[2021] UKUT 0162 (TCC)

Case number: FS/2019/021 & 022

FINANCIAL SERVICES– whether Chief Executive of small insurer demonstrated a lack of integrity in relation to issues arising out of his wife's employment by the insurer - Statement of Principle 1 of the FCA's and PRA's Statements are of Principle for Approved Persons , Rule 1 FCA's Individual Conduct Rules and Individual Conduct Standard 1 PRA's Insurance Conduct Standards

Financial penalty - whether action to impose financial penalty partially time-barred- whether financial penalty appropriate and if so appropriate level of penalty - s 66 FSMA

Fitness and properness of director as approved person - prohibition order in relation to all functions in relation to regulated activities - s 56 FSMA

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

STUART MALCOLM FORSYTH **Applicant**

- and -

THE FINANCIAL CONDUCT AUTHORITY (1)

THE PRUDENTIAL REGULATION AUTHORITY (2)

The Regulators

TRIBUNAL: Judge Timothy Herrington
Member Jo Neill
Member Peter Freeman

Sitting in public at The Rolls Buildings, Royal Courts of Justice, London EC4 on 13, 14, 15, 16, & 21 April 2021

Andrew George QC, instructed by DAC Beachcroft LLP, Solicitors, for the Applicant

Farhaz Khan and Teniola Onabanjo, Counsel, instructed by the Financial Conduct Authority and The Prudential Regulation Authority, for the Regulators

© CROWN COPYRIGHT 2021

DECISION

Introduction and decisions referred

1. This decision concerns two references by Mr Stuart Forsyth ("Mr Forsyth") as follows. The first reference is in respect of a decision notice of The Financial Conduct Authority (the "FCA") dated 30 September 2019 (the "FCA Decision Notice"). The second reference is in respect of a decision notice of The Prudential Regulation Authority (the "PRA") also dated 30 September 2019 (the "PRA Decision Notice"). Both decision notices (together the "Decision Notices") concern the same matters.

2. Pursuant to the FCA Decision Notice the FCA decided (i) to make an order, pursuant to section 56 of the Financial Services and Markets Act 2000 ("FSMA"), prohibiting Mr Forsyth from performing any function in relation to any regulated activity carried on by an FCA-authorised person, or by an exempt person or exempt professional firm in respect of any FCA-regulated activity and (ii) to impose, pursuant to section 66 of FSMA, a financial penalty of £78,318 on Mr Forsyth.

3. Pursuant to the PRA Decision Notice the PRA decided (i) to make an order, pursuant to section 56 of FSMA, prohibiting Mr Forsyth from performing any function in relation to any regulated activity carried on by a PRA-authorised person, or by an exempt person or exempt professional firm in relation to any PRA-regulated activity carried on by that person and (ii) to impose, pursuant to section 66 of FSMA, a financial penalty of £76,180 on Mr Forsyth.

4. The matters which are the subject of these references relate to the conduct of Mr Forsyth in his capacity as the Chief Executive Officer ("CEO or Chief Executive") of a small mutual insurance firm, the Scottish Boatowners Mutual Insurance Association ("SBMIA" or the "Association"). SBMIA was at all material times a mutual insurer that was founded in 1918 by fishermen in the area of Buckie, Scotland. It predominantly provided insurance for fishing vessels and associated insurance products.

5. Both the FCA and PRA (together the "Regulators") contend that during the period 19 February 2010 to 8 July 2016 (the "Relevant Period") Mr Forsyth's conduct demonstrated a serious lack of integrity in breach of Statement of Principle 1 (Integrity) of the Regulators' Statements of Principle for Approved Persons; Rule 1 (Integrity) of the FCA's Individual Conduct Rules; and Individual Conduct Standard 1 (Integrity) of the PRA's Insurance Conduct Standards. As summarised in the Regulators' Statement of Case on these references the Regulators say:

> (1) From 2010, Mr Forsyth improperly allocated a substantial part of his annual contractual bonuses to his wife Mrs Penelope Forsyth ("Mrs Forsyth"), who was also employed by SBMIA during the Relevant Period.

(2) From 2013, Mr Forsyth increased the proportion of his annual salary which he allocated to Mrs Forsyth to a level which was excessive and unjustified by any work which Mrs Forsyth performed.

(3) The salary and bonus arrangements at (1) and (2) above were not made in accordance with SBMIA's ordinary remuneration procedures and were not fully disclosed by Mr Forsyth to the SBMIA Board and Remuneration Committee (the "Remuneration Committee").

(4) When internal concerns were raised at SBMIA about certain matters, including the payment of part of Mr Forsyth's remuneration to Mrs Forsyth, he improperly involved himself in the investigation by an external auditor.

(5) Mr Forsyth created false minutes of the Remuneration Committee which purported to show that the Remuneration Committee had agreed the salaries of both Mr and Mrs Forsyth in 2013, 2014 and 2015. Mr Forsyth prepared these minutes deliberately to create a misleading record that the Remuneration Committee had agreed these payments.

(6) Mr Forsyth recklessly provided the PRA with an incomplete set of the SBMIA Remuneration Committee's minutes for 2013, 2014, 2015 which misled the PRA as to what had been agreed by the Remuneration Committee.

6. Mr Forsyth contends that at all material times he acted with integrity. As summarised in his Reply he says:

(1) All remuneration paid by SBMIA to Mrs Forsyth throughout the Relevant Period was lawful and permissible in accordance with both the policies and procedures implemented by SBMIA and the relevant rules of Her Majesty's Revenue and Customs Commissioners ("HMRC"). Mr Forsyth believed on reasonable grounds that this was the case.

(2) The procedure adopted by SBMIA in respect of Mrs Forsyth's remuneration involved a process whereby:

(a) The Remuneration Committee, being fully aware that Mrs Forsyth provided out-of-hours administrative and executive assistant type services to Mr Forsyth from the Forsyth's family home, set a global figure for Mr and Mrs Forsyth's remuneration which was not to be exceeded.

(b) The precise apportionment of that figure between Mr and Mrs Forsyth was subsequently proposed by Mr Forsyth and formally approved by a member of the Remuneration Committee (either the Chairman of SBMIA or the Chairman of the Remuneration Committee). It was entirely lawful and permissible for SBMIA to adopt such a procedure.

(c) To the extent that this process did not reflect "SBMIA's ordinary remuneration procedures", this was due to the specific nature of Mrs Forsyth's role and its inter-connections with Mr Forsyth's role, which led to SBMIA's decision to set the global figure referred to above. SBMIA was perfectly entitled to adopt a bespoke process for setting the remuneration of Mrs Forsyth.

(d) To the extent that the process of delegation set out above resulted in members of the Board and/or the Remuneration Committee not automatically being made aware of Mrs Forsyth's precise level of remuneration in any particular year, this was a consequence of the lawful and permissible process of delegation adopted by SBMIA. Any member of the Board and/or the Remuneration Committee who wished to obtain that information could easily have done so. Moreover, there is clear evidence that of the five individuals who from time to time constituted the Remuneration Committee during the Relevant Period, four were specifically aware of the precise remuneration awarded to Mrs Forsyth in one or more relevant years. To describe the aforesaid process as a failure on Mr Forsyth's part to fully disclose the relevant matters is misleading and wrong.

(3) The quantum of the remuneration paid to Mrs Forsyth was neither excessive nor unjustified by reference to the services she performed and was in any event within the lawful and permissible range of remuneration which SBMIA was entitled to award Mrs Forsyth for her services.

(4) Mr Forsyth did not improperly involve himself in the investigation by external auditors. The terms of reference of the external auditors, and the decision whether to undertake or commission further factual investigations, were approved by the SBMIA Board and the results of the relevant investigation were considered by the SBMIA Board in accordance with the process it had determined. Mr Forsyth's involvement in this process was lawful and permissible, and in accordance with the procedures adopted by the SBMIA Board.

(5) Mr Forsyth did not create any "false minutes". The documents created reflected the various stages of the process of approval and delegation set out above. To the extent that the document setting out the final conclusion of this process was inappositely described as a "minute", this was a mis-description of no consequence and it was self-evident from any consideration of the relevant document that it set out a resolution and decision rather than a narrative record of a meeting.

(6) Mr Forsyth acted reasonably, and in any event did not act recklessly, in sending the documents to the PRA which he sent.

(7) Pursuant to section 66 FSMA, the Regulators are precluded from imposing a financial penalty in respect of misconduct that occurred prior to 25 July 2014 insofar as the Regulators knew of the misconduct or had information from which the misconduct could be reasonably inferred more than 3 years prior to the issuance of the Warning Notice on 24 April 2019. The Regulators had such information by 6 November 2015 (and in any event before 25 April 2016) by which time it had been specifically alleged to the PRA by a whistle blower that "[Mr Forsyth] has arranged…to pay part of his salary and bonus to his wife who does not work in the business to reduce his tax liability thereby committing tax fraud." The fact that such clear and unequivocal allegations were made by

the whistle blower to the Regulators was sufficient to start the limitation clock for the purposes of section 66 FSMA.

7. Annex A to this decision is a schedule setting out in respect of each year in the Relevant Period (i) the amounts awarded to Mr Forsyth by the Remuneration Committee in respect of salary and bonus (ii) the salary split between Mr and Mrs Forsyth determined by Mr Forsyth and approved by a member of the Remuneration Committee (iii) the bonuses awarded to Mr Forsyth (iv) the portion of such bonuses which were paid to Mrs Forsyth and (v) the bonuses awarded directly to Mrs Forsyth.

8. This is the first time that this Tribunal has heard a reference in respect of a decision made by the PRA. Although the matters which caused the Regulators to institute regulatory proceedings against Mr Forsyth first came to the attention of the PRA and initially the PRA took the initiative in investigating those matters, the FCA subsequently became involved as well. That resulted in each Regulator ultimately issuing a decision notice in respect of the matter in substantively the same form following a joint meeting of the Regulators' respective decision-makers after hearing representations from Mr Forsyth, with each Regulator deciding to impose a prohibition order and imposing a financial penalty of a similar amount.

9. The Tribunal sought to simplify matters at an early stage in the proceedings by directing that a single Statement of Case be filed by the Regulators and thereafter the proceedings have been conducted in most respects as if the Tribunal were dealing with a single set of proceedings.

10. We have found that the Regulators have not made out their case that Mr Forsyth failed to act with integrity in relation to the subject matter of these references. Accordingly, we have directed that the Regulators should not impose a financial penalty on Mr Forsyth, and we have remitted the question of whether a prohibition order should be imposed to the Regulators for them to reconsider their decision in that regard.

11. We now set out the reasons for our conclusions.

Applicable legal and regulatory provisions

12. The Regulators' Statements of Principle and Code of Practice for Approved Persons "APER" were each issued under s 64 FSMA and were applicable in relation to Mr Forsyth until 6 March 2016.[1]

13. Statement of Principle 1 states that an approved person must act with integrity in carrying out his accountable functions.

14. From 7 March 2016 Individual Conduct Rules ("COCON") made by the FCA pursuant to s 64A FSMA applied to the persons set out in COCON 1.1.2. These persons include "an FCA-approved person or PRA-approved person approved to

[1] As regards the PRA, those provisions were in force from the PRA assuming its regulatory powers on 1 April 2013

perform a controlled function in a Solvency II firm (including a large non-directive insurer) or a small non-directive insurer" (1.1.2(1)(g)). SBMIA was a firm which fell within the scope of this rule.

15. Those rules apply to persons who have approval under s 59 FSMA to perform a designated senior management function. The rules applied to Mr Forsyth because of his position as Chief Executive of SBMIA.

16. Rule 1 states that an approved person must act with integrity in carrying out his senior management functions (COCON 2.1.1).

17. That part of the FCA's Handbook entitled "The Fit and Proper Test for Employees and Senior Personnel" ("FIT") sets out the criteria that the FCA will consider when assessing the fitness and propriety of a candidate for a controlled function. FIT is also relevant in assessing the continuing fitness and propriety of an approved person.

18. FIT 1.3.1G states that the FCA will have regard to a number of factors when assessing the fitness and propriety of a person. The most important considerations will be the person's honesty, integrity and reputation, competence and capability and financial soundness.

19. Clearly, in relation to these references, because of the way in which the Regulators present their case, the relevant consideration is whether it can be demonstrated that Mr Forsyth has acted without integrity.

20. FIT 2.1.1G provides that in determining a person's honesty and integrity the FCA will have regard to all relevant matters.

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

22. The FCA's policy in relation to prohibition orders is set out in Chapter 9 of the Enforcement Guide ("EG"). EG 9.1 states that the Authority may exercise this power where it considers that, to achieve any of its regulatory objectives, it is appropriate either to prevent an individual from performing any functions in relation to regulated activities or to restrict the functions which he may perform.

23. EG 9.2.3G provides that the scope of a prohibition order will depend on the range of functions that the individual performs in relation to regulated activities, the reasons why he is not fit and proper, and the severity of risk which he poses to consumers or the market generally.

24. EG 9.3.2G provides that, when deciding whether to make a prohibition order against an approved person, the FCA will consider all the relevant circumstances of the case which may include, but are not limited to, the question whether the individual is fit and proper to perform functions in relation to regulated activities and whether,

and to what extent, the approved person has failed to comply with the Statements of Principle.

25. EG 9.7.1G provides that in appropriate cases the FCA may take other action against an individual in addition to making a prohibition order including the use of its power to impose a financial penalty.

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

27. Misconduct includes failure, while an approved person, to comply with a Statement of Principle issued under s 64 FSMA or conduct rules issued under s 64A FSMA.

28. In exercising its power to impose a financial penalty, the FCA must have regard to relevant provisions in the FCA's Handbook of rules and guidance. The FCA's policy in relation to the imposition of financial penalties is set out in chapter 6 of the section of the Handbook entitled DEPP.

29. Provisions which are substantially the same as those described in relation to the FCA at [14] to [28] above apply to the PRA.

30. The relevant standards in force from 7 March 2016 are the Insurance Conduct Standards issued under s 64A FSMA. Individual Conduct Standard 1 states that any individual approved by the PRA or the FCA in relation to a relevant senior management function must act with integrity. By virtue of his position as Chief Executive of SBMIA Mr Forsyth fell within the scope of this provision.

31. Section 66(4) FSMA provides for a limitation on the period in which the Regulators may take action under s 66 FSMA, in the form of issuing a Warning Notice. Knowledge for this purpose includes having information from which the misconduct can reasonably be inferred: see s 66 (5). Mr Forsyth contends that the limitation period had expired in this case before the Regulators issued him with a Warning Notice in relation to conduct occurring prior to 25 July 2014.

32. Because of our conclusion that no financial penalty should be imposed in this case, we do not need to consider the limitation issue in any detail.

Issues to be determined and the role of the Tribunal

33. Section 133(4) FSMA provides that, on a reference, the Tribunal may consider any evidence relating to the subject matter of the reference whether or not it was available to the decision-maker at the material time. This is not an appeal against the Regulators' decisions but a complete rehearing of the issues which give rise to the decisions. Section 133(5) to (7) FSMA, following amendments made by the Financial Services Act 2012, now provides as follows:

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

34. In this case there are two decision-makers in relation to these references, namely the FCA and the PRA.

35. It can be seen that there is now a distinction between the powers of the Tribunal on what is described as a "disciplinary reference" and other references. Pursuant to s 133(7A) FSMA "disciplinary reference" includes a decision to take action under s 66 FSMA, that is to impose a financial penalty on a person. The term does not include a reference to impose a prohibition order under s 56. Thus, these references are effectively sub-divided. Mr Forsyth's references of the decisions to impose a financial penalty are "disciplinary references" and accordingly, as was the case in relation to all references made before 1 April 2013, the Tribunal has power to determine at its discretion what (if any) is the appropriate action for the Regulators to take. In relation to Mr Forsyth's reference of the Regulators' decisions to impose a prohibition order, which we shall refer to as the "non-disciplinary references", the powers of the Tribunal as set out in s 133(6) are more limited. The jurisdiction may now be characterised as a supervisory rather than a full jurisdiction. That means that, unless the Tribunal believes the reference to have no merit and therefore dismisses it, its powers are limited to remitting the matter to the Regulators with a direction to reconsider their decisions in accordance with the findings of the Tribunal.

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

> "39. If, having reviewed all the evidence and the factors taken into account by the Authority in making its decision, and having made findings of fact in relation to that evidence and such other findings of law that are relevant, the Tribunal concludes that the decision to prohibit is one that is reasonably open to the Authority then the correct course is to dismiss the reference.
>
> 40. Alternatively, if the Tribunal is not satisfied that in the light of its findings that the decision is one that in all the circumstances is within the range of reasonable decisions open to the Authority, the correct course is to remit the matter with a direction to reconsider the decision in the light of those findings. For example, that course would also be necessary were the Tribunal to make findings of fact that were clearly at variance with the findings made by the Authority, and which formed the basis of its decision. That course would also be necessary had there been a change of circumstance regarding the applicant which indicated that the original findings made on which the decision was based, for example as to his competence to undertake particular activities, had been overtaken by further developments, such as new evidence which clearly demonstrated the applicant's proficiency in relation to the relevant matters. Such a course would not usurp the Authority's role in making the overall assessment as to fitness and propriety but would ensure that it reconsidered its decision on a fully informed basis. In our view such a course is consistent with the policy referred to at [31] and [32] above as it leaves it to the Authority to make a judgment as to whether a prohibition order is appropriate."

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

38. The key issue in relation to these references is whether the Regulators can make out their case that Mr Forsyth has failed to act with integrity in relation to the subject matter of these references.

39. The correct legal approach to the question of integrity has been considered in many cases before this Tribunal and its predecessor, the Financial Services and Markets Tribunal.

40. In *Tinney v FCA* [2018] UKUT 0435 (TCC) the Tribunal, having considered the cases of *Hoodless and Blackwell v FSA* (2003) and *Vukelic v FSA* (2009) at [10] and [11] set out the following guidance at [12] to [14] which we gratefully adopt:

> "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."

41. Mr Khan also drew our attention to the later Court of Appeal case of *Wingate v SRA* [2018] 1 WLR 3696. In that case Rupert Jackson LJ made the following observations at [95], [97], and [100] as to the standard of conduct expected of a professional person acting with integrity:

> "95. Let me now turn to integrity. As a matter of common parlance and as a matter of law, integrity is a broader concept than honesty…
>
> 97. In professional codes of conduct, the term "integrity" is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members. See the judgment of Sir Brian Leveson P in Williams at [130]. The underlying rationale is that the professions have a privileged and trusted role in society. In return they are required to live up to their own professional standards.
>
> …
>
> 100. Integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty. To take one example, a solicitor conducting negotiations or a barrister making submissions to a judge or arbitrator will take particular care not to mislead. Such a professional person is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse."

42. *Wingate* concerned the standard of conduct expected of a solicitor. We accept that Mr Forsyth, as the Chief Executive of a regulated insurance firm, would likewise be expected to adhere to higher standards than those expected from general members of the public because of the trust that the public rightly put in those who lead regulated financial services firms. This is one of the ways of distinguishing "integrity" from "honesty". The latter concept is a basic moral quality which is expected of all members of society. Honesty involves being truthful about important matters and respecting the property rights of others. Telling lies about things that matter or committing fraud or stealing are generally regarded as dishonest conduct: See *Wingate* at [93]. It follows that a person who is dishonest in his conduct is guilty of more serious misconduct than a person who acts without integrity. That is why regulators are usually astute in identifying whether they characterise the conduct of which they complain as demonstrating a lack of honesty as opposed to a lack of integrity.

43. It is clear that there are both subjective and objective elements to the test of what constitutes a lack of integrity. As is now the case with an allegation of dishonesty since the Supreme Court's judgment in *Ivey v Genting* [2017] 3 WLR 1212, the test is essentially objective but nevertheless involves having regard to the state of mind of the actor as well as the facts which the person concerned knew: see *Wingate* at [115] to [120].

44. Therefore, as Mr Khan correctly submitted, in this case we may have regard to the actual state of Mr Forsyth's knowledge or belief as to the facts but there is no requirement that the Regulators prove that Mr Forsyth appreciated that what he had done constituted a failure to act with integrity in the objective sense.

45. In this case, the Regulators have not specifically pleaded that Mr Forsyth acted dishonestly. That allegation was made at a very early stage in the regulatory

proceedings. We have seen a draft Warning Notice, which was put to the Regulators' decision-makers but not accepted by them, which alleged that Mr Forsyth's conduct demonstrated a serious lack of honesty and integrity on the basis that, as the Regulators now accept not to be the case, Mrs Forsyth had not carried out any work which justified any remuneration at all. At that stage, the Regulators contended that the sole purpose of the arrangements which resulted in Mrs Forsyth receiving a salary was to minimise his liability to income tax on his own earnings.

46. The Regulators' summary of their case, as derived from paragraph 9 of its Statement of Case and set out at [5] above, alleges that Mr Forsyth "improperly allocated" a substantial part of his bonuses to Mrs Forsyth and increased the proportion of his annual salary which he allocated to Mrs Forsyth to a level which was "excessive and unjustified by any work which Mrs Forsyth performed". Those are the allegations which the Regulators rely on primarily to support their contention that Mr Forsyth's conduct demonstrated a serious lack of integrity, but without alleging dishonesty.

47. Nothing is said in the passages quoted [5] above as to Mr Forsyth's state of mind at the time that the decisions were made to allocate remuneration to Mrs Forsyth out of his own remuneration. However, at paragraph 51 of their Statement of Case, in support of their contentions that Mr Forsyth's conduct, as described in the preceding paragraphs of the Statement of Case, constituted a failure to act with integrity, the Regulators plead that Mr Forsyth "deliberately arranged" for Mrs Forsyth to receive remuneration in excess of what was reasonable for the work she was undertaking "with the object and effect of illegitimately reducing his income tax liability."

48. In our view that is an allegation of dishonesty. It is an allegation that Mr Forsyth allocated excessive remuneration to Mrs Forsyth for the purposes of committing a tax fraud. As was observed in *Wingate*, at [93] an allegation of fraud amounts to an allegation of dishonesty. The word "deliberate" in our view indicates an intention to achieve a particular result; in this case an intention to defraud HMRC.

49. That interpretation is consistent with the recent judgment of the Supreme Court in *Burnett or Grant v International Insurance Company of Hanover Ltd* [2021] UKSC 12. In that case, the issue was what was meant by "deliberate acts" in an insurance policy excluding cover for deliberate acts by an employee. The insurer's case was that it means acts which are intended to cause injury, or acts which are carried out recklessly as to whether they will cause injury. The insured's case was that it means acts which are intended to cause the specific injury which results, in that case death, or at least serious injury, but that on any view it does not include reckless acts. The Supreme Court accepted the insured's case on this point.

50. The allegations made against Mr Forsyth at paragraph 9 of the Regulators' Statement of Case which relate to disclosure failures do not allege deliberate behaviour on Mr Forsyth's part and the allegations concerning Mr Forsyth's involvement in the external auditors' investigation characterise Mr Forsyth's behaviour as "improper". However, the allegation that Mr Forsyth created false

minutes of the Remuneration Committee in order "deliberately to create a misleading record" is clearly an allegation of dishonesty.

51. Mr Khan accepted in argument that it was not part of the Regulators' case that Mr Forsyth acted dishonestly. Save for the specific allegation in the Statement of Case that Mr Forsyth responded recklessly to a request from the PRA for SBMIA's Remuneration Committee minutes Mr Khan also confirmed that the Regulators' case was not put on the basis that Mr Forsyth acted recklessly. Therefore, for example, the Regulators do not contend in relation to the allegations of improper allocation of his salary to his wife, that Mr Forsyth knew that there was a risk that in so doing he would be illegitimately reducing his income tax liability and proceeded to make the allocation regardless.

52. The Regulators' contentions in the Statement of Case do not deal specifically with the question as to what was Mr Forsyth's state of mind when he made the allocation of remuneration to Mrs Forsyth nor do they specifically deal with the question of what facts were known to Mr Forsyth in that regard.

53. In those circumstances, it is for us to make the necessary inferences in that regard from our findings of fact. We have proceeded on the basis that in the light of the fact that the Regulators are not alleging dishonest behaviour, that the use of the word "deliberate" was confined to the sense that it was a deliberate act on Mr Forsyth's part to make the necessary allocations of remuneration and to create a record of those payments.

54. As regards Mr Forsyth's state of mind, in argument Mr Khan submitted that Mr Forsyth made the allocation of remuneration to his wife being aware that the payments concerned were excessive for the amount of work that his wife had done.

55. Mr Khan therefore accepted that if (as we have found to be the case) substantial work was done by Mrs Forsyth in return for her remuneration and that in all the circumstances the remuneration was within the reasonable range of what might be paid for the work concerned by a person in Mrs Forsyth's position, then the allegation of acting without integrity in relation to the allegation of remuneration must fail. That would be the case even if the result of the allegation was to reduce Mr Forsyth's tax liability.

56. We have therefore proceeded to determine the references by making findings as to whether the facts that we have found demonstrated that Mr Forsyth acted without integrity in relation to the matters pleaded at paragraph 9 of the Regulators' Statement of Case, in the light of our observations set out above as to the basis on which the case is put.

57. As Mr Khan correctly submitted, the burden of proving Mr Forsyth failed to act with integrity to the required standard rests with the Regulators judged to the ordinary civil standard: see *Tariq Carrimjee v Financial Conduct Authority* [2015] UKUT 79 (TCC), 20 at [47]. In *Ford v FCA* [2018] UKUT 0358 (TCC) at [42], the Tribunal observed:

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

58. We are asked to make findings of fact as to events which took place some years ago, many of which are undocumented. We cannot know what actually happened in relation to the events concerned. The burden is on the Regulators to satisfy us as to what was more likely than not to have happened on the basis of the evidence before us.

Evidence

59. For the Regulators, Mr Paul Smith, a Solicitor within the Enforcement and Market Oversight Division of the FCA ("Enforcement") and Mr James Calveley, Deputy Head of Legal for the Enforcement and Litigation Division of the Bank of England filed witness statements on which they were cross-examined by Mr George.

60. Mr Smith's witness statement consisted largely of a recitation of the main documents the Regulators sourced during their investigation together with his opinion on their effect. We note that, somewhat unusually in our experience, the Regulators did not produce a formal investigation report on which they based their decision to present a case for regulatory action to their respective decision-makers but relied primarily on a draft Warning Notice which by its nature did not deal in any detail with the evidence on which the Enforcement team's conclusions were based. Mr Smith's witness statement was therefore of some limited assistance in drawing together the main documents on which the Regulators relied. Mr Smith's opinion on those documents was of course of no relevance and we have not relied on it.

61. Mr Smith also gave evidence on how Enforcement reached its conclusions on the limitation issue on which he was cross examined by Mr George.

62. Mr Calveley's evidence dealt primarily with the evidence of a whistleblower which took the form of a letter dated 27 October 2015 (the "Whistleblower Letter") and which contained wide-ranging concerns, allegations, and suspicions about SBMIA's business, Mr Forsyth's remuneration, and the arrangements around Mrs Forsyth's employment. Mr Calveley explained how the Whistleblower Letter led to the PRA visiting SBMIA subsequently opening an investigation into Mr Forsyth. As with Mr Smith's evidence, we have found this evidence of limited assistance.

63. Mr Calveley also gave evidence on the limitation issue on which he was cross examined by Mr George.

64. As a result of the limited witness evidence which the Regulators relied on, the Regulators' case was based principally on their assessment of Mr and Mrs Forsyth which was made following their interviews, together with their assessment of the large amount of documentary material which they obtained, mostly from SBMIA's records and the material available from Mr Forsyth's work laptop.

65. In respect of a number of those documents, the Regulators made submissions as to the circumstances in which they were created which were a matter of contention between themselves and Mr Forsyth, but without calling other witnesses who might have been able to assist the Tribunal, such as other employees or officers of SBMIA and its auditors or, in relation to what Mr Forsyth said was the heavy workload that fell upon him as a result of the implementation of Solvency II, Moore Stephens, who the Regulators contend, actually did most of the work Mr Forsyth claimed credit for.

66. Mr and Mrs Forsyth filed detailed witness statements on which they were cross examined extensively by Mr Khan. Mr Forsyth gave evidence on his professional background, the working life and culture at SBMIA and the nature of the local community in which it operated both at the time he was recruited as SMBIA's Chief Executive and the time that he was employed there. All that evidence was unchallenged and we have accepted it.

67. Mr Forsyth also explained how the very particular nature of his working environment at SBMIA led to Mrs Forsyth becoming employed by the company. The contentious areas of Mr Forsyth's evidence concerned the following matters:

(1) The practices of SBMIA's Remuneration Committee;

(2) The manner in which part of Mr Forsyth's approved remuneration was allocated to Mrs Forsyth;

(3) The extent to which that allocation was approved and known by the Remuneration Committee;

(4) The extent of the work undertaken by Mr and Mrs Forsyth in the Relevant Period and the related remuneration decisions;

(5) The justification for the increased remuneration allocated to Mrs Forsyth year by year;

(6) The report of external consultants as to allegations made by an employee of improper behaviour by Mr Forsyth, in particular regarding the payment of a salary to Mrs Forsyth; and

(7) The provision by Mr Forsyth of minutes from SBMIA's records to the PRA.

68. We have found Mr Forsyth to be an honest and credible witness in respect of all of the disputed matters. Mr Forsyth was consistent in his evidence which in all material respects did not differ with what he told the Regulators in interview, although he was able to give a lot more detail of the work that he and his wife did at SBMIA than he was able to do at his interviews. He was open and cooperative in his answers, at no time giving the impression that he was acting defensively and was willing to accept that in certain respects, with hindsight, he would have acted differently in a number of respects, particularly with regard to the documentary evidence of the remuneration arrangements for himself and his wife.

69. In his closing submissions, Mr Khan submitted that in a number of material respects Mr Forsyth's evidence was unreliable and as a consequence considerable

doubt is cast over facts and matters in Mr Forsyth's evidence that are uncorroborated by contemporaneous documents, such as the work on Solvency II which Mr Forsyth said his wife did. However, we have not found Mr Forsyth's evidence to be unreliable in respect of any of the matters raised by Mr Khan in that regard, all of which have been specifically dealt with in our findings of fact.

70. Mr Khan referred to Mr Forsyth's statement in his evidence that as a result of his review of the "considerable volume of documentation" that was disclosed to him in the proceedings, he was able to give a fuller account of events than he did in his interviews. Mr Khan submitted that Mr Forsyth's statement was not his recollection of events but rather, is in large parts, a reconstruction of events based on the documentary evidence. As a result, Mr Khan submitted that we should adopt the course indicated by Leggatt J (as he then was) in *Gestmin SGPS S.A. v Credit Suisse (UK) Limited, Credit Suisse Securities (Europe) Limited* [2013] EWHC 3560 (Comm) at [22] where he said:

> "…the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events."[2]

71. Mr Khan submitted that whilst this is not a commercial case, the approach indicated by Leggatt J in *Gestmin* (that is, to afford greater weight to the documentary record in making factual findings) is equally appropriate given Mr Forsyth's approach to his witness evidence.

72. The difficulty with that submission is, as Mr George submitted, that on the face of it the documentary evidence, such as there is, supports Mr Forsyth's version of events. For example, Mr Khan's submissions regarding the documentary record of the decisions regarding Mr and Mrs Forsyth's remuneration to the effect that they do not tell the whole story or were not signed on the dates stated on their face suffer from the disadvantage of lack of cross examination of other witnesses who could give relevant evidence as to these documents were not before the Tribunal.

73. Similarly, in relation to the dispute as to how much work was actually done by Mr and Mrs Forsyth in relation to Solvency II as opposed to the work undertaken by Moore Stephens, we have seen the draft documentation produced by Moore Stephens and heard Mr Forsyth's explanation as to how considerable time needed to be spent to make that documentation relevant for SBMIA's needs. Much of that work is not supported by documentary evidence because much of the time was spent in Mr and Mrs Forsyth's home in producing revised drafts of which there is no longer a record

and we heard no evidence from Moore Stephens as to the suitability of their work for use by SBMIA without the need for significant adaptation.

74. The Court of Appeal referred to this type of situation in its very recent decision in *NatWest Markets PLC and others v Bilta (UK) Limited (In Liquidation) and others* [2021] EWCA Civ 680. The court said this at [50] and [51] of its judgment:

> 50. "….it is important to bear in mind that there may be situations in which the approach advocated in *Gestmin* will not be open to a judge, or, even if it is, will be of limited assistance. There may simply be no, or no relevant, contemporaneous documents, and, even if there are, the documents themselves may be ambivalent or otherwise insufficiently helpful. The case could be one about an oral promise which turns entirely on the word of one person against another's, and the uncontested facts may well not point towards A's version of events being any more plausible than B's. Even in a case which is fairly document-heavy (as this one was) there may be critical events or conversations which are completely undocumented. The CarbonDesk dinner is a good example. Whilst there are documents from which inferences might be drawn about what was or was not said at that dinner, there are no notes of the discussions and no memoranda or emails sent afterwards which appear on their face to record or report what was said on that occasion.
>
> 51. Faced with documentary lacunae of this nature, the judge has little choice but to fall back on considerations such as the overall plausibility of the evidence; the consistency or inconsistency of the behaviour of the witness and other individuals with the witness's version of events; supporting or adverse inferences to be drawn from other documents; and the judge's assessment of the witness's credibility, including his or her impression of how they performed in the witness box, especially when their version of events was challenged in cross-examination. Provided that the judge is alive to the dangers of honest but mistaken reconstruction of events, and factors in the passage of time when making his or her assessment of a witness by reference to those matters, in a case of that nature it will rarely be appropriate for an appellate court to second-guess that assessment."

75. Furthermore, as Mr George submitted, the principle enunciated in *Wisniewski v Central Manchester Health Authority* [1998] 1 PIQR 324 is relevant in this regard. As was stated at page 340 of the judgment in that case, in certain circumstances the court may be entitled to draw adverse inferences from the absence of a witness who might be expected to have material evidence to give on an issue in action. In circumstances where the reason for the absence of the witness satisfies the court, then no such adverse inference may be drawn but in circumstances where it might have been expected that a party would call a particular witness then such an inference may be drawn. If the court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, produced by the party who might reasonably have been expected to call the witness.

76. We received no explanation as to why other witnesses who may have given relevant evidence as to the documents from which we were asked to draw inferences

were not present, as mentioned at [65] above, and in those circumstances, we are entitled to draw adverse inferences from their absences. We have done so to the extent that we have given more weight to Mr Forsyth's evidence as regards the documents in question and less weight to the evidence that the Authority sought to rely on in that regard.

77. We found Mrs Forsyth to be an impressive witness and we have accepted her evidence in full. Her full devotion to supporting her husband in the difficult situation in which he found himself struggling with the demands of Solvency II with no useful support to be found elsewhere within SBMIA, as our findings of fact below demonstrate, was readily apparent from her evidence. She did whatever she could to help her husband, notwithstanding a lack of technical expertise in relation to the matters concerned. It was, as Mr Forsyth put it, nothing short of heroic, notwithstanding the fact that on the face of it the way Mr Forsyth approached the issue may not have turned out to have been the most efficient way of dealing with the difficult subject matter.

78. We reject Mr Khan's submission that because Mrs Forsyth admits that she cannot recall the detail of the work she undertook, when precisely she undertook the work (which took place some years ago) and was not aware of the amount of remuneration paid to her at the relevant time that Mrs Forsyth is motivated by a desire to protect her husband and has therefore exaggerated the amount of work which she says she did in order to support his case. It was readily apparent that her witness statement was prepared independently of that of her husband and that the witness statements of both Mr and Mrs Forsyth give genuine independent recollections of the details of they can recollect. As the Tribunal observed, when professional people go through a particularly demanding and intense period of work requiring their total devotion, they cannot remember many years later the precise wording of documents they looked at or drafted but they can remember the effect that it had on their work life balance. The oral evidence of Mr and Mrs Forsyth gave on these issues rang true against the background of the challenges facing SBMIA at the time.

79. Finally, we had an expert report of Mr Simon Sheaf, an experienced fellow of the Institute and Faculty of Actuaries who is a partner in Grant Thornton UK LLP. Mr Sheaf has assisted a number of non-life insurers including small and medium-sized enterprises with their preparations for Solvency II and he states that his opinion therefore draws from that experience.

80. We have found Mr Sheaf's evidence, which was not challenged by the Regulators, extremely helpful in understanding the wide-ranging changes made to prudential insurance regulation by Solvency II. We observed from his evidence that large insurers were generally better prepared for implementation than smaller ones and many insurers lacked expert resources, particularly actuarial skills, to ensure a smooth transition to the new requirements.

81. In addition to the witness evidence, we had a large number of documents, much of it derived from the records of SBMIA as a result of requests for information from the Regulators. As indicated in this decision, we have relied on a significant amount of

this documentation in findings, even where it was not specifically drawn to our attention by the parties during the hearing.

Findings of fact

82. From the evidence that we heard, and the documents we read, we make the following findings of fact.

Mr Forsyth's professional background

83. Mr Forsyth has over 30 years' experience within the insurance industry, specifically in relation to marine insurance and reinsurance. He began his career in 1988 as an insurance broker at Willis Faber and moved in 1998 to perform the same role at Sedgwick.

84. In 2000, Mr Forsyth successfully applied for the position of Chief Executive at SBMIA and led that Association for over 15 years, until July 2016.

85. After leaving SBMIA, Mr Forsyth joined RSA Insurance Group ("RSA") on 24 October 2016 as the Head of Hull Operations. He was promoted at the end of 2017 to become RSA's London Market Hull and Liability Business Leader, managing a team of nine employees with an annual premium income of between £55 million and £60 million. Mr Forsyth left RSA after publication of the Decision Notices and has been unable to find employment as an insurance industry professional since.

Background to Mr Forsyth's employment with SBMIA

86. After Mr Forsyth had been working for London in 12 years, he started to look for a new job in Scotland for family reasons, primarily because his wife had been to school in Scotland and was keen to move back there. Mr Forsyth had hoped to find a job in one of the main commercial areas of Scotland, but he found that there were not many opportunities for someone with his particular expertise in the marine insurance sector. However, he applied for the position of Chief Executive at SBMIA in April 2000 after seeing an advert for the position in the insurance trade press.

87. SBMIA was at the time a small mutual insurance association based in Buckie, Scotland. Until 2008, it also had a small office in Peterhead which largely dealt with the claims side of the business. SBMIA was set up originally to provide insurance for fishermen at a time when they could not readily get insurance. The insurance market operating for fishermen continues to be a small one. The majority of policyholders were based in the North-East of Scotland. Mr Forsyth estimates that the number of vessels insured by SBMIA at the time that he joined was in the region of 130, and at its peak, reached around 350 to 400.

88. SBMIA had a small number of employees, no more than ten in total at any one time over the period Mr Forsyth was employed. Among the senior employees were Mrs Ann Johnston, who acted as Company Secretary among other things, although she had no formal qualifications in that regard, as well as a cashier and surveyor. During his time at SBMIA Mr Forsyth was the only insurance professional and there

was no middle management, except for a short period in 2015. Mr Forsyth was 30 years old when he was appointed and at the time of his appointment had had no previous experience at board level, and in particular in dealing with governance or regulatory requirements. His particular skills related to the assessment and underwriting of insurance risks.

89. The Board of SBMIA was comprised of members of the Association, who were consequently all policyholders and fishermen operating vessels which were insured by SBMIA. They were all non-executive and they had no insurance or regulatory expertise. An examination of the very detailed minutes of the board meetings of SBMIA that Mrs Johnston prepared demonstrate that the board kept a keen eye on expenses and made decisions on comparatively small items of expenditure. As Mr Forsyth said in his evidence the Board were almost entirely made up of people who had a vested interest by being policyholders or agents of policyholders and they wanted to keep the premium costs of their own business and their own clients as low as possible.

90. Mr Forsyth was interviewed by a panel of up to 14 members of the Board. At the interview, he set out his vision for how he would operate as Chief Executive, which was to seek to make SBMIA independent of its main competitor, Sunderland Marine, who had effectively been running it for four years. SBMIA had set up Boatowners (Management) Limited ("Boatowners Management") of which SBMIA owned 25% and Sunderland Marine owned 75%. Boatowners Management had a rolling contract to manage SBMIA and was the operative decision-making board of SBMIA at this time. Following Mr Forsyth's appointment as Chief Executive he ensured that SBMIA took control of Boatowners Management and the latter was subsequently liquidated in around 2006.

91. It was clear that Mr Forsyth had a network of contacts in the insurance industry which he would wish to use to bring in other areas of marine insurance to grow the business. His remit as Chief Executive would be to grow the business which meant diversifying into new areas, so that it was sustainable and profitable in the face of a shrinking domestic fishing industry.

92. Mr Alistair Reid, the Vice Chairman of SBMIA at the time, took the lead on negotiating Mr Forsyth's remuneration package. It was agreed that Mr Forsyth would be paid a London salary, commensurate with the rates paid to London based insurance executives in a comparable position to his own. He was asked what his current salary in London was, which was then about £40,000 – £42,500. Mr Forsyth was offered a salary of £45,000 and was allowed to join the pension scheme straightaway without having to wait the usual two years. His contract of employment provided for an annual review of his salary and the benefit of a performance related bonus scheme. If operational and financial targets set by the Board were met Mr Forsyth would be entitled to a percentage of his salary as a bonus, as agreed between the Board and Mr Forsyth. However, Mr Forsyth was offered a guaranteed bonus for the first two years of £7,500 a year. With effect from 1 January 2009, the bonus arrangements changed. Mr Forsyth then became entitled to a bonus of 5% of the surplus on SBMIA's

ordinary activities before tax, subject to the underlying profitability of the Association.

93. Mr Forsyth told the Board that he had potential for growth in earnings which was significantly above inflation and made the case that if he had not taken the SBMIA role then he would be progressing a career in London with much higher earnings potential. It was therefore agreed with Mr Reid that his salary should be benchmarked to someone working in London with a similar level of responsibility. That did not mean that the comparable position was the chief executive of a London based insurer. As Mr Forsyth explained it, the comparable adopted was along the lines of a class underwriter working in a London environment. As a result of this benchmarking, Mr Forsyth's salary increased considerably over the years. By 2010 he was earning approximately £90,000 and by the end of 2015 his salary was £180,000.

94. A Remuneration Committee was established in 2002, consisting of a number of directors, including Mr Forsyth, who would be responsible for the review of salaries, including that of Mr Forsyth. That Committee would also approve the employment of senior members of staff. Reports of the Committee's decisions would be given to the Board. During the Relevant Period, the Remuneration Committee convened at least twice a year. In some years, there was a further meeting to discuss Mr Forsyth's bonus. The purpose of one of the meetings was to agree Mr Forsyth remuneration and the purpose of the second meeting was to agree the salary of other employees. At the meeting at which Mr Forsyth's remuneration was discussed, Mr Forsyth set out his expectations to the Committee, which he had prepared in advance. He then left the room to allow the Committee to agree his remuneration and he then re-entered the room to be informed of the Committee's decision. We return to consider this process in more detail later.

95. Buckie, where SBMIA was based, is a small town on the North East coast of Scotland. At the time Mr Forsyth joined SBMIA it had a population of about 8,000 and fishing was still the dominant industry. There were no real restaurants and no hotels of the standard that might be required for business guests.

96. The local community was very close-knit, and Mr and Mrs Forsyth did not develop social relationships with Board members or the wider community.

97. SBMIA's office functioned in a very different way to what Mr Forsyth was used to in London. Unlike the London insurance market where city professionals work whatever hours were necessary to get the job done, SBMIA's employees arrived at 8.30 am sharp and left at 4.30 pm. At lunchtime the office was empty for an hour and ten minutes and staff went home for lunch.

98. However, because, as Mr Forsyth put it, the schedules of the policyholders who were largely local fishermen were incompatible with regimented office life, Mr Forsyth would be dealing with a lot of work, particularly on the claims side, at night and at weekends. He continued to work whatever hours were necessary to get the job done.

Background to Mrs Forsyth's employment with SBMIA

99. As Mr Forsyth said, it was because of the very particular nature of his working environment in Buckie that Mrs Forsyth's employment first came about. Right from the outset of Mr Forsyth's employment, there were frequent visitors, mainly reinsurers and reinsurance brokers. Because of the lack of suitable places to stay or entertain in the local area and the need to maintain privacy and confidentiality, these visitors stayed at Mr and Mrs Forsyth's home and were entertained there. Mrs Forsyth undertook the necessary hospitality services and she also provided, at times, the taxi service to pickup and drop-off professional visitors at the airport.

100. Furthermore, as mentioned above, the office closed for lunch for an hour and ten minutes. Accordingly, when the office was closed, calls were forwarded to Mr and Mrs Forsyth's home and Mrs Forsyth provided lunchtime phone cover as well as taking emergency calls from clients in the evenings and weekends. The Forsyth's landline was also used as a fax line for Mr Forsyth's work in Australia and New Zealand.

101. For what was nearly 3 years, Mrs Forsyth was not paid for the work that she did. Mr Forsyth then decided that rather than rely any longer on his wife's goodwill that it was appropriate that she was remunerated for her work going forward. Mrs Forsyth had also come to the view that as the work began to take up more of her time, she was not inclined to do it for free and trusted her husband to ensure that it was properly recognised and that she was paid a fair salary.

102. Mr Forsyth raised the matter with the Chairman of SBMIA, Mr Alec Barr. Mr Barr approved Mrs Forsyth's employment at the Association with a starting salary of £5,000 provided it would not impose any extra cost on SBMIA as the budget had already been set for that year. Accordingly, Mr Forsyth took a pay cut of the same amount so that Mrs Forsyth could be paid.

103. Mr Forsyth also mentioned the proposal to Mr John Yeoman, who at that time was the senior partner at Ritsons, SBMIA's auditors. Mr Forsyth sought comfort from Mr Yeoman that it was acceptable for Mrs Forsyth to be employed in this way, which Mr Yeoman gave, observing that the normal remuneration at the time for services of this kind was between £5,000 and £10,000. Mr Reid was also informed of the arrangement. Mr Forsyth was of the view that it was not necessary to go any further and inform the whole of the Board at that time of the arrangement bearing in mind that he had the authority to employ members of staff on behalf of the Association in circumstances where the approval of the Remuneration Committee was unnecessary. In our view, no criticism of Mr Forsyth may properly be made in that regard, bearing in mind the disclosures he did make and the fact that there was no extra cost to the Association.

104. In fact, the Board did become aware of the fact of Mrs Forsyth's employment by 25 February 2004 at the latest. The minutes of a meeting of the Board of Boatowners Management of that date record Mr Barr asking Mr Forsyth why the documents recorded an increase in the number of staff from 9 to 10. Mr Forsyth is recorded as

saying that this had been a way of reducing the National Insurance burden on the Association by taking an amount of his salary and paying it to Mrs Forsyth for entertaining at home and answering the phone. Mr Forsyth's explanation as to why Mr Barr asked this question when he knew of Mrs Forsyth employment was that he was possibly demonstrating to other members of the Board that he was providing some challenge and therefore adding value, bearing in mind that there were limited ways in which a non-insurance professional can add value in a board meeting of an insurance company. We accept that explanation; there was no other evidence to indicate that Mr Barr was not aware at that time of Mrs Forsyth's employment and indeed the minutes, which as we have previously said were very detailed, do not recall any concern on the part of any other members of the Board or any questions on the issue. Mr Barr, Mr Reid, and Mr John Scott, three members of the Remuneration Committee were present at that meeting.

105. Despite Mr Forsyth explaining the rationale for Mrs Forsyth's employment in terms of it being a way of reducing the National Insurance burden, it was clear, as we have found above, that the motivation for employing Mrs Forsyth was to recognise the work she was doing for the Association. We accept Mr Forsyth's explanation that the National Insurance burden reduction was mentioned to allay any directors' concerns about any increase in costs as a result of there being a new employee on the books. However, clearly the fact that there was a benefit to the Association was a positive factor in employing Mrs Forsyth provided that payment to her was justified for the work that she did. The Regulators no longer make any challenge to Mr Forsyth's evidence that Mrs Forsyth did sufficient work to justify the salary that she was being paid at this time.

106. Before Mrs Forsyth's employment was finalised, Mr Forsyth asked the Association's cashier to look into the impact on the Association's National Insurance employer contributions of reducing his salary by £5,000 and paying a £5,000 salary to Mrs Forsyth. On 7 February 2003 the cashier sent Mr Forsyth a memorandum which stated that the net effect would be to reduce the Association's National Insurance contributions by £98.29 per month. On this basis, Mr Forsyth agreed with Mr Barr that Mrs Forsyth would become an employee of the Association. Mr Forsyth was assured that his salary would increase sufficiently in future years in order to compensate for the reduction in his salary for the first year of Mrs Forsyth's employment.

107. The contract of employment was put in place with Mrs Forsyth on 12 February 2003. That contract was prepared by Mrs Johnston and signed by Mr Forsyth on behalf of the Association. In common with other staff employment contracts, Mrs Forsyth's tasks were not specified in any detail; her role was described as "Assistant". Mrs Forsyth's starting salary of £5,000 was mentioned, but there was no contractual right to a bonus.

108. In accordance with rules for other employees, Mrs Forsyth joined the Association's pension scheme two years after the date of her employment. Her entry into the scheme was discussed with Mr Reid and Mr Barr and approved by the scheme's trustees. Mr Forsyth explained that as a result, Mrs Forsyth being younger

than the average member of the scheme, the liability side of the balance of the fund was assisted. Mr Forsyth explained that at a time when Mr Barr was concerned that the final salary scheme was becoming a financial burden, he told Mr Barr that a favourable by-product of the increase in the percentage of the split between his and Mrs Forsyth's salary in later years would be a reduction to the Association's pension scheme liability, which Mr Barr supported.

109. Mrs Forsyth attended University but decided to leave before completing her degree and instead undertook a secretarial course, completing courses in word processing, audio typing and advanced typewriting in 1990. After a series of secretarial roles, in 1993 she became personal assistant to the Chairman of Racing Green, a well-established clothing brand. In that role, as well as providing secretarial support to the Chairman she undertook market research and liaised with a number of her employer's stakeholders. She earned approximately £23,000 a year, a good salary for such a role at that time. Later, she took up personal assistant roles to directors of a property company and architects' firm respectively before leaving work to concentrate on raising a family.

110.It is clear from Mrs Forsyth evidence that she has skills which complement those of her husband. Mrs Forsyth is not good with numbers and has never been particularly involved in the family's finances. She describes herself as a fine detail person, whereas her husband looks at the bigger picture. Mr Forsyth is exclusively responsible for managing the family's finances. Whilst he is good with Excel and can send emails, he is not adept at dealing with changing the format or layout of Word documents. Due to her secretarial experience, this is one of Mrs Forsyth's strengths.

111.Mr and Mrs Forsyth had two joint bank accounts, although Mrs Forsyth left it to her husband to manage these accounts. They have one current account which was used for day-to-day spending, and a savings account. The money in the savings account was not used for everyday spending. Mrs Forsyth's salary went into the savings account while Mr Forsyth's salary went into the current account.

112.Mrs Forsyth never received pay slips (which were retained in SBMIA's office). She did not ask her husband or anyone else at the Association what she was being paid, how her salary increased over the years and how she came to receive bonuses, some of which were in respect of bonuses awarded to Mr Forsyth. She said that she regarded the monies that she and Mr Forsyth received respectively in respect of their remuneration as being a global salary available to them both and how it was split between the two of them did not ultimately make a difference to them as a family.

113.Mrs Forsyth did, however, say that it was important that as individuals they were rewarded for the work that they were doing. Mrs Forsyth said that she had implicit trust in her husband to be looking after her best interests and he was the one who knew what work she was doing. Her evidence, which we accept, was that they worked closely together. Mrs Forsyth had no reason to doubt that the husband could do anything other than the best for her.

114.Mrs Forsyth's salary for the first year of her employment was fixed at £5,000. For the years thereafter, until 2013, it was agreed between Mr Forsyth and Mr Reid that Mrs Forsyth's salary would be fixed as a percentage of the global salary figure, that is the combined total of Mr and Mrs Forsyth's salary, on the basis of the original split in the first year of Mrs Forsyth's employment. That figure was 11.5%. Mr Barr was also aware of that figure. Consequently, the principle that a global salary figure to cover both Mr and Mrs Forsyth would be agreed by the Remuneration Committee with the split between Mr and Mrs Forsyth being determined by Mr Forsyth with, at that time, the approval of Mr Reid was established.

115.The agreed procedure did not require either the Board or the Remuneration Committee to agree the amount of the split, a matter which Mr Forsyth had the authority to determine. However, in practice Mr Forsyth agreed the split with Mr Reid. Mr Forsyth recalled that in those early years Mr Reid felt that the figure of 11.5% felt reasonable. That discussion took place in a separate meeting between Mr Reid and Mr Forsyth in advance of the annual Remuneration Committee meeting at which the global salary figure would be settled. Mr Reid and Mr Forsyth also discussed at that pre-meeting what sort of figure ought to be put to the Remuneration Committee for discussion and approval.

How the global salary figure was decided and implemented

116.Until the start of the Relevant Period, the process for agreeing the global salary figure was as described in [114] above. At the meeting of the Remuneration Committee, Mr Forsyth left the meeting to allow the Committee to discuss his salary. On his return, Mr Forsyth was advised of the revised salary. A very brief minute was produced to that effect. Mr Forsyth explained that no salary figures ever appeared in company minutes because of concerns about confidentiality. There had been instances in the past where a director had indiscreetly disclosed what particular employees were being paid. A separate document, signed by Mr Reid, was produced recording the amount of the agreed salary and, when relevant, the amount of any bonus awarded.

117.We have seen an email dated 30 July 2008 which shows that following the determination of the global salary figure by the Remuneration Committee in that year, Mr Forsyth informed the cashier of the amount of the split between himself and Mrs Forsyth. Mrs Johnston was also informed of the figure by means of a copy of the relevant memo. We have no reason to believe that the process was different in any other year prior to the Relevant Period.

118.During the Relevant Period, the members of the Remuneration Committee were, aside from Mr Forsyth, Mr Reid (from 2010 to 2014), Mr Barr (from 2010 to 2016), Mr Jackie Scott (from 2010 to 2016), Mr Fraser Weir (in 2010 only) and Mr Peter McIntosh (in 2014 to 2016).

119.Mr Reid was Chairman of the Remuneration Committee until 2014 when he passed away, and Mr Scott took over as Chairman the following year. Mr Barr, apart from being Chairman of the Board, was also Vice Chairman of the Remuneration Committee throughout the Relevant Period.

120.Mr Forsyth explained how the business of the three annual Remuneration Committee meetings was conducted during the Relevant Period. There was one meeting discussing staff salaries, a second meeting setting the global salary figure for himself and his wife and, in later years, a third meeting setting a global figure for his and his wife's bonus. Mr Forsyth would bring to the meeting papers setting out suggested figures for staff salaries, the global salary figure, and the bonus figures respectively.

121.The practice followed before the Relevant Period of Mr Forsyth having a discussion regarding his expectations for the year with Mr Reid before the Remuneration Committee meeting continued. In some years, he would additionally discuss his expectations with Mr Barr because Mr Forsyth felt that Mr Barr was the member of the Remuneration Committee who had the greatest influence over financial matters. When Mr Reid became ill sometime around 2012, Mr Forsyth began to have the pre-meetings predominantly with Mr Barr. Even when Mr Scott became chairman of the Remuneration Committee in 2015, Mr Forsyth continued speaking to Mr Barr for convenience's sake given his proximity to the office and because of his influential position as Chairman of the Board and his outspoken stance on financial matters.

122.Mr Forsyth explained that the Remuneration Committee would always negotiate downwards on his suggestions for increases to staff salaries, as well as his own. That explanation is consistent with what we have seen from the Board minutes which indicate that the directors took a keen interest in keeping costs down, understandably so as any increase in salary costs would be likely to have an impact on the premiums that they would have to pay as policyholders. Against that background, understandably Mr Forsyth knew to ask for more than he hoped to end up with as he was conscious that Mr Barr, in particular, would always want to "get a deal".

123.Mr Forsyth accepted that the work that his wife was doing was not discussed at any of the various Remuneration Committee meetings, whether dealing with staff salaries or the global salary and bonus figures. He did not consider it necessary to do so, bearing in mind that the agreement was that the remuneration split would be discussed between him and Mr Reid or, in later years, Mr Barr when Mr Reid became ill. Furthermore, it was clear that Mr Forsyth had considerable sensitivity about discussing in the later years with other members of the Board what his wife actually did.

124.As we discuss later in reviewing in detail the work that was actually done by both Mr and Mrs Forsyth on Solvency II, Mr Forsyth found getting to grips with the complexities of that situation extremely challenging and difficult to cope with. He kept that to himself and his wife, not wishing to reveal his difficulties to other members of the Board who, as we have found, were not insurance professionals and who did not have much of a personal relationship with Mr Forsyth. Mr Forsyth also explained his difficulties in taking information on board from complex documents and that he found it easier to take in that information when it was dictated to him rather than reading it himself, particularly off a screen, which he struggled with. As he said, he did not want to advertise the fact that his wife was reading documents to him.

125.Once the global salary figure had been decided, Mr Forsyth would arrange for a document to be typed up to reflect the decision, either by himself or Mrs Johnston. In each of the years in the Relevant Period, this document which was headed "Minutes of the Remuneration Committee Meeting", stated the date of the meeting and those present and then in one line recorded the amount to which Mr Forsyth's salary had been increased. The minute was signed by Mr Reid as Chairman in the years 2010 to 2014 inclusive and by Mr Scott in 2015. The date of signature appeared underneath the Chairman's name. Those documents were retained at the Association's office, possibly under Mrs Johnston's control, but Mr Forsyth could not be precise. As was the case before the Relevant Period, there was a separate brief minute of the Remuneration Committee recording that Mr Forsyth salary had been discussed while he was out of the room and that he was informed of his increase when he returned. As we have explained, that was for confidentiality reasons.

126.Therefore, although the global salary figure was kept largely confidential, it was known by all members of the Remuneration Committee and, we were told, reported to the Board.

127.As regards the salary split between Mr and Mrs Forsyth, once the global salary figure was decided, Mr Forsyth would consider whether the 11.5% split agreed with Mr Reid in the second year of Mrs Forsyth's employment was an appropriate amount to properly compensate for the amount of work which was being undertaken by each of them. Mr Forsyth felt that it was appropriate that he should be the one who considered the split given that, because of the manner in which Mr Forsyth and his wife worked, only he was fully aware of exactly how much work, and what value, Mrs Forsyth was undertaking.

128.In the years between 2010 and 2012, following agreement of the split between Mr Reid and Mr Forsyth, rather informally Mr Forsyth would handwrite the split on a post-it note to pass on to Mrs Johnston for filing and to the cashier for payment. It was during this period that Mrs Forsyth's work began to change, and Mr Forsyth also began to discuss the salary split with Mr Barr as well as Mr Reid.

129. Given that the salary split in this time continued to be set at 11.5% as pre-agreed with Mr Reid, Mr Forsyth did not believe that it was necessary to type up a separate minute evidencing the split and arrange for it to be signed. With hindsight, Mr Forsyth accepts that it would have been better to have had a more formal file note of the salary split, which was the case, as we shall see, in relation to bonus payments during that period. Mr Forsyth's explanation was that at the time he was operating on the basis that the 11.5% figure was very much common knowledge amongst the cashier, the company secretary and amongst the Remuneration Committee whereas the bonuses were variable and therefore ought to be signed off individually for the sake of good order.

130.In 2013, Mr Forsyth decided to propose increasing Mrs Forsyth's salary to what he thought was a more appropriate figure on the basis of his assessment of the work she was now undertaking. In 2013, Mr Forsyth's salary was increased to £125,000

and Mr Forsyth decided that the salary should be split so that £105,000 would be paid to him and £20,000 to Mrs Forsyth.

131. Mr Forsyth says that one of the factors that influenced both Mr Reid and Mr Barr in looking favourably on that proposal, aside from the amount of work that Mrs Forsyth was undertaking to which we return later, was that the bottom line of the total cost to the Association was paramount. A significant cost to the Association was the cost of the pension scheme. Mr Barr recognised that a favourable by-product of the increase in the percentage of the split between Mr and Mrs Forsyth's salaries would be a reduction to the Association's pension scheme liability. In view of what we have said previously as regards the non-executive directors' focus on cost reduction, this explanation is plausible, and we accept it.

How the global bonus figure was decided and implemented

132. In 2010, the practice of paying bonuses to Mrs Forsyth in addition to her salary started. Mr Forsyth's own contractual bonus would be decided after the Association's Annual General Meeting, once the report and accounts have been signed off and approved, as this was the point at which the company's financial performance of the preceding year would be clear. As the years went by, salary and bonus reviews took place at the same time. In the same way as for the global salary figure, Mr Forsyth set out his justification for bonus payments to either Mr Reid or Mr Barr in advance of the relevant Remuneration Committee meeting.

133. Mr Forsyth began to propose that Mrs Forsyth received bonuses, to be compensated for by a corresponding reduction in his own bonus in 2010. The reason for this was that it was Mr Forsyth's view that Mrs Forsyth was becoming far more integral to the Association through her work in assisting Mr Forsyth as she was providing a different, and far more consistent and time-consuming service.

134. Mr Forsyth initially sought to increase Mrs Forsyth's salary in recognition of that work at the time in discussions with Mr Reid, but Mr Reid thought that it was better for Mrs Forsyth to be rewarded by way of bonus rather than salary. Mr Reid at that time did not want to make a change to Mrs Forsyth's remuneration by way of a salary change which in his view would have been more permanent than a bonus award.

135. With the exception of two occasions in 2011 and 2014 when Mrs Forsyth was paid a bonus which was additional to the quantum of the total bonus figure set out in Mr Forsyth's contract, Mrs Forsyth bonus was paid in accordance with the principles agreed with Mr Reid by which Mrs Forsyth's remuneration would consist of an allocation of a global sum awarded to both Mr and Mrs Forsyth. Thus, as well as a global salary figure, there was a global bonus figure, with the specifics of the allocation being left to Mr Forsyth with the agreement of either Mr Reid or Mr Barr, again on the basis that he was the only one who knew how much work Mrs Forsyth was undertaking.

136. The first bonus payment made to Mrs Forsyth is recorded in a file note dated 19 February 2010. The note records that it was agreed that Mr Forsyth's contractual

bonus would be paid to Mrs Forsyth in compensation for additional duties carried out during 2009 and 2010. The note is signed by Mr Barr and Mr Forsyth. Thus, it is clear that in effect Mr Forsyth has assigned his right to receive a contractual bonus, which reflected the work that he personally had performed, to his wife. We refer to the tax implications of that decision later, but there is no evidence that either Mr Forsyth or anybody else within the Association gave any thought to the tax implications of Mr Forsyth assigning his bonus to his wife in this way at the time the decision was made.

137. In March 2011, in addition to Mr Forsyth's contractual bonus being paid to Mrs Forsyth, it was agreed that she would be paid in addition, a discretionary bonus of £10,000. Those decisions were recorded in notes, the note relating to the discretionary bonus being signed by Mr Reid and the note in respect of Mr Forsyth's contractual bonus being signed by both Mr Barr and Mr Forsyth. That made sense because, as we have found, Mr Forsyth was in effect assigning a contractual right he had to Mrs Forsyth. The note for the discretionary bonus bore the heading "Remuneration Committee Meeting" and it records that the Committee as a whole had approved the payment. No suggestion has been made that the position was not as described in the minute.

138. Mr Forsyth said that he would have preferred that Mrs Forsyth's salary had been increased to reflect the change in her duties during the previous year but that he was told that the work she was doing was short-term and should be reflected in a bonus rather than salary. Mr Forsyth's view was that the work that at the relevant time Mrs Forsyth was undertaking was worth a salary and combined bonus total in the region of £30,000 so he was content with the position whereby his own contractual bonus was added to the £10,000 discretionary bonus agreed by the Remuneration Committee to arrive at a total figure for Mrs Forsyth that he felt adequately rewarded her for her work.

139. A file note dated March 2012 signed by Mr Barr and Mr Forsyth records again that Mr Forsyth's bonus will be paid to Mrs Forsyth in compensation for additional duties carried out in the last year. The amount paid was £12,500. As with the previous two years, the Remuneration Committee were not prepared to agree to an increase in Mrs Forsyth salary or a discretionary bonus of her own and accordingly Mr Forsyth agreed to assign his bonus to his wife on the basis that he was of the view that the Remuneration Committee had not understood the quantity and the importance of the work that Mrs Forsyth was doing.

140. In June 2013 Mr Forsyth had a discussion with Mr Reid about Mrs Forsyth's remuneration. He explained to Mr Reid the nature of the work Mrs Forsyth was doing was more substantive and more permanent than it had been previously, and he therefore thought that any increase in her pay should be reflected in salary rather than simply in bonuses. Mr Reid agreed that it would now be appropriate for any rise in Mrs Forsyth's remuneration to be reflected in salary and not just in bonus.

141. It was therefore the case that going forward the 11.5% allocation of the global salary ceased to apply. In each of the years 2013, 2014 and 2015 there were substantial increases in Mrs Forsyth's salary, as shown in Annex A to this decision.

142.However, Mrs Forsyth continued to be paid bonuses. In February 2013 a file note signed by Mr Forsyth and Mr Barr records that Mr Forsyth's contractual bonus would be paid to Mrs Forsyth "in compensation for additional duties carried out in 2012/2013." A note dated 19 February 2014 signed by Mr Barr records an agreement that a bonus of £12,500 be paid to Mrs Forsyth for 2013. A similar note dated 6 May 2015 records that Mrs Forsyth's bonus for 2014 is agreed at £12,500. That payment was in fact one half of the bonus awarded to Mr Forsyth for 2014, although it does not say so.

143.Mr Forsyth was asked why bonuses continued to be paid notwithstanding the fact that it had been accepted that any additional work carried out by Mrs Forsyth could be remunerated through an increase in salary. Mr Forsyth's explanation was that during 2013, 2014 and 2015 Mrs Forsyth's work continued to increase, particularly in the light of Solvency II, visitors continued to stay with the Forsyths for whom hospitality services had to be provided and therefore Mr Forsyth wanted to ensure that together Mrs Forsyth's salary and any bonuses payable to her were appropriate for the work that she was doing. Mr Forsyth explained that bonuses were backward looking in terms of what work has been performed in the past whereas salaries were partially looking forwards.

144.Mr Forsyth also made the point that remuneration paid to Mrs Forsyth by way of discretionary bonuses as opposed to salary would not be pensionable, so there was a benefit to the Association's pension scheme for payments to be made in this way.

145.Mr Forsyth accepted that many of the conversations that led to bonuses being awarded to Mrs Forsyth took place outside the Remuneration Committee meetings, between himself and either Mr Reid or Mr Barr. Mr Forsyth explained that that was not unusual for SBMIA which was very much run on the basis of a members' club and an awful lot of what was agreed was agreed in conversation, rather than being agreed in formal documented minutes or formal documented agreements. Nevertheless, Mr Forsyth understood that for the purposes of an audit trail it was necessary to have documents signed by the relevant officers confirming various agreements that had been reached, albeit they were of an informal nature in the way that they were drafted. As we have said, Mr Forsyth had little expertise as regards company secretarial governance matters and the same can be said of the other directors who were essentially fishermen. We accept Mr Forsyth's evidence on these points. In particular, the documents concerned do evidence approval by duly authorised officers of the payments made to both Mr and Mrs Forsyth in the Relevant Period. That is of course aside from the issues to whether the payments were justified, a matter to which we return later.

Documentation recording the salary split -2013 to 2015

146.As mentioned at [129] above, between 2010 and 2012 Mr Forsyth would rather informally handwrite the split between his and Mrs Forsyth's salary on a post-it note to pass on to Mrs Johnston for filing and the cashier for payment. We accept Mr Forsyth's explanation that as the salary split in this time continued to be set at 11.5% of the global salary for Mrs Forsyth, as pre-agreed with Mr Reid, he did believe that it

was necessary for him to type up a separate minute evidencing this split and arrange for it to be signed.

147.The practice changed in 2013. This was when Mrs Forsyth's salary began to increase substantially year-on-year. Mr Forsyth explained that he foresaw that the amount of work Mrs Forsyth will be doing was going to be more permanent over the next few years and thought it was right that more of her remuneration should be paid as salary. We deal later with the question of how much work Mrs Forsyth did during the period after Solvency II created a significant new burden for Mr Forsyth. Mr Forsyth also says that he was at that stage becoming increasingly aware of the more stringent reporting requirements of Solvency II which was another reason why he thought it was appropriate that instead of simply providing a post-it note setting out the split in salary he should ensure that it was formally approved. Accordingly, in respect of each of the years 2013, 2014 and 2015 Mr Forsyth created a document which was signed by Mr Barr recording the salary split between Mr and Mrs Forsyth.

148.The first of these documents bore the date of 5 June 2013. That was the date of the Remuneration Committee meeting that agreed Mr Forsyth's increase in salary that year to £125,000 and a short minute of that decision was signed by Mr Reid in the form described at [125] above.

149. A post-it note written by Mr Forsyth, addressed to Mrs Johnston, is attached to the copy of the minute referred to in the second sentence of [148] above. That post-it note records the split, that is £110,625 to Mr Forsyth and £14,375 to Mrs Forsyth.

150.We have seen a further copy of the minute to which is attached another post-it note written by Mr Forsyth and addressed to Mrs Johnston which records a revised split of £105,000 to Mr Forsyth and £20,000 to Mrs Forsyth. Mr Forsyth's evidence was that a revised split of the salary was implemented with effect from September 2013 and that the post-it note would probably have been generated in August 2013.This is corroborated by a handwritten note on the document made by the cashier which records that Mr Forsyth had informed her that the salaries were to be changed in September. Mr Forsyth said that the reason given for this reallocation in August 2013 was that the pension scheme would be better off if more of Mr Forsyth's salary was allocated to Mrs Forsyth. As we have said at [131] above, we accept that explanation.

151.Against that background, the document recording the salary split for 2013 referred to at [147] and [148] above was created by Mr Forsyth. It was headed in exactly the same way as the Remuneration Committee minutes, that is it was expressed to be "Minutes of the Remuneration Committee Meeting", it bore the date of that meeting (5 June 2013) and it recited that Mr Reid, Mr Barr, Mr Scott and Mr Forsyth were present and that Mr Reid was the Chairman of the meeting. The document was signed by Mr Barr and dated 5 June 2013. The operative part of the document simply states:

> "It was agreed that Stuart Forsyth's salary is increased to £105,000 with immediate effect. It was agreed that Penny Forsyth's salary is increased to £20,000 with immediate effect."

152.There are a number of inaccuracies with that document which Mr Forsyth freely accepted. First, despite the heading, the document was not a minute of a Remuneration Committee meeting. As we have described above, two documents properly described as minutes of that meeting had previously been produced recording the decisions made at the meeting. Secondly, the document could not have been signed by Mr Barr on 5 June 2013 because the revised salary split was not agreed until some time after, but before September 2013. Thirdly, as a result of that position, the revised salary split did not take immediate effect from 5 June 2013, the date stated on the document.

153.Mr Forsyth's evidence was that he asked Mr Barr to sign this document sometime in August 2013. He accepted, with the benefit of hindsight, that the document might have given the misleading impression that the decision had been agreed by those who had been said to be present at the Remuneration Committee meeting on 5 June 2013.

154.Mr Forsyth's explanation was that he used the Remuneration Committee template to produce the salary split document and did not make the necessary changes to the template to reflect the different purpose of the document. He said that he used the minutes of the Remuneration Committee which set out the decision on the global salary figure as a template on the basis that this document was effectively setting out the conclusion of the Remuneration Committee process with regard to the global salary figure but accepted that he did not give the description of the document as "Minutes" any particular thought. He said that it carried no significance in his mind other than it being part and parcel of the salary approval process that had been implemented by the Remuneration Committee. He reiterated the point that the document was not intended to mislead anybody but was produced to provide a paper trail to satisfy the auditors. It had been well established that the salary split was a matter to be determined by himself, with the agreement of either Mr Reid or Mr Barr.

155.The same process was carried out in both 2014 and 2015. We have seen a document described as the Minutes of the Remuneration Committee meeting of 28 May 2014, reciting that Mr Reid (Chairman), Mr Barr, Mr Scott and Mr Forsyth were present and recording that it was agreed that Mr Forsyth's salary is increased to £140,000 with immediate effect. That document was signed by Mr Reid and the date of 28 May 2014 appears under his signature. There is attached to the Minute a post-it note showing the split between Mr and Mrs Forsyth – £110,000 to Mr Forsyth and £30,000 to Mrs Forsyth.

156.There is a further document, also headed "Minutes of the Remuneration Committee Meeting", also dated 28 May 2014, and also stating who was present at the meeting. That document records the salary split also recorded on the post-it note and is signed by Mr Barr and dated 28 May 2014. Mr Forsyth's evidence was that this document was not signed on 28 May 2014, but probably within a week thereafter, the process being that he would have taken it down the road to Mr Barr's office for it to be signed.

157.In relation to 2015, we have seen a document described as the Minutes of the Remuneration Meeting which recite that Mr Scott, Mr Barr, Mr McIntosh, and Mr

Forsyth were present. The date at the head of the minute is wrongly stated to be 6 May 2014. The correct date of 6 May 2015 appears under the signature of Mr Scott, the Chairman of the Remuneration Committee, and the minute records that Mr Forsyth's salary was increased to £180,000 with effect from 20 March 2015.

158. The salary split is evidenced by two documents. First, there is a document headed "Minutes of the Remuneration Committee Meeting" dated 6 May 2015 and stating that Mr Scott, Mr Barr Mr McIntosh, and Mr Forsyth were present at that meeting. That document records salary split, in this case £140,000 to Mr Forsyth and £40,000 to Mrs Forsyth and is signed by Mr Barr. The date of 6 May 2015 appears under Mr Barr's signature. Again, Mr Forsyth's evidence was at this document was not signed on 6 May 2015, but probably within a week thereafter. Secondly, there is an email dated 7 May 2015 from Mr Forsyth to the cashier asking her to amend his and Mrs Forsyth's salary back to 20 March so as to reflect the salary split referred to above. The email also notifies the cashier that there is a bonus which is £12,500 to each of Mr and Mrs Forsyth.

159. There is no post-it note attached to the Remuneration Committee Minute recording the salary split for this year.

160. Mr Khan referred to minutes of a meeting held on 6 February 2014 at which Mr Forsyth and two representatives of Ritsons, the Association's auditors, were present. Paragraph 10 of the minute records:

> "DN [Ritsons representative] told SF that if the Association was to have a PAYE inspection then they may try to recover additional tax from SF on the basis that he does not take all his salary and gives some to Penny. DN told SF that the remuneration committee should have something in writing to state the amount paid to SF and then an amount paid to Penny and that the bonus paid should state to Penny only."

161. In a letter to the Financial Reporting Council ("FRC") dated 12 December 2017, Ritsons answered questions being raised by the FRC in the context of an investigation into Ritsons' audits of SBMIA.

162. One of the questions was what audit procedures were performed over SBMIA's payroll and compliance with laws and regulations relating to employer taxation over a number of years.

163. In relation to the year ended 31 December 2013, Ritsons stated that the audit manager sought evidence for the salary and bonus paid to Mrs Forsyth and that documentation was obtained from the company's payroll records. They said that they had seen the file note recording the payment of Mr Forsyth's bonus to Mrs Forsyth referred to at [142] above, the minutes of the Remuneration Committee referred to [125] above to which was attached the post-it note recording the split between Mr and Mrs Forsyth referred to at [150] above. They do not say that they had seen the more formal document referred to at [148] above.

164. Ritsons go on to say that the issue of Mrs Forsyth's bonus and salary were discussed at the audit meeting held on 6 February 2014. This is the meeting referred

to at [160] above. Ritsons stated that they were concerned at the time that the bonus paid to Mrs Forsyth was linked to the bonus due to Mr Forsyth. They said that may be deemed to be a settlement of income by Mr Forsyth to Mrs Forsyth and Mr Forsyth was made aware of this issue and was advised that in the future any bonus paid to Mrs Forsyth should not be linked to his earnings.

165. Ritsons also say that they were concerned that Mrs Forsyth's salary had not been agreed by the Remuneration Committee and Mr Forsyth was advised that Mrs Forsyth's salary should be commensurate with the services carried out by her for the company. They say that Mr Forsyth had previously advised the Ritsons representative on at least one occasion that he was told by Mr Barr of the remuneration package available to him that it was left to Mr Forsyth allocate that package between himself and Mrs Forsyth.

166. The letter went on to state what effect the bonus and salary documentation Ritsons had seen would have on the audit. It recorded their understanding that the level of Mrs Forsyth's remuneration was left to Mr Forsyth to determine, that there was no concealment by Mr Forsyth of the allocation of salary to Mrs Forsyth, that Mr Forsyth did not deprive himself of income by allocating significantly disproportionate amounts to Mrs Forsyth, the bonus documentation was signed by Mr Barr, Chairman of the Board and member of the Remuneration Committee and that Mrs Forsyth's salary and bonus had been entered in the payroll and the employer taxation had been paid. They concluded by saying that if a PAYE investigation were to be carried out the only potential risk is that there could be deemed to have been a settlement of income on Mrs Forsyth by Mr Forsyth, which would be challenged by providing the documentation signed by Mr Barr. The note said that any tax due would be payable by Mr Forsyth and not the Association. Accordingly, Ritsons said that there was no potential liability to bring into the accounts as at 31 December 2013 any amount in respect of underpaid employer taxes.

167. In relation to the year ended 31 December 2014, in reciting the evidence that was seen for the salary paid to Mrs Forsyth, again reference was made to the minute of the Remuneration Committee with a post-it note being attached to it advising the split of the remuneration of £110,000 to Mr Forsyth and £30,000 to Mrs Forsyth. In relation to the year ended 31 December 2015, reference was made to the "Minute of the Remuneration Committee dated 6 May 2015" confirming Mrs Forsyth's salary of £40,000. As we have found that document is not in fact a Minute of the Remuneration Committee but is clearly a reference to the separate document recording the split created by Mr Forsyth, as referred to at [147] above.

168. Mr Forsyth was challenged on his evidence in relation to the documentation recording the salary split. The Regulators' pleaded case, as set out at paragraphs 45 and 46 of their Statement of Case was that the documents which Mr Forsyth created setting out the salary split, and which were signed by Mr Barr, were "false minutes" purporting to record that the Remuneration Committee had agreed that his and Mrs Forsyth's salary to be increased to the amount recorded on the documents. The Regulators plead that the "false minutes" were used by Mr Forsyth to instruct the Association's cashier to make payments to Mrs Forsyth and that Mr Forsyth was

aware that the "false minutes" gave the impression that such payments had been authorised by the Remuneration Committee, when in fact they had not.

169. In his cross-examination of Mr Forsyth, Mr Khan put it to him that what the Regulators described as the "false minutes" were created much later than the dates stated on the documents. It was put to Mr Forsyth that they were created sometime in late 2015 or early 2016. Mr Khan relied on the note of the meeting with Ritsons in February 2014 and their letter to the FRC dated 12 December 2017 which indicated that Ritsons had not seen the "false minutes" for 2013 and 2014 and only saw those for 2015 in 2016. Mr Khan submitted that in the light of that position, we should find that the documents concerned had not been created much earlier, that is shortly after the time the relevant salary split had been determined, as contended by Mr Forsyth.

170. As Mr George correctly observed, this allegation of "backdating" is unpleaded. It is also inconsistent with paragraph 46 of the Regulators' Statement of Case which states that the "false minutes" were used by Mr Forsyth to instruct the Association's cashier to make payments to Mrs Forsyth. If that were the case, the documents had to be in existence at the time that the relevant payments were made, which was clearly well before late 2015 or early 2016 in relation to most of the payments. Furthermore, the Regulators' case on this point is hindered by the fact that they have chosen not to call the relevant representatives of Ritsons to give evidence as to what documents they saw. Ritsons clearly did see the 2015 document and they also appear to be satisfied with the evidence given in the form of the post-it notes for the earlier years as to the salary split, and also Mr Forsyth's explanation as to the process for the agreement of the salary split. The case on this point would also have to proceed on the basis that, as accepted by the Regulators, Mr Barr was aware throughout the Relevant Period of the amount of remuneration that was being paid but did not sign the brief notes recording that split until some two and a half years later. No explanation was given by the Regulators how that could be the case.

171. In the circumstances, we refuse permission for this unpleaded case to be made at this late stage in the proceedings and we will not consider it. We therefore confine our findings to the allegations made by the Regulators that the documents generated by Mr Forsyth to record the salary split were deliberately designed by Mr Forsyth to give the impression that the salary split had been authorised by the Remuneration Committee, when in fact they had not.

172. We reject the Regulators' case on this issue and accept Mr Forsyth's evidence in that regard. Our reasons are as follows.

173. The so-called "false minutes" were created against a background where, as now accepted by the Regulators, all members of the Remuneration Committee were aware that in the Relevant Period the salary figure which it was awarding was a global figure which encompassed both Mr and Mrs Forsyth's salary. They were also aware that the global figure would be allocated by Mr Forsyth, following a discussion with either Mr Reid or Mr Barr as to whether the split proposed by Mr Forsyth was appropriate. There was no challenge to Mr Forsyth's evidence that once his wife had been employed the Remuneration Committee agreed a process by which a global salary

figure would be determined by that Committee and it would be left to Mr Forsyth to allocate the global figure between himself and his wife.

174. Moreover, the evidence shows that Mr Forsyth was perfectly open about the fact that his wife's remuneration was dealt with in this way. Mrs Johnston was clearly aware of it because she was the recipient of the various post-it notes setting out the salary split. Likewise, the cashier would have seen the post-it note or a separate email from Mr Forsyth setting out the split.

175. The auditors were also aware of the process, as indicated by their letter to the FRC in December 2017, as referred to above. There is also evidence that the various members of the Remuneration Committee, as constituted from time to time throughout the Relevant Period, were aware of the fact that there was a global figure and in many cases the amount of the split that Mr Forsyth had determined. For example, Mr Reid signed the relevant document recording his approval of the remuneration to be paid to Mrs Forsyth in 2011. Mr Barr signed the relevant documents recording his approval of the remuneration to be paid to Mrs Forsyth on all other occasions in the Relevant Period. An email of 5 May 2015 from Mr Forsyth to Mr McIntosh, who joined the Remuneration Committee in November 2014, set out the precise split of the global figure at that time between Mr and Mrs Forsyth. Mr Scott, in his interview with the FCA, appeared to accept that the Remuneration Committee was aware that £40,000 of the global salary figure had been allocated to Mrs Forsyth on 6 May 2015.

176. In those circumstances, it is difficult to see how it could be said that Mr Forsyth had deliberately created a misleading record that the Remuneration Committee had agreed the salary split. The agreed process did not require formal Remuneration Committee approval to the salary split, but there was no attempt on Mr Forsyth's part to conceal the position from the Remuneration Committee or any of its individual members.

177. Although we have found that the documents were not designed to mislead, as readily accepted by Mr Forsyth, they were in fact misleading in a number of respects. Mr Forsyth should have taken more care when preparing the documents to ensure that their status as a record of the salary split agreed between him and Mr Barr was clear so that they could be readily distinguished from the actual Minutes of the Remuneration Committee. Likewise, the document should have borne the actual dates on which they were signed rather than, as a matter of course, bearing the date of the Remuneration Committee at which the global salary figure was agreed. Mr Khan tried to make something of the point that Mr Forsyth had, in relation to the 2015 document, changed the erroneous date of 6 May 2014 to 6 May 2015 which he said indicated that Mr Forsyth had done more than simply cut and paste the heading from the Remuneration Committee minutes when creating the salary split document. Mr Forsyth's answer was that he was just as likely to have opened up the Word document and amended it rather than use the cut and paste function, which we find to be plausible.

178.As Mr Forsyth admitted, he did not think the whole process through. As we have found, he was not somebody with any experience of creating documents of this kind and in our view his approach disclosed a degree of naïveté but nothing more than that. Against the background of our other findings, we think that it is more likely than not that Mr Forsyth's motive was to create documents for an audit trail. It made sense that the documents reflected the process agreed by the Remuneration Committee, so that the various stages of the process could be seen together as a whole, but the way that Mr Forsyth did it, by conflating the documentation relating to the decision on the salary split with the decision of the Remuneration Committee was, as he now recognises, inapt.

The work undertaken by Mr and Mrs Forsyth – 2007 to 2012

179.Around 2008 to 2009 the volume of work that Mr Forsyth had to deal with was increasing significantly. He started taking work home in the evenings, and also during the weekends as a result. This state of affairs came about mainly as a result of:

(1) SBMIA's Peterhead office closing in 2008;

(2) the time spent on building up the Australia and New Zealand side of the business;

(3) work on diversifying the Association's business into what were known as "Section C" vessels; and

(4) it becoming apparent that SBMIA could fall into the scope of the onerous regulatory requirements of Solvency II.

180.As a consequence, although Mrs Forsyth continued to provide out of hours cover for calls and hospitality services, her role evolved into much more than an administrative one to assist Mr Forsyth with the increased workload. As we have found, overtime work was not part of the working culture at SBMIA and so outside the strict working hours Mr Forsyth had nobody to rely on for secretarial assistance other than Mrs Forsyth.

181.Mr Forsyth does not work in a conventional way. He struggles to digest documents on a computer screen, and he is poor at typing anything other than simple emails. He struggles to digest lengthy documents even when they are printed out and takes more on board and achieves more through talking and listening. As we have mentioned, these are difficulties that he kept to himself and his wife and they would not have been apparent to others at SBMIA.

182.Mrs Forsyth was clearly suited to assisting Mr Forsyth due to her secretarial skills and of course the ability to work antisocial hours because of the fact that they lived together.

Impact of the closure of the Peterhead office

183.The closure of the Peterhead office meant that Mr Forsyth became the point person for urgent calls regarding claims, which often took place in the evening and sometimes even late at night. Mr Forsyth also had to make regular visits out of the Buckie office to Peterhead and Fraserburgh.

184.Mrs Forsyth began to assist with the claims work by typing up responses dictated to her, picking up calls which were diverted when he was on the road, and organising paperwork. She would assist in verifying statements made regarding claims, thus assisting Mr Forsyth in analysing the claimant and getting to know the customer.

Australia and New Zealand work

185.During 2008 and 2009, Mr Forsyth was also spending a lot of time building the Australia and New Zealand side of the business. That also involved urgent work responding to claims which, with the time difference, meant that the work had to be done in the early mornings and evenings. Mrs Forsyth would assist in checking documentation that came in for new Australia and New Zealand business and that it was consistent with what Mr Forsyth believed were the agreed terms for the business.

186.From what we can see recorded in the Board Minutes, the Australia and New Zealand business developed successfully, particularly after February 2004 when the Association was insuring 32 Australia and New Zealand vessels. That had risen to nearly 100 a few years later, but it was reported at the Board Meeting in 2009 that the number of Australia and New Zealand vessels being insured was down to 32. Mr Forsyth explained that the Association had let a lot of business drift away rather than take it at what he regarded to be the wrong price.

187.Mr Khan put it to Mr Forsyth in cross examination that this decline in business was inconsistent with Mr Forsyth's evidence that Mrs Forsyth continued to do significant work in relation to the Australia and New Zealand business, right through to 2016, bearing in mind also that by September 2015 only 9 Australian and New Zealand vessels were being insured by the Association.

188.That was disputed by Mr Forsyth. He said that the battle to try and grow the business, and to retain the existing clients in a market that was too soft was very onerous, timewise. He said that there was an awful lot of work going on trying to provide alternative quotations on a different basis to each client rather than just offering a renewal on the expiring basis. There was work to be done in reviewing the successful business that had been obtained in previous years. Mrs Forsyth assisted in analysing the vessels, producing lists of when they were renewing, so that Mr Forsyth could give the broker in New Zealand a nudge to see if he could revisit those clients.

189.We have no reason to doubt that evidence. We are satisfied that work in maintaining or trying to develop a business in a declining market can be just as time-consuming as dealing with the administration of the remaining fleet.

190.Initially, the work that Mrs Forsyth did revolved around responding to claims being made alongside providing quotations and organising policy renewals. She said that claims by their nature, require a quick response and given the time difference Mr Forsyth would have also to work quickly to ensure his response was received in Australia or New Zealand before the start of their working day. Consequently, the work surrounding claims was very time pressured.

191.Furthermore, there was an earthquake in Christchurch in New Zealand in September 2010 and a further earthquake in the same area in February 2011. Mr Forsyth's evidence was that this generated a particularly high volume of work on the claims side, and was a particularly busy time for him and, as a result, for Mrs Forsyth. This was also the busiest time of the year for the Association, given that insurance renewals generally take place on 1 January. Mr Forsyth's evidence was that whilst there was no increase in the volume of claims as a result of the earthquakes, the claims management process became more complicated and time-consuming as a result of it. Many of the individuals with whom Mr Forsyth would deal on the brokerage side in New Zealand were consumed with personal issues resulting from the earthquakes, such as damage to their own homes. In order to help manage the situation, Mr Forsyth would talk to the boatowners in New Zealand and Australia directly whereas previously he would have managed communications via Willis in New Zealand. The same applied to other parties with whom Mr Forsyth would speak in the course of the usual claims' management process. The ship repairers and surveyors were equally consumed with dealing with a consequence of the earthquakes. As a result, Mr Forsyth was dealing with claims without the benefit of the usual assistance from these parties.

192.Mr Forsyth's evidence was that Mrs Forsyth assisted Mr Forsyth with various administrative support tasks, such as typing emails which he dictated to her, and taking calls. Information that came in regarding claims was not as well ordered as usual, because of the disruption caused by the earthquake. Mrs Forsyth would therefore assist with collating the documentation in relation to each claim. She would also assist in helping to make sense of the quotes. Nobody else was available to provide the necessary secretarial assistance which was necessarily done at antisocial times.

193.Mr Forsyth also said that this extra work had an effect on the rest of his responsibilities. He was still travelling to Peterhead once a week and on the drive back, he would use his wife for secretarial services, over the phone, so that when he arrived home he did not have to sit down and write out notes for the next day.

194.It was against that background that the discretionary bonus of £10,000 was paid directly to Mrs Forsyth in 2011 and Mr Forsyth's bonus was assigned to Mrs Forsyth.

195.We find Mr Forsyth's evidence on this point to be credible and there is no other evidence before us to doubt what he has said in this regard. Mrs Forsyth's evidence was that by March 2011 the time she spent on the Association's business had increased from 7 to 8 hours a week between 2007 to 2008 to 12 hours or more between 2009 to 2010 as she spent greater time on the Australia and New Zealand

work and Section C work and by March 2011 this had increased to around 16 hours a week.

196.Mrs Forsyth provided considerable detail of the kind of work that she did in relation to the Australia and New Zealand work in her witness statement. She observed that because of the time difference, Mr Forsyth carried out much of this side of the business at home rather than in the office so that Mrs Forsyth assisted him more consistently in this work whereas the other secretarial work was more ad hoc. Most of her work was spent in the evening and at night, as well as at weekends. She said she helped by typing up emails about claims issues, or instructions to solicitors on contentious matters, as well as longer documents which were dictated to her. Her evidence was that by the time she received her first bonus in February 2010 they were both spending a lot of time on Australia and New Zealand work and had been doing so for at least the last year.

197.By the time Mrs Forsyth received her 2010 bonus, she said she was spending approximately 4 hours a week on Australia and New Zealand work. In the light of the description of the work that she gave, we accept that estimate.

198.She also recalls that the Christchurch earthquakes led to an increase in the amount of work, and this was a particularly busy time. She observed that Mr Forsyth wanted to continue to give the most personal service he could as he was dealing with people he had met on his business trips to New Zealand and Australia. Mrs Forsyth provided some detailed examples, by reference to the documents that were disclosed, as to the role she performed in relation to particular claims, helping Mr Forsyth understand what the insurers were claiming for, reading large documents or reports, for example from surveyors to help Mr Forsyth's thought process and to think of any queries he might have. She helped organise files for Mr Forsyth out of the documents and reports that came through. She also referred to the role that Mr Forsyth mentioned in assisting with quotations.

199.When challenged on a lot of this detail by Mr Khan and whether she had overestimated the work that she had carried out, Mrs Forsyth explained that particular matters stuck in her mind because they reminded her of other things or events happening at the same time. As we have said, recalling matters in that way is not unusual and whilst there is of course a danger that a witness will seek to reconstruct events in the light of examining documents disclosed at a later date, we can find no evidence of that in this case. Mrs Forsyth was consistent and clear in her evidence that she had not exaggerated the work that she had done relation to Australia and New Zealand matters and we accept her evidence on that point.

Section C work

200.In accordance with SBMIA's reinsurance contracts, vessels were split into the following categories:

(1) Section A – UK fishing boats;

(2) Section B – Australian and New Zealand fishing and other boats; and

(3) Section C – Other vessels, such as tugs, ferries, and barges in the UK and internationally.

201. Since the time of his appointment, it had been part of Mr Forsyth's remit to grow the business and diversify revenue sources as far as possible. As his office day would be taken up mostly by Section A work, his work to grow the business largely took place outside of normal office hours.

202. As there was no directory of small boatowners, Mr Forsyth planned to make contact with contractors and brokers specialising in small marine businesses so as to investigate further whether there could be a lead to any business worth having. In this respect, Mrs Forsyth was asked to google the details of contractors and brokers specialising in small marine businesses and would compile lists of vessel owners, again from Internet searches. In cross-examination, Mr Forsyth explained that he needed his wife's assistance with this work whereas he had previously done it himself before because he was under more pressure during the working week. That was because of his need to be in Peterhead one day a week following the closure of the office there and cutbacks on staff meant there was less time in the day for the research process. Mrs Forsyth was well suited to help with the research work.

203. Other research work that Mrs Forsyth was asked to carry out involve researching who was operating pleasure boats on the Thames and looking at UK council websites to see if they operated marine assets, looking for appropriate contact details for somebody Mr Forsyth could call to discuss provision of insurance.

204. Mr Forsyth also gave details in his witness statement of work he asked Mrs Forsyth to do in investigating South Africa and Namibia as a potential source of fishing boats to insure and in particular saying that there was a South African Insurance Commissioners website that detailed guidelines relating to the licensing of foreign insurers insuring South African assets. Mr Forsyth had discovered that there was a vibrant fishery industry in Namibia which prompted his interest. He said that work would have taken place sometime between 2008 and 2012.

205. Mr Khan put it to Mr Forsyth that no such work was in fact undertaken, referring to the minutes of a Board meeting in February 2007 which indicated that the market in Namibia had already been investigated and recorded Mr Forsyth as saying that the market was incredibly competitive.

206. Mr Forsyth readily accepted that work had previously been done on Namibia, but he had in his mind put it at a much earlier date, sometime in 2005. The second later piece of work focused on the question as to whether a licence could be obtained to trade in South Africa on the basis that entry into that market could also lead to business in Namibia. However, matters were not pursued when it was discovered that the market in South Africa was closed to non-domiciled insurers.

207. In her witness statement, Mrs Forsyth records that she remembers conducting searches for vessels in Namibia and that Mr Forsyth had told her that the Association had looked into Namibia before, but it had been discounted at that time. Mrs Forsyth

recalls that, probably between 2009 and 2010, Mr Forsyth wanted to revisit it and asked her to help with that research.

208.Mrs Forsyth was not challenged on that evidence. That evidence complements what was said in Mr Forsyth's witness statement and is consistent with what he said under cross examination. As Mr George observed, this demonstrates that Mr and Mrs Forsyth's witness statements give genuine independent recollections and give the details that they can personally recollect.

209.We therefore find that Mr and Mrs Forsyth were correct in their evidence that the position in Namibia was researched on two different occasions.

210.Mrs Forsyth also gave further details of the tasks she undertook in relation to Section C work. Her evidence was that, that support was similar to the way she helped with some of the other types of work. She particularly remembers spending a lot of time helping Mr Forsyth with research around growing the Section C business, as described by Mr Forsyth's evidence. Additionally, she recalls Mr Forsyth coming back from trade fairs and conferences with leaflets and brochures which she would read to see if there was anything that could be looked into. She confirmed Mr Forsyth's evidence that he tended to do this business development work in the evening because he was the only one in the office who had any experience with boats outside of the fishing industry.

211.Mrs Forsyth was challenged on her evidence that she spent approximately 8 hours a week on Section C work by the time that she received her 2010 bonus. Mr Khan questioned as to how she could be so sure of that so long after the event. Mrs Forsyth said that it was a very different kind of work to the other areas that she had been involved with. As she saw it, there was an easy differentiation between the section C work and the Australia and New Zealand work because it was not dealing with existing clients or renewals or claims in general. It was more about research into looking for new business. Again, we find this explanation credible. Her estimate of the time spent was no more than that, but she was able to put it in the context of the other work that she was undertaking in the light of the different nature of the work concerned.

Other work

212. Mr Forsyth referred in his witness statement to a particular example of the local claims work that Mrs Forsyth assisted him with during 2011. He explained that this was an example of the ad hoc work that Mrs Forsyth would be asked to assist him with from time to time. The claim involved a total loss claim in respect of a fishing vessel. Some of the members of the Board were suspicious that the owner of the boat had purposefully destroyed it in order to claim insurance, but Mr Forsyth was not convinced that was the case. There was therefore pressure on Mr Forsyth to find a way not to pay the claim. There was extensive documentation in relation to the claim and considerable correspondence and calls with the owners and lawyers involved.

213.Mr Forsyth's evidence was that he and Mrs Forsyth spent a long time reading legal reports try to help him understand on what basis the claim could be declined and communicating with the lawyers involved to establish this. Mr Forsyth says he also conducted numerous interviews with the boat owner, the repairers and crew, and separately so did the lawyers, and Mrs Forsyth assisted in analysing the statements to check for areas which were inconsistent, or which did not correlate.

214.Although Mr Khan questioned whether it is plausible that Mrs Forsyth would be required to assist in relation to such a matter, we find Mr Forsyth's explanation to be credible, bearing in mind that at this time Mr and Mrs Forsyth were working together regularly on a wide range of matters.

215.Indeed, Mr Forsyth's unchallenged evidence was that the additional work which began in 2009 had effectively become the "new normal". He was of the view that Mrs Forsyth's salary (which was £11,072 as of June 2011) no longer adequately compensated her for her additional workload. Against that background, in order to recognise the work undertaken by Mrs Forsyth in 2011/2012, she received a bonus of £12,500 which equated to the bonus due to Mr Forsyth which he did not receive.

Solvency II

216.Mr Forsyth became aware in 2009 that extensive changes to the regulatory regime would be caused as a result of the implementation of Solvency II, resulting in structural change in the reporting and validation processes. Mr Forsyth had realised that SBMIA, as a small mutual, may fall within the scope of the new regime and that it would not be able simply to follow the lead of larger insurance players. There was no "one size fits all" option.

217.Mr Forsyth realised that the change that would be required to the way the Association was run was colossal. SBMIA had none of the policies likely to be required by Solvency II in place.

218.Mr Forsyth found the compliance with the regulatory obligations that preceded Solvency II had been relatively straightforward. It involved filling in the solvency declaration and reinsurance declaration and various forms which consisted of approximately 15 sheets of paper each year. Ritsons would produce the required figures and Mr Forsyth would review them before they were passed onto the Board for approval and then on to the regulator.

219.It is helpful at this stage, with the assistance of Mr Sheaf's unchallenged expert evidence, to give some background to the challenges faced by an entity such as the Association in implementing Solvency II.

220.In the overview section of his report, Mr Sheaf observed that the implementation of Solvency II was subject to the concept of proportionality and, as a consequence, precisely what work any particular insurer did to implement it was not fixed, and it was difficult to objectively compare the amount of work against an industry standard. That supports Mr Forsyth's view that there was no "one size fits all" option. Consequently, despite any assistance that might be obtained from looking at standard

templates or the work of other insurers would be limited. Any material received, would have to be carefully adapted to meet the requirements of the particular insurer in question.

221. At paragraph 3.4 of his report, Mr Sheaf observed that Solvency II signalled a move from prescriptive to principles-based regulation for insurers. Consequently, many insurers relied heavily on guidance from regulatory bodies and other market participants to determine how to implement the regulations appropriately for their business.

222.At paragraph 3.5, Mr Sheaf observed that the regulations also introduced a new format for reporting to the Regulator; much more information, in breadth and depth, was required than had been the case under the previous regulatory regime, Solvency I.

223.At paragraph 3.7 Mr Sheaf observed that the Solvency II framework comprised three pillars:

- Pillar 1 – Quantitative Requirements
- Pillar 2 – Qualitative Requirements
- Pillar 3 – Transparency & Disclosure

224. At paragraph 3.11 Mr Sheaf summarised the key milestones in the implementation of Solvency II. The framework directive was published in November 2009, originally due to come into force on 31 October 2012. This was delayed in September 2012 until 1 January 2014, and it was further delayed in October 2013 until 1 January 2016.

225. At paragraph 4.3 Mr Sheaf stated that Pillar 1 required insurers to value assets, liabilities, and capital by applying a combination of principles and prescribed methodologies. At paragraph 4.5 Mr Sheaf said that the work involved in establishing the balance sheet sits mostly with the finance and actuarial functions of insurers. In a small firm such as SBMIA the responsibility would inevitably have fallen upon Mr Forsyth alone in the absence of any middle management. At paragraph 4.7 Mr Sheaf observed that there were two distinct capital requirements: the Solvency Capital Requirement ("SCR") and the Minimum Capital Requirement ("MCR"). The SCR calculation was significantly more complex than the requirements that preceded it.

226. In relation to Pillar 3, Mr Sheaf observed that there was a significant increase in the quantity of regulatory reporting requirements for insurers. Over 200 templates were required.

227. Pillar 2 set out the requirements regarding insurers' systems of governance and risk management, as well as the supervisory review process. This is the area in which Mr Forsyth had to devote a considerable amount of time supported, he says, by Mrs Forsyth. As Mr Sheaf observed at paragraph 5.5, there was a requirement to establish and maintain four key functions, that is Compliance, Risk Management, Actuarial and

Internal Audit. None of these functions were previously established in any formal sense within SBMIA.

228. One of the key requirements was to prepare and complete an Own Risk and Solvency Assessment ("ORSA"). As Mr Sheaf explained at paragraph 5.35, insurers were required to perform an ORSA, at least annually, or following any major changes in risk profile, whereby insurers identify the risks to which they are exposed, including those not covered by the regulatory capital requirements, and produce forward-looking assessments of their ability to meet their MCR and SCR over the "business planning horizon" (usually interpreted as the next 3 to 5 years).

229. Mr Sheaf observed at paragraphs 5.38 and 5.39 that the requirements of the ORSA process were not prescriptive, and it is left to each insurer to develop a process which supports its risk management framework. As well as the ORSA process itself, insurers needed to establish an ORSA policy and a new reporting process, by which they could communicate the outcome of the ORSA.

230. Mr Sheaf explained that the ORSA would be expected to include the following components at a minimum:

- Description of the business model, business strategy and risk appetite of the insurer
- Description of the insurer's risk management framework
- Assessment of the current risk profile of the insurer
- Forward-looking assessment of the insurer's risk exposure, and of its solvency against regulatory and internally assessed capital requirements
- The insurer's contingency plans and/or management actions for raising capital
- Stress and scenario testing of the solvency position over the business planning horizon

231. At paragraph 5.41 Mr Sheaf said that in his experience the ORSA was a time-consuming process to implement, and insurers tended to make various refinements to their ORSA processes during the various dry runs conducted during the implementation period for Solvency II.

232.At paragraph 5.42 Mr Sheaf observed that Pillar 2 stipulates a wide variety of policies and procedures that insurers must establish and document in order to demonstrate compliance with Solvency II. This resulted in a significant workload during the implementation period for most insurers and larger insurers were further advanced with producing policies prior to Solvency II than smaller (SME) insurers.

233.At paragraph 5.43 Mr Sheaf set out a list of policies that can be considered as being the minimum requirement in this regard:

- ORSA policy
- Internal control policy
- Outsourcing policy
- Compliance policy
- Valuation policy
- Fit and proper policy
- Remuneration policy
- Business continuity policy
- Reporting policy
- Risk management policies with respect to
  - Underwriting and reserving
  - Asset-liability management
  - Investment risk management
  - Liquidity risk management
  - Concentration risk management
  - Operational risk management
  - Reinsurance and other insurance risk mitigation technique

234. At paragraph 5.45, Mr Sheaf stated that in his experience, where a number of policies did not previously exist for a particular insurer, it was a significant undertaking to create them. For each new policy that was created, it was important to ensure consistency with all previously created policies.

235. At paragraph 6.3 and 6.4, Mr Sheaf described how repeated delays to the implementation of Solvency II created disruption to the preparation plans of insurers, resulting in the pausing or slowing down of their implementation plans.

236. At paragraph 6.5 to 6.7, Mr Sheaf referred to the broad range of publications which emerged in respect of Solvency II from a variety of market bodies and which UK insurers had to keep abreast of, including additional guidance and requirements issued by the PRA. This included responding to any individual request for progress updates on Solvency II implementation.

237. At paragraph 6.8, Mr Sheaf stated that in addition to the formal publications, implementation approaches and best practice were in continuous development and would have required significant engagement from insurers as they prepared for the "go-live" date.

238. At paragraph 6.21, Mr Sheaf observed that a study carried out by the European Commission ahead of Solvency II implementation (the "QIS5 Study"), which many insurers, including SBMIA, participated in, revealed that large insurers were generally better prepared for implementation than smaller ones. Many insurers raised lack of expert resources, particularly those with actuarial skills, as a key challenge to ensuring a smooth transition.

239.At paragraph 6.29, Mr Sheaf observed that the level of information included in the Directive did not constitute practical guidance as to how an insurer could begin designing its ORSA process. At paragraph 6.31, he observed that smaller insurers would not have had direct access to the insight provided at annual conferences organised for actuaries which would make it more challenging to understand what was required and what other insurers were doing.

240. At paragraph 7.5, Mr Sheaf stated that the amount of work required to achieve compliance with Solvency II, and the time taken to complete this work, varied considerably by insurer, and was heavily dependent on the amount of work that the insurer chose to outsource. Engagement with Solvency II increased steadily from 2008 until implementation, with the vast majority of the work being carried out between 2010 and 2015.

241.At paragraph 7.8, Mr Sheaf observed that in order to meet Pillar 2 requirements, insurers invested significant time in designing a corporate governance structure, risk management framework, establishing the four required functions, writing Solvency II policies and procedures, designing an ORSA process and report, and building processes to produce the additional internal reporting required by Pillar 2.

242. At paragraph 7.12, Mr Sheaf observed that establishing an ORSA process was amongst the areas that insurers found most challenging.

243.At paragraph 7.14, Mr Sheaf observed that it was important to undertake what was commonly known as a gap analysis so that the insurer could understand how well it was currently set up to be able to meet the requirements of Solvency II and, most importantly, to understand where the gaps were. In order for an insurer to have undertaken a gap analysis, it was important that it first had a good understanding of the regulations it was seeking to comply with. Mr Sheaf observed that that exercise would not have been a small undertaking.

244.Paragraph 7.15, Mr Sheaf stated that many insurers also prepared an implementation plan which normally detailed a long list of tasks, how long those tasks will take, who would complete them and when those tasks would be undertaken. The implementation plan was also usually maintained and refreshed throughout the implementation period in order to track progress.

245.At paragraph 7.24, Mr Sheaf mentioned that one of the key principles underpinning Solvency II was that requirements should be applied to each insurer in a proportionate manner, to avoid placing burdens on SMEs which were excessive by comparison to their activities, and which could ultimately drive them out of the market. However, he observed that there is still considerable uncertainty about how the principle of proportionality ought to be implemented in practice, particularly as Solvency II contains a significant number of prescriptive requirements, where a proportionate approach cannot be taken.

246. At paragraph 7.25, Mr Sheaf observed that in his experience there was a substantial baseline amount of work that insurers are required to undertake, irrespective of their size, to comply with the requirements of Solvency II. As a result, his view was that the preparation for Solvency II was, in general, proportionately more owners for SMEs (in terms of both time and cost) than the larger insurers.

247. Against that background, we accept Mr Forsyth's evidence that as the proposed legislation around Solvency II developed, it became quickly apparent to him that SBMIA had to make significant changes in its approach to implementation. However, the Association was not in a financial position to be able to outsource the work to external advisers, whose charges were extremely high. There was no option but for Mr Forsyth, as the only insurance professional within the Association, to take responsibility for understanding the regulations and leading the implementation. As he rightly said, as Chief Executive it was his responsibility to make the Association compliant.

248.As Mr Forsyth said, having to shoulder the responsibility of Solvency II without being able to have in-depth advice and support from external advisers was a daunting experience.

249.Consistent with what Mr Sheaf said in his report, the first phase of work on Solvency II began for SBMIA in 2009. At this stage Mr Forsyth was trying to keep on top of the material published by the regulators and other professional bodies such as consultants and accountants. There was insufficient time for Mr Forsyth to read and absorb the large amount of material being published at the time and trying to keep on top of it, as well as continuing to run the Association was a challenge. There was no time to deal with Solvency II during the working day, so Mr Forsyth had to turn to it in the evenings and at weekends.

250. During 2010 – 2011 much of the work that Mr Forsyth undertook related to the QIS5 Study. Understandably, Mr Forsyth found it very time-consuming to understand the technically very dense guidance given and it was a difficult process to ensure the exercise was both proportionate to the Association and was still being appropriate for the regulator's purposes. Although Mrs Forsyth was not involved in that task, it was something extra to add to his workload which meant pushing more things outside office hours on to Mrs Forsyth.

251.In August 2010, it was confirmed by the Financial Services Authority, the Association's then regulator, that SBMIA could not be excluded from the scope of Solvency II.

252.As Mr Sheaf envisaged in his report, Mr Forsyth created a Solvency II implementation plan in 2011 which was continuously updated. Most of the items on the plan fell to Mr Forsyth to implement. He started to work on the ORSA and the Gap analysis. As Mr Forsyth had no concept of what the regulator was looking for by way of an implementation plan, many hours of research were undertaken to work that out. Mrs Forsyth persisted in researching the guidance around what the regulator wanted and reading those documents for him to process. He gave an example of Mrs Forsyth comparing the information provided by the UK regulator with information on the European regulator's website and telling him what the differences were, which assisted his understanding of the requirements.

253.Although, as he admitted, Mrs Forsyth has no expertise or experience in either marine insurance or regulatory requirements, he felt that she was excellent at applying a common sense understanding to dense and complex documents.

254.There was nobody else available to assist Mr Forsyth with this work. Mr Forsyth considers that in 2009 to 2010, Mrs Forsyth was spending about 12 hours a week on the Association's work. That workload increased in the 2010 to 2011 period, largely as a result of the ramping up in the volume of Solvency II material which he needed Mrs Forsyth's assistance to digest as well as his efforts to develop the Section C work and also the management of the Australia and New Zealand work.

255.Mr Forsyth explained that any evening involving Solvency II work was very hard going given his complete unfamiliarity with the new and constantly evolving regulatory landscape, compared to the insurance work in which his expertise lay. He estimated that Solvency II work took about half of all the time Mr and Mrs Forsyth spent working together outside of his office hours.

256.Mr Forsyth fully accepted that Mrs Forsyth's employment and the way in which he asked her to work were far from conventional, but, as we readily accept, working for a small insurer with the profile of the Association in a small town in Scotland was quite different from working in the much more comfortable work environment of a major financial centre in London. Mr Forsyth simply had to adapt and make best use of the resources available to him and we accept that it was a daunting challenge for him.

257.Mrs Forsyth's evidence was that she became aware of Solvency II from 2009 or 2010. At that time, she was asked to help on an ad hoc basis. She says she found herself spending an increasing amount of time on Solvency II work from 2011. Although she had little understanding at this stage of the significance or technicalities of Solvency II, she gained the impression that Mr Forsyth was becoming increasingly worried about the impact on SBMIA and how much work it was going to require. She confirmed Mr Forsyth's evidence that most of her work involved reviewing and

reading documents with Mr Forsyth at this stage, many of those documents having been found by searches on the Internet.

258.Both Mr and Mrs Forsyth did this work at the end of a long working day for both of them. Whilst Mr Forsyth was in the office dealing with the day-to-day running of the business Mrs Forsyth focused on her family and home. She felt that it was particularly important to have a second pair of hands, eyes, and ears to help Mr Forsyth to take in and understand what they were reading.

259.Mr Khan challenged Mr Forsyth as to the difficulty of the task which he faced and whether Mrs Forsyth assisted him to the extent that they both claimed.

260.In particular, Mr Khan referred Mr Forsyth to a Board minute from 2004 where it was recorded that Mr Forsyth had written a paper condensing some 800 pages from the Financial Services Authority's Handbook. Mr Khan submitted that this demonstrated that as part of his job as Chief Executive, he had to digest and present to the Board complex regulatory material.

261.Mr Forsyth accepted that to be the case but made the perfectly fair point that the original Handbook was much less dense than the Solvency II regulation and was much more user-friendly. We accept that observation. It is consistent with what Mr Sheaf said in his report about the comparison between the two regulatory regimes, so we do not accept that a fair comparison was being made.

262.Consequently, we also accept, bearing in mind the overall burden on Mr Forsyth at that time, that he asked his wife to assist him in researching what the various consultants, actuaries, accountants were saying about Solvency II on their websites and using research gleaned from their commentary to aid their understanding. We also accept, bearing in mind Mr Forsyth's difficulties with complex and long documents that Mrs Forsyth was assisting him in that regard at this time.

Summary

263. From 2009, as well as continuing with her previous work on call cover and hospitality, Mrs Forsyth's work increased due to the extra demands put upon Mr Forsyth as described above. It is of course impossible after this elapse in time to calculate with any precision the number of hours that she worked on the Association's business at this time but in our view, bearing in mind the work involved, we consider the estimates made by Mr and Mrs Forsyth to be reasonable.

264.We therefore accept that at the time of the bonus payment made to Mrs Forsyth in 2010, her work had increased from between 7 to 8 hours a week in 2008 to around 12 hours a week. By March 2011, following which the 2011 bonus payment was made, the work had increased to around 16 hours a week.

The work undertaken by Mr and Mrs Forsyth– 2013 to 2016

265. The period between 2012 and 2014 saw a continuation of the work Mrs Forsyth did regarding claims work and the Australia and New Zealand work. Mrs Forsyth also

continued her ad hoc secretarial work while her lunchtime receptionist role and hospitality work became progressively more intermittent throughout the period.

266.Mr Forsyth's evidence was that there was a huge increase in Solvency II work around 2013. Consistently with what was said in Mr Sheaf's report, the precise requirements of and deadlines for compliance with Solvency II began to crystallise. At this time, it was due for implementation on 1 January 2014. A new raft of guidance had come out at this time and the volume of research increased.

267.Mr Forsyth's evidence was that Mrs Forsyth would spend time in the evenings monitoring the auditors' and Solvency II consultants' websites which would comment on what was being released by the Regulators. As was usually the case, the period in November and December leading up to the January policy renewals took up a large proportion of Mr Forsyth's time. Mrs Forsyth was given key phrases to Google such as "ORSA" or "insurance company corporate policy" and ask her to read these documents by herself and draw any websites and documents which responded to those search terms to his attention.

268.Mr Forsyth now had a new challenge of drafting and implementing the policies which were required. At this time, SBMIA had not engaged external advisers and Mr Forsyth originally tried to start to draft policies from scratch. The implementation plan dated December 2012 and June 2013 shows that two of the items to be implemented were updating the ORSA and undertaking the GAP analysis.

269.Mr Forsyth's evidence was that he found the ORSA a never-ending task which, without the benefit of any template policies at the time, he attempted to put together from scratch. With Mrs Forsyth's assistance, he constantly searched for guidance on what this should include. Understandably, because, as Mr Sheaf said in his report, an ORSA had to be tailored to the circumstances of the particular insurer, it was therefore a confidential and commercially sensitive document which was inevitably not published online. Mr Forsyth therefore had the task of attempting to distil and convert the vast amounts of information into a policy document in circumstances where he was working outside his area of expertise and had no experience of drafting such documents.

270.The regulatory advice in relation to this document was to the effect that anything and everything that impacted on the business should be considered, mitigated, and controlled. Having received from Mrs Forsyth details of websites and guidance that might help, Mr Forsyth printed off the relevant documents and brought the hard copies home so that he and Mrs Forsyth could go through the process of Mrs Forsyth reading the documents to him after which he would make notes before attempting to put some wording together for the policy document which Mrs Forsyth would type up on the computer.

271. Mr Forsyth said that at the outset of this process he had no idea what a GAP analysis was so he faced a steep, self-taught learning curve to establish what was required and how it should be undertaken. He therefore had to work backwards from what Solvency II compliance would require in its final form, which was complicated

by the fact that the Regulators were still in the process of putting together its instructions at this stage. This again involved Mrs Forsyth in vast amounts of reading helping Mr Forsyth to digest the documents and taking notes of his comments. This, he said, involved many hours of work undertaken mainly in the evenings after the children had gone to bed. Mr Forsyth said his practice was often to ask Mrs Forsyth to re-read passages several times. If it was a document that required amendment or input from himself he would dictate what was required to Mrs Forsyth which she would then read back to him, and so on. He said that Mrs Forsyth would also help with setting agendas and timetables for the next steps required to complete work.

272. Mr Forsyth's evidence was that the Solvency II work at this time resulted in both Mr and Mrs Forsyth having to work almost every evening after supper which would be taken at about 6.30 pm once the children were in bed, they would work from about 9pm, both putting in between 2 to 4 hours each evening as well as work at weekends. Mr Forsyth estimated that from 2013, Mrs Forsyth was spending an average of 20 hours a week on the Association's business.

273. Mr Forsyth says that to recognise the work undertaken by Mrs Forsyth in 2012 to 2013 she received a bonus of £21,260 in 2013 which equated to the bonus due to Mr Forsyth under his contract, which he did not therefore receive.

274. It was at this stage that, as we have mentioned previously, Mr Forsyth proposed to increase Mrs Forsyth's salary to what he thought was a more appropriate figure given the work she was now undertaking which resulted in the global salary figure of £125,000 awarded by the Remuneration Committee in 2013 being split so that £105,000 was paid to Mr Forsyth, and £20,000 to his wife. At this stage, Mr Forsyth's view was that his wife's work had evolved into something that required considerable skill and required her to work extremely antisocial hours. This was against a background where Mr Forsyth anticipated a much greater permanence to the nature of Mrs Forsyth's work over the next couple of years which he felt should be reflected in an increase in salary as well as through bonuses where appropriate.

275. Mrs Forsyth received a discretionary bonus of £12,500 in February 2014 which Mr Forsyth says was to recognise the work undertaken by Mrs Forsyth in 2013 to 2014. Mr Forsyth separately received a bonus of £12,500 in that year.

276. In her evidence, Mrs Forsyth, fairly, did not profess to understand a lot of the documents on which she said she worked. However, she was clear that she can remember spending a lot of time on various versions of the ORSA at this time. She also confirmed that she would read out numerous documents stored on Mr Forsyth's laptop, such as guidance notes in draft policies, to help Mr Forsyth understand their content. She also referred to the documents that Mr Forsyth would print off and bring home which she would read to him. She remembers the technique of trying to translate the information that they were going through into something which was simpler and easier to understand, particularly for the benefit of the directors of the Association. She observed that not only was that sort of work time-consuming, but it was very dull and repetitive.

277.Mr Forsyth was challenged on whether in fact any significant work had been done on a GAP analysis or an ORSA before Moore Stephens were engaged to assist in the autumn of 2014, because the initial GAP analysis produced by Moore Stephens did not make any reference to any previous work.

278.Mr Forsyth's answer was that when he first went to see Moore Stephens he took his own GAP analysis and ORSA in hardcopy form and that they "rolled their eyes slightly" and said that Mr Forsyth had gone too far in trying to apply proportionality to the extent that he had tried to do so with these documents and was "wide off beam" of what was needed to be done. Mr Forsyth said that he challenged Moore Stephens on the proportionality issue in the context of their GAP analysis, a matter to which we will return later. This evidence is supported by an email that Mr Forsyth sent to the PRA on 15 July 2014, responding to a request for an update on the Association's preparedness for Solvency II, where he referred to the recent appointment of Moore Stephens and said that since their appointment "we are not doing much with our gap analysis until we have sat down with them and reviewed their analysis. We will then formulate a new (and possibly improved) version."

279.Mr Forsyth also said that most of the work in the period involved reading and research rather than producing voluminous documents. It was trying to understand what an ORSA was. Trying to establish exactly how far and wide an ORSA should cover by way of risk was a process of endless research. He said that he did not think that it was appropriate to use professional advisers at this stage because the regulatory landscape was still changing.

280.There is no significant documentary evidence to support what Mr and Mrs Forsyth say about the work that was undertaken on Solvency II during this period. However, it was readily apparent that SBMIA in common with other firms was being urged by its Regulator during this period to make preparations for Solvency II and is quite clear that he was conscientious in wanting to do the best he could for the Association in coming up to speed with the issues and assuring the regulator that matters were in hand.

281.We also accept that it makes sense for an insurer preparing for Solvency II at this stage to get to grips with the issues itself before incurring significant expense in appointing outside advisers. An insurer in SBMIA's position also did not have the resources necessary to expend significant sums on professional advice at a stage where matters were still developing.

282. If work was to be done on Solvency II at this time it had to fall to Mr Forsyth to do it. Our stark conclusion is that he probably was not well-suited or qualified to undertake this task. His difficulty with long documents and drafting documents made it even more challenging. His core skills lay in the area of underwriting. Our overall impression is therefore that he tried manfully to get to grips with the task but despite his best efforts, it seems likely that many hours were spent on attempting to produce the core documents such as the ORSA and the GAP analysis.

283.In that unwelcome situation, it is clear that he needed the support of his wife. It is likely, as Moore Stephens indicated at the outset of their appointment that the process they went through in trying to get to grips with what was required was not particularly productive at this stage, although, as we refer to later it did prepare the ground for the later work that was undertaken working with Moore Stephens. Nevertheless, we accept that Mrs Forsyth did her best to support her husband. There was nobody else at the office who could do so and it is clear that Mr Forsyth was not of the mind to indicate to the Board that he was struggling.

284.In those circumstances, we find Mr Forsyth's explanation that materials had been prepared which were shown to Moore Stephens in 2014 credible and we accept it. As we have observed previously, representatives from Moore Stephens could have been called by the Regulators to support their case that nothing had been done by the time they were appointed.

285.We also find that it is likely, bearing in mind the tensions between what Moore Stephens felt was necessary and what Mr Forsyth felt was appropriate for SBMIA, as we discuss later, that Mr Forsyth's work was at that stage put to one side and matters started again. That explains why we have no documentary evidence of the work that was done. Mr Forsyth explained that previous versions of documents were not retained on his laptop.

286.We also find Mrs Forsyth's description of the work she undertook and the effect it had on life at home compelling. In her cross examination and as she had previously explained to the Regulators in interview, she was consistent in her explanations as to the work was undertaken in this period. The observation was that it was a very hard time. As she put it, the fun and joy of family life and home life was taken from Mr and Mrs Forsyth once Solvency II came centre stage. That is what would have stuck in her mind rather than the detail of any particular document that she looked at or read to Mr Forsyth at the time.

287.Mr Forsyth's evidence was that in 2014 and 2015 the workload of himself and his wife increased further still. It was at this time, as Mr Sheaf's report demonstrates, that it was clear that Solvency II was to be implemented on 1 January 2016. As Mr Forsyth said in his evidence, the number and complexity of the data requests received from the PRA were increasing, as was the volume of regulatory updates and publications.

288.Therefore, in 2014, Mr Forsyth decided that external help beyond the very limited ad hoc assistance that had been received informally from a contact at Deloitte and from Ritsons was necessary.

289.Accordingly, in July 2014 Moore Stephens were appointed. Mr Forsyth was hopeful that due to their previous experience with other mutual insurers that the advice and documentation they produced would be tailored to a small mutual such as SBMIA. Bearing in mind that the Board had only set a limited budget for professional advisers, Moore Stephens' role would necessarily be limited. Mr Forsyth explained that Moore Stephens' role was to help as much as possible, commensurate to what the

Association was able to pay them. Mr Forsyth's evidence was that that meant Moore Stephens providing "off-the-shelf" policies which were voluminous but left Mr Forsyth still having a lot of work to do to find what was required for the Association's own particular circumstances and why, and to redraft those that were needed to make them fit for purpose.

290. As Mr Forsyth said in his evidence, and as the documentation before the Tribunal shows, following Moore Stephens' engagement the nature of Mr Forsyth's work changed. Moore Stephens sent Mr Forsyth lengthy documents for his review and comments. At this point, from his previous work, Mr Forsyth had digested the huge volume of guidance and had developed in his own mind the level of detail which was required for the Association's purposes. As he said, and we accept, SBMIA was not looking to conform to best practice so that the "gold standard" and "belt and braces" approach suggested by Moore Stephens was not feasible from SBMIA's perspective. SBMIA was simply looking, as Mr Forsyth put it, "to get over the line".

291.We accept Mr Forsyth's evidence as to the tension that developed between Moore Stephens' approach and SBMIA's more limited objective, as described above. For example, on 3 September 2014 Moore Stephens sent Mr Forsyth two example ORSA templates. These were both lengthy documents and appeared to be anonymized template policies which they have prepared for other companies. As Mr Sheaf's evidence demonstrates, an ORSA has to be tailored to meet the particular insurer's own requirements and situation and accordingly we accept that these documents could not have been simply adopted by the Association without considerable work being done on them by the Association itself, which, in this case meant Mr Forsyth personally.

292.The evidence shows that in order to assist him in dealing with this issue, Mr Forsyth contacted a colleague of Mr McIntosh's shortly after receiving the documentation from Moore Stephens to obtain some further information and guidance. He was provided with another ORSA template based on that prepared for Mr McIntosh's company. Again, demonstrating that an ORSA has to be tailored to the needs of the particular insurer, in responding to Mr Forsyth the point was made that "a lot of this is not applicable to you as it is internal model related, but hope this helps to give you a pointer as to what we have done to avoid reinventing wheels." The author also expressed his sympathies to Mr Forsyth "in trying to withstand the [Solvency II] Tsunami", thus indicating the challenges that the industry were facing at that time.

293.In our view, this is cogent evidence that Mr Forsyth could not get everything he needed simply by asking Moore Stephens or other insurers for sample documentation.

294.Furthermore, as Mr Forsyth said in his evidence, although SBMIA would not have been able to get through the Solvency II compliance process without Moore Stephens' input and assistance, their helpfulness was hampered by the fact that the Association could not afford the bespoke policies that Moore Stephens would have undoubtedly been able to provide. Mr Forsyth was told that in order to provide a bespoke service, the Association would need a Moore Stephens employee in place at the Association, shadowing the employees and attending meetings and Board Meetings.

295.That sort of service was clearly entirely outside of the Association's budget. Moore Stephens were paid £26,000 for preparing a draft ORSA in November 2014 and some £45,000 for work on Solvency II in 2015. Those are significant sums, but in our view, bearing in mind high cost of specialised London-based professionals in this field, is nothing like the fees that would have been incurred had Moore Stephens provided a bespoke service. Mr Forsyth's evidence was that Moore Stephens told him that such a service could cost a minimum of £250,000, which we have no reason to doubt. Such a sum would clearly be way beyond the Association's financial capabilities.

296.Consequently, we accept Mr Forsyth's evidence that between September and November 2014 he spent a large amount of time on redrafting the ORSA, changing it to tailor it to the Association's requirements. Mr Forsyth was mindful of keeping the documents as simple as possible for the benefit of the Board, while ensuring that all the regulatory requirements were met. Mr Forsyth's evidence was that aside from Mr McIntosh and Mr Yeoman, who were both familiar with the insurance market, the other directors, who, as we have found, were fishermen by trade, took little interest in the process and regarded it as fundamentally Mr Forsyth's job to implement. We have no reason to doubt that explanation.

297.As well as the ORSA the other key document that Mr Forsyth had to focus on at this stage was the extensive GAP analysis that Moore Stephens provided in September 2014. That is a very detailed and lengthy document, and we accept Mr Forsyth's observation that it illustrated the enormity of the task that lay ahead of him in trying to ensure the Association's compliance with Solvency II by January 2016. Our own review of this document confirms Mr Forsyth's observation in his oral evidence that he had to challenge Moore Stephens on the proportionality of this extensive document in the context of the Association's particular business.

298.In the absence of any particular interest on the part of the majority of the Board, it was down to Mr Forsyth to drive the process forward, taking such advice as the Association could afford, from Moore Stephens.

299.In addition, the Forsyth was also working at this time on a draft 3-year business plan and Risk Register.

300. Mr Forsyth's evidence was that Mrs Forsyth would assist him by going through the documents sentence by sentence to try and make sense of them and helping him to work out whether there was a simpler way of drafting any particular section. She also helped cross-check the documents received against company records, such as the summaries which preface the report and accounts, and the Chairman's annual statements regarding where the Association is going. He said that Mrs Forsyth would proof-read documents and Mr Forsyth would liaise with Moore Stephens in relation to the amendments that had been made.

301.Putting a three-year plan together, which Moore Stephens advised was the shortest period acceptable under Solvency II, was a new experience for the Association which had previously made no plans beyond the 12-month horizon. That was a particular

challenge for Mr Forsyth as the nature of the fishing industry made it difficult for him to project realistic growth prospects. Mr Forsyth's evidence was that his wife assisted by checking figures provided by investment managers, that the ORSA and the business plan were all consistent and helped again with proof reading sections populated by Moore Stephens against original documents.

302. Following the approval of the ORSA, and the Business Plan by the Board in November 2014, the focus of Mr Forsyth's work on Solvency II shifted to the numerous policy documents that had to be generated, along the lines described in Mr Sheaf's report and listed at [233] above.

303. Mr Forsyth's evidence was that as with the ORSA, Moore Stephens would produce generic documents which he then had to get into shape so that they were appropriate for the Association's business. The battles with Moore Stephens over proportionality continued, there being considerable tension between what Moore Stephens says was necessary as part of their "gold-plated" approach and what Mr Forsyth regarded as practical and relevant to the Association's business.

304. Mr Forsyth's evidence was that as he received draft policy documents from Moore Stephens, Mr Forsyth had to get up to speed with the full spectrum of governance and compliance matters which necessitated further researching and adjusting guidance online and from the PRA.

305. The evidence shows that there were a number of versions of each policy, generated over a number of months in 2015. Some generated more versions than others. For example, the Governance and Internal Control Policy, one of the more extensive and complex documents, went through five versions before it was adopted in October 2015. The Risk Policy was akin to the ORSA in that Mr Forsyth had to keep returning to it to ensure it reflected all the changes made across any of the other documents.

306. The ORSA continued to be adapted. We see large differences between the document adopted in 2014, the revised draft produced by Moore Stephens in January 2015 and the final version adopted in December 2015. The various iterations of this document corroborate Mr Forsyth's evidence as to the process of him pushing back at drafts produced by Moore Stephens in order to create something that he regarded as being more proportionate and suited to the Association's needs.

307. In view of the various versions produced of the policy documents, we accept the same process was undertaken in relation to those documents over a period of many months during 2015.

308. We also think it likely that Mrs Forsyth assisted in this process in the same way she did in relation to Solvency II work in the previous years. Mr Forsyth gave extensive evidence as to the particular ways in which Mrs Forsyth would assist, such as reading documents to him, typing revised versions from manuscript notes made by Mr Forsyth or through dictation. Cross-referencing was also a task which Mrs Forsyth undertook. Any change to one policy would require a review of the other policies to

ensure the cross-references across the suite of documents were all up to date. Because of the unusual way in which Mr Forsyth worked on documents, if, for example, Mr Forsyth made a change to the Risk Policy, Mrs Forsyth would look for areas where risk was referred to in other policies, and if it was, Mrs Forsyth would be asked to read to Mr Forsyth the section out loud so that he could check whether the section was consistent. The same process was applied to the ORSA, which also had to be updated as and when changes were made to the other policies.

309. Mrs Forsyth gave considerable detail in her witness statement of the work that she did to assist her husband during this time. It is consistent with our analysis of the evidence given by Mr Forsyth. She also explained the impact that she saw on both Mr Forsyth and the family. It is clear she felt that Mr Forsyth was under considerable stress during this time which manifested itself in physical as well as emotional ways. As we have found, Mr Forsyth did not share the effect that the burden had on him with other members of the Board or the staff at the Association and this undoubtedly would have added to the stress that he experienced.

310. Mrs Forsyth was challenged by Mr Khan as to whether the work that she and Mr Forsyth undertook in relation to Solvency II actually occurred to the extent alleged or that the hours alleged were actually spent on it by both of them. Mrs Forsyth was very clear and consistent in her answers that once the work on Solvency II was "ramped up" Mr and Mrs Forsyth ended up working every night and also over the weekend. In the light of our findings as to the manner in which Mr Forsyth worked and how the various documents were generated and amended over the months, Mrs Forsyth's explanations are credible, and we accept her evidence.

311. Accordingly, we reject Mr Khan's submissions that the evidence supports the case that Moore Stephens did a considerable amount of the necessary work, including in relation to policies which Mr Forsyth alleges that he and Mrs Forsyth spent a substantial amount of time working on.

312. In essence, the Regulators submit that very little work was needed to be done by Mr Forsyth once Moore Stephens had prepared drafts of the necessary documents and sent them for approval by Mr Forsyth and then the Board.

313. In view of what Mr Sheaf said about the need for the various documents to be tailored to meet the requirements of the particular insurer, we find it extraordinary that the Regulators should submit that it was acceptable for the Chief Executive to abrogate his responsibility in this way.

314. In our view, Mr Forsyth put the position very well in responding to Mr Khan's question that it was unnecessary for Mr Forsyth to put his wife through the ordeal that he said he did to help him with Solvency II when he had appointed professional advisers who were going to be paid to help.

315. Mr Forsyth said that Solvency II was not a matter of producing a certificate saying you have achieved a standard. It was a change in mindset in an insurance company and required an intrinsic understanding of checks and balances. He went on to say:

> "To pay a third party, as a Chief Executive of an insurance company, to get you through Solvency II and ignore everything that is going in the process would be, first of all, madness, and secondly, grossly negligent. You absolutely had to understand all the cogs behind the paperwork, the reasons that the paperwork was so voluminous, the reasons for the debate and the constant validation of every process. It was unlike anything I have ever come across before or since. It is a sea change in the way that insurers operate."

316. We also reject Mr Khan's submission that two members of the Audit & Risk Committee, Mr Forsyth and Mr Yeoman provided significant assistance in reviewing the Solvency II documentation prepared by Moore Stephens.

317. We accept that the Audit & Risk Committee had a role in reviewing the documentation before it was sent to the Board for approval and that both Mr McIntosh and Mr Yeoman played significant roles on the Audit & Risk Committee. However, none of the evidence we have seen suggests that the Committee went beyond its expected role of commenting on, and approving documents as opposed to carrying out substantial work on drafting and settling the documentation. Both Mr Yeoman and Mr McIntosh were non-executive and could not be expected to spend substantial amounts of their time on such activities and there is no evidence that they ever did. Had the Regulators believed that to be the case, it was of course open to them to call Mr McIntosh and Mr Yeoman as witnesses.

318. We therefore accept Mr and Mrs Forsyth's evidence as to the significant amounts of work that they both spent on Solvency II in 2015.

319. Against that background, the global salary was increased to £140,000 in May 2014, split by allocating £110,000 to Mrs Forsyth and £30,000 to Mrs Forsyth. Mrs Forsyth received a discretionary bonus of £12,500.

320. In May 2015, the global salary was increased to £180,000, split by allocating £140,000 to Mr Forsyth and £40,000 to Mrs Forsyth. Mr Forsyth was again awarded a bonus of £25,000, 50% of which was paid to Mrs Forsyth which Mr Forsyth therefore did not receive.

321. In the light of these findings, we accept that from spring 2013 until the end of 2015 Mrs Forsyth was working on the Association's business for approximately 20 hours in each week.

The Cheine + Tait Report

322. By way of background, Employee A, a non-qualified accountant, was employed by the Association in April 2015. The intention was that Employee A would assist with Solvency II enabling Mr Forsyth to free up some time for business growth purposes.

323. As it transpired, this intention was not realised. Employee A did not appear to understand the role that he had been hired for and completed very little of the Solvency II tasks that Mr Forsyth had in mind for him. Employee A took it upon

himself to devote himself to other tasks, such as preparing a report on the financial performance of the Association over a 20-year period which Mr Forsyth had not asked him to do.

324.Mr Forsyth quickly took the view that Employee A was seeking to undermine him, a view that was shared by Mr McIntosh and Mr Yeoman.

325.Matters came to a head when there were allegations of inappropriate behaviour on the part of Employee A in relation to other members of staff.

326.As a result, Employee A's position at the Association became untenable, and an external investigation into his behaviour was commissioned. That report observed that there was evidence that Employee A did not undertake tasks asked of him and spent considerable amounts of time on tasks which were not his concern. There was also evidence of inappropriate behaviour towards other employees. The report recommended disciplinary action against Employee A and shortly afterwards he left the Association's employment.

327.The report detailed a number of allegations that Employee A had made against Mr and Mrs Forsyth including that the payment of a salary to Mrs Forsyth was a "tax dodge" and that Mrs Forsyth's remuneration was improperly accounted for by the Association for tax purposes. None of those concerns had been raised by Employee A with Mr Forsyth. Mrs Johnston had told the investigator that during a conversation with Employee A on 11 June 2015, she felt that Employee A was trying to "take [Mr Forsyth] down" and to "get [Mrs Johnston] to say something negative" about him and that Employee A had asked Mrs Johnston not to mention the conversation to Mr Forsyth.

328.Mr Forsyth's unchallenged evidence was that although he was shocked at the allegations, he was not particularly concerned by the substance of them. Employee A was new to the business and had never seen or worked directly with Mrs Forsyth as she only ever worked from home. Mr Forsyth said he knew exactly how much work Mrs Forsyth was doing for the Association. The Board knew that she was employed, and her annual remuneration was approved by the Chairman.

329. Nevertheless, Mr Forsyth was willing for Employee A's allegations to be investigated. He discussed the allegations with Mr Yeoman, and they agreed that an independent report should be commissioned. Mr Yeoman suggested using a contact of his, Chiene + Tait, and so Mr Forsyth commissioned them to prepare a report ("the C & T Report").

330.Mr Yeoman, Mr McIntosh and Mr Barr all read the investigation report into Employee A's behaviour and were privy to the allegations made by Employee A against Mr Forsyth and his wife. Employee A's central allegation was that Mrs Forsyth's employment with the Association was a sham, and she did not do any work for the Association. All of those directors knew that Mr Forsyth was paid a global salary out of which he allocated a proportion to Mrs Forsyth and Mr Barr at all times knew the amount of the split as he approved it. The evidence shows that in addition

Mr McIntosh was aware in 2015 of the split for 2014, that is £110,000 to Mr Forsyth and £30,000 to Mrs Forsyth.

331.In an email of 11 November 2015 Mr Forsyth proposed to Mr Yeoman the following terms of reference for the C & T Report:

> "C & T to confirm that all is in order with the processes and actions/reporting to HMRC surrounding the following: –
>
> The Chief Executive salary
>
> Penny Forsyth's salary
>
> The P11Ds for The Chief Executive, The Co. Secretary & the Surveyor
>
> The Chief Executive's contract referring to private mileage being allowed
>
> Whether there is tax impropriety by the Chief Executive in using "The cycle to work scheme"

332.Mr Yeoman approved the terms of reference on the same day. He commented that they addressed the issues raised by Employee A. The email exchange was copied to Mr McIntosh who raised no objections.

333.It is clear that as regards Mr and Mrs Forsyth's remuneration the terms of reference were narrowly drawn. In addition, the investigation was only required to look into the position as regards the year ended 5 April 2015 and the period 6 April 2015 to November 2015. Mr Khan put it to Mr Forsyth that they did not address the concerns raised by Employee A because they omitted an investigation of the salary split between Mr and Mrs Forsyth.

334.Mr Forsyth's answer was that there was no need to address that issue in explicit terms because he did not take that as a criticism from the report of Employee A's investigation and it was open to Mr Yeoman and Mr McIntosh to suggest that issue be included within the scope of the terms of reference, but they did not do so. The thrust of Employee A's allegation was not that the salary split was inappropriate, but that Mrs Forsyth was not really an employee and was doing no work and that Mr Forsyth was shifting income entirely to Mrs Forsyth to take advantage of the lower tax bracket.

335. It was therefore clear that the question as to whether Mrs Forsyth was being paid an amount which justified the salary that was allocated to her out of the global salary was not part of the terms of reference. The starting position therefore is that neither of the non-executive directors, who knew that Mrs Forsyth was paid a proportion of Mr Forsyth's salary felt that it was necessary to extend the terms of reference any wider.

336.In those circumstances, we make no criticism of Mr Forsyth as to the process for the drawing up of the terms of reference or their substance. Mr Yeoman was of the

view that they addressed the points raised by Employee A and Mr McIntosh made no objection.

337.Therefore, as Mr Forsyth said in his evidence, the scope of the terms of reference was limited to considering the Association's reporting to HMRC and whether the right amount of tax was paid.

338.The draft C & T Report was sent to Mr Forsyth on 5 January 2016. Some relatively small discrepancies were identified, but the headline conclusion was that the Association was adhering to its obligations surrounding the deduction of income tax and national insurance via PAYE with regard to Mr and Mrs Forsyth's salaries.

339.The draft report contained considerable detail as to respective salaries paid to Mr and Mrs Forsyth and the tax due on those salaries. Mr Forsyth believed that including the specific details of the levels of his and Mrs Forsyth's salary was unnecessary because it was widely known at the Association that leaks from the Board to the local community happened frequently. As Mr Forsyth has observed, it was common knowledge that one long-standing Board member in particular was free and easy in discussing confidential Board meetings in the wider community. An employee had been embarrassed by community gossip about her salary negotiations which had leaked and become public knowledge.

340.Therefore, Mr Forsyth's evidence was that the primary driver to remove the figures was to avoid leaking the salary figures to the local community and thus generating gossip. It was unusual in Buckie for someone to have a six-figure salary and, in our view, it was unlikely for many in the community to be earning the amounts that Mrs Forsyth was earning by this stage.

341.Accordingly, on 12 January 2016 in an email to Cheine + Tait, Mr Forsyth asked for certain amendments to be made to the draft report. Towards the beginning of this email, he observed that the report would be widely circulated amongst the Board of Directors and members of the Association and that there were certain aspects which were not necessary to highlight.

342.In particular, he referred to the salary details and asked "Due to the extent that this report will be circulated" for those details be removed and replaced with the following statement:

> "in accordance with the end of year PAYE reconciliation schedule and form P60 that was provided to the Chief Executive, it can be considered that income tax was correctly deducted under the PAYE system. For the period 6/4/2015 – 12/11/2015 there is a shortfall of £726 with respect to PAYE withheld which will be a timing difference in applications of the tax codes and tax deducted to date. It is expected that the correct PAYE will be deducted by the year end".
>
> Also a statement to the effect that Penelope Forsyth's PAYE is correct bar a £177 overpayment which is expected to be corrected by the tax year end."

343.Those amendments were made and are reflected in the final version of the report that was received by Mr Forsyth on 14 January 2016 and circulated by Mr Forsyth to Mr Yeoman and Mr McIntosh on the same day.

344.The receipt of the report was reported to the Board on 17 February 2016. The minutes of the meeting record that Mr Yeoman explained the contents of the report and said that there was nothing that the Board should be "majorly concerned about". Mr Yeoman is recorded as saying that if any Board member who was not a member of the Audit & Risk Committee would like to look at anything it should be made available to them. Mr Forsyth is reported as saying that all the allegations were aimed at him and he had been very confident there was nothing wrong and that nothing was required to be reported to the Tax Authorities.

345.Mr Khan submitted that Mr Forsyth's involvement in this investigation was inappropriate. He submitted that had the Board been presented with the full draft report, the salary split between Mr and Mrs Forsyth would have been disclosed. Mr Forsyth had involved himself in setting the scope of the report – a report essentially concerned with allegations then raised concerning his pay and tax arrangements – to exclude allegations of unjustified salary split which was one of the allegations raised leading to the commission of the report. He then intervened further by requesting that Chiene + Tait delete sections of the draft report. Mr Forsyth accepts that a consequence of him causing Chiene + Tait to amend the report was that the Board as a whole was unaware of the salary split between him and Mrs Forsyth.

346.Therefore, the Regulators contend that Mr Forsyth acted as he did in order to conceal the level of Mrs Forsyth's remuneration from the Board. It was not, as Mr Forsyth contends, to prevent his and Mrs Forsyth's salary from being known to one indiscrete director.

347. We reject those submissions. As Mr George submitted, the allegation that Mr Forsyth improperly involved himself in the investigation needs to be seen in its proper context.

348.The text which Mr Forsyth wished to change did not affect any substantive opinion or determination of Chiene + Tait in relation to matters that they were asked to report on. As we have said, the terms of reference were narrowly drawn and, in relation to Mr and Mrs Forsyth's remuneration, were to consider whether SBMIA had "been accounting for PAYE correctly on The Chief Executive's and [Mrs Forsyth's] salary for the year ended 5 April 2015 and period 6 April to November 2015."

349.Mr Forsyth explained clearly in his email why he wanted the amendments to be made. This was not an email that he concealed from anybody; had his motive been to prevent the Board knowing how the global salary was split, he might well have simply passed his comments orally to Chiene + Tait. The reason Mr Forsyth gave as to why he wanted the amendments to be made was consistent with his evidence as to the activities of an indiscreet member of the Board.

Provision of documents to the PRA

350. On 22 April 2016, in advance of a supervisory visit to the Association, the PRA emailed Mr Forsyth and required him to provide, amongst other things:

> "Minutes from Board, Risk & Audit and Remuneration Committee: 2013, 2014 2015 and 2016 to date."

351. It is clear that Mr Forsyth asked Mrs Johnston to assist with that request. On 25 April 2016 Mrs Johnston sent an email to Mr Forsyth, the operative text of which simply read "Minutes 2013 – 2016". We infer from that email that Mrs Johnston simply attached what she believed to be the relevant documents being sought by the PRA and which she would have sourced from the records that she held in her files.

352.Some two hours later, Mr Forsyth emailed the PRA, attaching what he said were the "requested documents". He listed those documents in his email. In that list, in relation to the Minutes requested he used the same phrase used in the email from Mrs Johnston to him, namely "Minutes 2013 – 2016".

353.It appears that the documents attached did not include the complete set of Remuneration Committee Minutes for the years 2013, 2014, or 2015. What was attached were the documents for those years which recorded the salary split between Mr Forsyth and his wife, signed by Mr Barr which, as we have found, were erroneously headed "Minutes of the Remuneration Committee." There was also attached the bare minute for each of the years in question which simply recorded that Mr Forsyth's salary had been discussed and communicated to him, that is the document referred to the end of the [125] above.

354. Therefore, what was not included was the other document for the relevant years headed "Minutes of the Remuneration Committee Meeting" which recorded the global salary figure.

355.The missing documents were subsequently retrieved by the FCA during their visit to the Association's office on 5 December 2017. Mr Forsyth believes that these would have been retrieved from either the wages file provided by the cashier or from Mrs Johnston's files.

356. Mr Forsyth accepted in cross examination that he would have checked the contents of the documents that he received from Mrs Johnston before he sent them on to the PRA. He was asked whether he should not have checked to ensure that the actual minutes of the Remuneration Committee meeting, which reflected what that committee had agreed, namely the global salary figure, was included as attachments to the email that was sent to the PRA.

357.Mr Forsyth accepted, with the benefit of hindsight, that he should have ensured that any extra documents that existed were included. He says, however, that he was not aware that they still existed; he said he was under the impression that the original global salary documents no longer existed and would have been shredded once the memorandum recording the salary split had been signed by Mr Barr. He said he was

trying to give the PRA the final picture, that is the final outcome of the process that operated in two stages, namely the agreement of the global salary figure followed by the agreement of the split. He thought that the reason copies of the documents still existed was that extra copies would be made and given to cashiers and put on different files in the office, which is why they were subsequently discovered on the FCA's visit.

358. It was put to Mr Forsyth that he recklessly misled the PRA by providing only the documents recording the salary split in response to its request for information. Mr Khan submitted that Mr Forsyth was aware that there were original minutes that recorded the agreement of the Remuneration Committee to the global salary as well as the separate record of the salary split. He submitted that Mr Forsyth sent those latter documents to the PRA, rather than the original Remuneration Committee Minutes for 2013, 2014 and 2015. This was done in the knowledge that the original minutes would show that there had been no agreement by the Remuneration Committee to pay Mrs Forsyth the sums which were paid to her at Mr Forsyth's direction.

359. Mr Khan submitted that Mr Forsyth's contention that the Minutes had been destroyed is not credible and he sent the salary split documents to the PRA knowing that they did not reflect the true decision of the Remuneration Committee.

360. We do not accept that Mr Forsyth acted recklessly in this regard. In essence, the Regulators' case on this point is based on their contention, which we have rejected, that the salary split documents were "false minutes" purporting to record that the Remuneration Committee had agreed to the amount of the respective salaries paid to Mr and Mrs Forsyth when they had not in fact done so.

361. For the reasons set out at [173] to [178] above we have found that the salary split documents were not designed to mislead and that there was no attempt on Mr Forsyth's part to conceal the position from the Remuneration Committee.

362. We also accepted that although the documents were not designed to mislead, they were in fact misleading in a number of respects, particularly as regards the way that they were headed, and we found Mr Forsyth's approach to disclose a degree of naïveté. That is also true in relation to his approach to considering what documents should be sent to the PRA, which is consistent with the approach that he took to the same matters internally.

363. As we have found, the documentation recording the final result of the procedure whereby the Remuneration Committee set a global figure for the remuneration of Mr and Mrs Forsyth and the split was subject to determination and approval by a single senior individual was recorded in different ways in different documents over the years in which the procedure was in operation. In each case, however, the final split represented the final result of the procedure adopted by the Remuneration Committee.

364. Although Mr Forsyth accepted that the heading "Minutes of the Remuneration Committee" was inapposite the document does accurately record the conclusions of the decision-making procedure adopted by the Remuneration Committee.

365. Against that background, we do not accept that the documents were designed to mislead. Mr Barr and Mr Reid, respectively Chairman of SBMIA and Chairman of the Remuneration Committee, approved and signed documents on this basis. Mr McIntosh was clearly aware of the relevant split. Mr Scott was content to approve a global figure and leave the precise split to be determined in accordance with the agreed procedure.

366. Neither were the auditors, Ritsons, misled. They were aware of the split of the global figure and they specifically advised that formal documentation recording the final split should be created and filed.

367. As Mr Forsyth explained in his cross examination:

> "… my intention was to give the PRA the actual position that the Chairman of the Board had agreed, various people in authority at Scottish Boatowners were au fait with the machinations and no subterfuge was intended at any point to anybody."

368. Furthermore, the documents the Regulators say should also have been sent to the PRA are not, as we have found, complete minutes of the Remuneration Committee. They are more correctly described as a note of what was actually agreed as regards the global salary. Therefore, they did not technically fall within the scope of what was requested. Mr Forsyth did not regard them as such; he regarded the document that was important in this regard as being the salary split document, which transparently recorded the outcome of the process. As we have said, Mr Forsyth should have given more thought as to the preparation of these documents, but we do not find any intent to mislead or any recklessness on the basis that he knew there was a risk that the documents were misleading but proceeded as he did in any event.

369. Moreover, the actual "minutes" of the relevant Remuneration Committee meetings (in the sense of being a narrative and chronological record of the matters discussed) were sent to the PRA for each of the years 2013 – 2015 at the same time as Mr Forsyth sent the documents about which the Regulators complain. As we have found, these minutes do not contain any salary figures for either Mr or Mrs Forsyth or any global salary figure. It is, however, not suggested they are inaccurate.

370. We therefore conclude, as submitted by Mr George, that there was no intent to mislead on Mr Forsyth's part when he sent to the PRA, in respect of each relevant year, the document which contained the narrative and chronological record of the matters discussed at the meeting (in substance, the minutes of the meeting); and the separate document (inappositely labelled "minutes") which set out the final results of the process adopted by the Remuneration Committee for determining Mr and Mrs Forsyth's respective salaries. Nor was there any recklessness on his part.

Evaluation of the Facts

371. We now turn to the question as to whether the facts that we have found demonstrate that Mr Forsyth acted without integrity in relation to the matters pleaded at paragraph 9 of the Regulators' Statement of Case, applying the correct legal

approach to the question of integrity, as summarised at [40] to [44] above and the approach to be taken to the Regulators' pleadings, as set out at [51] to [56] above.

372. For convenience, we repeat the six matters on which the Regulators rely in their Statement of Case as demonstrating that Mr Forsyth acted without integrity:

> (1) From 2010, Mr Forsyth improperly allocated a substantial part of his annual contractual bonuses to his wife Mrs Penelope Forsyth ("Mrs Forsyth"), who was also employed by SBMIA during the Relevant Period.
>
> (2) From 2013, Mr Forsyth increased the proportion of his annual salary which he allocated to Mrs Forsyth to a level which was excessive and unjustified by any work which Mrs Forsyth performed.
>
> (3) The salary and bonus arrangements at (1) and (2) above were not made in accordance with SBMIA's ordinary remuneration procedures and were not fully disclosed by Mr Forsyth to the SBMIA Board and Remuneration Committee (the "Remuneration Committee").
>
> (4) When internal concerns were raised at SBMIA about certain matters, including the payment of part of Mr Forsyth's remuneration to Mrs Forsyth, he improperly involved himself in the investigation by an external auditor.
>
> (5) Mr Forsyth created false minutes of the Remuneration Committee which purported to show that the Remuneration Committee had agreed the salaries of both Mr and Mrs Forsyth in 2013, 2014 and 2015. Mr Forsyth prepared these minutes deliberately to create a misleading record that the Remuneration Committee had agreed these payments.
>
> (6) Mr Forsyth recklessly provided the PRA with an incomplete set of the SBMIA Remuneration Committee's minutes for 2013, 2014, 2015 which misled the PRA as to what had been agreed by the Remuneration Committee.

373. We take each these issues in turn, summarising our findings of fact which are relevant to each of them and then evaluating those findings.

Improper allocation of contractual bonuses

374. We have found:

> (1) The first bonus payment to Mrs Forsyth in addition to her salary was made in February 2010. It was in an amount of £7,310. Her salary in 2010 was £10,695. The bonus payment was effected by an assignment of Mr Forsyth's right to receive a contractual bonus in respect of work which he had performed. Neither Mr Forsyth nor anybody else within the Association gave any thought of the tax implications of Mr Forsyth assigning his bonus to his wife in this way at the time the decision was made. Mr Forsyth would have preferred to increase Mrs Forsyth's salary in recognition of her work, but Mr Reid thought that it was better for Mrs Forsyth to be rewarded by way of bonus rather than salary; the latter would have been more permanent than a bonus award: see [132] to [136] above and Annex A.

(2) At the time of the payment of this bonus, Mrs Forsyth's work had evolved beyond providing out of hours cover for calls and hospitality services into a much more administrative one to assist Mr Forsyth with his increased workload at this time. Most of Mrs Forsyth's extra work was undertaken in the evening and at night, as well as at weekends. At the time of the payment of the bonus Mrs Forsyth's work had increased from between 7 to 8 hours a week in 2008 to around 12 hours a week: see [179] to [190] and [263] to [264] above.

(3) In 2011, Mrs Forsyth was paid bonuses totalling £19,296 in total. £9,296 of that amount represented an assignment of Mr Forsyth's contractual bonus on the same basis as was the case in 2010 and the remaining sum of £10,000 was awarded directly to Mrs Forsyth as an additional discretionary bonus. Her salary in 2011 was £11,072: see [138], [194] and Annex A.

(4) At the time of the payment of these bonuses, Mrs Forsyth's work had increased to around 16 hours a week, again mainly undertaken in the evenings, at night and at the weekends: see [190] to [213] and [263] to [264] above.

(5) In 2012, Mrs Forsyth was paid a bonus of £12,500 which represented an assignment of Mr Forsyth's contractual bonus on the same basis as mentioned above. Her salary in 2012 was £11,428. As with the previous two years, the Remuneration Committee were not prepared to agree to an increase in Mrs Forsyth's salary or discretionary bonus of her own and accordingly Mr Forsyth agreed to assign his bonus to his wife on the basis of the quantity and the importance of the work Mrs Forsyth was doing: See [139], [215] and Annex A.

(6) At the time of the payment of this bonus, Mrs Forsyth's work remained in the region of 16 hours a week, again mainly undertaken in the evenings, at night and at the weekends: see [212] to [215] and [257] to [264].

(7) In 2013, Mrs Forsyth was paid a bonus of £21,260 which represented an assignment of Mr Forsyth contractual bonus on the same basis as mentioned above. The bonus was paid in two tranches, £10,000 in March 2013 and the balance on 20 April 2013. Her salary was increased in 2013 to £20,000: see [273] to [274] and Annex A.

(8) At the time of the payment of the bonus, Mrs Forsyth's work had increased to around 20 hours a week, due to the large increase in the amount of Solvency II work by this time, again mainly undertaken in the evening, at nights and weekends: see [267] to [272] and [321].

(9) It was at this stage that Mr Forsyth proposed to increase Mrs Forsyth's salary to reflect the quality and quantity of the work that she was doing and the fact that she was required to work extremely anti-social hours in circumstances where Mr Forsyth anticipated a much greater permanence to the nature of Mrs Forsyth's work: see [274].

(10) In February 2014, Mrs Forsyth received a discretionary bonus of £12,500. Her salary was increased to £30,000 in May 2014: see [319] and Annex A.

(11) Mrs Forsyth's work was at a similar level and carried out at similar times to that undertaken in the previous year. There was a continuation of the work Mrs Forsyth did regarding claims work and the Australia and New Zealand

work, as well as her ad hoc secretarial work as well as the increased Solvency II work: see [265] to [272] and [321].

(12) In May 2015, Mrs Forsyth was awarded a bonus of £12,500 which represented 50% of the bonus awarded to Mr Forsyth, which Mr Forsyth therefore did not receive. Mrs Forsyth's salary was increased to £40,000 at the same time: see [320] and Annex A.

(13) Mrs Forsyth continued to work at this time for approximately 20 hours per week on the Association's business, again during anti-social hours, with a large part of that work relating to Solvency II: see [276] to [318] and [321].

375. There are two issues which arise out of the Regulators' allegations in this regard. The first issue is whether there is anything inherently improper in Mr Forsyth agreeing to assign all or part of his contractual bonus to his wife. The second issue is whether it was improper in the sense that the objective was to reward Mrs Forsyth for work that she did not in fact do or reward her excessively for such work she did undertake.

376. In regard to the first issue, in our view the effect of the assignments made by Mr Forsyth to Mrs Forsyth are unlikely to have resulted in the income having become her income for tax purposes, notwithstanding the fact that the work she undertook may have justified her being paid remuneration which included an amount representing Mr Forsyth's bonus.

377. In that regard, we refer to the Supreme Court's Judgment in *RFC 2012 Plc (in liquidation) v Advocate General for Scotland* [2017] UKSC 45, a case that was not cited to us by either party.

378. That case established the principle that income tax on earnings is principally tax on the payment of money by an employer to an employee as a reward for his or her work as an employee. Lord Hodge, who gave the judgment of the Court, said that there was no requirement that an employee should receive the remuneration for his or her work in order for that reward to amount to taxable earnings in his or her hands. The employee whose work gives rise to the remuneration is taxed, not the recipient of the earnings: see [36] and [37] of the judgment.

379. Lord Hodge went on to say at [39] to [41] that there was nothing in the legislation which excludes from the tax charge a payment to a third party which the employer and employee have agreed as part of the employee's entitlement. Both sums involve the payment of remuneration for the employee's work as an employee.

380. In this case Mr Forsyth was awarded a contractual bonus as a reward for his own work as an employee of the Association. He would therefore have been liable to income tax on the amount of that bonus notwithstanding his decision to assign it to his wife and even though he did not receive it.

381. Therefore, insofar as his motive in assigning the bonus in this way was to reduce his own tax liability it would have been ineffective in that respect.

382.There is no evidence however that Mr Forsyth's motive in assigning all or part of his contractual bonuses to his wife was to reduce his own income tax liability. There is no evidence that Mr Forsyth himself was aware that the assignment would be ineffective in reducing the income on which he was liable to income tax. Undoubtedly the sums actually paid to Mrs Forsyth would become her money, but it would be Mr Forsyth not Mrs Forsyth who would have to pay the tax on it. No questions were put to Mr Forsyth as to his knowledge of the tax position. In any event, at the time of these payments, it might have been believed that the assignments were effective to cause the monies to be treated as Mrs Forsyth's income rather than Mr Forsyth's because these assignments took place before the judgment in *RFC* referred to above.

383.There was nothing in the documentation which suggested that Mr Forsyth was in any way seeking to hide the source of the monies as being derived from his own employment. The documentation made it clear that what was being assigned was all or part of bonuses awarded to Mr Forsyth in respect of his own employment. Had he been aware that an assignment of income effected in that way was not effective from a tax point of view, it does not seem likely that he would have effected it in a manner which he knew to be ineffective. In the circumstances, the way forward would have been for Mr Forsyth to have waived his right to a bonus and for Mrs Forsyth to have been awarded a discretionary bonus of an equivalent amount.

384.It appears to be the case that Ritsons did raise concerns regarding Mrs Forsyth's bonus being linked to the bonus due to Mr Forsyth: see our findings at [163] to [166] above.

385.However, such evidence that is available to us suggests that the concern being raised by Ritsons was whether the lack of documentation as to the basis on which the bonuses were being assigned to Mrs Forsyth might lead to the conclusion that she was being paid monies that did not relate to her own work as opposed to the work that Mr Forsyth had done and in respect of which bonuses were payable to him. The particular concern that Ritsons raised appears in fact to have been addressed because when each of the payments were made the assignment documents made it clear that the payments made to Mrs Forsyth were to reward her for her own work. The further issue, that is whether notwithstanding the fact that the payments were expressed to be for her own work, the sums concerned still formed part of Mr Forsyth's income for tax purposes does not appear to have been addressed. This we do not find surprising since the *RFC* case had not been decided in 2014 when these discussions took place.

386.Mr Khan submitted that there was no need to remunerate Mrs Forsyth in this way. She could be rewarded for extra work by an additional bonus payable to her as had happened previously. He submitted that given that Mr Forsyth had the contractual entitlement to the bonuses concerned, they bore no relationship to any work that Mrs Forsyth undertook.

387.We reject that submission. As we have indicated above, there is a distinction between the tax position and whether in fact Mrs Forsyth undertook work which justified the payment of remuneration to her. There cannot be anything wrong with an employee who believes that a fellow employee is deserving of increased remuneration

for her work deciding to transfer to that employee remuneration to which he would otherwise be entitled as a result of his own work.

388.We have accepted Mr Forsyth's evidence that at first the Remuneration Committee were not prepared to agree to an increase in Mrs Forsyth's salary or a discretionary bonus of her own because of the view that the work she was doing was short-term and should be reflected in a bonus rather than salary, whereas Mr Forsyth was of the view that the Remuneration Committee had not understood the quantity and importance of the work that Mrs Forsyth was doing, We have also accepted his evidence as to why bonuses continued to be paid in respect of 2013, 2014 and 2015 notwithstanding that it had been accepted that any additional work carried out by Mrs Forsyth could be remunerated through an increase in salary, namely that bonuses were backward looking in terms of what work had been performed in the past whereas salaries were partially forward-looking. Mr Forsyth had also referred to the benefits for the Association's pension scheme: see [136] to [145] above.

389.We therefore conclude that Mr Forsyth did not fail to act with integrity simply because he decided to assign all or part of his contractual bonus to Mrs Forsyth in the years in question.

390.That leaves the question as to whether the payments made to Mrs Forsyth were justified on the basis of the work that she undertook for the Association at the relevant time. That issue is no different to the issue that we need to determine in respect of the payments of salary made in that regard, and we therefore deal with it later at [391] to [416] below.

Allocation by Mr Forsyth of an excessive proportion of his annual salary which was unjustified

391.The findings summarised at [374] above are equally relevant to this issue.

392.In essence, Mr Khan's submissions on this issue can be summarised as follows:

(1) Mr and Mrs Forsyth have exaggerated the amount of work that Mrs Forsyth undertook for the Association during the Relevant Period with the consequence that the remuneration paid to Mrs Forsyth cannot be justified by reference to the work that she undertook.

(2) Even taking Mr Forsyth's case at its height, on the assumption that Mrs Forsyth did all the work that she allegedly did from 2013, this work cannot reasonably justify her salary and bonus in this period. The Regulators say that Mr Forsyth's case is effectively that it would have been reasonable to pay Mrs Forsyth an annual salary of about £80,000 plus bonus by 2015 were she to be working full time for SBMIA during normal working hours at that time.

(3) It follows that Mr Forsyth allocated an excessive proportion of his remuneration to his wife and the only inference that can be drawn from this is that Mr Forsyth allocated part of his salary and bonuses to Mrs Forsyth in order to reduce his tax liability.

393.In our findings of fact, we have accepted that Mr and Mrs Forsyth did not exaggerate the amount of work that Mrs Forsyth undertook for the Association during the Relevant Period.

394.As a result of our analysis as to the effect of Mr Forsyth assigning all or part of his contractual bonus to Mrs Forsyth, as set out above, it follows that we should approach this issue by combining the amount of salary and bonus that Mrs Forsyth received in each year in the Relevant Period and then make an assessment as to whether the work that we have found that Mrs Forsyth undertook could reasonably justify the total amount of the remuneration that she was paid in each year.

395.We set out in the table below the amount paid each year and the estimated number of hours per week worked by Mrs Forsyth in each of the relevant years.

Year of payment	**Amount of Mrs Forsyth's Total Remuneration**	**Hours worked per week**
2010	£18,005	12
2011	£30,368	16
2012	£23,928	16
2013	£41,260	20
2014	£42,500	20
2015	£52,500	20

396. Our findings in relation to the process for agreeing Mr Forsyth's salary and bonuses demonstrate that (except in relation to the additional discretionary bonuses awarded to Mrs Forsyth) a global figure was agreed by the Remuneration Committee with the split between Mr and Mrs Forsyth being determined by Mr Forsyth with the agreement of one member of the Remuneration Committee. It is therefore relevant to set out the proportion of the global figure allocated to Mrs Forsyth during the Relevant Period. This is set out in the table below.

Year of payment	Global amount	Amount awarded to Mrs Forsyth	Percentage split of global amount
2010	£100,310 (£93,000+£7,310)	£18,005	82%/18%
2011	£115,571 (£96,275+£9,296+£10,000)	£30,368	74%/26%
2012	£111,875 (£99,375+£12,500)	£23,928	79%/21%
2013	£146,260 (£125,000+£21,260)	£41,260	72%/28%
2014	£165,000 (£140,000+£12,500+£12,500)	£42,500	74%/26%
2015	£205,000 (£180,000+£25,000)	£52,500	74%/26%

397. Looked at superficially, as total remuneration for the Chief Executive of a small mutual insurer based in a small town in the North of Scotland and his part-time Executive Assistant the figures seem large. However, these figures have to be assessed in the light of all of the circumstances that Mr and Mrs Forsyth found themselves in during the Relevant Period.

398.Mr Forsyth was the only insurance professional and there was no middle management except for a short unproductive period in 2015.

399.Because of his personal circumstances, the reasonable adjustments that needed to be made to enable Mr Forsyth to perform the substantial work that he had to complete outside the limited office opening hours of the Association required him to enlist the assistance of his wife and for the two of them to work together in the manner that we have described. That was necessary so as to enable Mr Forsyth to get to grips with the issues which he faced, both in relation to the increased workload following the closure of the Peterhead office, the development of the Australia and New Zealand work and the Section C work, and the dramatic increase in workload that followed the need to prepare for Solvency II.

400. As a result, all of this work was probably more time consuming than would have been the case for someone who had more technical expertise in relation to Solvency II. We accept that individuals may reasonably adopt approaches to enable them to process long and complex documents in a way of working that is most appropriate to them in the light of their own individual circumstances.

401. However, as we have found, the work was in fact undertaken and there was no other realistic way in which it could have been, bearing in mind the cost constraints on the Association. As we have found, in relation to Solvency II outsourcing the whole operation to Moore Stephens was not an option.

402.We have also found that the work that Mrs Forsyth undertook was virtually all done during unsocial hours, resulting in considerable personal sacrifice as regards her family life and other commitments. That was inevitable bearing in mind the unavailability of other staff to work outside normal office hours.

403.Also, a key factor in the level of the global remuneration was the agreement as regards the objective of benchmarking Mr Forsyth's salary to someone working in London with a similar level of responsibility, the comparable adopted being along the lines of a class underwriter working in a London environment: see our findings at [92] above.

404.This is also confirmed by an email that Mr Forsyth sent to Mr McIntosh, then a new member of the Remuneration Committee, on 5 May 2015. After referring to the vast increase in Solvency II work and its impact on his weekends, Mr Forsyth observed that his "salary had been moving to try and catch up with the stated position of being as per the London market. Given the figures that you and [your employer] both came up with, I think my basic should be at least £200,000."

405.Also, as Mr George observed in his closing submissions, after Mr Forsyth left the Association, he was employed by a leading insurance company in a senior underwriting position at a remuneration of £187,000, rising to £212,000 by 2019. As Mr George submitted, that establishes that the global figure awarded by the Remuneration Committee in 2015, even if considered to relate purely to Mr Forsyth's services, was not in any way unreasonable by reference to a market-view of Mr Forsyth's skills and expertise.

406.Mr Forsyth, aptly in our view, regarded the global remuneration figure as being an award for the running of the office of the Chief Executive, consisting of himself and his wife.

407.Looked in that way, and against the background of the benchmarking agreement, we cannot say that either the total amount awarded or the amounts allocated out of that global amount to Mrs Forsyth can be regarded as outside a reasonable range.

408.Mr and Mrs Forsyth worked together as a team. It would be wrong to belittle the contribution that Mrs Forsyth made, which the Regulators sought to do. It is clear that she had considerable skills, based on her past experience and that Mr Forsyth could not manage without her during the Relevant Period. He rightly described her contributions as "heroic".

409. No evidence was adduced by the Regulators that suggested that the remuneration paid to Mrs Forsyth and the circumstances in which she found herself were excessive when benchmarked against comparable roles in Central London. The fact that she was paid more at the end of her employment than any other employee of the Association other than Mr Forsyth and well in excess of what was generally paid in relation to similar roles in the part of Scotland in which she worked is, in our view irrelevant against the background of the benchmarking agreement and the circumstances in which Mrs Forsyth worked.

410.Mr Forsyth's unchallenged evidence was that at the relevant time executive assistants in London were earning in the region of £40,000. Although Mrs Forsyth was working part-time, it was, as we have found at entirely anti-social hours. As Mr George observed, it is difficult to see how, at least in Buckie, an equivalent service could have been recruited on the open market.

411.Neither do the percentages of the global amount allocated to Mrs Forsyth suggest that a disproportionate amount was allocated to Mrs Forsyth, bearing in mind the way that Mr and Mrs Forsyth worked as a team and the circumstances in which that work was undertaken. In most years in the Relevant Period, Mrs Forsyth received about one quarter of the global amount. In the context of the increased workload in the later years, the increase from the original 11.5% allocation does not seem unreasonable.

412.As we have observed, Mr Forsyth was asked no questions which related to the issue of his knowledge of the tax implications of the allocations of remuneration to Mrs Forsyth that were made.

413. In the light of our findings as to the work that Mrs Forsyth undertook, the role that she performed and when she did it, in our view there is no evidence from which it can be inferred that the primary motive of Mr Forsyth in making the allocations that he did was to reduce his own tax liability. Mr Forsyth was aware that a reduction in his own tax liability may well have resulted from a proportion of the global remuneration being allocated to Mrs Forsyth. We have also found that there were benefits to the SBMIA pension scheme in Mrs Forsyth being employed and being paid a proportion of the global remuneration and also that the payment of bonuses rather than salary was a further benefit to the scheme.

414.In any event, the table set out at [396] does not indicate that any saving of tax on Mr Forsyth's part was substantial as a result of the allocations of the global amount that was paid. We also note that in some years a small amount of Mrs Forsyth's remuneration would have fallen into the higher rate tax bracket, the same as her husband, which meant that some of her income would be taxed at the higher rate. Whilst the assignment of his contractual bonus in 2014 meant that Mr Forsyth was not, subject to the assignment being effective from the tax point of view, liable to the additional rate payable on income over £150,000, the payment meant that Mrs Forsyth became liable to pay tax at the higher rate on a small amount of her income. In 2015, Mr Forsyth remained liable to the additional rate even after assigning a portion of his bonus to Mrs Forsyth, which, in any event as we have found, would not have been effective to reduce Mr Forsyth's own tax liability. None of this suggests that the primary motive was to reduce tax.

415.We therefore agree with Mr Forsyth that the quantum of remuneration paid to Mrs Forsyth was neither excessive nor unjustified by reference to the service she performed and was within the lawful and permissible range of remuneration which the Association was entitled to award Mrs Forsyth for her services. We are satisfied that the primary motive of the part of Mr Forsyth making the allocations that he did was to reward Mrs Forsyth appropriately for the work that she actually did perform and the

amount that was allocated to his wife was done so in accordance with the procedures adopted by the Association.

416. We therefore conclude that Mr Forsyth did not fail to act with integrity in the manner in which a proportion of the remuneration awarded to him by the Remuneration Committee was allocated to Mrs Forsyth.

Failure to disclose the salary and bonus allocations to the Board and Remuneration Committee

417. We have found:

(1) The Board of the Association established a Remuneration Committee to which was delegated the responsibility for the review of salaries, including that of Mr Forsyth: See [94].

(2) Mr Forsyth had the authority to employ his wife because he had the authority to employ members of staff in circumstances where the approval of the Remuneration Committee was unnecessary, as it was in the case of Mrs Forsyth, although the Board were aware of Mrs Forsyth's employment by 25 February 2004: see [103] and [104].

(3) Mrs Forsyth's employment was approved by Mr Barr, provided it would not impose any extra costs on the Association: see [102] and [106].

(4) Prior to the Relevant Period, the process for the Remuneration Committee agreeing Mr Forsyth's salary was that Mr Forsyth left the meeting to allow the Committee to discuss his salary. On his return, he was advised of the revised salary and a very brief minute was produced to that effect. No salary figures ever appeared in company minutes because of concerns about confidentiality. A separate document, signed by Mr Reid, was produced recording the amount of the agreed salary and, when relevant, the amount of any bonus awarded. The principle of Mrs Forsyth's salary being a proportion of the salary awarded to Mr Forsyth was established, as was the authority given to Mr Forsyth to decide the amount of the salary split after agreement with Mr Reid, or latterly Mr Barr: see [116] and [123].

(5) In the second year of Mrs Forsyth's employment, Mr Forsyth agreed with Mr Reid that 11.5% of the global salary would be allocated to Mrs Forsyth. At the beginning of the Relevant Period, there was a discussion each year when the global salary was determined as to whether that split remained appropriate: see [127].

(6) During the Relevant Period, once the global salary figure had been decided, Mr Forsyth would arrange for a document to be typed up to reflect the decision, headed "Minutes of the Remuneration Committee Meeting" which was signed by Mr Reid in the year 2010 to 2014 and by Mr Scott in 2015. As was the case before the Relevant Period, there was a separate brief minute of the Remuneration Committee meeting recording that Mr Forsyth's salary had been discussed while he was out of the room and that he was informed of his increase when he returned. That was for confidentiality reasons. Therefore, although the

global salary figure was kept largely confidential, it was known by all members of the Remuneration Committee and reported to the Board: see [125] and [126].

(7) A similar process was followed in relation to the global bonus figure. The documents produced recording the various decisions evidence approval by duly authorised officers of the payments made to both Mr and Mrs Forsyth in the Relevant Period: see [132] to [142].

(8) The documentation recording the salary split generated in the period between 2010 and 2012 was informal being recorded on a post-it note passed on to Mrs Johnston for filing and the cashier for payment: see [146].

(9) A more formal document was produced by Mr Forsyth from 2013 erroneously headed "Minutes of the Remuneration Committee Meeting", bearing the date of that meeting, reciting who was present. The operative part of that document recorded the split of the global salary between Mr and Mrs Forsyth and was signed by Mr Barr or, in 2015 by Mr Scott. That document was signed a short period after the date that it bore: see [151] to [159].

(10) All members of the Remuneration Committee were aware in the Relevant Period that the salary figure which it was awarding was a global figure which encompassed both Mr and Mrs Forsyth's salary which they were aware would be allocated between them by Mr Forsyth, following a discussion with either Mr Reid or Mr Barr as to whether the split proposed by Mr Forsyth was appropriate: see [173].

(11) Mr Forsyth did not deliberately create a misleading record that the Remuneration Committee had agreed the salary split. The agreed process did not require formal Remuneration Committee approval, but there was no attempt on Mr Forsyth's part to conceal the position from the Remuneration Committee or any of its individual members: see [174].

418. Mr Khan accepted in argument that the Board had given authority to the Remuneration Committee to agree a global remuneration package and leave it to Mr Forsyth as a matter of discretion on his part to agree the split between him and his wife. Neither the Board nor the Remuneration Committee were expecting to be told what the split was or to decide what it would be.

419. Mr Khan also accepted that Mr Forsyth was not required under that mandate to obtain any further approval of the split although he did in practice obtain the approval of a senior member of the Remuneration Committee.

420.In the light of those concessions and our findings as summarised at sub-paragraphs (10) and (11) of [417] above the Regulators' case on this point is unsustainable. Mr Forsyth followed the agreed process in the manner in which the salary split was determined and reported. Mr Forsyth did not fail to act with integrity in that regard.

Creation of false minutes

421. We have found at [176] above that Mr Forsyth did not deliberately create a misleading record that the Remuneration Committee had agreed the salary split. The agreed process did not require formal Remuneration Committee approval, but there was no attempt on Mr Forsyth's part to conceal the position from the Remuneration Committee or any of its individual members.

422. Our characterisation of the various records of the decisions of the Remuneration Committee and the subsequent record of the salary split means that Mr Forsyth did not create "false minutes" of the Remuneration Committee, although he did not think the whole process through as to how the various documents were described.

423.Mr Forsyth therefore did not fail to act with integrity in the manner in which he created the record of the salary split.

Improper involvement in the external auditor's investigation

424.We have found:

(1) No criticism can be made of Mr Forsyth as to the process for the drawing up of the terms of reference or their substance. The terms were approved by Mr Yeoman and another non-executive director, Mr McIntosh, did not object to them: see [336].

(2) The scope of the terms of reference was limited to considering the Association's reporting to HMRC and whether the right amount of tax was paid: see [337].

(3) Mr Forsyth did not ask the authors of the report to remove the specific details of the levels of his and Mrs Forsyth's salary in order to conceal the level of Mrs Forsyth's remuneration from the Board. The primary driver was to avoid leaking the salary figures to the local community and thus generating gossip: see [339] and [346] to [348].

(4) The text which Mr Forsyth wished to change did not affect any substantive opinion or determination of the external auditors in relation to matters that they were asked to report on: see [348].

425.In the light of our finding that Mr Forsyth did not ask the authors of the report to remove the specific details of the levels of his and Mrs Forsyth's salary in order to conceal the level of Mrs Forsyth's remuneration from the Board, the Regulators' case on this point is also unsustainable.

426.We also accept, as submitted by Mr George, that it was perfectly permissible for Chiene + Tait to offer Mr Forsyth, as the subject of the relevant allegations, the opportunity to comment on the terms of the draft report, and equally proper for Mr Forsyth to request that confidential details that it was not necessary to include (essentially the mathematical workings for the conclusions they had reached) be omitted.

427.As we have observed, Chiene + Tait were not asked by the Board to consider whether the amount paid to either Mr or Mrs Forsyth was permissible under the relevant tax regime or "reasonable" and nothing in Mr Forsyth's suggested amendments related to these issues. There was no indication that the Audit & Risk Committee, who oversaw the process wanted those wider issues to be investigated.

428.We also accept Mr George's observation that Employee A's allegations were not that Mrs Forsyth was not doing sufficient work to justify her particular remuneration but that the whole arrangement was a sham, an allegation which Mr Barr, Mr McIntosh and Mr Yeoman knew to be false.

429.Mr Forsyth therefore did not fail to act with integrity as regards the manner in which he was involved in the investigation carried out by Chiene + Tait and the production of its final report.

Misleading the PRA

430.We have found:

(1) In response to a request from the PRA to provide minutes of the Remuneration Committee for 2013, 2014 and 2015 Mr Forsyth attached the documents for those years which recorded the salary split between himself and his wife as well as the bare minute for each of the years in question which simply recorded that his salary had been discussed and communicated to him: see [356].

(2) Mr Forsyth did not attach the other documents for the relevant years headed "Minutes of the Remuneration Committee Meeting" which recorded the global salary figure.

(3) Against the background of our findings as to the agreed process for determining the global salary and salary split the omission of the documents recording the global salary figure as an attachment to the email to the PRA was not designed by Mr Forsyth to mislead the PRA into believing that the Remuneration Committee had agreed to pay Mrs Forsyth sums which were paid to her at Mr Forsyth's direction: see [368].

(4) Mr Forsyth's intention was to give the PRA the actual position that had been agreed in accordance with the approved procedures and no subterfuge was intended at any point: see [370].

431. In the light of our factual finding that the omission of the documents showing the global salary figure as an attachment to the email to the PRA was not designed by Mr Forsyth to mislead the PRA into believing that the Remuneration Committee had agreed to pay Mrs Forsyth sums which were paid to her at Mr Forsyth's direction. The Regulators' case on this point is also unsustainable. Mr Forsyth therefore did not fail to act with integrity in the manner in which the relevant documents were provided to the PRA.

Conclusion

432. Our evaluation of our factual findings leads to the conclusion that they cannot support any finding of a lack of integrity on Mr Forsyth's part. That in turn leads to the conclusion that we must allow the references, with the consequences set out below.

Limitation

433.Our conclusion that we will allow the references means that we do not need to consider Mr Forsyth's contentions to the effect that pursuant to section 66 FSMA, the Regulators are precluded from imposing a financial penalty in respect of misconduct that occurred prior to 25 July 2014 insofar as the Regulators knew of the misconduct or had information from which the misconduct could be reasonably inferred more than 3 years prior to the issuance of the Warning Notice on 24 April 2019.

434.Mr Forsyth contended that the Regulators had such information by 6 November 2015, and in any event before 25 April 2016.

435.However, we were troubled by what the Regulators have now admitted were failures in their duty to comply with the disclosure obligations imposed under the Tribunal's procedure rules. As a result, the Regulators made disclosure of documentation relevant to the limitation issue just before and during the course of the Tribunal hearing which should have been disclosed not only much earlier in the proceedings in this Tribunal but also in the earlier regulatory proceedings.

436.As a consequence, the Tribunal directed at the end of the Tribunal proceedings that the Regulators provide (i) an explanation as to the systems and guidance at the Regulators regarding disclosure processes and (ii) an explanation as to what occurred in this case that resulted in such late disclosures. This was to assist the Tribunal in considering whether to exercise its powers under s 133A (5) FSMA to make recommendations as to the Regulators' procedures in view of the fact that similar failings have been identified in previous cases before the Tribunal: see *Hussein v FCA* [2018] UKUT 186 (TCC) and *Alistair Burns v FCA* [2019] UKUT 0049.

437.We set out our review of this issue in the Appendix to this Decision.

Conclusion

438. The references are allowed. Our decision is unanimous.

Directions

439.We determine that the Regulators shall take no further action in relation to the subject matter of the disciplinary references.

440.In the light of our findings set out above, we cannot dismiss the non-disciplinary references. We therefore remit the matter to the Regulators with a direction to reconsider their decisions to prohibit Mr Forsyth in accordance with our findings.

441. The relevant findings that the Regulators must consider in this case are our findings of fact and evaluation of those findings as set out at [371] to [432] above.

442. We remit the references to the Regulators with a direction that effect be given to our determinations.

APPENDIX

Review of the Regulators' disclosure obligations

Background

1. The Regulators have apologised to the Tribunal and Mr Forsyth for what they admit were failings in identifying and providing documents which ought properly to have been disclosed to Mr Forsyth much earlier than they were in fact provided.

2. In the light of the Tribunal's concern at how this situation arose the Tribunal directed that the Regulators provide (i) an explanation as to the systems and guidance at the Regulators regarding disclosure processes and (ii) an explanation as to what occurred in this case that resulted in such late disclosures.

3. In letters dated 19 May 2021 and 24 May 2021 the FCA provided the explanations requested. The PRA provided the same in a letter dated the same day.

4. The disclosure failings arose in relation to the limitation issue raised by Mr Forsyth in his Reply to the Authority's Statement of Case.

5. On these references, the Regulators sought to impose a financial penalty on Mr Forsyth pursuant to s 66 FSMA on the basis that he was guilty of misconduct. In this case, the Regulators alleged that misconduct occurred between 2010 and 2016. The power to take action under s 66 in respect of misconduct which occurred prior to 25 July 2014 is proscribed by a 3-year limitation period: see s 66 (4) and (5ZA) FSMA. In order to be within the limitation period, the relevant Regulator was required to issue a Warning Notice in respect of misconduct which occurred prior to 24 July 2014 by 25 April 2016.

6. The Warning Notices in this case were issued on 24 April 2019. Accordingly, they were (just) issued within the limitation period unless, as provided by s 66 (4) FSMA, the relevant Regulator knew of the misconduct in question, or as provided by s 66 (5) (a) the Regulator had information from which the misconduct "can reasonably be inferred" before that time.

7. The principles to be applied in determining whether the Regulator has the requisite knowledge for this purpose are set out by the Tribunal in *Jeffrey v FCA* (2013) at [328]to [342]. At [337] of that decision the Tribunal said:

> "Although the Authority may only take action under s 66(1) if it appears to it that the relevant person is guilty of misconduct, the limitation period starts to run from an earlier time, when the Authority knows or has information from which the misconduct can reasonably be inferred. The Authority must, however, have sufficient knowledge of the particular misconduct, or such knowledge must be

> capable of being reasonably inferred, to justify an investigation. Mere suspicion is not enough, nor is any general impression that misconduct may have taken place."

8. In his Reply, Mr Forsyth pleaded that the Regulators had the requisite knowledge by 6 November 2015 (and in any event before 25 April 2016) by which time it had been specifically alleged to the PRA by a whistle blower that "[Mr Forsyth] has arranged…to pay part of his salary and bonus to his wife who does not work in the business to reduce his tax liability thereby committing tax fraud." Mr Forsyth contended that the fact that such clear and unequivocal allegations were made by the whistle blower to the Regulators was sufficient to start the limitation clock for the purposes of section 66 FSMA.

9. As a consequence of that pleading, it was incumbent upon the Regulators to make disclosure of any further material which might reasonably be expected to assist Mr Forsyth's case on limitation: see paragraph 6 to Schedule 3 to The Tribunal Procedure (Upper Tribunal) Rules 2008.

10. Some disclosure of internal PRA documents was made, in particular:

(1) a communication of 2 February 2016 where the PRA specifically told the FCA that "there are clearly concerns re.. integrity of the CEO";

(2) a note of an interview by the PRA of the whistleblower recording the whistleblower's allegations that "the CEO's wife is given a salary of £40,000 for entertaining"; "the [whistle blower] has never seen the CEO's wife in the office" and "The Chairman of the Board signed fraudulent minutes to split the CEO's bonus between the CEO and the CEO's wife."

(3) An email of 4 April 2016 from the PRA briefing the FCA that "Rem Committee approved [Mr Forsyth's] salary and amount split between CEO and his wife who does not provide services."

11. On the basis of these documents and the whistleblower's original communication to the PRA on 6 November 2015, in his written opening submissions dated 6 April 2021 on behalf of Mr Forsyth, Mr George submitted that well before 24 April 2016, the PRA had received documentary evidence, which was set to support the whistleblower's allegations, had interviewed the whistleblower and reached prima facie views as to the credibility of the allegations. Mr George submitted that such information was plainly sufficient to start the relevant period of limitation.

12. On 31 March 2021 in response to a request from Mr Forsyth's solicitors dated 22 March 2021, the FCA disclosed the minutes of a meeting held on 22 March 2016 between the PRA and FCA supervision teams, prepared by an FCA supervisor. In a letter dated 12 April 2021 to Mr Forsyth's solicitors, the FCA explained that it had not previously located this document in other searches, as it was not stored in the FCA's or PRA's Supervision records regarding SBMIA. It was a general meeting which also concerned non-SBMIA supervision matters and was stored in the FCA's general FCA/PRA supervision records.

13. The letter went on to say that following a search of the email inboxes of the FCA attendees at the meeting on 22 March 2016 a number of other documents had been found which were also then disclosed.

14. In the note of the meeting of 22 March 2016 there is a statement that "PRA are looking to remove the CEO and Chairman over alleged tax evasion, money laundering and excessive pay when contrast a poor financial performance and no distributions to members." That statement shows that this document was clearly relevant to the limitation issue and should previously have been disclosed.

15. On 16 April 2021, the FCA informed Mr Forsyth's solicitors and the Tribunal that further searches had been carried out and additional documents located which the FCA accepted were potentially relevant to limitation. The FCA apologised to the Applicant and the Tribunal for the FCA's late identification of any provision of this material. The documents were located by making searches of the sent items of the inboxes of various FCA employees, searches which had not previously been undertaken. Among the documents disclosed was an email of 15 March 2016 from an employee of the PRA referring to the "possibility" of regulatory action against a number of firms, one of which included SBMIA.

16. On 16 April 2021, the PRA wrote to Mr Forsyth's solicitors with the results of further searches that the PRA had undertaken for relevant documentation in the light of the ongoing correspondence between the FCA and Mr Forsyth's solicitors regarding disclosure of documents relevant to the limitation issue. This letter referred to the previous correspondence that had taken place between the PRA and Mr Forsyth's solicitors regarding a specific disclosure request that Mr Forsyth's solicitors had made to the PRA on 30 October 2020 in relation to inter-regulator communications between 2 November 2015 and May 2016. Following searches made by the PRA, it found a number of relevant documents that were disclosed to Mr Forsyth solicitors. The letter also records that on 22 March 2021, Mr Forsyth's solicitors made a further request in relation to the meeting which took place on 22 March 2016 following which the PRA conducted further searches using search terms relating to the meeting in question, including inter-alia, names of the relevant supervisors as keywords.

17. Although the PRA's own searches did not reveal any further documents, the FCA searches in response to the 22 March request returned an email dated 21 April 2016 from the PRA to the FCA. That email was provided to the PRA on 12 April 2021. The email was a communication between the regulators in advance of the supervisory visit to SBMIA in April 2016.

18. The PRA admitted that this email had not previously been reviewed but its discovery alerted it to the possibility that other potentially responsive records might exist which it had not yet discovered. Accordingly, further searches located another file of documents which returned early records of what was then the Regulatory Action Division but is now its Enforcement and Litigation Division in the period 3 February 2016 to 18 May 2016. Among the documents file was a file relating to SBMIA which was labelled as such (the "RAD file"), but which PRA said, "do not

appear to be considered previously by the PRA given its focus on material and information received into (as opposed to generated by) the PRA." Some of these documents fell for disclosure as they related to the limitation issue. The PRA admitted that certain of these documents "may assist" Mr Forsyth and expressed its "sincere regret" that these areas of search were omitted from the PRA's review of documents as part of the searches made following the original request for disclosure made on 30 October 2020.

19. There can be no doubt that some of the documents disclosed at this very late stage were highly relevant to the limitation issue. In particular, there is what is described as a "Note for Record" dated 30 March 2016 prepared by the PRA which in effect is a briefing for senior management of the PRA from the PRA's supervision division as to what action to take in relation to the allegations made by the whistleblower. That note starts with the statement that PRA's Supervision department "ultimately seeks the removal of the CEO and Chairman from office for poor governance and possible collusion in tax evasion and money laundering."

20. The note makes an assessment of the claims made by the whistleblower. In relation to the alleged tax evasion issue, namely the reapportionment by Mr Forsyth of his salary and bonus between himself and his wife for tax benefits, which is of course the essence of the issue that arises on these references, the report concludes that the evidence is "credible".

21. Also disclosed was an email dated 15 April 2016 from a Mr O'Reilly in the PRA to Mr Sam Woods, who we understand at that time was the member of the PRA senior management with overall responsibility for the supervision of insurance firms. In that email Mr O'Reilly said, "given the credibility of the evidence and the whistle-blower, supervision believe the Board has failed to govern the firm effectively." The issue regarding employment of Mrs Forsyth was one of the factors mentioned in support of that conclusion. The email concludes that the "ultimate outcome" "is likely to be the removal of the CEO and Chairman due to lack of integrity."

22. Also disclosed was an email of 18 April 2016 from Mr Woods to Mr O'Reilly attaching a copy of the email referred to above, on which Mr Woods has written in manuscript "I do think we are likely to have to intervene quite vigorously and soon."

23. Those documents are highly relevant to the question as to whether, applying the test from *Jeffrey* referred to at [7] above, the PRA had sufficient knowledge to justify an investigation, at the latest by 18 April 2016. If that were the case, then the Warning Notice was issued out of time in relation to conduct occurring before 24 July 2014.

24. Although the Tribunal ultimately did not have to decide that question in this case, it is clear that the documents which were disclosed late, as detailed above, provided strong support for the submissions that Mr George made on the limitation issue to the effect that the PRA had decided that it had credible evidence, going beyond mere suspicion, which justified the opening of an investigation.

25. Consequently, the failure to disclose these documents at a much earlier stage, despite, it seems from the correspondence, representations being made to the PRA and the FCA by Mr Forsyth's solicitors to the effect that there must be internal documents at the Regulators which could shed light on the issue, cannot be regarded as anything but the most serious failing on the part of the Regulators. Such failings threaten the integrity of the Tribunal process. If these documents had not come to light, then it is possible that the Tribunal would have made a finding on an issue in respect of which it had no jurisdiction because of the expiry of the limitation period. It goes without saying that the result is also that Mr Forsyth has not been dealt fairly in respect of this aspect of the proceedings, in respect of matters which are entirely within the control of the Regulators themselves. The subject of regulatory proceedings is largely in the hands of the Regulators when it comes to assessing the limitation question. The responsibility lies squarely with the Regulators in ensuring they take all reasonable steps to trawl their records and databases to discover all relevant information and to ensure that they have adopted processes which enable that to happen in a timely fashion. Those processes also need to have safeguards built in to minimise the effect of human error, which it is accepted in large organisations such as the Regulators are bound to happen from time to time.

26. It is for these reasons, that the Tribunal made the directions referred to at [2] above.

The Regulators' response

FCA

27. On 19 May 2021 the FCA wrote to the Tribunal in response to the Tribunal's directions.

28. Clearly it is fundamental to the FCA's ability to comply with its disclosure obligations that it has appropriate systems and processes for those handling enforcement investigations against individuals where limitation is an issue to be able to have access to all relevant information held about the individual or firm in question wherever that information is held and generated within the Authority. In that context, information would undoubtedly be held, for example, by authorisation and supervision departments, and the FCA's contact centre which would record notes of conversations with members of the public and others who contact the Authority to report matters which may be relevant to enforcement investigations.

29. In an annex to its letter, the FCA helpfully described the various systems which it has in that regard. In particular, there is a system dedicated to Enforcement known as EDT which provides a comprehensive evidence management system. This is used to store all relevant evidence obtained during the course of the investigation save, some cases, highly sensitive material. We were told that training has been provided to EDT users and extensive guidance about EDT is provided on the FCA's intranet.

30. It is therefore clear that it is the responsibility of those working on enforcement investigations to ensure that all relevant material obtained from within the FCA is

uploaded on to this system and likewise the responsibility of relevant members of the enforcement team to interact with the other systems mentioned below to ensure that relevant material is uploaded on to EDT.

31. There is also a legacy electronic database called Livelink which stores a range of business -related documents and information for departments across the FCA. Another important system is INTACT which is a case management system used by the Authorisations and Supervision Divisions, which is now part of an Integrated Case Management system known as ICM. INTACT is typically used by the Enforcement case teams in order to search and identify relevant case-specific documents held by these other Divisions.

32. ICM incorporates INTACT and provides a broader case management functionality. For Enforcement, ICM systematises project management matters and records decisions taken on investigations, including those relating to scope of the case or disclosure. Detailed guidance about the use of ICM is provided.

33. It therefore appears that the FCA has in theory appropriate systems by which Enforcement ought to be able to identify relevant information held across the FCA, upload it to EDT and then analyse it for the purposes of disclosure and assessing limitation periods in relation to particular cases. It also appears, from a detailed description given by the FCA in that regard in the annex to its letter, that appropriate training is given in relation to the operation and use of those systems.

34. It also appears that guidance is given to Enforcement investigation teams on matters such as gathering information, including from internal sources such as FCA systems, referring areas, and other FCA departments, and external sources by making voluntary requests or compelled information requirements.

35. Guidance is also given on investigating individuals, which highlights the importance of considering carefully what information the FCA might have received and whether this could have started the relevant limitation period, including information stored in various areas of the FCA and different internal systems. Practical guidance is also given on how to all conduct a disclosure exercise. There is also guidance on the legal review process carried out in relation to Enforcement cases in order to establish whether the evidence supports the alleged misconduct or other issues that is to be put to the FCA's decision-makers.

36. A detailed Disclosure Memorandum is prepared at the start of the investigation and kept up to date as the investigation progresses and reviewed as part of the legal review. This will enable the FCA to understand what from the document universe that it holds needs to be disclosed and the rationale for such disclosure. A decisions log is created to record all key decisions made by the case team including those relating to disclosure.

37. None of those matters described show any obvious gaps in the FCA's processes. However, as with all systems, they can only be effective in practice if the processes

are followed, and the staff have the necessary capabilities to operate them correctly and make the right judgments about disclosure.

38. As regards the disclosure failings that occurred in this case, the FCA's explanation is as follows:

> (1) Certain material had not been uploaded to EDT at the outset of the investigation, which meant that it was not assessed during the investigation or litigation until it was identified and disclosed, as described above.
>
> (2) In respect of the material which had been uploaded to EDT:
>
> > (a) in some instances, it was not considered to be potentially undermining material or material which assisted Mr Forsyth case at the time it was assessed, but was later considered to be relevant for disclosure in response to Mr Forsyth's specific disclosure request; or
> >
> > (b) in the other instances it is not clear from the investigation records whether it was considered to be potentially undermining, but it was not included in the undermining list. That was not revisited until Mr Forsyth specific disclosure requests which led to the late disclosures.

39. As regards category (1) set out at [38] above, certain material that was disclosed on 25 February 2021 in response to Mr Forsyth's solicitors request of 30 October 2020 referred to above, that is certain emails between the PRA and FCA Whistleblowing teams, were not uploaded to the predecessor system to EDT as they should have been. That appears to have been as a result of an oversight on the part of the staff concerned.

40. As regards the material regarding the PRA/FCA Supervision meeting held on 22 March 2016, it became apparent for the first time when responding to Mr Forsyth's solicitors' disclosure request in that regard that some records of the meeting may have been filed in a different location which had not been searched, that is in general Supervision material, and not in folders containing SBMIA specific Supervision material.

41. FCA say that they have a "reasonable and proportionate" approach to disclosure so that in accordance with that approach there had been a reliance on the record of steps taken during the early stages of the investigation to obtain relevant Supervision material, with confirmation from their then FCA supervisor that (i) all FCA records regarding SBMIA supervisory activity will be on the INTACT system and those records were uploaded to EMS (the predecessor to EDT) and (ii) emails relating to the Supervisor's work on SBMIA were uploaded to INTACT.

42. It was a result of targeted searches across non-SBMIA supervision records following the 22 March 2021 request that the note of the meeting on 22 March 2016 was identified. This note was stored on Livelink, which had not been searched on the basis that it was not considered reasonable or proportionate to search for non-SBMIA specific Supervision records. Subsequent searches of the mailboxes of 3 former members of FCA staff who attended the meeting on 22 March 2016 led to the

identification of further emails which were disclosed on 12 April 2021. Those emails were not on EMS, having not been uploaded to INTACT by the FCA's Supervisors and had therefore not been reviewed in the disclosure process.

43. As mentioned above, the disclosures of emails that were made on 16 April 2021 arose because earlier searches made in respect of the mailboxes referred to above had not extended to the sent items of those mailboxes and an email had been overlooked in the inbox of one of the staff members.

44. The documents that fell into category (2) set out at [38] above, include the Note for Record dated 30 March 2016, which, as we have set out above, is an important document. That document was on EMS and was reviewed as part of the Regulators' assessment of the limitation period. On that basis, it is inexplicable as to why it was not disclosed. It appears that the FCA cannot explain from its records whether the document was considered for the purposes of its list of undermining documents, but it was not included in the initial list. Neither was it considered again by the FCA during the regulatory proceedings or these proceedings. The 18 April 2016 email referred to at [22] above was on EMS and was reviewed by the investigation team. That email was marked as being legally professionally privileged, and as a result it appears it was not considered whether it was potentially undermining or not. In our view there is no proper basis on which it could have been considered to be privileged and therefore should clearly have been disclosed. We have been given no explanation as to the basis on which it was considered that the document was legally professionally privileged and at what level that decision was taken.

PRA

45. On 19 May 2021 the PRA wrote in response to the Tribunal's directions.

46. It is clear from the PRA's letter that they do not maintain the comprehensive systems and processes described in relation to the FCA.

47. The PRA mentioned that its Enforcement and Litigation Division maintained a Regulatory Investigations Guide which contains a detailed document management review and disclosure module. That guide provides detailed guidance to investigators on the PRA's disclosure obligations under FSMA and the Tribunal's Procedure Rules. The division also conduct a training cycle which includes "Document Management Review and Disclosure." The Regulatory Investigations Guide also contains a detailed module regarding information gathering to assist investigation teams in the information gathering stages of an investigation, including in relation to internal material. It appears that there is no evidence management system within the PRA comparable to EDT, the FCA's system.

48. Consequently, as the PRA explained in its letter, the PRA effectively outsourced its investigation of Mr Forsyth to the FCA. We were provided with the Terms of Reference entered into between the FCA and PRA in that regard. Consequently, the FCA provided all relevant evidential and legal analysis and managed all disclosure issues.

49. As a result, it was clearly essential that the PRA had systems and processes in place to enable it to identify from its records what information it held relating to SBMIA which was relevant to the investigation and which would need to be reviewed for disclosure purposes. We assume, because nothing was mentioned in this regard, the PRA does not have similar systems to those operated by the FCA, namely INTACT and ICM which would enable material held across the various divisions and departments of the PRA to be identified and reviewed.

50. Accordingly, it appears that initially the only documents provided by the PRA to the FCA were its supervisory records for SBMIA in the period up to 14 November 2016 to enable the FCA to upload the documents on to its evidence management system and conduct a disclosure review.

51. The PRA says that given the outsourced nature of the investigation and on the basis that the PRA had provided the supervisory records to the FCA, had received confirmation that these documents had been reviewed during the investigation and the FCA reviewed the documents in the disclosure list, the PRA did not separately review the supervisory records for potentially undermining material at any point thereafter.

52. The PRA sought to explain the failure to identify the RAD file referred to at [18] above during the initial disclosure exercise on the basis that the PRA's approach at the time had been based "on the reasonable and proportionate steps the PRA had taken to identify relevant supervisory records at the outset of the investigation." The PRA explained that these steps included obtaining confirmation from the relevant PRA supervisory team that all relevant records related to SBMIA were recorded with supervisory files which were provided to the FCA, as described at [50] above.

53. The PRA explained that the RAD file was not included as part of the PRA supervisory records sent to the FCA or included in earlier searches because their contents were judged either to be legally privileged communications and/or work product, or to form part of the supervisory records which the PRA understood had been reviewed and considered for potentially undermining material as part of the document review conducted by the FCA on the PRA's behalf.

54. The PRA expressed sincere regret for the late disclosure of materials and accept that with the benefit of hindsight there were potentially opportunities for the PRA to spot disclosure issues earlier. The PRA say it is reviewing its Regulatory Investigation Guide to ensure that the disclosure risks related to joint investigations are addressed and to learn the lessons from this experience, including by implementing any necessary improvements of the PRA systems and processes and the Regulators' approach to joint investigations.

Observations on the Regulators' responses

55. It is clear that there have been serious failings on the part of both Regulators in this case as regards their disclosure obligations in relation to the limitation issue. In the case of the FCA's failings, as referred to in more detail below, these appear to be largely due to human error which may have been caused by a basic lack of

competence on the part of those entrusted with performing the tasks that the FCA says the processes require. In relation to the PRA, the problems appear to be more systemic because of the lack of systems which replicate those maintained by the FCA.

56. Some of the issues that have arisen on this case may have occurred as a result of the way the joint investigation was structured. We make some observations below as to whether in the circumstances there should have been a single investigation by the FCA rather than two separate investigations with the PRA's investigation effectively outsourced to the FCA.

FCA's failings

57. As we have said, the FCA's processes appear to be appropriate and adequate. The approach of requiring all relevant information to be uploaded to EDT where it can be reviewed by the Enforcement team, backed up by systems which enable relevant material to be identified in places where it is expected to be found is a sensible one. We also accept that a reasonable and proportionate approach to disclosure has to be taken so that not every file that is held by the FCA can be examined on the off chance that it might contain information relevant to particular enforcement proceedings.

58. It is therefore inevitable that there will be failings from time to time when individuals within the FCA do not do their job properly. In those circumstances, as in this case, where certain records, in particular internal emails, were not uploaded to EDT when they should have been it calls into question whether the staff concerned have been properly trained and whether there are performance issues that need to be addressed. It seems to us that there should be an exercise to understand whether the importance of proper records management and why it is important in the context of enforcement proceedings is given sufficient emphasis and whether staff need to be reminded that it is a serious matter which could have disciplinary implications if the procedures are not followed.

59. It is equally important that, as in this case, when the subject of enforcement proceedings is reason to believe that there are documents, particularly internal documents, which may well exist, but which have not been disclosed that the FCA responds appropriately and fully to those requests. In those circumstances, it will often be necessary to do much more detailed and intensive searches to identify documents which are held outside EDT but for whatever reason have not found their way on to that file. That may be time consuming, but the FCA needs to take such disclosure requests more seriously than it appears to have done in this case. There were clearly failings in the way that the original request made by Mr Forsyth solicitors on 30 October 2020 was dealt with and it is totally unacceptable that the full picture did not emerge until the hearing of the references had commenced. The FCA therefore needs to review its procedures as to how it will deal with requests for further information in the circumstances.

60. It seems to us that the use of "general supervision" files on which matters relating to a specific firm or individual which may well be relevant to enforcement

proceedings are to be discouraged and that separate files or sub files which can easily be identified should be created whenever firm specific information is created. Staff also need, it seems, to be better disciplined in ensuring that where they have a meeting covering a number of firms that records of the meeting find their way onto the relevant firm's file.

61. As regards the items in this case which were on EDT but nevertheless were not disclosed when they should have been, as we have said [44] above no adequate explanation has been given as to how that situation arose. As mentioned at [36] above, the FCA says that they prepare and keep up to date a detailed Disclosure Memorandum which is created and there will be a log of all key decisions including those relating to disclosure. If those records were being kept properly, then there should have been a record which will explain why particular documents which were reviewed did not need to be disclosed and who made the relevant decision. As far as legal professional privilege is concerned, there clearly needs to be an explanation, in relation to documents which on the face of it do not appear to have any basis for being considered privileged, as to why that should nevertheless be the case and again a record of who made the decision concerned. In our view, it would be good practice to keep privileged documents in a file separate from other documents so it can be clearly seen that they have been reviewed for that purpose and identified separately.

62. As regards limitation generally, we emphasise again what we said at [25] above that disclosure failings which impact on this issue threaten the integrity not only of the FCA's regulatory decision-making but also the Tribunal process. The Tribunal has in previous cases suggested that it would be good practice at the outset of an investigation to record what the Enforcement team's understanding is at that time of when the limitation period had started and why. On the basis of the test set out in *Jeffrey* that should not be a difficult process. As new information is acquired in the course of the investigation, that understanding should be revisited and a further record made at that time as to when the limitation period expires. It may be inconvenient if new information comes to light which has the result of significantly shortening the limitation period but the FCA must resist the temptation to convince itself that the new information has no impact. It must treat the issue with an open mind. There may be a case for obtaining external legal advice on the question when the situation arises so that the matter can be considered entirely objectively.

63. We note in this regard that the limitation period has now been extended from 3 years to 6 years. It is hoped that in those circumstances, limitation will be a live issue in less cases in the future and that investigations do not simply expand to fill the time available.

PRA

64. The Terms of Reference entered into between the FCA and the PRA meant that the only significant responsibility left in the hands of the PRA, apart from reviewing the FCA's work, was collecting all relevant material in its possession for review by the FCA's investigation team and potential disclosure.

65. In regard to that responsibility, as we have seen, there were significant failures. We have no means of assessing whether the PRA has adequate systems and procedures, in the way that the FCA clearly has, for identifying material held throughout the PRA that may fall for disclosure.

66. In any event, in this case it appears that the PRA followed a flawed approach. It seems simply to have identified all the material that it needed to provide to the FCA for the investigation from its supervisory records relating to SBMIA. The PRA appears to have taken the view that a reasonable and proportionate approach to this disclosure was simply to look at the supervisory files. On that basis, it did not consider it necessary to consider files such as the RAD file, which was clearly identified as a file relating to SBMIA, in any detail. That explanation is woefully inadequate. It cannot be said to be disproportionate to have undertaken a rigorous review of that file. What review that did take place, seemed to conclude that some of the documents on the file were legally professionally privileged, but no explanation has been given as to why that was considered to be the case. We make the same point as we did in relation to the FCA; it would be better if legally privileged documents were kept separately.

67. It is also not clear what steps the Supervision Department of the PRA took to satisfy itself that all relevant records relating to SBMIA had been recorded within the supervisory files which were provided to the FCA before giving the confirmation referred to at [52] above. That confirmation was clearly inaccurate bearing in mind the subsequent documentation that came to light.

Joint investigations

68. Although described as a joint investigation, which led to two separate decision-making processes and two separate decision notices, in reality there was a single investigation, conducted on behalf of both Regulators.

69. We question whether it would not have been better for there have been a single investigation culminating in a single decision notice from the FCA. The Regulators must have taken the view that either of them could have taken the action proposed in relation to Mr Forsyth on the basis that the conduct concerned came within the scope of both Regulators' regulatory responsibilities. The FCA's investigation could of course have been informed by material provided largely by the PRA in the manner that it was in fact done in this case. If there was a single investigation, the FCA might have been able to access the material from the PRA's records directly, and effectively have had outsourced to it the work on identifying documents that the PRA undertook pursuant to the Terms of Reference.

Recommendations

70. It is clear from what we have said above that, as Mr Forsyth's solicitors said in their response on this issue, this is not just a case of the Regulators failing to locate documents due to their inadequate document management processes. They have also admitted having failed to appreciate the significance of documents they had identified as potentially relevant. They also admit that they had opportunity to rectify the situation before the trial period but failed to do so. We therefore accept, as Mr Forsyth's solicitors said, that the Regulators' conduct has fallen well below the standards which Mr Forsyth, the regulated community and public at large, are entitled to expect. We therefore consider that it is appropriate to make a number of recommendations which may assist in ensuring that better outcomes result in the future.

71. In the light of our review of the facts of this particular case we make the following recommendations pursuant to s 133A (5) FSMA:

(1) The FCA should consider whether its staff are adequately trained and have an adequate understanding of the importance of proper records management in the context of potential enforcement proceedings and the consequences that could follow if those procedures are not followed: see [58] and [60] above.

(2) The FCA should review its procedures for dealing with requests for disclosure of documents made after the usual disclosure process has been completed: see [59] above.

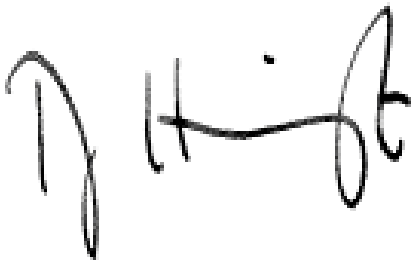
(3) The FCA should review the adequacy of its Disclosure Memorandum in its current form and whether it is fit for purpose as it is currently being used. Legally privileged material should be kept separate to other material: see [61] above.

(4) The FCA should make an assessment as to when the relevant limitation period begins which should be regularly reviewed as new information comes to its attention: see [62] above.

(5) The recommendations set out above are equally applicable to the PRA, as appropriate. In addition, the PRA should undertake a full review of its processes for the recording of supervisory and other information that may be relevant to possible enforcement actions: see [67] and [68] above.

(6) The approach to joint investigations should be reviewed. Where the conduct concerned falls equally within the scope of both Regulators consideration should be given as to whether there should be a single investigation by one of the Regulators and a single regulatory decision: see [70] above.

72. We direct that the Regulators respond with their views on these recommendations in a timely fashion and provide the Tribunal with an estimated timeframe for their response as soon as practicable after the release of this decision.



JUDGE TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE

RELEASE DATE: 6 July 2021

ANNEX A

SALARY

Year	Mr Forsyth's salary as decided by RemCo	Mr Forsyth's salary after split	Mrs Forsyth's salary after split
2010	£93,000	£82,305	£10,695
2011	£96,275	£85,203	£11,072
2012	£99,375	£87,947	£11,428
2013	£125,000	£110,625 (initial split)	£14,375
		£105,000 (from September 2013)	£20,000
2014	£140,000	£110,000	£30,000
2015	£180,000	£140,000	£40,000

BONUS

Year of payment	Amount of Mr Forsyth's bonus	Portion of Mr Forsyth's bonus paid to Mrs Forsyth	Bonus awarded directly to Mrs Forsyth
2010	£7,310	£7,310 (100%)	
2011	£9,296	£9,296 (100%)	£10,000
2012	£12,500	£12,500 (100%)	
2013	£21,260	£21,260 (100%)	
2014	£12,500	£0	£12,500
2015	£25,000	£12,500 (50%)	