pipeline (these were also matters raised by Mr Johnson in his note), which were not referred to in the report, and thus not taken into account in the cash flow projections.

422. Mr Smith wrote to Dr Gerasimowicz on 27 March 2008 to express the view, having reviewed Meditron 2a with Keydata, that "the quality of the report is far short of the required level. Principally this is because the report has not taken the format of the report template sent to you by Stewart and I." Mr Smith included many of the points raised by Mr Johnson, such as:

> "The references to a credit facility do not add up. This is because statements have been made about the facility paying out investors and no assets being available to support the facility. Can you rework your strategy to address that presentation concern."
>
> Early maturities within the asset pool need to be detailed. For example, how should the current early maturities of 30 Million be treated (reserve, reinvest??)"

423. Mr Ford also wrote to Dr Gerasimowicz, on 28 March 2008, with some further comments, which included an edited version of Mr Johnson's critical note. Mr Ford emphasised the importance of including the initial financial modelling and, as Grant Thornton had requested, including "every cost associated in the activities and cash flows". The email requested that Meditron firstly "demonstrate the forecast performances and applied stresses carried out at the point of creating the product. Secondly and less importantly is the reporting on actual current performances."

424. On 31 March 2008, Mr Smith provided to Meditron, by email subsequently sent to Mr Ford, a Reporting Memorandum ("the Tandem Report") which, amongst other things, exhibited a financial model said to demonstrate the return of income and capital to investors. The purpose of the Tandem Report was to provide a report to a meeting between Keydata and Irwin Mitchell. Reference was made to test scenarios run by the investment manager to test the impact of unfavourable scenarios on the performance of the model (although those scenarios were confined to insureds living longer than life expectancies, interest rate risk, and insurance carrier default; the Tandem Report stress testing exhibit did not include asset/liability mismatch). The report identified that the process of obtaining independent actuarial evaluations of the portfolio had yet to be defined and was under review with the investment manager. The cash flow model, however, was described as assuming that every policy would mature at the designated life expectancy. As regards the credit facility, this was referred to only by reference to the funding of ongoing premium payments (and not payments to bondholders), and it was said that the investment manager did not consider that such a facility was then required, as liquidity was managed from reserve funds. The report also said, contrary to the recommendation in the Meditron reports, that the investment manager operated a "buy to hold" strategy meaning that the portfolio would not be impacted by price movements on the assets.

425. In terms of Risk Management, the Tandem Report said:

> "The risk of non delivery within the securitization structure is managed by Keydata as the investor relying upon the trustee to properly represent its interests. In addition, Keydata has appointed a board member to Lifemark to participate in the issuer's activities and be aware of any items with a potential to lead to non delivery within the securitization structure."

> "Asset maturity waterfalls are produced by the investment manager each month and presented to the board of directors of Lifemark. Keydata has a board member appointed on that board, Keydata is able to review the maturity waterfalls to become satisfied with the bond maturity scheduled cashflows being forecast by the investment manager."

That board member was Mr Ford, and Mr Ford was aware of the risks of "non-delivery" which had been identified in the Meditron reports to date.

426. In his email to Dr Gerasimowicz, Mr Smith requested him to note, first, that the original model to be incorporated into Meditron's report had to be "detailed to show all of the costs within Lifemark and account for the fees of all service providers". Mr Smith said that it was necessary to be able to demonstrate the cash flow survival of the entire activities and not just IRR levels on the investing activities. Secondly, Mr Smith said:

> "Please observe the differences between how I have described asset risks versus the descriptions in your draft report. My report explains what each of the risks are and then explains how those risks are managed. Your report opens with statements about there not being any risk and backing that up with your views. To be objective the risks as they are need to be clearly stated, then the work you do in controlling the risks needs to be detailed, which should come back to the opening statements you provide, but this needs to be spelled out so the investor can see the risk and appreciate the methods employed to control the risks."

427. On 2 April 2008, Meditron provided Mr Ford with a further version of the report, which contained a number of new paragraphs reproduced substantially verbatim from the Tandem Report (relating to currency risk, performance of the Lifemark portfolio, product modelling and cross-subsidy risk). On 3 April 2008, Ms Bagwell provided to Mr Smith and to Mr Johnson by email "the version which we amended yesterday".

428. At some point prior to 14 April 2008, Keydata provided a version of the Meditron report ("Meditron 3"), which was substantially identical to the version sent by email on 3 April 2008, to Grant Thornton. This continued to include the 7.5% figure for the cost of raising funds, although in the monthly projected cash flow model that confusingly appears to relate to the coupon payments on the bonds. In that same model the actual cost of raising funds (described there as "underwriting fees") is at 5.5%. The Authority submitted that Meditron 3 also erroneously referred to "a 30.00% bondholder reserve based on the projected capital raised through bond issues", arguing that such a reserve did not exist. We do not accept that this was an

erroneous reference in the Report. In our view, the reference to a 30% reserve is simply a reference to the intended 70/30 split between the amount of investor funds intended to be used to purchase life settlements and the amount intended to be retained in cash or liquid investments. We do not have evidence as at April 2008 as to the actual extent of those retentions. The portfolio IRR calculations assumed the existence of such a liquidity reserve and the Report concluded that the 30% reserve would result in:

> "1. The repayment of principal to bondholders;
>
> 2. Payment of all coupons associated with bonds;
>
> 3. Coverage of all costs associated with the portfolio including premium payments, management fees, underwriting fees, formation fees, coupon payments, acquisition costs and principal bond repayments;
>
> 4. No potential need for a credit facility [throughout] the program life;
>
> 5. The most robust cash position across the various reserve scenarios."

429. According to the expert report of Ms Juliano (Juliano, at 4.9.5), the financial modelling exercise in Meditron 3 considered a structure different from that actually operated by Lifemark in that the model assumed that a significantly greater proportion of funds raised was expended on policies and a significantly lower proportion was spent on fees. Ms Juliano considers, and we agree, that the value of the analysis provided by Meditron to Lifemark was minimal.

430. In its report on Meditron 3, Grant Thornton's criticism was, as the Authority characterised it, scathing. The overall summary was that, although Meditron 3 had been provided to address the matters raised in the March 2008 Due Diligence Report, Meditron 3 had provided very little specific information about how the product worked and how it was performing. Its summary conclusions were:

- whilst [Meditron 3] does provide some information about the product model it is not sufficient to demonstrate that [the] product will deliver the returns claimed
- the information supplied about the pricing model is not sufficient to justify the target return specified nor to provide comfort that policies can be purchased at the prices necessary to deliver the returns
- no portfolio valuation has been carried out
- inadequate information about the actuarial model has been provided
- the explanation of the currency hedging arrangements is insufficient to determine whether currency risks have been adequately addressed and there does not appear to be any provision for the costs of the hedging arrangements
- no information has been provided to address cross-subsidy concerns

- the information that has been provided suggests that the portfolio will experience negative cashflows but no arrangements are currently in place to address this. We note that the document states that such arrangements are kept under review and that a facility will be arranged when required, but we are concerned that if the portfolio is experiencing, or is shortly to experience, negative cashflows, such facilities may be impossible to obtain or only available at very great expense
- the explanations provided to address the asset related risks identified are not sufficient to provide comfort that those risks are being adequately monitored or managed. Moreover, the risk that cash returns may be less than expected appears to have been misunderstood
- the statistical information presented about the performance of the Life Expectancy (LE) underwriters is not sufficiently detailed to demonstrate that the portfolio is performing adequately and may be misleading
- [Meditron 3] provides very little actual data about the portfolio
- some sections of the report appear to be irrelevant and Exhibit VII relating to the McCauley Duration appears to have been copied almost entirely from a paper published on the internet, but not attributed. In at least one place the information has been reproduced incorrectly raising concerns as to whether the material has been properly understood

431. In its submissions the Authority drew attention in particular to Grant Thornton's summary conclusions with regard to the prospect of negative cashflows, and submitted on that basis that Grant Thornton had been driven to the conclusion (even absent knowledge of the fees being extracted by Mr Ford) that the evidence cast significant doubts on the viability of the Lifemark model. We have some difficulty with that submission. Our understanding of Meditron 3 is that on the basis of a 30% cash reserve being created in respect of each tranche of bonds issued (which we understand was the way in which the portfolio was intended to be managed), no negative cashflows were forecast. It was only if the model were adjusted to assume a 20% reserve that cash flow issues were forecast to arise, and a credit facility was anticipated to be required. However, we do accept, on the basis of Ms Juliano's expert evidence, that Meditron 3 did not reflect the reality of the Lifemark financial structure.

432. In cross-examination Mr Ford challenged the conclusions and recommendations made by Grant Thornton in its report. Mr Ford pointed to areas of disagreement between Keydata and Grant Thornton in a number of respects, including the following:

(1) the conclusion of Grant Thornton that the model exhibited in Meditron 3 was inadequate and that Keydata should obtain a model showing all the cash flows associated with one tranche, and that the given assumptions did not show that the product worked;

(2) the need for Keydata to obtain comfort that adequate steps had been taken to establish that a credit facility could be secured when required;

(3) the understanding, from the summary analysis, that there was earmarking of policies purchased to certain bond maturities, and cross-subsidisation risk;

(4) the need for Keydata to include within its due diligence records an explanation of roles, responsibilities and risks with respect to Tandem and Société Européenne de Banque SA and other counterparties (which had not been referred to in the summary analysis since an exhibit (Exhibit III) had been omitted); and

(5) the need for Keydata to assess how any failures of Stocktrade might affect the performance of the SIP (Stocktrade had an administrative role).

433. On 24 April 2008, Grant Thornton provided comments on the draft letter prepared by Keydata in response to the compelled information requirement from the Authority of 3 April 2008. The comments noted that: "The covering note appears to be being used as an opportunity to inform the FSA that a new product is being launched. We have previously advised that the launch of this product should be delayed until the due diligence exercise has been completed satisfactorily." Mr Ford and Mr Owen did not follow that advice. Keydata continued to market DIP 1 and to go on to launch DIP 2 to DIP 9.

434. On 25 April 2008, Mr John Graham, a senior life actuary at Grant Thornton, wrote an internal memorandum to Mr Ford to comment on the "Summary Analysis Regarding Lifemark SA as 31 March 2008". That memorandum identified deficiencies in the analysis by reference to the key risks identified as being those the Authority would have expected Keydata to consider. The risks were (i) increase in life expectancy; (ii) changes in the economic climate; (iii) US$ depreciation against sterling; (iv) cross-subsidies between different tranches of business; and (v) non-delivery within the securitisation structure.

435. In cross-examination of Mr Storey, Mr Ford took issue with a number of the points made by Mr Graham. He referred to Lifemark's blended approach to the acquisition of policies, and the use of VBT tables with respect to mortality risk; that, however, did not explain the reference by Meditron to an increase in life expectancy for the entire portfolio being a "negligible possibility". Mr Graham's report identified that this contradicted global mortality trends and would only be possible if extremely conservative mortality assumptions had been employed. Mr Ford also referred to the existence within Lifemark of a single asset pool into which all investors invested. Grant Thornton's understanding of there being separate tranches had derived from Keydata's financial promotions, and there was thus an issue with how the Products were being presented to retail investors.

436. There are a number of issues to consider in respect of the Meditron reports. Of importance is what we consider to be the appropriate response of a regulated person of integrity. We accept that there could have been some "good faith" disagreements between Keydata and Grant Thornton, and we ourselves have certain reservations in relation to Grant Thornton's report on Meditron 3, but one overriding concern must

have been the ability of Dr Gerasimowicz to properly manage and report on the Lifemark Products. Mr Johnson was, we consider, entirely right to have doubted Dr Gerasimowicz's capabilities, and we consider that his view that nonetheless Dr Gerasimowicz understood the product to have been misplaced. In our view, the experience of the process by which it was Mr Smith and Mr Ford who had to school Dr Gerasimowicz in the production of a report should have suggested to Mr Ford and Mr Owen that the analysis could not be relied upon without independent verification of the nature suggested by Grant Thornton. Had Mr Ford, acting with the integrity expected of a person marketing products to retail investors, given proper consideration to the advice he had received, we do not consider he could properly have authorised issues of the DIP product without such verification having been obtained. Instead, Mr Ford always considered that he knew better than the professionals who had been employed to advise him. He was not prepared to accept any advice that would lead to an interruption in the continued marketing of the Lifemark Products.

437. Whilst Mr Smith and Mr Ford had to intervene following the production by Dr Gerasimowicz of Meditron 2, we do not consider that was done with the wrongful intention of influencing Dr Gerasimowicz. We did not see any evidence of collusion in that respect. We have no reason to doubt that the views expressed in Meditron 3, although the wording may have been derived in part from the Tandem Report, were those of Dr Gerasimowicz, based on the assumptions, including the erroneous assumptions as to fees, set out in his report. Nonetheless, given the doubts that Dr Gerasimowicz's performance in the production of the reports should properly have given rise to, coupled with the advice of Grant Thornton, it was, in our judgment, inappropriate for further issues of bonds to have been marketed until independent actuarial modelling had been carried out so as to confirm that the Lifemark portfolio could pay coupons and return capital to investors in different scenarios.

438. In this respect, we do not accept a number of submissions by Mr Ford and Mr Owen. The first is that all the risks to the return of investor capital were considered and it was made clear in the brochures (including on the front page) that return of capital was not guaranteed and that investors might not get back what they invested. Such statements cannot detract from the responsibility on those marketing a product to ensure, so far as possible, that it is modelled so as to achieve the returns marketed to investors. Secondly, we do not regard the continuing receipt of RAC certificates as properly giving any form of comfort with respect to the achievability of such a full return. It was cash flow that was the paramount measure. Thirdly, although we accept the general principle that a life settlement portfolio is more robust the greater the number of policies it contains, that does not eliminate the cross-subsidisation risk that would arise when further tranches of bonds are issued which increase the size of the asset portfolio as a whole which is then available for earlier redemptions.

439. Finally, we consider the question of costs of raising capital. We accept in this respect that the Meditron reports did not properly reflect the full extent of the costs of raising capital through the issue of the Lifemark bonds. That was something known to Mr Ford as well as Mr Smith, but not known as a matter of detail by Mr Owen. Given the steps taken by Mr Ford and Mr Smith to demonstrate to Dr Gerasimowicz

what should be covered by his report, including the request by Mr Smith that it show all of the costs within Lifemark and account for the fees of all service providers, it is in our view a serious omission at this stage for Mr Ford not to have insisted that the fees being paid to his entities be fully reflected.

440. Mr Ford submitted that those fees were not opaque, but that there was disclosure of the fees paid by Lifemark in a form and scope squarely based on the advice of Linklaters and PwC. We saw no evidence of specific advice being given in relation to such disclosure, but even if the fees had been, for example, reflected as such in Lifemark's audited accounts (the reference to LAS Global in the accounts to 31 December 2008 was as a creditor), that would not have excused Mr Ford from the responsibility of ensuring that the Meditron report designed to be sent to the Authority fully reflected the true fees position. Nor can the fact, if it be the case, that the CSSF received all the audit reports and periodic financial reports from Lifemark and that those reports all contained the "fee paid transactions that include LAS Global" mean, as Mr Ford submitted, that the CSSF must be deemed to have been informed. In any event, in our view, any such disclosure was not material in assessing the responsibility of Mr Ford to ensure that the Meditron report submitted to the Authority did fully reflect all relevant costs. Nor do we regard the fact that, at the relevant times, Luxembourg law might have imposed restrictions on Luxembourg entities, such as Mees Pierson and Tandem, from disclosing information concerning Orietex and LAS Global (which was referred to by Mr Smith in his evidence) as material to the question of appropriate disclosure by Mr Ford himself.

Issues with SLS payments to Keydata

441. On 14 April 2008, Mr Ford was informed by Mr McNeil, the finance director of Keydata, that SLS had defaulted on payments to Keydata totalling approximately £1.4 million, representing £916,000 in income payments and £482,000 in fees. Mr Ford was told that Keydata had funded the 31 March 2008 SIB 1 quarterly income payment, and that if monies were not received for the forthcoming SIB 3 quarterly income payment, that too would have to be funded by Keydata. At the same time Mr Ford received a copy of an email from a Ms Richie of Keydata to Mr McNeil which explained that, in relation to the quarterly income payments, SLS was relying on the terms of the bond issue which enabled them to settle income payments within 10 working days of the due date for payment without there being a requirement to notify bondholders of an event of default. The delays in making payments were increasing.

442. Mr McNeil recorded in the board pack for the Keydata board meeting on 28 April 2008 that "Keydata has funded SIB 1/3 quarterly income payments Need to resolve with SLS". In his compliance report, Mr Johnson was only able to record: "I have no information from SLS, although I know that Stewart is progressing matters." At the board meeting itself, Mr Ford was specifically charged with resolving the problem of outstanding fees.

443. Mr Ford also accepted that on 30 July 2008 he was advised by Mr McNeil of a potential default on 8 September 2008 in relation to SIB 1 if payment of £647,579 was not received from SLS by that date, and a potential default date of 23 September

2008 in relation to SIB 3 if payment of £332,312 was not received from SLS by that date.

444. In our judgment, in the case of Mr Ford, given the information he had previously been provided with concerning the cash position of SLS, this could only properly have confirmed for him the need to make appropriate disclosure to investors, IFAs and the Authority. In respect of Mr Owen, although he had not had prior visibility of the cash shortage issues within SLS, the revelation that SLS was late in making payments should in his case also have caused him to make, or arrange to be made, the relevant disclosures.

445. Mr Ford submitted that SLS had, by July 2008, often delayed payments in order to benefit from the "cure" period in the bond terms and conditions which essentially allowed SLS to delay the making of payments until the default dates. He and Mr Owen submit that despite the delays in SLS making the income payments, Equity Trust, as the payment administrator of SLS, did not call an event of default. Mr Ford and Mr Owen submit that at a time of global liquidity crisis Equity Trust was entitled to consider that was nothing particularly alarming with SLS experiencing a shortage of liquidity.

446. We do not accept that any comfort could be taken from the fact that no event of default had been notified. It cannot be inferred that Equity Trust, by not notifying an event of default, were themselves not alarmed by a failure of SLS to make payments on their due dates. The notifying of an event of default is a technical step, one that depends on the relevant conditions being satisfied; it is not an indicator of concern or alarm. It became apparent, a matter of months later, in December 2008, that Equity Trust had serious concerns about the cash flow of SLS. An email from Mr Frank Welman of Equity Trust to Mr Ford on 30 December 2008 expressed concern regarding redemptions of bonds being called for in January 2009 and interest on the A Bonds. A part of Equity Trust's fees for 2008 also remained outstanding. Mr Ford submitted that this email did not indicate that the SLS cupboard was bare. We consider, however, that an expression of concern of this nature can only have been properly regarded as casting doubt on the financial viability of SLS.

447. Nor is there any evidence which supports the submission by Mr Ford and Mr Owen that SLS and other counterparties would, at a time of global liquidity crisis, have sought to prioritise the underlying assets by first paying the premiums on the life settlements themselves. Although such a course could make sense, there is no evidence that it was one that SLS was adopting at the material times. Even if it had been, we consider that it would have been wrong for investors not to have been informed, especially at a time of liquidity crisis, so that they could consider their own positions in light of that information.

448. We accept that, in making timely payments to bondholders despite the non-receipt of income payments from SLS, Keydata was seeking to discharge its own obligations to those investors. That may, we accept, have been born out of a genuine desire to ensure that Keydata investors were not inconvenienced. It also had the effect, in our view, of obfuscating an underlying issue of which those same investors

should have been made aware. That was an obvious effect, and one that Mr Ford and Mr Owen should, if they had considered matters from the regulatory perspective, have appreciated, and should have prompted them to make an appropriate disclosure.

Allegations of active concealment

449. The Authority submits that from April 2008, as the Authority's investigation into Keydata intensified, and despite the receipt of even more troubling indications of the state of both the SLS and the Lifemark portfolios, Mr Ford and Mr Owen took further active steps to conceal the failure of the portfolios from both the Authority and the CSSF.

The first Deloitte valuation

450. Deloitte & Touche, out of their Dublin office, were engaged by Innova to produce a "valuation" or projection for the Lifemark portfolio. That comprised a valuation, from available data as at 2 May 2008, of the expected income stream arising from the Lifemark life settlements portfolio and a valuation of the Lifemark bond liabilities. Although originally produced for Innova, it was subsequently used to meet a specific request for such information from the CSSF. As accepted by Mr Smith in evidence and made clear in an email from Mr Smith to Mr Ford of 22 December 2008, the CSSF had specifically requested a report to validate the investments being made and the expected results to meet the investor commitments. As Mr Smith explained in his email:

> "The CSSF receive the accounts for Lifemark and all they can see is massive losses, so they needed to have the Deloitte report to convert the loss story over time to an explanation of how the cash flows turn around and are capable of providing investor return. The accounts on their own would tell the wrong story."

That emphasises the importance of cash flow, and Mr Ford's knowledge of that importance, to which we have referred above.

451. Mr Ford and Mr Owen received a draft of a report by Deloitte ("the Draft Lifemark Valuation Report") dated 29 May 2008. Although the quality of the print on the copy we had was very poor, we are satisfied that the report showed that, on the assumption that all life expectancies turned out to be accurate, the Lifemark portfolio would experience a cash deficit in every year from 2012 to 2025, peaking at $206 million in 2013. It is also the case that these projections did not take account of the LAS Global fees, which would have served to exacerbate the liquidity issue. The report went up to 2027; there was projected to be positive total accumulated cash by 2026.

452. Mr Ford submits that, based upon feedback from Lifemark and its advisers, Keydata management and directors did not accept the Draft Lifemark Valuation Report's projection that the Lifemark portfolio would face substantial deficits between 2011 and 2013. Mr Ford makes the point that, given Keydata's continued fund raising through bond issues, Keydata management and Lifemark advisers

honestly and reasonably believed that the number of lives in the Lifemark portfolio would continue to grow and the value of the growing asset class would continue to be enhanced for the benefit of investors. The Draft Lifemark Valuation Report was simply a draft. The projections in it were made in respect of a static pool of policies and projected just one possible outcome. It is submitted that full-scale valuations should only be undertaken as and when the Lifemark portfolio reached a sufficient size to make such valuations meaningful.

453. We accept that the modelling of a static pool would not accurately reflect the position of a growing pool (with corresponding increased liabilities). It is the case, however, that no steps were taken to expand the Draft Lifemark Valuation Report so as to show what was expected to be the positive effect of a growing asset pool; instead the decision was taken to remove – without explanation such as that now submitted – the negative results of the Deloitte analysis.

454. We accept the Authority's submission that there is no evidence that either Mr Ford or Mr Owen took steps to investigate the conclusions in the report or take steps to address the cash deficit issues that were raised. The Authority also submits that, to the contrary, Mr Ford took steps to conceal the report and its conclusions (and the modelling of the Lifemark portfolio generally) from Keydata's advisers, and ultimately the Authority and investors.

455. There is evidence, in the form of an email from Deloitte to Mr Smith dated 4 June 2008, that Deloitte had been asked to produce a Summary Extract Report alongside the Draft Lifemark Valuation Report. We cannot make any finding from this evidence as to who specifically gave that instruction, but we find that Mr Ford knew that it had been given. Mr Ford received copies of both reports on 4 June 2008. The Summary Extract Report omitted the summary calculations which showed the cash deficits in the relevant years: when discussing the Combined Portfolio (assets and liabilities) the summary merely recorded that, taking the whole period, and ignoring the cash flow issues throughout a large part of that period, the current assets (life settlement policies) were sufficient to cover the expected liabilities. In other words, the projected cash flow deficits, which were known to be important, had been omitted.

456. In response to a request to Mr Ford from Mr Graham of Grant Thornton on 2 May 2008 for a copy of the "Deloitte Report" (and the terms of reference), on 4 June 2008 Mr Ford provided only a copy of the Summary Extract Report. Grant Thornton then, on 19 June 2008, produced a report ("the June 2008 Extract Review") regarding the Summary Extract Report. Mr Ford and Mr Owen were sent copies of this report by Irwin Mitchell on 19 June 2008.

457. The June 2008 Extract Review noted Grant Thornton's suspicion that the cashflow modelling during the life of the portfolio had been removed. It said: "The reference to the simulation methodology is misleading in that none of the results quoted require such a model. It is likely that the outputs of the simulations were not favourable." The report is strongly critical of the Summary Extract Report, describing it as not fit for purpose and detailing its numerous and fundamental flaws. It stated

that "the Extract is not only unsuitable for the purpose it is being used but would lead an informed reader to conclude that the probability of Keydata meeting investors' expectations is no better than 50:50, and potentially a lot less. Moreover, it reinforces the concerns that we raised when reviewing the report produced by Meditron." The report also stated:

> "Section 4f
>
> This section appear[s] to state that on a best estimate basis the value of the assets is 101.7% of the liabilities of the fund. This is an extremely small margin and suggests there is little room for adverse experience or inaccuracies in the assumptions used, including mortality and resale costs.
>
> More importantly, the whole point of using simulations is to show how robust a particular business is. The final paragraph implies that at least 2,500 of the 5,000 simulations showed Lifemark/SIP being able to meet all of its obligations. Given the median simulation showed a margin of just 1.7% (referred to above), it follows that not many more than 2,500 of the scenarios showed the Fund being solvent.
>
> If, say, 2,750 simulations show the fund being solvent, the remainder being unfavourable, this would mean that there is only a 55% probability of Lifemark meeting its obligations to investors under SIP. If one also factores (sic.) in uncertainty around the assumptions, particularly the mortality assumption, this figure would fall well below 50%. The FSA would expect to see a probability of meeting obligations in excess of 95% and probably higher. An insurance company offering similar products must maintain a confidence level of 99.5%."

458. Mr Ford's case in this respect is that he fundamentally disagreed with the Grant Thornton view as to the probability of Keydata meeting investors' expectations. He submitted that in June 2008 all Lifemark Products were performing exactly as expected, if not better. The Lifemark portfolio of 229 lives had a total face value of $955 million. Of those, Mr Ford argues that the expert analysis indicated that 50% of the lives in the portfolio were expected to have died within the next five years and 80% were expected to have died before the end of 2019.

459. Mr Ford accepts that at this early stage the number of senior life settlement policies within the Lifemark portfolio was smaller than desired. In cross-examination of Mr Storey by both Mr Ford and Mr Owen reference was made to a report by A M Best Company Inc, a company in the business of rating securities backed by life settlements. In that report, dated 24 March 2008, A M Best described the securitisation of life settlements. Mr Ford and Mr Owen were especially critical of Grant Thornton for having regarded 229 lives as not a large pool. Mr Storey's evidence was that, although 300 lives would put a portfolio in a better position than a smaller number, a large portfolio would have many more lives, into the thousands. With a portfolio of 229 lives, there would only need to be four lives performing unexpectedly and the portfolio would not perform correctly. Our own review of the A M Best report does not support any different analysis: that report sets a minimum size of the collateral pool of 300 lives, with additional stress scenarios being applied to

smaller pools in evaluating the credit quality of the securities. A portfolio of 229 lives was, in our view, properly described as "small". We make the same finding with regard to the Towers Watson report of 2 January 2010; that report described a "relatively well constructed" portfolio as having "more than 300 lives". Mr Ford argues on the other hand that Grant Thornton were (as with Deloitte) performing a static pool analysis, which was contrary to the understanding of all those associated with Lifemark. Lifemark's core strategy of building the size of its portfolio of life settlement assets would result in the enhancement in value of the underlying portfolio, lowering risk to new and existing investors.

460. We accept that there is logic to that theory, and we also accept that this was Mr Ford's and Mr Owen's view at the material time. But none of the modelling intended to demonstrate to Grant Thornton and the Authority how this would be achieved – which Mr Ford had himself commissioned – came close to doing so. That was the essential criticism made by Grant Thornton, and it is a criticism which we consider to have been fully justified. It is a criticism that could not have been ignored or dismissed by a person of integrity when considering whether to continue with further bond issues.

461. On the other hand, we do not accept the Authority's submission that Mr Ford himself took steps to prevent the Lifemark financial model and financial modelling programme from being disclosed to the Authority. The request, made in an email from Ms Bagwell to Mr Smith on 10 June 2008, that Lifemark prepare a letter confirming that those items were owned by Lifemark and not available for distribution to external parties, does not appear to us to have emanated from Mr Ford, but in consequence of advice given by Keydata's lawyers. (Mr Johnson was in a meeting with the lawyers on that day, and the request appears to have been relayed through him.)

462. On 22 June 2008, Tandem sent a "Reporting Memorandum" to Mr Johnson drafted by Mr Smith by way of "follow up to your request for assistance in answering certain requests from the FSA about the performance and diligence in Lifemark". The email set out in tabular form the requests made by the Authority about the performance and due diligence in Lifemark. At point 63, the request was for "Reports relating to assets held within the Lifemark portfolio (during the relevant period)". Mr Smith's response is: "Lifemark is not obliged to provide that information to the investors, and the information is confidential, protected by Luxembourg Banking Secrecy laws and its distribution is not in the best interests of the company." This, we find, is nothing more than consistent with the legal advice given on 10 June 2008. We do not accept, therefore, that this was a contrivance instigated on the instruction of Mr Ford.

463. However, we find that certain of the information provided by Mr Smith was misleading, and this was to the knowledge of Mr Ford. In the Reporting Memorandum, in response to the request for "Documentation evidencing management consideration of the potential conflict of interest of Stewart Ford, as a director of Lifemark", Mr Smith stated "There is no conflict of interest and there is no opportunity for a conflict … Stewart Ford is not remunerated for his role as a director

of Lifemark." We accept the Authority's submission that this was deliberately misleading, as no mention was made of Orietex, LAS Global or LAS International.

464. It was clear that both Mr Ford and Mr Owen were aware of the importance, in assessing the question of Mr Ford's conflict of interest, of Mr Ford's financial interest in Lifemark. On 15 June 2008, Mr Johnson had sent an email to Mr Ford and Mr Owen in which he had relayed the Authority's concern regarding Mr Ford's role within Lifemark. Mr Johnson had said: "Another suggestion was that there is a conflict of interests as Stewart is both and director of lifemark and keydata (sic.). I maintained this was a position of strength however they thought if Stewart was benefitting financially this wouldn't be the case".

465. Mr Johnson confirmed in evidence that he was unaware that Mr Ford was benefitting financially from Lifemark and also that neither Mr Ford (who was fully aware of the position) or Mr Owen (who had a general understanding that Mr Ford was taking fees) informed him of the true position. We agree with the Authority that Mr Ford's explanation for this in his evidence was entirely disingenuous. Mr Ford said that he did not tell Mr Johnson because he was only benefitting from Orietex, LAS Global and LAS International and not receiving payments directly from Lifemark. We find that no person acting with integrity could genuinely have believed that the Authority's concerns and request for information would be negated simply because Mr Ford had interposed a corporate vehicle or vehicles between Lifemark and his receipt of funds. We find that the reason why Mr Ford adopted this approach was because he knew that, if he told Mr Johnson the true position, Mr Johnson would have been bound, as compliance officer, to report it to the Authority.

Investment manager reports and the abandonment of the Lifemark model

466. The Authority submits that, from at least July 2008, the concealment from investors of the true state of the Lifemark portfolio became active deception. Between 21 July 2008 and 29 August 2008, three further issues of Lifemark Products were launched, namely DIP 4 (launched on 21 July 2008), DIP 5 (18 August 2008) and DIP (Special Edition) (29 August 2008).

467. On 4 July 2008, in an email copied to Mr Ford, Ms Iliaszewicz, the marketing manager for Keydata, asked Mr Smith for information to provide to IFAs that would give "Reassurance that the portfolio is in great condition, the model is working well and that we are on course to fulfil our obligations to provide income payments as well as return of capital in full". When Mr Smith stated that he was working with Mr Ford to provide this information, Ms Iliaszewicz responded: "It is very urgent as some IFAs will not put more money into DIP unless they see some sort of confirmation from the investment manager that everything is on course to deliver what has been advertised at the outset."

468. On 14 July 2008, Dr Gerasimowicz provided Mr Ford with a draft of the first monthly "Investment Manager's Report", which was to be circulated to investors and which provided (or, as the Authority has submitted, purported to provide) an update on the state of the Lifemark portfolio. Dr Gerasimowicz had asked for Mr Ford's

comments on the draft, and on 15 July 2008, Mr Ford provided amendments. In summary:

(1) Mr Ford requested that something be added about the latest/current Required Asset Cover.

(2) Mr Ford asked for the removal of the statement: "Suffice it to say, that we have created the finest-quality life settlement portfolio in the short history of this evolving industry. We have set the standard!"

(3) With respect to the statement: "… the underlying assets provide a hedge to Key Data's (sic.) bond holders in terms of asset protection and stability", Mr Ford commented that care needed to be taken on this as "we can't really be absolute about this (may provide a headge (sic.) would be better).

469. The report sent to IFAs from 25 July 2008 was a Keydata document and it included a number of "SIP Portfolio Facts" and some diagrammatic representations, alongside the final form of the Investment Manager's Report for July 2008 (the document commented on by Mr Ford). The SIP Portfolio Facts included that "Coverage is met on 3:1 asset cover ratio", and "The arrangements for the SIP portfolio are working as anticipated. At this current moment in time, the portfolio is on target to pay income payments and return capital invested at the end of the investment terms for individual issues of the Plan."

470. It is clear that the reference to a 3:1 asset cover was untrue. It had never been suggested that the RAC ratio was at that level. Whilst it is not clear how this misinformation had come to be included in the facts presented to IFAs (it does not appear in Meditron's report itself, and Mr Ford had merely requested that reference be made to asset coverage, without specifying any particular level), both Mr Ford and Mr Owen must have been aware that this was not a proper representation to be made to IFAs.

471. The reference to the portfolio being on target to pay income and return capital was permitted to be made despite the reports, and commentary, which Mr Ford had received, and which we have referred to above. In this respect, we have accepted that at this time Mr Ford genuinely considered that the Lifemark Products were performing exactly as expected, if not better. However, that is not the same as representing that the portfolio was on target to satisfy both the income and capital requirements of all the Keydata investors. Mr Ford's view depended on an assumption that the portfolio would continue to grow based on further bond issues. But there was no modelling which supported such an outcome. No statement as to the meeting of targets for income payment and capital return should properly have been made without a verifiable model being in place.

472. On 29 July 2008, Mr Smith sent Mr Ford an agenda for meetings he was intending to have with various parties in New York. Mr Smith identified Item 1 as the most important:

> "Deloitte Report

> I need to sit down with Walter and go through the report to get his input, work out where his questions are, then get the report finalized with Deloitte so that you have it as presentable to the FSA and that Walter is signed up to work with it …
>
> The result I need to get to is that the Deloitte report becomes the 'Lifemark Model', and Meditron manage the portfolio keeping it compliant with the model."

473. It was thus the case that any prior modelling was intended to be replaced by the work done by Deloitte. Although Deloitte's projections had been constructed for a very different purpose, the intention was that they would effectively, and subject to input from Dr Gerasimowicz, become the Lifemark model. Mr Ford's evidence was that this was indeed the intention. He considered that this was a positive step. It reflected the fact, as Mr Ford put it, that as matters had moved on it was necessary to progress from a model based on acquisition methodology (which Mr Ford considered was the model being employed by Meditron, based on the KPMG model), to a model dealing with a "real live portfolio". We find from Mr Ford's evidence that he knew that there was no proper modelling in relation to the actual portfolio and its ability to service the bonds up to this point.

474. As Mr Ford knew, the Deloitte report had indicated that, on a static pool basis, a facility of up to $200 million was required to address cash flow issues arising from the Lifemark portfolio. That requirement was subsequently confirmed by Dr Gerasimowicz. On 22 September 2008, Mr Smith informed Mr Ford that: "After reviewing the Deloitte numbers with Walter today we need a facility to be available for up to USD 200 million … Securing that kind of money on the right terms is a really big ask".

475. It is common ground that no credit facility was ever obtained by Lifemark prior to its provisional administration. Mr Ford's case on this aspect is that there was no need for such a facility as cash flow issues would principally be addressed by increasing the flows of funds from investors, by way of further bond issues. We consider this issue further below.

476. In his email of 29 July 2008, Mr Smith also referred to the need for Keydata to provide "a monthly report providing information on the performance of the portfolio" and stated that: "The main drive for this is to restart IFA's that stopped selling the DIP product because they are not getting information on the portfolio performance". Mr Smith thus recommended that the investment manager report (in the form of a "3 page letter") should be provided each month. The Authority submits that the motivation for the reports was not to provide investors with an honest appraisal of the performance of the Lifemark portfolio but rather to drive further investment and thus, so the Authority argues, to mask the failure of the portfolio and maintain the flow of fees. We do not accept that submission. The mere fact that the investment manager's report was needed in order that IFAs might re-consider advising their clients to invest in the DIP Products (and thus into Lifemark) is in itself unexceptional. Such a report may have a number of genuine purposes, one of which may be to attract further investment.

477. It does not follow that the investment manager's report was designed to mask the failure of the Lifemark portfolio and to maintain the flow of fees. The flow of fees would of course be a product of increasing investment. The real question is whether the investment manager's report was either designed to mislead investors, or whether it did mislead investors and Mr Ford and/or Mr Owen knew or ought to have known that it did so.

478. The Authority submits that the investment manager reports, which – with some exceptions – appeared monthly until 2009 contained entirely misleading statements regarding the Lifemark portfolio. The only example given by the Authority in its closing submissions, however, was the use of the phrase "[the Lifemark portfolio] continues to experience superior performance" (which appeared in every update from November 2008 to December 2009). We have reviewed all those investment manager reports, and we have concluded that certain statements must, in the context of the modelling and the commentaries of which Mr Ford was aware, be regarded as misleading. We refer in particular to:

(a) We do not regard the statement that "… the maturity values of the policies are strategically balanced amongst short, medium and longer terms in order to match future obligations of the portfolio" as justified. In fact, as we have found, the meeting of those future obligations required cash flow from sources other than policy maturities, such as a credit facility or the proceeds of further bond issues. None of the modelling suggested a matching of maturities with bond redemptions.

(b) We reach a similar conclusion with respect to the statement: "Lifemark maintains adequate cash reserve balances during the portfolio life, which serve to meet all obligations". The reference to portfolio life is suggestive of a modelling over the whole period of the portfolio. To the extent that any such modelling had been done, it was clear by September 2008 that there was a cash flow gap of some $200 million, which needed to be filled in some way. It was not possible, in our view, for it properly to be said, in November 2008 and on a continuing basis, that there would be adequate cash balances to meet all obligations. The modelling was to the opposite effect.

(c) The report also referred to the RAC of 2:1 (these ongoing reports did not include reference to a 3:1 ratio) as being maintained "in order to provide appropriate security for the Lifemark investors". This was not misleading in itself, but we take the view that the RAC provided little security in the context of a cash flow gap that would arise.

By contrast, and contrary to the Authority's particular submission in this respect, we do not regard a statement as to superior performance of the Lifemark portfolio as misleading. That reference concerned the performance of the underlying portfolio of life settlements, and is particularly referable to maturities as compared with life expectancies. We do not consider that the reference to superior performance in that regard to have been misleading.

479. We were referred to the minutes of a meeting in New York on 11 December 2008. Those present included Mr Ford, Mr Smith, Mr Cooke of Montage and Dr Gerasimowicz. The meeting considered, amongst other things (a) investment manager monthly reporting for investors, (b) an update on FX collateral requirements and (c) an update on available credit facilities. Mr Smith reiterated to the meeting that regular reporting was required to investor groups on the performance of the portfolio. A draft report had been designed by Lifemark and further developed by Montage. As regards credit facilities, Dr Gerasimowicz referred to the Deloitte report which had identified the need for a credit facility for redemption of maturing bonds in 2012. Dr Gerasimowicz's opinion was that offers of credit facilities received from Goldman Sachs and Credit Suisse were too expensive in terms of interest cost and collateral, and that market conditions would improve closer to bond maturity and credit facility requirements in 2012. This strategy would avoid the cost of establishing a credit facility when it was not required.

480. Dr Gerasimowicz had also identified a structured solution from Credit Suisse which involved the swapping of long-term assets held by Lifemark for short-term assets held by Credit Suisse to meet the maturity cash flow gaps identified in the Deloitte report. A proposal made by Credit Suisse did not provide Lifemark investors with downside protection, and further negotiation was required.

481. We accept that this reflects Dr Gerasimowicz's view at that stage of the need for a credit facility. However, that view necessarily required a caveat on statements made to investors as to the matching of maturity values of policies against bond obligations and the continuing availability of cash reserves during the portfolio life. Absent such a caveat, statements in the investment manager report in those respects were, in our judgment, misleading.

Proposals with reference to SLS

482. In early September 2008, Mr Ford was informed by Mr Elias that the SLS portfolio contained inadmissible assets in that some of the insurance policies were within a two-year "contestable" period during which their validity could be challenged[2] and one "Jumbo" policy (a double-life policy held in the name of "Wagner" – the "Wagner policy") was well in excess of the single-policy limits for the SLS portfolio. In an email from Ms Barker dated 29 September 2008, it was reported that Mr Elias was suggesting to Mr Ford that the sale of these assets would "free up some short term liquidity" for SLS.

483. The discussions had been ongoing since early September 2008. In an email of 10 September 2008, Mr Ford (through Ms Bagwell) had requested from Mr Elias a

[2] Ms Juliano's evidence, which was not controversial, was that although the precise requirements varied from US state to US state, most states provided a maximum period for carriers to contest payment of death benefit on the basis of fraud or lack of disclosure from the time the policy came into effect. This period was frequently two years. While policies were within this period, they were known as "contestable". Contestable policies were considered to have more risk and were consequently valued less than non-contestable policies with identical characteristics.

considerable amount of detail in respect of all the policies in the SLS portfolio. An email of 11 September 2008 from Ms Barker (of CIB) to Mr Elias, which was copied to Mr Rakison and Mr Eber recorded Mr Ford as having said that he was not interested in just the contestable policy information, but wanted information on all the policies. Ms Barker surmised that Mr Ford's primary motivation was to obtain information for the Authority's investigation. Ms Barker also ventured the view that if Mr Ford were to buy the contestables from SLS he would be unlikely to pay SLS, but would insist on the funds being kept in escrow until there were enough funds to redeem the Keydata bonds.

484. A further email from Ms Barker to Mr Eber of 23 September 2008 illustrates that there was a concerted effort to mislead Mr Ford at this time. Ms Barker said:

> "Have you spoken with David recently? He hasn't paid the Key Data bond interest £321k and it is now in default. I'll speak to Robert re: what should be communicated to Key Data as they keep chasing. No doubt the late payment will raise questions by Stewart, David wants me to give Stewart the run around re: info on the policies but Stewarts (sic.) not an idiot and I'm sure he knows something is up."

485. Information was provided, but only on the contestable policies. The information, which included a number of life expectancy certificates and a spreadsheet setting out details of 28 contestable policies, was sent by Ms Barker to Mr Ford and the same copy recipients on 15 September 2008. Mr Ford raised detailed questions on this information in an email to Mr Elias of 18 September 2008. Similar information was also requested with regard to the non-contestables. An email from Ms Barker to Mr Eber and copied to Mr Elias on 26 September 2008 then stated that, according to Mr Elias, Mr Ford was ready to buy the policies. On 30 September 2008, CIB issued an adviser's report which, on the basis of unaudited information received from SLS, put the SLS portfolio at an aggregate face value of £363 million.

486. Mr Ford's evidence was that he did not consider that the SLS portfolio contained contestable policies, as he was aware that the acquisition of such policies was prohibited as a matter of policy. He had discounted what Ms Barker had said. We accept that Mr Ford did not have visibility of the SLS portfolio, and could not control what policies had been bought and sold within it. But, given that lack of transparency, it is difficult to understand why Ms Barker's emails did not give rise to a concern for Mr Ford that the purchasing parameters in SLS had not been observed. We do not accept the suggestion that Mr Ford could have mistakenly considered that when Ms Barker was referring to "SLS" in this context she was somehow referring to senior life settlements generally, and not to the company SLS.

487. However, at this stage, as the Authority accepts, Mr Ford understood, from the information he had received, in particular from Mr Elias and CIB, that the SLS portfolio was as described in the RAC issued by CIB and that it comprised insurance policies. The Authority also accepts that Mr Ford's understanding was incorrect. In fact, on 18 April 2008, SLS had entered into an agreement with a company connected with Mr Elias, called Life Settlements Capital SA ("LSC"), under which all the policies in the SLS portfolio and other assets of SLS had been transferred to LSC in

return for a guarantee in relation to the liabilities of SLS. From that date, the guarantee was the only asset in the SLS portfolio. RAC certificates had been issued after that date which indicated that the RAC ratio was being met even though there was, from that date, no proper basis for such certificates to be issued. At this stage, as the Authority accepts, and we find, neither Keydata nor Mr Ford or Mr Owen were involved in, or informed of, the arrangements between SLS and the guarantor to put in place the guarantee.

488. On 2 October 2008, Mr Elias himself wrote to Mr Ford with what he described as a copy of the details of "the remaining non-contestables" and saying "portfolio attached". He also said that SLS had started to sell policies in the market to institutions in the summer of 2007, and at low prices. By an email to Mr Ford on the same day, headed "SLS Capital Pre-Payment Strategy", Mr Elias set out the position with respect to SLS and the SLS portfolio and a "strategy for pre-paying, as quickly as possible, all the bonds issued by SLS … which includes all the Key Data Tranches." As the Authority submits, the email conveyed a number of very significant messages.

489. First, Mr Elias explained that it was an opportune time to be pre-paying all the bonds issued by SLS, including all the Keydata tranches. This was because the life settlement market and the life settlement investments were becoming unprofitable in light of the global financial crisis.

490. Secondly, he explained that SLS had become a wholly-owned subsidiary of LSC. Mr Elias continued:

> "In the summer of 2007, we took a very negative view of what might happen in the Life Settlements market, and decided to liquidate as much of the portfolio as possible. This took much longer than we had hoped, and we encountered, what we believe to be some deliberate "bid-rigging", involving an organisation known to both of us.
>
> The net result was we were selling a portfolio for which, in our view, an excessive price had been paid, at a very significant discount, thereby exacerbating any potential shortfall, but at least crystallizing it"

That we consider cannot be taken as anything other than a description of a distressed sale of the portfolio as a whole. It cannot, in our view, reasonably be read, as Mr Ford claimed to have done, as saying that Mr Elias wanted to liquidate the portfolio but that because of the prices he had not done so or done so only to a minimal extent. We find that Mr Ford must have known, and did know, from the time of this email that the likelihood was that all, or substantially all, of the policies comprised in the SLS portfolio had been sold. We do not accept Mr Ford's submission that, even as late as January 2009, he continued to believe that SLS had a valuable portfolio of life settlement policies, albeit that by then Mr Ford had suspected that Mr Elias had in some way charged those policies as security for borrowing.

491. The further email of 2 October 2008 (to which we referred above) contained the same message, although it does appear to be somewhat garbled. Mr Elias referred to the selling of policies, and said "we took a view, that in the light of very unfavorable

prices, we might actually buy back cheaper". But he then said: "This led to transactions where we sold, but there was a gentleman's agreement, that we could repurchase at a higher price, if we did not require the liquidity."

492. Reverting to the email concerning pre-payment, the third point is that Mr Elias' plan to repay the Keydata investors was through issuing "Rainforest Asset-Backed Securitisation Bonds" (RASBs), backed by carbon credits owned by a company itself owned by Mr Elias' vehicle BWT, called Rainforest Capital SA. This was clearly a radically different approach to what the Keydata investors had signed up to, and was something that ought to have been disclosed to them, and to IFAs and the Authority.

493. Fourthly, Mr Elias explained that, notwithstanding the liquidation of the SLS portfolio and what Mr Ford referred to in his evidence as the resultant cash which Mr Elias would have, which would provide an opportunity to purchase policies, there were immediate issues with liquidity. Mr Ford knew that to be the case, and thus he knew that not only had the SLS portfolio been sold, but that any cash that had arisen from the sale of policies had largely been dissipated.

494. It is a fact that, notwithstanding what Mr Ford had learnt from these communications, and what we have found he must properly have understood, Mr Ford did not inform the Authority or investors. We also find that he did not tell the Keydata board. Mr Owen stated in evidence, and we accept, that he was not informed that the SLS portfolio had been sold. He reasonably believed that the portfolio was in place because of the regular receipt of the RAC certificates from CIB (and unlike Mr Ford, Mr Owen had no contrary indication). We also accept that Mr Owen was not informed that SLS had encumbered the portfolio in any way. Likewise, Mr Johnson was not aware of the emails from Mr Elias to Mr Ford at the time. His clear evidence, which we consider to be self-evident as a regulatory matter, was that the matters raised in the email should have been brought to the immediate attention of the Authority.

495. Instead, Mr Ford continued to take steps, with SLS, to acquire the Wagner policy (along with one other non-contestable policy) and the contestables. A draft agreement was prepared on 3 October 2008. On 6 October 2008, Ms Barker wrote to Mr Ford, amongst others, responding to Mr Ford's request for information about the contestables, to say that those policies were in the legal name of LSC, but beneficially owned by SLS. We do not accept, therefore, the submission of Mr Ford that at this time his understanding was that, as the SLS portfolio could not hold contestable policies, the acquisition of the contestables was from LSC, and not out of the SLS portfolio. On the same day, Mr Ford offered Mr Elias $1.5 million for the Wagner policy, with a stipulation that the proceeds, or such part of the proceeds as may be necessary, be used to "repay interest and premium due to Keydata". There was further correspondence regarding valuation methodology for the contestables.

496. At the Keydata board meeting on 10 October 2008, Mr Ford did not inform the board of any of the information he had discovered regarding the SLS portfolio. Instead, the minutes simply recorded that "[SLS] have defaulted on income payments

for SIB 1/2 claiming under contract they have up to 8 weeks to fund. [Keydata] has funded income payments pending a meeting between [Mr Ford] and SLS to resolve."

497. On 12 October 2008, Mr Rakison wrote to Mr Ford with a copy of an email sent by Mr Elias to Mr Rakison which set out what had been agreed in principle between Mr Elias and Mr Ford. Mr Rakison asked Mr Ford to confirm his understanding of the position, and also gave certain confirmations with respect to the proposals. One was that there was no "implosion risk" and that matters could be implemented quickly; the other to provide "good standing" assurances with respect to Mr Elias.

498. The eventual deal between Mr Elias and Mr Ford was:

(a) Lifemark would purchase the Wagner policy;

(b) Mr Ford (through his company, Kez Trading) would personally purchase the contestable policies for a sum of $10 million;

(c) part of that purchase price would be paid by way of set-off of fees owed to Keydata of approximately $4.1 million; Kez Trading would only be required to pay just under $6 million (the sum ultimately paid was $5,357,166) with the sum due to Keydata to be paid to Keydata by Mr Ford;

(d) payment of ongoing amounts to Keydata would be "a matter of trust" on the basis of "informal assurances" from Mr Elias; and

(e) Mr Ford would make a loan to Mr Elias of a further $1 million in return for a "fee" of $500,000 which would be added to the loan and "DE will pay Ford and then SLS in that order", thus affording Mr Ford priority over SLS (and the Keydata investors).

499. This negotiation illustrated well the inherent conflict of interest which Mr Ford had. Mr Ford was negotiating for himself and for Keydata at the same time, but clearly prioritising his own interests before those of Keydata and the Keydata investors in SLS. The net result of the deal was that Mr Elias would receive $5.3 million plus a loan of $1 million, Mr Ford (through Kez Trading) would receive the contestables and a personal profit of $500,000 and the SLS debt to Keydata would be effectively written off. Although it was proposed that Mr Ford would reimburse the relevant amount to Keydata, and Mr Ford told us in his opening submissions that he had intended to do so in a matter of months as soon as the policies ceased to be contestable, Mr Ford did not pay Keydata that amount.

500. We accept the Authority's submission that by these means Mr Ford effectively misappropriated money due to Keydata to help him personally purchase the contestable policies. Keydata was left to rely on informal assurances from Mr Elias, which had not proved reliable in the past. In the event, Keydata received no further payments in respect of amounts due from SLS after August 2008.

501. It is also the case that the only significant point from the emailed summary of the deal proposals that Mr Ford subsequently renegotiated was the fee that he was to be paid a fee of $750,000, rather than $500,000. This was recorded in an email from

Mr Elias the following day, 13 October 2008, from which it also appears that Mr Elias' informal assurance was converted into "a letter specifically undertaking to ensure that these payments [to Keydata] are made", and that the RAC certificates would be forthcoming (which could not without deception be achieved, because of the absence of a proper basis for the issue of the certificates). We do not consider that, given what he had been told by Mr Elias himself as to the state of the SLS portfolio, Mr Ford could reasonably have believed that such RAC certificates would genuinely reflect the position.

502. The issues regarding late payment of interest continued to arise in relation to SLS. It is evident that bondholders had been seeking further information from Keydata, and that Keydata had, it appears, referred those bondholders to Mr Rakison. It was thus the case that on 14 November 2008 Mr Rakison wrote to Ms Bagwell with a copy to Mr Ford and Mr Elias with a revised draft (an earlier draft having been reviewed by Mr Elias) of an email intended to be sent to those bondholders. The draft text was as follows:

> "SLS Capital S.A. – Bond Interest
>
> I am instructed by the Directors of SLS to inform you that the administrative problems that had arisen relating to payment of interest have now been resolved, and that payment in respect of interest due and any redemptions due in the ordinary course for the quarter ended 30 September 2008 will be made no later than Friday, 21 November 2008.
>
> Once again the Directors have asked me to pass on their apologies for the delays in this matter.
>
> Regards,
>
> Robert Rakison"

503. In light of our findings as to the state of the SLS portfolio at that time, and the knowledge of Mr Ford in that respect, a proposal to write in those terms to bondholders without disclosing that the underlying portfolio of life settlements no longer existed was apt to be materially misleading. Mr Ford, we find, was aware that such a communication would be materially misleading. We do not accept Mr Ford's evidence that at this time he believed that the only problems with SLS were of a temporary liquidity nature and that the problems were being resolved by those responsible.

The Deloitte 2008 actuarial review

504. On 10 September 2008, Mr Smith circulated an email, including to Mr Ford, to say that the Luxembourg regulator, the CSSF, had requested a meeting to discuss the current financial situation of Lifemark. Mr Smith advised that at this meeting the board would have to demonstrate its knowledge of the company's financial position.

505. On 30 October 2008, Dr Gerasimowicz sent Mr Ford a draft of a second report by Deloitte, which was the yearly actuarial review of the Lifemark portfolio ("the 2008 Actuarial Review") and Meditron's commentary on that report.

506. The Meditron commentary included the following:

(a) In relation to the Investment Bond Analysis of Deloitte, the Meditron commentary stated: "Fees associated with the investment bonds include trail commissions, listing fees, *etc*. The fees were applied until the maturity or redemption of the bonds. Meditron has carefully reviewed the investment bond projections produced by deloitte and confirms the accuracy of the expected dates of coupon payments, maturity principle (sic – an error occurring throughout both the Meditron and Deloitte reports) payments and fees associated with the investment bonds in the Lifemark Portfolio."

(b) Meditron confirmed the accuracy of a table in Section 2.1 of the 2008 Actuarial Review showing bond principal repayments up to 2018 totalling $631,178,232, and aggregating that with bond interest payments, trail commissions and management fees (Tandem) to show total bond related outflows.

(c) In relation to Deloitte's analysis of estimated cash funds raised from the bond issues, Meditron's commentary said:

> "Meditron provided Deloitte with the original distribution and commission fees associated with the investment bonds. Distribution and commission fees of 5.5% were assessed on the principle raised. With additional formation costs of $460,000, the total fees subtracted from the principle amount raised totaled (sic) $35,174,803."

507. The figure of 5.5% did not reflect the Orietex/LAS Global fees, which were a direct cost of raising the bond capital. In his evidence, Mr Ford sought to characterise the reference to 5.5% as limited to the fees payable to Keydata. It is correct that Keydata was paid fees at that level (to include 3% broker commissions), but what is also clear is that to confine the costs of raising the bond capital to 5.5% produced a wholly misleading analysis. Mr Ford also sought to distance himself from the work done by Dr Gerasimowicz in this respect. However, in the context of a report which was designed to enable the directors of Lifemark to demonstrate their knowledge of the financial position of the company, we do not consider that to be a tenable position. It may be the case that Dr Gerasimowicz was himself aware of the Orietex/LAS Global fees, and it is difficult to understand why he omitted to inform Deloitte of them, but Mr Ford himself was certainly keenly aware of those fees, he saw the Meditron commentary and the 2008 Actuarial Review, and yet he allowed the calculations to be done on a false basis.

508. In closing submissions, Mr Ford submitted that the 2008 Actuarial Review was an incomplete draft, which was not finalised until around 5 November 2008 and in any event had not failed to take account of the fees paid by Lifemark to Orietex/LAS Global. Mr Ford's position is that those payments, although not specifically mentioned, were included in the review. He points to the executive summary in the Meditron commentary where, at Section 2.1, it states: "The total principle raised by the respective bond issues is summarised in the table below. This table may be reviewed in the Deloitte Report under Section 2.1 …". Mr Ford's submission is that

projected returns are based on the total principal sum, which sum would always include the total amount outstanding on the bonds, interest for the duration of the bonds and all upfront costs of capital (i.e. distribution fees are treated as being part of the cost of capital and necessarily include the distribution fees earned by LAS Global and Keydata).

509. We do not accept Mr Ford's submissions. It is quite apparent from a review of the figures that the amount of $631,178,232 was the gross amount of the principal raised; it appeared in the table in Section 2.1 of the 2008 Actuarial Review as the aggregate amount of principal repayments up to 2018. To arrive at what was described as the "Total Outgo to Investment Bonds", there were added (i) the bond interest payments, (ii) trail commissions (Keydata and broker) and (iii) Tandem's management fees. The fee assumptions on which that table had been produced were at Section 4.9 of the review; those fees did not include any of the front-end fees, either of Keydata or LAS Global.

510. The analysis of the net cash raised from the aggregate bond issues of $631,178,232 is set out at Section 2.5 of the Executive Summary. That refers in terms to Distribution and Commission Fees of 5.5% which, together with additional costs of $460,000, amounted in total to $35,174,803 and were charged against the principal amount raised. That gave rise, as the review sets out, to an estimate of net cash raised of $530,882,198. That figure then fed into a statement of net cash funds at September 2008 of $257 million, after taking account in particular of the net expenditure on the life settlement portfolio and maturities prior to May 2008, along with investment income earned on surplus funds since March 2006 and other earned funds. This was accordingly a calculated amount; it was not a true cash amount based on bank statements or any actual enquiry and it did not reflect the true cash position of Lifemark at that time. That figure of $257 million Mr Ford knew to be false, he having been told by Dr Gerasimowicz on 3 September 2008 that the cash balance was "some 100 million dollars". The true figure, at December 2008, was £64,384,132 ($94,129,904). We do not accept the assertion by Mr Smith in his evidence that the net cash funds set out in the 2008 Actuarial Review could be reconciled with the actual cash at bank. There was no correlation between the two. The figure in the Review was a notional figure. Although that figure could be augmented by known future cash receipts, such as on anticipated policy maturities, all other items referred to in the Review would have been reflected in the actual cash balance which was known to be considerably lower than that contained in the Review.

511. The 2008 Actuarial Review also stated that, in respect of a credit facility, "Deloitte has been advised that Lifemark S.A. has arranged a credit facility with Credit Swiss (sic) Securities 'Europe' Limited to cover any cash shortfalls that may or may not arise during the development portfolio of Bonds and Life Settlement Policies. Deloitte is not aware of the details, terms or costs of this facility and such aspects have not formed part of this analysis." We find that Mr Ford knew this to be untrue. Even the cover email by which the report was sent to Mr Ford makes it clear that Lifemark had received only "financing proposals" from Credit Suisse. Although Mr Ford denied that the Lifemark directors had confirmed to Deloitte that a credit facility was actually in place, on the basis of the clear statement in the 2008 Actuarial

Review, and the fact that there is no evidence of the statement having been corrected, we find that such an assurance was indeed given.

512. We find that Mr Ford knew that these vital assumptions were wrong, and that the inclusion of them distorted the 2008 Actuarial Review and rendered it worthless. He raised no objection but allowed the false assumptions to persist in the final report.

513. It is also the case, as the Authority submits, that even on this distorted basis, the 2008 Actuarial Review predicted a cash deficit of $59.2 million in 2012 rising to $196 million in 2014 (and continuing to 2023). On that single simulation there would be a cash surplus in 2024 – 2027. However, on a Monte Carlo analysis[3], based on a cash position in 2008 of $257 million and 5,000 simulations, there was only a 56.8% probability of a result giving positive surplus accumulated cash funds in 2027.

514. In his closing submissions, Mr Ford asserted that the 2008 actuarial review "gave a 97.5% probability of the Lifemark portfolio having a positive cumulative cash surplus in 2027". That is not a sustainable position for Mr Ford to have adopted. The probability of a cash surplus was demonstrated only by reference to the Monte Carlo simulations described in the report, with the result, as we have described, that the probability of a cash surplus (on the false assumptions in the report, including the assumed cash position in 2008 of $257 million) was 56.8%. The report made the point, at Section 2.10, that because of the fixed term and amount of life settlement portfolio and bond liabilities the only way the overall probability of achieving a greater chance of a positive accumulated cash surplus was to change the initial 2008 cash funds. Thus, if the initial cash funds were assumed to be $306 million (which Mr Ford knew was not possible), then the probability of surplus in 2027 would have been increased to 95.2%. (No probability factor of 97.5% appears in the report, and in the Meditron "Conclusion Statement" dated 30 October 2008, Meditron referred to a 95% probability of a positive outcome "given current cash levels". Those cash levels were, we find, illusory, and Mr Ford knew that was the case.)

515. Mr Ford's further submission on the 2008 Actuarial Review is that it was made in respect of a static pool, and that the review stated that the number of lives in the Lifemark portfolio was small. Mr Ford submits that, having regard to feedback and assurances from Lifemark advisers (including the Lifemark investment manager, the originator, the custodian and the trustee) he honestly and reasonably believed that, with an increased purchase allocation, the number of lives in the Lifemark portfolio would continue to grow and the value of the growing asset class would continue to be enhanced. Although Mr Ford accepts that there was a possibility that Lifemark might face a deficit at some point between two to five years from 2008, he denies there was any reason for concern about the performance of the Lifemark portfolio and/or any liquidity crisis in Lifemark. Mr Ford referred to strategies for managing liquidity

[3] As Ms Juliano explained it (Juliano, at 3.6.9), Monte Carlo analysis generates random scenarios of maturities within the life settlement portfolio to illustrate the potential returns the portfolio could provide in each individual scenario. With the numerous random scenarios generated, the final result would show a confidence interval around the expected return for the portfolio. Typically, investors would run between 1,000 and 10,000 Monte Carlo simulations so that the accuracy around probability of the return is perceived as higher.

other than merely obtaining a credit facility, such as the sale of policies, use of Keydata International funds, insurance, imaginative portfolio management and the availability of LAS International funds as methods of redeeming bonds at maturity.

516. We reject Mr Ford's submissions in this respect. The only actuarial review that was carried out at this time was the 2008 Actuarial Review. It cannot be discounted on account of being prepared on the basis of a static pool. There is no evidence that Mr Ford's belief in the potential performance of a growing pool was supported by any actuarial model. Nor is there any evidence that Mr Ford was advised at this time as to the probability of an improved performance if a growing pool were to be assumed. All the advisers were working off the same (essentially flawed) model. Assumptions that were not based on a proper actuarial model could not honestly and reasonably be made, in particular in the face of an actuarial review which, even on the falsely optimistic premises contained in it, described a very poor liquidity outcome. Nor was there any evidence of modelling for the management of liquidity in any of the ways described by Mr Ford.

517. Mr Ford referred in this connection to a review of the Lifemark portfolio carried out in 2011 by Carlisle Management Company SCA, a European based fund management firm focused on US life settlements, which was referred to by Mr Gallo in his expert report. Mr Ford pointed to the statement in Carlisle's letter of 16 February 2011 to Mr Smith, which was a servicing proposal (a pitch for business) in respect of a long-term solution for the Lifemark portfolio, that: "We have reviewed the portfolio and conducted fair value analysis using stochastic modelling of the portfolio's cash flows, and given correct servicing and management we believe the fund can still offer a real return on investment for investors." We do not consider that this letter can come anywhere close to supporting any understanding in 2008 as to the prospects for the Lifemark portfolio. We do not consider that it was appropriate for it to have been relied upon by Mr Gallo in reaching his own expert conclusions. The available evidence in 2008 supported only one proper conclusion with respect to the Lifemark portfolio, namely that its liquidity was in serious doubt.

The SLS fraud

518. Before we move onto the matter of certain responses given by Mr Ford and Mr Owen at their respective compelled interviews in November 2008, where the issue of their knowledge and understanding at the material time will be relevant, we must address the submission that Mr Ford in particular and to some extent Mr Owen as well were, along with Keydata, the victims of a fraud, or possibly more than one fraud, perpetrated by certain persons connected with SLS.

519. Principal amongst those persons is Mr Elias. However, Mr Ford in particular alleges fraud against Mr Rakison, and that claim is the subject of separate proceedings in the High Court, and others. In closing submissions, Mr Ford and Mr Owen also pointed to proceedings instigated in 2014 in the Southern District of New York by the liquidator of SLS against CRT and two of its senior managers, Mr McCarty and Mr Gibson, in which fraud allegations are made ("the CRT proceedings").

520. As a preliminary point, Mr Ford and Mr Owen have submitted that the Authority acted improperly in failing to disclose the pleadings in the CRT proceedings. We reject that submission. The pleadings themselves were available publicly by online search. We agree with the Authority that pleadings cannot comprise evidence of anything (except the fact of the proceedings and the pleadings themselves). Pleadings are, in general, no more than one party's assertions of fact. They cannot therefore satisfy the test for secondary disclosure, as they are not capable of undermining the Authority's case or assisting the case of Mr Ford and Mr Owen.

521. Contrary to the submission of Mr Ford and Mr Owen, these references are not concerned with the question of who was responsible for the failure of the SLS Products. That may well have been caused by fraudulent behaviour of others, including Mr Elias. It may be the case that SLS and the bondholders were victims of a major fraud. But, it has never been the Authority's case that Mr Ford or Mr Owen were engaged in fraud or were themselves responsible for the failure of the SLS Products. The case concerns what, on the evidence, Mr Ford and Mr Owen are found to have known, and when, and what they did when in possession of that information.

522. It is thus, we find, unnecessary for us to make any finding as to whether any person was engaged in fraud. Those living persons who are the subject of allegations made by Mr Ford and Mr Owen did not appear as witnesses in this Tribunal and were accordingly not in a position to defend themselves against any such allegations. Furthermore, there are separate proceedings both in the UK and in the US where such allegations are more particularly raised. Our findings are in respect of the conduct of Mr Ford and Mr Owen. We have carefully considered the extent and nature of their knowledge and understanding at all material times, including the extent to which they may have been misled or labouring under any misapprehension as a result of the actions of others or generally. Where they might have been misled, it is not necessary for us to consider whether that is a result of fraud or deliberate deception on the part of those other persons; what is material in these proceedings is the state of knowledge and understanding of Mr Ford and Mr Owen and not how or why that was brought about.

523. We should record, however, that it is clear on the evidence before us that actions were being taken by Mr Elias and others with regard to SLS and the SLS portfolio without any notice to Mr Ford or anyone else at Keydata. Thus, by way of example, Mr Elias was in October 2007 writing to a Mr Steven Kessler, who we understand to be a lawyer, seeking advice about a proposal to dispose of some or all of the SLS portfolio, possibly to LSC (the parent company of SLS), and to re-invest in Jumbo policies, followed by a Eurobond issue to European institutional investors. Although that email was also copied to Mr Eber, amongst others, neither Mr Elias nor Mr Eber advised Mr Ford or Keydata of these proposals. Sales of policies at that time took place without notice to Mr Ford or Keydata. Mr Eber and Mr Rakison were also copied in on an email from Mr Elias to Equity Trust of 21 April 2008 which sets out the proposal for LSC to purchase all the assets of SLS in return for LSC guaranteeing the SLS bonds and other liabilities. We accept that none of these proposals were at those respective times brought to the attention of Mr Ford or Keydata. It was only at

a later stage that we have found that Mr Ford became aware of the position regarding the SLS portfolio.

The compelled interviews

524. On 11 November 2008, Mr Owen attended a compelled interview with the Authority. At that interview the Authority asked Mr Owen how the SLS and Lifemark Products were performing. Mr Owen responded that the Products were "performing in line with how they're meant to" and "I think we are comfortable as a company that those products are on course to deliver what the investor is expecting, which is their income or their growth and a full return of capital."

525. We find that these statements can only have been designed to assure the Authority that, so far as Keydata was aware, the bond obligations of both SLS and Lifemark as to income (or growth) throughout the term of the bond and redemption at the end of the term would be satisfied in full. However, in relation to SLS, Mr Owen knew that not to be the case. First, he was aware, from the October 2008 Keydata board meeting, that £1.3 million of Keydata fees and £1.4 million of income payments from SLS were outstanding (and that Keydata had stepped in to make payments to its investors). Secondly, he was aware that, far from the bond obligations being met throughout their terms, the proposal was that Mr Elias would procure an early redemption of the bonds.

526. In evidence, Mr Owen said that he had been asked, at the very end of a lengthy interview, whether the investors would get their money back. Given the assurances which he had understood to have been provided by Mr Elias, and his own understanding that the SLS portfolio remained in place, he believed that, as he said in the interview, the bonds were "currently running at a full return of capital". We accept that Mr Owen believed that SLS continued to own its portfolio of policies, and that he did not mislead the Authority in that respect. But, as regards SLS, we find that he also knew that it could not confidently be asserted that investors' expectations would be met, and that a more comprehensive answer, explaining the position regarding delays in income payments and the prospect of early redemption would have been required if Mr Owen were to have met the required standard of Statement of Principle 4, namely of dealing with the Authority in an open and cooperative way and making appropriate disclosure of information of which the Authority would expect notice.

527. As regards Lifemark, Mr Owen also stated in the interview that: "The portfolio, which is the Lifemark portfolio, from the report that I receive is in good stead". Mr Owen confirmed in evidence that he was here referring to the Meditron reports that had been provided to Keydata from July 2008. Taking those Meditron reports separately, and confining Mr Owen's observations to the portfolio of life settlements in Lifemark (the context for Mr Owen's statement is the IRR of the portfolio and the early maturity of some policies), we do not consider that what Mr Owen said in this regard to have been misleading. But Mr Owen was aware at this time of the concerns expressed by Grant Thornton as to the lack of a viable financial model, and of the liquidity issues highlighted by the Deloitte 2008 Actuarial Review. His failure at this

stage to refer to those matters cannot be explained by reference to any notion that the documents, including the Grant Thornton reports, were legally privileged. No person of integrity could have held the view that a misleading statement to the Authority would be acceptable if the reason why it was misleading is because it fails to have regard to something that is arguably legally privileged. That failure, in our judgment, was a breach by Mr Owen of Statement of Principle 4.

528. In making these findings, we are conscious that Mr Owen's state of knowledge both in respect of SLS and in respect of Lifemark was very much less than that of Mr Ford. We find that, in common with Mr Johnson and members of the board of Keydata, Mr Owen was largely kept in the dark by Mr Ford with respect to the real concerns and problems with both Products.

529. On 12 November 2008, Mr Ford attended a compelled interview with the Authority. As with Mr Owen, the Authority asked Mr Ford how the SLS and Lifemark Products were currently performing. Mr Ford responded: "They're on target to meet their obligations." As the Authority submits, Mr Ford made that statement knowing that, in respect of SLS, the company had no assets, no cash (other than that Mr Ford had himself provided) and that any prospect of it acquiring assets or making further payments to Keydata rested on the "informal assurance" of Mr Elias. In respect of Lifemark, Mr Ford knew that the Deloitte report was based on false figures as to the fees charged to Lifemark, and that even on that basis the report had revealed considerable liquidity problems.

530. It is clear that Mr Ford's statement with respect to SLS was simply untrue, given the state of his knowledge at that time. Furthermore, although Mr Ford himself might have believed that all the liquidity issues thrown up by the Deloitte report (taking account of the correct levels of fees) could be addressed in a number of ways, and that the position might be different for a growing pool of life settlements funded by further bond issues, his failure to inform the Authority of the contra-indications provided by all the available documented evidence (whilst at the same time explaining the strategy for addressing such issues) was in our view a breach of Statement of Principle 4.

531. Mr Ford was, in the course of the interview, asked specifically what assets were held within the SLS portfolio. Mr Ford stated that the portfolio held cash and policies and later that "the various parties that have been … working with the SLS bond have confirmed to us all the way through this is cash and policies." On the basis of what we have found Mr Ford's own knowledge was at this time, we accept the Authority's submission that this was deliberately misleading. Furthermore, it was also misleading for Mr Ford to have said, in November 2008, that the SLS bonds would be listed "within … days."

532. What both Mr Ford and Mr Owen had told the Authority in their compelled interviews masked the true position with respect to SLS which became clearer, at least to Mr Owen, at the board meeting of Keydata held on the day after Mr Ford's interview, 13 November 2008. Mr Ford then reported to the board on the temporary rescue plan for SLS he had reached with Mr Elias:

> "SF confirmed that following discussion with David Elias of SLS Capital Inc, DE had intimated that there was insufficient liquidity in the fund to make income payments in the short term and that were (sic.) looking to redeem the SLS bonds early (circa April 2009). SF said that DE had substantial private wealth and was looking to sell some private assets to enable the required top up to the fund to facilitate an early redemption. In the meantime SF had agreed to acquire a portfolio of contestable policies from SLS as collateral with a projected value of $12 million (face value $120 million) when they became non-contestable around April/May 2009. SG stated that the projected collateral value of £7m should comfortably cover SIB1-3 income payments of $4m payable to end April 2009. To facilitate the purchase of collateral by SF, Tandem charged £0.5m additional fee in Oct 2008 and [Keydata] would effectively waive its entitlement to trail commission on DIP5 (£1.16m) and DIP6 (c£0.8m) with Tandem being beneficiary."

533. The effect of this was that the fact of the failure of the SLS product to produce the necessary return to make income payments to the Keydata investors would not be revealed to investors, IFAs or the Authority. In the meantime, Mr Ford's own vehicle, Tandem Marketing Partners (Mr Ford accepted that the reference in the minutes to Tandem was to his vehicle) would gain an additional fee of £0.5 million at Keydata's expense.

534. There are two elements to these board minutes. The first states that there was insufficient liquidity in SLS for income payments to be made in the short term. Although in his evidence Mr Owen sought to downplay the significance of that information, arguing that it was a matter of a short-term timing issue, and that he did not consider that there would be an event of default, we consider that this knowledge was incompatible with what Mr Owen had told the Authority as to the performance of the SLS portfolio, and that Mr Owen ought properly to have informed the Authority.

535. We are unable to find, as the Authority submitted we should, that Mr Owen was himself made aware of the fact that up to April 2009 payments of income would be made, not out of the SLS portfolio itself, but the collateral to be provided by Mr Ford. Having heard and considered Mr Owen's evidence in this regard, and having regard to the fact that there is evidence of Mr McNeil having written up or altered board minutes of Keydata after the event, we accept his account that this element was not discussed at the board meeting itself, but at a separate meeting between Mr Ford and Mr McNeil. We find therefore that Mr Owen's knowledge did not include the use of the collateral to fund income payments up to April 2009.

RAC certificates for SLS issued on the basis of guarantees

536. We have found that, in or about October 2008, Mr Ford knew that SLS no longer had any viable or substantial portfolio of life settlements. On 16 December 2008, Mr Rakison sent Mr Ford a "draft of the RAC from CIB to be supported by a guarantee from LSC to SLS and in turn a guarantee from BWT to LSC". This was later that day followed by an email attaching "the proposed BWT/SLS Guarantee, which I trust you will find satisfactory to enable CIB to issue the RAC for SLS."

537. The position was confirmed by Mr Elias in an email to Mr Ford following a "conference call" with Mr Ford in which Mr Elias stated that "LSC has guaranteed the obligations of [SLS], and on this basis CIB Partners is prepared to provide RAC".

538. This was very material information on the state of the SLS portfolio and product. Mr Ford knew that the RACs were to be issued on a basis that was wholly incompatible with the assurances given to investors as to asset cover. Yet, despite the responses Mr Ford had given to the Authority at his compelled interview, he took no steps to inform the Authority, and no steps were taken to advise investors or IFAs as to the position. There is on the other hand no evidence that Mr Owen was informed of the reliance on a LSC/BWT guarantee, and Mr Johnson also confirmed in evidence that he had not been informed that this was the basis on which the RAC certificates at the relevant time (for 31 March 2008 and 30 June 2008) had been issued.

539. We do not accept that at this time Mr Ford could have been under any illusion that the SLS portfolio was intact and comprised $390 million of face value of policies. Mr Ford made particular reference to an email dated 9 December 2008 sent to him by Mr Rakison which included a spreadsheet describing a portfolio with that aggregate face value. Mr Smith in evidence said that he believed those policies to have been SLS policies. Yet the spreadsheet itself did not describe the portfolio as such; it described it as an "Elias Portfolio". Given what Mr Ford knew from Mr Elias himself about the sales of policies out of the SLS portfolio, we do not consider that Mr Ford could genuinely have relied upon the 9 December 2008 email and spreadsheet as evidencing the state of the SLS portfolio. It was perfectly clear, as confirmed only a week later, that the RAC with respect to SLS was to be based, not on a portfolio of policies, but on a related party guarantee.

540. For the same reason, we do not accept that Mr Ford believed that the letter sent by Mr Rakison to Mr Ford on 16 December 2008, which purported to refer to a listing of the SLS bonds, evidenced that the SLS portfolio was intact. Mr Ford knew, certainly by then, that it was not. As we have found, the letter of 16 December 2008 was nothing more than a deliberate attempt to mislead the Authority, to whom it was intended to be sent by Keydata.

ISA issue and "simplified voiding"

541. The position of the Authority is that, whilst it relies on the fact that Mr Ford was informed by Mr Elias at the Dorchester meeting that the SLS bonds would not be listed at all, its case proceeds on the basis that up until 22 December 2008 Mr Ford and Mr Owen, in common with Mr Johnson, held the mistaken belief that the SLS and Lifemark bonds would be eligible for ISA status if listed at any time within the five-year period of their term.

542. On 22 December 2008, however, Mr Ford was sent a letter from the Authority which stated that the Authority had become aware (following confirmation from Mr Johnson during a compelled interview on 18 November 2008 that the SLS bonds remained unlisted and that listing was necessary to secure ISA status) that the SLS bonds were unlisted and that the delay in listing the SLS and Lifemark bonds may

have resulted in the SLS and Lifemark Products not being ISA compliant. The Authority's letter urged Keydata to refer the matter urgently to HMRC as the proper agency to determine the tax status of the Products. Mr Johnson responded to say that Keydata would be instructing Allen & Overy, and that Mr Johnson would write in a more formal manner on his return from holiday after the Christmas period.

543. Notwithstanding this, Mr Ford allowed DIP 7 (which had been marketed since 17 November 2008 on the basis that it was ISA compliant) to strike on 13 February 2009 and on 12 January 2009 issued a further product – DIP 8 – with a strike date of 17 April 2009. The DIP 8 brochure specifically advertised the product as a "double ISA opportunity" (referring to the ability, in theory, to obtain the benefit of ISA treatment for both 2008-09 and 2009-10). It also stated that: "The Securities available under the Plan will be a bond denominated in Sterling listed on the Luxembourg stock exchange and will qualify for the purposes of ISA investments." Mr Ford and Mr Owen submitted in this respect that Keydata had taken the view that the status quo should be maintained until it was advised otherwise by its external advisers, and that was the position adopted by the compliance department. We do not consider that was an appropriate course, and Mr Ford and Mr Owen should have known that it was not. There is no submission or evidence to the effect that there was positive legal advice to continue with the bond issues. We have no doubt that Allen & Overy would have advised as to the seriousness of the breaches and would not have countenanced further issues which themselves would breach the ISA Regulations. Neither Mr Ford nor Mr Owen should have done so either.

544. The letter of 22 December 2008 was addressed to Mr Ford. We accept Mr Owen's evidence that he did not become aware of the ISA issue until February 2009. Until then, the matter had been dealt with by Mr Ford and Mr Johnson. It is nonetheless the case that Mr Owen allowed Products to strike after he became aware of the matter. In his evidence, Mr Owen accepted that there was a mistake in relation to DIP 8 in that the product did not list until 9 June 2009 and there should, he said, have been an extension so that the product was listed at the time it was issued to the investors. That mistake was attributable, Mr Owen claimed, to Keydata's compliance department and others, and not to him. We do not accept that submission. Along with Mr Ford, Mr Owen had a regulatory responsibility to ensure that the Products marketed by Keydata complied with the relevant rules and adhered to the claims made for them in the promotional literature. That responsibility could not be deflected onto others within Keydata.

545. Notwithstanding the Authority's demand for Keydata to refer the matter to HMRC, when the Authority followed this up on 26 January 2009, in an email to Mr Johnson, Mr Johnson advised the Authority that Keydata would only take the matter up with HMRC once the SLS bonds were in fact listed. That, according to Mr Ford and Mr Owen, was on the advice of Allen & Overy, and we accept that to be the case. On 30 January 2009, the Authority advised Keydata that the delay in dealing with this matter was an unacceptable risk to investors and asked that Keydata consent to the Authority referring the matter to HMRC.

546. Formal notification to HMRC was made on behalf of Keydata by Allen & Overy on 4 March 2009. Allen & Overy's letter of that date informed HMRC of "certain breaches of the [ISA Regulations]" which were said to have been inadvertent and to request that the breaches be dealt with by way of the simplified voiding procedure available for inadvertent breaches of the ISA Regulations. The letter detailed that none of the SLS bonds had been listed on a recognised stock exchange and that one of the tranches had a maturity date of less than the five years required under the ISA Regulations. The breaches were proposed to be repaired by the repackaging of the SLS bonds into bonds to be issued by Lifemark or a derivative of Lifemark ("Lifemark II"). The proposed repackaging involved the transfer of the unlisted SLS bonds to Lifemark or Lifemark II and the issue to Keydata by Lifemark or Lifemark II of corresponding bonds which would be listed on a recognised stock exchange. It was recognised that if the new bonds matured on the same dates as the SLS bonds they replaced, that would not meet the requirement for a term of at least five years, but it was requested that the new bonds nonetheless be treated as "qualifying investments". Allen & Overy also promised to write in respect of certain further breaches.

547. We heard and accept the evidence of Mr Turner who, at the relevant time, was the Lead Technical Adviser at HMRC with respect to the ISA Regulations. Mr Turner explained that simplified voiding was a non-statutory procedure which provided an alternative approach for some breaches of the ISA Regulations. The effect is that the ISA is not voided. The procedure is, however, available only for inadvertent breaches or those which, despite the manager's best efforts, have slipped through the checking procedure. Mr Turner explained that this typically involved administrative error or cases where a former qualifying investment had ceased to qualify, for technical reasons, and the manager had failed to realise this immediately.

548. A feature of simplified voiding is that generally the investors will be unaware that it has taken place. It is the manager, rather than the investors themselves, who agrees to make a payment to HMRC of a sum representing the tax that should have been paid.

549. On 13 March 2009, HMRC replied to Allen & Overy's letter of 4 March 2009. HMRC explained that HMRC was not objecting to the use of simplified voiding for SLS bonds. However, a remedy such as that proposed by Allen & Overy, with new bonds matching existing maturity dates, would not be possible as the new bonds could not be qualifying investments. HMRC also sought details of the further breaches.

550. Following receipt by HMRC of a revised proposal set out in a letter from Allen & Overy dated 31 March 2009, on that day the Authority wrote to HMRC setting out their concerns. Chief amongst these was an email from Mr Johnson, copied to Mr Ford and Mr Owen, dated 9 January 2006, which HMRC concluded showed that Keydata was aware at that time that the SLS bonds did not satisfy the ISA Regulations yet despite that knowledge Keydata had continued issuing the bonds and including them as ISA investments. The terms of that email were as follows:

> "Just a reminder of a key issue. Given the delay in listing, we need to ensure that for PEP and ISA investment qualifying reasons that there is a listing on a recognised stock exchange with a time horizon of 5 years.
>
> As we are now three months into the 5 years period, I am concerned on the latter point, perhaps."

551. In cross-examination, Mr Turner repeated that the terms of Mr Johnson's email suggested that the breaches were known in 2006; that appeared also to be confirmed by the terms of Allen & Overy's letter of 4 March 2009, which noted that it had become apparent to Keydata in that year that the bonds were not listed. Mr Turner commented that as ISA manager Keydata were responsible for understanding the regulations, or else discussing them with HMRC.

552. Following discussions between Mr Turner and Ms Lilian Small of the Authority, Mr Turner wrote to Ms Small to advise of the possibility of the withdrawal of Keydata's manager status under the ISA Regulations. At this stage, as Mr Turner explained in his evidence, this was a course of action he was contemplating, although it had never been done before.

553. On 13 May 2009, Mr Turner and an HMRC colleague met representatives of the Authority. During that meeting Mr Turner explained that HMRC's current view was that the SIB 1-3 Products did not qualify as ISA investments and could not be repaired so that they would qualify whilst still retaining the current maturity dates. They said that they had been led to conclude that the breach of the ISA Regulations was not inadvertent and that accordingly simplified voiding was not appropriate. However, further consideration would need to be undertaken before making such a decision.

554. Immediately following that meeting, Ms Small wrote by email to Mr Turner with what was described as a draft proposal. The Proposed FSA Action was:

(1) Send Keydata the Authority's preliminary investigation report.

(2) Ask Keydata to agree to a VVOP (Voluntary Variation of Permission) to restrict it from accepting any new investments from consumers until the FSA Enforcement process was concluded and to appoint a skilled person under s 166 FSMA to consider all of Keydata's investment products and assess the manner in which it obtained the products, whether it performed due diligence on the products, whether it promoted them appropriately, and whether they qualify as ISAs (if sold with an ISA wrapper).

(3) If Keydata was unwilling to agree to a VVOP, the Authority would seek an OIVOP (Own Initiative Variation of Permission) in the same terms.

555. The email of Ms Small then went on to summarise issues that had been discussed with HMRC. It had been agreed that HMRC would have to make a decision on whether the SIB 1, 2 and 3 Products were ISAs in advance of a VVOP, as this could cause a run on the fund as investors looked to transfer their ISAs. Ms Small then said:

> "**FSA Administration –** the FSA outlined that the potential best route here is for HMRC to declare the SIB 1, 2 and 3 ISAs in default, at which time [Keydata] will face a potential £41 million liability for misselling those issues as ISAs which would almost certainly result in its insolvency. The FSA could then seek an administration order under FSMA on the basis that it would provide a better outcome than a liquidation and although it would crystallise those investor losses (the majority of which will be covered by the FSCS) it would enable an administrator to:
>
> (1) undertake a full review of the business (which would assist the FSA, HMRC and any potential buyers);
>
> (2) look to retain value for creditors (which would then include the FSCS) by selling off parts of the business which are valuable such as the administrative services for other institutions; and
>
> (3) it would give the other investors the best chance of collecting the income/growth owed to them and to recover their initial investment capital in full. This is relevant to both ISAs and direct investments (many of which are above the FSCS threshold). As such this could have the effect of minimising investor losses to only those with ISAs which HMRC declare to have failed (this could of course be substantially more than those which the FSA are currently aware of, £41 million."

556. Mr Ford was strongly critical of this approach. He characterised it as "plotting" and argued that there was a pre-determined outcome. We do not regard the actions taken by the Authority to address the issues it perceived to have arisen with Keydata in those respects as material to the matters of conduct of Mr Ford and Mr Owen with which we are concerned in these references. Whether the Authority was right in its judgment of the consequences for Keydata, its investors and creditors, and the actions that should be taken is not the subject of our enquiry. We can say, however, that in our view the discussions that took place between HMRC and the Authority were to address various possible outcomes and were not part of any plot or conspiracy. Nor was any outcome pre-determined; the decision of HMRC was not pre-determined and nor was the fact or outcome of any application by the Authority for Keydata to be placed in administration. Furthermore, we do not accept Mr Ford's submission that, in seeking to show that Keydata was insolvent, the Authority was attempting to avoid "due process" (in the sense of Keydata being able to dispute the Authority's actions).

557. We have examined the trail of email correspondence at this time. There is much email traffic, and extensive discussion of steps to be taken. We do not find this surprising, and it is not in our view indicative of any pre-determined outcome. It would be expected that a major event in the financial services industry would engage many participants, all of whom would need to be kept informed and consulted on the steps to be taken. We are satisfied that those steps and the outcome of those steps were not engineered by the Authority; they were the consequence of the circumstances that had arisen in Keydata itself.

558. On 15 May 2009 Mr Turner wrote to Allen & Overy to say that, after further consideration, HMRC did not consider this to be a case suitable for simplified voiding

as it was not based on an inadvertent breach of the ISA Regulations. It was explained that the HMRC view was that "inadvertent" meant "unintentional". A copy of that letter was sent to Keydata, and Keydata was informed that the investments were not qualifying investments and that HMRC would be seeking to recover the tax due.

559. Allen & Overy wrote to HMRC again on 22 May 2009, this time in relation to the Lifemark bond issues. The letter explained that Keydata had identified breaches of the ISA Regulations relating to 140 issues of bonds by Lifemark. HMRC's reply on 3 June 2009 stated that HMRC did not believe "in view of the size and nature of the breaches" in respect of the Lifemark bonds that simplified voiding was appropriate. Allen & Overy's reply of 7 June 2009 set out further breaches of the Lifemark DIP bonds.

560. Mr Ford and Mr Owen maintained that HMRC were wrong to treat the breaches as otherwise than inadvertent, and to deny simplified voiding on that basis. They sought to blame Allen & Overy for not having explained sufficiently Mr Johnson's inadvertence and absence of understanding. That is not a matter on which it is necessary for us to express a view; nor would it be proper for us to do so. This is not an appeal against a decision of HMRC, nor does it amount to a judicial review of HMRC's decision. In that regard, although there was correspondence and discussion between HMRC and the Authority, we are satisfied, on the evidence of Mr Turner, that the decisions with respect to simplified voiding and the possible withdrawal of Keydata's ISA manager status were genuine decisions of HMRC, and not decisions suggested to them by the Authority. Contrary to Mr Ford's and Mr Owen's submissions, there was no pre-judged outcome.

Polymer Vision and Mr Eliasch

561. On 24 December 2008, Mr Elias sent an email to Mr Ford (with copy to Mr Rakison). Mr Elias referred in that email to what he regarded as possible, and not possible, in order to achieve what he described as "our mutual objective" of repaying all bonds issued by SLS and LSC. Mr Elias stated that he needed "$12m ASAP" in order to solve the issues of repayment of the bonds by "ensuring that we can monetise PV [Polymer Vision] and the rainforest." We find, as the Authority submitted, that this email could only be read as confirming that any bond repayments could derive only from assets external to SLS, and that SLS no longer had a viable life settlement portfolio. This, we find, was something that Mr Ford knew. He did not inform investors or the Authority, but sought to address the problem directly with Mr Elias.

562. On 5 February 2009, Mr Ford entered into an agreement with Polymer Vision Limited ("Polymer Vision") under which it was recorded that Mr Ford had, on 3 February 2009, made a loan to Polymer Vision of £190,000. The agreement itself was an option agreement by which Mr Ford was granted an option for a ten-year period to purchase the entire undertaking, goodwill and assets of Polymer Vision for a price to be agreed or, in default of agreement, equal to the amount of Polymer Vision's liabilities and indebtedness on the exercise date. Polymer Vision had been estimated by Mr Eber in April 2008 as having a value of $400 million. However, by February 2009 there appears to have been general agreement that Polymer Vision was

technically insolvent (as a letter from Mr Ford dated 19 February to a Mr Eliasch – to whom we refer below – records). We do not accept therefore the Authority's submission that Mr Ford's agreement with Polymer Vision was motivated principally by personal gain from the value of that company.

563. We accept that the actions of Mr Ford at this time were primarily aimed at benefitting the SLS bondholders by seeking to procure funds from Mr Elias to effect repayment of those bonds. Mr Ford had a personal interest also, in particular in seeking to achieve a "clean" exit from SLS without giving rise to adverse comment which could have affected the Lifemark issues. It was thus necessary for Mr Ford to seek to achieve these aims without informing investors, IFAs, the market generally or the Authority. That, we have concluded, was the reason why Mr Ford did not make the disclosure of the position that a person of integrity would certainly have done.

564. Mr Ford's concern to earmark assets for bondholders is evident from a conference call of 10 January 2009 the participants in which were Mr Ford, Mr Elias, Mr Rakison and Mr Eber. In that call Mr Ford recounted a conversation he had had with a third party, a Mr Eliasch, who was claiming that the principal assets of LSC (whose guarantee to SLS was by that time, as Mr Ford knew, the basis for the RAC certificates in relation to SLS) had been pledged to him and that he intended to call in the guarantees. Mr Elias purported to be aiming to ensure that the assets would be available for Mr Ford (and the bondholders) but appeared to be most concerned not to be considered to have defrauded bondholders or otherwise as having done anything wrong. He made the point that the structure was not a fund structure, but a company issuing bonds, and that "a company can do what it likes with its money". Mr Ford is recorded as saying, by way of example, that: "My interests are to protect all of our interests and make sure that bondholders are paid, okay, that's the plan." Mr Elias sought to reassure Mr Ford by telling him that he had pledged no "value", and that he did not think he had stopped any value or assets going to Mr Ford.

565. Relations between the parties then deteriorated rapidly. Mr Rakison wrote to Mr Eber on 12 January 2009 with reference to a telephone conference involving Mr Eber, Mr Ford and Mr Eliasch on 9 January 2009. A copy of that letter was sent by email to Mr Ford. In that letter Mr Rakison seeks a retraction and apology for certain statements made to Mr Eliasch, including that there was a pledge over the shares in Polymer Vision which had been entered into to enable BWT to guarantee the obligations of SLS and/or LSC. Mr Rakison's letter sets out the position as follows:

> "… neither SLS nor LSC has, and has never had, a pledge over [the Polymer Vision] shares. The position is that, on 16 April 2008 and again on 9 July 2008, guarantees were given by LSC to SLS in respect of SLS's obligations which included payment of interest to and redemption of Bonds held by SLS Bondholders. The above two guarantees were satisfactory to your firm, CIB Partners Limited ("CIB"), who were the advisers to SLS, and which was the entity that was tasked by SLS to provide the Required Asset Cover Certificate ("RAC") to enable SLS to be compliant under the terms of its Bonds … Discussions were entered into with a view to CIB providing a RAC for the period 30 September 2008 (in respect of which a draft was

prepared by CIB) and indeed for the period to 31 December 2008. A draft guarantee was prepared and this version was signed by the directors of BWT, to be held in escrow pending it being released by such directors in order to (i) enable CIB to provide the RAC for at least 30 September 2008, and (ii) to understand whether the guarantee in that form would be adequate to Stewart Ford for SLS Bondholders in connection with the loans being negotiated by David with Stewart. That subsequent guarantee was to be given direct by BWT to SLS and included a provision that the assets of TCSA [indirectly Polymer Vision] and Applejack Holdings Limited ("Applejack") were agreed to be pledged, which never took place. The guarantee remains in escrow (and I expect it will now be withdrawn) and the pledges over the assets have never been drafted, let alone completed."

566. Mr Rakison's letter also records Mr Ford and Mr Eber having told Mr Eliasch that they believed that funds had been diverted from SLS Bondholders for Mr Elias' own purposes and that "this was some type of fraud". We do not consider that this was an empty suggestion; we find that this is what Mr Ford genuinely believed at that time. Indeed, as recorded by Mr Rakison in a subsequent letter to Mr Eber of 13 January 2009 (also copied to Mr Ford), referring to what he had been told by Mr Eliasch, Mr Eber had told Mr Eliasch that the matter would be referred to the Serious Fraud Office. In view of what Mr Ford knew about the disappearance of the SLS assets, a belief that those assets had been diverted away from SLS Bondholders was perfectly understandable. It was a belief that should, with the evidence on which it was based, have been disclosed by Mr Ford to investors, IFAs, the market and the Authority. Mr Ford did not do so.

567. On 30 January 2009, Mr Eber passed on to Mr Ford dire news regarding the bonds issued by LSC, with the terse message: "I'm really concerned events will take us over." The email chain included a warning from Dexia Banque that, in view of claims in respect of interest due, the clearing systems were requiring a "default notification" to be delivered to LSC bondholders, and Ms Barker's assessment that this was "[f]urther evidence that David's world is crumbling … These poor investors are unlikely to receive a dime!".

568. On 19 February 2009, Mr Ford wrote a letter to Mr Eliasch in which he set out his belief that both he and Mr Eliasch had been "victims of David Elias' dissembling and outright dishonesty" and had been "seriously misled by David Elias over a period of many months". Mr Ford accepted in evidence that this was indeed the position he had reached, but that he did not inform the Authority, investors or IFAs. Nor was any specific disclosure made to the board of Keydata (including Mr Owen). The minutes of the board meeting of 5 February 2009 noted only that Mr Ford had advised the board, in relation to SLS, that "[Keydata] has funded £2.95m of income payments and IFA commission to date" and that "discussions were ongoing with SLS to resolve matters".

569. No substantive disclosure to the Keydata board was made by Mr Ford at the following two board meetings. At the board meeting held on 2 March 2009, the extent of Mr Ford's reporting on SLS was: "FSA review on SIB product ongoing. Key area is listing which SF was working on with a listing date targeted in April

2009" and "Counterparty issues – SLS discussions ongoing", while the minutes of the board meeting on 30 April 2009 record only that Mr Ford had advised that no real progress was being made with SLS.

570. Mr Ford did not accept that the board minutes faithfully recorded what had taken place at the meetings. His evidence was that he believed that he had "solved the problem". We do not accept that could have been a genuine belief. He accepted that no further reliance could be placed on Mr Elias providing any assets capable of repaying the SLS bondholders, but he planned to "take out the contestable portfolios, go out and acquire a portfolio of assets that I would use as part of the Lifemark II story" and thus "create a portfolio of assets, effectively get to a point where in April, or whenever the time would be, there would be a swap and there would be a portfolio of assets there for the benefit of the bondholders". That might have been a plan, but it was not at the stage of any sort of solution. Mr Ford's evidence is that he was aware that returns to investors were entirely reliant on Mr Ford purchasing, with his own funds, a portfolio from which the Keydata investors in SLS would (on novation of the liabilities, or some other unexplained mechanism) be paid. If anything needed to be disclosed, it was that. But there was no disclosure. Mr Ford's explanation, which cannot be accepted as the explanation of a person of integrity, was that he "would have rather told them at a point in time when in fact there was something for them". That failure to disclose not only deprived the SLS bondholders of material information, it deprived the Lifemark bondholders and those considering investing in Lifemark of equally pertinent information concerning a similar product.

571. In closing submissions, Mr Ford and Mr Owen sought to elaborate on the Lifemark II proposals. They referred to a gradual erosion of confidence by themselves and the Keydata management in the ability of Messrs Elias and Rakison to ensure the SLS Products met their obligations to bondholders. We have set out our findings with respect to that lack of confidence and what each of Mr Ford and Mr Owen knew at the material times. Mr Ford and Mr Owen say that it was not until late February 2009, with the commencement of litigation with respect to Polymer Vision that relations with Mr Elias and Mr Rakison broke down completely and it became apparent to Mr Ford and Mr Owen that the direct listing of the SLS bonds was no longer a viable option.

572. With respect to Mr Ford, we do not accept that submission. We have found that Mr Ford was aware from October 2008 that the SLS portfolio of life settlements had been dissipated and that from that time there was no prospect of any listing of the SLS bonds. We accept that Mr Ford did not share this information with Mr Owen, whose knowledge with regard to SLS was much more limited. We accept therefore that Mr Owen came to understand that there could be no listing of the SLS bonds only in February 2009.

573. Mr Ford's submission is that he was working on an alternative means of achieving an effective listing of the SLS bonds through Lifemark II. In closing submissions, Mr Ford described this as the "repackaging" of the SLS bonds into bonds issued by Lifemark II which would be listed on the Luxembourg Stock Exchange. Lifemark II would be created by merging together the contestable policies

acquired by Kez Trading with newly-acquired life settlement assets. The Lifemark II portfolio would then be offered (presumably to SLS) as collateral to acquire the SLS portfolio. But, as Mr Ford then clearly knew, there was no SLS portfolio. We do not accept therefore that, as Mr Ford submitted, this proposal would have removed any risk to the income and capital of the Keydata investors in the SLS Products. Nor do we accept the submission that this proposal was "innovative and imaginative commerce in the protection of the Keydata investors". In our judgment the proposal was based on a premise which Mr Ford knew to be false and it was a proposal that had no substance and no prospect of realisation.

Further statements to the Authority

574. The Authority's case is that both Mr Ford and Mr Owen misled the Authority further in January 2009. On 14 January 2009 (two days after the letter from Mr Rakison which had been copied to Mr Ford), Mr Johnson forwarded to Mr Ford an email he had received from the Authority seeking answers to certain questions that were to be discussed at the meeting held on 23 January 2009. Those questions included:

> (a) "How does Keydata obtain information on the current valuations of the SLS and Lifemark portfolios?"
>
> (b) "Who is responsible for reporting this information?"
>
> (c) "How do senior management know (or seek comfort) that the bonds are running to a full return of capital?"
>
> (d) "What is the current financial position of the SLS and Lifemark portfolio?"

575. Mr Ford claimed in evidence that he did not believe that he had received this forwarded email. He accepted that at that stage he knew that SLS was in a disastrous situation. He also said that he might not have received a further email from Mr Johnson, on 18 January 2009, in which Mr Johnson put forward suggested answers to the Authority. Mr Johnson stated that he intended to confirm that the "[c]urrent financial position of Lifemark is good" and that the "[c]urrent financial position on bonds is good – all income paid and up to date" and added: "I do not propose to talk about the [2008 Actuarial Review]" at this stage". Mr Ford was aware at this stage of the dire position of SLS and consequently of the prospects for the SLS bondholders. Mr Owen knew only that Keydata had been obliged to fund interest payments to SLS bondholders. As regards Lifemark, both Mr Ford and Mr Owen were aware of the concerns expressed by Grant Thornton as to the lack of a viable financial model and the liquidity issues thrown up by the 2008 Actuarial Review. All of these issues made Mr Johnson's proposed replies misleading. Yet Mr Owen responded to Mr Johnson on the following day only to say: "Agree peter but stewart has sls bond cert and liaises with them". Mr Ford did not provide any further information. We do not accept that Mr Ford can have been unaware of this correspondence. Although Mr Ford travelled internationally, the evidence suggests that he had little difficulty in receiving emails throughout the relevant period. It is improbable that he would have failed to receive this particular tranche of emails, and we find therefore that he did receive them and

did not disclose the true position, in particular that of SLS, to Mr Johnson even though he knew that Mr Johnson's proposed responses would be misleading.

576. In reaching that conclusion, we reject the submissions of Mr Ford and Mr Owen to the contrary. In particular, we do not accept their submission that Mr Johnson was at all material times acting in accordance with the expert advice he was receiving in his liaison with the Authority. We do not accept that it was entirely a matter for Mr Johnson and such expert advice whether or not Mr Johnson referred to the 2008 Actuarial Review in the meeting with the Authority. In our judgment, given what we have found to be within the knowledge respectively of Mr Ford and Mr Owen, it is not possible for them to deflect responsibility away from themselves in this manner.

Suspension of sales by CSSF

577. On 22 December 2008, in the email from Mr Smith to Mr Ford of that date, Mr Smith told Mr Ford that the Draft Lifemark Valuation Report would need to be provided to the CSSF. On 20 January 2009, Mr Ford, the other directors of Lifemark and Meditron attended on a conference call with the CSSF to discuss its concerns over the solvency of the Lifemark portfolio.

578. Following that call, on 23 January 2009, Dr Gerasimowicz provided additional information to the CSSF by way of a memorandum. The memorandum stated that "as the result of prudent management of cash flows, [the Lifemark portfolio] is currently structured such that solvency is expected to be achieved with a probability exceeding 95%. As we have found in relation to the Deloitte 2008 Actuarial Review, such a probability was illusory, as it assumed a false 2008 cash position. The report also falsely stated that "The additional funds of 52MM have an attached cost of capital of 7.5% and further stated that "The portfolio manager expects this capital to be re-invested in policies that will return in the range of 15-25% IRR". That was followed by a further report from Meditron to the CSSF (following the CSSF having raised further questions) in which it was stated that "The Target Average IRR is expected to be in the 17 – 25% range. As such, we ran the expected death benefit of the asset at a 21% IRR." Mr Ford was aware that these statements were unsupported. Although the average IRRs in respect of policies purchased by Lifemark in 2009 was higher than the overall average, it was still only 15%. Furthermore, in respect of the fee structure, the Meditron report simply referred the CSSF to the 2008 Actuarial Review which, as Mr Ford was aware, was based on erroneous assumptions and in particular did not include the LAS Global fees.

579. On 9 February 2009, Mr Ford was informed by Mr Smith that the CSSF "have told us we can not issue any more bonds until they are satisfied with how we operate". Mr Smith asked for guidance on what message should be sent to Keydata in this respect, having regard to the fact that a bond issue was imminent and that Keydata had £7.7 million of funds, and Keydata International £1.3 million ready for investment. It is not known what response Mr Ford provided, but Mr Johnson told us in evidence that he had not been notified of this suspension.

580. On 29 April 2009 Mr Smith confirmed to Dr Gerasimowicz and Mr Ford that the CSSF had authorised Lifemark to continue to issue bonds. That was subject to a number of conditions:

(a) The Deloitte review would have to be a semi-annual exercise.

(b) The CSSF had to be informed of a potential liquidity gap and the associated risks; Dr Gerasimowicz was asked to provide wording in this respect, which would also be included as a note to the audited financial statements.

(c) The liquidity gap should be included in the monthly investor reporting.

Mr Ford confirmed in evidence that he was aware that the CSSF wanted to be satisfied that the Deloitte model had been adopted. Mr Ford knew, however, that the Deloitte 2008 Actuarial Review, on which the CSSF was clearly placing considerable reliance, was itself misleading.

581. We do not accept, as Mr Ford submitted, that the fact that the CSSF permitted Lifemark to continue issuing bonds is evidence that the CSSF considered the Lifemark Products to be sound. As the Authority has submitted, it is clear from the CSSF's decision regarding its disciplinary action against Mr Smith that the CSSF only permitted Lifemark to continue issuing bonds on the basis of the misleading reports it had received. The decision makes clear that the CSSF only discovered the fees that were being paid to Mr Ford's companies during an on-site audit of Equity Trust in early September 2009 at which point Mr Smith "suddenly presented [LAS Global] as the 'arranger' of the [Lifemark] products" notwithstanding that "the presence of an arranger had not been mentioned at the presentation of the Lifemark project at the end of 2006 or subsequently".

582. The report went on:

> "In this context, it is important to note that [Lifemark] … obtained approval as approved securitisation organisation … by means of an incomplete and specious approval application, given that the complete structure of the prepaid commissions … had not been disclosed to the CSSF … [or] provided in any of the Prospectuses of [Lifemark] or via other information publications in connection with the securities admitted on the Luxembourg regulated market."

583. We make a similar observation with respect to Mr Ford's reliance on the fact that Lifemark's accounts for the period to 31 December 2008 were signed off by its auditors. As the Authority submitted, whilst a securitisation vehicle's accounts would not treat bondholders as creditors, and the ultimate bond liabilities would not therefore be taken into account in assessing balance sheet solvency (bondholders essentially being treated as shareholders and bond liabilities as share capital), that did not eliminate the risk to the bondholders or the liquidity risk. Any shortfall attributable to the bonds was accounted for in Lifemark by means of an equalisation provision, as explained in the audited accounts, for example those to 31 December 2008. Losses are borne by the bondholders and provision is made for this by

deducting the amount of the value diminution from the amount repayable on the bonds; that provision is included in the profit and loss account as the equalisation provision. In the accounts to 31 December 2008, the equalisation provision in Lifemark's profit and loss account was €43.4 million. That resulted in an accumulated provision of €124.3 million, which reduced the value of bondholders' liabilities on the balance sheet from the adjusted nominal amount of €518.8 million to €394.5 million. However, without further evidence, we find that it is not possible for us to conclude, as we were invited by the Authority to do, that this provision was "extremely high" and should have provided a further indication to the directors of Lifemark (including Mr Ford) that there was a significant shortfall which threatened the likelihood of the bonds being successfully repaid. Ms Juliano was not able to provide any expert analysis in this regard.

Administration of Keydata and Provisional Administration of Lifemark

584. On 5 June 2009 an Own Initiative Variation of Permission ("OIVOP") was issued by the Authority to vary Keydata's permissions with immediate effect pursuant to s 45(1)(c) (as it then was) of FSMA.

585. On that day, Keydata's solicitors wrote to the Authority to respond to certain further information requests. A copy of the email was sent to, among others, Mr Ford and Mr Owen. Much of the email is devoted to seeking to clarify certain "misunderstandings", but it also attached a spreadsheet in response to the Authority's request for information as to the dates when Keydata would receive income for distribution to holders of the SIB 1, 2 and 3 Products (namely the SLS Products).

586. The spreadsheet in question set out in tabular form, for each of SIB 1, 2 and 3, the relevant quarterly dates on which coupon payments were due to be paid under the terms of the bonds, whether on a quarterly or annual basis; the dates in each case were set by reference to the strike date for each product. That spreadsheet was, as the Authority submitted, misleading. In referring only to the contractual payment dates, the information crucially failed to disclose the fact, as known to Mr Ford and Mr Owen but never disclosed to the Authority, investors or IFAs, that SLS had not paid trail commissions to Keydata since February 2008, had been making payments late (and so not in accordance with the contractual terms represented by the spreadsheet as dates of receipt), and had not made any income payments at all in respect of amounts due from SLS from August 2008 (and we have found that Mr Owen was aware of this from October 2008).

587. On 8 June 2009, Keydata was put into administration pursuant to an application by the Authority on the grounds of insolvency. Representatives of PricewaterhouseCoopers LLP ("PwC") were appointed as administrators. The Authority considered that Keydata was balance sheet insolvent as at 5 June 2009 with total liabilities (including to HMRC) of between £5.8 million and £10.1 million. We note that Mr Ford and Mr Owen dispute that Keydata was insolvent at the relevant time, but that is not something on which we can express a view. We can note only the fact that, on the basis of the Authority's application, Keydata was put into administration.

588. The Lifemark Products had continued to be marketed in this period. DIP 9 was current and due to strike on 5 June 2009, the date of the OIVOP. At that time funds of £7 million had been collected from investors, none of whom had been made aware of the issues with either the SLS or Lifemark Products. Following the intervention of the Authority, DIP 9 did not strike. The investors' monies were returned by the administrators.

589. The evidence then reveals a damning series of payments by Lifemark to LAS International. The Authority's Financial Benefits Report in relation to Mr Ford shows that, by reference to Lifemark's escrow account bank statements with Bank of America, regular substantial payments had been made by Lifemark to LAS International from 30 January 2007 to 22 May 2008. There was then a hiatus in the making of such payments. However, after Keydata went into administration on 8 June 2009, Lifemark then made a series of payments to LAS International between 7 and 20 July 2009 totalling $18.3 million. Mr Ford was at that time a director of Lifemark; he resigned on 25 August 2009. That series of payments, we find, can only be described as a cynical raid by Mr Ford on the cash resources of Lifemark at a time when, as Mr Ford knew, the projections for Lifemark, even on the basis of false information as to its available cash and cost of capital, showed that there were significant liquidity concerns. That, in our judgment puts into perspective Mr Ford's professed concern for the bondholders in Lifemark, and SLS; cash that would otherwise have been available for those investors (or, indeed, to pay premiums on the policies in order to maintain their value) was instead channelled into a company under Mr Ford's personal control.

590. On 18 November 2009, Lifemark entered provisional administration in Luxembourg.

Expert evidence

591. The Authority's submission is that the expert evidence adduced by it (that of Ms Juliano and Mr Boger) demonstrates that both the SLS and Lifemark Products were fundamentally flawed in their structure and doomed to failure. The Authority argues that this evidence was effectively unchallenged since there was no alternative modelling before the Tribunal and neither expert was challenged on their actual calculations.

592. We do not accept that there was no challenge to the Authority's experts. We shall consider that evidence in the light both of the evidence of the expert for Mr Ford and Mr Owen, Mr Gallo, the cross-examination of Ms Juliano and Mr Boger, and the submissions of Mr Ford and Mr Owen in this respect. We should, on the other hand, say that we do not regard the objective question of the fundamental nature of the Products themselves as of material importance to our determination. We are primarily concerned with the conduct of Mr Ford and Mr Owen and in that connection their respective subjective understanding of the position with regard to the SLS and Lifemark Products at the material times. In our judgment a post-event objective analysis is of little assistance in that enquiry.

Asset/Liability mismatch

593. There is, as Ms Juliano's report at 4.5 demonstrates, a mismatch risk where bond maturities and expected policy maturities do not match, in the sense of capital repayments being required earlier than policy maturity proceeds are expected to be received. As Ms Juliano noted, absent a liquidity facility, this could give rise to significant liquidity stress. It is the case that a robust securitisation structure would have sought to either match bond maturities with the expected maturities of the policies or have liquidity facilities in place at the time of bond issuance. It was a significant weakness of both the SLS and Lifemark structures that they did not do so.

594. There were therefore risks to the investors which were not explained to them. Although it is the case that capital repayments could in theory be deferred by rollovers (and we have regard to the fact that other Keydata products had proved capable of rollover), and that further issues of bonds could themselves provide necessary liquidity until policy maturities began to crystallise, both those routes involved a matter of hope or speculation (and thus of risk) and could not be as robust as matching and a firm commitment for the provision of liquidity facilities.

595. In his submissions in relation to Lifemark, Mr Ford submitted that, prior to the Authority's intervention, Lifemark did not have a liquidity problem. That, however, is inconsistent with the objective evidence which we have considered above. He submits that mismatches in timing for bond maturities against policy maturities were identified by actuarial stochastic modelling, but that these were not foreseen at the time. With respect to Mr Ford, that is an implausible submission. The mismatch was an obvious one from the start. Equally mystifying is Mr Ford's suggestion that a liquidity gap (which he acknowledges did arise) could be dealt with, in part, by a delay in bond maturity.

596. It is suggested that any liquidity gap could have been managed in a number of ways, only one of which was a credit facility (of which none was ever put in place). Mr Ford (and Mr Owen) say that other strategies included the sale of policies, Innova insurance and "imaginative portfolio management", including LAS International and LAS Global (it being submitted that LAS International funds were also available for investor benefit and could be used to redeem bonds at maturity or otherwise provide liquidity support to Lifemark or, it is also suggested, applied for the benefit of Keydata investors in the SLS Products).

597. We reject all those submissions. Whilst we accept that policies could be sold, that would be to the detriment of the commercial rationale of the product, which depended on the increasing value of the life settlements as they approached maturity. It would also depend on there being a market for what were illiquid assets. We shall address Innova below, but suffice to say at this stage that the nature of the Innova products in our view could not have provided any form of liquidity support. We do not know what is meant by the broad expression "imaginative portfolio management"; the expert evidence did not identify any such mechanism to assist the asset/liability mismatch, but in any event we dismiss any suggestion that this could properly include any form of financial assistance from LAS International or LAS Global. We have

already referred to the raid on the Lifemark cash by LAS International in July 2009 at the very time when Lifemark was in need of liquidity support.

Fees

598. We accept the conclusion of the Authority's experts that both the SLS model and, in particular, the Lifemark model were fundamentally compromised by the level of fees they were expected to bear. The total fees paid by SLS were approximately 22% of sums invested, with origination fees at a rate of 9.6% of the death benefit of the policies. Lifemark origination fees (paid to Montage, brokers and LAS International) averaged 10.6% of the death benefit of the policies purchased (calculated by Ms Juliano as amounting to some 31% of the purchase price of each policy). Placement fees (paid to Keydata and, primarily, to Orietex/LAS Global) were calculated by Ms Juliano as averaging some 19.5% of the sums invested.

599. Ms Juliano and Mr Gallo expressed different views as to the market level of origination fees during the Relevant Period. Ms Juliano's evidence was that originator fees were typically 1.5% of the death benefit of a policy with a declared maximum of 3%. However, Ms Juliano accepted that undisclosed fees greater than 3% were also possible; such fees would be hidden from the investor by the provider finding a way of settling the policy without disclosure of the full level of the fees. Ms Juliano recognised that the market environment was challenging for providers with high standards and operating procedures. Mr Gallo split what Ms Juliano had termed "originator fees" into fees paid to brokers and agents acting for the seller of the policy and fees paid to "originators" acting for the investor, such as Montage. His evidence was that brokers/agents would be paid between 1% and 8% of death benefit but more typically between 4% and 5%, while the fees to originators were between 1% and 10% of death benefits and typically between 3% and 6%.

600. Although invited by the Authority to accept Ms Juliano's evidence as to typical origination fees in the market at the relevant time over that of Mr Gallo, we are unable to make such a distinction. Whilst we accept Ms Juliano's evidence of a normal range, that evidence is also illustrative of market practice outside that range. We do not therefore observe such a clear distinction between the evidence of Ms Juliano and that of Mr Gallo which would justify any rejection of Mr Gallo's evidence. We accept, therefore, that fees within the range indicated by Mr Gallo were not untypical at the material times.

601. It is the case, however, that if the LAS International fees are included in the origination fees (as Mr Ford argued they properly should be), the aggregate of those fees exceeded the range postulated by Mr Gallo. Mr Gallo accepted in cross-examination that the inclusion of the LAS International fees (amounting to 4% of death benefit) would take the total origination fees outside that range (the total being 9.6% as opposed to the 8% top of the range), but if excluded, so that the total of broker fees was 5.6%, they would be within that range.

602. As to the market level of servicing fees, Ms Juliano's evidence was that such fees were in the region of $1,000 per policy per year up to a maximum of $1,500. Mr

Gallo's evidence was that the servicing fees of 0.55% of face value per annum for SLS and 0.25% per annum for Lifemark were above average at the time.

603. In relation to capital raising and distribution fees, Ms Juliano's evidence was that 5-6% of death benefit would be considered high. We accept that evidence, as it was effectively unchallenged. Mr Gallo fairly stated that he did not have the experience to provide any opinion on the "validity of the requirement or magnitude of those fees".

604. We do not consider that a finding as to the market level of fees materially assists our determination. We have made particular findings as to the nature of the LAS International fees, the non-disclosure of fee arrangements benefiting Mr Ford, and the misleading omission of certain fees from financial models and reports on which reliance was placed and intended to be placed. Those aspects are, in our judgment, more material than historic evaluation of market practice. In any event, the focus of the expert evidence was not so much on the market levels of the relevant fees, but on the impact of the fees actually charged on the solvency or financial stability of SLS and Lifemark and the viability of their respective financial models.

Balance sheet and cash flow insolvency

605. Ms Juliano's evidence, at 4.6 of her report was that, on an analysis of the balance sheets of SLS and Lifemark, rather than potential issues of illiquidity, at the relevant times both were suffering from a more fundamental problem of insolvency in that liabilities exceeded their assets and they were unlikely to bridge that shortfall, including by rollover of all the issued bonds. Ms Juliano opined that the principal reasons for the shortfall appeared to have been the extraction from the structure of fees, expenses or other unattributed payments and a failure to acquire sufficient life settlement policies in the proportions advertised.

606. Ms Juliano found, on a basic solvency analysis as at September 2007 (in respect of SLS) and December 2008 (in respect of Lifemark) the liabilities of the companies (in fees, premium payments and bond payments) exceeded the expected return from their respective assets (the policies). Specifically, at those dates, Ms Juliano opined that:

(a) As at 26 September 2007, SLS's total assets (life settlement policies valued on a discounted basis as at that date by reference to the expected IRR of 12.5% plus cash reserves) equalled $153,662,956, while its total liabilities in terms of bond principal (after FX conversion) equalled $212,658,726. On this basis, at that date SLS's liabilities exceeded its assets by $61,995,770 (Juliano, at 5.3); and

(b) As at 31 December 2008, Lifemark's total assets (life settlement policies valued on a discounted basis as at that date by reference to the expected IRR of 10.55% plus cash reserves) equalled $428,915,768, while its total liabilities in terms of bond principal (after FX conversion) equalled $689,188,101. On this basis, at that date Lifemark's liabilities exceeded its assets by $260,272,333 (Juliano, at 5.2).

607. In our judgment, in the context of a securitisation of long-term assets whose return crystallises only on later maturity, a snapshot solvency analysis of this nature is of no material value. As the Tribunal itself observed in the course of Ms Juliano's evidence, such an analysis is liable to give rise to a misleading picture, as it values the assets on the one hand on a discounted basis but the bond liabilities at the undiscounted principal amount. Even if the more robust structure of matched bond durations and predicted policy maturities advocated by Ms Juliano at 4.5.8 of her report had been adopted, calculations made on this basis would show insolvency.

608. It is no answer to that observation for the Authority to say, as it did in its closing submissions, that the liabilities must be regarded as having been valued on a discounted basis because they exclude coupon payments representing the time value of the debt. That is said as a matter of submission without any evidential support, and it is in our view simply misconceived. As Ms Juliano herself said in evidence, the snapshot approach was designed to consider the value if the portfolio were liquidated and the principal amount of the bonds became due. There is no suggestion that the bonds would have to be redeemed at above par (having regard to something in the nature of "breakage" costs or fees). There is, accordingly, no question of the exclusion of future interest payments being regarded as a discount equivalent to the discount on the value of the policies by reference to the assumed IRR.

609. On the other hand the forward projections calculated by Ms Juliano on the basis of a probabilistic cash flow model are more instructive. This alternative methodology did not discount the value of the assets to provide a value at a certain date but calculated the relevant asset and liability values as at the date when all assets and liabilities had crystallised. The position ascertained by Ms Juliano was as follows:

(a) The SLS portfolio would, from 26 September 2007, have generated a lifetime positive cashflow of $233.7 million to meet total liabilities of $266 million (even ignoring ongoing fees such as servicing fees). To meet its liabilities, SLS required an IRR of 18.9% from its policies rather than the expected IRR of 12.5% (Juliano, at 5.3.8).

(b) The Lifemark portfolio would, from 31 December 2008, have generated a lifetime positive cashflow of $614,492,316 which, combined with pre-existing cash balances and anticipated interest thereon, amounted to lifetime cash assets of $728.4 million to meet total liabilities of $953.4 million. To meet its liabilities, Lifemark required an IRR of over 25% from its policies rather than the expected IRR of 10.55% (Juliano, at 5.2.17).

610. This result was effectively replicated in detailed modelling carried out by Mr Boger. Mr Boger used "Monte Carlo" simulations to model both the SLS portfolio as at September 2007 and the Lifemark portfolio at Decmber 2008 and June 2009. He used 1001 randomly generated scenarios as to the date on which insured individuals die (and thus the policies mature) as a means of determining the probability of the portfolios generating, or failing to generate, sufficient returns to meet bond repayments. This modelling demonstrated as follows:

(a) As at September 2007, the probability of the SLS bonds failing before the first repayment obligations was 95%, and in respect of subsequent repayment obligations, the probability was 100%. Even if mortality rates were double those predicted, the probability of failure by January 2011 was 99% (Boger, at 5.91 – 5.94).

(b) As at December 2008, the probability of the Lifemark bonds failing by April 2012 was 100%. Even if mortality rates were double those predicted, the Lifemark bonds would still be expected to fail over 98% of the time by April 2014 (Boger, at 5.54 and 5.57).

(c) As at June 2009, there was a 100% probability that the Lifemark portfolio would fail by April 2012. Even if mortality rates were double those predicted, the Lifemark bonds would still be expected to fail between 62% and 73% of the time by April 2013 (depending on the level of assumed starting cash) and over 96% of the time by April 2014 (Boger, at 5.41 and 5.45).

Rollovers and restructuring

611. Mr Boger also modelled the effect of rollovers:

(a) Even assuming all Lifemark investors rolled-over their investments (Mr Ford and Mr Owen postulated that an investment rollover rate of at least 20% could be expected and that in practice, based on Keydata's experience, rollovers of between 30% and 40% were not unusual), the Lifemark bonds would still fail by 2018. If 20% of investors rolled-over the Lifemark bonds would fail in 2013 (98.4% probability), if 40% the bonds would fail by 2013 (82.7% probability) or by 2014 (99% probability), and if 50% the bonds would fail by 2014 (92.6% probability) or by 2015 (100% probability) (Boger, at 5.63).

(b) Further, even on the assumption of an unlimited line of credit at a (commercially unrealistic) APR of 4.91% being available to support the Lifemark portfolio from June 2009, the amount required would exceed by some $200 million or more that which the portfolio could ever repay (Boger, at 5.70).

612. Mr Ford's case in this respect was that there were ways of solving the cash flow issues (apart from rollovers). We have rejected as unrealistic all the suggested means of plugging the liquidity gap. We also find that, having regard to the evidence of Mr Boger in particular, there was no feasible way in which, on the Lifemark model as constructed by Mr Ford and his advisers, Lifemark could have been enabled to meet its obligations. It is not in our judgment realistic or consistent with proper regard to regulatory responsibilities, in connection with obligations to retail investors, to seek to place reliance on further bond issues, whether into the retail market or otherwise, or the existence of a fortuitously favourable market for the purchase of further life settlements. An entrepreneur whose own money was at risk might have been able to take such a view, but no such position could properly be adopted by a custodian of a structure for retail investment.

613. Mr Boger modelled the restructuring of the Lifemark portfolio which would have been required to enable Lifemark to fulfil its obligations. We accept from his evidence that only the most extreme, and wholly unrealistic (in the context), restructuring could have reduced the probability of the Lifemark bonds failing to below 25%. Specifically, such restructuring would have required that:

(a) the term of the Lifemark bonds was extended by five years;

(b) the bonds were converted to "zero coupon" bonds (in other words, no interest payments are made until the final maturity date);

(c) the yield paid to investors was reduced to 1.5% (rather than the advertised 7.5% per annum); and

(d) no further trail commissions were paid to Keydata.

614. We accordingly find that, at the dates in question, there were no available means of forestalling the inevitable failure of the Lifemark bonds.

Mr Ford's proposals for funding the portfolios

615. A material part of Mr Ford's case rested on his concern for the Keydata investors and the proposals he submitted were put in place to rescue both the SLS and Lifemark portfolios. We have referred already to one of those proposals, namely Lifemark II. We address here certain other proposals. In each case, the Authority says that the proposals did not come to fruition and that they generally shared the same characteristics, namely that they involved procuring money from new investors by misleading them as to the nature of the investment and they also involved Mr Ford personally making money.

616. In respect of Lifemark, the proposals were (1) Keydata International, (2) the "Irish Deal", (3) Innova and (4) Seaport. None of the potential deals was actually carried through. In each case, Mr Ford explained that the proposals were not in fact needed, as the Lifemark portfolio was performing well. We have found that Mr Ford was aware of issues with the Lifemark portfolio. In respect of SLS, the proposal was Lifemark II and the Billericay portfolio.

(1) Keydata International

617. In his Amended Reply, Mr Ford stated that "Based on discussions with Credit Suisse and other financial institutions [Mr Ford] and Keydata management believed that a facility would have been available to Lifemark should the need arise". However, as the Authority has submitted, the evidence we had from Mr Crane of Deutsche Bank, Mr Szollosi of Credit Suisse and Mr McDonald of KBC Bank demonstrated that this could not have reasonably been a genuine belief. Any credit facility discussions were preliminary in nature only.

618. Faced with this evidence, Mr Ford's position before the Tribunal changed. Instead of a belief that a credit facility would have been available, Mr Ford argued that Keydata never really seriously talked about obtaining a credit facility from these

or any other banks. Mr Ford considered that Keydata were "experts in raising money, so we did it and we could do it and we had confidence that we could do it … We didn't need any credit facility, none." Thus, Mr Ford's case was that liquidity and cash flow issues with respect to earlier bond issues could be managed by Keydata selling more Lifemark bonds.

619. The primary means of doing this was through Keydata International, described as a mutual fund to be listed on the Cayman Islands Stock Exchange and administered from the Isle of Man. As Mr Ford explained to the Tribunal, the intention was for Keydata International (which we accept, as Mr Owen described the position, was a fund to offer products to non-UK investors and to enable UK investors to invest through their own personal life insurance bonds) to market a new fund and for investment in that fund to pay off Lifemark investors who, Mr Ford claimed, under the terms of the Lifemark Products, could be "kicked out at any time".

620. The Authority claimed that such a proposal was fundamentally flawed and that a CEO of a regulated firm should have known that. We find that such a proposal was inconsistent with Mr Ford's regulatory responsibilities to investors, both those investors who had invested in fixed term bonds but whose investments it was proposed would be redeemed early and those who were to be invited to invest in order to bail out another distressed investment, but without being made aware that was the case. Mr Ford's evidence in this regard was illuminating. As the director of a regulated firm with responsibilities for the retail investors to whom these Products had been marketed as suitable for their savings, Mr Ford's approach was in our judgment singularly cavalier. He appeared to have forgotten his regulatory responsibilities to those investors and had instead come to regard them – as an entrepreneur might - as simply a relatively cheap source of finance for his life settlements business.

621. In fact, the Keydata International fund was sold to investors, not on the basis that the funds would be used to retire existing bond obligations, but on the following basis, as set out in the Keydata International brochure:

(a) The fund was called a "Lifemark S.A. Segregated Portfolio". Mr Ford's evidence was that this did not mean that the portfolio would be a segregated fund within Lifemark. Although it might be considered that such a description could give the misleading impression that the portfolio would be so segregated, we accept the explanation given by Mr Ford and Mr Owen that the reference was to the segregation within the fund itself of the life settlement assets from other aspects of the fund, comprising or at least including renewable energy projects.

(b) The brochure claimed that "The bonds are secured against a portfolio of senior life insurance policies and cash deposits" and "Approximately 70% of the funds in the bonds are allocated to purchase a portfolio of US Life Insurance Contracts that aim to provide the Income and Capital returns. The remaining 30% is held in cash to provide liquidity for making income payments to investors and to pay the ongoing premiums and servicing costs of the insurance Contracts within the portfolio." No indication was given to investors that the monies raised would be used to retire other debt.

622. The advertised target returns for the Keydata International fund were 7.5% per year, which would be required to be generated by income on Lifemark bonds to be issued to the fund. Although such a coupon would no doubt have represented cheaper finance than a bank facility, it was unclear how this return (which was the same as on the bonds which the new monies were intended to repay) would be generated, or how the advertised ability for Keydata International investors to have penalty-free withdrawals of up to 5% per annum could have been met. We were shown no modelling to explain the cash flows involved, and we do not consider that any such modelling was undertaken. Keydata International, in our view, simply replicated the triumph of blind hope over the painstaking analysis that should have been undertaken.

623. It was, as we have found, and as the Authority submitted, unconscionable for any person with regulatory responsibilities to have considered it right and proper for investors to be simply "kicked out" midway through the duration of a product to achieve a commercial advantage for the firm, thereby undermining one of the primary bases upon which Keydata induced investors to acquire the Lifemark Products. To do so clearly demonstrates in our view a lack of integrity on the part of Mr Ford. We do not include Mr Owen in that criticism; although he was very much concerned with Keydata International, we accept that he was not a party to Mr Ford's plans for the use of the proceeds within Lifemark.

624. It is also illustrative of the unscientific approach adopted by Mr Ford that in any event there was no power, under the terms of the Lifemark bonds, for Lifemark simply to redeem the existing Lifemark bonds early. As the Authority pointed out, the terms of those bonds, as set out in the Lifemark prospectus were that redemption was on the Maturity Date of the bonds, subject to the following limited ability for bonds to be redeemed on between 30 and 60 days' notice:

> "… if (i) the Issuer is obliged to make any withholding or deduction for tax from payments in respect of the Bonds or on the occurrence of certain tax events with respect to the Issuer [broadly with respect to interest deductibility], or (ii) it becomes illegal for the Issuer to perform its obligations under the Bonds."

We do not consider that any regulated person of integrity would have proposed the early redemption of bonds in this way. In our view, such a proposal, being flawed in any event, was not one that was genuinely considered.

(2) The Irish Deal

625. This proposal was also a proposal based on the flawed approach of redeeming existing Keydata investors early. It comprised Lifemark issuing 10 year bonds to Irish investors "via a separate compartment". This was estimated to generate an expected $254 million of funds which Mr Ford suggested Dr Gerasimowicz "could do what he likes with" including redeeming existing Keydata investors in the Lifemark bonds. That, as we have described, was not contractually possible. It was also

unconscionable conduct for a regulated person. The effect, had it been achievable, would simply have deferred the liquidity and cash flow problems. (It was tantamount to a rollover of existing bonds – by way of replacement of existing bonds with new ones – which Mr Boger's modelling demonstrated would have had a very high probability of ultimate failure.)

626. An email from Mr Smith of 13 January 2008 provides further insight into the Irish deal. There is in fact no mention of Mr Ford's suggestion that the proceeds could be used to redeem existing bondholders. That, we consider, is because there was no such proposal at that time. Mr Ford has attempted to bring the Irish deal into the equation as a cash flow management tool by way of post-event rationalisation in the face of the evidence of liquidity issues and the unavailability of credit facilities. It was not such a proposal. Mr Smith's email makes it plain that it was considered to be a "general increase of Lifemark portfolio" of some £300 million. It was also expected to generate commission for LAS International, and thus for Mr Ford, of more than $40 million. We do not accept that it was ever, or was ever intended to be, a liquidity management tool.

(3) Innova

627. As regards Innova, Mr Ford's case was that he "acquired the Innova re-insurance company for US$2.5m in July/August 2007 for the sole purpose of providing insurance to the Lifemark portfolio (and other portfolios of life settlement assets)" and that "investor returns could also be financed by re-insurance, for example, Innova Insurance ('Innova')". Any suggestion, however, that Innova was any part of a solution to the cash flow or liquidity issues facing Lifemark was false, and Mr Ford was aware of that.

628. Mr Ford accepted, both in his opening submissions and in evidence, that Innova only putatively offered to insure against life expectancies being inaccurate and insured individuals living longer than expected. It did not offer insurance against the risk that the financial model was flawed, nor (absent life expectancy issues) did it have anything to do with cash flow or liquidity issues otherwise arising, for example as a result of asset/liability mismatches. In any event, as Mr Ford also accepted, at no time did Lifemark have an insurance policy with Innova. Thus, whilst in closing submissions Mr Ford referred to the evidence of Ms Juliano that "the reinsurance market can be an interesting solution if it's done right", that evidence is of no assistance to Mr Ford in the context of Innova and Lifemark. Such reinsurance was a solution only in respect of longevity risk.

629. Furthermore, as the Authority submitted, Mr Ford's case in this regard is without substance:

(a) The genesis of the idea to acquire Innova was not out of concern to reduce risk to investors but was to provide, as Mr Smith described the position in an email dated 16 October 2007 to Mr Ford and Mr Owen, after referring to advice from Mr Briginshaw as to how to stimulate investor interest, including by the use of the term "Capital Guaranteed" and in connection with a proposal to have “an Innova Insurance overlay on the portfolio linked to the bond”, “a new spark to lift its investor interest”.

(b) Innova itself did not have the resources to satisfy any insurance claims. It could only have offered a product if it had entered into a reinsurance contract with another insurance company.

(c) Negotiations with the reinsurance company proposed, CIBC Reinsurance Limited, on which Mr Ford placed considerable reliance in relation to Innova – referring to the strength of CIBC’s balance sheet – only reached the stage of them requiring due diligence on Mr Ford and the Innova directors and further information regarding the credit risk of the life insurance companies providing the policies. Although a draft Reinsurance Agreement between Innova and CIBC Reinsurance Company Limited was prepared, no reinsurance contract was ever ultimately entered into with CIBC or any other firm. The supposed support through Innova was illusory.

(4) Seaport/CSG Investments

630. In his first witness statement, Mr Ford referred to what he described as the Authority’s steps, following the administration of Lifemark, to frustrate a number of rescue proposals, including proposals from parties introduced by Mr Ford.

631. Mr Ford’s evidence was that during the first quarter of 2011 he had been part of a team working on a rescue plan for Lifemark and that in that connection he had managed to secure a term sheet offer of a $150 million loan from CGS Investments, part of Beal Bank. The loan offer described by Mr Ford was based on the following terms:

(a) The maximum available facility was $150 million, based on a lender valuation of $300 million.

(b) The facility would be secured against the entire Lifemark portfolio which Mr Ford said was understood at that time to have a face value of $1.074 billion.

(c) The loan assumed an initial drawdown of $100 million, leaving headroom of about $50 million available to deal with any shortfalls on life settlement maturities or other cash flow issues.

(d) The loan assumed an up front cash flow return to bondholders of approximately $30 – 50 million.

(e) Repayments of capital to bondholders would commence 18 months after the facility was put in place, by which time the initial drawdown of the loan would have been repaid in full, together with all interest thereon.

(f) If the facility was put in place by the end of September 2011, repayments of capital would commence in March 2013. The average quarterly distributions to bondholders would be as follows:

Year 2: $21m per quarter

Year 3: $23m per quarter

Year 4: $26m per quarter

Year 5: $22m per quarter

Year 6: $ 19.5m per quarter

(g) Over the next 4½ years (from March 2013 to September 2017), bondholders would receive quarterly repayments of capital, subject to the performance of the portfolio.

(h) If the portfolio performed as expected, bondholders would receive a total of about $574m over the next 6 years, in addition to the $30m up front payment (a total of over $600m cash).

632. Mr Ford submitted that if this loan had been allowed to proceed, it would have had the effect of returning almost all of the bondholders' money. Mr Ford worked on the project for almost a year. The time and costs of everyone involved in trying to put the deal together is described as "enormous", the financial costs being estimated at some $2 million.

633. In his evidence, Mr Ford omitted to describe the costs of the loan, which had an interest rate of three-month LIBOR + 4% and fees of 3% of the closing amount plus $120,000 annually. The loan, as described, was repayable six months prior to the maturity of the bonds. Thus, the loan had to be repaid before any bondholder received any capital repayment, even if already due. In the eventual proposal, the bonds were to be restructured for a 12 year period from the date the loans were made.

634. We are satisfied that these were genuine financing proposals. We accept the evidence of Mr Jorn to that effect. However, the loan was conditional on a satisfactory due diligence process (to be paid for by Lifemark) and CSG pulled out before this began. The proximate cause of the failure to proceed further with the proposals was, we find, the unwillingness of Beal Bank to accept the implications of the necessary bondholder voting processes to approve the loan and consequent restructuring which would have entailed certain disclosures mandated by Luxembourg law and not, as submitted by Mr Ford, any improper conduct on the part of Lifemark's administrator.

635. We also find that the assertion by Mr Ford that the loan would have had the effect of returning almost all of the bondholders' money to them is not a complete picture. In correspondence with the FSCS, referred to by Mr Jorn in an email to Lifemark's administrator of 25 August 2011, which included cash flow scenarios based on conservative, base and aggressive assumptions. The effect of the facility on a "stand alone" basis (that is, removing historical coupon payments from the calculation) showed that the measure of return of principal was 53% (conservative), 70% (base) and 79% (aggressive).

(5) Lifemark II and the Billericay portfolio

636. We have made certain findings above with respect to the proposed use of Lifemark II to secure the SLS portfolio and to enable the SLS bonds to achieve a listing.

637. The initial plan was set out by Mr Smith in an email dated 11 February 2009 to Mr Ford in which Mr Smith was seeking clarification of a number of issues. Mr Smith described the proposal as "to receive assets from [Mr Ford], being a distressed portfolio identified by Montage and financed by [Mr Ford], and to receive a contestable portfolio contributed by [Mr Ford]. Thereafter to issue notes to Keydata investors to raise new investor funds to be used to pay out [Mr Ford] for the contributed portfolios and to acquire additional policies for the portfolio."

638. At this stage it was unclear (to Mr Smith) how the SLS investors fitted into the picture. He was seeking an explanation from Mr Ford as to how the proposed structure would "benefit from SLS Capital/David and what obligations there will be for Keydata SLS investors". As things stood, the proposals amounted to no more than the generation of investor funds for the purpose of paying Mr Ford for two portfolios of life settlements.

639. Mr Ford's submissions were that by this stage he was aware that no reliance could be placed on Mr Elias and Mr Rakison, and that he regarded Lifemark II as a sort of insurance policy so that if, by May or June 2009, there had been an SLS default, Keydata would effectively take control of the SLS assets (which, we note, we have found that Mr Ford knew at that stage did not exist in terms of life settlements) through the default mechanism and use the Lifemark II portfolio as a replacement. This would be achieved by "some form of swap arrangement". None of that, however, is apparent from the February 2009 email. Even though it was proposed that Mr Ford inject a portfolio of contestables and policies purchased on a distressed sale, that was to be funded by new Keydata investors (with Mr Ford being repaid). No modelling had been done on how that fund was also to accommodate Keydata's SLS investors. Subsequent correspondence, such as an email from Mr Smith to Mr Cook at Montage, copied to Mr Ford, which refers to documents having been assembled for the Lifemark II transaction, and the move towards a prospectus, does not show that in 2009 there was any actual proposal with respect to the SLS bonds.

640. Later, on 30 June 2009, Billericay Trading Limited (a Gibraltan company beneficially owned by Mr Ford and which was entirely funded by monies received from LAS International) entered into a loan agreement with Lifemark pursuant to which Billericay lent Lifemark $17.2 million in order for it to purchase, from Billericay, the Billericay portfolio (a portfolio of life policies as set out in Schedule 2 to the loan agreement).

641. The agreement provided that Lifemark would be liable for the payment of the premiums on the Billericay portfolio. The loan was for a maximum 10-year period (the Repayment Date was on or before 30 June 2019, but there were provisions entitling Billericay to require early repayment on 12 months' notice and Lifemark to prepay in full on five business days' notice). The amount repayable was the maturity

proceeds of policies in the portfolio which had matured at the relevant time (the Repayment Date or earlier demand by Billericay for repayment) less (i) premium payments on the matured policies and (ii) payments to bondholders on redemption of bonds over and above the cash proceeds from existing Lifemark assets.

642. The Authority submitted that by putting the Billericay portfolio into Lifemark Mr Ford was able to require Lifemark to pay the premiums on that portfolio and yet still realise any ultimate value for himself. We do not accept that submission as fully describing the arrangements. Lifemark was to bear the premiums, but at the ultimate cost of Billericay (assuming no event of default entitling Billericay to full repayment of the loan). The loan itself (unless repayable in full in certain events) was limited recourse, thus throwing onto Billericay the risk that the existing portfolio was insufficient to redeem bondholders. We do not consider that these arrangements can be impugned from the outset in the way the Authority sought to portray them.

643. Nor do we regard it as material that the CSSF found, in disciplinary proceedings against Mr Smith, that the Billericay portfolio had actually "aggravated" the illiquidity of Lifemark in light of the high level of premiums and that a subsequent sale of some of the policies within the portfolio had been a "loss-making operation", and negative in terms of cash flow. That result does not, in our view, cast light upon the loan arrangements at the time they were made.

644. As noted, there were certain circumstances where, on an event of default, the Billericay loan would become repayable in full, and not on a limited recourse or subordinated basis. During the course of the Lifemark administration Mr Ford procured that Billericay took action, firstly to prevent the disposal of policies in the portfolio and to force Lifemark to pay the premiums on them, and secondly asserting an event of default in order to recover the full loan amount of $17.2 million. Mr Ford accepted that in doing so he took legal steps (unsuccessfully) to obtain repayment of the Billericay loan in priority to the Keydata investors. This again was a stark example of the conflict of interest which Mr Ford had, and which he sought to resolve in favour of his own interests and not those of the Keydata investors.

Our conclusions

Mr Ford

Fit and proper

645. Although in our analysis we have not accepted all of the Authority's submissions with respect to the conduct of Mr Ford, we are entirely satisfied that Mr Ford's conduct demonstrated a consistent failure by him to act with integrity in carrying out his controlled function, in breach of Statement of Principle 1. Indeed, for the reasons we have given above, we regard that conduct as of the most egregious kind. We consider that Mr Ford consciously and deliberately set aside his regulatory responsibilities in pursuit of entrepreneurial ambition. His professed concern for the Keydata investors who had been induced to invest in both SLS and Lifemark, and who were deliberately kept in the dark about the serious issues with both Products

which emerged, and of which Mr Ford became fully aware, was in truth a concern principally directed at maintaining the illusion of a safe and stable investment vehicle through which Mr Ford and his own vehicles received continuing and very substantial financial benefits.

646. We accept the Authority's submission that Mr Ford's actions were driven by his desire to maximise and preserve financial gain for himself without regard for the impact this would have on investors. As the facts have demonstrated, Mr Ford extracted substantial fees from both the SLS and Lifemark structures which could not be justified commercially. Mr Ford had, and continues to have, no conception of the clear conflict of interest that was created, and the conflict that actually arose to the detriment of retail investors who had entrusted Keydata with their savings.

647. A constant theme is the deliberate and calculated concealment by Mr Ford of material information, both as to the fees being extracted by Mr Ford, and as to the serious issues that arose with respect to both the SLS and Lifemark Products, from Keydata's compliance officer, investors, IFAs and the Authority. That concealment itself demonstrates a clear lack of integrity on the part of Mr Ford. We have concluded that Mr Ford had, and continues to have, a misplaced conviction that it was a matter for him to resolve any problems that arose and that those issues were not something that should be disclosed to those with a material interest. That in our judgment was not compatible with the promotion, distribution or stewardship of an investment product. It was inconsistent with the conduct expected of a regulated person.

648. The Authority submits that a finding of lack of integrity in respect of Mr Ford must follow even accepting his own case before the Tribunal. We agree, but our findings in that respect are not confined to the following matters not in dispute. Mr Ford as CEO of Keydata:

(a) personally received 1.5% of funds invested in SLS pursuant to an oral agreement with the owner of a Keydata counterparty (Mr Elias);

(b) extracted some £31 million of funds invested in Lifemark through LAS International pursuant to an agreement under which LAS International provided no services whatsoever;

(c) received a total of £36 million of funds invested in Lifemark Products through an agreement with LAS Global in return for services unrelated to those Products; and

(d) failed to inform the board of Keydata, Keydata's compliance officer or the Authority of any of those matters.

649. In our judgment, it is not necessary to itemise the litany of misconduct we have already described in respect of Mr Ford. Any summary would fail to reflect the extensive analysis we have carried out and which we have detailed above. Our clear conclusion is that Mr Ford is not a fit and proper person to conduct any functions in the financial services industry. Having said that, for completeness, and acknowledging that in certain matters of detail we have not accepted all of the

Authority's case, we accept – with some reservations as we have noted - the following submissions of the Authority, and make our own findings in those respects, as showing, in the case of Mr Ford, a clear and coherent story of misconduct. We emphasise, however, that our own conclusions are not limited to those outlined below; we base our conclusions on the full findings we have made in this decision:

(1) From 5 December 2005, Mr Ford permitted Keydata to sell the SLS Products (and took no action in respect of those already sold) despite being aware that the model on which those Products was based had been used without consent, and was said by its author, KPMG, to be unsuitable, that various representations made in respect of the SLS Products were false and Keydata's brochures in relation to those Products were misleading in material respects. Mr Ford did so, we find, because he was personally incentivised to sell those Products, in particular by way of a payment of 1.5% of the value of the investment, being a payment which he deliberately concealed from the board of Keydata, the Authority and investors, and which was a clear and obvious conflict of interest.

(2) From December 2006 (and not the slightly earlier date of 13 November 2006 as submitted by the Authority), Mr Ford failed to disclose to Keydata's compliance officer, the Authority, investors and IFAs his awareness of concerns that had arisen with respect to the SLS portfolio and consequent risk to Keydata investors and despite that awareness he allowed those concerns to be obscured by permitting, and failing to disclose to the Authority, investors and IFAs the fact that Keydata itself was funding income payments to Keydata investors in the SLS Products.

(3) From 14 November 2007, Mr Ford was aware that the SLS Products were fundamentally flawed, but he took no steps to inform the Authority, investors or IFAs of what he knew.

(4) We find that Mr Ford acted as he did because he knew that any investigation of the SLS Products would be likely to prompt an investigation into Lifemark and prejudice the lucrative, and undisclosed, personal fee arrangements he had in connection with the Lifemark Products.

(5) From 22 February 2008 (the date of the Dorchester meeting), Mr Ford concealed from Keydata's compliance officer, the Authority, investors and IFAs his awareness that SLS (through Mr Elias) were not intending to list the SLS bonds and thus that (even on what we accept was at that time Mr Ford's erroneous understanding of the effect of the ISA Regulations) the SLS Products would not be ISA compliant despite having been marketed and sold as such.

(6) Mr Ford caused Keydata to market and sell the Lifemark Products without having taken steps to ensure the financial viability of those Products and the advertised returns to investors by means of any proper, independent, financial modelling. We find that Mr Ford was concerned primarily with maintaining the flow of Products based on life settlements in order to extract fees from the money obtained from Keydata investors, and without any proper regard to the

interests of those investors at that time, whom Mr Ford regarded principally as a source of funds.

(7) Mr Ford had no basis for believing that Lifemark had a financial model capable of producing the advertised returns. The only model that was created, some six months after launch of the Lifemark Products, required policies at an IRR of 11% - 15%. Mr Ford's own case was that, allowing for the cash element of the portfolio, the required IRR was 16.66%. He knew, however, that as a result of the extraction of fees through LAS International, policies were generally only purchased at IRRs of 10% - 11%. We have rejected Mr Ford's submission that he had understood the IRR figure to have been "net of costs". We find that Mr Ford was aware of the mismatch, but did nothing to address it, nor to do anything to alert investors, IFAs or the Authority.

(8) Mr Ford caused Keydata to market and sell the Lifemark Products despite failing to ensure and, from 10 October 2007, being repeatedly informed by advisers, that the financial promotions for the Lifemark Products were not clear, fair and not misleading. We find, as regards Mr Ford, that he did not act in good faith in disagreeing with the advice of Grant Thornton with respect to due diligence and the adequacy of the Lifemark product modelling; that advice was inconvenient to Mr Ford as to follow it would have disrupted the continuing sale of the Lifemark Products and the flow of fee income for Mr Ford's benefit.

(9) As regards the Authority's submissions with regard to Mr Ford having permitted further issues of Lifemark Products despite being aware that it was highly likely that they would not perform, our findings are more nuanced than those submissions:

(a) For the reasons we have given, we did not accept the Authority's submission that Meditron Report 1, received by Mr Ford on 23 May 2007, and the further analysis received on 5 July 2007, in themselves revealed a liquidity issue that ought to have led to the abandonment of the Lifemark bond issue at that time (SIP 9).

(b) Nor did we consider that the correspondence and discussions concerning the cash position of Lifemark in February 2008 would have caused Mr Ford to have concluded that Lifemark had a structural liquidity problem.

(c) However, we have found that, given Mr Ford's awareness that the costs of raising capital had been erroneously stated in Meditron 2, Meditron 2a and Meditron 3, his failure to ensure that the error was not rectified and the doubts that the process of the production of those reports should have given rise to on the ability of Dr Gerasimowicz, without independent verification, to properly manage and report on the Lifemark Products, Mr Ford was guilty of misconduct in permitting the issue of the DIP product to proceed.

(d) We have also found that the Deloitte reports raised material cash flow deficit issues which should have been addressed by Mr Ford before further bond issues were made, but that Mr Ford failed to address those issues.

(e) Mr Ford permitted the Deloitte report to be adopted as the effective model for the Lifemark Products despite being aware that the Deloitte report had indicated that a facility of $200 million was required to address cash flow issues. Mr Ford also permitted reliance on the Deloitte 2008 Actuarial Review despite knowing that the review failed to take account of the undisclosed Orietex/LAS Global fees and thus included misleading information as to the costs of raising capital and was based, as Mr Ford knew, on a false figure for net cash funds at September 2008.

(10) Mr Ford was, as we have found, explicit about his intention to solve the problems in Lifemark by deliberately misleading further investors into investing through Keydata International and the "Irish deal" and then, without informing those investors, using the money so raised to "kick out" existing investors in Lifemark bonds. We agree with the Authority that Mr Ford's evident failure to comprehend the impropriety of such a course of action is a clear demonstration of Mr Ford's lack of understanding of the standards of behaviour required of an approved person. It showed beyond doubt Mr Ford's lack of integrity in that respect.

(11) Mr Ford extracted substantial fees from Lifemark, through companies beneficially owned by him or otherwise for his benefit. Although we have found that Mr Ford did provide services under certain of the relevant agreements (those with Orietex and LAS Global), we have also found that there was no appropriate disclosure of those arrangements, and that without such disclosure they were improper in being based on funds derived from Keydata investors. Those fees were concealed by Mr Ford from Keydata's compliance officer, the Authority, investors, IFAs and Keydata's professional advisers. We accept that it was the prospect of extracting those fees and continuing to do so that led Mr Ford to systematically conceal matters that would have been likely to have prevented further successful bond issues being made, and to ignore clear professional advice on a number of occasions that bond issues should not be made until material deficiencies identified had been addressed. In the case of LAS International, the fees were extracted with no commercial justification, and led to Lifemark acquiring policies at IRRs lower than those required to meet its obligations to bondholders.

(12) We find that from 22 December 2008, when the Authority made clear its concerns on the ISA status of the Products, Mr Ford continued to cause Keydata to market and sell the Lifemark Products as being appropriate for investment through an ISA "wrapper" despite being aware that it was likely that those Products would not fulfil the conditions set out in the ISA Regulations.

650. We also find that Mr Ford failed to deal with the Authority in an open and cooperative way, in breach of Statement of Principle 4, by failing to take any or any adequate steps to inform the Authority of the matters we have described in our analysis above, including:

(a) making false statements to the Authority in a compelled interview held on 12 November 2008;

(b) failing to instruct Keydata's compliance officer not to mislead the authority at a meeting held on 23 January 2009;

(c) being aware that the spreadsheet provided by Keydata to the Authority on 5 June 2009 was highly likely to mislead the Authority by representing that future income was expected from SLS and failing to correct the information provided;

(d) failing to disclose to the Authority his true involvement with Lifemark and the Ford companies despite knowing of its concern over his dual role as director of Keydata and Lifemark; and

(e) failing to ensure that the Authority was made aware that the Luxembourg regulator had concerns with the financial position of the Lifemark portfolio.

651. In light of these findings, the prohibition order made by the Authority in respect of Mr Ford is fully justified; indeed in our judgment it is the only appropriate sanction for such extensive regulatory misconduct.

Financial penalty

652. We have no doubt that the financial penalty imposed by the Authority on Mr Ford was justified in the circumstances. It is a very substantial penalty (amounting now to £76 million), but its amount has been determined largely by reference to the fees extracted by Mr Ford through Orietex, LAS Global and LAS International, together with an additional element (amounting to £2,640,600) reflecting the seriousness of Mr Ford's misconduct and the need for a true penal element to be included within the penalty.

653. It is clear, as we have found, that Mr Ford actively concealed material matters from investors, IFAs and the Authority, and that it was that active concealment which permitted Mr Ford to continue to reap financial benefits from SLS and Lifemark. It is therefore entirely appropriate that particular regard should be had to those financial benefits and the principle, as set out in DEPP, that a person should not benefit from their misconduct. To permit Mr Ford to retain those financial benefits would in effect be to reward him for both continuing to disregard his regulatory responsibilities over an extended period and engaging in active concealment to perpetuate his money-making activities.

654. The Authority has submitted that an aggravating factor is the level of consumer detriment caused by Mr Ford's misconduct. Mr Ford expended a great deal of time and energy seeking to show that the consumer detriment was not attributable to anything he had done, or not done, but was due entirely to the ill-conceived actions of the Authority in forcing Keydata and Lifemark into administration. We reject those submissions. Having regard to the evidence as a whole, including the expert evidence as to the objectively-assessed state of the SLS and Lifemark portfolios, and taking account of the Authority's actions, we find that the Authority acted appropriately in

performance of its regulatory functions in the face of a determined campaign of concealment and obfuscation orchestrated by Mr Ford. In our judgment the consumer detriment is laid squarely at Mr Ford's door by reason of his continuing failures to disclose to the market his own knowledge and awareness of the true position of the SLS and Lifemark Products.

655. We accept the evidence of the Authority's Financial Benefit Report in respect of Mr Ford, and the expert opinion of Mr Hunt in that regard. Mr Hunt identified only two anomalies in the report concerning transaction amounts having any financial impact. The result was to increase the aggregate amount of the financial benefits from £72,337,739 to £73,359,400. That increase is reflected in the revised penalty sought to be imposed on Mr Ford.

656. We also accept that in respect of the "disgorgement" element of the proposed penalty on Mr Ford no account has been taken of other financial benefits to Mr Ford, from Tandem Marketing and Keydata itself, which arose from, and would not have occurred but for the misconduct.

657. In relation to quantum, Mr Ford has argued that he went to very considerable lengths and procured the expenditure of large sums of money by Ford trust companies, specifically for the benefit of Keydata investors. Amongst other things, Mr Ford submits that all such expenditure believed by Mr Ford to be in the interests of Keydata investors should be considered by the Tribunal if the issue of "disgorgement" sought by the Authority arises. It is asserted that Mr Ford cannot disgorge money that he does not have, especially when Mr Ford believes that money has been spent protecting the interests of investors.

658. We accept the Authority's submissions in this regard. First, we do not accept that monies were expended by Mr Ford in the interests of Keydata investors. In our view, any rescue proposals made by Mr Ford, in particular those in relation to SLS, were primarily motivated, not by the interests of investors, but by Mr Ford's determination that it should appear that all was well so that Lifemark Products could continue to be marketed and sold, with consequent financial benefit for Mr Ford. We do not accept that Mr Ford believed that his activities were for the benefit of investors, without the material commercial benefit such expenditure would give him. Even those investments themselves were designed to provide financial benefit to Mr Ford, at the expense of others including Keydata.

659. We agree with the Authority that, even if that expenditure was intended to benefit Keydata investors, this would not justify a reduction in penalty. As the Authority submitted, the monies were wrongfully extracted and thereby wrongfully put beyond the pool of assets to which SLS and Lifemark would otherwise have had access, whether as assets of their own or contractually.

660. Mr Ford has not availed himself of the formal mechanism (set out in DEPP 6.5D) by which serious financial hardship can be raised in respect of a financial penalty. In consequence, there has been no full disclosure of Mr Ford's financial position. In any event, as the Authority has submitted, the penalty is predominantly

comprised of “disgorgement”, and that does not fall to be reduced on account of serious financial hardship (see *Fox Hayes v The Financial Services Authority*; FIN/2006/0015; 3 June 2011, at 14-15). We accordingly reject Mr Ford’s submissions in that regard.

661. We conclude in relation to Mr Ford that the appropriate financial penalty in all the circumstances is £76 million.

Mr Owen

Fit and proper

662. The cases put by Mr Ford and Mr Owen have been intertwined to a substantial extent. At the commencement of the hearing the Tribunal raised a concern that Mr Owen appeared very much to have adopted a passive stance of supporting Mr Ford’s case and had neglected to make an individual case of his own. The joint Amended Reply served by Mr Ford and Mr Owen, though making some reference to the Applicants in the plural, was very much focused on a singular applicant who can only have been understood to refer to Mr Ford.

663. Along with Mr Ford’s own oral opening submissions, Mr Owen made his own submissions. We are satisfied therefore that, ultimately, Mr Owen’s own voice was heard in these proceedings. We have been careful in our analysis to distinguish the respective roles of Mr Ford and Mr Owen, and to make individual findings, especially as to the extent of the knowledge of Mr Ford and Mr Owen respectively, and their respective responsibilities.

664. We have found that Mr Owen’s position was materially different in a number of respects from that of Mr Ford. In particular, Mr Owen, along with others, was subject to Mr Ford’s lack of candour in a number of material respects. The following is not an exhaustive list (our findings set out the complete position), but it is we consider helpful to draw the distinction:

(1) Although Mr Owen knew in general terms that Mr Ford was receiving fees from the Lifemark Products, Mr Ford did not inform Mr Owen of the nature or extent of those fee arrangements.

(2) Mr Owen had much less visibility than Mr Ford of the financial problems in SLS. He was aware from January 2007 of the possible default by SLS in making income payments and was aware of the fact that Keydata was funding those income payments. But unlike Mr Ford, Mr Owen did not know at November 2007 that the SLS Products were fundamentally flawed.

(3) Mr Owen was not informed of the serious concerns that arose out of the Dorchester meeting on 22 February 2008. Nor was he informed that the SLS portfolio had been sold or encumbered. At October 2008, Mr Owen reasonably believed that the SLS portfolio was intact. He was not aware that the RAC certificates in relation to SLS relied upon the LSC/BWT guarantees and not a life policy portfolio.

(4) Mr Owen was not aware of Mr Ford's proposals to use cash raised in Lifemark through Keydata International to make early redemption of bonds to which Keydata investors were entitled.

665. It is thus the case that we conclude that Mr Owen's conduct was not of the egregious nature of Mr Ford's conduct. Unlike the case of Mr Ford, we do not accept, on the evidence, that the commissions received by Mr Owen from Mr Ford (which we consider below) incentivised Mr Owen to "keep the show on the road", nor that they had the effect that Mr Owen offered no meaningful challenge to Mr Ford throughout the Relevant Period.

666. In its closing submissions, the Authority accepted that Mr Owen's knowledge of the failure of the SLS and Lifemark Products was very much more limited than that of Mr Ford. It accepts that it is clear from the evidence that, particularly in respect of SLS, Mr Ford took the lead in negotiating with the relevant third parties and was aware of matters that were not disclosed to Mr Owen. We would say the same in respect of Lifemark. However, the Authority's case against Mr Owen is that what he did know should have alerted him to the need for sales to be halted, the Authority to be informed and for immediate further investigations to be commissioned. For the reasons we have given, and in the particular circumstances we have described, we agree with the Authority's submission in that regard.

667. In the case of Mr Owen, however, we do not accept the Authority's submission that on Mr Owen's own case he must be found to have acted without integrity. The Authority has referred to the commission arrangements whereby Mr Owen received 1.5% of funds invested in Lifemark pursuant to an off-balance sheet arrangement with Mr Ford. Although such a commission structure is unusual, we do not consider that it shows a lack of integrity on the part of Mr Owen. It amounted to remuneration for work done by Mr Owen in marketing the life settlement Products. Secondly, the Authority points to Mr Owen's knowledge of the fact that Mr Ford was being paid fees by Lifemark. We have found that Mr Owen's understanding was general in nature and not detailed, and that it did not give rise to any obligation on Mr Owen's part to inform Mr Johnson. Thirdly, the Authority submits that Mr Owen permitted Keydata to mislead investors by allowing Keydata to make income payments on behalf of SLS. We do not consider that Mr Owen intended to mislead investors in that way. We do, however, find that this, along with other knowledge that Mr Owen had, was such as to require disclosure to investors, IFAs and the Authority, and that Mr Owen was at fault for not doing so.

668. On the other hand, our own findings with respect to Mr Owen have led us to conclude that, in certain respects, Mr Owen did act without integrity. We have referred to those findings in our analysis above, but in summary:

(1) Mr Owen permitted, indeed was instrumental in, the sale by Keydata of the SLS Products (and took no remedial action in respect of those already sold) despite being aware that the model on which those Products was based had been used without consent and was said by its author (KPMG) to be entirely unsuitable, that various representations made by Mr Elias were false and that the SLS brochures were accordingly misleading. Mr Owen compounded that

misconduct by making, and permitting to be made, false statements to the financial press, which were designed to alleviate investor and market concerns.

(2) Mr Owen failed to act upon the advice of Norton Rose to the effect that the references in the brochures to KPMG were inaccurate and likely to be misleading. Mr Owen failed to inform investors, IFAs and the Authority of that fact.

(3) Mr Owen improperly placed reliance on the adoption by Lifemark of the KPMG "model" and permitted the launch of SIB 4 when there was no financial model in place to support the advertised returns and knowing that statements made in the SIB 4 brochure were untrue.

(4) Mr Owen caused Keydata to market and sell the Lifemark Products despite failing to ensure that Keydata had carried out sufficient due diligence as to the viability of the Lifemark bonds, as advised by Grant Thornton.

(5) Mr Owen caused Keydata to market and sell the Lifemark Products despite failing to ensure and, from 7 February 2008, being repeatedly told by advisers that the financial promotions for the Lifemark Products were not clear, fair and not misleading.

(6) Mr Owen failed to have proper regard to the Meditron reports, and the advice of Grant Thornton in that respect, and allowed the continued marketing of the Lifemark Products without obtaining independent actuarial input.

(7) From February 2009 (and not the earlier date of December 2008 as submitted by the Authority) Mr Owen caused Keydata to continue to market and sell the Lifemark Products despite being aware that it was highly likely that the Lifemark Products would not fulfil the conditions set out in the ISA Regulations.

669. We also find that Mr Owen failed to deal with the Authority in an open and cooperative way, in breach of Statement of Principle 4, by failing to take any or any adequate steps to inform the Authority of the matters of which he was aware, and we have described in our analysis above, including:

(a) making false statements to the Authority in a compelled interview held on 11 November 2008;

(b) failing to instruct Keydata's compliance officer not to mislead the Authority at a meeting held on 23 January 2009;

(c) being aware that the spreadsheet provided by Keydata to the Authority on 5 June 2009 was highly likely to mislead the Authority by representing that future income was expected from SLS, and failing to correct the information provided; and

(d) failing to disclose to the Authority the commissions received from Mr Ford in respect of funds invested in Lifemark when Mr Owen was specifically asked by the Authority for details of any commissions or other benefits he had received in respect of the SLS and Lifemark Products (as to which see below).

We do not consider that, as submitted by the Authority, a case has been made that Mr Owen was in breach of Statement of Principle 4 by failing to ensure that the Authority was made aware that the Luxembourg regulator had concerns with the financial situation of the Lifemark portfolio. Whilst, as we have found, Mr Ford was fully aware of those concerns along with other members of the board of Lifemark, Mr Owen was not a director of Lifemark and we have not seen evidence that he was aware of the concerns raised by the CSSF.

670. We have accordingly found that, in the conduct we have identified, Mr Owen acted without integrity. Although his misconduct fell some way short of the egregious nature of Mr Ford's own misconduct, we have reached the conclusion, viewing Mr Owen's conduct in isolation, that he too is not a fit and proper person to conduct any functions in the financial services industry. It is in our view regrettable that, even at a late stage, and in the face of the evidence, Mr Owen sought to maintain at the hearing before us that nothing was done that was wrong. Although the final written submissions of Mr Ford and Mr Owen after the hearing were prepared to acknowledge, as they said, that "[w]ith the benefit of ten years of hindsight fertilised by a protracted litigation and twenty-three days of hearing, the truth is … that there may have been some failure of due skill, care and diligence to properly discharge every regulatory and statutory obligation of their controlled functions", that did not come close to an acknowledgement of the nature of the misconduct either of Mr Ford or Mr Owen. In the case of Mr Owen, although his misconduct was not of the order of that of Mr Ford, such a belated and qualified acknowledgement cannot affect our conclusion that the prohibition order imposed by the Authority on Mr Owen was fully justified.

Financial penalty

671. In the case of Mr Owen, the Authority has submitted that a penalty of £4 million is appropriate. In large part this comprises "disgorgement" of the undisclosed commissions that Mr Owen received from Mr Ford with respect to sales of the Lifemark Products. According to the Authority's Undisclosed Commissions Report in relation to Mr Owen, Mr Owen received £2,540,787 in undisclosed commissions from Mr Ford which related to 12 issues of the Lifemark Products (SIB 4 and SIPs 1-11). Those undisclosed commissions, according to the report, were paid to Mr Owen:

(a) directly from Mr Ford's personal bank account in Liechtenstein; and

(b) indirectly from the bank account of a trust controlled by Mr Ford, the Stewart Ford 2006 Settlement, to a corporate entity of which Mr Owen was a 50% shareholder, namely Merthyr Industrial Services (Biomass) Limited ("MerthyrCo").

672. The case of Mr Ford and Mr Owen in this respect was that the payments were not of commission, but were loans. We do not accept that submission. It is contrary to the contemporaneous evidence and also contrary to evidence given by Mr Owen in oral submissions to the RDC on 22 July 2014.

673. In re-examination, Mr Owen said that he needed capital to invest in some new business ventures and he had asked Mr Ford, whom he knew had access to a considerable amount of capital, to help. Mr Owen's preference was that this money should be in the nature of a bonus or commission, and that is what he had asked for. However, Mr Ford had always insisted that the money would be in the form of a loan. According to Mr Owen, where matters ended up was that Mr Ford agreed to provide Mr Owen with a loan facility in an amount up to 1.5% of sales of Lifemark Products. The full amount was never actually advanced but this was the maximum amount that Mr Ford was prepared to lend and that Mr Owen wished to borrow at that time.

674. The contemporaneous evidence consists of:

(a) An email from Mr Owen to Mr Ford dated 6 September 2006, in which Mr Owen calculated an amount of £1,393,176 by reference to levels of business for SIB 4 and SIPs 1-3 of £92,878,456 (1.5%).

(b) Emails of 12 October 2006 and 18 October 2006, with reference to the same issues but also including SIP 4, performing a similar calculation based on 1.5% of the new total of £115,178,456, giving an amount of £1,727,676.

(c) An email of 16 March 2007 calculating at 1.5% an amount of £2,357,676 by reference to SIB 4 and SIPs 1-6.

(d) An email of 12 December 2007 calculating 1.5% of £83.3 million on SIPs 7-11 (and SIP 11 rollover) at £1,249,500.

675. None of these emails suggest that payments were to be made by way of loan. Nor is there any evidence of loan terms being negotiated or stipulated. Indeed, at least by the time of December 2007, payment had become automatic, Ms Bagwell simply asking Mr Owen, in an email of 12 December 2007, "Which account should I transfer funds to? Your LGT?" (LGT referred to an account of Mr Owen with LGT Bank in Liechtenstein.)

676. There was no loan documentation for any of these payments. The Authority submitted that the only reference in the documents to any of these payments being a loan is a demand for repayment sent, long after the entry into administration of Keydata, on the instruction of Mr Ford by his solicitors in respect of just one of the payments. In an email dated 24 November 2011 from Mr Duthie of Withers to Mr Owen, Mr Duthie refers to a "loan" made by Pointforce to Mr Owen of £1,250,000 and advanced directly to MerthyrCo at Mr Owen's request, and other loans made by a Mr Brian Cormack on behalf of Mr Ford, and makes a demand for repayment. Interest is not calculated, but the demand is also for "all applicable interest".

677. We do not regard that email as evidencing that any of the payments to Mr Owen were loans. It is instructive, we consider, that even at a stage when such purported loans were sought to be repaid no effort was made to specify the interest said to be due on them. This is in spite of the fact, so it was said, that Mr Ford had made "repeated requests for repayment", none of which was evidenced. We agree with the

Authority that this was nothing more than a self-serving and sham request made in the context of the Authority's investigation.

678. In fact, the email dated 24 November 2011 was not the only document to refer to the payments as a loan. There was also an email dated 12 September 2011 from Pointforce Limited, as trustee of the Stewart Owen Ford 2006 Settlement, referring to a loan to Mr Owen of £1,250,000 on 30 January 2008 at an interest rate of Bank of England base rate plus 2%. The letter setting out the terms of the purported loan post-dates the asserted date of the making of the loan by some 3½ years. Whilst, therefore, the asserted date of the loan corresponds to a payment made by the Settlement to MerthyrCo on 31 January 2008, it was not contemporaneous and we do not accept that it reflects the true nature of the payment at that time.

679. Mr Ford was unconvincing in his evidence concerning the purported loans. He was unable satisfactorily to explain why a loan to assist with a start-up business should have been calculated by reference to the volume of sales of Lifemark Products, nor how he thought Mr Owen might be in a position to repay the loans. Mr Owen's assertion that the sums paid by way of loan directly contradicted his evidence to the RDC where he had stated that: "initially I thought they were commission payments and then I was told by Mr Ford they were not commission payments, they were loans and they were being paid by those companies and those loans were there". Mr Owen confirmed to the RDC that he was not told that these were loans rather than commission payments by Mr Ford until 2007.

680. We do not consider that these payments were ever loans. They were simply commission payments calculated as such by reference to sales for which Mr Owen was ultimately responsible, and for which he was credited. The only evidence that they were loans comes from Mr Ford and Mr Owen, or from documents created, we consider, at the instigation of Mr Ford, long after the payments were made. We do not believe that evidence, which we consider to be a fabrication. That in itself, both for Mr Ford and Mr Owen, displays a lack of integrity.

681. We are not deflected from that conclusion in relation to the payments to Mr Owen by evidence of a loan, which appears to have been made on 30 June 2006, by Mr Ford, or a company controlled by him, to a company, Miles Properties, Inc. for the funding of the acquisition and related project costs of the Madison Pointe Apartment project in Orlando, Florida. Although this was a project introduced to Keydata by Mr Owen, and Mr Owen had requested a loan from Mr Ford in this respect, no loan was made to Mr Owen; the loan, backed by a promissory note, was made to the US company. That loan does not form part of the undisclosed commissions that are the subject of the disgorgement element of the penalty sought by the Authority in respect of Mr Owen.

682. We have referred above to a finding that Mr Owen failed to disclose these payments to the Authority. On 7 May 2009, the Authority issued a Statutory Requirement to Mr Owen personally which sought "details of any commission(s) earned in respect of the Products" from 2005 to 2009 and "details of any commission(s) earned (or benefits) in respect of the Products". On 22 May 2009, Mr

Owen responded to confirm that he had received no commission payments related to the Products.

683. That, as Mr Owen knew, was a false statement. It was, as the Authority has submitted, clearly and deliberately misleading. Even if Mr Owen had genuinely believed that the amounts paid to him or, at his direction, to MerthyrCo, had been loans, he could not in good conscience have omitted to disclose those payments as benefits related to the Lifemark Products. Nor could they have genuinely been considered by Mr Owen not to have been a benefit of his purely because they had been invested into projects with which he was concerned.

684. We find, therefore, that Mr Owen received a benefit of £2,540,787 in respect of the Lifemark Products. That benefit arose from Mr Owen's misconduct in permitting the SLS Products and subsequently the Lifemark Products to be sold to investors (on the basis of which sales Mr Owen's benefit was calculated). It is accordingly appropriate that he be deprived of that benefit. That remains the case, in our judgment, notwithstanding that those amounts were, it can be inferred, paid from funds which Mr Ford extracted from Lifemark and which accordingly form part of the disgorgement element of the financial penalty levied on Mr Ford. There is in our view no double-counting. We accept that the principle of disgorgement is to deprive the wrongdoer of the benefit of their wrongdoing. That principle does not look to the source of the benefit (in particular if that source is also the product of misconduct) nor is it concerned with whether or how the sums in question have been disbursed or otherwise applied.

685. We agree with the Authority that Mr Owen's misconduct, viewed on its own, is such as to merit a substantial penalty above and beyond the disgorgement of benefit obtained by Mr Owen. Originally, according to the Undisclosed Commissions report, that punitive element was set at £1 million. On the basis of a penalty of £4 million as proposed by the Authority, the punitive element now amounts to £1,459,213. We have seen no justification for that increase. It is to be compared, we consider, to the punitive element of the penalty proposed for Mr Ford, amounting to £2,640,600. We regard Mr Ford's misconduct to be materially more serious than that of Mr Owen. We consider that it would be disproportionate, in light of the punitive element of the penalty proposed for Mr Ford, for that element of the penalty proposed for Mr Owen to be as high as £1.4 million. Furthermore, we also consider that a penal element of £1 million would, having regard to our findings with respect to Mr Owen's conduct, be a disproportionately high amount in his case. Having given careful consideration to the matter, we would set that element of the penalty at £700,000.

686. No formal submission has been made by Mr Owen as to serious financial hardship.

Decision

687. In light of our findings:

(1) We dismiss the references of Mr Ford and Mr Owen in respect of the prohibition orders pursuant to s 56 FSMA (the non-disciplinary references) prohibiting each of Mr Ford and Mr Owen from performing any function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm.

(2) On the reference of Mr Ford with respect to the penalty sought to be imposed under s 66 FSMA (the disciplinary reference of Mr Ford) we determine that the appropriate action for the Authority to take is to impose on Mr Ford a penalty of £76 million and we remit the reference to the Authority with a direction to impose a penalty on Mr Ford in that amount.

(3) On the reference of Mr Owen with respect to the penalty sought to be imposed under s 66 FSMA (the disciplinary reference of Mr Owen) we determine that the appropriate action for the Authority to take is to impose on Mr Owen a penalty of £3,240,787 and we remit the reference to the Authority with a direction to impose a penalty on Mr Owen in that amount.

688. Our decision is unanimous.

Application for permission to appeal

689. An application for permission to appeal in respect of a decision in a financial services case must normally be made or delivered to the Upper Tribunal so that it is received within 14 days after the date on which the Upper Tribunal sent to the person making the application (a) written notice of the decision; (b) notification of amended reasons for, or correction of, the decision following a review; or (c) notification that an application for the decision to be set aside has been unsuccessful ("the relevant event") (see rule 44(3D) of the Tribunal Procedure (Upper Tribunal) Rules 2008). Given the length of this decision, in exercise of the Tribunal's power under Rule 5(3)(a) the time for making an application for permission to appeal is extended to 28 days from the relevant event.

ROGER BERNER
UPPER TRIBUNAL JUDGE

RELEASE DATE: 6 NOVEMBER 2018

APPENDIX A

Glossary of terms

Ms Bagwell	Ms Zerina Bagwell, née Morgan, personal assistant to Mr Ford
Ms Barker	Ms Renee Barker, personal assistant to Mr Eber at CIB
BDO	BDO Stoy Hayward
Mr Bennett	Mr John Bennett, Man Financial
Billericay	Billericay Trading Limited, a Gibraltar company beneficially owned by Mr Ford
Mr Briginshaw	Mr Rob Briginshaw, Keydata Broker Executive
BWT	BWT Holdings Limited, distributor of the SLS Bonds
CIB	CIB Partners Limited, investment manager of SLS from 5 September 2007
Mr Cook	Mr Blaine Cook, owner and chief executive officer of Montage
Credit Suisse	Credit Suisse Securities
CRT	CRT Capital Investment Banking Group, investment manager of SLS until 5 September 2007
CSSF	Commission de Surveillance du Secteur Financier, Luxembourg Financial Services regulator
Mr Darby	Mr Nigel Darby, Keydata compliance manager
DIP	Defined Income Plan
Mr Eber	Mr Arnold Eber, chief executive officer of CIB
Mr Elias	Mr David Elias, beneficial owner of BWT
Mr Eliasch	Mr Johan Eliasch
Equity Trust	Until April 2008, corporate director of SLS and SLS bond registrar and paying agent
Mr Ford	Mr Stewart Owen Ford, applicant
Fortis Bank	Provider of banking services to SLS
FSCS	Financial Services Compensation Scheme
Mr Gaw	Mr Les Gaw, Keydata Operations Director until August 2005
Dr Gerasimowicz	Dr Walter Gerasimowicz, Meditron
Mr Grainger	Mr Paul Grainger, Grainger Consulting Limited and Resources Compliance, compliance consultants to Keydata

Grant Thornton	Author of a number of reports concerning Keydata on instruction of Irwin Mitchell
Grundberg Mocatta Rakison LLP	Law firm engaged by Mr Elias and SLS
HSBC	HSBC Bank USA, US trustee acting as custodian in respect of the SLS Bonds
Innova	Innova Insurance Limited, a company incorporated in Bermuda in 2003 which received a reinsurance licence in May 2005
ISA	Individual Savings Account
ISA Regulations	The Individual Savings Account Regulations 1998 (SI 1998/1870)
Mr Johnson	Mr Peter Johnson, Keydata compliance officer
Mr Jorn	Mr Todd Jorn, managing director of Global Insurance Markets for Seaborn Group
Keydata International	Keydata International Limited, structured product provider licensed by the Cayman Islands Monetary Authority
Keydata	Keydata Investment Services Limited, distributor of the SLS and Lifemark Products
KDUK	Keydata UK Limited, the holding company of Keydata
Kez Trading	Kez Trading Limited, a Gibraltar-incorporated company
KPMG	KPMG LLP
LAS Global	Las Global Limited, a British Virgin Islands company
LAS International	LAS International Limited, a British Virgin Islands company
Lifemark	Lifemark S.A., a Luxembourg company and issuer of the Lifemark Bonds
Lifemark II	A Dutch charitable entity (Stichting)
Lifemark Products	SIB 4, SIPs 1 – 14 and DIPs 1 - 8
Life settlements	Second-hand US life insurance policies
LSC	Life Settlement Capital S.A., a Luxembourg company owned or controlled by Mr Elias and which was the 100% shareholder of SLS from September 2007
LSS	Life Settlement Solutions, the originator and servicer of policies for SLS
Mr McCall	Mr William McCall, non-executive chairman of the board of Keydata UK Limited from 22 January 2002 to 12

	December 2006
Mr McCarty	Mr Michiel (Mike) McCarty, managing director of and head of investment banking at CRT
Mr McNeil	Mr Craig McNeil, finance director of Keydata
Meditron	Meditron Asset Management LLC, investment manager of the Lifemark portfolio
Mees Pierson or MPI	Mees Pierson Intertrust (Luxembourg) S.A., custodian, bond registrar and payment administrator for SLS
Montage	Montage Financial Group Inc, life settlement originator for Lifemark
Orietex	Orietex Ventures Inc., a Panamanian company
Mr Owen	Mr Mark John Owen, applicant
Polymer Vision	Polymer Vision Limited
Products	The SIBs, the SIPs, the Income Plan and the DIPs (both collectively and individually)
RAC	Required Asset Cover
Mr Rakison	Mr Robert Rakison, Grundberg Mocatta Rakison LLP
RASBs	Rainforest Asset-backed Securitisation Bonds
Relevant Period	26 July 2005 to 8 June 2009
Seaport	Seaport Group New York
Sheffield	Sheffield Merchant Banking Group, the precursor to CRT
SIB	Secure Income Bond
Mr Simon	Mr Larry Simon, chief executive officer of LSS
SIP	Secure Income Plan
SLS	SLS Capital S.A., a Luxembourg company and issuer of the SLS Bonds
SLS Products	SIBs 1 - 3
Mr Smith	Mr Colm Smith, managing partner of Tandem Partners and director of Lifemark
SOF	SOF Services, a company controlled by Mr Ford
Mr Storey	Mr Patrick Storey, partner of Grant Thornton
Tandem	Tandem Partners S.a.r.l., a Luxembourg-based firm owned and managed by Mr Smith and which provided managerial

	services to Lifemark
Tandem Marketing	Tandem Marketing Partners S.a.r.l., a subsidiary of Tandem
Mr Turner	Mr Simon Turner, lead technical adviser at HMRC
Mr Vaughan Thomas	Mr Roddi Vaughan Thomas, head of Group Communications at Keydata until the summer of 2006
Wagner policy	A Jumbo double-life policy in the name of Wagner, which formed part of the SLS portfolio in September 2008

APPENDIX B

Material provisions of DEPP (version as at 8 June 2009)

DEPP 1.2: The principal purpose of imposing a financial penalty … is to promote high standards of regulatory and/or market conduct by deterring persons who have committed *breaches* from committing further *breaches*, helping to deter other persons from committing similar breaches, and demonstrating generally the benefits of compliant behaviour. Financial penalties … are therefore tools that the *FSA* may employ to help it achieve its *regulatory objectives*.

DEPP 6.2.1: The FSA will consider the full circumstances of each case when determining whether or not to take action for a financial penalty ... Set out below is a list of factors that may be relevant for this purpose. The list is not exhaustive: not all of these factors may be applicable in a particular case, and there may be other factors, not listed, that are relevant.

(1) The nature, seriousness and impact of the suspected *breach*, including:

(a) whether the *breach* was deliberate or reckless;

(b) the duration and frequency of the *breach*;

(c) the amount of any benefit gained or loss avoided as a result of the *breach*;

(d) whether the *breach* reveals serious or systemic weaknesses of the management systems or *internal controls* relating to all or part of a *person's* business;

(e) the impact or potential impact of the *breach* on the orderliness of markets including whether confidence in those markets has been damaged or put at risk;

(f) the loss or risk of loss caused to *consumers* or other market users;

(g) the nature and extent of any *financial crime* facilitated, occasioned or otherwise attributable to the breach; and

(h) whether there are a number of smaller issues, which individually may not justify disciplinary action, but which do so when taken collectively.

(2) The conduct of the *person* after the *breach*, including the following:

(a) how quickly, effectively and completely the *person* brought the *breach* to the attention of the *FSA* or another relevant regulatory authority;

(b) the degree of co-operation the *person* showed during the investigation of the *breach*;

(c) any remedial steps the *person* has taken in respect of the *breach*;

(d) the likelihood that the same type of *breach* (whether on the part of the *person* under investigation or others) will recur if no action is taken;

(e) whether the *person* concerned has complied with any requirements or rulings of another regulatory authority relating to his *behaviour* (for example, where relevant, those of the *Takeover Panel* or an *RIE*); and

(f) the nature and extent of any false or inaccurate information given by the *person* and whether the information appears to have been given in an attempt to knowingly mislead the *FSA*.

(3) The previous disciplinary record and compliance history of the *person* including:

(a) whether the *FSA* (or any *previous regulator*) has taken any previous disciplinary action resulting in adverse findings against the *person*;

(b) whether the *person* has previously undertaken not to do a particular act or engage in particular *behaviour*;

(c) whether the *FSA* (or any *previous regulator*) has previously taken protective action in respect of a *firm*, using its own initiative powers, by means of a variation of a *Part IV permission* or otherwise, or has previously requested the *firm* to take remedial action, and the extent to which such action has been taken; and

(d) the general compliance history of the *person*, including whether the *FSA* (or any *previous regulator*) has previously issued the *person* with a private warning.

(4) *FSA guidance* and other published materials:

The *FSA* will not take action against a person for behaviour that it considers to be in line with *guidance*, other materials published by the *FSA* in support of the *Handbook* or *FSA*-confirmed Industry Guidance which were current at the time of the behaviour in question. (The manner in which *guidance* and other published materials may otherwise be relevant to an enforcement case is described in EG 2.)

(5) Action taken by the *FSA* in previous similar cases.

(6) Action taken by other domestic or international regulatory authorities:

Where other regulatory authorities propose to take action in respect of the *breach* which is under consideration by the *FSA*, or one similar to it, the *FSA* will consider whether the other authority's action would be adequate to address the *FSA's* concerns, or whether it would be appropriate for the *FSA* to take its own action.

DEPP 6.5.2: The following factors may be relevant to determining the appropriate level of financial penalty to be imposed on a *person* under the *Act*:

(1) Deterrence

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

(2) The nature, seriousness and impact of the *breach* in question

The *FSA* will consider the seriousness of the *breach* in relation to the nature of the *rule*, requirement or provision breached. The following considerations are among those that may be relevant:

(a) the duration and frequency of the *breach*;

(b) whether the *breach* revealed serious or systemic weaknesses in the *person's* procedures or of the management systems or *internal controls* relating to all or part of a *person's* business;

(c) in market abuse cases, the *FSA* will consider whether the breach had an adverse effect on markets and, if it did, how serious that effect was, which may include having regard to whether the orderliness of, or confidence in, the markets in question has been damaged or put at risk. This factor may also be relevant in other types of case;

(d) the loss or risk of loss caused to *consumers*, investors or other market users;

(e) the nature and extent of any *financial crime* facilitated, occasioned or otherwise attributable to the breach; and

...

(3) The extent to which the *breach* was deliberate or reckless

The *FSA* will regard as more serious a *breach* which is deliberately or recklessly committed. The matters to which the *FSA* may have regard in determining whether a *breach* was deliberate or reckless include, but are not limited to, the following:

(a) whether the *breach* was intentional, in that the *person* intended or foresaw the potential or actual consequences of its actions;

(b) where the *person* has not followed a *firm's* internal procedures and/or *FSA guidance*, the reasons for not doing so;

(c) where the *person* has taken decisions beyond its or his field of competence, the reasons for the decisions and for them being taken by that *person*;

(d) whether the *person* has given no apparent consideration to the consequences of the *behaviour* that constitutes the *breach*;

...

If the *FSA* decides that the *breach* was deliberate or reckless, it is more likely to impose a higher penalty on a *person* than would otherwise be the case.

(4) Whether the *person* on whom the penalty is to be imposed is an individual

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

(5) The size, financial resources and other circumstances of the person on whom the penalty is to be imposed

(a) The *FSA* may take into account whether there is verifiable evidence of serious financial hardship or financial difficulties if the *person* were to pay the level of penalty appropriate for the particular *breach*. The *FSA* regards these factors as matters to be taken into account in determining the level of a penalty, but not to the extent that there is a direct correlation between those factors and the level of penalty.

(b) The purpose of a penalty is not to render a person insolvent or to threaten the person's solvency. Where this would be a material consideration, the *FSA* will consider, having regard to all other factors, whether a lower penalty would be appropriate. This is most likely to be relevant to a *person* with lower financial resources; but if a *person* reduces its solvency with the purpose of reducing its ability to pay a financial penalty, for example by transferring assets to third parties, the *FSA* will take account of those assets when determining the amount of a penalty.

(c) The degree of seriousness of a *breach* may be linked to the size of the *firm*. For example, a systemic failure in a large firm could damage or threaten to damage a much larger number of consumers or investors than would be the case with a small firm: *breaches* in *firms* with a high volume of business over a protracted period may be more serious than *breaches* over similar periods in *firms* with a smaller volume of business.

(d) The size and resources of a *person* may also be relevant in relation to mitigation, in particular what steps the person took after the *breach* had been identified; the *FSA* will take into account what it is reasonable to expect from a *person* in relation to its size and resources, and factors such as what proportion of a *person's* resources were used to resolve a problem.

...

(6) The amount of benefit gained or loss avoided

The *FSA* may have regard to the amount of benefit gained or loss avoided as a result of the *breach*, for example:

(a) the *FSA* will propose a penalty which is consistent with the principle that a *person* should not benefit from the *breach*; and

(b) the penalty should also act as an incentive to the *person* (and others) to comply with regulatory standards and required standards of market conduct.

(7) Difficulty of detecting the *breach*

A *person's* incentive to commit a *breach* may be greater where the *breach* is, by its nature, harder to detect. The *FSA* may, therefore, impose a higher penalty where it considers that a *person* committed a *breach* in such a way as to avoid or reduce the risk that the *breach* would be discovered, or that the difficulty of detection (whether actual or perceived) may have affected the *behaviour* in question.

(8) Conduct following the *breach*

The *FSA* may take the following factors into account:

(a) the conduct of the *person* in bringing (or failing to bring) quickly, effectively and completely the *breach* to the *FSA's* attention (or the attention of other regulatory authorities, where relevant);

(b) the degree of co-operation the *person* showed during the investigation of the *breach* by the *FSA*, or any other regulatory authority allowed to share information with the *FSA*, such as an *RIE* or the *Takeover Panel*. Where a *person* has fully co-operated with the *FSA's* investigation, this will be a factor tending to reduce the level of financial penalty;

(c) any remedial steps taken since the *breach* was identified, including whether these were taken on the *person's* own initiative or that of the *FSA* or another regulatory authority; for example, identifying whether *consumers* or investors or other market users suffered loss and compensating them where they have; correcting any misleading statement or impression; taking disciplinary action against staff involved (if appropriate); and taking steps to ensure that similar problems cannot arise in the future; and

(d) whether the *person* concerned has complied with any requirements or rulings of another regulatory authority relating to the *breach* (for example, where relevant, those of the *Takeover Panel*).

(9) Disciplinary record and compliance history

The *FSA* may take the previous disciplinary record and general compliance history of the *person* into account. This will include:

(a) whether the *FSA* (or any *previous regulator*) has taken any previous disciplinary action against the *person*;

(b) whether the *person* has previously undertaken not to do a particular act or engage in particular *behaviour*;

(c) whether the *FSA* (or any *previous regulator*) has previously taken protective action in respect of a *firm* using its own initiative powers, by means of a variation of a *firm's Part IV permission*, or has previously requested the *firm* to take remedial action and the extent to which that action has been taken.

(d) the general compliance history of the *person*, including whether the *FSA* (or any *previous regulator*) has previously brought to the *person's* attention, including by way of a private warning, issues similar or related to the conduct that constitutes the *breach* in respect of which the penalty is imposed.

A *person's* disciplinary record could lead to the *FSA* imposing a higher penalty, for example where the *person* has committed similar *breaches* in the past.

In assessing the relevance of a *person's* disciplinary record and compliance history, the age of a particular matter will be taken into account, although a long-standing matter may still be relevant.

(10) Other action taken by the *FSA* (or a *previous regulator*)

Action that the *FSA* (or a *previous regulator*) has taken in relation to similar *breaches* by other *persons* may be taken into account. This includes previous actions in which the *FSA* (whether acting by the *RDC* or the *settlement decision makers*) and a *person* on whom a penalty is to be imposed have reached agreement as to the amount of the penalty. As stated at DEPP 6.5.1G (2), the *FSA* does not operate a tariff system. However, the *FSA* will seek to apply a consistent approach to determining the appropriate level of penalty.

(11) Action taken by other domestic or international regulatory authorities

Considerations could include, for example:

(a) action taken or to be taken against a *person* by other regulatory authorities which may be relevant where that action relates to the *breach* in question;

(b) the degree to which any remedial or compensatory steps required by other regulatory authorities have been taken (and whether taken promptly).

(12) *FSA guidance* and other published materials

(a) A *person* does not commit a *breach* by not following *FSA guidance* or other published examples of compliant behaviour. However, where a *breach* has otherwise been established, the fact that guidance or other published materials had raised relevant concerns may inform the seriousness with which the *breach* is to be regarded by the *FSA* when determining the level of penalty.

(b) The *FSA* will consider the nature and accessibility of the *guidance* or other published materials when deciding whether they are relevant to the level of penalty and, if they are, what weight to give them in relation to other relevant factors.

…

APPENDIX C

Approved transcript of the Tribunal's decision on the application of Mr Tim Harrop to set aside the witness summons issued on 6 October 2017

18 October 2017

JUDGE BERNER:

1. I am going to give the decision of the tribunal.

2. The real question here, as was indicated in the exchange I had with Mr Brown, is not the question whether Mr Harrop is to be required to make any sort of disclosure or produce documents. That, on the face of the witness summons, is not required. All that the witness summons required Mr Harrop to do was to attend and give evidence as a witness.

3. There is, however, a question of substance in relation to the assertion of legal professional privilege in this case vis-à-vis advice which may have been given by Allen & Overy to Keydata. As Mr Brown has rightly submitted, there has been an important case on this, the case of *Garvin Trustees Limited v The Pensions Regulator and Desmond & Ors* (FS/2010/0010; 17 November 2014), which is a case in this tribunal in regulatory proceedings, although of a different variety from those that we are concerned with here. At paragraph [24] of that decision the general point is made that privilege is simply the right to resist the compulsory disclosure of information, and it is for the person who is entitled to that right to assert it, and the authority cited in *Garvin* in that respect is the well-known authority of *Three Rivers DC v Bank of England (No. 6)* [2004] 3 WLR 1274.

4. That requirement is modified in the case of solicitors and, of course, Mr Harrop is a solicitor with the firm of Allen & Overy. Solicitors have a duty to maintain privilege on behalf of a client or former client, and the basis for that is the continuing duty of confidentiality which is owed by a solicitor to a client. But it is clear from *Garvin* that the duty to maintain confidentiality cannot survive the dissolution of the company, subject to the points which I will come on to in a moment that Mr Brown makes about the possibility of a company being restored to the register. Once a company is dissolved, it cannot enforce any obligation of confidentiality. That right, along with any right to assert privilege, vests in the Crown as *bona vacantia* but, as *Garvin* makes clear at paragraphs [38] to [39], the Crown's role is akin to one of custodian and not a successor in title, so that the Crown has no power to act on its own behalf either to assert privilege or to enforce an obligation of confidentiality. For that reason, although no steps have been taken to ascertain the view of the Crown in this particular case, that was not necessary. It is certainly the case that no assertion of privilege by the Crown has been made in this case, and such an assertion would have to be made or capable of being made.

5. There is thus, in my judgment, no basis on which privilege can be asserted on behalf of Keydata. The only way that privilege could be asserted would be if Keydata were restored to the register and itself asserted privilege.

6. I have heard what Mr Brown has submitted in relation to the process that would arise if Keydata were restored to the register, namely that Keydata would be treated as having always had the relevant rights. That situation is hypothetical because Keydata has not been restored to the register and there has been no indication that any steps have been or would be taken for Keydata to be restored to the register. It appears to me that what is being argued is that there is a sort of limbo period where privilege can be asserted where, in fact, no privilege would ever be asserted in reality, and that cannot be right. The mere possibility of a company being restored to the register is not, in my judgment, sufficient to enable a duty of confidentiality or a right to assert privilege to endure.

7. For those reasons I conclude that privilege cannot be asserted in this case and that the witness summons should not be set aside on that basis. I need not, in light of that conclusion, deal with the other points that were made concerning the question of waiver of privilege and whether there were any relevant limitations on that.