[2018] UKUT 0435 (TCC)

Reference number: FS/2016/010

FINANCIAL SERVICES – public censure and partial prohibition for knowingly or recklessly making misleading statements – whether Applicant's conduct deliberate or reckless – whether Applicant acted without integrity

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

ANDREW TINNEY

Applicant

- and –

THE FINANCIAL CONDUCT AUTHORITY

Respondent

Tribunal: Judge Greg Sinfield
Mrs Catherine Farquharson
Mr John Woodman

Sitting in public at the Rolls Building, Fetter Lane, London EC4A 1NL on 23 – 26 and 30 - 31 January 2018 and in private on 26 March 2019

Guy Philipps QC, at the hearing in January 2018, and Saima Hanif, counsel, at the hearing in March 2019, instructed by Withers LLP, solicitors, for the Applicant

Benjamin Strong QC, at the hearing in January 2018 only, and Richard Mott, counsel, instructed by the Financial Conduct Authority, for the Respondent

DECISION

Introduction

1. This reference concerns the behaviour of the Applicant, Mr Andrew Tinney, in his role as the Chief Operating Officer ('COO') of Barclays Wealth and Investment Management ('Wealth'), a division of Barclays Bank PLC ('Barclays').

2. The Financial Conduct Authority ('FCA') alleged that Mr Tinney deliberately (alternatively, recklessly) made false or misleading statements and omitted material information about a document ('the GenVen Document') concerning the culture of Barclays Wealth Americas ('BWA'), a branch of Wealth based in New York on two separate occasions between 26 September and 17 December 2012. The first was in drafting a note ('the Kalaris Note') for the CEO of Wealth, Tom Kalaris, to send to Barclays' senior management in response to an anonymous email ('the Anonymous Email') alleging that "a Wealth cultural audit report" had been suppressed. The second occasion was in connection with a response to a request by the Federal Reserve Bank of New York (the 'New York Fed'), which is one of Barclays' regulators in the United States, for a copy of the "BWA cultural audit".

3. In a Decision Notice issued on 8 July 2016 and published on 14 September 2016, the Regulatory Decisions Committee ('RDC') of the FCA found that Mr Tinney had recklessly made misleading statements and omissions to certain colleagues as to the nature and/or existence of the GenVen Document. The RDC concluded that Mr Tinney's conduct was serious and contravened APER 1, which provides that an approved person must act with integrity in carrying out his controlled functions. The RDC held that Mr Tinney was not a fit and proper person to perform such functions because he lacked integrity. In the Decision Notice, the RDC decided to:

> (1) publish a statement of misconduct (a 'public censure') by Mr Tinney under section 66 of the Financial Services and Markets Act 2000 ('FSMA'); and
>
> (2) make an order under section 56 of the FSMA, prohibiting Mr Tinney from performing any senior management function and any significant influence function in relation to a regulated activity (the 'partial prohibition order').

4. Mr Tinney referred the Decision Notice to the Upper Tribunal on 4 August 2016. He denied the allegations of misconduct and contended that he had done nothing wrong. On that basis, he submitted that the Upper Tribunal should direct the FCA to take no action against him. In the event that the Tribunal finds any allegations of misconduct proved, then Mr Tinney asked to make further submissions on the question of the appropriate sanction.

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

6. For the reasons set out below, we have found that, when he drafted his second and third drafts of the Kalaris Note, Mr Tinney was reckless as to whether the note might give the impression that the GenVen Document had never existed and, in doing so, Mr Tinney acted without integrity in breach of APER 1. We have also found, however, that the FCA

has not proved that Mr Tinney, either deliberately or recklessly, made false or misleading statements or omitted material information about the GenVen Document in relation to the request by the New York Fed and thus acted without integrity.

Legislative framework

7. The FCA's regulatory objectives are set out in section 1B of the FSMA and include securing an appropriate degree of protection for consumers and protecting and enhancing the integrity of the UK financial system.

8. Section 56 of the FSMA provides that 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 an authorised person. The FCA's guidance as to how it assesses fitness and propriety is set out in the FIT section of its handbook. This provides that the most important considerations in assessing fitness and propriety include the person's "honesty, integrity and reputation" (FIT 1.3.1G).

9. Section 66 of the FSMA provides that, where it appears to the FCA that a person is guilty of misconduct and it is satisfied that it is appropriate in all the circumstances to take action, the FCA may impose a penalty on the person of such amount as the FCA considers appropriate or publish a statement of the person's misconduct. Misconduct includes failure, while an approved person, to comply with a Statement of Principle issued under section 64 of the FSMA. The Statement of Principle relevant to this reference is APER 1 which provides that an approved person must act with integrity in carrying out a controlled function.

Meaning of integrity

10. The meaning of integrity was considered by the Tribunal in *Hoodless and Blackwell v FSA* (2003). The Tribunal observed 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.)"

11. While the passage quoted above is useful guidance as to the meaning of the concept, the second sentence is clearly not the only circumstance in which a person can be said to lack integrity. In the subsequent cases of *Vukelic v FSA* (2009) at [23] and *Atlantic Law LLP and Greystoke v FSA* [2010] UKUT B30 (TCC) at [96], the Tribunal has cautioned against attempting to formulate a comprehensive definition of integrity. As the Tribunal in *Vukelic* observed, integrity remains a concept "elusive to define in a vacuum but still readily recognisable by those with specialist knowledge and/or experience in a particular market."

12. The Tribunal in *First Financial Advisors Limited v FSA* [2012] UKUT B16 (TCC) agreed with the observation in *Vukelic* and endorsed the guidance in *Hoodless* and *Atlantic Law*. At [119], the Tribunal observed:

> "Even 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."

13. We agree. A lack of integrity does not necessarily equate to dishonesty. While a person who acts dishonestly is obviously also acting without integrity, a person may lack integrity without being dishonest. 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. Such behaviour was found to be evidence of a lack of integrity by the Tribunal in *Vukelic* 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."

14. The Tribunal in *Allen v FSA* (2009) adopted the view of the Tribunal in *Vukelic* that to turn a blind eye to the obvious and to fail to follow up obviously suspicious signs is a lack of integrity. We agree with the views expressed in *Vukelic* and *Allen* but note that 'recklessness' is a difficult concept that is not defined in the FSMA or Statements of Principle produced by the FCA. In *R v G* [2003] UKHL 50, [2004] 1 AC 1034, the House of Lords construed 'recklessly' in the Criminal Damage Act 1971 as meaning that a person acts recklessly when he is aware of a risk that a circumstance exists or a result will occur and it is, in the circumstances known to him, unreasonable to take the risk. The House of Lords based its interpretation on the definition proposed by the Law Commission in clause 18(c) of the Criminal Code Bill annexed to its Report on Criminal Law: A Criminal Code for England and Wales and Draft Criminal Code Bill, Vol 1 (Law Com No 177, 1989). A similar definition of recklessness was included in a draft Bill for reforming the law of offences against the person, which the Government published in 1998 but did not take forward. The definition was quoted by Lady Hale and Lord Toulson, in a joint judgment, in *Rhodes v OPO & Anor* [2015] UKSC 32 at [84]. They pointed out that recklessness is a word capable of different shades of meaning and presents problems of definition. However, they set out the definition proposed by the Law Commission in a scoping consultation paper on Reform of Offences against the Person (LCCP 217, 2015):

> "A person acts recklessly with respect to a result if he is aware of a risk that it will occur and it is unreasonable to take that risk having regard to the circumstances as he knows or believes them to be."

We adopt that proposed definition as an appropriate standard of recklessness in this case.

Details of the alleged misconduct

15. The FCA justified its decision partially to prohibit Mr Tinney from carrying out any controlled function and issue a public censure by reference to two specific instances of alleged misconduct on the part of Mr Tinney.

16. The first allegation was that, in preparing some drafts of the Kalaris Note to Mr Agius and Mr Jenkins to inform them of the allegations made in the Anonymous Email in September 2012, Mr Tinney acted without integrity in breach of APER 1 in that he:

(1) intended the Kalaris Note to give the impression (or was reckless as to whether it gave the impression) that Genesis Ventures had not produced anything in writing, which he knew to be false;

(2) deliberately omitted any mention of the GenVen Document when it was obvious that any person investigating the Anonymous Email's allegation that a recently issued Wealth cultural audit report, prepared by a third-party consultancy, had been suppressed should be informed of the existence of the GenVen Document and what had become of it; and

(3) closed his mind to the likelihood that the Anonymous Email was referring to the GenVen Document and the legitimate interest that Mr Agius, Mr Jenkins and the Salz Review team had in being made aware of the existence of the GenVen Document.

17. The second allegation was that in relation to a request, originally made by the New York Fed, for a document relating to the "BWA cultural audit", Mr Tinney acted without integrity in breach of APER 1 in that he:

(1) knowingly made false or misleading statements to Erin Mansfield, Barclays' Global Head of Regulatory Relations, in emails on 1 and 6 December 2012 and during a telephone conversation on 6 December and made further false or misleading statements to her and to Mr Kalaris during a meeting on 10 December;

(2) having learned that the New York Fed was requesting a document, he closed his mind to the likelihood that the New York Fed wanted a copy of, or to know of the existence of, the GenVen Document and, having done so, deliberately made statements which made it less likely that either Ms Mansfield or the New York Fed would ask for a copy of the GenVen Document; and

(3) thereby recklessly risked frustrating Barclays' attempts to comply with a legitimate request from a regulator.

18. In addition, the FCA alleged that Mr Tinney made false statements to the Institute of Chartered Accountants in England and Wales ('ICAEW') and the FCA on four occasions in 2013. These were not put forward as separate examples of misconduct but as 'aggravating factors'.

Evidence

19. The FCA provided statements from six witnesses, namely:

(1) Jonathan Peddie, former Managing Director of Group Litigation and Investigations at Barclays PLC

(2) Neil Vowden, former Senior Investigations Manager in Group Litigation and Investigations at Barclays PLC

(3) Michael Walters, Global Head of Compliance and Regulatory Affairs and Managing Director for Conduct and Risk at Barclays PLC

(4) Erin Mansfield, Managing Director and Global Head of Regulatory Relations of Barclays PLC;

(5) Antony Jenkins, the former CEO of Barclays PLC; and

(6) Dominic Stearns, the former Head of Compliance at Wealth.

20. Mr Tinney did not wish to cross-examine Antony Jenkins and he was not called to give evidence orally. Another of the FCA's witnesses, Mr Stearns, did not give oral evidence. Mr Tinney had wanted to cross-examine him but, although the FCA wished to call him, he lives in Switzerland and declined to attend the hearing. The FCA sought to rely on his statement as hearsay.

21. Evidence on behalf of Mr Tinney was provided in the form of witness statements and oral testimony by Mr Tinney and Justin Doll, COO of BWA and director of Wealth's remediation program.

22. Two persons who featured prominently in the relevant events but who did not provide a witness statement or give evidence are Tom Kalaris and Duncan Perry, who was the Global General Counsel of Wealth at the relevant time. This gave rise to difficulties in that the FCA sought to rely on emails and notes written by Mr Perry as well as covert tape recordings made by him and answers given by him in interviews conducted by Simmons and Simmons, the law firm which assisted Barclays' investigation into the allegations in the Anonymous Email, and in compelled interviews by the FCA subsequently. Mr Perry and Mr Kalaris were not available to be cross-examined. In the circumstances, we could not accept the version of events given to Simmons and Simmons or the FCA by Mr Perry unless it was corroborated by other evidence or accepted by Mr Tinney.

Findings of fact

23. This part of our decision sets out findings of fact relevant to the reference. It is common ground that the burden of proof is on the FCA and the standard of proof to be applied in this case is the ordinary civil standard of proof on the balance of probability, namely whether the alleged misconduct more probably occurred than not – see *Re S-B Children* [2009] UKSC 17 paragraphs 10 - 14. Our findings are made on the basis of the evidence presented to us and inferences that we have drawn from such evidence.

General background to alleged misconduct

24. Barclays is a major global financial services provider engaged in retail banking, credit cards, wholesale banking, investment banking, wealth management and investment management services. It is a public limited company. As at 31 December 2012, it operated in over 50 countries and employed approximately 140,000 people. During the period in question its CEO was Bob Diamond (until July 2012) and then Antony Jenkins.

25. Wealth was one of the five divisions within Barclays. Wealth provided a full range of wealth management services to high net worth clients globally. During the period in question, the CEO of Wealth was Tom Kalaris. Mr Kalaris was also a member of Barclays's Executive Committee. Mr Kalaris recruited Mr Tinney to be the Global COO of Wealth in May 2010.

26. Mr Tinney is a chartered accountant, having qualified in 1991. He became a partner in Arthur Andersen in 1997. Following the division of Arthur Andersen, he joined Deloitte's financial services consulting practice in 2002. In 2003, he left private practice to become Deutsche Bank's Asia Pacific Chief Financial Officer ('CFO'). In 2008, he moved to London to become Deutsche Bank's UK CFO. He then moved to Barclays as Wealth's COO in May 2010.

27. Mr Tinney was approved by the FCA to carry out the CF29 (Significant Management) controlled function from 20 May 2010 until 14 January 2013. As such, he was required, in that period, to comply with the Statements of Principle for Approved Persons ('APER') made by the FCA under section 64 of the FSMA.

28. In his role as Wealth's COO, Mr Tinney's responsibilities included overseeing Wealth's global technology, operations and infrastructure activities and its compliance function, and he also had joint responsibility for Wealth's legal function. Mr Tinney reported direct to Mr Kalaris. Mr Tinney said that he found Mr Kalaris to be a micro-manager with a very forceful and controlling manner who was confident but also paranoid. He said that Mr Kalaris wanted to be kept in the loop in case anybody sought to criticise him or any of the key people around him. Mr Tinney said that Mr Kalaris's style of management required any decisions to be discussed and agreed with him first and the only way to survive and to build Mr Kalaris's trust was to ensure that he knew and approved of everything in advance.

29. BWA operated through Barclays Capital Inc ('BCI') which was part of Barclays' investment banking division, Barclays Capital ('BarCap'). BCI's main regulators were the US Securities and Exchange Commission (the 'SEC'), the New York Fed, and the Commodity Futures and Trading Commission. During the period in question, the CEO of BWA was Mitch Cox. Mr Kalaris had recruited Mr Cox from Merrill Lynch ('Merrill') together with a number of other former Merrill's senior managers to lead a merger of various legacy businesses in the US into BWA. The BWA senior managers responsible for the conduct of BWA's business reported through Mr Cox to Mr Kalaris.

The SEC Deficiency Letter

30. Between July and November 2011, the SEC carried out an onsite examination of BWA. This examination identified a significant number of deficiencies, which were set out in an exit interview with the SEC on 20 December. On 25 January 2012, the SEC sent a letter ('the SEC Deficiency Letter') to Mr Cox which identified a large number of serious deficiencies and weaknesses in the operations of BWA in respect of which the SEC required immediate corrective action. As a result, Mr Kalaris asked Mr Tinney to oversee the SEC remediation process to remedy the deficiencies in BWA identified in the SEC Deficiency Letter. Mr Tinney attended a meeting with the SEC on or about 27 January at which he assured the SEC that he would personally make sure that the issues raised in the SEC Deficiency Letter were addressed fully and comprehensively.

The culture audit workstream

31. Shortly after his meeting with the SEC, Mr Tinney decided that there should be a workstream within the remediation programme to look at the culture at BWA. It was called the culture audit workstream and was to be overseen by the Steering Committee discussed in [35] below. Mr Tinney said that this was his idea and not directly responsive to the SEC Deficiency Letter or required by the SEC. Mr Kalaris approved this work being carried out. Mr Tinney decided to engage two consultants:

> (1) Genesis Ventures, a consultancy run by Tom Biesinger and Ross Wall; and
>
> (2) Erin Hilgart LLC, a consultancy run by Ms Erin Hilgart.

32. Mr Tinney's Chief of Staff, Ms Griffiths, contacted Genesis Ventures about the culture audit workstream at the beginning of February. Mr Tinney had worked with

Genesis Ventures when he had been at Deutsche Bank and had continued to engage them for management coaching and similar matters at Barclays. Mr Tinney's idea was that there should be a review of how the tone at the top filtered down through BWA and a bottom up review looking at how problems were escalated upwards. He wanted a range of employees to be interviewed as part of the review and he suggested that Genesis Ventures might be assisted by Ms Hilgart, who he thought would be a better person to interview the more junior employees. Mr Tinney said that he did not have any fixed idea at the outset of where this work would lead. He said it was more like a voyage of discovery. There were other aspects to the culture audit workstream, including a workshop on 29 May 2012, which are discussed below.

33. On 8 February, Mr Tinney spoke with Tom Biesinger and Ross Wall of Genesis Ventures about the scope of the report. Mr Tinney said that he told them he wanted them to carry out an independent exercise and that he wanted their assessment of whether major management changes were needed in BWA. On 10 February, Genesis Ventures sent Mr Tinney, at his request, a couple of pages setting out an outline of what a full culture audit might contain.

The second SEC meeting

34. On 10 February, Mr Tinney had a second meeting with the SEC. At this meeting, Mr Tinney mentioned the culture audit workstream as a separate component of the SEC remediation programme but did not describe what it would contain or seek to address. At the end of the meeting, George Canellos, Head of Enforcement at the SEC spoke to Mr Tinney alone and revealed that the SEC had received an email ('the Second Whistleblowing Email') which raised concerns about the compliance culture of BWA. These concerns appeared to Mr Tinney to be similar to concerns raised in an anonymous email ('the First Whistleblowing Email') that had been received by BWA on 30 December 2011 which alleged that BWA management were hostile to those raising compliance-related concerns. Mr Canellos asked Mr Tinney whether Barclays had received similar correspondence and Mr Tinney confirmed that BWA had received the First Whistleblowing Email. Mr Canellos also asked Mr Tinney whether the First Whistleblowing Email had influenced his decision to include the culture audit workstream in the SEC remediation exercise. Mr Tinney said that it was one of the reasons but that it was not the only reason and he had wanted to make sure that what BWA did to meet the SEC's immediate requirements was sustainable in the long term. Mr Canellos said that it was up to Mr Tinney how he dealt with it. Mr Tinney's evidence, which we accept, was that this was the last communication or discussion that he and BWA had with the SEC about the culture audit workstream.

Steps leading to the production of the GenVen Document

35. On 13 February, a Steering Committee was established within Barclays to oversee the rectification of the deficiencies and weaknesses identified in the SEC Deficiency Letter. Mr Tinney was the chairman. One of the Steering Committee's responsibilities was to manage the process of communicating with the SEC and other regulators about its work. Mr Tinney's role in addressing the deficiencies identified by the SEC was his top priority. Shortly after setting up the Steering Committee, Mr Tinney brought in Mr Doll, who he had worked with previously at Deutsche Bank, to be the programme manager of the remediation programme. Mr Doll was not, at this stage, responsible for the culture audit workstream.

36. On 16 February, Mr Kalaris told the New York Fed that a culture audit was being undertaken and would be completed in approximately one month. This was confirmed by BWA in a letter to the New York Fed on 24 February.

37. After the second SEC meeting, Mr Tinney spoke with Mr Biesinger of Genesis Ventures about the outline setting out what might be involved in a potential culture audit exercise that had been sent to Mr Tinney on 10 February. Mr Tinney said that he did not want Genesis Ventures to conduct a full audit exercise. He explicitly rejected Genesis Ventures' suggestion that they carry out a more wide-ranging cultural audit and that there be a cultural questionnaire for all staff to complete. Mr Tinney and Mr Biesinger agreed that Genesis Ventures would interview BWA senior management and provide Mr Tinney with their preliminary views as to whether any of the current BWA senior management team needed to be changed and if so in what way to ensure that the correct tone would flow from the top in the future.

38. Mr Tinney's evidence was that, previously, he and Genesis Ventures had always worked on the understanding that initial feedback about sensitive human resources issues would be given by way of an oral briefing before it was formally decided what action should be taken. Mr Biesinger's evidence was that there was no explicit instruction from Mr Tinney not to provide anything in writing. Mr Tinney seemed to accept that in cross-examination but maintained that there was a very clear expectation that Genesis Ventures would not produce anything in writing.

39. On 8 March, Mr Tinney sent Annemarie Crouch, Head of Wealth's Human Resources Department, an email with the subject line "Culture Audit" that set out the objectives of the exercise with a view to that being communicated to those who would be interviewed. On 9 March, Mr Cox sent an email to certain BWA staff, copied to Mr Tinney, headed "Culture and Compliance". It invited the staff to interviews with Genesis Ventures and included the statement "… we have asked … Genesis Ventures to undertake a Compliance Culture Audit".

40. Between 12 and 15 March, Genesis Ventures interviewed senior managers at BWA although Mr Cox was not among them because he was on holiday at the time of the interviews.

The GenVen Document

41. Mr Tinney's evidence was that his chief of staff, Ms Griffiths, had told Mr Biesinger on 29 March that, because Mr Tinney was travelling, Genesis Ventures should send a report to his home address the following day so that he could read it over the weekend in advance of a meeting with Mr Kalaris.

42. Genesis Ventures set out their findings from the interviews in the GenVen Document which they sent in hard copy by courier to Mr Tinney's home on the evening of Friday 30 March. It was not emailed to Mr Tinney, or anyone else at Barclays, either at the time or subsequently. The GenVen Document was not sent to Mr Kalaris because he was in the United States at the time and there was a concern that the document might come into the hands of some of the BWA senior managers, who were potentially the subject of criticism in it, if it was sent to Mr Kalaris via BWA's New York office. It had originally been intended that there would be a conference call between Mr Kalaris, Mr Tinney and Genesis Ventures on Monday 2 April, when Mr Kalaris was in New York.

However, it was later agreed that there should be a meeting when Mr Kalaris returned to London and the meeting was ultimately arranged for 5 April.

43. The nature and status of the GenVen Document were disputed by the parties. As it is central to the issues to be decided in this reference, we must describe the GenVen Document fully and quote from it at length. It is a 29 page spiral bound document. On the title page, it is called the "Barclays Wealth America Cultural Assessment March 2012" and marked "Strictly Confidential". At the top of each page of the main body of the document is a header that says "Barclays Wealth America - Culture Audit". The GenVen Document contains: a contents page; a description of methodology and data sources; a summary; recommendations; descriptions of core cultural issues identified; a review of the attitudes, skills and behaviours of senior management; proposed next steps; and an appendix summarising findings by reference to particular themes and setting out illustrative quotations from interviewees.

44. The first section of the GenVen Document begins:

> "Genesis Ventures have been asked to conduct a culture audit into BWA specifically to review the culture and human behaviours that have led to the current situation within the company."

45. The second section is a summary of Genesis Venture's findings and is as follows:

> "BWA was largely brought together in the crucible of the Lehmans' collapse, subsequent acquisition by Barclays and survival instinct of the financial crisis. Whilst these factors made initial integration efforts difficult, current BWA leadership have chosen the party line of 'we didn't know it was that bad'.
>
> In our opinion, the preponderance of documentary evidence and the corroborating anecdotal trends attests [sic] otherwise. The current leadership team, largely 'Mitch's Merrill team' have pursued a course of 'revenue at all costs'; taken a conscious decision to ignore support functions, reinforced a culture that is high risk and actively hostile to compliance, and ruled with an iron fist to remove any intervention from those who speak up in opposition.
>
> The culture is fragmented, built on the carcasses of cultures that were indifferent at best to these issues, and no positive culture change has taken place under his leadership.
>
> In its siloed state, BWA has not been influenced by positive culture from any of the other Barclays companies or regions. On this course, failure of the SEC exam was inevitable and further failures are also inevitable unless a concerted effort is made to change the broken culture at BWA and make the necessary investments.
>
> The issue now becomes two fold; how deep do you cut and how to quarantine the contagion?"

46. The third section is titled "Possible Scenarios" and sets out available courses of action which vary from making no changes to a complete change of the leadership of BWA with alternative, intermediate changes that are less radical.

47. Section 4 of the GenVen Document is headed "BWA Core Cultural Issues". It consists of five points, each followed by an explanatory narrative and five or seven quotes from those interviewed that support the points made. Those points are as follows:

> "1 Management made a conscious decision to ignore/under-invest in a weak infrastructure in favour of business growth objectives.
>
> Management made a conscious decision to chase revenues at all costs and ignore the foundation on which the business was to be built. Management consciously failed to invest in necessary technology, people and safeguards that it knew it needed, leaving these areas understaffed, underskilled, undersupported and in disarray. A conscious choice was made to ignore compliance until an issue was raised by the regulators – actively inviting intervention. There has been a total lack of accountability by the senior team.
>
> …
>
> 2 Merrill leadership have driven a culture of fear.
>
> Management have created a culture of dominance and fear that has removed escalation of issues and created a siloed organisation with serious flaws. Issues do not flow up but are buried, stopping any solution ever coming to light. This culture immediately removes anyone who opposes Mitch and his team or expresses dissent in any way. This prevents any counterbalance to the 'revenue at all costs' strategy and any intervention on the other issues listed in this report.
>
> …
>
> 3 Deficient, fragmented culture has not changed.
>
> Three fragmented cultures continue to operate inside BWA: Lehman, Merrill and Barclays. The Lehman and Merrill cultures have remained intact from the date of their purchase, largely unchanged. BWA's isolationist attitude and lack of relationship with BarCap and London have not allowed a Barclays culture to positively influence the company. Barclays culture is by far the weakest of the three. Lehmans' employees still question the validity of doing anything they didn't used to do at Lehmans despite the fact they now run a different business.
>
> …
>
> 4 Management have created a culture that actively undermines compliance.
>
> Senior management have established a culture of indifference to all issues not sales related. They have set compliance as the lowest possible priority by actively blocking compliance and building a social reward structure that ignores everything not sales related. They have modelled poor behaviour for the next level of management and driven a culture that undermines compliance. Ian Lowitt has been the gatekeeper of many of these issues.
>
> …
>
> 5. Normal checks and balances are ineffective or absent.
>
> Many of the factors above mean the business is out of control and the ability to internally govern is severely hampered. None of the functions

> can or are able to provide appropriate control. This situation is exasperated by poor end-to-end MI.
>
> …
>
> For additional cultural factors affecting BWA see Appendix A."

48. The fifth section of the GenVen Document is headed "Review of Management". It contains thumbnail character sketches, mostly negative, of the BWA senior management team setting out their attitudes, skills and behaviours followed by a list of quotes from those interviewed giving feedback on individuals in the BWA management.

49. Section six of the GenVen Document sets out seven recommended next steps:

> "1 Determine which option to act upon
>
> 2 Immediately begin working with BWA ManCo in NY
>
> 3 Require a change agenda across all issues not just the SEC – present the findings to Mitch and agree what he wants to sponsor in his business
>
> 4 Swiftly move to restructure management. Break up the Merrill management culture and install appropriate checks and balances
>
> 5 Agree SEC communications strategy
>
> 6 Address BWA-BarCap political, structural and cultural misalignment
>
> 7 In 6 months rollout change workshops that link to the change agenda from the bottom-up"

50. The final part of the GenVen Document is an appendix containing "Additional Factors & Quotes Regarding BWA Culture". The appendix contains 15 themes under the heading "Detailed Themes & Anecdotal Evidence". Each theme is followed by a summary and multiple quotes from persons interviewed that illustrate the themes. The themes and summaries are as follows:

> "Culture of Fear
>
> There is a culture of fear and control at BWA driven by the senior leadership team. This culture at best is described as transparent and energising, and at worst it's an iron fist, intimidation [sic], and abusive. The senior team portray themselves as all-powerful and all-knowing; especially Mitch and Ian, and people chose to disagree with them at their own peril. It is a mentality of superiority, which, when combined with other deficiencies, stops the team from tackling their blind spots. When those deficiencies are in compliance, this results in serious issues that no one else has the power to address."
>
> Lack of Escalation
>
> The culture of fear also leads to a culture where people are unwilling to escalate issues. Management have made it clear that they do not want to hear about issues, and there is an expectation that management are more interested in apportioning blame than finding solutions. Stories circulate of individuals that have been fired because they brought issues to management's attention.
>
> In the wider organisation this has led to a culture of avoidance, gameplaying and masking. Individuals will hide problems so they are not brought to the attention of management, and they refuse to take

problems to leadership even though they are accessible. This results in significant issues being hidden in pockets, and in employees working on their own ad-hoc solutions rather than involving the right people.

Weak Compliance Focus and Lack of Empowerment

Compliance takes a back seat at BWA and is not a priority of management. Focus is undermined by the culture and structure: compliance has no budget and reports into the CEO who does not place an emphasis on it. It is culturally acceptable at BWA from the top of the organisation down to ignore, put off, and even deride risk and compliance issues. This issue is also exacerbated by weak compliance team and poor technology.

Week Compliance Team and Mismanagement of Compliance Staff

The compliance team does not have the skill or ability to manage the current situation, and have contributed as one of the factors causing the current state. The compliance team do not have the right experience in the appropriate businesses. They are not strong enough to deal with the dominant, non-escalation and fear culture. Mismanagement of the team has put people in the wrong roles. All this results in a broken function, which is also under supported by the business and overworked. Under all these constraints, they have delivered poorly.

Weak HR Support in Areas of Culture, Risk and People Management

HR has not stood up to the business to drive culture change in vital areas. They are reactive to the business and have not acted as a second line of defence, but have instead pandered to the strong culture set by Mitch and his immediate team. This has been a contributing factor.

Lack of Senior Management Understanding of Aspects of the Business

Mitch and his team do not understand several key aspects of the business. The business is changing and constantly updating. They come from a different background and have not done this before. In addition, many areas of the business have deficiencies in talent, which means it is hard for the business to get up to speed, even if the senior management were actively listening to feedback and willing to learn – and they are unwilling to learn underlying aspects not related to sales that require immediate attention.

Lack of Senior Management Understanding of Technology and Operations

Along with lack of understanding of aspects of the business, there is even greater lack of understanding of the technology and operations required to support the business. These areas are in real disarray (see next point in more detail), and much of this is caused by underrepresentation on the senior team and lack of understanding or willingness to engage from the senior team.

Overextension of Delivery from Supply Lines

Intense focus on sales at all costs … and lack of understanding or focus on technology and operations … have resulted in a lopsided business that is overextended. This has been described as a house of cards or a land war in Russia, with overextended supply lines. Even when the business made a profit in 2011, the business chose not to reinvest in

required technology and support. Immediate attention is required to shore up the business. There are 'time bombs' everywhere.

Culture of Avoidance and Collusion ('I didn't know it was as bad as it was')

Some members of the management team denied all knowledge that there is anything wrong with compliance and operations at BWA. It is also clear that this culture of denial has been prevalent some time as management pursued a strategy of 'growths [sic] at all costs.'

Poor Management of the SEC and Other Officials

Along with lack of focus on risk and compliance and a weak compliance team, there has been poor management of regulatory investigations, no clear point man, and no checking of data. This small change would go a long way to preventing future issues.

Not Taking Regulation Seriously – Challenging Regulators to Intervene

The culture is one of waiting for a reprimand. It is clear that no one in the organisation was actively trying to aggravate any of the regulators. However, there was a culture of avoidance, of intentionally waiting to be warned before doing anything. Now that the SEC is involved, the culture has shifted and most individuals are actively working to address the situation, but this shift is still not sufficient and more attention is urgently required.

Disproportional Risk Appetite

BWA has been held to very strong growth goals and has been pursuing growth at all costs. This has contributed significantly to the current culture and caused significant issues in all other areas of the business.

Siloed Organization Failing to Communicate Effectively

The organization is fractured in silos internally, and also has a disconnect with Barclays Wealth globally and BarCap in the US … Internally this causes lack of information, lack of understanding, poor solutions, and further aggravates previous issues. This silo mentality is a result of the culture of fear and lack of leadership by senior management.

Misalignment with BarCap

There are serious misalignment issues with BarCap, which are significant because BarCap owns many of BWAs [sic] systems. This is adding additional stress to the already overburdened BWA business. There [sic] primary reasons for this are mismanagement and poor culture.

Culture that Inhibits Internal Execution

With the emphasis on revenue growth at the expense of internal support, a complex network of blockers and obstacles has grown up to inhibit execution in technology and operations. This is both a cultural and structural issue. This is also causing significant burnout in these teams and an ongoing talent drain. This talent drain is especially dangerous as often the organisation is only one deep in expertise and these individuals are taking huge amounts of tacit business knowhow with them."

51. Mr Tinney's evidence was that, as soon as he read it, he felt strongly that the GenVen Document was not what he had wanted or expected from Genesis Ventures. He had asked them to interview the senior management of BWA about their approach to compliance issues escalated to them and how they ensured that the tone at the top of zero tolerance of regulatory failures flowed down. He had wanted recommendations, based on those interviews, as to whether any senior individuals could or should be changed, either by coaching or by being moved or fired. Mr Tinney was critical of the fact that Genesis Ventures had not interviewed Mr Cox, who was on annual leave when the interviews were conducted. He also observed that it was clear from the quoted criticisms of BWA management that Genesis Ventures had interviewed more junior staff whereas they knew that the bottom-up interviews were to be carried out by Erin Hilgart.

52. Mr Tinney said that Genesis Ventures stated that they had been asked to conduct a culture audit into BWA but, in his witness statement, he said that was precisely what he had told them he did not want (see [37] above). However, the email sent by Mr Tinney to Ms Crouch on 8 March and the one that followed it from Mr Cox to BWA staff on 9 March both used the term "Culture Audit" and we consider that casts doubt on Mr Tinney's account (see [39] above). Mr Tinney was concerned that the GenVen Document contained a large number of quotes from the interviews which could be highly toxic if there were any litigation arising from any staff changes that might be made. We are not satisfied on the evidence that Mr Tinney had clearly communicated to Genesis Ventures that he had not wanted them to conduct a culture audit. We consider that his evidence at this distance in time is influenced by what he thinks he would have said rather than being an actual recollection of what he said. In any event, we find, based on the terms used in the two emails on 8 and 9 March that Genesis Ventures had been engaged to conduct a "Culture Audit".

53. Mr Tinney was angry with Ms Griffiths for telling Genesis Ventures to produce a document at this stage as he did not want anything in writing as it might be discoverable in litigation brought by those criticised in it. When interviewed by the FCA, Mr Tinney had given a different version of events. He had said that he had spoken to Mr Biesinger to ask why he had produced anything in writing ahead of the oral briefing and torn him off a strip. Before us, Mr Tinney said that, on further reflection, he thought he must have been mistaken. His recollection of his displeasure at Ms Griffiths and conversation with her were clear but he did not think he had complained to Mr Biesinger as that would have been unfair given that Ms Griffiths had told him that she had instructed Genesis Ventures to produce the document. We accept the version of events that Mr Tinney gave at the hearing. It does not seem to us that Mr Tinney would have blamed Genesis Ventures for doing what they were told to do by Ms Griffiths.

The 2 April discussion

54. Mr Tinney and Mr Kalaris discussed the contents of the GenVen Document on 2 April by telephone as Mr Kalaris was in New York. Mr Tinney's evidence was that he told Mr Kalaris that the GenVen Document was a written summary of their interviews which made various recommendations, which Mr Tinney relayed to Mr Kalaris, about BWA's senior management team. Mr Tinney said that he also warned Mr Kalaris that the GenVen Document was toxic because it contained a large number of quotes from individuals who were identifiable. Mr Tinney's witness statement said "attributable" but he clarified in cross-examination that he meant only that, at the time, he could identify some of the persons quoted from what they had said. Mr Tinney said that this breached

Wealth's commitment that the interviews would be confidential and non-attributable. Mr Tinney told Mr Kalaris that the GenVen Document contained some very strong commentary and quotes about certain named individuals in BWA senior management. Mr Tinney warned Mr Kalaris that the document created a litigation risk if there was ever any dispute about those individuals' employment. Mr Tinney said Wealth would not want it on its systems as it would be discoverable in any such employment litigation. Mr Tinney also asked Mr Kalaris if he wanted his own hard copy and he said he did not. Mr Kalaris asked Mr Tinney to arrange for Genesis Ventures to brief him orally before any conclusions were drawn.

55. Accordingly, the GenVen Document was not circulated within Barclays and there was no electronic version of the GenVen Document stored in Barclays' systems. Mr Tinney said that this was not unusual and sensitive documents were often not circulated or stored electronically.

56. After his telephone call with Mr Kalaris on 2 April, Mr Tinney spoke to Genesis Ventures and told them that Mr Kalaris did not want his own copy and they were not to circulate the GenVen Document to anybody else until Mr Kalaris had decided what to do next.

The 4 April emails

57. On 4 April, Mr Biesinger sent Mr Tinney a blank email with the subject header "Can u confirm that u r not expecting anything in writing for TK meet?" to which Mr Tinney replied "Confirmed". Mr Tinney explained that this was a reference to a suggestion that Mr Biesinger had made to Ms Griffiths that Genesis Ventures produce a summary of their findings for the oral briefing with Mr Kalaris. Mr Tinney had told her that he did not want anything else produced in writing until Mr Kalaris had decided what to do next. We accept Mr Tinney's evidence on this point.

The 5 April Meeting

58. On 5 April, a meeting took place in London attended by Mr Tinney, Mr Biesinger, Mr Kalaris and his Chief of Staff, Michelle Witter. Mr Wall and Mr Perry joined the meeting by telephone from different locations. There was no physical copy of the GenVen Document in the meeting room but Mr Wall had the document with him and began to read extracts from it over the telephone. Ms Witter immediately challenged Genesis Ventures about their methodology and how they could have come to their conclusions on the basis of only three days of interviews. When it was suggested that there were issues beyond BWA in BarCap's US operations that needed to be investigated, the meeting became heated. Ms Witter asked so many questions that Genesis Ventures were unable to deliver most of their findings before the meeting ran out of time and it became clear that a further meeting would be necessary. Mr Kalaris made it clear that he did not want the report circulated in the meantime.

59. Mr Perry made a note of the meeting which records Mr Tinney as saying *"I don't want this R to surface until TK's comfortable with it – OK? – I want TK to have PD."* In cross-examination, Mr Tinney accepted that, at the meeting on 5 April, he might have said that he did not want the GenVen Document to surface until Mr Kalaris was comfortable with it and that he wanted Mr Kalaris to have what he called "plausible deniability". Mr Tinney said that Mr Kalaris was ultimately responsible for the initial

decision not to circulate the document and the later decision that it should not be worked up into a full report for distribution.

Request from the New York Fed for update on cultural audit

60. Later on 5 April, Carmen Menendez-Puerto, who was BWA's Head of Compliance, forwarded an email that she had received from the New York Fed to Mr Tinney. In the email, the New York Fed set out a list of topics that it wished to cover at its monthly meeting with BWA. The second of those topics was "Cultural Audit (scope and status; when available, we'd like to go over the conclusions)".

61. Mr Tinney forwarded Ms Menendez-Puerto's email to Mr Kalaris with the comment "as discussed, we should formalise our deliverable". In cross-examination, Mr Tinney indicated that, by "deliverable", he meant a report. Mr Kalaris replied saying "Yes. But we should wait until we have everything, including juniors [i.e. Ms Hilgart's work], so probably May?" Mr Tinney replied by email agreeing and that message was duly conveyed to Ms Menendez-Puerto. We understand this indicates that Mr Kalaris and Mr Tinney intended to use the consultants' reports to produce a cultural audit report. We consider that this exchange of emails shows that both Mr Kalaris and Mr Tinney were genuinely of the view that the GenVen Document and any report produced by Ms Hilgart were not the "Cultural Audit" requested by the New York Fed in April 2012.

The 12 April Meeting

62. On 12 April, Mr Biesinger met with Jo Swaby, Wealth's Global Head of Human Resources, to brief her on Genesis Ventures' findings. Mr Perry also attended the meeting. Prior to the meeting, Mr Biesinger had emailed Mr Tinney to ask "Any guidance on how deep you want me to go with feedback on the Audit?". Mr Tinney, who was on leave, replied "I have no issues in whatever depth you judge appropriate". The reply was not received until after the meeting. Ms Swaby was not provided with a copy of the GenVen Document in advance or at the meeting.

The 18 April Meeting

63. On 18 April, there was a meeting in New York attended by Mr Kalaris, Mr Tinney, Mr Biesinger and Mr Wall. Mr Tinney's evidence was that Mr Wall had a copy of the GenVen Document at the meeting and read extracts from it. Mr Tinney said that he also had his own copy of the GenVen Document at the meeting. In his witness statement, Mr Tinney said that he openly referred the GenVen Document at the meeting. Mr Tinney was cross-examined about this and said that he could not recall whether he actually got his copy out of his bag and started thumbing through it or whether he used the copy brought by Genesis Ventures. He maintained that Genesis Ventures had brought a copy of the report to the meeting, that Mr Wall had read from it (and not from some other document) and that Mr Kalaris had seen it. In the absence of any testimony that contradicted it and could be tested by cross-examination, we accept Mr Tinney's evidence on this point.

64. At the conclusion of the meeting, Mr Kalaris decided that no more time should be spent on the GenVen Document as it would take too much effort and had served its purpose. Instead, he decided that the findings of Genesis Ventures would be part of a workshop that would bring together all aspects of the culture audit workstream including Ms Hilgart's findings, the Employee Opinion Survey results and BWA senior management's observations as well as those of the SEC.

65. Mr Kalaris instructed Dylan Pereira, Head of Strategy at Wealth, to facilitate the culture audit workshop which he had directed to bring together all the various strands of the culture audit workstream ahead of the production of any overarching culture audit report summarising the various inputs and overall conclusions of the workstream. It was put to Mr Tinney in cross-examination that Mr Kalaris did not say, at the meeting on 18 April, that a report should be produced after the workshop. Mr Tinney maintained that his recollection was that Mr Kalaris had given an instruction that there should be a report. In the absence of any testimony that contradicted it and could be tested by cross-examination, we accept Mr Tinney's evidence on this point.

The 19 April Meetings

66. On 19 April, Mr Tinney met Mr Cox to brief him about Genesis Ventures' findings. Mr Kalaris was due to attend the meeting (and it was in his diary as "Call with Tinney & Cox re. Culture Audit & Next Steps") but he did not do so. Mr Tinney was concerned about whether Mr Cox would take the findings seriously as Mr Cox did not report to him but to Mr Kalaris. Mr Tinney's evidence was that he subsequently spoke to Mr Kalaris to check whether he had spoken with Mr Cox himself and Mr Kalaris said that he had. Around the same time, Mr Tinney asked Mr Kalaris if he had told Mr Diamond about the culture audit work and Mr Kalaris replied "Yes, I've briefed him at a high level, but he doesn't want to get involved in the detail." We accept Mr Tinney's evidence that he had this discussion with Mr Kalaris and was told that Mr Diamond had been briefed.

67. On 19 April, Ms Hilgart submitted a five-page document ('the Hilgart Document') with no title page but the header on each page: "[Barclays Wealth and Investment Culture Interviews]". This was in preparation for a meeting later that day with Mr Kalaris and Mr Tinney. The document was forwarded to Mr Kalaris, Mr Tinney and Ms Swaby. The document contained an executive summary of Ms Hilgart's findings from the interviews, supported or illustrated by a large number of verbatim quotes from those interviewed, together with recommendations for future action. At the meeting in New York, Ms Hilgart briefed Mr Kalaris and Mr Tinney on the results of the interviews she had conducted with the more junior employees of BWA.

The 2 May email

68. Mr Stearns said in his witness statement that he had attended meetings of the SEC regarding the remediation programme and he was concerned to understand what progress had been made on the cultural audit.

69. On 2 May, Mr Stearns sent Mr Perry an email. The subject line and main text read together said "Where r we on … The Culture Audit – has a report been published?" Mr Perry replied two minutes later:

> "No … Fudged
>
> Why?"

70. We received no explanation for Mr Perry's response to Mr Stearns because neither of them gave evidence or was available to answer questions. It appears to us that, at the time of the email, Mr Perry considered that no culture audit report had been published. That response to Mr Stearns strikes us as odd given that Mr Perry's note of the meeting on 5 April referred to the GenVen Document as "R" which everyone accepted stood for "report". Assuming that Mr Perry had no reason to lie to Mr Stearns, we can only think of two possible explanations. The first is that Mr Perry meant that, as only Mr Tinney

had a hard copy, the GenVen Document had not been published within Barclays. An alternative explanation is that, as at 2 May, Mr Perry did not consider that the GenVen Document was the "Culture Audit". If the former explanation is correct then it seems very strange that Mr Perry did not say, in response to Mr Stearns enquiry, that there was no culture audit report but Genesis Ventures had produced a report of which only Mr Tinney had a copy. In that situation "fudged" also seems to be an odd word to describe Mr Tinney's actions to prevent the GenVen Document being circulated. It seems to us that the second explanation is more likely to be correct. If that is correct then it makes Mr Perry's subsequent conduct all the more curious and casts doubt on statements made by him in notes and in interviews.

Preparation for the 29 May Workshop

71. In preparation for the workshop for the BWA senior leadership team about the culture audit findings, Mr Pereira met with Mr Biesinger on 17 and 25 May 2012. We were shown Mr Pereira's manuscript note which describes in rather cryptic terms what he was told by Mr Biesinger. The note states "50 interviews – 25 pg report". Mr Pereira told the FCA that in relation to the reference in the notes to 'the 25 page report' he did not believe at the time of that meeting that there was a formal report. He just understood from GenVen that they had gathered a lot of feedback from the interviews and that their notes were about 25 pages.

72. Mr Pereira asked him for the GenVen Document and was told by Mr Biesinger that there was no report. Mr Pereira was also told that there was no report by Ms Griffiths. Mr Tinney's evidence was that he did not want anyone being provided with or seeing the GenVen Document because those were Mr Kalaris's instructions.

73. Genesis Ventures gave Mr Pereira a summary of their findings under 18 heads which he combined with a summary of Ms Hilgart's findings under 12 heads and included in the written materials for the workshop.

The 29 May Workshop

74. On 29 May, Mr Pereira led a workshop in New York. It was attended by Mr Doll, who had recently been appointed CEO of BWA and director of Wealth's SEC remediation program, Mr Cox and senior employees of BWA as well as Mr Tinney and Ms Swaby. Mr Biesinger and Mr Wall of Genesis Ventures and Ms Hilgart were also present. Mr Kalaris and Ms Witter attended the debriefing at the end of the day.

75. Mr Pereira had prepared a slide deck for use at the workshop. It included a slide showing 18 bullet points which were the same as the headings used in the GenVen Document and its appendix and in the summary given to Mr Pereira by Genesis Ventures before the workshop. During the workshop, Mr Biesinger discussed issues under these headings but no copy of the GenVen Document was provided to those attending the workshop (apart, of course, to Mr Tinney on 30 March). Ms Hilgart also discussed her findings at the workshop and, unlike the GenVen Document, her document was made available to the senior managers participating in the workshop.

Post-workshop follow-up

76. On 30 May, Mr Kalaris met with Stephanie Chaly, the Senior Supervising Officer in the Financial Institution Supervision Group of the New York Fed for a quarterly catch up meeting at which they discussed the culture audit work.

77. We observe that this seemed to be a follow-up to what Mr Kalaris had told the New York Fed at the meeting on 16 February although he had then stated that the culture audit would be completed in approximately one month (see [36] above). Following the meeting with Ms Chaly, Mr Kalaris told Mr Tinney and Mr Doll in an email that he had committed to sharing "the high level feedback and most importantly the action steps" in relation to the culture audit work that remained to be set out. Mr Kalaris said that Mr Tinney should do this sometime in June. On 6 June, Mr Tinney asked his personal assistant to arrange a meeting with Ms Chaly to provide her with the requested feedback on the culture audit work. Although a number of dates later in the month were suggested, no meeting was ever actually arranged.

78. Between 1 and 19 June, emails were exchanged within Wealth as a result of which Mr Pereira finalised a list of eight action points arising out of the workshop which included holding a "culture reset offsite" meeting in about six months' time to assess progress.

79. In the course of July, Ms Crouch and Ms Hilgart prepared slides for a presentation, variously called "Culture Reset" and "Culture Shift", regarding activities to be undertaken following the workshop.

80. At the end of July, Jill Ostergaard, Head of Compliance of BarCap US, emailed Mr Doll for an update on the culture audit workstream. Mr Doll forwarded the email to Mr Tinney with the comment "interesting". Mr Tinney understood that to be suggesting that Ms Ostergaard, who was quite new to the business, was trying to ensure that all compliance functions reported to her which Mr Doll did not like. At a steering committee meeting subsequently, Ms Ostergaard asked Mr Doll why no findings of the culture audit workstream had been shared with BarCap and the other SEC·remediation workstreams, so everybody could learn from them. Mr Doll replied that the work plan was still being finalised and he did not want to share anything with a wider group until a detailed implementation plan was in place.

81. In cross-examination, Mr Benjamin Strong QC, who appeared with Mr Richard Mott for the FCA, suggested to Mr Tinney that Mr Doll's reaction to Ms Ostergaard's question why no findings of the culture audit workstream had been shared could have been the origin of the allegation in the Anonymous Email that Mr Doll had suppressed a "Wealth cultural audit report … prepared by a third-party consultancy" which was being withheld from Bar Cap and the workstream members. Mr Tinney did not accept this but when asked why he did not say in his drafts of the Kalaris Note something along the lines that there were presentations that had been prepared after the workshop but there was no report to the SEC workstream and neither Mr Doll nor anyone else had suppressed anything, Mr Tinney said "And to this day, I wish I'd said something like that." We found Mr Tinney's response to be genuine. Whether Mr Doll's response to Ms Ostergaard's question was the matter referred to in the Anonymous Email is not, however, relevant to the issue that we have to decide.

The Salz Review

82. On 27 June, Barclays announced that it had agreed to pay financial penalties totalling £219 million to the US Commodities and Futures Trading Commission and the US Department of Justice. The penalties were in respect of misconduct relating to LIBOR and EURIBOR. On 2 July, Barclays announced that, in the light of the unacceptable standards of behaviour within Barclays in relation to LIBOR and EURIBOR, its

chairman, Marcus Agius, would resign and an independent audit of its business practices would be conducted. On 3 July, Mr Diamond resigned as Barclays CEO and, on 30 August, Mr Antony Jenkins was appointed as the new Barclays CEO.

83. The independent review was led by Mr Anthony Salz, and became known as the Salz Review. The Salz Review's terms of reference set out that it was, among other things, to analyse past events in order to understand whether there was a gap between Barclays' articulated values and behaviours and the way in which the bank operated in practice. The Salz Review was also to publish a report of its findings and to produce a mandatory code of conduct to be applied across Barclays. Mr Tinney was aware of the existence and purpose of the Salz Review.

The Anonymous Email

84. On 25 September, the Anonymous Email was received by Barclays' Chairman, Mr Agius. Its subject line was "Salz Review – Confidential". The anonymous author stated that he or she was a consultant with BWA. The Anonymous Email criticised the culture at BWA in strong terms and among other allegations, including complaints about named individual employees, it stated:

> "What is also deeply disturbing is that a Wealth cultural audit report, mandated earlier this year by Kalaris and prepared by an independent third-party consultancy, is being withheld from BarCap and those on the internal SEC workstreams. This report was issued recently but Justin Doll has suppressed the report from BarCap and the workstream members as 'he does not agree with its findings' and is clearly shielding those named in the report as they are all part of a clique – 'club'. Many previously worked at Merrill together and are very much protected. This is unacceptable, and the report should be shown to the wider workstream members so that the findings can be properly discussed and addressed. How else can the deeply flawed culture in Wealth even begin to be fixed?"

85. We accept that the Anonymous Email could be read as referring to the culture audit work that Mr Kalaris had told the New York Fed would be shared with them ("a Wealth cultural audit report, mandated earlier this year by Kalaris and prepared by an independent third-party consultancy"). It could, however, also be referring to the findings of the culture audit workstream that Ms Ostergaard had asked Mr Doll to share with BarCap and the other SEC remediation workstreams in July and which Mr Doll had refused to share ("Wealth cultural audit report … withheld from BarCap and those on the internal SEC workstreams [that] … Justin Doll has suppressed … from BarCap and the workstream members". The ambiguity or lack of clarity in the Anonymous Email is a key issue in this case.

Response to the Anonymous Email

86. Mr Agius forwarded the Anonymous Email to Mr Kalaris, copying in Mr Jenkins and Mr Mark Harding, Barclays General Counsel, with the comment:

> "Tom
>
> This came in overnight – you should see it.
>
> Can I leave it with you to follow up as necessary?"

87. Mr Kalaris was in Geneva at the time with Mr Tinney, Mr Perry and Mr Stearns. Mr Kalaris, Mr Tinney, Mr Perry and Mr Stearns discussed the Anonymous Email on 26 September. Mr Tinney's evidence was that, at that meeting, he said to Mr Kalaris that the Anonymous Email could be referring to the GenVen Document although he did not think so and Mr Kalaris agreed. Mr Tinney said that they did not think that the GenVen Document fitted the description in the Anonymous Email as it had not been 'recently issued', it had not been specifically 'mandated by Kalaris' and it had not been 'suppressed' either by Mr Doll or at all. Mr Tinney said that he considered that the Anonymous Email must be referring to the output of the culture workshop at the end of May because he believed that the reference to the report not having been shared with BarCap and the other SEC remediation workstreams was probably a reference to Ms Ostergaard having challenged Mr Doll at a steering committee meeting in July about the lack of reporting from the cultural audit workstream which perhaps she or someone else had viewed as Mr Doll suppressing it. We accept that, at this time, Mr Tinney held the view that the Anonymous Email was not referring to the GenVen Document.

88. After discussions, it was decided to refer the Anonymous Email for investigation by Mr Peddie, independent of Wealth's senior management, as had occurred with the First Whistleblowing Email, sent to Wealth in December 2011, and the Second Whistleblowing Email, sent to the SEC in January 2012, which also made allegations about BWA. Mr Kalaris decided that he would send a note, ie the Kalaris Note, to Mr Agius and Mr Jenkins regarding the allegations made in the Anonymous Email.

The Kalaris Note

89. Mr Kalaris asked Mr Perry to prepare the first draft of the Kalaris Note. The Kalaris Note underwent revision on several occasions and some 12 drafts, including Mr Tinney's, were produced before the final version was agreed.

90. Mr Perry asked Don Gershuny, BWA's General Counsel, to get someone to draft a summary of how Barclays had dealt with the three anonymous emails under seven headings. It appears that Carlos Pelayo, a member of the BWA Legal team, was assigned the task of preparing this summary. Mr Pelayo sent that first draft to Mr Perry at 4:10 am (Swiss time) on Thursday 27 September. Having described the other allegations, Mr Pelayo's draft states "the author also claims that the [BWA] COO's office has improperly suppressed a culture audit report from BarCap and the SEC." Mr Pelayo's draft stated that the "Ongoing Work Streams" included a "Culture Audit". The note later states in relation to the culture audit that "An independent firm, Genesis Ventures, was retained to conduct a 'Compliance Culture Audit' of [BWA]."

91. Mr Perry amended Mr Pelayo's draft but retained the references to a culture audit and Genesis Ventures. Mr Perry's amendments included a recommendation that "a deep and thorough independent review should be carried out bringing all these issues together and that these particular allegations around the BWA be brought to the attention of and dealt specifically [with] in the Salz review." Mr Perry also added a conclusion that "all of the issues raised over the last 12 months, including these allegations, should first be pulled together and scrutinised by an independent third-party who should then be linked into the Salz review." Mr Perry sent the draft to Mr Kalaris, copying in Mr Tinney among others, at 7:15 am on 27 September.

92. Mr Kalaris was not satisfied with Mr Perry's draft. According to a manuscript note produced by Mr Perry, Mr Kalaris telephoned him on receipt of the first draft and

demanded that the note be rewritten to make it clear that, among other things, no "report" had been "suppressed". Mr Kalaris asked Mr Tinney to revise it. Mr Tinney called Mr Perry to inform him that he would do so.

Mr Tinney's first draft

93. Mr Tinney comprehensively rewrote Mr Perry's draft of the Kalaris Note while retaining some parts of Mr Perry's and Mr Pelayo's drafting. Mr Tinney sent the redraft to Mr Perry at 6:52 pm on 27 September, copying in David Mason, who had recently been appointed as Mr Tinney's Chief of Staff in place of Ms Griffiths. Mr Tinney's first draft included the following:

> "An independent firm, Genesis Ventures, was retained to conduct a 'Compliance Culture Audit' of BWA. This was done in conjunction with another third party (Erin Hilgart) with Genesis focused on interviewing the Management Committee and their direct reports and Erin Hilgart focused on interviewing junior members of staff. In all more than 10% of staff were interviewed, their input collated and a full day workshop undertaken on 29 May 2012 to review the findings. This workshop was attended by the [Wealth] Global COO, Global Head of HR and a senior representative of the [Wealth] CEO's office as well as by the [BWA] CEO and COO and the principals of Genesis and Erin Hilgart. Eight key actions/workstreams were identified and further work has been progressing. A key deliverable was a planned 'culture reset' offsite. This was postponed until after the Summer in the aftermath of the LIBOR settlement … The offsite will now take place in the next two weeks. It will include all of [BWA's] senior management and the independent consultants who worked on the review."

94. Mr Tinney's draft note made no reference to the GenVen Document or to the Hilgart Document. Given his view, see [87], that the Anonymous Email was referring to the output of the Culture workshop at the end of May, we consider that there was nothing to alert Mr Tinney to the need to discuss the GenVen Document (or the Hilgart Document) at this point and we do not make any criticism of Mr Tinney's first draft of the Kalaris Note.

95. Mr Perry emailed Mr Tinney within minutes of receiving his draft. Mr Tinney then telephoned Mr Perry who said that the note needed to comment on the allegation that a report been suppressed. The contents of that conversation are disputed (as is a note of that conversation made by Mr Perry), although Mr Tinney accepts that Mr Perry told him that the specific allegation in the Anonymous Email that a "Wealth cultural audit report" had been suppressed by Mr Doll needed to be addressed.

Mr Tinney's second draft

96. Mr Tinney provided a revised draft to Mr Perry at 6:57 am on 28 September. The note included the following:

> "In all c. 10% of [BWA] staff were interviewed, their input collated and a full day workshop undertaken on 29 May 2012 to review the findings. Erin Hilgart provided a summary of her interviews in writing, Genesis Ventures provided verbal input by reference to their interview notes and working papers. There has never been a "Wealth Cultural Audit Report" produced at any time. This workshop was attended by the

> [Wealth] Global COO, Global Head of HR and a senior representative of the [Wealth] CEO's office as well as by the [BWA] CEO and COO and the principals of Genesis and Erin Hilgart. Eight key actions/workstreams were identified and further work has been progressing. A key deliverable was a planned 'culture reset' offsite. This was postponed until after the Summer in the aftermath of the LIBOR settlement … The offsite will now take place in the next two weeks. It will include all of [BWA's] senior management and the independent consultants who worked on the review."

97. Mr Strong submitted that, while the drafting was literally accurate, the overall effect was misleading because it gave the impression that Genesis Ventures, who were still described as having been retained to conduct a "Compliance Culture Audit", had not produced any form of culture audit report. We do not consider that the evidence shows, on the balance of probabilities, that Mr Tinney deliberately intended to give the impression, which he knew was false, that Genesis Ventures had never issued a report on the work that they had been retained to carry out. We consider that, read in isolation, the statement that there had never been a Wealth Cultural Audit Report produced at any time appears to be misleading if it is remembered that the GenVen Document was described in headers on each page as a "Barclays Wealth America - Cultural Audit". Words and phrases must, however, be read in their context and we note that this sentence immediately follows the description of the culture workshop and precedes a description of what actions Wealth proposed to take following the culture workshop. Accordingly, the statement could be read as saying that there had never been any report of the output from the culture workshop. If that is the correct way to read it, the last sentence of the passage quoted above was strictly true. We consider, however, that, given the discussion at [87], Mr Tinney must have appreciated that there was a risk that a person with no previous knowledge of events would not have read the sentence that way but would have understood it as saying that no Wealth Cultural Audit Report had been produced both before and after the culture workshop. We consider that, being aware of the risk of misunderstanding and the importance of providing all relevant information to Barclays' senior management and the Salz Review, Mr Tinney acted recklessly when he drafted the Kalaris Note without referring to the GenVen Document.

98. Mr Perry forwarded Mr Tinney's draft to Mr Kalaris, copying in Mr Tinney, Ms Witter, Mr Stearns and Mark Cooke, Wealth's Chief Risk Officer, at 7:17 am. The email contained no comment on the draft but, in the subject header, Mr Perry suggested that the draft be sent to Mr Harding for review. Further changes were made to the document between 7:17 am and 9:08 am that morning, apparently by Mr Kalaris or at his direction, principally the addition of an executive summary. Mr Kalaris emailed a revised draft to Mr Perry at 9:08 am on 28 September.

99. At 10:47 am on 28 September, Mr Stearns sent an email to Mr Perry only with the revised draft and saying "we need to talk about one aspect I am uncomfortable with." At some point over the weekend, Mr Stearns and Mr Perry spoke by telephone. Mr Stearns' witness statement says that he was concerned about the assertion "There has never been a 'Wealth Cultural Audit Report' produced at any time". Although he had not seen any such report, Mr Stearns said that he assumed that such a report must exist. In his witness statement, Mr Stearns said that he made it clear to Mr Perry that he was formally escalating the issue to Mr Perry as his manager and told him that he (Mr Perry) should in turn escalate the issue to Mike Walters, Barclays' Global Head of Compliance, and that if Mr Perry did not do so then he (Mr Stearns) would. Mr Perry confirmed that he would

escalate the issue. Mr Tinney gave notice to the FCA that he wished to cross-examine Mr Stearns but he declined to attend the hearing to give oral evidence. Accordingly, Mr Stearns' evidence is hearsay. Although we have regard to his evidence, it is unfortunate that Mr Stearns was not available to be cross-examined on what sort of report he had in mind.

100. Mr Perry emailed the draft Kalaris Note to Mr Harding at 11:19am on Friday 28 September. At 4:35 pm, Mr Perry emailed Mr Peddie saying that Mr Harding was content with the draft save that he thought an explanation of the results and findings of the investigation into the previous whistleblowing communications should be included. Mr Perry asked Mr Peddie to provide that explanation.

101. The FCA relied on statements made by Mr Perry to Simmons and Simmons and to the FCA that he spoke to Mr Tinney again on Friday 28 September about the draft and, in particular, about the statement that "There has never been a 'Wealth Cultural Audit Report' produced at any time". Mr Perry made a file note as follows:

> "called [Mr Tinney] that evening + challenged him
>
> AT -> adamant it was never written – not even a draft. Only handwritten notes in the meeting to brief TK + no discussion of a R[eport]
>
> – I asked AT again x2
>
> – I then explained in that meeting to brief TK on the R[eport] w T + R [Tom and Ross] that they had attempted to go through the R[eport].
>
> AT -> It's very nuanced D. I'll sit down w u when u get back. We need to sit down F2F [face to face]. There was never anything produced, nothing in writing. Maybe handwritten notes but nothing you would call a R[eport]."

102. Mr Tinney denies this conversation occurred on Friday 28 September although he said that he recognised some of it as forming part of a conversation on the morning of 1 October. Mr Tinney denied having used the phrase "handwritten notes" because it would have been untrue and because Mr Perry, although he had never seen it, had been aware of the existence of the report since the previous April. We do not have to determine precisely when the conversation between Mr Tinney and Mr Perry occurred. What was said matters more than when it occurred. We cannot be certain about exactly what was said but, on balance, we accept that Mr Tinney did not use the phrase "handwritten notes". There would not seem to be any reason why, when they were jointly preparing a draft of the Kalaris Note, Mr Tinney would say something to Mr Perry that Mr Tinney knew to be untrue. Further, if the document being discussed was the GenVen Document then Mr Tinney knew that Mr Perry was aware of its existence and would realise that the statement was untrue.

103. Mr Walters' evidence was that he spoke to Mr Perry by telephone over that weekend but he did not precisely recall the discussions. He also recalled another telephone call with Mr Perry around that time during which they discussed the question of whether there had been a report produced by the independent consultants. Although he did not recall the precise words used, Mr Walters recalled that Mr Perry had clearly given him to understand that there was no report. Mr Walters was surprised by this as, in his experience, there was almost always a report following a consultancy assignment such as this one. However, Mr Walters accepted that there was no report because the draft note

said there was no report and Mr Perry had confirmed that this was the case. We accept that Mr Perry did not mention the GenVen Document and the Hilgart Document to Mr Walters when he expressed surprise that no report had been produced and stated that he would have expected one. Even though he had never seen the GenVen Document, Mr Perry was aware of both documents and had referred to the GenVen Document as a report ("R") in his note of his telephone call with Mr Tinney. In our view, the obvious response to Mr Walters would have been to say that the consultants had produced reports even if, as in the case of the GenVen Document, they had not been widely circulated. It may be that Mr Perry did not wish Mr Walters to see the GenVen Document or the Hilgart Document. Another possible explanation is that Mr Perry did not regard either of those documents as corresponding to the description 'Wealth Cultural Audit Report'. We are not able to say, with confidence, which of those two explanations, if either, is correct. What is clear, however, is that Mr Stearns (see [99] above) and Mr Walters both assumed that Genesis Ventures (and Hilgart) had each produced a report and read the draft Kalaris Note as saying that they had not done so.

104. Mr Perry sent Mr Kalaris a revised draft at 2:25 pm on Sunday 30 September. In the covering email, Mr Perry stated:

> "… after discussions with Mike Walters and Dominic [Stearns] over the weekend we feel, given that this will be wrapped up and sent to Salz very soon, for total transparency we need to add a paragraph about the conclusions of the 'Compliance Culture Audit'.
>
> Whilst I understand that there wasn't a report, the note talks about 'Genesis Ventures provided verbal input by reference to their interview notes and working papers' and that there was a 'full day workshop' and that 'eight key actions/work streams were identified and further work has been progressing'. What we don't articulate are their findings and the content of both the 'verbal input' and of the 'full day workshop' which then led to the 'key actions/work streams'."

105. On the morning of Monday 1 October, Mr Perry arrived in his office around 8:00 am to find Mr Tinney waiting for him. Mr Tinney's evidence was that, in this conversation, he explained to Mr Perry the various pieces of work that had taken place as part of the culture audit workstream since April and said that no report had been produced following the culture workshop held on 29 May. Mr Tinney said that he believed that the reference in the Anonymous Email to a Wealth cultural audit report must have been referring to an output from the workshop. Mr Tinney said that Mr Perry advised him that "the outcome of the culture workshop could be construed as a culture audit report", and that was the only reason why he deleted the sentence "There has never been a 'Wealth Cultural Audit Report' produced at any time" in the next draft. Mr Tinney proposed to expand what had already been said about "the conclusions of the 'Compliance Culture Audit'" by specifying the eight follow-up items from the 'Culture Reset' presentation which had been agreed following the culture workshop.

Mr Tinney's third draft

106. After the further discussions early on Monday 1 October between Mr Tinney and Mr Perry, Mr Tinney sent Mr Kalaris, Mr Perry, Mr Stearns and Ms Witter a further revised draft at 8:45 am. The sentence "An independent firm, Genesis Ventures, was retained to conduct a 'Compliance Culture Audit' of BWA" did not appear in that draft. The sentence "There has never been a 'Wealth Cultural Audit Report' produced at any

time" had also been deleted. The draft note retained the sentence "Erin Hilgart provided a summary of her interviews in writing, Genesis Ventures provided verbal input by reference to their interview notes and working papers". The relevant part of the note now read as follows:

> "After the SEC shared the e-mail they had received, an additional workstream was added to the remediation. This 'Culture' workstream, is designed to embed a sustainable compliance culture. A series of activities was planned to include data gathering interviews of [BWA] personnel and a follow up workshop to agree actions and a workplan. An independent firm, Genesis Ventures, in conjunction with another third party (Erin Hilgart) undertook the data gathering interviews with Genesis focussed on interviewing the Management Committee and their direct reports and Erin Hilgart focussed on interviewing junior members of staff. Genesis and Erin Hilgart have worked together previously. In all c.10% of [BWA] staff were interviewed. A full day workshop was undertaken on 29 May 2012 to determine next steps. Erin Hilgart provided a summary of her interviews in writing. Genesis Ventures provided verbal input by reference to their interview notes and working papers. The workshop was attended by the [BWA] Global COO, Global Head of HR and a senior representative of the [Wealth] CEO's office as well as by the [BWA] CEO and COO and the principals of Genesis and Erin Hilgart. Eight key actions/work streams were identified as follows:
>
> ...
>
> 7. Conduct 'culture reset' offsite with key influencers (e.g. Manco, office heads, control and infra heads, etc.
>
> 8. Repeat cultural review at the end of 2012 to assess progress against May baseline
>
> and further Work has been progressing across these priorities. A key deliverable was 7. above, a planned 'culture reset' offsite. This was postponed until after the Summer in the aftermath of the LIBOR settlement as it was necessary to keep as many people at their posts reassuring clients. The offsite will now take place in the next two weeks. It will include all of [BWA's] senior management and the independent consultants who worked on the review."

107. Around 9 am on 1 October, Mr Tinney met with Mr Kalaris. In his witness statement, Mr Tinney said of this meeting:

> "I reported my conversation with Mr Perry earlier that morning and Mr Perry's advice that the inputs and outputs of the Culture workshop be described more fully and that the reference to there never having been a 'Wealth Cultural Audit Report' be deleted. We talked about the Genesis Ventures document, which we again agreed could not be the recent report suppressed by Mr Doll to which the whistleblower was referring, and whose findings had in any event all been discussed and worked through. Mr Kalaris' view, like mine, was that the whistleblower was simply wrong to allege that a 'Wealth cultural audit report' had been suppressed. But he said that the revised drafting of the Kalaris Note made clear that a number of documents had been produced in the Culture Audit workstream, so that the independent investigation

> and the Salz Review had a 'trail of breadcrumbs' to follow which would enable them to 'surface' any documents they wanted to see."

108. In cross-examination, Mr Tinney accepted that the reference in the draft note to interview notes and working papers used by Genesis Ventures at the workshop was not a reference to the GenVen Document sent to his house and, even if the notes and papers were a 'trail of breadcrumbs', they might not lead to that document. Mr Tinney accepted that he could have said in the note that the GenVen Document had existed but was not circulated because its contents were sensitive but he did not. Mr Tinney told us that he now thought that it would have been better to say "Mr Doll suppressed nothing." Mr Tinney did not agree that the reason he did not refer to the GenVen Document was that he did not want it to surface. He observed that, if that had been his intention, then he would have done what ultimately happened (see [112] and [113] below) and deleted all reference to any work product of any of the consultants.

109. We do not consider that Mr Tinney deliberately intended to give the impression, which he knew was false, that the GenVen Document had never been issued. We find, however, that Mr Tinney acted recklessly in drafting his third draft as he did. For the same reasons as in relation to his second draft (see [97] above), we consider that Mr Tinney must have appreciated that there was a risk that this draft gave a misleading impression that no GenVen Document had ever existed. In addition, we do not accept that the draft created a "trail of breadcrumbs" or, even if it did, that reliance on the reader picking up such 'crumbs' was reasonable. Mr Tinney would have known that Barclays' senior management would want and expect to be told about the GenVen Document to provide background and context to the allegations in the Anonymous Email yet the only way that they would find out about the GenVen Document would be by asking further questions which, in our view, it was not obvious from the note needed to be asked. It is clear that Mr Tinney was prepared to take the risk that the recipients of the Kalaris Note would never know about the existence of the GenVen Document.

Mr Tinney's fourth and fifth drafts

110. Following his conversation with Mr Kalaris, Mr Tinney circulated another draft note at 9:44 am on 1 October. That version contained changes that are not relevant for the purposes of the reference. At 9:58 am on 1 October, Mr Tinney circulated a revised version of the draft note making a change suggested by Mr Kalaris. The change is not relevant to the reference. Mr Tinney had no further involvement in drafting the Kalaris Note after the draft circulated at 9:58 am on 1 October.

Subsequent drafts

111. Mr Kalaris asked Mr Perry to send him a clean version of the latest draft. Mr Perry did so by email, copied to Mr Tinney and Mr Stearns, at 11:32 am. Mr Kalaris immediately forwarded the draft to Mr Richard Haworth, CEO of Barclays Corporate and Investment Banking, by email, copied to Mr Perry but not to Mr Tinney.

112. Mr Haworth replied to Mr Perry, copying in Mr Kalaris, at 9:23 pm on 1 October. Mr Hawarth's suggested changes included deleting the following sentences:

> "Genesis and Erin Hilgart have worked together previously … Erin Hilgart provided a summary of her interviews in writing. Genesis Ventures provided verbal input by reference to their interview notes and working papers. The workshop was attended by the [Wealth] Global COO, Global Head of HR and a senior representative of the [Wealth]

> CEO's office as well as by the [BWA] CEO and COO and the principals of Genesis and Erin Hilgart."

Mr Haworth's suggestions were not sent to or seen by Mr Tinney. There is no suggestion by the FCA that, in suggesting the deletions that he did, Mr Haworth acted without integrity.

113. Mr Perry incorporated Mr Haworth's changes in a further draft note which he emailed to Mr Haworth, copying in Mr Kalaris, at 9:53 am on Tuesday 2 October. The relevant part of the note now read as follows:

> "We have further addressed the questions around culture by having a separate 'Culture' workstream which is designed to embed a sustainable compliance culture. A series of activities was planned to include data gathering interviews of [BWA] personnel and a follow up workshop to agree actions and a workplan. An independent firm, Genesis Ventures, in conjunction with another third party (Erin Hilgart) undertook the data gathering interviews with Genesis focused on interviewing the Management Committee and their direct reports and Erin Hilgart focused on interviewing junior members of staff. In all c.10% of [BWA] staff were interviewed. A full day workshop was undertaken on 29 May 2012 to determine next steps. Eight key actions/work streams were identified as follows:
>
> …
>
> 7. Conduct 'culture reset' offsite with key influencers (e.g. Manco, office heads, control and infra heads, etc.)
>
> 8. …
>
> Work has been progressing across these priorities. A key deliverable was 7 above and a planned "culture reset" off-site will take place in the next two weeks it will include all of [BWA's] senior management and the independent consultants who worked on the review."

114. It was no part of the FCA's case before us that, in making these changes, Mr Perry was acting without integrity. The final version of the Kalaris Note was sent by Mr Kalaris to Mr Jenkins, copied to Mr Harding, on 2 October at 12:35 pm. It included minor amendments made by Mr Kalaris and Mr Haworth to the draft circulated by Mr Perry. The FCA did not allege that Mr Kalaris or any other employee of Barclays Group acted without integrity. On the same day, Mr Kalaris also sent a separate email to Mr Agius at 12:48 pm, reporting that he had provided Mr Jenkins with a detailed response to the Anonymous Email and that he would forward that response to the Salz Review. Mr Tinney accepted that he knew that the Kalaris Note was ultimately likely to be sent to Mr Agius, who had originally forwarded the Anonymous Email to Mr Kalaris.

Discussion of alleged misconduct in relation to Anonymous Email

115. The FCA allege that in preparing the drafts of the Kalaris Note, knowing they would be sent to Mr Agius and Mr Jenkins to inform them of the allegations made in the Anonymous Email, Mr Tinney acted without integrity in breach of APER 1 in three respects, namely that Mr Tinney:

> (1) intended the Kalaris Note to give the impression (or was reckless as to whether it gave the impression) that Genesis Ventures had not produced anything in writing, which he knew to be false;

(2) deliberately omitted any mention of the GenVen Document when it was obvious that any person investigating the Anonymous Email's allegation that a recently issued Wealth cultural audit report, prepared by a third-party consultancy, had been suppressed should be informed of the existence of the GenVen Document and what had become of it; and

(3) closed his mind to the likelihood that the Anonymous Email was referring to the GenVen Document and the legitimate interest that Mr Agius, Mr Jenkins and the Salz Review team had in being made aware of the existence of the GenVen Document.

116. We start by considering the third allegation of misconduct first. That allegation is in two parts. In relation to the first, we do not accept that Mr Tinney deliberately closed his mind to the possibility that the Anonymous Email referred to the GenVen Document or was reckless as to whether it referred to the GenVen Document. Mr Tinney's evidence (see [87] above), which we accept, was that he and Mr Kalaris discussed the possibility at their meeting on 26 September and dismissed it for reasons that we find are, at least, plausible. We accept that, at the time of the meeting and up to the time he produced his last draft of the Kalaris Note, Mr Tinney had considered the possibility that the Anonymous Email referred to the GenVen Document and concluded that it did not.

117. The second part of the third allegation is that Mr Tinney closed his mind to the legitimate interest that Mr Agius, Mr Jenkins and the Salz Review team had in being made aware of the existence of the GenVen Document. We consider that even if, as we have found, he believed that the Anonymous Email was not referring to the GenVen Document, Mr Tinney should have known that the fact that such a document had been produced was something that should have been communicated to Barclays' senior management and the Salz Review team in connection with the Anonymous Email, either by a reference in the Kalaris Note or otherwise. This was not because the GenVen Document was or might have been the document referred to in the Anonymous Email but because it was an important document in relation to issues raised in the Anonymous Email. The GenVen Document was relevant background information as it set the culture audit work in context. As we have found (see [97] and [109] above), this must have been obvious to Mr Tinney and, in producing the second and third drafts, he was reckless as to whether a false picture was being given to Barclays' senior management and the Salz Review team. Given the nature of the allegations in the Anonymous Email and in the context of the Salz Review, we have concluded that, in being reckless as to whether the Kalaris Note provided Barclays' senior management and the Salz Review team with the full details of Genesis Venture's contribution to the culture audit, Mr Tinney acted without integrity in breach of APER 1.

118. In relation to the first and second allegations of misconduct in relation to Anonymous Email, it follows from our findings of fact at [97] and [108] above and our conclusion in relation to the third allegation that we do not accept that the FCA has proved that Mr Tinney, knowing that Genesis Ventures had produced the GenVen Document, deliberately intended the Kalaris Note to give the impression that Genesis Ventures had not produced anything in writing and omitted any mention of it from the Kalaris Note. It is clear that no version of the Kalaris Note, whether produced by Mr Tinney or others, referred to the GenVen Document. We have found that Mr Tinney considered whether the Anonymous Email was referring to the GenVen Document, concluded that it did not and drafted his versions of the Kalaris Note accordingly. In those circumstances, we do not consider that the FCA has established, on the balance of probabilities, that Mr Tinney

deliberately drafted the Kalaris Note to give a misleading impression that the GenVen Document had never existed. However, for reasons given above, we consider that, when he produced his second and third drafts, Mr Tinney must have appreciated that the GenVen Document was relevant and been aware that the Kalaris Note might give the impression that it had never existed but he unjustifiably ignored that risk. We consider that such conduct was reckless and showed that Mr Tinney acted without integrity in breach of APER 1.

Events between the sending of the Kalaris Note and the New York Fed's Request

119. After speaking with Mr Stearns over the weekend of 29 and 30 September, Mr Perry telephoned Mr Walters and went to see him in his office on Thursday 4 October. Mr Perry told Mr Walters that, contrary to what he had been told, there was a compliance culture audit report and that it had been delivered to Mr Tinney's home. In an email to himself on 5 October, Mr Perry made a note of his conversation with Mr Walters which Mr Walters said in evidence was more or less correct. The email note included the following:

> "This is about the BWA Compliance Culture Audit Report that AT and TK say don't exist. It does exist. It was hand delivered as a hard copy only to AT at his home.
>
> AT read it and showed it to TK and he went ballistic and told AT to take out all negative references to the culture across Wealth as a whole and all criticism of AT and TK because they were only commissioned to report on the compliance culture in BWA …
>
> We had one meeting (AT, TK and MW were in the room) and I was on the phone. I think Ross (TB's partner) was on the phone too. Ross was definitely talking. Ross and Tom were definitely talking as if they were taking us all through a 'written report' – it was obvious from the way that T & R were talking through 'multiple sections'. After the initial introduction (where T & R said they had multiple – 15 to 20 observations on BWA, Wealth's culture as a whole and Wealth's management, including TK and AT). TK told them he's not interested in what they have to say about Wealth as a whole, him or AT – just focus on Mitch and BWA.
>
> I had always thought that a 'Report' would later come out and be in a much reduced form and I didn't tell anyone of my specific concerns. However, when AT lied to me 3 times over the phone, once on email and once f2f [face to face] following the anonymous letter to Agius, that was the tipping point for me."

120. Mr Walters's evidence is that he was shocked. If what Mr Perry was saying was correct, Mr Tinney had lied to Mr Perry about the non-existence of the "Wealth cultural audit report", had caused a false statement to be circulated to Mr Walters, who was the Global Head of Compliance, and had intended for it to be sent to Mr Jenkins, Mr Agius and the Salz Review. Mr Walters regarded this as a very serious allegation and told Mr Perry that he needed to escalate the matter to Mr Harding. Mr Perry did so the same day. Following this, Mr Harding, Mr Walters and Mr Perry met and agreed that the matter would have to be referred to Mr Peddie, to be included in the independent investigation called 'Project Helium', which was already in train. Mr Perry made a note of this conversation with Mr Harding in an email sent to himself on the morning of Saturday 6 October.

121. On Thursday 4 October, Mr Perry emailed Mr Biesinger asking to chat and they spoke over the weekend. Mr Perry asked Mr Biesinger for a copy of the GenVen Document, under the pretext that he was acting to protect Mr Tinney. At the start of the week commencing 8 October, Mr Biesinger telephoned Mr Tinney and told him that Mr Perry had asked him to give him a copy of the GenVen Document "off the record" without any reference to Mr Tinney. Mr Tinney's evidence was that neither he nor Mr Biesinger could understand why Mr Perry had not simply asked Mr Tinney for a copy of the GenVen Document but approached Mr Biesinger off the record. Mr Tinney said that both he and Mr Biesinger agreed that it was worrying that Mr Perry was going behind Mr Kalaris's and Mr Tinney's backs in such a way. Mr Tinney said he wanted to discuss the matter with Mr Kalaris.

122. Mr Tinney then spoke to Mr Kalaris. His evidence was that Mr Kalaris said that Mr Perry should not be given a copy "off the record" and instead he should be directed to speak to Mr Kalaris or Mr Tinney. Mr Tinney says that both he and Mr Kalaris were concerned as to the use that Mr Perry would put the GenVen Document given that it was highly critical of Mr Cox and Mr Perry had a well-known antipathy towards him.

123. Mr Tinney subsequently told Mr Biesinger not to provide the GenVen Document to Mr Perry. Mr Tinney told Mr Biesinger that he could give a copy of the GenVen Document to anyone from Barclays who made a bone fide formal request for it without referring back to him to check first. We were sceptical that, having said that Mr Biesinger should not provide the GenVen Document to Mr Perry, Mr Tinney would then say that he could provided it to anyone at Barclays without checking with Mr Tinney. However, that was Mr Tinney's evidence and, in the absence of any direct evidence to contradict it, we accept it.

124. Sometime after Mr Tinney had his conversation with Mr Biesinger, Mr Tinney's evidence was that he had a discussion with Mr Perry over a drink at The Slug and Lettuce in Canary Wharf. Mr Tinney thought that this occurred before Mr Perry's meeting with Mr Biesinger on 16 October discussed in the next paragraph. Mr Perry recorded it in another email to himself as a telephone call taking place on 21 October. Where and when this conversation took place does not matter as Mr Tinney did not dispute that it had occurred. Mr Tinney challenged Mr Perry about going to Mr Biesinger behind his back Mr Tinney told Mr Perry that Genesis Ventures should not have written things down because their interviews had been non-attributable and Mr Tinney did not want to be criticised for doing the right thing. Mr Tinney also said that he did not want a cigarette paper between him and Mr Perry. Mr Perry's note recorded Mr Tinney saying Genesis Ventures did not produce a report and that Mr Wall had been referring to personal hand-written notes in the meeting on 5 April. Mr Tinney's evidence was that he told Mr Perry that he did not want the GenVen Document to be changed in any way and he did not want anything new made up. He denied having referred to hand-written notes saying that he believed Genesis Ventures did not make handwritten notes but used iPads.

125. On 16 October, Mr Biesinger and Mr Perry met for a drink at the Coq d'Argent in the City of London. Unbeknownst to Mr Biesinger, Mr Perry wore a covert recording device and recorded their conversation. A transcript of the recording was produced to us. At this meeting, Mr Perry maintained the pretext that he was acting in Mr Tinney's interests and asked for a copy of the GenVen Document. Mr Biesinger declined to provide a copy of the GenVen Document to Mr Perry. In the course of that conversation,

Mr Biesinger repeatedly described the document that he had sent to Mr Tinney as "notes", or "meeting notes", or "interview notes". At one point, he said to Mr Perry:

> "There was no report. It was just, you know, my notes of the findings … I have my interview notes from [when I did the three days in New York] and I think at one stage I shared some of those with Andrew Tinney. But nothing was ever circulated. And I think that to circulate the notes would have been a breach of confidentiality."

126. The FCA submitted that Mr Biesinger described the document as "meeting notes" and "interview notes" to downplay its significance in order to put off Mr Perry and his request for a copy of the GenVen Document. Mr Strong specifically stated that he was not suggesting that there was any explicit agreement between Mr Biesinger and Mr Tinney to do that. There was no evidence that Mr Tinney and Mr Biesinger agreed to describe the GenVen Document as "notes" or that Mr Biesinger deliberately used that term not believing it to be an accurate description. In the absence of any such evidence, we consider that the conversation with Mr Perry shows that Mr Biesinger thought that "meeting notes" and "interview notes" were appropriate terms to describe the GenVen Document.

127. On Friday 2 November, Mr Perry and Mr Tinney went for a pre-arranged drink at the Fine Line in Canary Wharf. Mr Perry again wore covert recording equipment and a transcript of the recording was produced to us. Mr Perry said he wanted to have an off the record conversation with Mr Tinney as his General Counsel. Mr Perry told Mr Tinney that there had been another whistleblowing letter and that his conversations with Mr Biesinger about the Genesis Ventures report had made him nervous. Mr Perry warned Mr Tinney that Mr Peddie's investigation would establish that Mr Tinney had been sent a copy of the GenVen Document. Mr Tinney said in evidence that he did not express any concern about that as it was exactly what he expected Mr Peddie to do. At the meeting, Mr Tinney told Mr Perry that the GenVen Document, which he referred to as a "report", was a summary of Genesis Ventures' meeting notes. He said that it was not on Barclays' electronic systems, "because I didn't want a partial set of observations to be discoverable at any point in time". Mr Tinney told Mr Perry "I had a summary of the meeting notes in a hard copy which I read and then destroyed". Mr Perry said that he remembered Mr Wall having gone through the document at the oral briefing with Mr Kalaris on 5 April.

128. Mr Tinney and Mr Perry also discussed the Kalaris Note. Mr Tinney said as follows:

> "Where I'm at on this is exactly what I said all along which is why you will recall the phrasing in that response to Marcus [Agius] about...you know the...no report was issued to the firm or something – it was something that I said and you said 'whoa that is a bit mealy-mouthed, blah, blah, blah' and I said to you at the time that they had given me a hard copy of their interview notes, basically – a summary of their interview notes. They had given me a hard copy of it but I deliberately asked them not to provide a report."

129. Mr Tinney explained that he had not wanted a written document that may be discoverable in any employment litigation. He told Mr Perry:

> "[Genesis Ventures] biked it to me. I arrived home from travelling on the Friday night from wherever I was flying from, I got home and a

> courier had delivered, delivered this thing for me and it's stuff, set of quotes, and [I] didn't like it. … I didn't want a hard copy of it frankly but they had delivered it on paper because I told them I don't want a report, I want to use what you've got to input to what we need to fix. I insisted that it went nowhere near [Mr Kalaris]."

The New York Fed's Request

130. On 18 October, Mr Cox and Mr Doll had a meeting with the New York Fed at which they discussed the outcome of the BWA culture audit workstream. At a separate meeting with the New York Fed on the same day, Mr Kalaris said that he would provide the New York Fed with the BWA culture audit and set up a meeting between them and Mr Tinney to go through the report in detail. This appears to be a repetition by Mr Kalaris of his offers to provide the New York Fed with the BWA culture audit at meetings on 16 February (see [36] above) and 30 May (see [76] above) which had yet to be fulfilled.

131. On 29 November 2012, Ms Chaly sent an email to Ms Mansfield headed "BWA cultural audit". The email said:

> "Hi Erin, we are just following up on this request. The team have been briefed on the output by Mitch [Cox] but we were interested in the document itself. Can you help?"

We note that the reference to a briefing on the output by Mr Cox means that the document requested by Ms Chaly cannot have been the GenVen Document as Mr Cox was not aware of its existence and it preceded his involvement in the culture audit workstream at the culture workshop in May.

132. On the same day, Ms Mansfield sent an email to Mr Tinney headed "BWA" stating simply "Andrew, can I get a copy of the cultural audit? Thanks". Mr Tinney had not seen the email from the New York Fed and did not know why Ms Mansfield was asking for a copy of "the cultural audit". Mr Tinney was aware that Ms Mansfield, as Compliance Officer - Head of the Americas, was responsible for liaising with Barclays' US regulators, which included the New York Fed.

133. Later in the evening of 29 November, Mr Tinney replied, copying in Mr Doll and Mr Cox:

> "There was a workshop which took place a few months ago, the output from which was a series of actions/worksteps.
>
> Justin, can you let Erin have the relevant material/plan, please. It might be worth you guys having a quick catch up to go through the plan."

134. On 30 November, Mr Doll emailed Mr Tinney only, not copying in the others, asking Mr Tinney what he would like him to provide:

> "Andrew, there were three outputs that I am familiar with: (a) Erin Hilgart's conclusion from her bottom up interviews; (b) Tom [Biesinger] and Ross [Wall]'s conclusion from their top down interviews which I have not seen; (c) [the May culture] workshop … facilitated by Dylan [Pereira] which contains the action point from the session. What would you like me to share? I don't have Ross and Tom's piece. I guess I am struggling with the word audit in the description."

Mr Tinney's email of 1 December

135. Mr Tinney replied to Mr Doll's email on 1 December:

> "To your point, the only substantive input/output was from the workshop which Dylan [Pereira] facilitated. Please share that with Erin [Mansfield]."

136. Mr Strong, for the FCA, submitted that Mr Tinney's reply to Mr Doll was false and misleading in two respects. The first is that it was untrue on its face because the GenVen Document was clearly a substantive input into the workshop on 29 May. We do not accept this submission. Ms Mansfield had asked for a copy of "the cultural audit". Mr Doll had asked Mr Tinney for guidance on what was meant by "audit". Mr Doll was aware of Ms Hilgart's report (which he had seen at the workshop), the GenVen Document (which he had not seen but was aware of its existence and conclusions from the workshop) and the action points from the culture workshop but he clearly did not consider that they were a cultural 'audit'. Neither Ms Mansfield nor Mr Doll were asking Mr Tinney for inputs into the cultural audit but for a copy of the audit itself. Mr Doll used the term "outputs" in his email to Mr Tinney. Although he used the term "input/output", we interpret Mr Tinney's response to Mr Doll's request for guidance as being that the only output that might be described as an audit was the material produced following the culture workshop in May. Mr Tinney said that he did not put a great deal of thought into the drafting of this email. We agree that it could have been more clearly expressed but we do not consider that, in the context of the emails that preceded it, Mr Tinney's email to Mr Doll was untrue or misleading.

137. The second respect in which Mr Tinney's response to Mr Doll was said to be misleading was that, in the context of Ms Mansfield's request for a copy of the cultural audit and where Mr Doll himself had identified the GenVen Document as possibly being the document that Ms Mansfield was seeking, Mr Tinney should not have stated that the only thing which should be provided to Ms Mansfield was the output of the cultural workshop. For the same reasons as given in relation to the first point, we do not consider that Mr Tinney can be criticised for providing the material produced following the culture workshop in May in response to a request for a cultural audit and not providing two documents containing materials that were inputs to and considered at the workshop.

Further emails on 4, 5 and 6 December

138. On 4 December, Ms Chaly sent Ms Mansfield an email following up on the request on 29 November for the "BWA cultural audit". Ms Mansfield, who had not received any response, sent an email to Mr Tinney and Mr Doll saying that she had still not received anything. Mr Doll replied on 4 December in an email, copied to Mr Tinney and Mr Cox, stating as follows:

> "At the start of the remediation program there was a workstream called Culture Audit. It wasn't specific to "Culture of Compliance" but more of an opportunity to look at the culture of [BWA]. We had numerous discussions with Annemarie Crouch, Andrew Tinney, Mitch [Cox] and myself where we concluded understanding our values and tone at the top messaging should be the focus points. We engaged two different consultants who conducted interviews; one directed at senior mgmt (top-down) and the other as a cross-section of staff (bottom-up). Feedback was then consolidated where we then held a workshop which was facilitated by Dylan Pereira that included Andrew Tinney,

> Annemarie, Mitch, Jo Swaby, and the two consultants. We have not reported on the topic at the SEC Steering Committee nor provided an update to the SEC as the elements were organizational development rather than regulatory. Below was [sic] the action items we concluded on.
>
> 1. Conduct 360//leadership reviews of ManCo and direct reports (Mitch, Jo, Andrew)
>
> 2. Develop communication plan – align messaging at townhalls, etc. to encompass full range of objectives (Mitch, Justin)
>
> 3. Designate a ManCo member to champion each Gamma end-state metric category (value creation, people, clients, risk/regs)
>
> 4. Develop talent plan for each control and infrastructure area
>
> 5. Require each ManCo member to directly own hiring and development two levels below them
>
> 6. Ensure alignment of individual performance objectives
>
> 7. Conduct 'culture reset' off-site with key influencers (e.g. Manco, office heads, control and infra heads, etc.)
>
> 8. Repeat cultural review at the end of 2012 to assess progress against May baseline
>
> Please let me know if you questions [sic]."

139. Ms Mansfield replied to Mr Doll, copying in Mr Tinney and Mr Cox, in the early hours of 5 December at 1.50 am stating only "I need the document". Mr Doll emailed Mr Tinney saying:

> "Is there a specific document that she has in mind? I don't have a document other than Erin's summary. I also think it is time to call out bad behavior."

140. Mr Tinney replied to Mr Doll in an email on 5 December:

> "Dylan or Erin H put together a summary from the workshop, that's what Erin [Mansfield] is looking for. I will catch up with you later."

141. Mr Tinney had not discussed with Ms Mansfield, and did not know, what document she wanted. Not having received any document, on 6 December, Ms Mansfield sent an email to Mr Doll, Mr Tinney and Mr Cox saying "I need the actual report. The Fed is chasing me for this!!". This was the first time that Ms Mansfield had mentioned that her request was in response to a request from the Fed.

142. At 10:07 am (New York time) on 6 December, Mr Pereira emailed Ms Mansfield, copying in Mr Doll and Ms Crouch but not Mr Tinney, attaching a copy of the Culture Reset document saying:

> "This was the document Annemarie Crouch (then Head of HR for WMA) pulled together, which incorporated the actions from the culture workshop I facilitated."

143. At 1:38 pm (New York time, ie 6:38 pm London time), Ms Mansfield emailed Mr Tinney saying: "As discussed, please may I get the document asap". Mr Tinney replied

at 6:53 pm (London time) offering to have the document sent by Mr Pereira resent if it had not been received.

144. At 2:00 pm (New York time) on 6 December, under the subject line "BWA Culture workstream", Ms Mansfield forwarded the document sent to her by Mr Pereira to Ms Chaly and another person at the New York Fed. In the covering email, Ms Mansfield stated:

> "As requested, apologies it took so long. There was some confusion in terms of what I was requesting."

145. Ms Chaly responded by email saying:

> "Hi Erin - had a read through this and I don't think this is what we are looking for. Tom had described the cultural audit as a 'look back' type of review after the SEC exam assessing: 1) why did the tone at the top did [sic] not filter down to the bottom; and 2) what issues were there around escalation going from the ground up? When we met w/him a few months ago, he had offered to have us meet w/Andrew Tinney to go over the results. Can you set something up for us?"

The reference to a meeting a few months ago with Mr Kalaris appears to be referring to the meeting in New York on 18 October (see [130] above) or possibly one or more of the earlier meetings on 16 February (see [36] above) and 30 May (see [76] above).

146. Ms Mansfield forwarded this to Mr Tinney, copying in Mr Kalaris for the first time, saying:

> "Please see attached. When Stephanie [Chaly] reached out to me she asked for the BWA Culture workstream document. Hence, the subject line [of Ms Mansfield's email].
>
> Can you please provide document based on the attached? I also think that it would be good for you to walk her through whatever we provide."

Mr Tinney's emails of 6 December

147. Mr Tinney replied by email:

> "Thanks, Erin. I don't know to what extent there was a look back in the work we did. We were much more focused on the [sic] what do we need to do differently going forward. I am very happy to brief Stephanie at any time but Justin [Doll] did brief Juan and the team a few months ago.
>
> Give me a call if you would like to discuss."

The reference to a briefing by Mr Doll appears to be a reference to the meeting on 30 May (see [76] above).

148. Ms Mansfield responded:

> "They are really after a document in advance of any discussion. Is there anything we can send them?"

149. In response to Ms Mansfield's email, Mr Tinney said in a further email on 6 December:

> "We can create something if that would be helpful but as I say, the intention of the review was more Salz like – what do we need to do differently going forward, which is in the Culture Reset paper we sent through previously."

150. The FCA's case is that Mr Tinney's emails in [147] and [149] above were deliberately false and misleading. Mr Strong submitted that, at the time of the emails, Mr Tinney knew that the Culture Reset document produced after the workshop was not what the New York Fed wanted and that the further description in Ms Chaly's email of 6 December pointed clearly to the GenVen Document and Hilgart Document. Notwithstanding these points, Mr Tinney denied there was a look back in the work and offered to create something. In the alternative, the FCA asserted that Mr Tinney deliberately closed his mind to the possibility that the New York Fed were asking for the GenVen Document and decided to proceed on the basis that they were not.

151. Mr Tinney denied this but he accepted in cross-examination that the Gen Ven Document and the Hilgart Document were a 'look back' and included an examination of why the tone at the top did not filter down and issues of escalation from the bottom up. Mr Tinney said that he was concerned to understand what Mr Kalaris had promised the New York Fed so that he could respond to the request properly.

152. We accept that Mr Tinney was being cautious in his emails of 6 December because he did not know what Mr Kalaris had said to the New York Fed. We also find that, on their own, the emails would have given an incomplete and thus false impression to Ms Mansfield. It would have been better if Mr Tinney had explained that Genesis Ventures and Ms Hilgart had produced documents which were used to provide inputs to the culture workshop in May but were not the output of that workshop or the culture audit workstream. However, in considering whether Mr Tinney made false or misleading statements to Ms Mansfield, the emails must be seen in the context of Mr Tinney's other communication with her on the same day, namely the telephone call which we consider next.

The 6 December telephone call

153. Mr Tinney and Ms Mansfield had a conversation by telephone on the afternoon of 6 December around the time of the exchange of emails described above. Mr Tinney was in New York at the time. There was a disagreement between them as to exactly when the conversation occurred but nothing turns on the exact time of the call.

154. Mr Tinney's evidence was that he explained to Ms Mansfield that the available documents included the GenVen Document and the Hilgart Document. He said that he told Ms Mansfield that the GenVen Document summarised their notes from their interviews and contained a lot of verbatim quotes from interviews that were supposed to be confidential and that it was pretty unpleasant. He also told her that the GenVen Document made a limited set of recommendations and if that was what the New York Fed wanted then he could obtain it for her. He said that he recommended that no single document was responsive to the New York Fed's request and to provide an appropriate context for the culture audit, all the documents should be sent to the New York Fed. His evidence was that Ms Mansfield said that neither the GenVen Document nor the Hilgart Document appeared to be responsive to the New York Fed's request. Ms Mansfield told him that the New York Fed were looking for what Mr Kalaris had described to them as the cultural audit.

155. Ms Mansfield's evidence was that Mr Tinney said that he had interview notes from the culture audit work but that was not what the New York Fed was asking for, that there was no report to provide to the Fed and he did not offer to provide them to her. She said that he told her that it would be necessary to create something but she offered guidance that the New York Fed generally did not like having materials created just for them so he should pull together what had been shown to senior management.

156. In cross-examination, both Mr Tinney and Ms Mansfield maintained their versions of events. On balance, we accept Mr Tinney's version. This is not to say that we consider that Ms Mansfield was being untruthful. The fact that Mr Tinney and Ms Mansfield have different recollections of events is unsurprising after the passage of so much time. Having heard both witnesses, we cannot be certain which recollection is the more accurate. Having seen both of them give evidence before us, it seemed to us that Mr Tinney had a more detailed recollection of what was said during the call than Ms Mansfield and we tended to accept his version as the more accurate of the two. The FCA, which bears the burden of proof, has failed to satisfy us that, on the balance of probabilities, Ms Mansfield's version of the conversation on 6 December is more likely be correct than Mr Tinney's version. Accordingly, we accept that Mr Tinney referred to the GenVen Document and the Hilgart Document during his telephone call with Ms Mansfield who told him that they did not appear to be what the New York Fed were looking for.

The 10 December meeting

157. On 10 December, there was a meeting in Mr Kalaris's office in London to discuss what document would be produced for the New York Fed in advance of Mr Tinney's meeting with them. As well as Mr Kalaris, the meeting was attended by Mr Tinney, Ms Mansfield (who arrived late and left early, being at the meeting only for some 30 minutes) and Mr Mason. Mr Mason made a manuscript note of the meeting and we had the benefit of a typed version. It was the only contemporaneous record of the meeting and we consider that, where there is (as there was) a dispute about what was said in the meeting, it is more likely to be correct than the recollection of a witness many years later.

158. Mr Tinney's recollection of the meeting was that he had made the point to Mr Kalaris that there was no existing single document that could be responsive to what the New York Fed was asking for, ie a lookback review on a top down and bottom up basis. Mr Tinney said that Mr Kalaris directed that a new document would be produced for the New York Fed. Mr Mason was given responsibility for preparing the first draft. The document came to be known as the 'Fed Deck'. The meeting then discussed what should go into the Fed Deck. Mr Tinney's evidence was that he told the meeting that documents had been produced by Ms Hilgart and Genesis Ventures. He said that he had an electronic copy of Ms Hilgart's document which summarised her bottom up interviews. He told the meeting that he had been sent a hard copy of the GenVen Document which summarised their top down interviews. Mr Tinney said that he told the meeting that he had shredded the GenVen Document but that he could get a copy from Genesis Ventures if required or possibly from Mr Peddie who Mr Tinney was meeting the following day. Mr Tinney's evidence was that, when he said he had shredded the GenVen Document, Ms Mansfield told Mr Mason not to note that and told Mr Tinney that he should not say it to the New York Fed. In cross-examination, Ms Mansfield said she had not heard Mr Tinney say he had shredded the document and denied saying that he should not mention it to the New York Fed. She also denied saying that she thought that what he had described was not what they were looking for in any event. Ms Mansfield said that if she did not hear it

then she was not in the meeting at that point. In fact, Mr Tinney had not shredded the GenVen Document and subsequently found it among his papers at home. Nothing turns on this as the FCA accepted that Mr Tinney had genuinely believed that he had shredded it at the time of the meeting and, if he had, that no adverse inferences should be drawn from the secure destruction of the document in the circumstances of this case.

159. Mr Tinney said that he described the GenVen Document to Ms Mansfield in the same terms as he had previously (presumably, during the telephone call on 6 December) as well as other work done in preparation for the culture workshop in May. His evidence was that Ms Mansfield said that, in her view, these items were not what the New York Fed was expecting to receive as the results of the Culture Audit workstream and Mr Kalaris agreed with her. Mr Tinney said that he told Mr Kalaris and Ms Mansfield that he would ask Mr Peddie, who he was meeting the next day, if he thought that there was anything to share with the New York Fed.

160. Ms Mansfield agreed that Mr Kalaris had directed that a document should be produced for the New York Fed but her recollection of the meeting on 10 December differed from Mr Tinney's in important respects. Ms Mansfield said that it was at the meeting that she heard the names Genesis Ventures and Erin Hilgart for the first time and had it explained to her that Genesis Ventures had done top down work while Ms Hilgart had done bottom-up work. Mr Tinney agrees that he referred to Genesis Ventures and Ms Hilgart and described their work at the meeting but he maintained he had done so before in the telephone call with Ms Mansfield on 6 December. For reasons given above at [156], we are not satisfied that Ms Mansfield's evidence should be preferred on this point.

161. Ms Mansfield's evidence was that Mr Tinney said firmly that there was no report, only interview notes and they were not responsive to the New York Fed's request and that it would be necessary to create something for the New York Fed. Ms Mansfield said that Mr Tinney did not offer to share any Genesis Ventures or Erin Hilgart materials. Her evidence was that if Mr Tinney had said that there was a written report from Genesis Ventures then she would have said that it appeared to be responsive to the New York Fed's request and should be offered to them to see if it was what they were looking for.

162. Mr Mason's note is not in narrative form but consists of a series of words and phrases in relation to the points discussed. Accordingly, it does not enable us to determine exactly what was said or who said what. It seems clear from Mr Mason's note that the decision that a deck should be produced for the New York Fed was, consistent with Mr Tinney's evidence, taken by Mr Kalaris at the start of the meeting. We think this indicates that, contrary to Ms Mansfield's evidence, it was unnecessary for Mr Tinney to state that something must be created for the New York Fed and therefore unlikely that he did so.

163. The note refers to "Erin Hilgart's paper" which is described as "ok" and can be sent. On the next line, the note states "top down" which must, we think, be a reference to the GenVen Document and a few lines later:

> "3. Top down interviews by XZY [sic]:
>
> - list the people
> - anonymous
> - share verbally

4. Bottom up was shared

5. Took info

- cross referenced with BWA generally
- held a workshop – which involved XYZ
- why did tone [from] top not filter down
- escalation going up"

164. A little later, the note contains the following:

"AT: 1. How does the tone at the top cascade

2. When issues are raised how are they dealt with

Top Down review:

- Tom & Ross – leadership coaches
- AT suggestion & TK approved

Erin Hilgart: Learning + Development – knew junior staff + EOS + HR + Dylan FACILITATED THE WORKSHOP

<u>Output</u>

- Explicit asked not to write it down – discoverable for a litigation trail
  - briefing only
  - but physical notes which AT shredded it [sic]
- 'Sept report was suppressed' – email
- workshop output 'report'
- TK/DP (legal privilege) / verbal briefing - Tom & Ross – they quoted from their interviews.

…

- AT wanted to avoid litigation risk
- It was not about suppression"

165. It is clear from the extracts from the note quoted above that the work done by Genesis Ventures (referred to as XYZ or Tom and Ross) was discussed in some detail at the meeting. It is also clear that Mr Tinney told the meeting that the "physical notes" of the interviews by Genesis Ventures had been shredded. Ms Mansfield said that she did not hear Mr Tinney say that, which may be explained by the fact that she was not present at that point, having only attended the meeting for a short time.

166. Later, the note refers to the workshop on 29 May and the September email as follows:

"Sept/Oct – email on suppression:

- Duncan/AT discussion
- there was a rigorous exchange of emails

- this wasn't a culture audit
- the workshop created the 8 streams
- Anne-Marie Crouch to participate
- was there anything in the 'notes' that didn't make it to the workshop"

167. The FCA allege that, at this meeting, Mr Tinney made false or misleading statements to Mr Kalaris and to Ms Mansfield. The FCA's position is that Mr Tinney said at the meeting that there was no report to give to the New York Fed and that all he had received were interview notes which were not helpful and which he no longer had because he had shredded the document. It is clear from the note that the meeting of 5 April at which Mr Biesinger and Mr Wall briefed Mr Kalaris, Mr Perry and Mr Tinney about the interviews by reading extracts from the GenVen Document was discussed at the meeting on 10 December. Mr Kalaris would have recalled the 5 April meeting and must, therefore, have known that the GenVen Document existed and what it contained. There can be no question, therefore, of Mr Kalaris being misled by Mr Tinney. Indeed, it seems from the final section of the note that Mr Kalaris and Mr Tinney, if not Ms Mansfield who by then might have left, discussed the significance of the GenVen Document:

"Culture Re-set

Would Tom say there is anything missing?

…

Why not sent electronically

I don't want a litigation trail

Did you get to a complete picture.

Was there a disadvantage in not having a hard copy?"

168. As already stated, Ms Mansfield was not present for much of the meeting and therefore she cannot be a witness to what she did not see or hear. In so far as there is a conflict between Mr Tinney's evidence and that of Ms Mansfield, we think that it can be explained by the fact that she was not present throughout. Mr Mason's note, for example, shows that the shredding of the GenVen Document was mentioned although Ms Mansfield said that she did not hear Mr Tinney say that. It also shows that there was a more detailed discussion of the work of Genesis Ventures than Ms Mansfield's evidence would indicate. It seems to us that the note supports Mr Tinney's version of events more than Ms Mansfield's and for that reason we prefer and accept Mr Tinney's evidence about the meeting. Accordingly, we find that Mr Tinney did not deliberately make false or misleading statements about the GenVen Document at the meeting on 10 December. On the contrary, we find that there was a full and informed discussion about the GenVen Document between Mr Kalaris and Mr Tinney at the meeting, especially towards the end. As it is unclear at what point Ms Mansfield left the meeting, we are unable to make any finding as to whether Ms Mansfield was present for any part of that discussion.

Discussion of alleged misconduct in relation to New York Fed's Request

169. We now consider the FCA's allegations of misconduct in relation to the New York Fed's Request. The FCA allege that Mr Tinney knowingly made false or misleading statements to Ms Mansfield in his email of 1 December, his two emails and the telephone

conversation on 6 December and made further false or misleading statements to her and to Mr Kalaris during a meeting on 10 December.

170. In conclusion, we are not satisfied that Mr Tinney knowingly made false or misleading statements to Ms Mansfield or to Mr Kalaris in emails and conversations on 6 and 10 December. For the reasons given above and taking the emails and telephone conversation of 6 December together, we do not accept that Mr Tinney lied to or misled Ms Mansfield. We accept that Mr Tinney discussed the GenVen Document with Ms Mansfield during the telephone conversation on 6 December and that she said that it did not appear to be what the New York Fed wanted. We have also found that the GenVen Document was discussed in detail at the meeting on 10 December. Accordingly, we do not accept that Mr Tinney made false or misleading statements to Mr Kalaris in the meeting on 10 December as Mr Kalaris already knew all about the existence of the GenVen Document.

171. We also cannot agree that Mr Tinney had deliberately or recklessly closed his mind to the possibility that the GenVen Document and the Hilgart Document might be responsive to the New York Fed's Request. On the contrary, we have found that Mr Tinney considered that possibility at the meeting on 10 December and agreed with Mr Kalaris (whether or not Ms Mansfield was present at the time) that a new document should be produced. Even if she were present, we consider that Ms Mansfield's recollection of what was said at that meeting may not be correct, understandably, due to the passage of time and we prefer Mr Tinney's version of events.

Subsequent events

The 11 December meeting

172. Mr Tinney met with Mr Peddie on 11 December. Mr Peddie had been provided with a copy of the GenVen Document by Mr Biesinger on 6 December. It is common ground that Mr Tinney told Mr Peddie that he had received the GenVen Document in March and (mistakenly) that he had shredded it. The FCA do not allege that Mr Tinney made any false or misleading statements about the GenVen Document to Mr Peddie at this meeting on 11 December.

The 17 December meeting

173. Mr Jenkins had obtained a copy of the GenVen Document in early December. In his witness statement, Mr Jenkins said that he was appalled by the contents of the GenVen Document which showed serious failures in the leadership of Wealth and was a poor reflection on its management. By the time of the meeting, Mr Jenkins understood that Mr Tinney had received a copy of the GenVen Document and had not circulated it or provided it to senior management or regulators. Mr Jenkins also understood that Mr Tinney had not ensured that the Kalaris Note drew attention to the GenVen Document and had failed to provide it in response to a request from the New York Fed. On the basis of his understanding, Mr Jenkins considered that Mr Tinney had not been open and transparent or handled the matter in a way that was consistent with Barclays' values and so should be dismissed.

174. On 17 December, there was a meeting of Mr Jenkins, Mr Harding and Mr Kalaris. Mr Jenkins and Mr Harding asked Mr Kalaris if he had seen the GenVen Document. Mr Kalaris said that he had not seen the GenVen Document before that day which may have been literally true but undoubtedly gave a false impression of his awareness of the

document. When Mr Jenkins asked him what should be done, Mr Kalaris said that Mr Tinney should be dismissed. Mr Jenkins and Mr Harding agreed that Mr Tinney should be dismissed because he had suppressed the existence of the GenVen Document and much of its contents from Barclays senior management and regulators. Later on 17 December, Barclays suspended Mr Tinney. Mr Tinney and Barclays subsequently concluded a compromise agreement under which Mr Tinney's employment was terminated.

175. On 17 December, Ms Mansfield sent the GenVen Document, the Hilgart Document, the slides used at the culture workshop and the Culture Reset Slides created subsequently to the New York Fed. The New York Fed made no request for any further documents in relation to the culture audit.

176. On 20 January 2013, the Mail on Sunday published an article under the headline: "Exposed: The regime of fear inside Barclays - and how the boss lied and shredded the evidence", naming Mr Tinney and quoting from the GenVen Document, which it said he had suppressed. By the time the article was published, Mr Tinney had found the GenVen Document, which he mistakenly thought he had shredded, at his home and provided it to Barclays. It was subsequently established that the origin of the Mail on Sunday article had been a leak to the newspaper by Mr Perry.

The ICAEW investigation

177. As a result of the Mail on Sunday article, Mr Tinney's professional body, the ICAEW, began an investigation to find out whether the allegations in the article were true. In a letter dated 11 September 2013, the ICAEW asked Mr Tinney to provide information about the events described in the Mail on Sunday. Mr Tinney responded in a letter dated 17 September with an accompanying note. The letter was signed by Mr Tinney but it and the accompanying note had been drafted by his solicitors. The accompanying note contained the following:

> "… it was Mr Tinney's understanding of the legal advice that he had received from Mr Perry [in April 2012] that the BWA report should not be entered into Barclays' computer system because of the litigation risk it posed. HR action was in prospect as a result of its findings in relation to BWA's senior management."

178. When questioned on this issue by the FCA and before us, Mr Tinney accepted that Mr Perry had never specifically advised him not to store the GenVen Document on Barclays' computer systems. Mr Tinney said that he could see that the language in the note could be read as saying that Mr Perry had given specific advice and he regretted that he had not picked that up when he reviewed the draft of the note. Mr Tinney said that he had no intention of misleading the ICAEW and he did not believe that the ICAEW was misled. We think that the language of the note provided to the ICAEW is clear and only capable of being read in one way, namely that Mr Perry had advised Mr Tinney that the GenVen Document should not be put on Barclays' computer system. In the Decision Notice, the RDC concluded that Mr Tinney permitted the statement to be made in order to avoid criticism of his conduct.

179. In our view, Mr Tinney would have appreciated what the passage conveyed on even a cursory reading of the draft note. It was an important statement because it provided an explanation for Mr Tinney's conduct which was the subject of the ICAEW investigation. We consider that Mr Tinney either deliberately chose not to correct the statement in the note or, at best, was careless as to the accuracy of the response to the ICAEW's request for information drafted by his solicitors. The FCA do not rely on this as showing a lack of

integrity but as an aggravating factor. We agree that it is not to Mr Tinney's credit that, either deliberately or carelessly, he allowed a misleading statement to be made to the ICAEW on his behalf. If it is necessary to decide whether Mr Tinney acted deliberately or was merely careless, we consider that the statement that he had relied on "legal advice that he had received from Mr Perry" was so clear and prominent that, on balance, Mr Tinney deliberately allowed the inaccuracy to go uncorrected. We consider that this is something that should be taken into account when considering what sanction is appropriate for the misconduct in relation to the Kalaris Note that we have found has been proved.

The compelled interviews

180. The FCA says Mr Tinney also made false statements in his compelled interviews on 29 July 2014 and 23 January 2015.

181. In the interview on 29 July 2014, Mr Tinney told the FCA that he had asked Genesis Ventures not to produce anything in writing and that, when he expressed surprise to Ms Griffiths that a report was being sent to him, she told him that she had instructed Genesis Ventures to produce something in writing. Mr Tinney repeated this in the interview on 23 January 2015 and also stated that he had reprimanded Genesis Ventures for producing the GenVen Document. In a later interview, Mr Tinney modified his initial version of events to say that Ms Griffiths had told him only that she thought Genesis Ventures needed to put something in writing rather than that she told them to do so and that he might not have expressed his displeasure to Genesis Ventures. We deal with this at [41] above. We accept Mr Tinney's evidence before us that his recollection in the interviews was mistaken. We also accept the version of events that Mr Tinney gave at the hearing. The issue is whether the incorrect version of events that Mr Tinney gave to the FCA in his interviews shows that Mr Tinney deliberately or carelessly misled the FCA and, if so, does it show a lack of integrity. In our opinion, it does not. On the evidence that we have seen and our assessment of Mr Tinney, we conclude that he made a mistake in his interviews which he recognised, on reflection, and sought to correct in these proceedings. The outcome of the reference does not turn on whether Mr Tinney was angry at Ms Griffiths or Genesis Ventures or both of them. Mr Tinney could have said nothing about this point and the FCA would have been unable to make this criticism. We regard the fact that Mr Tinney wanted to ensure that his evidence was accurate, even at the risk of undermining his credibility, as commendable.

182. Also, in the interview on 29 July 2014, Mr Tinney told the FCA that an email of 4 April 2012 did not confirm an instruction that Genesis Ventures should not bring the GenVen Document to a meeting with Mr Kalaris but related instead to a summary of the GenVen Document or an agenda document. He repeated this explanation in the interview on 23 January 2015. We deal with this at [56] and [57] above. We accept what Mr Tinney said, namely that he had already told Genesis Ventures on 2 April that Mr Kalaris did not want a copy of the GenVen Document. On 4 April, he was responding to the email from Mr Biesinger which related to a suggestion that Mr Biesinger had made to Ms Griffiths that Genesis Ventures produce a summary of their findings for the oral briefing with Mr Kalaris. Mr Tinney had told Ms Griffiths that he did not want anything else produced in writing until Mr Kalaris had decided what to do next. We accept his evidence on this point and, accordingly, his answers in the interviews were truthful.

183. In both interviews, Mr Tinney told the FCA that he had instructed Genesis Ventures in April 2012 and again in October 2012 that they should retain a copy of the GenVen

Document and provide it to anyone from Barclays without reference to him. Mr Tinney was cross-examined about this by Mr Strong but maintained that the statement was true. We discuss this at [123] above. Mr Tinney was consistent on this point and, even if the FCA's scepticism is understandable, we consider that there is no basis on which we can find that Mr Tinney did not give the instruction or gave it but did not mean it.

184. Finally, in the interview on 29 July 2014, Mr Tinney told the FCA that, at the meeting with Mr Kalaris, Ms Mansfield and Mr Mason on 10 December 2012, he had recommended providing a copy of the GenVen Document to the New York Fed. Mr Tinney maintained that was true in that he had said at the meeting that the document sent to him by Genesis Ventures could be included in the Fed Deck but was told by Ms Mansfield and Mr Kalaris that they did not think the document he described was what the New York Fed was looking for. We deal with this in [157] to [168] above where we accept Mr Tinney's version of what was said at the meeting on 10 December and, accordingly, his answers in the interviews were truthful.

Findings on alleged misconduct

185. For the reasons given above, we have found that, when he drafted his second and third drafts of the Kalaris Note, Mr Tinney was reckless as to whether the note would give Barclays' senior management and the Salz Review team accurate information about the involvement of Genesis Ventures in the cultural audit and might give the impression that the GenVen Document never existed. We consider that, in drafting the Kalaris Note as he did, Mr Tinney acted without integrity in breach of APER 1. We have also found, however, that the FCA have not proved that Mr Tinney acted without integrity in relation to the New York Fed's Request.

Sanction for misconduct

Introduction

186. At the hearing in January 2018, Mr Guy Philipps QC, who appeared on behalf of Mr Tinney, submitted that, if we found any misconduct, we should allow Mr Tinney to make further submissions before deciding what action to take. We agreed that we would allow both parties to make further submissions before finalising our decision. Accordingly, on 18 December 2018, we issued a draft decision containing our findings of fact as to the relevant events and the allegations of misconduct but with no consideration of the issue of sanction. At the same time as issuing the draft decision, we asked the parties for submissions on the final disposal of this reference and specifically whether there should be an exchange of written submissions and/or a further hearing in relation to the question of sanction. After some correspondence, it was decided that a further hearing would be necessary.

187. The hearing eventually resumed on 26 March 2019 to consider what, if any, sanction should be imposed on Mr Tinney. Mr Tinney provided a witness statement, dated 5 March 2019, for the resumed hearing which set out the impact of the events described in this decision on his personal and professional life and made various points about the lack of enforcement action against others involved in the events, some reflections on his conduct and his otherwise good character. Mr Mott, who represented the FCA, made it clear that not everything that was said by Mr Tinney in the witness statement was accepted. Mr Tinney did not give oral evidence and was not cross-examined but, at the start of the hearing, he made a short personal statement which

covered some of the points made in his witness statement. In our view, nothing useful would have been served by Mr Tinney giving evidence and being cross-examined. Almost all the matters in his statement were either not contested, eg the effect on his personal life, or could be (and were) made in submissions by Ms Hanif who appeared for him.

Powers and approach of the Tribunal

188. It was common ground that the reference is not an appeal against the RDC's decision on sanction but a rehearing. Further, it is clear from section 133(4) of the FSMA that the Tribunal is not constrained to determine the reference on the basis of the evidence available to the decision-maker at the time but may take other evidence into account.

189. As stated at [8] and [9] above, Section 56 of the FSMA provides that 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 an authorised person. Section 66 of the FSMA provides that, where it appears to the FCA that a person is guilty of misconduct and it is satisfied that it is appropriate in all the circumstances to take action, the FCA may impose a penalty on the person of such amount as the FCA considers appropriate and/or publish a statement of the person's misconduct (a public censure).

190. The Tribunal has different powers in relation to sanctions under section 56 and section 66. On a reference in respect of a decision under section 56, section 133(6) of the FSMA provides that the Tribunal must determine such a reference 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."

191. Section 133(6A) of the FSMA provides that those findings are to be 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."

192. The Tribunal's role in a reference in relation to a prohibition under section 56 was explained in *Carrimjee v FCA* [2015] UKUT 0079 (TCC) [F2/20] as follows:

> "38. If, having reviewed all the evidence and the factors taken into account by the Authority in making its decision, and having made findings of fact in relation to that evidence and such other findings of law that are relevant, the Tribunal concludes that the decision to prohibit is one that is reasonably open to the Authority then the correct course is to dismiss the reference.
>
> 39. Alternatively, if the Tribunal is not satisfied that in the light of its findings that the decision is one that in all the circumstances is within the range of reasonable decisions open to the Authority, the correct course is to remit the matter with a direction to reconsider the decision in the light of those findings."

193. A reference to the Tribunal in respect of a decision under section 66 is defined in section 133(7A)(b) as a "disciplinary reference". Section 133(5) provides that, on 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."

194. The Tribunal's role on a disciplinary reference was considered in *Palmer v FCA* [2017] UKUT 313 (TCC). At [49], the Tribunal explained that in relation to a disciplinary reference, "the Tribunal has power to determine at its discretion what (if any) is the appropriate action for the Authority to take".

195. Neither party was able to refer us to any decision in which the Tribunal had imposed a financial penalty where none had been imposed by the RDC and we were not referred to any case where the Tribunal had increased a financial penalty imposed by the RDC. That may be because of the guidance given by the Tribunal in *Parker v FSA* (2006) FSMT 037 ('*Parker*') at [178]:

> "The Tribunal should, we consider, be slow to increase a penalty save in a case where the RDC has plainly misdirected itself and the penalty imposed falls substantially below a proper amount, since its doing so might otherwise act as a disincentive to the making of meritorious references."

196. The Tribunal in *Parker* took that view notwithstanding that the RDC in that case had wrongly thought that the profit on the market abuse was less than, in fact, it was. The Tribunal has followed the same approach in several other cases, eg *Curren v FSA* [2011] UKUT B32 (TCC) at [35], *Visser and Fagbulu v FSA* [2011] UKUT B37 (TCC) at [124] and *Carrimjee v FCA* [2015] UKUT 79 (TCC) at [334].

197. We consider that the approach described by the Tribunal in *Parker* is clearly correct. We do not go so far as to accept, as Ms Hanif urged, that *Parker* showed that there is, in effect, a presumption that a penalty will not be increased and the burden is on the FCA to rebut the presumption. Our task on a disciplinary reference is to determine, on the basis of our findings of fact and conclusions, what is the appropriate action (if any) for the RDC to take. In making that determination, we have regard to the RDC's reasons for issuing a public censure under section 66 of the FSMA rather than imposing a financial penalty under that section. Approaching the matter in that way, we consider that we should not impose a penalty where the RDC had decided not to do so unless we are satisfied that the RDC's decision was clearly wrong. A decision not to impose a penalty would be clearly wrong if, for example, the RDC had misdirected itself and the penalty imposed was substantially below an appropriate amount. A decision might also be clearly wrong if, on a reference, the Tribunal had found that the facts of the matter showed that the misconduct or its consequences were more serious than the RDC had appreciated when making its decision on the appropriate sanction.

RDC's decision

198. The RDC found that the FCA's allegations of misconduct by Mr Tinney had been proved and thus that Mr Tinney had acted without integrity in breach of APER1. The

RDC concluded that Mr Tinney was not a fit and proper person to perform controlled functions. The RDC then determined what sanction or sanctions should be applied. The RDC decided to issue a public censure under section 66 of the FSMA and not to impose any financial penalty under that section. In addition, the RDC imposed a partial prohibition under section 56. The RDC set out its reasons for imposing those sanctions in the Decision Notice as follows.

199. The RDC stated in relation to the public censure under section 66:

> "6.1 The principal purpose of issuing a public censure is to promote high standards of regulatory conduct by deterring persons who have committed breaches from committing further breaches and helping to deter other persons from committing similar breaches, as well as demonstrating generally the benefits of compliant behaviour.
>
> 6.2 DEPP 6.4.2 sets out factors that may be of particular relevance when the Authority determines whether it is appropriate to issue a public censure rather than impose a financial penalty. The criteria are not exhaustive and DEPP 6.4.1G(1) provides that the Authority will consider all the relevant circumstances when deciding whether to impose a penalty or issue a public censure. The Authority considers that the factors below are particularly relevant in this case.
>
> Deterrence (DEPP 6.4.2G(1))
>
> 6.3 In determining whether to publish a statement of Mr Tinney's misconduct, the Authority has had regard to the need to send a clear message that the Authority considers that the reckless making of misleading statements and omissions by an individual performing a significant influence controlled function constitutes serious misconduct, and to the need to ensure that Mr Tinney and other persons are deterred from committing similar breaches in the future. The Authority considers that, in the circumstances of this case, deterrence is effectively achieved by issuing a public censure.
>
> The seriousness of the breaches (DEPP 6.4.2G(3))
>
> 6.4 As mentioned in paragraph 6.3 above, the Authority considers that the reckless making of misleading statements and omissions by an individual performing a significant influence controlled function constitutes serious misconduct. While the Authority considers that a person of integrity in Mr Tinney's position would not have failed to mention the Report's existence in drafting the September Note and in response to the New York Fed's request, and would not have made misleading statements, the Authority considers that the following factors, which are relevant to the Authority's assessment of the seriousness of Mr Tinney's misconduct, support its view that the appropriate sanction is a public censure rather than a financial penalty:
>
> (1) Mr Tinney did not personally profit as a result of his misconduct, and his misconduct did not result in loss to consumers, investors or other market users or increase the existing risk of loss to the Firm's clients that had been identified by the SEC.
>
> (2) The Authority does not conclude that Mr Tinney made the statements and omissions with a deliberate intention to mislead.
>
> (3) The Relevant Period was relatively brief.

Mitigating factors

6.5 The Authority has taken account of the mitigating factors mentioned below. While these factors do not excuse Mr Tinney's actions, especially as Mr Tinney was a senior individual at the Firm approved to carry out the CF29 (Significant Management) controlled function and therefore required to meet certain minimum standards whatever the environment he worked in, the Authority considers that they support its conclusion that, whilst Mr Tinney's failings were serious, the appropriate sanction to be imposed on him is a public censure.

(1) Mr Tinney initiated both the Culture Audit workstream and the steps designed to address some of the BWA cultural issues identified in the Report. The Authority considers that Mr Tinney genuinely did hope that the Culture Audit workstream would in due course help to improve the Firm's culture and compliance with regulatory requirements, and reduce the risk of loss to consumers, investors or other market users, albeit his conduct during the Relevant Period was inconsistent with these goals.

(2) As the Report is highly critical of BWA and some members of its senior management, and recommends that the Firm should replace or consider replacing some members of BWA's senior management, the Authority considers it potentially carried some litigation risk and that it is therefore understandable why Mr Tinney, after discussion with his manager, took steps prior to the Relevant Period which aimed to ensure it was not seen by or available to others."

200. The passage on the prohibition order under section 56 was as follows:

"6.6 The Authority has the power to prohibit individuals under section 56 of the Act. The Authority has had regard to the guidance in Chapter 9 of EG in considering whether to impose a prohibition order on Mr Tinney.

6.7 The Authority considers that Mr Tinney is not a fit and proper person to perform any senior management function or any significant influence function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm and has decided that a prohibition order should be imposed on him under section 56 of the Act in those terms. The prohibition order is based on the Authority's conclusions that Mr Tinney:

(1) failed to comply with Statement of Principle 1 during the Relevant Period by recklessly making misleading statements and omissions in relation to matters relevant to regulatory compliance;

(2) subsequently recklessly gave a misleading account of certain matters in correspondence with the ICAEW (through his solicitors) and in interview with the Authority; and

(3) as a consequence, lacks integrity.

6.8 In deciding to impose the prohibition order, the Authority has taken account of the factors mentioned in paragraphs 6.3 to 6.5 of this Notice, and has concluded that, on the basis of Mr Tinney's reckless conduct in the course of carrying out the CF29 (Significant Management) controlled function, the prohibition order is appropriate in order to support the Authority's regulatory objectives of protecting and

> enhancing the integrity of the UK financial system and securing an appropriate degree of protection for consumers.

Public censure under section 66

201. Mr Mott submitted that, in a case such as this where a lack of integrity amounting to a breach of APER 1 had been found, the RDC's decision to impose a public censure rather than a financial penalty was clearly wrong. He contended that Mr Tinney had been found to have displayed a lack of integrity and that was the most serious non-criminal misconduct that an approved person could commit. He argued that, as a matter of principle, the appropriate sanction for such misconduct was a financial penalty in all but the most exceptional cases. He submitted that the circumstances of Mr Tinney's case were not unusual. He emphasised the seriousness of the misconduct by reference to our findings as set out in this decision. He submitted that, notwithstanding what was said in *Parker* and *Curren*, the reference was a complete re-hearing and it was not clear why the RDC's opinion as to what was an appropriate penalty should have any influence on the Tribunal. He contended that the RDC had clearly got it wrong and asked us to form our own view and determine that a financial penalty was the appropriate action to be taken in this case. He submitted that the RDC had not referred to DEPP 6.5B in the Decision Notice which was an error.

202. Ms Hanif submitted, by reference to the FCA guidance on whether to impose a financial penalty or a public censure found at DEPP 6.4, that the financial penalty and public censure are to be considered as alternative sanctions. She also pointed out that DEPP 6 stated that the decision maker should consider whether or not deterrence may be effectively achieved by issuing a public censure. Ms Hanif contended that if, on the facts, deterrence can be effectively achieved by issuing a public censure then that is the proportionate response and, in those circumstances, it would be disproportionate (and inconsistent with DEPP) to impose a financial penalty. Ms Hanif urged us to be guided by DEPP 6 and the case law referred to at [195] and [196] above.

203. As we have set out how we approach this issue at [197] above, we can deal with this issue quite briefly. In the Decision Notice, the RDC decided to issue a public censure under section 66 of the FSMA in relation to Mr Tinney's misconduct rather than impose a financial penalty. It did so having referred to DEPP 6.4.1G and DEPP 6.4.2G which both parties accept are the relevant passages from the guidance. It is correct that the Decision Notice makes no mention of DEPP 6.5B but it did not need to as the factors in it expressly included by reference in DEPP 6.4.2G and the RDC must be taken to have had them in mind. In the relevant passages of the Decision Notice, reproduced at [199] above, the RDC set out detailed and cogent reasons why it was appropriate to issue a public censure rather than impose a financial penalty. Taking that reasoning into account, we consider that there are no grounds on which the RDC's decision to issue a statement of public censure rather than impose a financial penalty can be said to be clearly wrong. In our view, the sanction decision was clearly right in the circumstances of this case, as described in the Decision Notice, and even more so in light of our findings of fact in this decision. We consider that a public censure adequately promotes the FCA's deterrence objective, referred to at [7] above, and the FCA has not satisfied us to the contrary. Accordingly, we determine that the appropriate action for the RDC as decision maker to take under section 66 of the FSMA is to issue a statement of public censure. Mr Tinney accepted that public censure is proportionate and accordingly this part of the reference must be dismissed.

Partial prohibition under section 56

204. In relation to the partial prohibition under section 56, Mr Mott submitted that this part of the reference should be dismissed which would have the effect that a partial prohibition order would be made. He contended that the decision to impose a partial prohibition was (at the very least) reasonably open to the RDC and, applying paragraph 38 of *Carrimjee*, the Tribunal should dismiss the reference.

205. Ms Hanif submitted that no prohibition order should be made. She relied on section 9.9 of the Enforcement Guide which sets out factors that the FCA should consider when deciding whether to make a prohibition against an approved person. The factors in section 9.9 include:

> "(6) The length of time since the occurrence of any matters indicating unfitness.
>
> …
>
> (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 …"

206. Ms Hanif submitted that, in contrast to a penalty, the primary purpose of a prohibition is to protect the public not to punish the individual and Mr Tinney does not pose any risk to consumers or the market, such that he should never be permitted to practice again in a senior function. Indeed, no consumers were harmed by his failings in respect of the second and third draft of the Kalaris Note. We accept this submission and indeed the preceding sentence is consistent with the RDC's view in paragraphs 6.4(1) and (2) of the Decision Notice, quoted at [199] above. We also accept that a considerable period of time has elapsed since the events of 2012 and since the RDC's decision to make a partial prohibition order in July 2016. We accept that Mr Tinney has been reflecting on his conduct in that time and that his remorse is genuine. It was also not disputed that, apart from the events described in this decision, Mr Tinney has a blameless disciplinary record.

207. Ms Hanif also asked us to conclude that, taking account of those factors, and in particular, the absence of any risk to consumers or the market, an imposition of a partial prohibition would be disproportionate. We do not consider that it would be appropriate to make such a finding on a speculative basis.

208. In relation to the decision to impose a partial prohibition under section 56 of the FSMA, we are not satisfied that the decision to make a partial prohibition order can be regarded as one that, in all the circumstances, is within the range of reasonable decisions open to the RDC. Accordingly, we have decided to remit the case to the FCA with a direction to reconsider its decision to impose a partial prohibition in the light of the matters identified in the Decision Notice and, in so far as they differ, our findings in this decision. Specifically, we draw the FCA's attention to our findings that there was no misconduct by Mr Tinney in relation to New York Fed's Request, the length of time since the events of September and October 2012 and his otherwise spotless disciplinary record.

Conclusions

209. For the reasons given above, we dismiss the reference of the Decision Notice in so far as it relates to the question of whether Mr Tinney had acted without integrity in breach of APER 1 when he drafted his second and third drafts of the Kalaris Note. The reference is allowed in so far as it relates to the RDC's finding that Mr Tinney had acted without integrity in relation to the New York Fed's Request.

210. In relation to the sanction under section 66 of the FSMA, we have determined that the issue of a statement of public censure was the appropriate action for the RDC as decision maker to take in relation to Mr Tinney's conduct when drafting the Kalaris Note. Accordingly, that part of the reference is dismissed, and no direction is required in relation to it.

211. Having made our findings of fact in relation to Mr Tinney's conduct and as those findings differ significantly from the findings of the RDC, we are not satisfied that the decision to make a partial prohibition order under section 56 of the FSMA is one that, in all the circumstances, is within the range of reasonable decisions open to the RDC. Accordingly, we allow the reference to that extent.

Directions

212. In relation to the partial prohibition under section 56 of the FSMA, we remit the matter to the FCA and direct it to reconsider and reach a decision in accordance with our findings as set out above.

213. We remit the references to the FCA with the direction that effect be given to our determination.

Judge Greg Sinfield

Release date: 13 May 2019