UT Neutral citation number: **[2023] UKUT 00101 (TCC)**

UT (Tax & Chancery) Reference Number: **UT-2021-000025**

Upper Tribunal (Tax and Chancery Chamber)

Hearing venue: The Rolls Building, London EC4A 1NL

Sitting in public on 7-11 November 2022

Judgment given on 27 April 2023

Before

JUDGE RUPERT JONES

MEMBER JO NEILL

Between

MR MARKOS MARKOU

Applicant

and

THE FINANCIAL CONDUCT AUTHORITY

The Authority

Representation:

Ian Rees Phillips, counsel for the Applicant

Edward Brown KC, instructed by the Financial Conduct Authority

DECISION

Introduction

1. This is our decision in respect of a Reference Notice dated 22 February 2021 (the "Reference") made to the Upper Tribunal by the Applicant (Mr Markos Markou). The Reference is in respect of a Decision Notice (the "Decision Notice") issued by the Financial Conduct Authority ("the Authority") on 29 January 2021.

2. In these proceedings, the Authority's overarching case is that the Applicant had personal responsibility for maintaining a compliant regulated mortgage business at Financial Solutions (Euro) Limited ("FSE") at all times in the Relevant Period, but that he failed to do so. The Authority argues that by ignoring the risks that he knew his conduct created, the Applicant acted recklessly and demonstrated a lack of integrity. The Applicant denies that he failed to maintain a compliant mortgage business within FSE and denies that he acted recklessly or lacks integrity.

The Decision referred

3. By the Decision Notice dated 29 January 2021, the Authority decided to:

   (i) impose on the Applicant, pursuant to section 66 of the Financial Services and Markets Act 2000 ("the Act"), a financial penalty of £25,000;
   (ii) withdraw, pursuant to section 63 of the Act, the Applicant's approval given by the Authority under section 59 of the Act to perform the SMF1 (Director) and SMF3 (Chief Executive) controlled functions at FSE; and
   (iii) make an order, pursuant to section 56 of the Act, prohibiting the Applicant from performing any function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm.

4. The Decision Notice recorded the Authority's decision and findings in relation to the Applicant's conduct in the period from 24 November 2015 to 14 October 2017 ("the Relevant Period").

Overview of the Authority's case

5. The precise subject matter of the Decision Notice is explored below but it included the following findings which the Authority continues to rely upon as allegations in this Reference.

6. The Authority decided that the Applicant did not have the necessary appropriate oversight of FSE's regulated mortgage business. This was demonstrated by his reckless: a) failure to implement policies to combat mortgage fraud; b) failure to properly supervise his mortgage advisors; and c) failure to take sufficient steps to prevent FSE from transacting mortgage business between 10 July 2017 and 14 October 2017, during which period he was aware that FSE did not have professional indemnity insurance ("PII").

7. The Authority concluded that the Applicant's conduct placed FSE at risk of being used as a vehicle for financial crime and did not appropriately protect the interests of consumers.

8. In its Decision Notice the Authority found, and in this Reference it alleges, that the Applicant:
   (i) failed to comply with Statement of Principle 1 (acting with integrity) in the Authority's Statements of Principle and Code of Practice for Approved Persons part of the Handbook;
   (ii) is not a fit and proper person to perform the SMF1 (Director) and SMF3 (Chief Executive) controlled functions at FSE; and
   (iii) is not a fit and proper person to perform any function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm.

9. In these proceedings, the Authority relies on five grounds on which the Applicant is said to have misconducted the mortgage business of FSE during the Relevant Period. These were developed in the Authority's skeleton argument for the hearing and paragraphs 3, 12.1-12.5 and 67 of its Statement of Case dated 24 March 2021. It is said that the Applicant recklessly:

   (i) Failed to establish, maintain and enforce effective financial crime systems and controls, particularly in relation to the detection and prevention of mortgage fraud;
   (ii) Failed to establish and practise an appropriate level of oversight and monitoring of FSE's mortgage advisors, particularly in relation to the detection and prevention of mortgage fraud;
   (iii) Failed to ensure that FSE's mortgage advisors did not carry on regulated mortgage business without PII in place (from 11 May 2017) and beyond the date on which the Applicant knew that FSE's PII had lapsed (10 July 2017);
   (iv) Failed to ensure that FSE's mortgage business did not revert to previous non-compliant practices in relation to which the Authority had previously expressed serious concerns (the period 2011 to 2015, prior to the Relevant Period); and
   (v) Failed to deal transparently with the Authority and the Upper Tribunal in relation to the explanations given by him as to the extent of FSE's "trading" activity following the Authority's supervisory visit on 9 May 2017.

Overview of the Applicant's case

10. The Applicant's case is that he has not acted recklessly in any manner in the conduct of any business or regulated activity at FSE during the Relevant Period. He submits that his actions did not lack integrity and he remains a fit and proper person to perform all the regulated functions and activities for which he should remain approved.

11. In broad terms he contends that he maintained a compliant mortgage business at FSE in that:
   (i) he implemented, maintained and enforced, reasonable and effective policies and procedures for FSE during the Relevant Period in relation to preventing and detecting financial crime such as mortgage fraud;

(ii) he exercised reasonable and effective oversight and supervision of his mortgage advisors at FSE during the Relevant Period in relation to preventing and detecting financial crime such as mortgage fraud;

(iii) he was not aware of the non-renewal of FSE's PII (on 10 May 2017) until 10 July 2017 and he had instructed his mortgage advisors not to take on new business from 10 May 2017. Any failure by him to prevent FSE's mortgage advisors from processing three applications as new business after 10 July 2017 was not unreasonable, negligent nor reckless in the circumstances and any failing was modest or de minimis; and

(iv) in this Reference, the Authority is estopped / matters are *res judicata* / or it would be an abuse of process to go behind the findings in the earlier decision of the Upper Tribunal in *FSE v FCA [2020] UKUT 0139 (TCC)*. In that decision the Upper Tribunal found that FSE voluntarily ceased carrying on regulated activities and took on no new business when its PII cover lapsed on 10 May 2017 (well before 10 July 2017 when the Applicant knew that his PII had not been renewed).

12. In relation to the disciplinary decision under the Decision Notice, the Applicant effectively argued that the financial penalty should be cancelled. In any event, he submitted that where he has made no personal revenue from FSE, a fine of £25,000 was plainly unwarranted.

13. It is submitted that the Authority's non-disciplinary decisions: a) that his approval to act as Director and Chief Executive of FSE should be withdrawn; and b) he should be prohibited from performing any function in relation to regulated activity, were unreasonable and should be remitted to the Authority for reconsideration.

14. The Applicant invited the Tribunal to direct the Authority to reconsider its decisions with a direction to consider his alleged failings to only warrant supervisory action and to permit FSE to re-commence trading under his supervision.

The hearing of the Reference and the evidence

15. The Reference was heard on 7-11 November 2022.

16. The Authority called six witnesses, the first four being its employees:

(i) Gemma Clarkson, Senior Associate within the Assurance team of the Risk & Compliance Oversight Division;

(ii) Paul Williams, Senior Manager in charge of authorising retail lending and debt firms within the Authorisations Division;

(iii) Lucy Castledine, Head of Department of the Financial Promotions and Enforcement Taskforce; and

(iv) Richard Topham, Manager of a team within the Retail 2 Department within the Retail and Regulatory Enforcement Directorate.

17. The final two witnesses on behalf of the Authority were former employees of FSE:

(v) Agnieszka Jalkiewicz, a Mortgage and Protection Advisor who previously worked for the Applicant at FSE.
(vi) Jowita Jozwik, also a Mortgage and Protection Advisor who previously worked for the Applicant at FSE.

18. The Applicant gave evidence himself and called no other witnesses.

19. All witnesses provided written witness statements which stood as evidence in chief, gave oral evidence in-person and were cross examined.

20. The Tribunal also considered an electronic Bundle comprising 9 volumes of documentary exhibits.

21. We heard open and closing submissions from Mr Brown KC on behalf of the Authority and Mr Rees Phillips on behalf of the Applicant. We received supplementary written submissions from both counsel on 20 and 21 March 2023. We are grateful to each of them for their assistance. We have considered carefully all the evidence and submissions of both parties in reaching our decision even if we have found it unnecessary to refer to all of it below.

The Law

22. The Authority has imposed three sanctions upon the Applicant under the Act: prohibition on performing functions in relation to any regulated activity (s.56); withdrawal of the Applicant's approval to perform controlled functions in respect of FSE (s.63); and. imposition of £25,000 penalty (s.66).

Prohibition order

23. Section 56 of the Act provides that the Authority may make an order prohibiting an individual from performing a specified function, a function falling within a specified description or any function, if it appears to the Authority that that individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person, exempt person or a person to whom, as a result of Part 20, the general prohibition does not apply in relation to that activity. Such an order may relate to a specified regulated activity, any regulated activity falling within a specified description, or all regulated activities. In this case it is the latter – a general prohibition.

24. Section 56 of the Act so far as relevant provides as follows:

> (1) The FCA may make a prohibition order if it appears to it that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by-
> (a) an authorised person,
> (b) a person who is an exempt person in relation to that activity, or (c) a person to whom, as a result of Part 20, the general prohibition does not apply in relation to that activity.
> (1A) ……
> (2) A "prohibition order" is an order prohibiting the individual from performing a specified function, any function falling within a specified description or any function.
> (3) A prohibition order may relate to-
> (a) a specified regulated activity, any regulated activity falling within a specified description or all regulated activities;

(b) all persons falling within subsection (3A) or a particular paragraph of that subsection or all persons within a specified class of person falling within a particular paragraph of that subsection.
(3A) A person falls within this subsection if the person is-
(a) an authorised person,
(b) an exempt person, or
(c) a person to whom, as a result of Part 20, the general prohibition does not apply in relation to a regulated activity,
(4) An individual who performs or agrees to perform a function in breach of a prohibition order is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.
(5) In proceedings for an offence under subsection (4) it is defence for the accused to show that he took all reasonable precautions and exercised all due diligence to avoid committing the offence.
(6) A person falling within subsection (3A) must take reasonable care to ensure that no function of his, in relation to the carrying on of a regulated activity, is performed by a person who is prohibited from performing that function by a prohibition order.
…..
(9) "Specified" means specified in the prohibition order.

Withdrawal of approval

25. Section 63 of the Act provides that the Authority may withdraw an approval given by the Authority under section 59 of the Act in relation to the performance by a person of a function if the Authority considers that the person is not a fit and proper person to perform the function. The Authority decided to withdraw the approval for the Applicant to exercise controlled functions in relation to FSE.

Statutory power to take disciplinary action for misconduct – financial penalty

26. Section 66 of the Act provides that the Authority may take action against a person if it appears to the Authority that the person is guilty of misconduct and the Authority is satisfied that it is appropriate in all the circumstances to take action against him/her. Misconduct includes failure, while an approved person, to comply with a Statement of Principle issued under section 64 of the Act. The action that may be taken by the Authority pursuant to section 66 of the Act includes the imposition of a financial penalty on the approved person of such amount as it considers appropriate.

27. Under section 66(3) of the Act the Authority may impose a financial penalty on any approved person if it is satisfied that he has failed to comply with a Statement of Principle.

28. Section 67(1) of the Act provides that when the Authority proposes to impose a penalty for misconduct pursuant to s.66 (*"Disciplinary powers"*) the Authority *"must"* give a warning notice. If the Authority decides to impose such a penalty, under s.67(4) it *"must"* give a decision notice. Sections 387 and 388 of the Act provide that warning notices and decision notices *"must" "give reasons"* for the proposed action and decision respectively. These confer fundamentally important procedural protections for applicants, enabling them to know the case that they must meet, to make effective representations, and to understand the reasons for the Authority's decisions, and thus whether and on what basis to refer them to the Tribunal. Section 67(7) provides that,

"If a regulator decides to take action against a person under section 66, he may refer the matter to the Tribunal …"

29. The Authority's policy on imposing a financial penalty states that the principal purpose of imposing a financial penalty is to promote high standards of regulatory and/or market conduct by deterring persons who have committed breaches from committing further breaches and helping to deter other persons from committing similar breaches, as well as demonstrating generally the benefits of compliant business.

30. The Authority applies a five-step framework to determine the appropriate level of financial penalty. In cases such as this the five-step framework operates as follows:

    Step 1: *Disgorgement* The Authority seeks to deprive an individual of the financial benefit derived directly from the breach where it is practical to quantify this.

    Step 2: *The seriousness of the breach* The Authority will determine a figure that reflects the seriousness of the breach which is based on the percentage of the individual's relevant revenue from the employment connected to the breach, being the relevant income earned by the individual in the twelve months preceding the end of the breach. The percentage to be applied depends on the seriousness of the breach which will be assessed on a scale of 1 (least serious) to 5 (most serious) depending on the impact and nature of the breach and whether it was committed deliberately or recklessly.

    Step 3: *Mitigating and aggravating factors* The Authority may increase or decrease the amount of financial penalty arrived at after step 2, to take into account factors which aggravate or mitigate the breach. Any such adjustment will be made by any of a percentage adjustment to the figure defined at step 2.

    Step 4: *Adjustment for deterrence* If the Authority considers that the figure arrived at after step 3 is insufficient to deter the individual who committed the breach, or others, from committing further or similar breaches then the Authority may increase the penalty through the application of a multiplier to the figure arrived at after step 3.

    Step 5: *Settlement Discount* This step is not relevant in this case as the matter has not been settled by agreement with the Authority.

31. The Tribunal is not bound by the Authority's policy when making an assessment of a financial penalty on a Reference but it pays the policy due regard when carrying out its overriding objective of doing justice between the parties. In so doing the Tribunal looks at all the circumstances of the case.

Authority's statutory objectives

32. The Authority's statutory objectives, set out in section 1B(3) of the Act, include the consumer protection and integrity objectives. The consumer protection objective is: securing an appropriate degree of protection for consumers (1C(1)). The integrity objective is protecting and enhancing the integrity of the UK financial system (1D(1)).

33. Pursuant to s 64A of the Act, the Authority has issued a number of Statements of Principle that are contained within the part of the Handbook entitled Statements of

Principle and Code of Practice for Approved Persons ("APER"). APER sets out the fundamental obligations of approved persons and describes conduct, which in the opinion of the Authority, does not comply with the relevant Statement of Principle. APER further describes factors which, in the opinion of the Authority, are to be taken into account in determining whether or not an approved person's conduct complies with a Statement of Principle.

34. There are seven Statements of Principle issued under section 64A(1)(a) of the Act the first of which is relied upon by the Authority in these proceedings. APER 2.1A.3 (R) of the FCA Handbook provides: 'Statement of Principle 1: An approved person must act with integrity in carrying out his accountable functions.'

35. While it was not relied upon nor raised by either party during proceedings, we also note that Statement of Principle 2 provides that an approved person must act with due skill, care and diligence in carrying out his controlled function. After the hearing, in February 2023, we invited submissions on the applicability of Statement of Principle 2 and received post hearing written submissions in March 2023. We address these below.

Approach to lack of integrity allegations

36. The decisions were made and sanctions imposed upon the Applicant by the decision of the Authority's Regulatory Decisions Committee ('RDC'). It did so on the sole basis that it found that the Applicant demonstrated a lack of integrity by way of recklessness, in accordance with Statement of Principle 1 as set out above.

37. The Authority alleges that the Applicant engaged in conduct that demonstrated a lack of integrity. Accordingly, Statement of Principle 1 is relevant, which provides that an approved person must act with integrity in carrying out his controlled functions.

38. The Authority accepts that the behaviour that the Authority alleges amounts to failing to act with integrity must be linked to the controlled functions for which the individual concerned has approval.

39. There is no strict definition of what constitutes acting with integrity. It is a fact specific conclusion. It is wider than the concept of dishonesty and does not necessarily involve deliberate behaviour.

40. APER 3.2.1 provides that in determining whether or not the particular conduct of an approved person within his controlled function complies with the Statements of Principle, it is to be taken into account whether that conduct is consistent with the requirements and standards of the regulatory system relevant to his or her firm. APER identifies no specific factors to be taken into account in relation to the behaviour which is the subject of this reference that may be found to be reckless or in determining whether conduct of this type complies with Statement of Principle 2.

41. APER 3.1.6 provides that the specific examples which may be in breach of a generic description of conduct in APER are not an exclusive list of types of conduct that may contravene the Statements of Principle.

42. APER 3.1.3(G) of the FCA Handbook provides that all the circumstances of a particular case must be considered in assessing compliance with, or a breach of, a Statement of Principle. Account is to be taken of the context in which a course of conduct was undertaken, including the precise circumstances of the individual case, the characteristics of the particular controlled function and the behaviour to be expected in that function.

43. APER 3.1.4 (G) of the FCA Handbook provides:
"An approved person will only be in breach of a Statement of Principle where he is personally culpable. Personal culpability arises where an approved person's conduct was deliberate or where the approved person's standard of conduct was below that which would be reasonable in all the circumstances."

44. Whilst not exhaustive, APER 4.1.2 (G) of the FCA Handbooks sets out guidance as to the Authority's opinion as to the type of conduct which does not comply with Statement of Principle 1. All of the sections cited in the list thereafter refer to examples of conduct which would amount to deliberate dishonesty or malpractice (falsifying documents, deliberately misleading clients, deliberately disguising breaches of the regulatory system etc.) rather than recklessness.

Recklessness

45. The Authority in this reference relies solely upon the Applicant's alleged recklessness as grounds for finding that the Applicant lacks integrity in accordance with Statement of Principle 1. It does not rely on any of the APER 4.1.2 (G) guidance, which does not refer to recklessness at all.

46. In *Tinney v FCA [2018] UKUT 0435 (TCC)* at [10]-[14] ([12]-[14] of which is set out below) the Tribunal considered the concept of recklessness in the context of the question of an approved person lacking integrity. The meaning of 'lacking integrity' from the case law and authorities has always required the Tribunal to find subjective and personal failings against the Applicant. For example, the cases cited in *Tinney* refer to a person lacking integrity where a) (s)he subjectively was unable to distinguish between honesty and dishonesty, b) (s)he lacked an ethical compass, and / or c) (s)he turned a blind eye to obviously suspicious signs of wrongdoing.

47. In *Forsyth v FCA and PRA* [2021] UKUT 162 (TCC) ("*Forsyth*") at [40] to [44] the UT considered [12]-[14] of *Tinney* and said:

"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."

48. It follows that acting recklessly can amount to acting without integrity. However, the Tribunal also specifically noted that whilst recklessness can amount to a lack of integrity, it does not necessarily amount to it.

49. As the UT earlier stated in *Ford and Owen v FCA* [2018] UKUT 0358 (TCC) at [22]:

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

50. The Tribunal in *Tinney* adopted the definition of recklessness proposed in a Law Commission paper on the reform of offences against the person, and we adopt the same standard, connoting as it does that whether the Applicant committed recklessness depended upon his own subjective state of mind:

"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."

51. One way of re-formulating this test is to ask two questions:
    i. Was the Applicant aware of a risk (such as the Authority alleges)?
    ii. If so, was it unreasonable to take that risk having regard to the circumstances as the Applicant knew or believed them to be?

52. When considering the circumstances of this case, the fact that the Applicant was approved to perform the important CF1 and CF3 functions is a matter that indicates that higher standards would be expected from him over the general public: see *Page and others v FCA* [2022] UKUT 124 (TCC) ("*Page*") at [59].

The Tribunal's jurisdiction and powers in relation to the Reference

53. Section 57(5) of the Act provides that an applicant who wishes to challenge the Authority's decision to make a prohibition order against them under section 56 may refer "the matter" to the Upper Tribunal. Section 63(5) FSMA provides that an applicant who wishes to challenge the Authority's decision under section 63(1) to withdraw approval under section 59 may refer "the matter" to the Upper Tribunal. Section 67 provides that an applicant who wishes to challenge the Authority's decision under section 66 to impose a penalty upon them may refer 'the matter' to the Tribunal. In each case, section 57, 63 and 66 require that before the Authority makes its relevant decision, it must issue the person a Warning Notice (and section 387 requires reasons to be given therein).

54. Section 133 of the Act provides for the procedure on appeals or references to the Upper Tribunal from decisions of the Authority (and other bodies not relevant to these proceedings).

55. Section 133(4) of the Act provides that, on a reference, the Tribunal may consider any evidence relating to the subject matter of the reference whether or not it was available to the decision-maker at the material time. This is not an appeal against the Authority's decision in the reference(s) but a complete rehearing of the issues which gave rise to the decision. Thus, the hearing of the reference by the Upper Tribunal is not an appeal against the Authority's decision but a complete rehearing of the issues which give rise to the decision - see for example, *Lewis Alexander Ltd (LAL) v FCA* [2019] UKUT 0049 (TCC) ('*Lewis Alexander*') at [29].

56. Sections 133(5) to (7) of the Act provide as follows:

"(5) In the case of a disciplinary reference or a reference under section 393(11), the Tribunal-
(a) must determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter, and
(b) on determining the reference, must remit the matter to the decision-maker with such directions (if any) as the Tribunal consider appropriate for giving effect to its determination.

(6) In any other case, the Tribunal must determine the reference or appeal by either-
(a) dismissing it; or

(b) remitting the matter to the decision-maker with a direction to reconsider and reach a decision in accordance with the findings of the Tribunal.

(6A) The findings mentioned in subsection (6) (b) are limited to findings as to-
(a) issues of fact or law;
(b) the matters to be, or not to be, taken into account in making the decision; and
(c) the procedural or other steps to be taken in connection with the making of the decision.

(7) The decision-maker must act in accordance with the determination of, and any direction given by, the Tribunal."

57. There is a distinction between the powers of the Tribunal on what is described as a "disciplinary reference" and other references. Pursuant to s. 133(7A), "disciplinary reference" includes a decision to take action under s. 66, that is to impose a financial penalty on a person. The term does not include a reference of a decision to impose a prohibition order under s. 56 which is a non-disciplinary decision.

58. Accordingly, the present Reference includes 'disciplinary' (against the financial penalty) and 'non-disciplinary' elements (against the withdrawal of approval and prohibition order).

59. For the disciplinary element, the reference against the Financial Penalty, the Tribunal has power to determine at its discretion what (if any) is the appropriate action for the Authority to take.

60. For the non-disciplinary element, the reference against the withdrawal of approval and prohibition, the powers of the Tribunal as set out in s 133(6) are supervisory. The procedure set out at sections 133(6) and (6A) of the Act applies. The decision-maker in this Reference is the Authority (acting through the RDC).

61. The Tribunal in *Hussein v FCA* [2018] UKUT 0186 (TCC) described the Tribunal's jurisdiction as "*a supervisory rather than a full jurisdiction; in that unless the Tribunal believes the reference to have no merit and therefore dismisses it, its powers are limited to remitting the matter to the Authority with a direction to reconsider its decision in accordance with the findings of the Tribunal."*

62. Unless the Tribunal believes the matter to have no merit and is dismissed, its powers are limited to remitting the matter to the Authority with a direction to reconsider their decisions in accordance with the findings of the Tribunal: *Carrimjee v FCA* [2016] UKUT 0447 (TCC) ("*Carrimjee 2016*") at [39] and [40].

38. If, having reviewed all the evidence and the factors taken into account by the Authority in making its decision, and having made findings of fact in relation to that evidence and such other findings of law that are relevant, the Tribunal concludes that the decision to prohibit is one that is reasonably open to the Authority then the correct course is to dismiss the reference.

39. Alternatively, if the Tribunal is not satisfied that in the light of its findings that the decision is one that in all the circumstances is within the range of reasonable decisions open to the Authority, the correct course is to remit the matter with a direction to reconsider the decision in the light of those findings. 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.

[Emphasis Added]

63. The effect of the above, is that the Upper Tribunal must dismiss the Reference unless it makes findings of fact and/or law which lead to a conclusion that the Decision (whether the prohibition order or withdrawal of approval) was not one that was reasonably open to the Authority.

64. Even in the case where the Tribunal has not accepted all of the factors that led the Authority to conclude that a prohibition order (or withdrawal of approval) was appropriate and it might therefore be said that the Authority has taken into account irrelevant considerations in deciding whether to impose a prohibition order, it would not be appropriate to remit the decision to the Authority for further consideration where the seriousness of the matters which the Tribunal has found would lead inevitably to the Authority reaching the same decision were that course to be followed: *Palmer v FCA* [2017] UKUT 313 (TCC) at [270].

65. Therefore, even if the Tribunal finds flaws in the Authority's decision-making process, for example by making findings of fact which contradict or are inconsistent with the findings on which the Authority based its decision, it should not remit the Reference if it is of the view that despite such failings, it is inevitable that if the matter were remitted, the Authority would come to the same conclusion.

66. In resolving the issues arising in this reference it is common ground that the burden of proof is on the Authority and the standard of proof is on the normal civil standard of the balance of probabilities. This is established by the relevant authorities on the Act: the burden of proving that Applicant failed to act with integrity to the required standard rests with the Authority judged to the ordinary civil standard: see *Carrimjee v FCA* [2015] UKUT 0079 (TCC) ('*Carrimjee 2015*') at [47]: 'We have done so, and in the familiar phrase, the time has come to say once and for all that the civil standard of proof applies in relation to all disciplinary and non-disciplinary references made to this Tribunal pursuant to FSMA.'

67. This followed the dicta of Lady Hale in the judgment of the Supreme Court in *Re S-B (Children) Care Proceedings: standard of proof* [2010] 1 AC 25 678, and in particular her statement, in paragraph 11, approving the statement of Lord Hoffmann in *Re B* [2009] 1 AC 11, paragraph 13 that except in relation to a category of cases identified by Lord Hoffmann in that case which the law classed as civil but for which the criminal standard was appropriate "the time has come to say, once and for all that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not."

Approach to written and oral evidence

68. In *Page and others v FCA* [2022] UKUT 124 (TCC) ("*Page*") at [118] & [126]-[130], the UT summarised helpful guidance from the civil courts as to the approach to oral and written evidence:

> 118. We are asked to make findings of fact as to events which took place some years ago, many of which are undocumented. As Mr Lloyd correctly submitted, in small firms such as those we are concerned with in these references, much discussion takes place in person, often informally. … We cannot know what actually happened in relation to all the events concerned. The burden is on the Authority to satisfy us as to what was more likely than not to have happened on the basis of the evidence before us. …… it is important for the Tribunal to have regard to the contemporaneous documents and the overall probabilities. As has often been said, the contemporaneous documents are usually more reliable than the content of witness statements, prepared with the assistance of a legal team after the event and for the purpose of proving a case or meeting a case against them.
>
> …
>
> 126. In *Simetra Global Assets Ltd & Anor v Ikon Finance Ltd & Ors* [2019] EWCA Civ 1413, Males LJ stated the following at [48] to [49]:
>
> > "48. In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence. The classic statement of Robert Goff LJ in *The Ocean Frost* [1985] 1 Lloyd's Rep 1 at p.57 is frequently, indeed routinely, cited: "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth. I have been driven to the conclusion that the Judge did not pay sufficient regard to these matters in making his findings of fact in the present case."
> >
> > 49. It is therefore particularly important that, in a case where there are contemporary documents which appear on their face to provide cogent evidence contrary to the conclusion which the judge proposes to reach, he should explain why they are not to be taken at face value or are outweighed by other compelling considerations."
>
> 127. Whilst *The Ocean Frost* and *Simetra* were cases concerning fraud, in our view the principles are equally applicable to proceedings in this Tribunal, particularly where, as in the current case, questions of dishonesty and integrity are in issue.

128. In *Grace Shipping v Sharp & Co* [1987] 1 Lloyd's Rep 207 (Privy Council) Lord Goff said at p. 215: "It is not to be forgotten that, in the present case, the Judge was faced with the task of assessing the evidence of witnesses about 15 telephone conversations which had taken place over five years before. In such a case, memories may very well be unreliable; and it is of crucial importance for the Judge to have regard to the contemporary documents and to the overall probabilities."

129. In *Gestmin SGPS S.A. v Credit Suisse (UK) Limited, Credit Suisse Securities (Europe) Limited* [2013] EWHC 3560 (Comm) Leggatt J (as he then was) said this at [22]: "…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."

130. However, that is not to say that all the evidence including the oral evidence should not be taken into account. The Court of Appeal in *Kogan v Martin* [2020] EMLR 4 said this at [88] :

> "88. …First, as has very recently been noted by HHJ Gore QC in *CBX v North West Anglia NHS Trust* [2019] 7 WLUK 57, *Gestmin* is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay The Judge as Juror: The Judicial Determination of Factual Issues (from The Business of Judging, Oxford 2000). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence."

Prior Reference to the Tribunal and proceedings in relation to FSE

<u>The FSE Tribunal decision</u>

69. FSE has been the subject of an earlier decision by the Authority on 23 May 2019 - to cancel FSE's Part 4A permission. The Authority found in its decision notice, and alleged on the subsequent reference to the Tribunal, that FSE had failed to maintain PII cover and to pay levied fees and that it should have its permission to carry out regulated activities withdrawn. The Applicant, as sole director, took a central role in referring the decision to the Tribunal and giving evidence on the company's behalf. The Upper Tribunal ('UT') made a decision dated 22 April 2020 on FSE's reference: *Financial Services (Euro) Limited v FCA* [2020] UKUT 0139 (TCC) ('the FSE Tribunal Decision').

70. The FSE Tribunal decision was to allow the reference on the basis that the decision to cancel FSE's Part 4A permission was not reasonably open to it and to remit the case to

the Authority with a direction to reconsider the decision in accordance with the UT's findings. The FSE Tribunal Decision dated 22 April 2020 determined that the Authority should reconsider its decision to cancel FSE's Part 4A permission in accordance with the findings of fact made at paragraphs [83], [86]- [91] and [93] of the FSE Tribunal Decision.

71. The key factual findings in the previous reference were summarised at [83] of the decision:

> [83] We summarise as follows our principal findings of fact that are relevant to our assessment as to whether the Authority's decision to cancel FSE's Part 4A permission was reasonably open to it:
> (1) FSE was unable to obtain PII after 9 May 2017 as a direct consequence of the conclusions in the Supervision Letter, and in particular the request by the Authority that FSE should cancel its permission: see [51] above.
> (2) The Authority did not pursue the issue of a Supervisory Notice in order to restrict FSE's regulated activities notwithstanding the concerns expressed in the Supervision Letter: see [52] and [74] above.
> (3) There was a significant delay in making a decision as to whether to refer FSE and Mr Markou to Enforcement after the Supervision Letter and little progress was made in progressing those investigations once the investigations were opened: see [53] to [58] above.
> (4) FSE had not paid any of the fees which became due and payable after 9 May 2017 because it had insufficient resources to do so, notwithstanding its receipt of income of some £13,000 after it ceased trading. Mr Markou remained willing to ensure that FSE paid the outstanding fees as and when it was able to resume trading. FSE's policy was to pay its regulatory fees out of current trading income and provisions were not made in earlier accounting periods in respect of fees becoming due in the next accounting period: see [68] and [69] above.
> (5) The Threshold Conditions case was presented to the RDC on the basis of it being a simple routine case of a firm failing to meet the Threshold Conditions because of its refusal to pay fees and not having PII for good reason: see [73] above.
> (6) The Warning Notice suggested that had the Authority itself given an instruction to FSE not to trade then enforcement action for non-payment of the fees and the failure to obtain PII would not have been taken: see [75] above.
> (7) The RDC recognised Mr Markou's arguments concerning the reasons why PII was not obtained and the fees not paid and that it was necessary to consider whether other angles should be explored: see [77] above.
> (8) The RDC considered whether the discretion in FEES 2.3.1R should be exercised so as to remit the fees but declined to exercise the discretion itself. It did not refer the matter back to Enforcement or any other division of the Authority for policy guidance: see [78] above.

72. At [93(4)], the FSE Tribunal held that the Authority should have, as an alternative to cancelling FSE's permission, concluded its investigation into FSE and the Applicant either by discontinuing the investigation or instituting regulatory proceedings.

73. The UT also made specific findings of fact that FSE did not trade (or carry on any regulated activity) after its PII cover lapsed in May 2017. For example, it found:

    a. At [24] & [25]: "… FSE was not trading and could not pay the fees as it was prevented from renewing its PII, solely because of the failure of the Authority to conclude investigations that had been opened against both the Applicant and Mr Markou personally as regards, among other things, FSE's policies and procedures aimed at countering mortgage fraud. …

We regard Mr Markou as an honest witness who gave consistent and credible answers under cross-examination. We therefore have no hesitation in accepting his evidence which to a significant degree was corroborated by the documentary evidence that we saw. In particular, Mr Markou was mindful of his and his firm's legal and regulatory obligations and demonstrated to us a willingness to comply with those obligations wherever possible in relation to the matters which are the subject of this reference. That was clearly demonstrated by his voluntary act in ensuring that FSE carried on no further regulated activity once issues had been raised in a supervision visit that place in 2017 and the impact that had on the ability of FSE to obtain PII…"

b. At [34]: "It appears from his own evidence that Mr Markou was aware that Barclays' action had prompted the visit. He notified his insurance brokers of this development at the same time, which happened to coincide with the time that FSE's PII came up for renewal. FSE's PII was due to expire on 11 May 2017 and clearly this development was material in the context of the renewal. Accordingly, after discussion with the broker, Mr Markou decided not to renew FSE's PII until the outcome of the visit was known and that FSE would cease to undertake any new business in the meantime."

c. At [45]: "FSE decided not to take steps to renew its PII until the position following the Supervision Visit had been clarified. FSE maintained its decision not to undertake any new business until it had been able to obtain PII. Accordingly, it asked its brokers, Oak Insurance Services to arrange cover. The brokers were unsuccessful in doing so."

d. At [52]: "Following FSE's decision not to undertake any new regulated activity in the light of the results of the Supervision Visit and its consequential failure to obtain renewal of its PII, it was not surprising that FSE and Mr Markou hoped that the position regarding the instigation of any enforcement proceedings would be known as soon as possible. We observe that the Authority took no steps to exercise its supervisory powers to prevent FSE carrying on any regulated business following FSE's refusal to cancel its permission voluntarily and we assume therefore that the Authority took the view that the concerns it had expressed in the Supervision Letter were not so serious that they merited further supervisory action."

e. At [68] & [69]: "During his cross-examination, Mr Markou explained that due to the fact that FSE ceased to trade after 9 May 2017, it did not have the resources to pay the outstanding fees. The firm did have some income after that date, some £13,000 according to its last financial return. Mr Markou explained that 85% of that income is payable to the advisors who had placed the business to which the income related so that there was very little income available to pay the firm's other debts. Mr Markou explained that he had used his own resources to pay some of the firm's other debts. The usual practice of the firm was to pay the Authority's fees out of current income rather than make provision for them in earlier accounting periods, on the basis that on the assumption that the firm was continuing to trade, there would be sufficient income to pay the fees as they became due. …

We accept Mr Markou's evidence on this point and also his further evidence given in cross-examination that had the firm had the resources to do so the fees would

have been paid, but that those resources were not available because of the decision taken by the firm to cease trading pending the resolution of the issues that arose after the Supervision Visit..."

f. At [90] & [91]:
"90. In our view, FSE also acted responsibly and prudently in ceasing to carry on any regulated activities once the concerns in the Supervision Letter had been expressed and by deciding to await further developments rather than attempt to renew its PII immediately. Clearly, the risk to consumers has been mitigated by that approach….

91. In those circumstances, we find as a matter of fact that after 9 May 2017 FSE was managing its business in such a way as to ensure that its affairs were being conducted in a sound and prudent manner. It did everything it reasonably could to push the enforcement process along. It was of course, open to the Authority at that point to use its supervisory powers to put the cessation of business for the time being on a formal footing until circumstances changed by varying FSE's Part 4A permission by, for example, making it a condition that it did not resume trading until it obtained PII and paid its outstanding fees. It is clear from our findings of fact that had such an instruction been given, then the Authority would not have pursued the cancellation of the firm's Part 4A permission and then could have pursued the enforcement investigations which, if the outcome was favourable to FSE, would have enabled it to resume trading because it would then be likely that it would be in a position to pay the fees and obtain PII. We therefore agree with the RDC's observation that without the investigation being pursued and the firm not being in a position to trade it was indeed caught in a "vicious circle".

92. Because the Authority treated the case simply as a routine case of a firm simply failing to have PII and pay its fees, and it is clear from our findings of fact that there was more to the case than that, it follows that the Authority has failed to take into account a number of relevant factors in reaching its decision. As the authorities we have referred to above demonstrate, that in itself justifies us allowing the reference and referring the matter back for reconsideration."

[Emphasis Added]

74. Some of the paragraphs above refer to ceasing new business as opposed to any business after 9 May 2017. They imply a distinction between 'new' business undertaken – where contact was first made with a client after 9 May 2017 and a mortgage application submitted for approval thereafter – and ongoing business - where contact was first made with a client before 9 May 2017 but a mortgage application submitted for approval thereafter.

75. The Authority accepted, following the FSE Tribunal Decision, that FSE was unable to obtain PII cover. The Applicant said in oral evidence to the FSE Tribunal (and the FSE Tribunal accepted) that FSE "*did not trade".* One argument on behalf of the Applicant in this Reference is that his previous evidence (and finding of the FSE Tribunal) that FSE "*did not trade"* appears to mean (only) that FSE did not accept any "*new business*". That is set out in his witness statement in these proceedings: at [8] ("*no new work was*

undertaken by FSE"); in contrast, [9] asserts that no "*ongoing business"* was conducted; but [10] states that "*routine accounting"* work ahead of drawdown was conducted.

76. It is clear from the underlined passages, and contrary to Mr Rees Phillips' argument, that in the FSE Tribunal Decision the UT found both:
    a) that FSE did not undertake any 'new' business or regulated activity after 10 May 2017 (to which there are two references in the underlined at [34] and [52]); and
    b) that after that date it 'ceased' to trade or undertook 'no' regulated mortgage business or did not undertake 'any' business (to which there are three references in the underlined at [25], [68] and [90]). This must cover both new and ongoing business.

77. We also take into account that there is little ambiguity as to what the Applicant actually said about the extent of FSE's trading without PII after 9 May 2017 before the FSE Tribunal in February 2020:

78. FSE's counsel before the FSE Tribunal said that there was a "*cessation of regulated activities"* after 9 May 2017. As found by the FSE Tribunal in its decision, that is unambiguous and does not amount to "*no new work*".

79. The Applicant said in cross-examination before the FSE Tribunal:
    "That was because since the 9 May 2017, I stopped trading because I was more or less told -- well I was told, basically, that I shouldn't trade any longer until the matter is resolved. I have not traded -- there's been no new business from 9 May 2017 and the actual PII ended on 12 May but, actually, it wasn't until July that they confirmed that they were not renewing."

80. The Applicant repeated before the FSE Tribunal at various times the evidence that FSE "*did not trade"* without any qualification.

81. The FSE Tribunal found as fact that FSE "*did not trade":* FSE Tribunal Decision [4], [62], [66], [68], [69], [88].

82. The significance in these proceedings of the UT's earlier findings regarding FSE and the Applicant is the subject of legal argument addressed below.

Issue of Law (1): Estoppel and abuse of process as to the prior findings of the UT on the FSE reference

<u>The Applicant's argument</u>

83. The Applicant contends that the Authority is estopped from pursuing part of its regulatory case in this Reference by reason of the earlier reference brought by FSE and the decision in the FSE Tribunal Decision dated 22 April 2020. Mr Rees Phillips submits that there has already been a finding of fact by a court or tribunal of competent jurisdiction that FSE voluntarily ceased carrying on regulated activities when its PII cover lapsed (11 May 2017). He argues that there is a) an estoppel (either an issue estoppel or on the basis of *res judicata);* and / or b) it would be an abuse of process, for the Authority to be permitted to go behind the UT's findings contained in the FSE Tribunal Decision.

84. Mr Rees Phillips submits that we are bound to find that FSE did not conduct any new regulated mortgage business after the PII cover lapsed on 11 May 2017. As a result, the ground at paragraph 12.3 of the Statement of Case on which the Authority relies against the Applicant - that he recklessly failed to ensure that FSE did not carry on regulated mortgage business after the time at which its PII had lapsed - must be rejected as unreasonable or not available in law. Applying the findings of the FSE Tribunal Decision that there was no regulated business carried on after 10 May 2017, the Applicant did not fail to ensure that FSE's mortgage advisors did not carry on regulated mortgage business without PII in place (from 11 May 2017) nor beyond the date on which the Applicant knew that FSE's PII had lapsed (10 July 2017).

The parties privy to the FSE Tribunal Decision

85. Mr Rees Phillips submitted that it is irrelevant that the parties to the previous proceedings were different (the applicant being FSE rather than Mr Markou) as he was still privy to the previous case. In the present case, the Applicant is a director and the sole shareholder of FSE and was effectively its legal and ultimate beneficial owner. Mr Rees Phillips argued an individual may be a privy of a corporate body, per *Deutsche Bank AG v Sebastian Holdings Incorporated & Anor [2014] EWHC 2073 (Comm)*, where he or she is a sole shareholder and director of the company which controlled litigation and stood to benefit from it. In particular, Cooke J in that case said (quoting Sir Robert Megarry VC in *Gleeson v J Whipple & Co Ltd [1977] 1 WLR 510*) that there had to be *"a sufficient degree of identity"* between the two parties where an estoppel was raised:

> "I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase 'privity of interest'."

86. He argued that there is no serious issue of fact that would suggest that there can be any grounds to say that the Applicant was not in the position of being privy to FSE. If the Authority were to suggest that the fact that the Applicant has not profited from FSE and should therefore not be privy to its interests, Mr Rees Phillips submitted that this is irrelevant. Companies House's public records show the Applicant to be director and sole shareholder and he has specifically explained that he has not financially benefitted from FSE because all profit revenue was put back into the business.

Issue Estoppel

87. Mr Rees Phillips first submitted that issue estoppel applied. It was central to the case before the FSE Tribunal whether or not FSE carried out regulated activities after its PII cover lapsed, because the Authority's case was that FSE should have been able to pay its fees and levies and FSE's case was that it could not afford to do so because it had reasonably and properly chosen to cease trading until it had PII cover in place. In order to determine whether or not FSE's permission should be withdrawn, the FSE Tribunal had to directly engage with this central issue, and as set out above it made specific findings of fact in FSE's favour and against the Authority.

88. He relied on *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly known as Contour Aerospace Ltd) [2013] UKSC 46* in which Lord Sumption considered estoppel

on the basis of *res judicata* in broad terms. In relation to the point in issue in these proceedings the Supreme Court ruled (in summary terms) as follows:

a. Where a cause of action is not the same in a later action as it was in an earlier one, some issue which is necessarily common to both and which had been decided on the earlier occasion may be binding on the parties. A party may not bring subsequent proceedings on an issue that has already been determined; and
b. A party is precluded from raising in subsequent proceedings matters which could and should have been raised in earlier proceedings but were not (the principle in *Henderson v Henderson*).

89. In *Arnold v National Westminster Bank plc [1991] 2 AC 93*, Lord Keith said:
"Issue estoppel may arise when a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue." This indicates that an issue which has been decided (or ought to have been decided) in previous litigation can be reopened if there is fresh evidence, but only if that evidence:
a. Entirely changes that aspect of the case; and
b. Could not by reasonable diligence have been discovered previously by the party wishing to put that evidence before the court.

90. Mr Rees Phillips also accepted that an issue (but not an entire cause of action) may also be reopened in the event of a change in the law subsequent to the original decision. Otherwise, there is a bar on the subsequent proceedings unless fraud or collusion in relation to the original proceedings is alleged.

91. He argued that the issue of whether FSE carried out regulated activities after 10 May or 10 July 2017 is the subject of findings of fact in the previous proceedings, and accordingly the Authority as another party to that case is estopped in these proceedings from asserting otherwise in these proceedings.

92. The Authority's alleged evidence of trading after 10 May or 10 July 2017 is not evidence which *'could not by reasonable diligence have been discovered previously'*. It appears the Authority in fact was in possession of this evidence, or at least certainly could have been, when the previous case was before the Tribunal at the hearing in February 2020. It could have introduced that evidence on the central issue of whether FSE had traded after 10 May 2017 or 10 July 2017 (the dates on which PII had lapsed and the date on which the Applicant knew of it) in those proceedings so as to be able to afford to pay the Authority's fees and levies. However, as the Tribunal noted in its decision: *"Unusually, the Authority filed no witness evidence. That is surprising, bearing in mind that the burden of proof lies on the Authority".*

Abuse of process

93. Second and in the alternative, he submitted that there would be an abuse of process under the principle in *Henderson v Henderson* [1843-1860] All ER Rep 378 for us to make different findings in these proceedings. Even if the Applicant were incorrect and that there was no earlier direct finding on this issue in the FSE Tribunal Decision, it was a matter which the Authority could have introduced evidence upon, and as such it would now be an abuse for the Authority to attempt to assert that it can prove this issue

to a finding which would be in direct conflict with the Tribunal's finding that FSE was not trading at the material time.

94. The case of *Henderson v Henderson* established a rule of principle preventing litigants from advancing causes of action or arguments that they could have advanced in earlier proceedings:

"…the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case."

95. In *Barrow v Bankside Members Agency Limited [1996] 1 All ER 981,* Sir Thomas Bingham explained the idea behind the rule as follows:

"The rule in Henderson v Henderson ... requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the courts so that all aspects of it may be finally decided ... once and for all. In the absence of special circumstances the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion, but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."

96. Mr Rees Phillips therefore submitted that it had been open to the Authority to introduce evidence before the Tribunal in the previous proceedings and argue that FSE was trading after the time when PII was not in place (11 May 2017) or when the Applicant knew of it (10 July 2017), but it failed to do so, and to now re-litigate the issue would be an abuse of process.

<u>Discussion and Analysis</u>

97. We are not satisfied that we are bound by the earlier findings of the FSE Tribunal Decision that FSE conducted no regulated business after 9 May 2017 in these proceedings. We are not satisfied that the principles of issue estoppel, res judicata and abuse of process prevent us considering and determining the same factual issue in these proceedings. Likewise, we are satisfied the principles do not prohibit us from determining the further issue of whether the Applicant failed to ensure that FSE did not conduct regulated mortgage business after 10 May 2017 (and 10 July 2017) when PII was not in place.

Estoppel

98. We are satisfied that it is relevant that Mr Markou (the Applicant) was not the applicant party in the FSE Tribunal proceedings and the Authority's decision and facts in issue were different. While he is sole shareholder and director of FSE, it was the Applicant's business that was the relevant party to the earlier reference (and there is no basis on which to lift the corporate veil and treat the company as an individual and indivisible entity from the Applicant).

99. In terms of issue estoppel, the allegations now raised were not a necessary ingredient in the cause of action in the FSE Tribunal Proceedings. Whether or not FSE carried on regulated activities between 15 July 2017 and 14 October 2017 was not an issue which the Authority made submissions on in the FSE Tribunal Proceedings, nor was it fundamental to, or an essential part of the legal foundation of, the decision that the Tribunal had to make as to whether FSE, at the time of the FSE Tribunal Decision, met the Threshold Conditions. The Authority's case did not include the allegation that FSE had continued to carry on regulated activities after 9 May 2017, and the Authority did not dispute the Applicant's evidence that FSE had ceased trading, and so it was not necessary for the FSE Tribunal to reach a determination on whether or not this actually happened.

100. The FSE reference concerned the legal issue of the reasonableness of Authority's cancellation of FSE's Part 4A permission because it did not meet a threshold condition. This Reference concerns the reasonableness of Authority's decisions against the Applicant – whether he should be fined, prohibited and have his approval withdrawn. The FSE Tribunal proceedings were concerned with whether, by failing to have PII cover in place and to pay regulatory fees and levies, FSE was meeting the Threshold Conditions, rather than whether FSE had committed misconduct by carrying out regulated activities after its PII cover had lapsed. As the issues now raised were not the issues key to the FSE Tribunal Decision, we do not consider it an abuse of process for the Authority to allege that the Applicant failed to ensure that the mortgage advisors stopped carrying on regulated mortgage business without PII in place.

101. This Reference concerns factual issues of the Applicant's conduct in his supervision of the mortgage brokers and FSE itself in failing to ensure that PII was in place to cover the regulated mortgage business. It is apparent that the factual issue of the extent to which FSE continued to conduct regulated mortgage business after 10 May 2017, let alone after 10 July 2017, was not a key factual finding or issue in the proceedings. Rather, the focus of those proceedings was the fact of FSE not holding PII after 10 May 2017 and the reason for this – see [83] of the FSE Tribunal Decision set above for the principle findings.

102. There are further factual issues in these proceedings such as:

1) the steps taken to supervise and ensure his advisors did not place ongoing and new business without PII in place;

2) whether the Applicant knowingly or recklessly allowed new business to be conducted without PII (his state of knowledge as to the PII in place – was not in issue previously, only whether business was conducted by FSE); and

3) whether the Applicant gave unreliable or incredible evidence in the earlier proceedings (whether he was reckless or lying) when stating no new business was undertaken after 9 May 2017 or without PII being in place.

103. Thus, the core factual issues in these proceedings are the Applicant's conduct in supervising his advisors and then his knowledge of whether PII was in place - not whether the PII was in fact in place. These were not issues previously determined by the FSE Tribunal as it was only the fact of PII no longer in place that was an issue to any real extent. However, these issues form core allegations on which the Authority now relies.

104. In essence, the Applicant relies on the fact that the FSE Tribunal found that FSE had "*ceased to trade*" after 9 May 2017. However, whether or not FSE had ceased to trade in the period after 9 May 2017 but before 14 October 2017 was not a fact in issue before the FSE Tribunal. The Authority did not challenge, and was not required to challenge, FSE's assertion (through the Applicant) that it had ceased to trade in that period.

105. The FSE Tribunal was instead asked to conclude that it was reasonable for the Authority to cancel FSE's Part 4A permission, on the basis that its PII cover had lapsed and it had not paid outstanding fees and so at that time was not meeting the Threshold Conditions, notwithstanding that the Applicant believed that it had ceased trading after 9 May 2017. Therefore, whether or not FSE carried on regulated activities between 15 July 2017 and 14 October 2017 was not an issue which made any difference to the Authority's case in the FSE Tribunal Proceedings.

106. In summary, we are satisfied that there were different parties, different legal issues and different key factual issues considered by the FSE Tribunal in the previous reference. Any incidental findings made by the earlier Tribunal, where the factual issue was not in dispute, do not estop nor bind us and there is no abuse of process in us considering the issues and allegations afresh and making relevant factual findings on all the issues that now arise.

Abuse of process

107. We have considered the judgment in *Mansing Moorjani v Durban Estates Limited [2019] EWHC 1229 (TCC)*, when approaching the abuse of process application. We take into account: (a) the onus is upon the applicant to establish abuse; (b) the mere fact that the claimant (for which read the Authority) could with reasonable diligence have taken the new point in the first action does not necessarily mean that the second action is abusive; (c) the court is required to undertake a broad, merits-based assessment taking account of the public and private interests involved and all of the facts of the case; (d) the court's focus must be on whether, in all the circumstances, the claimant is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before; and (e) the court will rarely find abuse unless the second action involves unjust harassment of the defendant.

108. In undertaking a broad merits-based analysis, we are satisfied that it would not be unfair to the Applicant for the Authority to pursue its case and he can receive a fair trial. There is an important public interest at stake in the Authority's actions against the Applicant and in these proceedings – namely the protection of the consumer against financial crime and upholding or enforcing the Authority's Statement of Principles. It is also consistent with the Authority's operational objectives, and it is in the public interest, for the Authority to take action where it believes it has identified serious misconduct and to pursue the full extent of that misconduct (so long as it is reflected in the statutory Warning Notice and Decision Notice and constitutes the subject matter of the Reference).

109. We do not consider that this action involves unjust harassment of the Applicant. Contrary to the Applicant's case, we are not satisfied the Authority is pursuing a vendetta or unfairly targeting the Applicant in taking regulatory action against him

following the action taken against FSE (which was successfully challenged before the FSE Tribunal).

110. The specific issues now raised in this Reference were not considered by the Tribunal in the FSE Tribunal Proceedings, such that it could be reasonably argued that it would be oppressive or waste time and costs for it to be considered again.

Issues relevant to issue estoppel and abuse of process: fresh evidence and the Applicant's change of position

111. Additionally, and importantly, there is significant fresh evidence now relied upon by the Authority in these proceedings to establish that FSE undertook both ongoing and new business after 10 May 2017.

112. The Authority has obtained significant new material from mortgage lenders since the FSE Tribunal Decision regarding new mortgage applications submitted by FSE after its PII cover lapsed. We accept that the Authority reasonably believed at the time of the FSE Tribunal Proceedings that it was not necessary to undertake further investigation to obtain this material. We consider that it cannot be right to expect a party to obtain and deploy in evidence material which it reasonably considered at the time was not relevant to the matters forming the underlying cause of action.

113. Accordingly, we are satisfied that the Authority's conduct is not abusive and it should not be estopped from relying on the material now in its possession. This material may demonstrate that the Applicant in fact failed to ensure that FSE's mortgage advisors did not carry on regulated mortgage business beyond the date on which the Applicant knew FSE's PII had lapsed.

114. The Applicant himself has now conceded that the Authority's allegations that FSE undertook regulated mortgage business without PII after 11 May 2017 and even after 10 July 2017, when he knew PII was no longer in place, is now correct. This concession is contrary to the finding of the FSE Tribunal. In circumstances where the Applicant does not dispute this evidence, only his knowledge as to and responsibility for the business conducted without PII being in place, it would not be abusive to and we should not be estopped from considering this evidence.

115. The Applicant now accepts to a limited extent that there was regulated mortgage business conducted by FSE without PII being in place after 11 May 2017 and July 2017 and up to October 2017. He had previously denied there was any new or ongoing business conducted after 11 May 2017 in his witness statement dated 25 April 2022 for this Reference (we consider this in more detail in our factual findings). However, his counsel accepted in his opening submissions dated 4 November 2022 in these proceedings, and the Applicant admitted in his own oral evidence in cross examination during the hearing, that there was a limited amount of new business conducted after 11 May 2017 and 10 July 2017.

116. It is inevitable that the parties' concessions means that the previous findings of the Tribunal that FSE did not conduct new business after 9 May 2017 and without PII in place, must have been inaccurate. We would consider it irrational to ignore this

evidence, given the lack of dispute. Per *Arnold*: it entirely changes this aspect of the case.

117. We have also considered whether the evidence now relied upon by the Authority could not by reasonable diligence have been discovered previously by the party wishing to put that evidence before the court.

118. For the reasons set out above, the evidence now relied on by the Authority that there was regulated trading after 11 May 2017 was not reasonably required to have been obtained and served by the Authority in the previous Reference before the FSE Tribunal. That was because it was not a key legal or factual issue in the case. We reject the Applicant's submission that it should have been supplied by the Authority.

119. Furthermore, as above, this evidence is no longer in dispute in these proceedings. By asserting "*abuse"* the Applicant appears to suggest that the Authority should not be permitted to rely on facts that are now accepted by the Applicant to be true, namely that FSE was indeed submitting mortgage applications (and thereby carrying on regulated activity) after 9 May 2017, despite his earlier denial that it was "*trading*".

120. We are also satisfied that the Authority could not reasonably have been expected to obtain and serve in the previous proceedings the further evidence that remains in dispute in these proceedings. This is the evidence of the two FSE mortgage advisors that suggests that the Applicant recklessly failed to ensure that FSE conducted regulated business with PII in place. This was not an issue in the FSE Tribunal proceedings so the Authority could not reasonably have been expected to elicit and serve their evidence at that time.

121. We also take into account the Applicant's evidence and submissions to the RDC between September 2020 leading to the Decision Notice in this case in January 2021. In paragraph 19 of his written submissions to the RDC dated 11 September 2020, the Applicant stated: "*FSE did not submit any new mortgage business after 9 May 2017. The only money received to matters dealt with prior to 9 May 2017 and related to fees earned prior to this date."* As the Applicant confirms in paragraph 21, FSE submitted mortgage applications after 9 May 2017 where FSE had received (or, it appears, invoiced) fees prior to that date.

122. In his RDC skeleton argument dated 16 November 2020 (prepared by counsel) the Applicant asserted (at paragraph 7) that "*it was central to the case before the UT…whether or not FSE did carrying* [sic] *out regulated activities after its PII cover lapsed*…" See also paragraph 13. At paragraph 14, it was asserted that: *"Even if Mr Markou is incorrect in respect of whether there was a direct finding on this issue, it was a matter which the FCA could have introduced evidence upon, and as such it is now an abuse for the FCA to attempt to assert that it can prove this issue to a finding which would be in direct conflict with the UT's finding that FSE was not trading at the material time."*

123. It follows, therefore, that the Applicant, directly and through his counsel, has adopted different positions in his evidence before the FSE Tribunal in February to April 2020, the RDC in September 2020 to January 2021 and before us in this Reference.

This change of position is relevant to our finding that the Authority is not acting abusively.

Conclusion on estoppel and abuse of process

124. In conclusion, we are not estopped nor would it be an abuse of process to consider the evidence and determine in these proceedings whether FSE continued to conduct regulated mortgage business without PII after 11 May 2017.

The further allegations in paragraphs 12.3 and 12.5 of the Authority's Statement of Case

125. The Authority relies on the Applicant's change of position, his now accepting that FSE conducted some regulated business without PII, in support of the allegation that he lacks integrity and allege that he has recklessly failed to be transparent with the Authority and the FSE Tribunal.

126. It submits that the Applicant's assertion to the FSE Tribunal that FSE "*did not trade"* was misleading by omission as the Applicant should have been clear that FSE in fact carried on regulated activities beyond 11 May 2017 without PII in place and indeed beyond 10 July 2017 (the date on which the Applicant knew the PII had expired and would not be renewed).

127. For the reason set out above, we are satisfied that there is no abuse and we are not estopped from considering and determining the further factual issues in these proceedings, namely:

a) whether the Applicant recklessly failed to ensure that FSE conducted regulated mortgage business after PII had lapsed on 11 May 2017 (paragraph 12.3 of the Authority's Statement of Case); and
b) whether the Applicant failed to deal transparently in the FSE Tribunal proceedings and to the Authority and whether his evidence to them was reckless and misleading (paragraph 12.5 of the Authority's Statement of Case).

128. However, the Applicant objects to the Authority pursuing these allegations regarding FSE trading without PII and the Applicant's role in this for an additional reason beyond estoppel or abuse of process. The objection is that there is a jurisdictional bar to the Authority pursuing these grounds because they fall outside the subject matter of the Reference. We shall shortly turn to consider this further objection that the Applicant takes to the Authority pursuing the allegations.

129. However, before doing so, and in case these allegations do fall within the subject matter of the reference, we go on to make findings on the issues later in this decision. The Applicant is clear that he gave reliable evidence to the best of his ability in the FSE Tribunal proceedings, did not lie and was not reckless. Our findings on these issues are made below but, in essence, we accept this evidence. For the reasons set out below, we do not accept that the Applicant intended to or was recklessly misleading or failed to deal transparently with the Authority and FSE Tribunal.

130. We do accept that the Applicant has provided unclear and different evidence to the FSE Tribunal regarding regulated activity without PII after 11 May 2017. Taking all factors into consideration, it is apparent that the Applicant now acknowledges that

FSE was carrying on regulated activities at the material time and accordingly his evidence to the FSE Tribunal was inaccurate. We find that his evidence was given through innocent mistake rather than anything more culpable - we accept his inaccuracy was due to his mistake rather than through recklessness or dishonesty. Further, and for the avoidance of doubt, the Authority do not suggest that the FSE Tribunal would have reached any different decision having regard to the issues before it even if the Applicant had given accurate evidence to it.

Issue of Law (2): The subject matter of the reference in relation to PII (paras 12.3 & 12.5 of the Authority's Statement of Case)

131. The Applicant has a further objection as to the scope of the allegations that FSE conducted regulated mortgage business in the period following 11 May 2017 without having PII in place. The Applicant objects to the Authority pursuing the allegations at paragraphs 12.3 & 12.5 of the Authority's Statement of Case as summarised above and set out in full below.

132. This dispute requires deciding what is within the subject matter of the reference: what is the scope of the circumstances, evidence and allegations that the Authority has considered in its Decision Notice and which 'matters' have been referred to this Tribunal. The Applicant submits the grounds the Authority may pursue are limited to those set out in the Decision Notice and do not extend to the allegations at paragraphs 12.3 and 12.5 of the Authority's Statement of Case.

The law on jurisdiction – subject matter of a reference for the purposes of s. 133(4)

133. The question of what is within the subject matter of a reference to the Tribunal for the purpose of section 133(4) of the Act has previously been addressed in a long line of authorities. It was considered by the Financial Services and Market Tribunal ('FSMT') in *Jabre (Decision on Jurisdiction) v Financial Services Authority* [2002] UKFSM FSM035 (10 July 2006) where the Tribunal stated at [28]-[29]:

> 28. The meaning of the expressions "the matter referred", or "the subject-matter of the reference" in section 133 has to be derived from their context. The first point relevant to this is the Tribunal's function. It provides a stage in the regulatory process to "determine" what is the appropriate action for the Authority to take having considered any evidence relating to the subject-matter of the reference. As the Tribunal's role is not to adjudicate on the lightness or otherwise of the decision as expressed in the decision notice, the decision itself is not strictly a relevant consideration for the Tribunal to take into account. Instead it is the allegations made in the decision notice and the circumstances on which these are based that fall to be considered and evaluated. They comprise the matter referred. It is in relation to those circumstances and any further relevant evidence that was not available to the Regulatory Decisions Committee that the Tribunal's function is to determine the appropriate action for the Authority to take. The indications, so far, are that the circumstances, the evidence and the allegations before the Regulatory Decisions Committee, and not the decision, are "the subject-matter of the reference".
>
> 29. The second point is that in the present case the facts and circumstances on which the Authority relies in its statement of case were before the Regulatory Decisions Committee. They are either set out within the decision notice or are recorded in the decision notice as matters on which the Regulatory Decisions Committee did not reach

> a concluded factual finding. In this respect it can be said that the facts and matters before the Regulatory Decisions Committee are the facts and matters relied upon by the Authority for the purposes of the present reference. This is not a case such as that considered in *Parker v FSA* (an unreported decision on a preliminary issue) where a new allegation unconnected with the factual context that gave rise to the original decision was sought to be raised. Nor is the present situation comparable to that found in *Ryder (No.2)* (2006), a Pensions Regulator Tribunal reference. There the matter that Mr Ryder had sought to raise related to factual issues that had not been in front of the Determinations Panel of the Pensions Regulator and therefore formed no part of the body of facts to which the determination notice related.
>
> Emphasis Added

134. It is clear that [28] and [29] of the decision in *Jabre* circumscribe the subject matter of a Reference, the foundations for which must be contained in the Decision Notice. Per [28]: 'the circumstances, the evidence and the allegations before the Regulatory Decisions Committee ('RDC'), and not the decision, are "the subject-matter of the reference"'. The Tribunal explains at [29] that even if findings are not made in the Decision Notice the subject matter may include the allegations which were before the RDC - the facts and circumstances on which the findings were sought by the Authority may form the subject matter of the Reference ie. allegations which were in the statutory notices and made to the RDC may be revived before the Tribunal.

135. The Tribunal in *Jabre* distinguished the facts of *James Parker v FSA* (FSMT, 13 October 2004) where a new allegation unconnected with the factual context that gave rise to the original decision was found to be outside the subject matter of the reference. The *"matter"* referred extends beyond the decision notice to the *"circumstances, the evidence and the allegations before the [RDC]"*, as the Tribunal put it. Hence it included allegations (lack of fitness justifying withdrawal of approvals and prohibition order) which the Authority had included in the warning notice as to fitness and which were therefore before the RDC (and able to be addressed by Mr Jabre). This was even though the RDC had chosen not to rely on them in the decision notice (albeit included as matters on which it chose not to rely). This was why, as the Tribunal reasoned, its decision was consistent with *Parker v FSA*, where the new allegation of market abuse sought to be added had not been ventilated before the RDC nor included in the decision notice, and was therefore not part of the matter referred.

136. *Jabre* is thus authority for the proposition that the *"matter"* which the Tribunal is required to determine is not restricted to the specific decision (i.e. action to be taken by the Authority) contained in the decision notice. *"Matter"* has a broader meaning: it is the allegations in the statutory notices and which were before the RDC, and the circumstances, evidence and facts on which they are based. This accords with procedural fairness and statutory regime by which a party is first given a Warning Notice of the proposed action by the Authority and may make representations on the facts and issues raised before the RDC makes its decisions and gives its reasons as contained within the Decision Notice. At each stage, the regulated person makes an informed decision whether to contest the matter contained in the warning notice before the RDC or to contest the matter contained in the Decision Notice in a reference to the Tribunal knowing clearly what the allegation is.

137. Nonetheless, and non controversially, it is clear that the Tribunal may consider any *"evidence"* relating to the subject matter of the reference, whether available to the Authority at the RDC stage or not: this is expressly provided for in s.133(4) FSMA.

138. In *Allen v Financial Conduct Authority* ([2013] 5 WLUK 766, Upper Tribunal, 30 May 2013) the applicant referred a decision notice which found that he was not a fit and proper person and imposed a prohibition order pursuant to s.56 FSMA. The misconduct set out in the decision notice concerned overcharging insurance broker clients, concealing this conduct and misappropriating money from his employer. In separate High Court proceedings, a witness on whom the Authority proposed to rely before the Tribunal was found to have lied – as was Mr Allen, who was found to have adduced false documents in evidence and colluded with a witness to give false evidence. The Authority sought to amend its case to remove its reliance on the witness and to rely on Mr Allen's misconduct in the related proceedings as further evidence of his being not fit and proper. Mr Allen submitted that these were new allegations, and the amendment should not be permitted. The Tribunal (at [19]) considered the scope of *Parker* and *Jabre*, but rightly distinguished them, while clearly approving their rationale:

> "In this case, I do not consider that the charge made against Mr Allen has changed. My view is that, as recognised by the Tribunal in *Parker*, there is a distinction between an allegation or charge and the evidence relating to it. I consider that the allegation in this case is that Mr Allen is not fit and proper to perform any function in relation to regulated activities because he lacks honesty and integrity. It follows that the 'matter referred' or 'subject-matter of the reference' in this case is whether Mr Allen is a fit and proper person. I regard the circumstances pleaded in the original and amended Statement of Case as evidence that relates to that allegation. The Authority no longer relies on the evidence contained in the original Statement of Case for the reasons set out above. The Authority has not, however, withdrawn its allegation that Mr Allen is not a fit and proper person. The Authority now relies on other evidence which, it says, shows that Mr Allen is not a fit and proper person but the allegation is the same. The factual situation in *Parker* was, in my view, different. In that case, the allegation was of market abuse relating to specific dealings in shares. Market abuse in relation to other share transactions would be a new allegation involving separate misconduct, albeit of the same type. In the case of Mr Allen, the allegation is general rather than specific. The allegation is not that Mr Allan was not fit and proper in relation to a specific transaction or transactions. As the Tribunal held in *Jabre*, it is the allegations made in the Decision Notice and the circumstances on which these are based that comprise the matter referred. The allegation in the Decision Notice was that Mr Allen is not a fit and proper person to perform any function in relation to regulated activities generally because he lacks honesty and integrity. Any evidence that relates to Mr Allen's honesty and integrity, whether or not it was available to the Authority at the time of the Decision Notice, may be considered by the Upper Tribunal."

139. In *Allen* where the allegation of not being fit and proper did not change but other evidence in support of it was introduced on the Reference, the allegation did not fall outside the subject matter of the Reference. A similar distinction was drawn by the Court of Appeal (on appeal from the Tribunal) in *Financial Conduct Authority v Hobbs* [2013] EWCA Civ 918, although given the parties' agreement as to the approach, it received little examination. The Authority appealed the Tribunal's decision upholding a reference concerning a prohibition order, in part on the basis that the Tribunal had not considered its alternative case that the prohibition order was justified in light of the

applicant's lies during the course of the investigation. The Court of Appeal recognised that it was necessary for the allegations as to the Applicant's lies to be part of the *"matter referred"*. The Court of Appeal noted (at [32]) counsels' agreement as to the broad meaning of *"the matter"*: *"The matter' includes the facts and evidence referred to in the decision notice on the basis of which the authority concluded that the person in question was not fit and proper and that a prohibition order was appropriate"*.

140. The Court of Appeal was satisfied that the allegation as to Mr Hobbs' honesty was a basis for the decision (at [34]), and thus that it was incumbent on the Tribunal to consider it as part of the "*matter referred*".

141. The issue was also addressed in *Khan v Financial Conduct Authority* ([2014] UKUT 186 (TCC)), which once again underlines the jurisdictional necessity for any *"fresh"* allegation to have been raised during the RDC process. The Authority's statement of case alleged that the applicant had acted dishonestly in relation to the certification of mortgage applications. The applicant made an application challenging the inclusion of that allegation in the statement of case, on the basis that it was contrary to the findings of the RDC which, he said, only found that he had failed to act with due skill, care and diligence in making the certifications: [77] to [79]. Judge Herrington refused the application but did so on what transpired to be the *"mistaken assumption"* (see [79] and [80]) that the warning notice issued to the applicant had contained the dishonesty allegation (which the RDC had then simply downgraded to a finding of negligence). In fact, at the full hearing of the reference, it emerged that the dishonesty allegation had not been included in the warning notice, or preliminary investigation report: [81].

142. The Authority sought to retain the allegation of dishonesty on a different basis: by submitting that the RDC had in fact raised the issue of dishonesty of its own initiative, including an implicit finding to that effect in one line of the decision notice: [84] and [85]. The Tribunal found as follows:

> "87. As we indicated above this position is not satisfactory. It is to be expected that in normal circumstances the Authority should maintain the same case as it set out in its Warning Notice and on which the subject would have framed his representations before the RDC. As the case of *Allen v FCA* (FS/2012/0019) indicates, there can be a departure from this position where new circumstances come to light after a Warning Notice has been issued but we are not convinced that the subject matter of the reference embraces matters that were raised by the RDC on its own initiative but which do not relate to a change in circumstances without those circumstances having been the subject of a full investigation and the Warning Notice procedure."

143. Paragraphs [28]-[29] of *Jabre* and the later authorities also leave some room for debate as to the position where the precise allegations are not made before the RDC or in the statutory notices, but the allegations raised and relied upon in the reference are based upon the same breach of Statement of Principle and are connected to the factual issues and evidence which were before the RDC and contained in the Decision Notice. That is close to the position in which we find ourselves in this Reference, as we explain below.

144. To the extent that we are required to resolve this, and it was not argued before us, we are satisfied that these passages from *Jabre* and the later authorities are to be

read as follows. In order for the Authority's allegations to form part of the subject matter of the Reference and be considered or determined by the Tribunal, they must be of the same nature and based upon the same factual background as the allegations made to the RDC and contained in the Warning and Decision Notices, even if no findings are made upon them therein.

145. This in no way prevents the Authority, on a reference to the Tribunal, from relying on fresh evidence that was not contained within the Decision Notice in relation to allegations or findings that are contained in the Decision Notice. Section 133(4) of the Act specifically contemplates this and empowers the Tribunal to make findings on a reference based upon evidence that was not available to the decision-maker (in this case the RDC of the Authority) at the time of the decision so long as the evidence relates to the subject matter of the reference.

Application to the facts of this case: The Warning Notice and Decision Notice

146. The Authority's Warning Notice (given to the Applicant for the purpose of 57, 63 and 67 of the Act) is dated 23 July 2020. In so far as relevant, within the summary of reasons at para 2.2 and at paras 4.40-4.41 and 5.2, the Authority warned the Applicant of its proposed findings and decisions:

> 2.2. In the period from 24 November 2015 to 14 October 2017, Mr Markou did not have appropriate oversight of FSE's mortgage business. Mr Markou also failed to take sufficient steps to prevent FSE from transacting mortgage business between 10 July 2017 and 14 October 2017, during which period he was aware that FSE did not have professional indemnity insurance. Mr Markou's conduct placed FSE at risk of being used as a vehicle for financial crime and his conduct did not appropriately protect the interests of consumers.
> …
>
> 4.40. FSE held valid PII cover from 12 May 2016 until 11 May 2017 when it expired and was not renewed. Mr Markou became aware that FSE's PII cover would not be renewed no later than 10 July 2017. However, despite this knowledge, Mr Markou did not take action to ensure that FSE ceased to carry on regulated activities. Between 15 July 2017 and 14 October 2017 FSE's mortgage advisors processed 19 new residential mortgage applications without having PII cover in place.
>
> 4.41. By failing to prevent FSE's mortgage advisors from submitting new mortgage business when he was aware that FSE did not have valid PII cover, Mr Markou put the interests of FSE's mortgage customers at risk; this practice risked causing consumer detriment.
>
> 5.2 Mr Markou demonstrated a lack of integrity during the Relevant Period by recklessly failing to:
> (a) establish, maintain and enforce effective financial crime systems and controls, particularly in relation to the detection and prevention of mortgage fraud;
> (b) establish and practise an appropriate level of oversight and monitoring of FSE's mortgage advisors, particularly in relation to the detection and prevention of mortgage fraud; and
> (c) ensure that FSE's mortgage advisors did not carry on regulated mortgage business beyond the date on which he knew FSE's PII had lapsed.

147. The Authority's Decision Notice dated 29 January 2021 makes the findings in identical terms to the allegations contained in the Warning Notice in the same numbered paragraphs at paragraphs 2.2, 4.40-4.41 and 5.2. As above, it includes the specific

reference to the time period between 10 July 2017 and 14 October 2017 as the time during which the Applicant knew or was aware that FSE did not have PII cover in place.

148. The Decision Notice concludes with the following findings of failures by the Applicant at paragraphs 5.2-5.4:

> **Failure to comply with Statement of Principle 1**
> 5.2. Contrary to Statement of Principle 1, Mr Markou demonstrated a lack of integrity during the Relevant Period by recklessly failing to:
> (a) establish, maintain and enforce effective financial crime systems and controls, particularly in relation to the detection and prevention of mortgage fraud;
> (b) establish and practise an appropriate level of oversight and monitoring of FSE's mortgage advisors, particularly in relation to the detection and prevention of mortgage fraud; and
> (c) ensure that the mortgage advisors did not carry on regulated mortgage business beyond the date on which he knew FSE's professional indemnity insurance had lapsed.
>
> 5.3. Mr Markou knew the regulatory standards required in relation to FSE's mortgage business as the Authority had, prior to the Relevant Period, repeatedly communicated serious concerns relating to FSE's financial crime systems and controls and oversight arrangements. While Mr Markou had satisfied the Authority that he had addressed these concerns on two previous occasions, by the time of the May 2017 Visit, Mr Markou had permitted FSE to revert to practices in relation to which the Authority had previously expressed serious concerns. In doing so, the Authority considers that Mr Markou closed his mind to the obvious risks created by his conduct.
>
> **Lack of fitness and propriety**
> 5.4. As a result of having demonstrated a lack of integrity, as set out above, the Authority considers that Mr Markou is not a fit and proper person to perform any functions in relation to any regulated activities carried on by an authorised or exempt person, or exempt professional firm.

149. The Decision Notice itself makes absolutely no reference to any allegations of the Applicant failing to deal transparently with the Authority or the FSE Tribunal and makes no allegations that he recklessly or otherwise misled the Authority and FSE Tribunal. The most relevant mention of the FSE Tribunal is set out in Annex 3 to the Decision Notice which summarises the representations it had received on issue estoppel and abuse of process from the Applicant and the Authority's conclusions thereupon. However, there is no reference to the evidence that the Applicant gave in those proceedings or any suggestion that it was misleading, reckless or lacked integrity.

150. The Decision Notice also records at paragraph 8.4 that 'Mr Markou has the right to refer the matter to which this Notice relates to the Tribunal'. We are therefore satisfied that it is the allegation, evidence and findings contained in the Decision Notice as identified above (which replicate those of the Warning Notice) that are the subject matter of this Reference.

The Authority's Statement of Case

151. The Authority subsequently produced a Statement of Case for these proceedings (as required by the Tribunal Procedural Rules) dated 24 March 2021. The allegation regarding PII at paragraphs 12.3 and 12.5 of the Statement of Case go beyond the scope of the evidence, allegations and findings in the Authority's Warning notice and Decision notice.

152. Paragraphs 12.1-12.5 of the Statement of Case allege that the Applicant should have:

> 12.1. established, maintained and enforced effective financial crime systems and controls, particularly in relation to the detection and prevention of mortgage fraud;
> 12.2. established and practised an appropriate level of oversight and monitoring of FSE's mortgage business, particularly in relation to the detection and prevention of mortgage fraud;
> 12.3. ensured that FSE did not carry on regulated activity in relation to mortgage business without professional indemnity insurance in place;
> 12.4. ensured that FSE's mortgage business did not revert to previous non-compliant practices in relation to which the Authority had previously expressed serious concerns;
> 12.5. dealt transparently with the Authority and the Upper Tribunal in relation to the explanations given by him as to the extent of FSE's "trading" activity following the Authority's supervisory visit on 9 May 2017.

153. Paragraph 12.3. and 12.5 of these grounds expand upon the allegations, evidence and findings contained in the Authority's Warning Notice and Decision Notice regarding PII. The allegation in paragraph 12.3 broadens the alleged failure to one of preventing any regulated business being conducted by FSE without PII (after 10 May 2017). It is also to be noted that paragraph 12 is contained within the section of the statement of case titled 'Fact and Matters - FSE background and structure' and is not within the formal pleadings.

154. It is noteworthy that the alleged failings at paragraph 12.1-12.5 are not replicated in the more pertinent pleaded grounds within the Statement of Case. Paragraphs 50-51 of the Authority's Statement of Case are directed to PII under the heading 'submission of new mortgage business without PII in place'. These paragraphs are almost identical to paragraphs 4.40-4.41 of the Warning Notice and Decision Notice and are more limited than paragraph 12.3:

> 50.FSE held valid PII cover from 12 May 2016 until 11 May 2017 when it expired and was not renewed. The Applicant became aware that FSE's PII cover would not be renewed no later than 10 July 2017. However, despite this knowledge, the Applicant failed to ensure that FSE ceased to carry on regulated activities. Between 15 July 2017 and 14 October 2017 FSE's mortgage advisors processed 20 new residential mortgage applications without having PII cover in place (contrary to MIPRU rule 3.2.1). The transaction of mortgage business, including the submission of applications to lenders, is a regulated activity under the Regulated Activities Order.
>
> 51. By failing to prevent FSE's mortgage advisors from submitting new mortgage business when he was aware that FSE did not have valid PII cover, the Applicant put the interests of FSE's mortgage customers at risk and this practice risked causing consumer detriment.

155. The allegation within paragraph 12.5 was developed in much greater length later in the Statement of Case at paragraphs [56]-[65] in the following terms:

> 56. In the view of the Authority, the Applicant has not been transparent to the Authority (including the RDC) and to the Upper Tribunal as to the regulated activities that FSE carried on without PII in place.
> 57. The Applicant said in oral evidence to the FSE Tribunal (and the FSE Tribunal accepted) that FSE "*did not trade".* However, the evidence (and finding of the FSE Tribunal) that FSE "*did not trade"* appears to mean (only) that FSE did not accept any "*new business*".

58. This appears from the following:
58.1. FSE's counsel before the FSE Tribunal said that there was a "*cessation of regulated activities"* after 9 May 2017.
58.2. The Applicant said in cross-examination:
"That was because since the 9 May 2017, I stopped trading because I was more or less told -- well I was told, basically, that I shouldn't trade any longer until the matter is resolved. I have not traded -- there's been no new business from 9 May 2017 and the actual PII ended on 12 May but, actually, it wasn't until July that they confirmed that they were not renewing."
58.3. However, the Applicant repeated at various times the evidence that FSE "*did not trade"* without any qualification.
58.4. The FSE Tribunal found as fact that FSE "*did not trade":* FSE Tribunal Decision [4], [62], [66], [68], [69], [88].
59. It follows, therefore, that the Applicant, directly and through his counsel, has adopted inconsistent positions. The Authority considers that the assertion that FSE "*did not trade"* was misleading by omission as the Applicant should have been clear that FSE in fact carried on regulated activities beyond 9 May 2017 without PII in place and indeed beyond 10 July 2017 (the date on which the Applicant knew the PII had expired and would not be renewed). The Applicant has provided unclear and contradictory evidence regarding this activity.
60. In particular, in paragraph 19 of his written submissions to the RDC dated 11 September 2020, the Applicant stated: "*FSE did not submit any new mortgage business after 9 May 2017. The only money received to matters dealt with prior to 9 May 2017 and related to fees earned prior to this date."* As the Applicant confirms in paragraph 21, FSE submitted mortgage applications after 9 May 2020 where FSE had received (or, it appears, invoiced) fees prior to that date.
61. In his skeleton argument dated 16 November 2020 (prepared by counsel), the Applicant asserted (at paragraph 7) that "*it was central to the case before the UT…whether or not FSE did carrying* [sic] *out regulated activities after its PII cover lapsed*…" See also paragraph 13. At paragraph 14, it was asserted that:
"Even if Mr Markou is incorrect in respect of whether there was a direct finding on this issue, it was a matter which the FCA could have introduced evidence upon, and as such it is now an abuse for the FCA to attempt to assert that it can prove this issue to a finding which would be in direct conflict with the UT's finding that FSE was not trading at the material time."
62. By asserting "*abuse"* the Applicant appears to suggest that the Authority should not be permitted to rely on facts that are now accepted by the Applicant to be true, namely that FSE was indeed submitting mortgage applications (and thereby carrying on regulated activity) after 9 May 2017, despite his denial that it was "*trading*". That is untenable.
63. Taking all factors into consideration, the Authority considers that the Applicant now acknowledges that FSE was carrying on regulated activities at the material time and accordingly the Authority considers that his evidence to the FSE Tribunal was inaccurate by omission.
64. It also follows that the references in the FSE Judgment to FSE "*not trading"* after 9 May 2017 can, in context, only mean that FSE had not accepted new business (which is the basis upon which the Applicant used the expression in part of his evidence, albeit inaccurately).
65. For the avoidance of doubt, the Authority does not suggest that the FSE Tribunal would have reached any different decision having regard to the issues before it.

156. The Authority's Statement of Case returns to the issues in the more limited terms found in the Decision Notice in its conclusion at paragraphs 67-68:

67. Contrary to Statement of Principle 1, the Applicant demonstrated a lack of integrity during the Relevant Period by recklessly failing to:

67.1. establish, maintain and enforce effective financial crime systems and controls, particularly in relation to the detection and prevention of mortgage fraud;
67.2. establish and practise an appropriate level of oversight and monitoring of FSE's mortgage advisors, particularly in relation to the detection and prevention of mortgage fraud; and
67.3. ensure that FSE's mortgage advisors did not carry on regulated mortgage business beyond the date on which he knew FSE's PII had lapsed.

68. The Applicant was aware of the regulatory standards required in relation to FSE's mortgage business as the Authority had, prior to the Relevant Period, repeatedly communicated serious concerns relating to FSE's financial crime systems and controls and oversight arrangements. While the Applicant had satisfied the Authority that he had addressed these concerns on two previous occasions, by the time of the May 2017 Visit the Applicant had permitted FSE to revert to practices in relation to which the Authority had previously expressed serious concerns. In doing so, the Authority considers that the Applicant ignored the obvious risks created by his conduct.

Lack of fitness and propriety
69. As a result of having demonstrated a lack of integrity, as set out above, the Authority considers that the Applicant is not a fit and proper person to perform any functions in relation to any regulated activities carried on by an authorised or exempt person, or exempt professional firm.

Are the allegations within paragraph 12.5 of the Statement of Case within the subject matter of the Reference?

157. Mr Rees Phillips notes that the Authority's skeleton argument for the hearing records the 'new' allegation which is to be found at paragraph 12.5 of the Statement of Case concerning the Applicant 'not dealing transparently' with the Authority and Tribunal as to the extent of FSE's trading following 10 May 2017. The Authority relies on this as going to the Applicant's integrity.

158. He submits that this is not a matter the RDC considered as an allegation or in its findings as amounting to misconduct showing an alleged lack of integrity (see para 5.2 of the Warning Notice and Decision Notice). Further it was not a matter the Authority addressed in its Statement of Case in its conclusion at paragraph 67. He submitted that, in so far as there is any discussion of it at paras 52-65 of the Authority's Statement of Case, 'not being transparent' appears to relate solely to the Applicant's conduct in the previous proceedings before the FSE Tribunal in 2020, not to conduct occurring during the 'Relevant Period' of 24 November 2015 – 14 October 2017 which is the subject matter of the Authority's decisions referred to the Tribunal in these proceedings.

159. He invited the Tribunal to discount this new freestanding allegation of misconduct. He submitted that whilst the Tribunal can take account of all facts before it, it would be quite wrong for the Authority to now be permitted to make new allegations against the Applicant when they occurred before and could easily have been a matter determined by the RDC decision, but which were not. All the allegations within paragraph 12.5 of the Statement of Case on which the Authority seeks to rely occurred between February and November 2000, before the RDC's decision notice dated January 2021.

160. The Tribunal was invited to accordingly limit its consideration to the decision of the Authority referred to it, namely the three matters set out at para 5.2 of the of the Decision Notice, which are reflected in paragraph 67 Statement of Case, and to the sanctions applied to the Applicant as a result.

161. Mr Rees Phillips did not refer to *Jabre* and the later authorities, but it flows from his argument that the subject matter of the Reference regarding PII is the allegations and findings contained in the Warning Notice and Decision Notice. Therefore, the allegations in paragraph 12.5 of the Statement of Case should not fall to be determined within the Reference.

162. To the extent he addressed this directly, Mr Brown submitted that the allegations were connected to the same facts and circumstances regarding FSE trading without PII as set out clearly in the Warning Notice and Decision Notice. The allegations go to the Applicant's integrity and are further examples of recklessness founded in the same evidential matrix. Where the Applicant had changed his evidence and position in the various sets of proceedings on the issue of FSE's trading without PII, the Authority should not be prevented from arguing, and the Tribunal from finding, that he had previously given misleading evidence to the FSE Tribunal and Authority.

Conclusion on paragraph 12.5

163. We accept the submissions of Mr Rees Phillips – there was no mention of the allegation that the Applicant failed to deal transparently with the FSE Tribunal and Authority as alleged in paragraph 12.5 (and 56-65) of the Statement of Case within the Warning Notice nor Decision Notice of the Authority. There was no reference within the Decision Notice even to the evidence upon which the allegation was based (the evidence of the Applicant to the FSE Tribunal in February 2020, its findings thereupon in April 2020 or the submissions made to the RDC between September 2020 and November 2020). The facts and evidence all concerned events which took place well before the Decision Notice and could have been raised before the RDC and decided. 'Failing to deal transparently' was an allegation of entirely different nature, category or type from those put to and considered by the RDC and contained in the Decision Notice. The fact that it is another allegation of breach of Statement of Principle 1 (recklessly acting without integrity) is not sufficient in itself. It is a separate and factually distinct allegation.

164. Even though neither party referred us to the case of *Jabre,* and other authorities, applying our interpretation thereof to section 133(4) of the Act, the evidence and allegations pursued by the Authority at paragraphs 12.5 and 56-65 of the Statement of Case are not within the subject matter of this Reference. Further, they were matters that were available to the Authority and could reasonably have been pursued before the RDC should the Authority have chosen. In addition, the allegations do not concern the Relevant Period 24 November 2015 to 14 October 2017 that fell within the Authority's investigation and enforcement proceedings.

165. None of the allegations in paragraphs 12.5 and 56-65 were canvassed before the RDC nor were contained in the Authority's Decision Notice dated 29 January 2021. The Decision Notice post dated the previous FSE Tribunal hearing and decision in February - April 2020 and submissions made to the RDC in September to November 2020. There was no allegation, evidence or finding in the Warning notice nor Decision Notice that the Applicant 'failed to deal transparently' with the Authority and the Upper Tribunal in relation to the explanations given by him as to the extent of FSE's "trading" activity following the Authority's supervisory visit on 9 May 2017'.

166. Thus, even though we have rejected the Applicant's objections based on issue estoppel and abuse of process, we have decided that the allegations regarding the Applicant's previous evidence to the FSE Tribunal and the Authority on the topic of FSE's lack of PII (as alleged in paragraph 12.5 of the Statement of Case) should be excluded from consideration in this reference. The allegations are outside the subject matter of the reference and we have no jurisdiction to hear them.

167. We are satisfied that, even though the new allegations are connected to the same background circumstances, regarding the absence of PII, they are not based upon the same facts as the allegations pursued before the RDC and those pursued in the Statement of Case. They involve new facts, evidence and circumstances concerning the Applicant's communications with the RDC and evidence before the Tribunal. Even if there were a sufficient factual connection to the allegations in the Decision Notice, the evidence, allegations and findings were of a different nature, category or type, than a 'failure to deal transparently'. The allegations in paragraph 12.5 are therefore outside the scope of the subject matter because they were not addressed in the allegations, evidence or findings in the RDC proceedings, Warning and Decision Notices.

Paragraph 12.3 of the Statement of Case

168. Mr Rees Phillips concentrated his objection to our hearing and determining the allegation in paragraph 12.3 of the Authority's Statement of Case on the grounds of issue estoppel / res judicata / abuse of process. This was on the basis that the FSE Tribunal had already made findings that FSE did not conduct any or any new business after 10 May 2017 when PII was no longer in place. We have rejected this objection for the reasons set out above - we find these principles do not apply so as to bar the Authority from pursuing the allegation.

169. However, he also raised a further objection about the scope of paragraph 12.3 of the Authority's Statement of Case on a similar basis to his objection to paragraph 12.5. He submitted that the misconduct found by the Authority's RDC, set out in the Decision Notice dated 29 January 2021, is limited to the finding that mortgage applications were submitted after 10 July 2017 when the Applicant knew that PII was not in place (because he was told the cover was not being renewed).

170. This is to be contrasted with the rather broader allegation in paragraph 12.3 of the Statement Case that the Applicant failed to ensure that no regulated business was conducted by FSE after PII had lapsed (expired) on 10 May 2017.

171. Mr Rees Phillips therefore submitted that the relevant allegation for the Tribunal to determine is not whether the Applicant failed to ensure that no new mortgage applications were submitted by FSE after 10 May 2017 when cover lapsed (as pleaded in the Authority's Statement of Case). Instead it is whether the Applicant failed to ensure that no new mortgage applications were submitted after 10 July 2017 when he knew FSE no longer benefitted from PII (as found in the Authority's Decision Notice).

172. Mr Rees Phillips in his opening and closing submissions invited us to compare the nature of the allegations, evidence and findings in the Authority's Decision Notice and the Statement of Case as we have done. His general submission was that we are limited to considering the allegations, evidence and findings that were within the scope of the Decision Notice because they are the subject matter of the Reference and this does not include the broader allegation regarding PII in paragraph 12.3 of the Statement of the Case. This broader allegation was available to the Authority and could have been raised before the RDC.

173. By implication, and although not argued by reference to *Jabre* and the other authorities, Mr Brown submitted that the scope of the Authority's determination and findings in the Decision Notice was in relation to the same factual circumstances regarding the Applicant failing to ensure that FSE's mortgage advisors did not conduct regulated mortgage business when it did not hold PII. Hence, the matter referred to the Tribunal encompassed the allegation that the Applicant failed to ensure that no mortgage applications were submitted by FSE after 10 May 2017 when PII cover lapsed.

Conclusion on paragraph 12.3

174. We reject the technical textual point, which Mr Brown pursues, that paragraph 5.2(c) of the Decision Notice and 67.3 of the Statement of Case could be referring to 10 May 2017 as the day the PII expired (or lapsed) as opposed to 10 July 2017 when the Applicant knew it was no longer in place (that it would not be renewed).

175. We are satisfied that paragraph 5.2(c) of the Decision Notice and paragraph 67.3 of the Statement of Case must be referring to the date after 10 July 2017 when the Applicant knew that FSE's PII had lapsed. Reading all the paragraphs of the Decision Notice and Statement of Case together and considering their natural meaning, the pleadings are referring to the Applicant's state of knowledge and the time period after 10 July 2017. Paragraphs 2.40-2.41 of each of the Warning Notice and Decision Notice and 50-51 of the Statement of Case make the point explicitly.

176. The Authority's Decision Notice only makes a finding regarding the Applicant's failures in the period after 10 July 2017 at a time when it is agreed that the Applicant knew FSE no longer had PII in place. The Authority has never alleged that the Applicant knew that there was no longer PII in place as of 10 May 2017. It accepts that he was only informed by his insurers as of 10 July 2017 that it had not been renewed.

177. We accept that the allegation at paragraph 12.3 of the Statement Case beginning from the lapse of the PII (10 May 2017) is not a specific allegation contained within the Decision Notice. We accept there is some difference based upon the Applicant's state of knowledge. The reason for this is understandable - the Applicant's state of mind is key to an allegation of lacking integrity. The Authority is alleging recklessness and sought to concentrate on the Applicant's awareness of not having PII in the time after 10 July 2017.

178. Nonetheless, the allegation of the Applicant's reckless failure to prevent regulated business occurring without PII occurred from 10 May 2017 is an extension to and is factually connected to the allegation and decision in the Decision Notice that there was a reckless failure from 10 July 2017 when he knew of the absence of PII. The undisputed subject matter is that the Applicant failed to ensure the mortgage advisors did not conduct regulated business in the period following 10 July 2017 when the Applicant 'knew' that PII was no longer in place. The only difference is the extent of the time period and the Applicant's state of knowledge.

179. While the allegation in paragraph 12.3 of the Statement of Case is broader than the allegation in paragraph 5.2(c) of the Decision Notice, it is not a new allegation. It is based upon the same evidence and facts which were in the warning and decision notice and before the RDC. The allegation from 10 May 2017 concerns the same circumstances - that the Applicant's reckless failures to prevent regulated business being conducted without PII. It is of the same nature – recklessly failing to prevent mortgage advisors conducting regulated business without PII in the period following 10 May 2017. It concerns a failure to comply with the same Statement of Principle and on the same basis - a breach of Principle 1 - a lack of integrity based on recklessness. It is an allegation based on breach of the same Principle, on the same basis, over a similar time period and on the same facts. Therefore, we are satisfied that the allegation is within our jurisdiction to consider and paragraph 12.3 of the Statement of Case falls within the subject matter of the reference.

180. To the extent that there would be any discretion to exclude the allegation in paragraph 12.3, even though it is within our jurisdiction, we would admit it as being just and fair to do so under the overriding objective under Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008. We admit the evidence in support for the purposes of Rule 15(1)(a) & (b) as being in the interests of justice. If necessary, we would have amended paragraph 67.3 of the Statement of Case to permit it under Rule 5(3)(c) applying the relevant factors set out in *Bittar v Financial Conduct Authority* [2017] UKUT 82 (TCC) at [55]:

> "the timing and circumstances in which the proposed amendments are advanced; whether there is a good reason why the relevant allegations were not advanced sooner; and whether the proposed amendments have been formulated with sufficient clarity and particularity".

181. Any required amendment to the Statement of Case is sufficiently clear and particular. The allegation is relevant to the issues in the case because it concerns the

subject matter of the reference. There is relevant evidence already admitted in support of the allegation. The Applicant had a fair opportunity to dispute the matter both before the RDC and before the Tribunal – calling evidence to deny it and making legal submissions on estoppel and abuse of process. There has been sufficient notice of the allegation and full opportunity to contest it such that the Applicant has not been prejudiced. The timing and circumstances are brought about because of the nature of the objection taken at trial when it might have been taken at any time before on the pleadings.

182. Therefore, we are not satisfied that the subject matter of this Reference excludes paragraph 12.3 of the Statement of Case in the way the Applicant submits nor that the allegation upon which the Authority may rely is so limited. The Authority is not limited simply to the allegation in paragraph 5.2(c) in the Decision Notice. The facts, evidence and allegations upon which it now relies are contained within the Decision Notice and form part of the facts, evidence or allegations therein. The allegation in paragraph 12.3 is very closely factually connected and of the same nature to that in the Decision Notice – recklessly failing to prevent the mortgage advisors conducting regulated business without PII in place in the period following May 2017.

183. We are therefore satisfied that the subject matter of the Reference concerns the Authority's evidence and allegation that the Applicant recklessly failed to ensure the mortgage advisors did not conduct regulated business in the period following 10 May 2017 when no PII was no longer in place (paragraph 12.3 of the Statement of Case). The subject matter of the Reference is not simply that contained in the Warning Notice and Decision Notice (at paragraphs 2.40-41 and 5.2(c)) and the latter paragraphs of the Statement of Case (50-51 and 67.3). The allegations and surrounding circumstances which are the subject matter of the reference are identified above.

184. The allegations to be determined when considering paragraph 12.3 of the Statement of Case are: a) whether the Applicant recklessly failed to ensure that the mortgage advisors did not carry on regulated mortgage business after FSE's professional indemnity insurance lapsed (10 May 2017); and b) beyond the date on which he knew would not be renewed (10 July 2017).

Conclusion on jurisdiction to determine paragraphs 12.3 and 12.5 of the Statement of Case

185. In conclusion, we have found that the allegations in paragraph 12.3 of the Authority's Statement of Case are within the subject matter of the reference but that the new allegations in paragraph 12.5 are not within the subject matter of this reference, thus not within our jurisdiction to determine.

186. Nonetheless, because it was not argued in the context of section 133(4) or *Jabre* or the authorities, and in the event that we are wrong in our interpretation, we have admitted the evidence and considered the allegations in paragraph 12.5 as factual issues. We have gone on to determine these allegations and make findings of fact having heard all the evidence during the hearing.

187. For the reasons set out below, having admitted all the evidence on the allegations in paragraphs 12.3 and 12.5, we have made findings which reject the Authority's case on both grounds. We are not satisfied that: the Applicant acted recklessly in failing to ensure that FSE did not conduct regulated business without PII after 10 May 2017 nor after 10 July 2017; nor are we satisfied that he recklessly failed to deal transparently with the Authority nor FSE Tribunal nor gave misleading evidence to them as to the extent of FSE's trading after 10 May 2017. Therefore, we have found that he does not lack integrity.

188. Thus, our hard-edged decision on jurisdiction - the subject matter of the reference - is not decisive of the outcome of the case due to the facts we have gone on to find. Therefore, we did not invite further submissions from the parties on the jurisdictional issue.

The parties' submissions on the facts

189. Having addressed the issues of law and the parties' submissions thereupon, we turn to their submissions on the facts. Most of the parties' submissions are subsumed within our findings of fact below where we consider the allegations, make findings of fact on the evidence and give reasons for rejecting any evidence from witnesses. We therefore provide only brief overviews in this section.

The Authority's submissions

190. Mr Brown submitted that each of the grounds on which the Authority relied in its Decision Notice and Statement of Case had been established on the balance of probabilities. The Applicant was guilty of reckless failings and therefore lacked integrity whether each failure was considered individually or cumulatively.

191. He submitted that all of the Authority's witnesses were reliable and made reasonable concessions during their oral evidence. In addition, he argued that the evidence of Ms Jalkiewicz ("AJ") and Ms Jozwik ("JJ"), FSE's former mortgage advisors, was to be preferred over that of the Applicant. Their evidence established that the Applicant was the responsible and approved individual who had failed to monitor, supervise and train them when carrying out regulated activities throughout the Relevant Period. He had failed to implement financial crime policies and exposed lenders to a high risk of mortgage fraud.

192. Mr Brown contended that AJ and JJ's evidence was consistent with the lack of contemporaneous documentation produced by the Applicant to support his account. He submitted that the two witnesses were reliable and credible. This was revealed by their able performance under cross examination, bearing in mind it was not a memory test. They were not even challenged on a number of points upon which the Applicant relied. Mr Brown suggested their evidence revealed the Applicant's attitude was one of regulatory non-compliance. Mr Brown relied on the sheer number of inconsistencies that had not been highlighted by the advisors and the Applicant in the mortgage file reviews which revealed a sustained failure and lack of training, supervision and oversight over his advisors.

193. Mr Brown submitted that throughout the period between 2011 and 2017 the Applicant only took any action towards compliance with basic regulatory requirements when the Authority intervened by way of supervisory investigation or enforcement investigation and action. Whenever the Applicant was no longer subject to the Authority's supervision – such as by 24 November 2015 - he would revert to his previous poor practices.

194. Mr Brown contended that the Applicant's oral evidence was not reliable. He relied on the fact that the Applicant's witness statement dated 25 April 2022 contained almost no evidence in response to any of the allegations at paragraphs 12.1-12.5 of the Authority's Statement of Case dated March 2021. The Applicant's minimal written evidence in chief was telling – the Tribunal could safely draw inferences that he did not wish it to be tested in cross examination. It also revealed that Applicant failed to engage with the proceedings. If he was in any way unsure about the scope of the Authority's case he could have sought clarification. This undermined his reliability.

195. Mr Brown also relied on the fact that the Applicant stated during oral evidence that he could produce more contemporaneous documents to support his case than the ones he had supplied – such as more minutes of meeting with his mortgage advisors. Yet the Applicant had had plenty of opportunity to do so in the proceedings prior to the hearing. Mr Brown submitted that there was no dispute that the Applicant had ultimate responsibility for devising and implementing FSE's procedures and policies, monitoring, supervising and training his staff and having PII in place for all regulated business conducted. However, there were consistent failures in each of these activities. He argued that it would be excessively generous to find that the Applicant was only incompetent or careless when the evidence was that there very large shortcoming and the Applicant had demonstrated an attitude of recklessness throughout towards his obligations to the Authority.

196. Mr Brown therefore invited us to uphold all the findings in the Decision Notice, finding all the allegations established on the balance of probabilities. He invited us to dismiss the reference thus upholding the financial penalty, withdrawal of approval and prohibition order against the Applicant.

The Applicant's submissions

197. Mr Rees Phillips made submissions on behalf of the Applicant. He contended that the three allegations of misconduct made against the Applicant are only those set out at para 5.2(a)-(c) of the Decision Notice. The sole question in respect of each of the same is whether the Applicant demonstrated a lack of integrity by acting recklessly, namely, in each case:

i. Was he aware of the risk the Authority alleges?
ii. If so, was it unreasonable to take that risk having regard to the circumstances as he knew or believed them to be?
iii. If so, did that recklessness amount to a lack of integrity?
iv. If he did lack integrity, what sanction should be applied?

198. In respect of these allegations, he submitted that FSE's financial crime policies were robust and implemented. The same applied to the Applicant's supervision and training of his mortgage advisors. It had never been established that there had been any mortgage fraud in respect of any of the client files reviewed or otherwise.

199. He argued that the Applicant had supplied a number of contemporaneous documents which supported his case. These were to be preferred over the memories of AJ and JJ which were inevitably less reliable due to the passage of time some 5 years later. The witnesses were understandably mistaken at times, for example stating they had never seen documents that in fact they had countersigned.

200. Mr Rees Phillips submitted that the Applicant was an honest and reliable witness who also made reasonable concessions. The absence of evidence from the Applicant's witness statement dated 25 April 2022 addressing most of the allegations against him was explained by the absence of clear and particularised allegations against the Applicant at that time. It was not made clear whether the financial crime policies of FSE were inadequate in themselves or improperly implemented until the Authority's skeleton argument served just before the hearing and there was no specificity in the Authority's pleadings. The same applied to the absence of particularised allegations regarding the mortgage file reviews and lack of oversight of the two mortgage advisors (whose statements were only served in March / April 2022).

201. He asked the Tribunal to bear in mind that much of the evidence now relied upon had been available to the Authority since 2017/2018 and had been able to be set out in the Supervision investigation feedback letter of 9 June 2017. However, there were no particularised allegations the Enforcement Submissions documents for the RDC (September to November 2020), the Enforcement Warning Notice (July 2020), the RDC Decision Notice (dated January 2021) and the Statement of Case on this reference (dated March 2021). This was remarkable. All of these earlier documents largely make blanket assertions as to the Applicant's conduct without tying those alleged failings either to any evidence or even the standard to which the Authority suggested he should be held.

202. He submitted that it was only in the course of the reference hearing that the Authority had confirmed that it was content with the documents forming the FSE's financial crime and mortgage fraud policies and procedures, and its concerns were limited to the level to which these were applied in practice. The Authority's skeleton argument dated 31 October 2022 was the first time that the Authority had set out any detailed statement addressing what evidence it relied upon in support of the specific breaches asserted against the Applicant. Therefore, the Tribunal should judge the Applicant's evidence by reference to the Authority's prior omissions.

203. Mr Rees Phillips also suggested that there were hurdles in relation to proving misconduct against the Applicant which the Authority had failed to surmount. First, the Authority had failed to identify the underlying standard to which the Applicant should be held to account. Second the Authority had failed to particularise what was asserted by way of breach of that standard and the third was the lack of evidence that demonstrated any breach.

204. In the event that the Tribunal dismissed the Applicant's arguments on the substantive issue on the reference, Mr Rees Phillips invited us to vary the sanction imposed. He argued that the Applicant's conduct was plainly not as significant, impactful or as deficient as the Authority contend. The Authority's determination of a

sanction of a fine of £25,000, withdrawal of approval for controlled functions, and prohibition on supervision of regulated activities, were all plainly excessive.

205. In the circumstances, he invited the Tribunal to direct the Authority to reconsider its decisions with a direction to consider the Applicant's alleged failings only to warrant supervisory action and to permit FSE to re-commence trading under his supervision. In particular, where the Applicant had made no personal revenue or profit from FSE, a fine of £25,000 was particularly unwarranted.

Findings of Fact

206. We make following findings of fact on the balance of probabilities within this fact-finding section. Where relevant, we provide our reasons for not accepting any of the evidence that has been given reminding ourselves that the burden of proof is upon the Authority. It goes without saying that it is not necessary to refer to every piece of evidence but we only refer to evidence where there is a relevant factual issue in dispute. We have made findings not only of primary fact, but secondary findings such as inferences from primary facts, and the consequential evaluative judgments and conclusions that are derived from the findings.

Pen portraits – assessment of the Authority's witnesses

207. At this stage, we provide a brief overview of the Authority's four witnesses who were also its employees and gave oral evidence during the hearing. We will provide assessments of the remaining three and key witnesses – the two mortgage advisors and the Applicant – at the appropriate point below.

208. All of the following four witnesses of the Authority were honest and credible in their evidence and sought to assist the Tribunal to the best of their ability.

209. Gemma Clarkson gave evidence in relation to the interactions between the Authority and the Applicant and the Supervisory History of FSE from 2011 to 2014 prior to the Relevant Period. We found her evidence to be reliable and rely upon it below.

210. Lucy Castledine oversaw the team responsible for supervising FSE between April 2017 and October 2019. She explained the Authority's expectations of a mortgage brokerage firm and its management, the need for PII, risks in the mortgage broking sector and the Authority's approach to supervising firms and resolving issues. She then traced the history of supervision of FSE and the Applicant between 2011 until the referral to Enforcement in November 2017. Again, we found her evidence to be reliable.

211. Richard Topham gave evidence regarding the Relevant Period and the Authority's investigation of the Applicant between 24 November 2015 to 14 October 2017. He explained the roles of the Authority's Supervision and Enforcement divisions. This included the process for making a referral to Enforcement, the process for an Enforcement case and the Op Bessemer investigation into the Applicant and FSE. He outlined the nature of the investigations and allegations and the enforcement proceedings taken against FSE between 2018 and 2021 for failure to comply with the

Threshold conditions and non-payment of Regulatory fees. He explained that the FSE matter was accepted by the Threshold Conditions team in September 2018 which paused the enforcement investigation into FSE's conduct but continued with the case against the Applicant. The investigation team closed the investigation into FSE's conduct on 15 January 2021. He explained the Authority's approach to enforcement outcomes and penalties available including private warnings, financial penalties and prohibition orders. We accepted his evidence as reliable.

212. Paul Williams gave evidence as the manager of the team which supervised FSE between April 2013 and March 2018. He set out the history of the Authority's Supervision from 2014 including the Voluntary Variation of Permission (VVOP), the use of independent compliance consultants for FSE, meeting with the Applicant and lifting of the requirements in December 2014. He outlined the Authority's desk-based review of FSE's files in July 2015, IFL (Information From Lenders) reports in October 2016 and March 2017, the Authority's visit to FSE's office on 9 May 2017 and supervisory feedback letter dated 9 June 2017. We accept that his evidence as to the primary facts was reliable. However we do not accept the inferences he drew nor his conclusions of failings that the Authority now relies upon against the Applicant. We disagree with his evaluative conclusions for the reasons set out below.

Prior to the Relevant period

FSE background and structure

213. FSE was incorporated on 29 November 2001. The Applicant is its sole director and shareholder. FSE was authorised by the Authority to advise on and arrange regulated mortgage contracts on 9 November 2004. These activities account for the majority of FSE's business but FSE was also authorised to advise on and arrange retail non-investment insurance contracts. It is the mortgage business of FSE that is the subject matter of the Authority's Decision Notice and this Reference.

214. The Applicant was approved by the Authority on 9 November 2004 to perform the CF1 (Director) and CF3 (Chief Executive) controlled functions at FSE. The Applicant was approved to perform the CF1 (Director) and CF3 (Chief Executive) controlled functions at FSE until 8 December 2019. Since 9 December 2019, and until the Decision Notice in January 2021, pursuant to the introduction of the Senior Managers and Certification Regime, the Applicant was approved to perform the SMF1 (Director) and SMF3 (Chief Executive) controlled functions at FSE.

215. Since 2004, including throughout the Relevant Period from 24 November 2015 to 14 October 2017, the Applicant was responsible for establishing and maintaining FSE's systems and controls and for maintaining proper oversight of FSE's business, including in relation to the detection and prevention of financial crime.

216. The Applicant has undertaken some but minimal training in financial services. He does not hold the CeMAP qualification. He has several other business interests and in the Relevant Period was a director of seven other companies in the UK (five throughout, with two further appointments during the Relevant Period), some of which businesses operated from the same premises as FSE. He has previously been a director of multiple other UK companies. His professional experience is primarily confined to

the provision of legal and dispute resolution services. He describes himself in his witness statement as a "*businessman, voluntary charity worker, Litigation and property manager".* He works part-time for AJ Angelo Solicitors, who represented him in the Reference.

FSE's Regulatory History

217. The Authority's interventions in relation to FSE's mortgage business date back to February 2011, many years prior to the Relevant Period.

218. Although the matters below were not relied on within the Decision Notice, the Authority submits that these repeated instances of close supervision of FSE by the Authority demonstrate the Applicant's knowledge of the risks arising from his conduct during the Relevant Period.

219. We make the following findings.

2011-2012 the voluntary variation of permission, the first investigation and warning letter

220. The Authority visited FSE on 9 February 2011 and highlighted concerns about FSE's financial crime systems and controls.

221. In March 2011, the Authority invited the Applicant to apply for a voluntary variation of permission ("VVOP"). The Applicant stated that he considered that there was no need to remedy anything and that he had contacted the office of the Chancellor of the Exchequer. He subsequently followed this up with a further email stating that a temporary suspension would cause financial hardship.

222. In May 2011, the Authority sent the Applicant a feedback letter setting out concerns regarding FSE's compliance.

223. In July 2011, the Authority notified the Applicant that it had opened an investigation into FSE.

224. On 5 December 2011, on the application of FSE, the Authority varied the permission granted to FSE pursuant to Part IV of the Act by imposing a requirement on FSE which prevented it from carrying on mortgage business unless all mortgage applications that it intended to submit to lenders were reviewed by an independent compliance consultant. The terms of the December 2011 Variation of Permission also required FSE to obtain an independent report on its compliance systems and controls.

225. In January 2012, the Authority concluded its investigation and expressed its concerns in a private warning letter to FSE that it had inadequate systems and controls in place to assess and monitor the competence of its mortgage advisors, whether permanent employees or self-employed. The Authority also raised concerns that FSE's record keeping was inadequate and prevented it from demonstrating that it was providing suitable advice to its customers.

226. As a result of the private warning letter, the agreed independent compliance consultant (Wendy Derry of Bankhall) produced a report. However, the Applicant

failed to implement the recommendations by the agreed deadline. The Applicant on 15 June 2012 applied for an amended VVOP. The Authority made arrangements for an in-person meeting in September 2012 to discuss the Applicant's compliance.

The September 2012 visit and events of 2013-14

227. The Authority visited FSE in September 2012 to assess the progress made in relation to its systems and controls following the December 2011 Variation of Permission. The Authority subsequently notified FSE and the Applicant of areas for improvement, emphasising its concerns regarding the adequacy of FSE's financial crime systems and controls and the adequacy of FSE's assessment of mortgage advisor competency.

228. Following the visit, the Applicant provided a copy of the further Bankhall report to the Authority. FSE maintained an application to add general insurance permissions and entered into correspondence with the Authority.

229. The Authority granted FSE additional permissions enabling it to conduct insurance mediation business from 8 January 2013. This was on basis that the VVOP requiring FSE to have all regulated transactions checked by a compliance consultant was still in place.

230. The Authority further corresponded with the Applicant in relation to disciplinary action taken against him by the Institute of Legal Executives, pursuant to which the Applicant undertook not to reapply for membership. The Applicant failed to bring this matter to the attention of the Authority. The Authority decided to take no further action against him, which decision was communicated in a letter dated 6 January 2014.

231. Over the course of March 2013-August 2014, the Applicant recommenced trading. The Authority sought confirmation regarding his compliance with the VVOP. The information provided by the Applicant indicated that he may not be compliant.

August 2014 meeting

232. On 29 August 2014, the Applicant attended a meeting at the Authority's offices. The Applicant admitted non-compliance with the December 2011 VVOP, stating the cost and the burden to him was the reason he had not complied and he had felt under pressure at the time he agreed to the requirement. Of approximately ten pieces of new mortgage business since July 2012, six had been sent to Bankhall and he had not supplied Bankhall's file review to the Authority. He did not think the requirement was fair and he felt that he had tried to discuss this further so he did not consider it a deliberate breach. The Applicant was advised that compliance was not optional and again agreed not to submit any regulated business to lenders until it had first been reviewed by an independent compliance consultant. The Applicant was advised about possible enforcement action.

December 2014 lifting of the VVOP

233. In December 2014, the December 2011 VVOP was lifted on the basis that the external compliance consultant found no regulatory failings in relation to FSE's mortgage applications. The Authority informed the Applicant that it considered it appropriate for it to monitor FSE's progress and that it therefore intended to conduct a further review of FSE's business in 2015.

July-November 2015

234. In July 2015, the Authority conducted a desk-based review ('DBR'). This identified several issues indicating vulnerability to mortgage fraud.

235. In September 2015, the Authority carried out a DBR of FSE's regulated activities and FSE's systems and controls on financial crime.

236. On 10 September 2015, the Authority wrote to the Applicant setting out its detailed findings and conclusions. The Authority informed the Applicant that it had identified non-compliance with the Mortgages and Home Finance: Conduct of Business ('MCOB') rules, that it had concerns about the plausibility of client income and employment details declared on some mortgage files, and that it considered that FSE had inadequate financial crime systems and controls which left it at risk of being used for financial crime.

237. The Applicant, subsequently to 10 September 2015, agreed to a similar arrangement to that which was in place between December 2011 and December 2014, such that an external compliance consultant would review FSE's mortgage applications before they were submitted to lenders.

The Relevant Period – 24 November 2015 to 14 October 2017

238. On 24 November 2015, following a further review of eight of FSE's mortgage customer files which demonstrated that FSE's clients had received suitable advice, the Authority lifted its requirement that FSE must not place any regulated mortgage business with lenders without an external compliance check. The review highlighted two areas for improvements (certifying identity documents and carrying out additional due diligence on long-distance customers).

239. However, the Authority's correspondence to FSE and the Applicant of that date concluded that it 'will now close our supervisory case; thank you for your cooperation….'.

240. There is disagreement as to the significance of the Authority's decision to close the supervisory case. The Applicant contends that the above interactions with the Authority resulted in FSE receiving a "*clean bill of health"* in relation to its approach to compliance. The Authority submits that it does not (and did not) provide a "*clean bill of health"* to firms as alleged or at all.

241. It is not in dispute that, at times prior to the Relevant Period, the Authority's Supervision Department scaled down and then closed its close and continuous supervisory interest in FSE (as a result of FSE's client files appearing to the Authority to be following compliance procedures). Therefore, ultimately, it is not necessary to

resolve this dispute because the issues in this case concern FSE's compliance during the Relevant Period thereafter.

Removal of FSE from lenders' panels in October 2016 and February 2017

242. In October 2016, RBS (Natwest) notified the Applicant that it had removed FSE from its panel of mortgage intermediaries. The lender intended to visit FSE's offices but was unable to do so because the Applicant refused to allow the lender's monitoring team to visit, in breach of the terms and conditions of being on the lender's panel. The purpose of the proposed visit by the lender was to address its concerns over potentially false documentation and unverified payslips being provided in support of mortgage applications being submitted by FSE. It must be stressed that there was no finding that mortgage fraud had actually taken place.

243. This resulted in the Authority directing its supervisory focus to FSE again.

244. The Applicant later stated to the Authority that he intended at the time to 'appeal' the lender's decision. However, the Applicant did not formally appeal the lender's decision, nor did he notify the Authority of FSE's removal from the lender's panel.

245. In January 2017, the Authority wrote to lenders to seek information about FSE. It also sought information from the Applicant.

246. On 20 February 2017, Barclays removed FSE from its lending panel. The removal arose because Barclays suspected mortgage fraud was taking place at FSE. Barclays' concerns arose from its identification of at least 48 mortgage applications submitted by FSE between 2014 and 2017, where the income of the mortgage applicants either reduced or ceased shortly after the mortgage was completed. There was no finding that actual fraud had taken place on any of the occasions.

247. The Applicant did not notify the Authority of FSE's removal from the lender's panel. Contrary to their evidence, for the reasons set out below, we are satisfied that the Applicant did tell his two advisors that FSE had been removed from both panels.

The May 2017 visit and subsequent events

248. On 9 May 2017, the Authority visited FSE's offices. The purpose of the visit was to assess FSE's financial crime systems and controls and to perform a review of FSE's client files. The Applicant was present at the meeting and provided information to the Authority.

249. The Applicant complained to the Authority about the visit and the fact that he had been asked to consider a voluntary application to cancel FSE's authorisations.

250. On 11 May 2017, two days after the Authority's visit, and by coincidence, FSE's annual PII cover lapsed. The Applicant sought to renew it but it was not

subsequently renewed. He did not know of this until 10 July 2017. This was the date that Applicant was made aware by his broker that his PII would not be renewed, given the Authority's intervention – the premium costs would be prohibitive.

251. On 9 June 2017, the Authority communicated the conclusions of its review to the Applicant in a supervision investigation feedback letter (that is addressed below). Among these conclusions were concerns that FSE had inadequate financial crime systems and controls, leaving FSE exposed to being used as a vehicle for financial crime.

252. The Applicant rejected an invitation to consider applying on a voluntary basis to cancel the firm's authorisation and his approved person status by 23 June 2017.

253. There were a limited number of mortgage approvals (regulated business) submitted by FSE's two mortgage advisors after 11 May 2017 and up to 14 October 2017. This is addressed in detail below.

254. We now turn to consider the factual allegations made against the Applicant by the Authority during the Relevant Period as set out in the Authority's Statement of Case (notwithstanding our ruling that paragraph 12.5 does not fall within the subject matter of the Reference because the allegations, evidence and findings were not contained in the Decision Notice).

Assessment of the Applicant's reliability and credibility

255. We begin with a general assessment of the Applicant as a witness. We put out of our mind the finding of the FSE Tribunal that he was an honest and reliable witness. We have based our judgement on the oral and written evidence in these proceedings.

256. We found the Applicant's evidence to be honest and credible. We are not satisfied that he was lying or dishonest in his evidence to the Tribunal in any regard. We accept that some of his evidence was not wholly reliable and we identify these parts, where relevant, below. We indicate those matters on which we found him to be mistaken or confused in his evidence. We are not satisfied the Applicant was reckless in relation to the evidence he gave or lacked integrity. He made some reasonable concessions and was intent on assisting the Tribunal. We reject all the allegations of recklessness and lacking integrity relied upon by the Authority for the reasons set out below. We found that much of the Applicant's evidence was based upon or supported by contemporaneous written documentation.

257. The Authority invited the Tribunal to draw adverse inferences against the Applicant on the basis that he elected not to adduce detailed written evidence in his witness statement. Most of his statement concerned his previous evidence to the FSE Tribunal and the legal argument on issue estoppel (which was not a matter which should be argued in evidence). He did not answer the detail of the allegations particularised at paragraphs 12.1 to 12.5. However, we are satisfied both from the Applicant's answers in cross examination, and the submissions made on his behalf by counsel, that at the

time of writing the witness statement, he did not know the precise case against him such as to enable him to answer the allegations therein.

258. The Authority's Statement of Case dated March 2021 was at a high level of generality and the Authority's witness evidence which was produced in March and April 2022 was not sufficiently tied to specific allegations. It was further supplemented by later disclosure of the Authority which the Applicant did not have at the time of making his statement. The Authority's allegations were only finally crystallised and tied to detailed evidence in the Authority's skeleton argument in late October 2022.

259. We observe that the Applicant's answers in cross examination were long and descended into detail that would have been better placed in advance of the hearing in a written statement. The absence of detailed witness statement did not greatly assist in the presentation of his case and its determination by the Tribunal. Nonetheless, we do not hold this against the Applicant nor draw any adverse inferences. We are not satisfied in this case that the brevity and generality of the witness statement was a deliberate tactic to avoid disclosing the Applicant's case in advance and to avoid it being subjected to scrutiny in cross examination.

FSE's financial crime systems and controls during the Relevant Period

Paragraph 12.1 of the Authority's Statement of Case - the Applicant recklessly failed to establish, maintain and enforce effective financial crime systems and controls, particularly in relation to the detection and prevention of mortgage fraud

260. The Authority accepted that FSE had a number of general financial crime policies and procedures such as Anti-Money laundering and Anti-Bribery Policies but alleged that some documents were undated. The Authority did not particularise which these were. In any event, we accept the Applicant's evidence that by the time of the Relevant Period he had the requisite policies in place and there is no dispute about this.

261. We are satisfied that the necessary policies were in place and had been well before the Relevant period. This was evidenced by copies of the policies themselves and the history of their development. For example, the policies and procedures which FSE had implemented with the assistance of compliance consultants (Bankhall, Compliance Checking and Mr Steve Soteriou ("SS") & Mr Cass ("IC")). These had been put in place from early 2012 onwards.

262. Importantly, the Authority accepted that it was content with the documents forming the Applicant's policies and procedures, and its concerns were limited to the failures in the way these were applied in practice. The only time the evidence of failures was particularised by the Authority, prior to its skeleton argument for the hearing dated 31 October 2022, was in the Supervision investigation feedback letter of 9 June 2017 – it was not particularised within the Warning Notice or Decision Notice.

263. The Authority did not particularise the ways in which it said the Applicant failed to implement financial crime policies in any of the documents which followed in the five years thereafter: the Enforcement Submissions documents for the RDC (in 2020), the Enforcement Warning Notice (July 2020), the RDC Decision Notice (29 January 2021) and the Statement of Case on this Reference (24 March 2021). All of these prior

documents largely made blanket assertions as to the Applicant's conduct without connecting those alleged failings to either any evidence or even the standard to which the Authority suggested he should be held.

264. By the time of its skeleton argument the Authority alleged that policies were not implemented in practice, monitored or reviewed by the Applicant. It relied on the written evidence of the two mortgage advisors Ms Jalkiewicz (see [73]-[74] of the statement) and Ms Jozwik (at [44]) whose witness statements were dated 1 April 2022 and 29 March 2022 respectively.

265. Specifically, it was said that FSE had a "Business Risk Awareness" checklist, which should have been followed. The Authority alleged it was not used either by the Applicant or FSE's mortgage advisors during the Relevant Period. It was alleged that FSE produced policies relating to "Customer Vulnerability" and "PEPs and Enhanced Due Diligence", but neither of these were dated and they were not properly implemented, followed, monitored or reviewed by the Applicant or FSE's mortgage advisors.

266. We are not satisfied that these allegations are established on the balance of probabilities having heard the oral evidence. We are satisfied that by the time of the Relevant Period FSE had, with the assistance of professional advisors, devised and implemented relevant and necessary policies regarding combating financial crime – in particular in relation to the risk of mortgage fraud.

267. The Applicant produced a reasonable selection of contemporaneous documentary material in relation to the general financial crime polices that FSE had during the Relevant Period (such as polices regarding anti-money laundering, anti-bribery and preventing mortgage fraud). We accept his explanation that the selection produced some five to seven years later was not exhaustive of all records, due to some potentially being misplaced in multiple office moves, or not being available due to the sheer number of documents in existence.

268. The Mortgage Sales Process was updated in June 2014 and had a new checklist implemented to sit alongside it (see the draft notes to accompany it dated 15 September 2015) which was finalised and implemented on 21 October 2015 (copies were provided together with the Applicant's email to the Authority which explains how this was being drawn up). A Financial Crime and Anti-Money Laundering Risk Assessment was carried out by the Applicant in June 2017 (a record of this was produced).

269. Of the relevant financial crime policies that FSE had in place, the Authority concentrated its allegations on the Applicant failing to implement and enforce the Mortgage Sales Process and Mortgage Fraud Checklist which were to be completed by his advisors and supervised by him. These are therefore the most relevant two documents to this part of the Reference.

Bank statements and payslips

270. One of the Authority's key allegations was that the actions specified in FSE's Mortgage Sales Process ("MSP") document were not followed by the mortgage

advisors nor identified and corrected by the Applicant. The MSP required payslips and bank statements to be collected from customers and checked for inconsistencies in advance of their mortgage application being submitted. The Authority relied on the fact that four months of payslips and bank statements were required from customers under the MSP, and it alleged that the Applicant did not ensure that this process was followed by his advisors, based upon the sample of files it examined.

271. As set out in Appendix 2 to the Supervision investigation feedback letter of 9 June 2017 the Authority alleged that four of the Applicant's files which it had examined (plus an unknown number of the files in Appendix 1, which the Authority never particularised) had fewer than four months' worth of payslips or bank statements present in the files.

272. This is factually correct – as accepted by the Applicant, there were not four months' worth of payslips or bank statements present in the files. However, we are not satisfied there is any substance to this allegation as constituting a relevant failure to ensure the implementation of financial crime policies. Each of the four files which might have lacked either four months' worth of payslips or bank statements had in each case at least three months' worth of payslips / bank statements.

273. In relation to specific client files: one [Ozog] had four months' of payslips from one of his jobs and three months from the other; a second [Baranowski and Romaniuk] had 3.5 months' and 3 months' of bank statements, respectively; a third [Gajzler and Herman] had 4 months' and 3 months' of bank statements, respectively; and a fourth [Dragan and Grezak] had three months' worth of payslips and bank statements each. The Applicant did not dispute that it was Ms Jalkiewicz's practice to only obtain three months bank statements and pay slips.

274. The Mortgage Sales Process itself did not require four months' provision - only the notes to the checklist used as a tool to comply with the MSP. There is no evidence that not having four months' worth of payslips or bank statements in each case led to any way to any exposure to mortgage fraud, and we accept the oral evidence of the Applicant that it is fairly standard within the mortgage broking industry to obtain three months' worth of the documents for PAYE employees, not four.

The Authority's allegations regarding inconsistencies

275. The mortgage approval process then involved carrying out the affordability checks on clients as set out in the MSP. This was supposed to take into account the customer's income and outgoings. In particular, the check was supposed to "*consider how plausible a customer's income or outgoings are, taking into account the customer's overall circumstances. This will involve cross-referencing the information on the fact find to any documentation received from the customer such as the bank statement*".

276. The specific allegation was that FSE's MSP stated: "*robust notes will be required to be placed on file to clarify any inconsistencies*" in the documents provided by clients. The purpose behind the policy and the check was that inconsistencies in the documents might reveal a risk that a mortgage fraud was being attempted or committed.

277. The Authority conducted a review of 19 client files from FSE. The results of that review showed that none of the 19 client files reviewed contained notes querying

or identifying any unusual transactions, income or documentation. There is no dispute about that but the question is whether such notes were in fact required.

278. The Authority alleged that the 19 client files reviewed by the Authority during its investigation showed no evidence of adequate checks being carried out in accordance with FSE's written procedures. It alleged that the mortgage applications submitted by FSE contained obvious inconsistencies which were not identified or queried by the advisors initially or the Applicant or his inspection thereafter. It submitted that there were inconsistencies across the 19 client files, none of which contained any notes querying unusual financial behaviour, income or transactions. There was no record of the Applicant having appropriate oversight of this process. Further, there were no notes placed on the client files by the Applicant to clarify any inconsistencies.

279. The Authority also alleged that the Applicant's failure to ensure that he had appropriate oversight of FSE's mortgage business meant that processes were not followed correctly and obvious inconsistencies in customers' income and outgoings were not identified or queried. The lack of oversight meant that the Applicant failed to identify occasions where the plausibility of income and outgoings was not being assessed with an appropriate degree of scrutiny.

280. These allegations were particularised in Appendix 1 of the supervision investigation feedback letter of June 2017 where the Authority outlined details of inconsistencies in 15 different file numbers (20 clients) which it said that FSE's advisors had failed to detect or record, thus evidencing that the Applicant had failed to ensure the policy, as set out in the MSP, was implemented. Examples of inconsistencies alleged by the Authority included:

i) dates of salary payment on a customer's payslips which were materially different to the date the salary actually appeared on the customer's bank statement;
ii) unexplained fluctuations in salary from one month to the next; and
iii) a payment being made by the client, as employee, to their employer, including a significant and large payment of £9,000.

Our findings on 'the inconsistencies'

281. Again, we are not satisfied that these allegations are made out nor reveal any significant failing in the Applicant's implementation of his financial crime polices.

282. In respect of the selected client files in Appendix 1 to the Supervision feedback letter, the Applicant's general evidence was that all of these are matters where there was clear ground for reasonable disagreement as to what might amount to a relevant 'discrepancy' or 'inconsistency' within the client documentation. Therefore, his advisors were not required to make notes on the file and he did not fail to identify any of these 'inconsistencies' in reviewing the files. We accept his evidence.

283. The MSP itself and checklist do not use the word 'inconsistency', and the checklist only in fact applied to mortgage business conducted after October 2015 (so was quite new when all of these files were in process), and if not judged to be such an inconsistency, no notes were required on the file.

284. We also note that in none of the cases highlighted in Appendix 1 to the Supervision letter has the Authority acquired any evidence of actual wrongdoing by FSE or the client, in particular there is no allegation by the Authority that any actual mortgage fraud was attempted or committed in any of the cases.

285. Separately, the RBS (Natwest) provided 'Information From Lenders' ('IFL') to the Authority and did allege fraud. IFL is the mechanism by which lenders can inform the Authority about intermediaries they suspect of being involved in mortgage fraud. Barclays asserted as much concerning FSE but with no evidence other than a reduction in income for some of the clients immediately following the approval of their mortgages. However, the Authority chose not to investigate these allegations at all, despite apparently considering that the Applicant and FSE may be complicit in organised crime. This inaction is unexplained.

286. We also accept that the Applicant has provided explanations for the lack of any note or record in relation to the 'inconsistencies' highlighted by the Authority in Appendix 1 which were reasonable. This is the case even if other advisors or supervisors might have adopted a stricter approach interpreting 'inconsistencies' when conducting the file review. Our finding in relation to the alleged inconsistencies are as follows:

i. Sz[arek] and Sz[arek] – the payment of £2,353.97 was paid in on 23 December 2015, not the payslip date of 30 December 2015. We are satisfied that it was reasonable for the advisors or the Applicant not to note this difference and not to designate it as a relevant 'inconsistency'. FSE and the Applicant did not consider it to be such. As such, no 'robust notes' were required. Likewise, the expenses reimbursement payments from Mr Sz[arek]'s employer were not judged to be 'inconsistencies'. The Authority's witness, when cross-examined, could not explain why the receipt of £1,002 by the client from his employer for expenses was an inconsistency, in the context of the employer regularly paying such expenses back for relatively similar amounts;

ii. Ra[czkiewicz] and Ra[czkiewicz] – the payment of £2,360.97 was paid into the bank account, contrary to the Authority's erroneous assertion that it did not appear in the bank statement. Payments to Mrs Ra[czkiewicz] were reasonably explainable in the context of her working for a company but also registered as a bookkeeper and / or also being self-employed;

iii. Dz[iaren] – the explanation for 2 payslips for the same period of different amounts might reasonably be that the client had possession of a payslip for October 2015 which was updated and replaced by a later one, and which sum matched the sum deposited in the bank account. It was reasonable to consider that this was not a discrepancy which required noting as an inconsistency;

iv. Wy[krent] – it would be reasonable for mortgage advisors and the Applicant to decide that date of payslips not matching the payments which the Authority have identified as discrepancies are not adverse indicators of fraud and did not require recording. It may not be unusual for some employers to pay employees on slightly different days than the payslip records, for example for cashflow reasons. It is not necessarily an 'inconsistency' that should have been noted in each case. In any event,

the difference in the dates between payslip and bank statement were in fact recorded on the checklist;

v. Wr[obel] and Wr[obel] – the clients were directors and owners of a company and a Buy to Let business and paying themselves. It is not unexpected that a company director's income might fluctuate. Furthermore, payments, even to the extent of £112,000 going into an account and then going out to a payee, when not declared as income or relevant to the mortgage application (and possibly relating to business expenses), are not necessarily an 'inconsistency' that require noting for the purposes of mortgage application. The money went to a company called VFX Financial Ltd, a finance company or one which looked like a foreign currency trading company so that the movement of money was not as striking as it may at first appear;

vi. Ad[ameczek] – the Applicant reasonably conceded that there appeared to be a payment for June and July of around £1,000 missing from the bank statements. The client's husband appears to have received one of these payments for some reason. The Applicant was not previously aware of the RBS Information From Lenders ('IFL') Report which named this client as alleged to have been actively involved in a mortgage fraud, as that report was not disclosed to the Applicant by the Authority until the reference was made to the Tribunal;

vii. Am[brozy] – the Applicant rightly conceded that the payments into the account of £8,900 and out of £9,000, apparently to the client's employer though this is not known for sure, was arguably a relevant inconsistency and should have been noted on the file;

viii. Ka[rpasitis] – the Applicant gave evidence that he was a friend of this client and is perfectly content that the Authority's concerns in this area are ill-founded. The Authority was concerned whether inaccurate and misleading information was being provided regarding residential addresses and mortgages. In short, the Applicant gave evidence that the property at 30 Blackthorn Road was a showhouse and not lived in. No allegation of fraud or misleading information being provided was put to the Applicant in cross-examination and he clearly stated he was happy to address this issue;

ix. Ja[lkiewciz] and others – the Appendix alleged that identical payslips were being provided for different corporate employers but not being highlighted by FSE in its checks (there were numerous files, but none produced by the Authority which show the alleged duplicate payslips). The Applicant gave evidence that he was aware that payroll systems can produce similar-looking payslips. In the circumstances of not having these alleged payslips to challenge, he could not say anything else. We accept this evidence and the explanation was reasonable; and

x. Ga[jzler] and He[rman] – one of the clients seeking to use a tax free allowance for a previous year on her self-employed income tax return and in the next year on her employed income is not necessarily an 'inconsistency'. It does not establish the Authority's allegation that she was wrongfully claiming two personal allowances until she completed her self-assessment return for the second year, which she had not, as otherwise there is no mis-use of the tax free allowance established.

287. The Applicant agreed in his oral evidence that the Information from Lenders report from RBS on potential or suspected mortgage fraud revealed the reason why

inconsistencies need to be verified and a robust file note needs to be taken: "*Yes, I understand that if there is a suspicion, there is a suspicion and you look into it."*

288. In principle, the Applicant accepted that any inconsistencies within documents obtained from clients for mortgage applications needed to be noted. The Applicant accepted that the mortgage advisors have to check the inconsistencies in the client documentation and note what the reason for the inconsistency is. He accepted he had not undertaken training in how criminals can use falsified payslips in order to commit mortgage fraud. However, he was "familiar with common practices and risk because he has "dealt with things like this before": he had a "global understanding of that and also guidance". The Applicant only kept a note if there was a reason he felt he had to keep it. "*If, for example, everything was okay, I would not keep a note. I would only keep a note essentially if I thought there was some reason to keep a note*.".

289. The Applicant agreed in his evidence that the Mortgage Sales Process required every inconsistency to be identified and if any inconsistency was identified there needs to be a robust file note identifying what the explanation is for that inconsistency. "*There are always arrangements with small companies that do not always look right".* He simply disagreed with the Authority as to what constituted 'an inconsistency.' The Applicant accepted that if there is a discrepancy, such as if there were not four payslips or four months' bank statements, the client should be challenged to explain and provide supporting evidence.

290. We accept the general tenor of the Applicant's evidence that in all but one case (that at [284(vii)] above) there was no failure to record clear and necessary inconsistencies in the files, as required by FSE's policy. We accept that it was reasonable for the Advisors and the Applicant, when deciding what constituted a relevant inconsistency, to evaluate whether a difference in documentation gave rise to a risk of mortgage fraud. We accept that this did allow for a measure of discretion by FSE's mortgage advisors and the Applicant, as supervisor of the files. The Applicant was ultimately responsible for the prevention and detection of such fraud and while he might have taken a more literal approach to the interpretation of inconsistency we accept that he was reasonably entitled to apply an evaluative judgment as to which inconsistencies required noting as badges of potential fraud. We accept that his interpretation of what constituted a relevant inconsistency was within reasonable bounds.

291. Therefore, we do not accept the Authority's submission that implementation of FSE's policy required a two-stage approach: identifying and recording any inconsistency (no matter how trivial or explainable); then evaluating whether it was an inconsistency that gave rise to a risk of fraud. The Applicant relied upon a reasonable approach and understanding in his evidence and made reasonable concessions. This is not to suggest that his approach was a counsel of perfection. It is not to find that the implementation of FSE's financial crime policies was exemplary, it was not, only that it was reasonable and proportionate to the risks it faced.

The mortgage fraud checklist

292. The Applicant accepted that a Mortgage Fraud Checklist was introduced as an additional document as an aide memoire for carrying out mortgage fraud checks. It was completed by the advisors then a sample were reviewed by the Applicant.

293. The Mortgage Fraud Checklist was to assist the Applicant and the Mortgage Advisors in identifying indicators of fraud. It sets out requirements for FSE to follow. It was adopted by the Applicant as being appropriate for FSE's business. The Applicant agreed that not implementing the Mortgage Fraud Checklist would mean that he was not implementing the systems and controls that he had determined were appropriate for FSE. However, we accept his evidence that he did implement it.

294. The Applicant stated to the Authority that his approach to the identification of mortgage fraud involved file checks against the Mortgage Fraud Checklist, and that the systems and controls in relation to these did not change during the Relevant Period. We accept his evidence that a sample of the client files completed by the advisors was reviewed and was checked by the Applicant during the Relevant Period.

295. The Authority alleged that some of the files apparently did not contain a Mortgage Fraud Checklist, but this was not particularised so the Applicant could not respond in detail and it is a matter for the Authority to prove its case. If these files pre-dated October 2015, then it would not have been present in any case.

296. The Applicant admitted that the Mortgage Fraud Checklist should be present in every file but because "*unfortunately we live in a real commercial world and sometimes these things do not happen, even though they are meant to happen*". In our assessment, while it was far from ideal, it did at least represent what was a reasonable and realistic approach when set against an established policy that was implemented reasonably in the vast majority of the cases (as established with regards to the very small sample of cases reviewed by the Authority).

297. The Authority alleged that *"the name of the reviewer was left blank"* on the Mortgage Fraud Checklist. However, the document itself does not contain space for a reviewer to comment, and as such it cannot be a failure so long as he did indeed review checklists, which we accept that he did. It may be that the Authority was mistakenly referring to the checklist when it meant to refer to the New Business Register. If so, the Applicant provided evidence of him or his compliance consultants checking files, and said in oral evidence that he did so, and the Authority has not asserted any particular provision in FSE's policies that required the New Business Register to be updated when the Applicant or compliance consultant reviewed the files.

Caveats

298. It is fair to record that the Applicant did not appreciate any potential conflict of interest with Ms Jalkiewicz being both the advisor and the customer in respect of her own mortgage application when the application was made. Nor did he appreciate any potential conflict when asked about this at the hearing. While this did not reflect positively upon him, it was not an allegation relied upon by the Authority in the Decision Notice or Statement of Case – nor is it central to the allegation that he acted recklessly or without integrity in relation to the risk of mortgage fraud being facilitated by FSE.

299. The initial stages of FSE's mortgage sales process involved FSE providing customers with an initial disclosure document ("IDD"), completing the client fact find

and collecting each customer's proof of identification and address and financial documentation, e.g. payslips and bank statements to verify income. The IDD incorrectly stated that FSE served the whole of the market, when it did not. The Applicant fairly conceded that FSE's IDD was not updated when FSE was taken off some lenders' panels in 2016. This was a simple oversight – he conceded that this should have been amended but this was one document in amongst a very great number, and no thought was given to correcting it to change the fact that it had become outdated. Again, this failing does not reasonably lead to any finding of a failure to implement financial crime policies nor recklessness nor lack of integrity on the part of the Applicant.

Conclusion on paragraph 12.1

300. In conclusion, we are not satisfied that the Applicant failed to establish, maintain and enforce effective financial crime systems and controls, particularly in relation to the detection and prevention of mortgage fraud during the Relevant Period. We are not satisfied that he was reckless (*that he was aware of a risk and that would occur and it was unreasonable to take that risk having regard to the circumstances as he knows or believed them to be)* in any regard. He was aware of a risk of mortgage fraud and the risk that failing to implement FSE's financial crime policies would create but he did not take any unreasonable risks because he reasonably oversaw the implementation of the policies. Therefore, the Authority's finding and allegation that he acted without integrity is not established. Therefore, he has not failed to comply with Statement of Principle 1 as alleged on this ground.

Paragraph 12.2 of the Authority's Statement of Case – the Applicant recklessly failed to establish and practise an appropriate level of oversight and monitoring of FSE's mortgage advisors, particularly in relation to the detection and prevention of mortgage fraud

301. As part of this ground, the Authority found in the Decision Notice and alleged in the Statement of Case that the Applicant failed to properly train, oversee and monitor the work of his two mortgage advisors in relation to the risk of mortgage fraud during the Relevant Period up to October 2017.

302. FSE's two mortgage advisors during the Relevant Period, Ms Jalkiewicz ("AJ") and Ms Jozwik ("JJ"), were self-employed and did not have signed and dated contracts for their services (AJ had a signed but undated draft and an unsigned draft). For convenience, and meaning no discourtesy to either witness, we refer to them as 'AJ' and 'JJ' hereafter. They were remunerated by commission only (payable only on successful applications). They worked remotely, visiting FSE's offices occasionally. They advised clients unsupervised from their home (AJ) or rented office (JJ). They generated mortgage business for FSE primarily through word-of-mouth in their local Polish communities. The Applicant also generated mortgage leads in the same way (and sourced business through clients of his other companies) but to a lesser extent.

303. The primary witness evidence that the Authority relied upon to allege that the Applicant failed to train, oversee or his monitor FSE's two mortgage advisors consisted of the statements of AJ and JJ dated March and April 2022 (over a year after the Authority's Decision Notice). They were called as witnesses of truth. AJ was previously the subject of supervisory investigation and compulsory interview by the Authority but there were no further proceedings against her. Despite suggestion in one

of the documents, AJ was not suggested by the Authority to have been complicit in any mortgage fraud (no actual fraud having been asserted to take place). They were each cross examined.

304. To the extent the Authority's evidence on the disputed issues in this allegation is derived from the written and oral testimony of AJ and JJ, we reject it as mistaken and therefore unreliable. This is because it does not accord with the face of the contemporaneous documents or with parts of their own oral evidence. While the two witnesses were undoubtedly honest and trying their best to give accurate evidence, it is unlikely that their recollection in 2022 of which documents they recall seeing or being informed of as far back as 2012 (and during the relevant period of 2015-2017) is likely to be accurate. Their own evidence contained inconsistencies, some of which supported the Applicant's account. The Applicant's account was also better supported by the contemporaneous documentary evidence and parts of the advisors' oral evidence.

305. For example, when asked in cross-examination, AJ was only able to name the Training & Competence Plan and financial crime as being policies she was not given and said she did not know what business risk awareness was. This was subsequently shown to be in error, as she had to accept in cross examination that she had countersigned each page of various documents such as a variety of financial crime policies (anti-bribery and anti-money laundering policies) in October 2012 and completed a business risk awareness review in July 2017.

306. JJ, while able to speak English competently, was not a native speaker. She did rely to a substantial degree on AJ for advice, training and knowledge but likewise, she suggested that she had not received training from the Applicant when the documentary evidence revealed that she had recorded that she had.

Oversight of FSE's mortgage advisors - Reporting lines, accessibility and Approach to monitoring FSE's mortgage advisors

307. The Authority alleged, based upon AJ and JJ's evidence, that Applicant operated no formal reporting process between himself and FSE's mortgage advisors - that were no formal lines of communication at all. The Applicant took no formal steps to monitor FSE's mortgage advisors and instead simply relied on their experience and the absence of complaints from customers. Rather than regularly monitor mortgage files, the Applicant instead preferred to trust that there were no issues with the work.

308. We are not satisfied that these allegations are established on the balance of probabilities. We reject the evidence of the witnesses.

309. It is accepted that AJ and JJ predominantly worked remotely away from FSE's offices and recorded business conducted via FSE's electronic New Business Register. Occasionally, FSE's mortgage advisors would meet clients at FSE's offices but the clients were more often advised offsite at the advisors' homes. The mortgage advisors also attended FSE's offices for meetings when requested by the Applicant, but there was no formal requirement for them to do so. Nonetheless we are satisfied that there were reasonable reporting lines from the two advisors to the Applicant and he was sufficiently accessible.

310. Because they worked remotely, the Applicant was not in a position to give direct or detailed evidence to the Tribunal about either of the mortgage advisors' day to-day working practices. However, we accept the Applicant's evidence that he did regularly speak to the two advisors about their work, was available to them whenever they wished and reviewed their work – initially more frequently but less so when they were more established in their roles. The Applicant had also employed the services of an external advisor, Steve Soteriou, to review files and support the advisors.

311. We reject the evidence that the advisors had insufficient access to the Applicant. AJ and JJ had reasonable and necessary access to the Applicant who was their superior available to discuss cases with or ask questions of. Even though JJ's reporting line was to the Applicant, in practice she primarily consulted AJ. This does not mean that the Applicant was not available to her to discuss any of her clients or files, which he did from time to time, and which she knew. She accepted as much in her oral evidence.

312. The Applicant appears to have held occasional 1-2-1 meetings with FSE's mortgage advisors of a maximum frequency of "*once every two months*", but records of these were, according to the Applicant, "*not kept strictly 100% the way it should have been done*". However, there were some records available that support his oral evidence. These was also documentary evidence that in addition to 1-2-1s being held with AJ, that she was fully aware of the compliance efforts of FSE, and practice notes on mortgage fraud were disseminated by the Applicant.

313. Key performance indicator reviews were held between the Applicant and AJ - the Applicant provided copies of minutes from the following meetings: i. February 2014; ii. May 2014; iii. August 2014; iv. November 2014; v. May 2015. Again, we accept the Applicant's oral evidence that this continued throughout the Relevant Period.

314. There were minutes of meetings held with the Applicant and the advisors on: 15 January 2015; ii. 13 February 2015; iii. 12 March 2015; iv. 16 April 2015; v. 14 May 2015; vi. 4 June 2015; vii. 8 September 2015; viii. 26 Feb 2016; and ix. 11 January 2017. We accept that, given the passage of time, not all contemporaneous material was available but the documents which were produced represents a selection of the meetings conducted which continued through the Relevant Period.

315. We accept that generally, the Applicant had an attitude whereby he was reasonably intent on delivering FSE's compliance with its regularly requirements – we accept that he set this out in both emails to the Authority and his staff.

316. In respect of AJ, the Applicant had the means to oversee her work because, although both mortgage advisors worked remotely, AJ's client files were uploaded to the FSE server to which the Applicant had access. JJ did not upload any documents to the FSE server. Instead, she brought in her client files to the FSE office in hardcopy.

317. The Applicant provided contemporaneous documentary evidence of him carrying out and documenting pre-sale reviews of AJ's client files in 2014 and we accept his oral evidence that he continued to do in respect of AJ and JJ throughout the

Relevant Period. We accept that the Applicant reviewed a small proportion (5-10%) of the advisors' client files prior to the submission to the lender albeit that the frequency and percentage of review reduced over time given the experience had had developed of the quality of the files they presented. Further we accept the Applicant's evidence that AJ was reviewing JJ's files and answering queries.

318. There was contemporaneous evidence of file reviews of mortgage sale files which were carried out by the Applicant in the Relevant Period in 2016 unprompted by any action by Authority. The Applicant admitted during his representations made to the RDC that the Applicant did not consider that every file had to be reviewed but 10% was the advised target.

319. In addition, FSE continued to have spot-check compliance reviews by external compliance consultants outside the bounds of the Authority's mandated reviews. For example there was a Compliance Checking Limited report dated 10 November 2016 which provided a file review of two clients of JJ. This was done after Mr Kabir had indicated Supervision was no longer investigating FSE and before FSE was notified of the Information From Lenders that RBS had provided to the Authority in October 2016.

320. There was contemporaneous evidence of other steps that FSE was taking to, implement, monitor and update its financial crime policies. FSE also arranged a Business Risk Awareness Review in 2017 with its consultant Mr Cass and this was completed by AJ, and was sent to the Authority on or around 9 July 2017. There was documentary evidence that FSE had implemented and continued to review and update its fraud, anti-money laundering and bribery policies (for example drafts of October 2012 and September 2015, prior to the Relevant Period).

321. While the Applicant's practices were by no means perfect, they were reasonable and proportionate to the size and business that he was running and his experience of their work and competence. He was entitled to take account the length of time the advisors had been working for FSE in the frequency of formalised contact he had them.

322. Therefore, we do not accept that the Applicant took no proactive steps to understand or acquire any awareness of who approved FSE's mortgage-related correspondence, including recommendations and suitability letters. We do not accept that he had no interest in maintaining compliant processes nor that he was reckless.

323. We do not accept any allegation that the Applicant did not review the New Business Register into which the advisors would insert details of new customer applications. We do not accept that the Client File Record Keeping and Checklist was merely a 'tickbox' exercise and the advisors were not trained in relation to it.

324. As explained above, we do not accept that the Applicant failed to establish an adequate system to monitor the competence of FSE's mortgage advisors, either through 1-2-1 assessments or any form of appraisal system. The Applicant did introduce an internal Advisor Competency Framework, although it was not implemented until after the May 2017 Visit. FSE's Training and Competency Plan was implemented in October 2012 (the original date on amended document), reviewed in May 2014 and in December 2016 for implementation in June 2017. This indicated an ongoing review

and implementation of policies. They were also involved with monitoring of the implementation.

325. We do not accept the advisors' oral evidence that no training was provided despite suggestions by AJ and JJ. We do not accept that the Applicant took no steps to provide financial crime training, nor that the Applicant's approach to assessing competence and training was inadequate. We prefer the contemporaneous documentary evidence that advisor competency was developed through ad hoc CPD training undertaken on the mortgage advisors' own initiative. However, some training was conducted at the instigation of the Applicant, and witnessed, checked or assessed by him.

326. As well as his oral evidence to the contrary, the Applicant produced training records for JJ from 2015 and 2016 – for example records of observations he conducted or attended and training materials that was carried out, including evidence that training was carried out by AJ as well as the Applicant. It may not have been regular or detailed training, but it was reasonable and proportionate to the demands of a small business and we saw the CPD records which were kept for AJ (the report, CPD record and further records were produced to us).

327. The Applicant did arrange for occasional compliance training from consultants as well as using compliance companies to devise and implement his policies. The sessions were irregular but did take place. Training sessions with one advisor (Mr Soteriou) ceased after he left in early 2016. However, there was evidence such an email from JJ of 6 January 2016 requesting assistance from Mr Soteriou with her files after the Applicant had communicated that his review of them had picked up an issue.

328. We are therefore satisfied that the documentary evidence and the Applicant's own account are to be preferred to the accounts given by AJ and JJ, which were largely based on memory, and asserted by the Authority. We find that evidence demonstrates that the Applicant was exercising proper (reasonable and proportionate) implementation of FSE's policies and procedures during the Relevant Period together with reasonable oversight, supervision and training of the advisors.

Caveats

329. This is not to find that the Applicant's conduct and compliance with his policies and oversight or supervision of his supervisors was a model of its kinds. It was not. Record keeping was inconsistent or absent at times and the Applicant was perhaps over prepared to adopt an informal or flexible approach to his own agreed policies.

330. At times he came close to failing to take reasonable care. The Applicant did not complete a file review sheet as per FSE policy to indicate that a formal file review was conducted. The record keeping appeared incomplete. For example, the MSP also obliged mortgage advisors "*to discuss the recommendation and proposed outcome to the customer with the Firm's CF1 Director (Markos T Markou), before the business is submitted, which is an addition* [sic] *safeguard*". None of the client files reviewed by the Authority contained any evidence of such discussions. We accept he may have had some discussions but the Applicant states that he had a different way of doing things and refers to the scribbles he made as a note. The Applicant admitted that the appraisals

he conducted were limited to when they "sat down and spoke about them". The Applicant provided only limited examples of written evidence of reviewing or discussing any mortgage application or customer pre-submission.

331. The Applicant was never present at JJ's meetings with clients although he was with AJ. He "relied to a certain extent" on the fact that AJ would meet with clients on occasions with JJ. They did not have a job description or written record of responsibilities.

332. At time the Applicant perhaps relied too heavily on AJ supervising JJ but we are satisfied that they were sufficiently trained and supervised to know whether client documents "*looked genuine"* and whether they gave rise to a risk of mortgage fraud. The MSP, Checklist and other policies that the advisors countersigned as having read made manifest what checks were required in this regard and there were contemporaneous documents that make clear that discussions were had when queries were raised regarding files.

333. We are not satisfied FSE's removal from the lender panels in October 2016 and February 2017, was as result of specific failings of the Applicant in monitoring, training and supervising the advisors. Indeed, the Authority did not put their case in such direct terms. While both of the lenders, RBS and Barclays, had concerns about the mortgage applications submitted by FSE and specifically the veracity of the income and employment details of customers, these cannot be specifically linked to any failing relied upon by the Authority in the Applicant's practices. Further no mortgage fraud has been proved to have occurred as a result. Following the removal of the firm from the panel by Barclays, no steps were taken by the Applicant to investigate the conclusions regarding possible mortgage fraud but nor were these done by the lender themselves, nor by the Authority. The Applicant was not fully informed of the 'red flags' that the lenders relied upon, or if he was, the indicators of potential fraud were not so obvious as to require immediate action.

Conclusion on paragraph 12.2

334. We are not satisfied that the Applicant failed to establish and practise an appropriate level of oversight and monitoring of FSE's mortgage advisors, particularly in relation to the detection and prevention of mortgage fraud. Further, we are not satisfied that the Applicant was careless let alone reckless. He did take reasonable care to implement and monitor policies and supervise his advisors. That care was reasonable and proportionate to the small business that was being undertaken. He was not reckless – he was aware of the risk of not overseeing and monitoring the mortgage advisors in relation to detection and prevention of crime but he did not take unreasonable risks. Therefore, he has not failed to comply with Statement of Principle 1 as alleged on this ground nor does he lack integrity.

Paragraph 12.3 of the Statement of Case: The Applicant recklessly failed to ensure that FSE did not carry on regulated activity in relation to mortgage business without PII in place;

335. The transaction of mortgage business, including the submission of applications to lenders, is a regulated activity under the Regulated Activities Order. It is a requirement for firms which are arranging and advising on regulated mortgages to have

Professional Indemnity Insurance ('PII') in place (see rule 3.2.1 of MIPRU – the Prudential sourcebook for Mortgage and Home Finance Firms, and Insurance Intermediaries). The purpose of PII is to protect the firm and its customers should something go wrong as a result of defective advice or actions taken by a firm in the conduct of its business. Consequently, a mortgage intermediary without appropriate PII cover should not be advising on or arranging regulated mortgages for consumers.

336. The expiry of FSE's PII was addressed in the previous proceedings on the reference by FSE against the action of the Authority and in the FSE Tribunal decision. We have set out the previous findings of the FSE Tribunal regarding PII above but also decided that we are not bound by them in these proceedings.

337. There was and is no dispute that FSE's PII lapsed on 11 May 2017. The FSE Tribunal went on to find that FSE conducted no regulated mortgage business including no new business after that date. As set out above and below, that finding is now agreed by both parties to be incorrect.

338. The Authority's allegation at 5.2(c) of the Decision Notice, which is the subject matter of the Reference, is that the Applicant recklessly failed to ensure that FSE ensure that FSE's mortgage advisors did not carry on regulated mortgage business beyond the date on which he knew (10 July 2017) FSE's PII had lapsed. The Authority's allegation under paragraph 12.3 is that the Applicant recklessly failed to ensure that FSE did not carry on regulated activity in relation to mortgage business without PII in place (from 11 May 2017). We consider both allegations.

339. The factual issues in these proceedings are therefore: a) whether FSE carried on regulated mortgage business of any kind (whether ongoing or new business) after its PII lapse; b) what the Applicant knew about this or was aware; and c) whether he took any or reasonable steps to prevent his mortgage advisors from conducting such business after 11 May 2017 or 10 July 2017.

340. The Applicant addressed the first of these issues in his witness statement in these proceedings dated 25 April 2022. He stated at [8]-[10]:

> '8. One of the biggest "wrongs" committed by the Authority, is in relation to the manner in which they stated that I have lied in my witness statement dated 2 December 2019, which was used in the above case. The Authority allege that I lied, in that I accepted new business under FSE after 9 May 2017, despite being expressly advised that no new work was to be undertaken after that date (and I voluntarily agreed to that as set out in my email of 10 May 2017 (00:16). References are made by the Authority to mortgage applications being submitted after 9 May 2017. These have not been disclosed to us by the Authority despite us requesting full and frank disclosure of all such documentation, but in any event, my position remains unchanged. No new work was undertaken by FSE.
>
> 9. Further, and more importantly, despite referring to the fact that FSE would complete "ongoing business" taken on prior to 9 May 2017, the reality of the situation was that there was no such work undertaken. The Authority refer to the relevant date being 14 October 2017, which is completely inaccurate and this based upon the submission of a residential mortgage application (which has not been disclosed to us), which is vehemently denied as this work was not undertaken by FSE. Therefore, there was no

period of time whereby FSE undertook work without insurance in place as the PII insurance expired on 12 May 2017.

10.To be clear, the only matters undertaken by FSE were routine accounting aspects, which were incapable of being dealt with in advance, as the drawdown of the facilities (or otherwise) had not yet completed and the timeframe for doing so was unknown to us.'

341. Thus, the Applicant's written evidence in these proceedings was that there was no business conducted by FSE after its PII expired - this is consistent with his evidence to the FSE Tribunal. However, in the opening written submissions on his behalf in these proceedings dated 4 November 2022, the Applicant conceded that there had been some business conducted by FSE after 11 May 2017 and after 10 July 2017.

342. Paragraph 27 of those submissions stated:

'27. Of the 10 [mortgage] applications identified by the Authority as occurring after 11 May 2017, the vast majority of these are irrelevant in the context of the Authority's decision in any case, which, per para 2.2 of the RDC Decision Notice (Document C.013 at page 2 thereof), was that the Applicant's failing *"was to prevent FSE from transacting mortgage business between 10 July 2017 and 14 October 2017".* Only 3 of the 10 applications were submitted after 10 July 2017, with the others all being submitted earlier than that.'

343. Therefore, by the time of the hearing there was no dispute that, as a matter of fact, FSE continued to conduct business through its advisors after 11 May 2017 when no PII was in place. This was accepted to consist of: a) the conduct of ongoing business - where contact with clients had been made prior to the expiry of PII in May 2017 even if mortgage approval applications were submitted thereafter; b) the conduct of a limited amount of new business – where contact was made with clients and applications submitted for approval by the two mortgage advisors both after the expiry of PII on 11 May 2017; and c) the conduct of new business even after 10 July 2017 (the date on which the Applicant was informed by the insurer that PII cover would not be renewed).

344. The Applicant also accepted these points in his oral evidence in cross examination during the hearing. He accepted FSE continued regulated activity without PII cover: "*I think there is about three cases that I identified that were posted after and they were done by Agnieszka*". FSE, via its mortgage advisors, continued to carry on regulated activities without PII: "*So, the error there was that when Agnieszka put it through, and/or Jowita, the three cases we are talking about, that was the time when there was not, there was not PII insurance and that is a fact so I cannot argue with that*." The Applicant stated: "*[A]nything after the 9th [May 2017] that appears that have been discussed and shown afterwards were regulated business, nothing else except for regulated business. And of those that were submitted, three of them were, did not have PII cover*."

345. It is apparent that, even within this Reference, the Applicant gave inconsistent evidence relating to the carrying on of regulated mortgage business and we find his witness statement at [8]-[10] in these proceedings to be inaccurate.

346. At one point in his oral evidence, the Applicant attempted to explain the reference to 'no such work undertaken' in paragraph 9 of his witness statement set out above. He suggested that this was a reference to the new work described in paragraph 8, namely that no new work was undertaken after 10 May 2017. Despite it being put to him in cross-examination that he had used the word 'such' to refer to 'ongoing business' or 'existing clients' in the first sentence in paragraph 9, he repeatedly and consistently set out that he was referring to instead to 'new business'.

347. In other parts of his oral evidence the Applicant accepted that paragraph 9 of his witness statement was clear; there was no ongoing business undertaken after 9 May 2017. This evidence to be contrasted with the reference to his contemporaneous email of 10 May 2017 at 00.16 (as addressed below) discussing stopping all new business for 21 days.

348. We do not accept the Applicant's oral evidence in as far as he attempted to maintain that paragraph 9 of his statement continued to be accurate. The final sentence of paragraph 9 of the Applicant's witness statement is inaccurate. ("*Therefore, there was no period of time whereby FSE undertook work without insurance in place as the PII insurance expired on 12th May 2017*".)

349. We are satisfied that the meaning of the Applicant's witness statement was straightforward from a natural reading and do not accept his oral evidence about its meaning. Paragraph 8 of his statement is clear in stating that no new work was undertaken by FSE after 9 May 2017 (no new clients were accepted nor new mortgage applications submitted on their behalf to lenders for approval). Paragraph 9 of his statement is also clear, that furthermore, no ongoing business for existing clients was conducted after 9 May 2017 (ie. applications for mortgage approval being submitted on behalf of clients who had been taken on by FSE prior to 9 May 2017). The reference to 'no such work undertaken' in the first sentence of paragraph 9 refers to the earlier part of the sentence which describes ongoing business. This is reinforced by the conclusion to paragraph 9, 'there was no period of time whereby FSE undertook without work without insurance in place as the PII insurance expired on 12 May 2017.' This reading is also consistent with his evidence and the findings in the previous Tribunal proceedings.

350. The evidence of the Applicant was therefore inaccurate, in: a) his witness statement dated 25 April 2022 in these proceedings when stating that no regulated mortgage business was conducted after 9 May 2017; and b) in his oral evidence to us during the hearing which at one point suggested that he was only referring to new business. However, we are not satisfied that the Applicant was being dishonest, deliberately inaccurate nor reckless in giving evidence on this topic.

351. We accept that he was honestly mistaken and confused on both occasions. At the time of his preparing his witness statement he had not reviewed the Authority's documentary evidence from lenders that proved that mortgage applications had been submitted after 10 May 2017. By the time of giving oral evidence, he had already

accepted prior to the hearing that both ongoing and new business was conducted after 10 May 2017. Therefore, there would be nothing to gain to attempt deliberately to mislead the Tribunal in giving his oral evidence.

352. We now turn to consider the factual allegations that form part of paragraph 5.2(c) of the Decision Notice and paragraph 12.3 of the Statement of Case: that the Applicant recklessly failed to ensure that FSE's mortgage advisors did not carry on regulated activity in relation to mortgage business without PII in place (after 11 May 2017) or at a time when he knew it had lapsed (10 July 2017).

353. It was not in dispute that the Applicant did not know that FSE's PII had expired until 10 July 2017 when informed by his broker so there were two months when he was unaware that FSE's PII had lapsed.

The extent of the regulated business conducted without PII – number of approvals & whether they were new or ongoing business

354. The extent of the regulated mortgage business conducted by FSE between 11 May 2017 and 14 October 2017 is in dispute. The Authority suggests FSE's mortgage advisors processed 20 new residential mortgage applications without having PII cover in place. However, it did not pursue this allegation with any detail or supporting documentary material.

355. We accept that the documentary evidence only established on the balance of probabilities that there were ten mortgage applications after 11 May 2017, three of which were after 10 July 2017. We accept the Applicant is not clear how these files marry up to the list in AJ's witness statement, as the Authority has not prepared the statement accurately so as to reflect the direction to still process existing clients' applications, and the names do not appear to marry up with the three in AJ's list which were applications submitted after 10 July 2017 (numbers 7, 9 and 10 on the list).

356. We are satisfied that all of these applications were new business where contact was made with FSE after 11 May 2017. The Applicant does not have any written record to establish to his satisfaction that any of the applications were opened or initial contact was before 9 May "*other than what we have here [the new Business Register] and my discussions with Agnieszka and Jowita*." The basis of the Applicant's belief as to whether the three cases post July were new business was: "*That is just something I had assumed because I had told Agnieszka and Jowita not to do any new business."*

357. On balance we are satisfied that there were three files which were submitted for mortgage approval after 10 July 2017 without PII being in place and these were new clients and business and not existing customers or those who had made contact with FSE prior to 10 May 2017.

358. In terms of knowledge, we are satisfied that the Applicant did not know at the time of any of the business taking place without PII being in place and had instructed his advisors not to conduct any new business after 9 May 2017. He only knew PII was not in place from 10 July 2017 but did not know any regulated mortgage business was being conducted after May or July 2017. This became apparent to him only when he

reviewed the material in preparation for the hearing of this reference and after he filed his witness statement in April 2022.

359. The Applicant does not know why AJ appears not to have followed his direction not to process new business but we are satisfied that this was as much a failure on the Applicant's part as hers. As set out below, there was a failure by the Applicant to give repeated or written instructions and there was a lack of file supervision.

Failure to ensure that FSE did not carry on regulated business without PII in place

360. It is not in dispute that it was the Applicant's responsibility to prevent FSE conducting regulated mortgage business without PII in place. We are satisfied he failed to ensure that FSE did not conduct regulated business after 11 May 2017 (when PII lapsed) and 10 July 2017 (when he knew of it) even though we will go on to find that these failures were not due to recklessness.

361. We are satisfied that the Applicant failed to ensure that FSE did not carry on regulated mortgage business without PII in place and, particularly, after the time he knew this to be the case.

362. The Applicant did not clarify the position with his insurers as of 11 May 2017 as to whether he was insured in the interim while he sought to renew the insurance. He did not obtain written confirmation that PII was in place at least in the interim following 10 May 2017. The Applicant understood that his business had only very recently been subjected to a supervisory visit by the Authority (on 9 May 2017). In respect of the period after 10 July 2017, he also knew that supervisory action had resulted in a critical feedback letter being issued against him (on 9 June 2017).

363. He did not issue written instructions (at least by email) to his two mortgage advisors to cease conducting any business (both new or ongoing) without having any confirmation written or oral that PII continued to be in place after 10 May 2017. This failure was repeated after 10 July 2017 when he knew PII was not in place.

364. In addition to the written instructions to his advisors, he did not take further available steps to ensure that his advisors were not conducting regulated mortgage business during this time. There was no evidence that the Applicant examined any of the files (at least 10) submitted to lender for his approval by his mortgage advisors after 11 May 2017 (at least three of which were submitted after 10 July 2017). He did not check the position with his mortgage advisors to ensure that no files were being submitted to lenders for approval in this period.

365. Therefore, the Applicant failed to ensure that FSE ceased to carry on any regulated activities after the time when PII was no longer in place, in particular at the time when he knew it was not in place.

366. In conclusion, we are satisfied that by failing to prevent FSE's mortgage advisors from submitting any mortgage business (whether new or ongoing), and failing even to be aware at the time that FSE was conducting business which constituted regulated activity, the Applicant put the interests of FSE's mortgage customers at risk.

This applies with greater force to the time after 10 July 2017 when he was aware that FSE did not have valid PII cover. Nonetheless, as set out below, we are not satisfied the Applicant acted recklessly nor demonstrated a lack of integrity in this regard.

Mitigating factors to the failure

367. There are numerous mitigating factors in relation to the Applicant's failures. Mr Rees Phillips relied upon these in relation to recklessness but they apply with equal force.

368. The first is the limited amount of regulated business that was conducted without PII – only 10 mortgage approval submissions after 10 May 2017. We accept that the Applicant's case that the Authority have proved that only three applications on FSE's New Business Register relate to applications where the client opened a file with FSE after 10 July 2017. All of these were processed by the one mortgage advisor AJ. We are satisfied that the Applicant himself did not know this was taking place at the time.

369. The total amount of business conducted without insurance after 11 May 2017 was modest and insignificant after 10 July 2017. At the highest, the Applicant's failure is in preventing his advisors from processing three applications as new business after 10 July 2017 and seven applications between 11 May 2017 and 10 July 2017 when he did not know whether his PII would be renewed and remained in place.

370. Second, as noted by the FSE Tribunal in the previous proceedings, FSE's PII policy had been on a 'claims made' basis, that is, indemnity covered liability for claims made against FSE and notified to the insurer during the period of the policy, not on the basis of whatever policy was in place when the alleged negligence or breach of contract became actionable. As such, any future securing of PII would indemnify FSE against any wrongdoing or faults occurring with those three applications occurring after 10 July 2017.

371. Third, in any case, once cover lapsed on 10 May 2017 due to the FCA's Supervision action, the effect was to ensure that all of FSE's previous clients were un-indemnified. In that context, seven applications after 11 May 2017 is modest and three after 10 July 2017 is insignificant.

372. Fourth, as has been found irrefutably in the last set of proceedings, it was the Authority's conduct which prevented FSE from having PII in place (and which remains the case, given its failure to resolve its substantive investigation into FSE). If the Authority had resolved its Enforcement investigation speedily rather than refer FSE to the Threshold Conditions Team, FSE could have re-commenced trading, re-secured PII and all of FSE's previous clients (subject to any insurance policy conditions) would have been indemnified by PII, including the three clients whose applications were submitted where they had files opened after 10 July 2017.

373. Fifth, we accept the further mitigation that no clients have complained or made claims against FSE or had any reason to be indemnified under a PII policy. There was no actual loss or damage caused to any customer or client despite the absence of PII. The Authority have not found that any mortgage fraud was committed.

Recklessness

374. Although we have found that the Applicant failed to prevent FSE's mortgage advisors conducting regulated business after 11 May 2017 or 10 July 2017, the key issue is whether the Applicant was reckless in doing so.

375. 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. Therefore, the Authority needs to establish that the Applicant was aware of the risk that the advisors would be conducting regulated business without PII and unreasonably took risks in failing to prevent them from doing so.

376. FSE's insurer was informed by the Applicant of the Authority's Supervision visit which had taken place on 9 May 2017, two days before the PII was due to expire. On 10 May 2017 the Applicant wrote to the Authority by email concerning his dissatisfaction with its visit on 9 May 2017. He stated 'I am most disappointed that you have requested that we voluntarily surrender this firm's permission which I declined….You have stated that we cannot conduct any more new business. . I will voluntarily comply with your request for a limited period and if the matter becomes unduly protracted from more than 21 days I will revert to you and let you know if the firm's position changes…'

377. The Authority did not exercise its own powers to withdraw FSE's Part IV permission at that time. Instead, the Applicant had undertaken to the Authority to cease 'new business' from 10 May 2017.

378. We are satisfied that this was the Applicant's sincere intention and he wished to maintain that undertaking in respect of new business but believed that this did not prevent him from continuing ongoing business. His motivation at this stage was to attempt to comply with the Authority's demands regarding new business. He was not motivated or concerned to do so in order to comply with insurance requirements because he believed that his PII would be renewed.

379. After the visit of the Authority on 9 May 2017, we accept the Applicant's evidence that AJ asked him what the advisors were going to do with the clients that were already being processed and he said they could submit ongoing cases for mortgage approval. We accept that the Applicant did therefore tell his advisors they could continue processing existing customers' applications. This partially reflects the evidence given by the Applicant in the previous proceedings and the findings of the Tribunal set out above – namely that he believed FSE ceased any 'new business' after 9 May 2017.

380. However, it is now evident that mortgage approvals were submitted by his advisors in relation to new clients after both 11 May 2017 and 10 July 2017. We accept that the Applicant did not know of this at the time.

381. The issue is whether he recklessly failed to ensure that this did not happen. In order to be reckless, he would need to be aware that the PII had expired or was not in

place (or not care whether it was in place) and have taken the unreasonable risk of letting (or failing to prevent) his advisors continuing to transact regulated business nonetheless.

382. We are not satisfied of either requirement. The Applicant was not aware of the risk that the advisors would be conducting regulated business without PII and did not unreasonably take the risk of failing to prevent them from doing so. We are satisfied that the Applicant honestly and reasonably, but mistakenly, believed that PII would be renewed and remain in place after 11 May 2017. He also honestly and reasonably believed that he had instructed the mortgage advisors not to undertake new business in this period.

383. We accept that from 11 May to 10 July 2017, the Applicant laboured under the reasonable but mistaken apprehension that the PII would be renewed and cover the relevant period. He sought renewal of the policy and had not been told that it had not or would not be renewed until 10 July 2017.

384. We accept his evidence that the Applicant did give oral instructions to his advisors in May 2017 consistent with what he had told the Authority in the email that no new business should be undertaken.

385. Therefore, he did not know that his firm was conducting regulated mortgage business during without PII after 11 May 2017 because he did not know that it was conducting new or ongoing business during this time and did not know FSE no longer had PII in place. He honestly and reasonably believed that PII was in place and that the mortgage advisors were conducting no new business. He did care about both these matters but was mistaken in both regards.

386. We accept his evidence that the Applicant discussed with the mortgage advisors what no new business meant "*I just said to them no more new clients, basically*." The Authority suggests that the Applicant instructed the mortgage advisors to continue to submit "*ongoing"* cases, without defining what that meant. We are satisfied that this is established on the balance of probabilities – he only prohibited them from conducting 'new' business – taking on new clients.

387. As set out above, there were failings on the Applicant's part. We are satisfied that the Applicant did not discuss with AJ or JJ in any further detail what they should do following 11 May 2017 (at a time when PII had in fact expired). Further, he did not put any instructions in writing to his advisors and did not monitor or check their submissions to lenders or files at all such as to prevent them making further approval applications on at least ten occasions after 11 May 2017 as identified by the Authority (at least three of which occasions occurred after 10 July 2017 and up to 14 October 2017).

388. However, in relation to the Applicant's misapprehensions as to the extent of his mortgage business and the PII cover, we are not satisfied he acted recklessly. He did care and give thought to obvious and reasonable risks. He was not aware that he would be uninsured after 11 May 2017 (or even that this was likely) as he honestly and

reasonably believed his PII would be renewed. Although he should reasonably have appreciated there was some risk, this was not an unreasonable risk to take.

389. In any event, the Applicant did give oral instructions to his advisors not to take on new business after 11 May 2017 and inform the Authority of the proposed course of action. These are not the actions of a regulated person who, while aware of an objectively unreasonable risk that would occur, nevertheless took that risk having regard to the circumstances as he knew or believed them to be. He was not aware that the mortgage advisors were conducting business after that date. Therefore, it was not unreasonable to take the risk of continuing with ongoing business having regard to the circumstances as he knew or believed them to be.

390. He did inform the Authority he would not be conducting new business and it never instructed him not to conduct any or any new business after the visit on 9 May 2017. He informed the insurers of the Authority's visit and reasonably believed renewed cover would be forthcoming. The non-renewal and removal of PII was a result of the visit of the Authority which led to the insurer not offering continued cover for any sensible premium.

391. The date of 10 July 2017 (some two months later) is a significant date because on this date the Applicant knew for sure that his firm did not have and would no longer have the benefit of any PII in place. It was not until that day the Applicant was told by his broker that the insurer had declined to renew cover due to the supervisory investigation of the Authority.

392. We accept the Applicant's evidence that he informed the Authority of FSE's loss of PII cover shortly after 10 July 2017 (there was an email of 12 July 2017 indicating the Authority was made immediately aware). This was the first occasion that the Applicant told the Authority that FSE's PII had expired on 11 May 2017 but this was close to the time when he knew that this was in fact the position.

393. We also accept the Applicant's oral evidence, and reject that of his advisors, that he did orally inform his two mortgage advisors of this fact. By his own admission his oral instruction informing them of the position on 10 July 2017 was not detailed. The Applicant did not discuss with the mortgage advisors what business they should conduct after 10 July 2017, he only mentioned that the PII had stopped.

394. The same finding that there was no recklessness applies to the period after 10 July 2017 when he knew that PII was no longer in place. During this time, we accept his evidence that he informed the Authority of the position and told his advisors of the lack of PII which was further to his previous oral instructions to not to place any new mortgage business. He was not reckless.

395. We are satisfied that the Applicant was trying to conduct FSE's business in a compliant manner (in respect of his obligations to his clients, insurer and to his regulator) but his actions turned out to be insufficient to do so. The Applicant was aware of the risks of conducting business without insurance, gave thought to this obvious and

reasonable risk and took no unreasonable risk in any event by giving instructions to his mortgage advisors. Therefore, he was aware of the risk the Authority alleges but it was not unreasonable to take that risk having regard to the circumstances as he knew or believed them to be.

396. We therefore find the Applicant acted honestly and was not reckless such that he did not lack integrity.

Conclusion on paragraphs 12.3 and 67.3 of the Statement of Case

397. In conclusion, we are satisfied that the Applicant was responsible for the regulated business that FSE conducted. Following both 11 May 2017 and 10 July 2017 he failed to ensure that the advisors did not submit any further regulated business for approval by lenders without PII being in place.

398. However, we are not satisfied that the Authority has established that the Applicant recklessly failed to ensure that FSE did not carry on regulated mortgage business without PII in place (after 11 May 2017) as alleged at Statement of Case at paragraph 12.3.

399. Further, we are not satisfied that the Applicant recklessly failed to ensure that FSE's mortgage advisors did not carry on regulated mortgage business beyond the date on which he knew FSE's PII had lapsed (after 10 July 2017) as alleged at paragraphs 5.2(c) of the Decision Notice and 67.3 of the Statement of Case.

400. We are therefore satisfied that the Authority has not established any failure to comply with Statement of Principle 1 – the Applicant does not lack integrity on this ground.

Paragraph 12.4: The Applicant recklessly failed to ensure that FSE's mortgage business did not revert to previous non-compliant practices in relation to which the Authority had previously expressed serious concerns

401. The Authority argues that the Applicant subsequently reduced his own oversight of FSE after the decision of 24 November 2015 and returned to non-compliant practices that are set out in the chronology from 2011 as above.

402. Necessarily, the question of whether the Applicant was 'reckless' requires the 'result' in respect of which he was reckless to be identified. The decision of the Authority's RDC did not identify specific individual acts of misconduct, but found three generalised failings (set out at para 5.2 of the Decision Notice):

a. Failing to establish, maintain and enforce effective financial crime systems and controls, particularly in relation to the detection and prevention of mortgage fraud;
b. Failing to establish and practise an appropriate level of oversight and monitoring of FSE's mortgage advisors, particularly in relation to the detection and prevention of mortgage fraud; and

c. Failing to ensure that FSE's mortgage advisors did not carry on regulated mortgage business beyond the date on which the Applicant knew that FSE's PII had lapsed (10 July 2017).

403. The Authority's Decision Notice (para 5.3) also set out that it considered that the Applicant had *"permitted FSE to revert to practices in relation to which the Authority had previously expressed serious concerns"* and that this was evidence he had *"ignored the obvious risks created by his conduct".*

404. The Applicant submits that this had been reasonably interpreted as an argument going to the alleged subjective recklessness of the Applicant, not as a freestanding allegation of lack of integrity. In support, Mr Rees Phillips observes that neither the Decision Notice (para 5.3) nor the Authority's Statement of Case in this reference (para 68) separately allege that this amounts to a failure to comply with Statement of Principle 1 in and of itself. Mr Rees Phillips argues that it is surprising that the Authority's skeleton argument includes this as a separate allegation of misconduct (see para 43.4). In the circumstances we were invited to discount this allegation save as it relates to the three findings set out in the RDC's decision set out above or as it relates generally to the background of the decision, and not to consider it a separate freestanding allegation of misconduct.

405. We agree with these submissions and the issue can be dealt with shortly. The allegation in paragraph 12.4 of the Statement of Case has no independent factual grounding – the allegation of reverting to practices the Authority disapproved of is factually the same as the first two of the findings made above at 5.2(a) & (b) of the Decision Notice or the allegations at paragraphs 12.1 and 12.2 of the Statement of Case (i.e. the two allegations not relating to PII).

406. We have dismissed each of these findings / allegations as not being established on the balance of probabilities. We have found that there were no failures as alleged and there was no recklessness on the Applicant's part. In those circumstances we cannot be satisfied that the Applicant reverted to previous non-compliant practices as alleged. The Applicant has not failed to comply with Statement of Principle 1 nor lacked integrity in this regard.

Paragraph 12.5 of the Statement of Case: The Applicant recklessly failed to deal transparently with the Authority and the Upper Tribunal in relation to the explanations given by him as to the extent of FSE's "trading" activity following the Authority's supervisory visit on 9 May 2017.

407. This allegation has already been considered in those sections of this decision addressing issue estoppel (paragraphs [111]-[130] above), the subject matter of the Reference and paragraph 12.3 of the Statement of Case.

408. We remind ourselves that this allegation is outside the subject matter of this Reference but, in case we are wrong, we have decided to determine it as a factual issue. As we have set out above, we are not satisfied that the Applicant was intentionally or recklessly misleading in his evidence to the FSE tribunal that no new regulated mortgaged business was conducted after 9 May 2017 (which evidence was accepted as

a finding of fact). We have found this evidence to be mistaken and given in ignorance of the later documentary evidence which has been produced by the Authority (accepting some criticism made of the extent to which the Applicant monitored or reviewed his advisors' files after 10 May 2017).

409. The Applicant states the date he first realised that FSE had continued to carry on regulated activity without PII followed his evidence in the FSE Tribunal in February 2020: "*[W]hen the new warning notice came on 23 July 2020 I think it was, when it was pointed out, that is when I started to address my mind to that."* We accept this evidence. Further, we are satisfied that it was only after the Applicant had received the Authority's evidence and reviewed the disclosure after April 2022 that it became clear to him that FSE (through its mortgage advisors) had engaged in regulated business and submitted mortgage applications to lenders for approval on behalf of its clients from 11 May 2017 at a time when it did not have PII in place.

410. The Applicant accepted this much in advance of the November 2022 hearing. He accepted that FSE had conducted both new and ongoing business after 11 May 2017 before and during the hearing. To the extent that the Applicant tried to explain away his witness statement in his oral evidence, we are satisfied that this was due to his confusion rather than a deliberate or reckless attempt to mislead the Tribunal.

411. We also accept the Applicant's oral evidence in these proceedings, conceding that some business was conducted after 11 May 2017 and 10 July 2017 without PII being in place, and was different to that which he gave to the FSE Tribunal. He was cross examined about this:

"Q. Is this the same evidence that you gave to the Upper Tribunal?
A. In what respect, sorry? The position has been the same. After they came, I said there is going to be no new business, no one walked through the door and said "Can I have a mortgage", we did not do that. Anything was there that was ongoing, Agnieszka and Jowita finished it off and that was it."

"*Q. Is it your belief that paragraph 9 [of the witness statement dated 25 April 2022] is the same evidence that you gave to the Upper Tribunal in the FSE reference?*
A. What I have just said now is what the evidence is, and I would say that this is along the same lines of exactly what I am saying, both of those paragraphs are saying the same thing."

412. As we have already addressed above, the Applicant's written statement in these proceedings – suggesting that no business (whether new or ongoing) was conducted after 11 May 2017 - was indeed consistent at least with the evidence given to the Upper Tribunal in the earlier proceedings, even though he must now concede it was inaccurate.

413. We have found that, on balance and on occasion, the Applicant's written statement in these proceedings and oral evidence (to the FSE Tribunal and to this Tribunal) has been mistaken regarding the extent of business conducted after 11 May 2017 without PII. However, we are not satisfied that these mistakes result from any recklessness or dishonesty on his part. We are satisfied that he was speaking in

ignorance of the true state of affairs which he later accepted to be correct having reviewed the full documentation.

414. Therefore, we are not satisfied on the balance of probabilities that the Applicant recklessly failed to deal transparently with the FSE Tribunal in relation to the explanations given by him as to the extent of FSE's "trading" activity following the Authority's supervisory visit on 9 May 2017. The Applicant did not fail to care, fail to give thought to an obvious risk or take an unreasonable risk when giving evidence to the FSE Tribunal. He did not recklessly or intentionally mislead the Tribunal. He was aware of the risk of giving inaccurate or untruthful evidence and was intent on telling the truth on each occasion. He did give thought and care about the answer he gave. He did not take unreasonable risks in giving such evidence even if he was mistaken.

415. However, we do accept that, prior to the concession made shortly before the hearing, the Applicant gave insufficient attention to retain, retrieve and inspect his business's records as to what occurred after 11 May 2017 and was over reliant on his memory and desire to wholly vindicate his actions.

416. We are satisfied that the Applicant was aware of the risk of failing to deal transparently with the FSE Tribunal as he was with us. He did not do so. Further, it was not unreasonable for him to take the risk of giving the evidence that he did, having regard to the circumstances as he knew or believed them to be at the time. He was honestly and reasonably mistaken. There was no recklessness or action that could amount to a lack of integrity.

417. All of these findings apply with equal force to any statements made by the Applicant to the Authority on the topic (the submissions made to the RDC between September 2020 and January 2021 addressed above) as they do to the statements made by the Applicant to the Tribunal on each occasion he gave evidence.

418. This therefore disposes of the factual allegations in paragraph 12.5 of the Authority's Statement of Case. We are not satisfied on the balance of probabilities that the Applicant recklessly or otherwise failed to deal transparently with the Authority or the Upper Tribunal in relation to the explanations given by him as to the extent of FSE's "trading" activity following the Authority's supervisory visit on 9 May 2017. In the absence of any recklessness (and with dishonesty not being alleged), we find that he did not fail to comply with Statement of Principle 1 and did not lack integrity in this regard.

Discussion and Analysis

419. As is apparent from our factual findings set out above, the Authority has failed to establish its case on the balance of probabilities. We are not satisfied that the Applicant acted recklessly or without integrity in any of the ways found by the RDC at paragraphs 5.2 and 5.3 of the Decision Notice or as alleged in paragraphs 12.1-12.5 of the Authority's Statement of Case. The Applicant has not failed to comply with Statement of Principle 1 in any manner as alleged or at all.

<u>Summary of factual and legal findings</u>

420. We begin by providing a summary of our factual and legal findings, in determining the allegations in paragraphs 12.1-12.5 of the Statement of Case as follows:

(i) The Applicant did not fail to establish, maintain and enforce effective financial crime systems and controls, particularly in relation to the detection and prevention of mortgage fraud. He did not act recklessly or without integrity (see paragraphs [260]-[300] above);

(ii) The Applicant did not fail to establish and practise an appropriate level of oversight and monitoring of FSE's mortgage advisors, particularly in relation to the detection and prevention of mortgage fraud. He did not act recklessly or without integrity (see paragraphs [301]-[334] above);

(iii) The Applicant did fail to ensure that FSE's mortgage advisors did not carry on regulated mortgage business without PII in place (from 10 May 2017) and beyond the date on which the Applicant knew that FSE's PII had lapsed (10 July 2017) (see paragraphs [335]-[373]). He did not act recklessly or without integrity in so doing (see paragraphs [374]-[400]).

Legal findings

The Authority was not estopped (or otherwise prohibited by the principles of abuse of process or res judicata) from bringing this allegation despite the findings of the FSE Tribunal in 2020 as to whether regulated mortgage business was conducted after 10 May 2017 without PII in place (see paragraphs [83]-[124] above).

The subject matter of the Reference includes whether the Applicant failed to ensure that FSE's mortgage advisors did not carry on regulated mortgage business without PII in place beyond the date on which it lapsed (10 May 2017) and beyond the date the Applicant knew that FSE's PII had lapsed (10 July 2017) (see paragraphs [168]-[188] above). Nonetheless, nothing turns on this as no recklessness nor lack of integrity has been established (see paragraphs [374]-[400] above);

(iv) The Applicant did not fail to ensure that FSE's mortgage business did not revert to previous non-compliant practices in relation to which the Authority had previously expressed serious concerns (the period 2011 to 2015 prior to the Relevant Period). He did not act recklessly or without integrity (see paragraphs [401]-[406] above); and

(v) The Applicant did not recklessly fail to deal transparently with the Authority and the Upper Tribunal in relation to the explanations given by him as to the extent of FSE's "trading" activity following the Authority's supervisory visit on 9 May 2017. He did not act without integrity. He was honestly and reasonably mistaken in his communications with the Authority and evidence to the FSE Tribunal and this was not due to any deliberate or reckless attempt to mislead the Authority or Tribunal (see paragraphs [407]-[418] above).

Legal findings

The Authority was not estopped (or otherwise prohibited by the principles of abuse of process or res judicata) from bringing this allegation despite the findings of the FSE Tribunal in 2020 (see paragraphs [83]-[124] above). However, this allegation was outside the subject matter of the Reference and we had no jurisdiction to determine it. The subject matter did not concern whether the Applicant failed to deal transparently with the Authority and the Upper Tribunal nor whether he gave misleading to the FSE Tribunal in previous proceedings. There was no such evidence, allegation or finding in the Authority's Decision Notice and it was of a different nature to the allegations therein (see paragraphs [131]-[167] above). Nonetheless, we have made findings about this allegation in the event we are wrong even though nothing turns on this as no recklessness nor loss of integrity has been established (see paragraphs [407]-[418] above).

Whether the Tribunal can or should consider a breach of any other Statement of Principle

421. In considering the Authority's allegations in 12.1-2 & 12.4-5 of the Statement of Case we found no failures by the Applicant, let alone recklessness such as to constitute acting without integrity. Therefore, our findings do not give rise to a breach of any Statement of Principle.

422. In considering paragraph 12.3 of the Authority's Statement of Case we have concluded that the Applicant failed to ensure that FSE's mortgage advisors did not carry on regulated mortgage business beyond the date on which FSE's PII had lapsed (10 May 2017) and the date on which he knew of the expiry (10 July 2017). However, we concluded that the failure was not reckless.

423. By direction dated 10 February 2023 we asked for post-hearing written submissions from the parties on the following questions:

> If the Tribunal were not to find any recklessness established (and therefore no breach of Statement of Principle 1) on any material allegation pursued by the Authority, whether the Tribunal:
>
> i) could or should go on to make factual findings as to there being a failure to act with due skill, care and diligence;
> ii) whether it could or should go on to make findings of any breach of Statement of Principle not pleaded ie. Principle 2 or any other principle;
> iii) whether these issues are matters that could or should be directed to be reconsidered on a remittal.

424. We are assisted in the correct approach to take by the decision of the Tribunal in *Carrimjee v Financial Conduct Authority* [2015] UKUT 0079 (TCC) (*Carrimjee 2015*) at [57]-[61]:

> '57. Let us suppose that in this reference we were to find that Mr Carrimjee's behaviour was perfectly acceptable and did not constitute a breach of a Statement of Principle. In these circumstances it would be clearly open to the Tribunal to indicate that there was only one rational answer as to how the question of withdrawal of approval and imposition of a prohibition order should be determined because to prohibit and withdraw approvals in these circumstances

would be unlawful as an irrational decision, and any further decision made by the Authority would be capable of being referred to the Tribunal.

58. The position is more complicated if the Tribunal were to decide that there was a degree of culpability on Mr Carrimjee's falling short of failing to act with integrity but that it constitutes a failure to act with due skill, care and diligence. In these circumstances, if the reference had been made before 1 April 2013, the Tribunal may have decided to impose a financial penalty, and would also decide whether it was appropriate to withdraw any approval under section 63 or make any kind of prohibition order under section 56 and, if so, the scope of such order. Now that decision can only be made by the Authority. However, in our view it would be open to the Tribunal to make a finding as to whether, in the light of the findings of fact it had made the withdrawal of any approval or the making of a prohibition order, or a prohibition order of limited scope, would be disproportionate; or was one that no reasonable authority, properly directing itself as to the law, could have made. This would be a finding of law which is open to the Tribunal under section 133(6)A. However, if the Tribunal was of the view that as a matter of law a withdrawal of approval or a prohibition order of a specified description was within the range of reasonable decisions which the Authority could make, then it is not open to the Tribunal itself to determine what the appropriate action is for the Authority to take, that is a matter for the Authority alone.

59. As we shall see, these considerations come into play on the current reference. It was common ground that even if we were to find that Mr Carrimjee's behaviour did not demonstrate a lack of integrity, it was open to us to make a finding as to whether his behaviour demonstrated breach of a Statement of Principle to a lesser degree. In this case therefore, it would be open to us, having made the relevant findings of fact, to make a finding that those findings demonstrated a failure to act with due skill care and diligence as required by Statement of Principle 2.

60. That course of action is open to us because a reference is not an appeal against the Authority's decision, it is a determination of what is the appropriate action to take in the circumstances falling within the subject matter of the reference, that is the circumstances that have been the subject of the prior regulatory proceedings, rather than the particular outcome as found in the Decision Notice.

61. We therefore approach the issues in this reference as follows:

(1) We shall first determine whether on the balance of probabilities Mr Carrimjee's conduct demonstrated a failure to act with integrity in breach of Statement of Principle 1;

(2) If the answer to the first issue is in the negative, we shall determine whether his conduct nevertheless demonstrated a failure to act with due skill care and diligence in breach of Statement of Principle 2;

(3) We shall then determine the appropriate financial penalty, if any, to be imposed; and

(4) Finally we shall make such further findings and directions as are necessary in relation to the non-disciplinary references.'

425. We pause to note that the Authority did not make any alternative allegation or finding in the Decision Notice, Statement of Case or at the hearing that the Applicant had failed to act with due skill, care and diligence in any manner such that he had breached Statement of Principle 2. A breach of Statement of Principle 2 formed no part of the Authority's case in these proceedings and did not feature in written or oral submissions of the parties. Therefore, the position in *Carrimjee 2015* was rather different from this Reference in that the alternative case at [61(2)] thereof was

considered and accepted by the parties as part of the Reference – it was common ground between the parties - see [59]. It was not 'common ground' in this Reference.

426. In inviting submissions from the parties, we therefore observed:

> The submissions should take into account that there was no other alternative factual or legal case put by the Authority before the RDC, in the Decision Notice, the Statement of Case nor during the hearing of the Reference that the Applicant failed to act with due skill, care and diligence nor in breach of Principle 2 in any regard.
>
> The submissions should consider the nature of the evidence heard during the hearing, allegations put in cross examination and legal factual submissions made and the question of procedural fairness. They should also take into account the case of *Carrimjee v Financial Conduct Authority* [2015] UKUT 0079 (TCC) at paragraphs 58-61 on alternative cases and paragraphs 28-29 of *Jabre (Decision on Jurisdiction) v Financial Services Authority* [2002] UKFSM FSM035 (10 July 2006) on the subject matter of the Reference.

The Authority's submissions

427. The Authority filed written submissions dated 21 March 2023. Mr Brown submitted that, if recklessness had not been established, we could and should make findings as to the Applicant failing to act with due care, skill and diligence in carrying out his accountable functions (a breach of Statement of Principle 2) or in managing the business of the firm for which he was responsible in his accountable function (Principle 6). He argued that the authorities of *Jabre* and *Carrimjee 2015* supported this approach.

428. Furthermore, Mr Brown contended that the dicta at [38] of the Court of Appeal's judgment in *Hobbs v FCA [2013]* Bus LR 1290 applied:

a) From a policy perspective, there was "*a public interest in ensuring, so far as possible, that persons who are not fit and proper persons to perform functions in relation to a regulated activity are precluded from doing so*".
b) Provided the applicant was afforded a "*fair opportunity to address the Authority's case*", a narrowing of the inquiry by the Tribunal that excluded relevant material from its assessment of an applicant "*is to be avoided*".
c) If the Tribunal adopted an overly restrictive approach, and improperly limited its consideration, this could have far-reaching consequences contrary to the overriding public interest, including in respect of potential future arguments of issue estoppel.

429. Accordingly, Mr Brown submitted that we should: (a) make factual findings in respect of each aspect of the Authority's case (i.e. make factual determinations as to whether the matters alleged in fact occurred and in what respects); and (b) then consider our conclusions on culpability as a consequence. This would be consistent with the overall nature of the regulatory enforcement process and the Tribunal's role within that process.

430. He argued it was in the interests of the parties and in the public interest for the Tribunal to make relevant conclusions on all matters referred to it. The entirety of the factual matters that have been alleged by the Authority were capable of going to both

Principles 1, 2 and 6 (reflecting the fact that Statement of Principles 2 and 6 are, in essence, lower levels of culpability). He submitted that the relevant failings (in respect of paragraphs 12.1-12.5 of the Statement of Case) had been put to the Applicant in cross examination and he had been afforded an opportunity to comment. There would be no purpose in remittal.

431. Mr Brown contended that if misconduct to a lesser standard were established then we should impose the same financial penalty of £25,000 because it had been calculated on the basis of deterrence. Further, it would not be appropriate to remit the decision to the Authority for further consideration of the seriousness where it would inevitably lead to the Authority reaching the same decision were that course to be followed – *Palmer v FCA* [2017] UUT 313 (TCC) at [270]. The misconduct of the Applicant, even if found to be at a lower level, would be highly likely to warrant withdrawal and prohibition.

The Applicant's submissions

432. Mr Rees Phillips filed written submissions on behalf of the Applicant dated 20 March 2023 opposing us making any findings of breaches of alternative Principles. We consider those submissions below.

Discussion and analysis of whether to make findings on breach of other Principles

433. We begin by reminding ourselves that the Authority did not allege the Applicant breached Statement of Principle 2 (or any other Principle) in any regard in the Warning Notice, RDC proceedings, Decision Notice nor Statement of Case within these proceedings. The Authority did not allege any alternative legal or factual case against the Applicant equivalent to a breach of Principle 2 or 6 – a failure to act without due skill, care and diligence - at any point before or during the hearing (neither in written or oral submissions nor in cross examination).

434. While Mr Brown points out that it is in the public interest for the Tribunal to make relevant findings on all matters under consideration, this should not usurp the Authority's function to decide, with clarity and certainty, the regulatory case that it wishes to pursue. The starting point should be that if the Authority wishes to pursue an alternative or lesser case it should plead this from the outset of enforcement proceedings before the RDC and then the Tribunal itself. Pleadings on a reference to the Tribunal are in no way akin to an indictment in criminal proceedings or particulars of claim in civil proceedings. A reference is a continuation of a regulatory process that has begun by way of a Warning Notice and enforcement proceedings before the RDC. In those proceedings the Applicant is entitled to know the full nature of the allegations, findings and decisions made against him by the Authority in order to consider whether to contest the regulatory action proposed or whether to make a reference to the Tribunal.

435. An application by the Authority to amend a Statement of Case on a reference, or even to introduce fresh factual or legal allegations without such an amendment, is therefore not akin to amending pleadings in criminal, disciplinary or civil proceedings. In those proceedings allegations are free-standing and the court may exercise its discretion to permit amendments subject to the standard principles of procedural

fairness. However, if the Authority seeks to amend factual or legal allegations within a reference, the first question will always be whether they fall within the subject matter of the reference and the Tribunal's jurisdiction.

436. Mr Rees Phillips did not dispute our jurisdiction to consider alternative Principles within this reference. He did not suggest that an allegation of breach of Principle 2 was not within the subject matter of the reference nor that it fell foul of the reasoning in *Jabre*. We note that, as in this case, the parties in *Carrimjee 2015* did not dispute the Tribunal's jurisdiction to make findings of lesser misconduct (breach of Principle 2) where the allegations were effectively subsumed within the allegations of greater misconduct (breach of Principle 1).

437. Therefore, while it has not been argued, we will proceed on the basis that we do have such a jurisdiction to consider a breach of Principle 2 as an alternative to Principle 1 on this reference. This is on the basis that it is a lesser allegation of misconduct (failure to act with due skill care and diligence) subsumed within a more serious one (a reckless failure amounting to a lack of integrity) and based on the same primary facts.

438. However, we make no ruling of general application that this will always be the case. Whether there is jurisdiction for a Tribunal to make findings on a breach of an alternative Principle on the hearing of a reference where it has not been raised or pleaded before the RDC nor in the statutory Notices nor in the Authority's Statement of Case, will have to be decided on the specific facts of any case.

439. Assuming there is jurisdiction in this case, we nonetheless exercise our discretion not to consider or determine any alternative allegation against the Applicant of a failure to act with due skill, care and diligence (a breach of Statement of Principle 2 or 6). We agree with Mr Rees Phillips that we should not do so in this case for a number of reasons.

440. Both *Carrimjee 2015* and *Jabre* were examples where the tribunal in each case was prepared to consider alternative cases to those relied upon by the Authority in the initial Decision Notice. However, they were predicated on the basis that the alternative finding had been (in the case of *Carrimjee 2015*) or would be (in the case of *Jabre*) a live issue at trial, and that evidence was or would be called or tendered on the issue, because the parties were aware that the Tribunal was or would be considering the alternative case in its determination.

441. That is not the case here, where the matter has been raised for the first time well after all the evidence has been called and after closing submissions have been made. In the circumstances, the Applicant may be disadvantaged and prejudiced by the inclusion of an alternative basis for the determination in our findings where the Authority now contend that he lacked due skill, care and diligence as an alternative to the allegation of recklessness.

442. Had the Applicant had fair notice of the alternative allegation in advance of the trial, he may have tendered further evidence going to this issue at the hearing, and / or may have given the evidence and submissions he tendered in a different light and context than that he in fact gave. The issue of the standard of care applicable within the scope of 'due skill, care and diligence' was unexamined in evidence and un-argued in submissions during the hearing.

443. The standard of care applicable in the test of 'due skill, care and diligence' is likely to be that of the reasonably competent professional (or the ordinary, reasonable and prudent professional placed in the same circumstances as the Applicant) exercising the relevant controlled functions. This test would be objective, unlike the subjective test of whether the Applicant lacked integrity (whether through dishonesty or recklessness). We accept that we are not fully equipped at this stage properly to determine the issue of whether Statement of Principle 2 has been breached, as we cannot finally determine the standard against which the Applicant should be judged. No evidence was called or submissions made during the hearing on the question of the scope or extent of the objective duty owed, nor what a reasonably competent professional exercising the controlled functions would or would not have done in respect of the conduct alleged against the Applicant.

444. The Authority had the opportunity at every stage of the process prior to the matter being referred to put its case on the basis of both Statement of Principle 1 and Statement of Principle 2, or on an alternative basis to each other. The Authority chose not to do so in the Enforcement Submission, the RDC Decision Notice, the Statement of Case for the reference, in its Skeleton Argument, or at any point during the hearing of the reference. In now having to address this alternative case belatedly and without full evidence and argument being addressed before and at the hearing of the reference, the Applicant may be worse off than if the Authority had put the alternative basis in advance. If he had been aware that there would be a live issue, he may have sought to rely on evidence additional to his own evidence which he only gave in the context of a reference concerning an alleged ack of integrity (a subjective question). The Applicant may, for example, have chosen to call the people who gave him compliance advice over the years in order to demonstrate that he had acted with due skill, care and diligence and / or that in any event he had taken proper professional advice as a defence to the Authority's allegation he had not.

445. Further, the Applicant may be prejudiced by not knowing what, if anything, the Authority might allege amounted to particulars of a breach of Statement of Principle 2. Although it seeks to allege that Statement of Principle 2 can be made out as an alternative to Statement of Principle 1, the Applicant has not been furnished with what the Authority would allege are the particulars of that alleged breach.

446. We accept that the Applicant was cross examined upon the nature and manner of instructions he gave to his mortgage advisors regarding the business to be conducted after 11 May 2017 and the manner and quality of the supervision of their work and the files they submitted for mortgage approvals. It was also put to him and submitted that

there were failings in all regards in relation to the allegations at paragraphs 12.1-12.5. However, it was never put to him that he acted without due skill, care and diligence in these regards - he was not given an opportunity to answer this specific allegation in relation to the failures.

447. Neither party had the opportunity to make submissions upon such an alternative case as part of the reference or at the hearing. Further the Applicant was invited to put in post-hearing written submissions without sight of the Authority's allegations, because the directions were for submissions to be exchanged, and without being able to answer any questions we might have or to give evidence or submissions on the relevant (assumed) allegations. Therefore, the Applicant is faced with the risk of being made subject to findings which he has not had a fair opportunity to address, counter or defend himself against. There is therefore a risk of injustice to him.

Conclusion on whether to consider alternative Principles

448. For the reasons we explained above, we have assumed that we may be entitled as a matter of jurisdiction to make alternative findings as to whether there has been a breach of an alternative Principle by the Applicant (at least to the extent the allegations are subsumed within the allegation of breach of Principle 1 or constitute a lesser allegation of the same nature). However, as a matter of discretion we have decided that we should not do so.

449. We accept that Applicant should not now be potentially prejudiced by engaging with an alternative basis for a decision against him when he should reasonably have had the opportunity to address that case before and during the hearing. He has lost the full opportunity due to the manner in which the Authority presented its case throughout. The Applicant is now less able to defend an allegation by the Authority of breach of Statement of Principle 2 than if it had been alleged against him timeously. Where there is no good reason for its failure, we are satisfied that the Authority should not now be permitted to put that alternative basis forward as part of this reference.

450. As far as procedural fairness is concerned, we are satisfied it would not be just or fair for the Applicant to face an alternative basis after the close of the trial. The effect of doing so may prejudice him and preclude him from adducing evidence he might wish to call or on which he might wish to cross-examine the Authority's witnesses. This is especially the case in the circumstance where the Authority had the opportunity throughout to put that alternative case. Therefore, we decline to make any further findings as to where there has been a breach of any other Principle than Principle 1.

451. We will remit the issue for the Authority to consider whether the Applicant failed to act with due skill, care and diligence in relation to the failure to ensure that regulated business was conducted after PII had lapsed (10 May 2017), and particularly when he knew of this (10 July 2017) – the allegation of paragraph 12.3 of the Statement of Case. We direct that this will be a matter for the Authority to decide on the remittal and reconsideration, together with any appropriate mitigation and sanction, as we will explain below.

452. As for the other allegations, 12.1-12.2 & 12.4-5 we have not found any failures that could be the subject of an alleged breach of any Statement of Principle.

The four-stage approach

453. Adopting the same four stage approach set out in [61(1)-(4)] of *Carrimjee 2015*. We have already decided stage 1 above – on the balance of probabilities the Applicant's conduct did not demonstrate a failure to act with integrity in breach of Statement of Principle 1. He did not act dishonestly or recklessly in any regard.

454. In relation to stage 2, we have found that the Applicant did fail to ensure that FSE did not conduct regulated mortgage business after 11 May 2017 and 10 July 2017 without PII. However, we have not decided whether the Applicant breached Statement of Principle 2 (or 6) as this was not relied upon in the alternative by the Authority and not the subject of oral or written argument at the hearing. We have decided to remit that issue to be decided by the Authority together with the other matters set out below.

Disciplinary Sanction – Financial Penalty

455. At stage 3 we must determine pursuant to section 133(5) what is the appropriate action for the Authority (the decision-maker) to take in relation to the financial penalty imposed upon the Applicant under section 66 of the Act. We must remit the matter to the Authority with such directions as the Tribunal considers appropriate for giving effect to its determination.

456. The penalty was significant - £25,000. It was calculated by the Authority and imposed upon the Applicant on the basis that he had failed to comply Statement of Principle 1. It was calculated in the following manner according to the five steps set out in the Authority's skeleton argument:

105. It is appropriate to impose a financial penalty on the Applicant pursuant to section 66 of the Act in respect of his failure to comply with Statement of Principle 1. The Authority's policy on the imposition of financial penalties is set out in Chapter 6 of DEPP. In determining its view as to the financial penalty, the Authority has had regard to that guidance.

105. The Authority has had particular regard to the following matters:
105.1. the seriousness of the breach;
105.2. the aggravating factors relating to the breach; and
105.3. the need for credible deterrence.

106. The Authority's policy for imposing a financial penalty is set out in Chapter 6 of DEPP.

107. DEPP 6.5B sets out the details of the five-step framework that the Authority applies in calculating financial penalties imposed on individuals in non-market abuse cases.

Step 1: disgorgement
108. The Authority has not identified any financial benefit that the Applicant derived directly from his breach. Step 1 is therefore £0.

Step 2: the seriousness of the breach
109. Pursuant to DEPP 6.5B.2G, at Step 2 the Authority determines a figure that reflects the seriousness of the breach. That figure is based on a percentage of the individual's relevant income. The individual's relevant income is the gross amount of all benefits received by the individual from the employment in connection with which the breach occurred, and for the period of the breach.
110. The Applicant did not receive any income from FSE during the Relevant Period and so had no relevant income. Step 2 is therefore £0. Nonetheless, the Authority has determined the seriousness of the Applicant's breach for the purposes of Step 2.
111. In assessing the seriousness level, the Authority takes into account various factors which reflect the impact and nature of the breach, and whether it was committed deliberately or recklessly. DEPP 6.5B.2G(12) lists factors likely to be considered 'level 4 or 5 factors' (i.e. indicative of a more serious breach). Of these, the Authority considers the following factors to be relevant:
111.1. The Applicant's breach created a significant risk that financial crime would be facilitated, occasioned or otherwise occur;
111.2. The Applicant failed to act with integrity; and
111.3. The Applicant committed the breach recklessly.
112. DEPP 6.5B.2G(13) lists factors likely to be considered level 1 to 3 factors (i.e. indicative of a less serious breach). Of these, the Authority considers it relevant that little, or no profits were made or losses avoided as a result of the breach, either directly or indirectly.
113. Taking all relevant factors into account, the Authority considers the seriousness of the breach to be level 4.

Step 3: mitigating and aggravating factors
114. Pursuant to DEPP 6.5B.3G, the Authority may increase or decrease the amount of the financial penalty arrived at after Step 2, but not including any amount to be disgorged as set out in Step 1, to take into account factors which aggravate or mitigate the breach.
115. The Authority considers the following factors aggravate the Applicant's breach:

115.1. The Authority had previously and repeatedly communicated to the Applicant on occasions prior to the Relevant Period serious concerns regarding FSE's oversight arrangements and its systems and controls relating to the prevention of financial crime; and
115.2. The December 2011 Variation of Permission was imposed on FSE as a result of the Authority's concerns with FSE's financial crime systems and controls, and the Applicant failed to ensure that FSE complied with the December 2011 Variation of Permission.
116. The Authority considers that there are no factors that mitigate the breaches.
117. The Authority considers that these aggravating factors warrant an increase to the financial penalty of 25%. However, given that the Step 2 figure is £0, the Step 3 figure remains at £0.

Step 4: adjustment for deterrence
118. Pursuant to DEPP 6.5B.4G, if the Authority considers that the figure arrived at after Step 3 is insufficient to deter the individual who committed the breach, or others, from committing further or similar breaches, then the Authority may increase the penalty.
119. Since the figure after Step 3 would result in a penalty figure of £0, the Authority considers it appropriate to adjust the penalty level upwards to £25,000. The Authority has had regard to the following factors in deciding to increase the penalty level to this amount:
119.1. the seriousness of the breach, which the Authority considers to be level 4;
119.2. the aggravating factors, which the Authority considers merit a Step 3 uplift of 25%;
119.3. the Authority considers that a financial penalty of this level is needed for credible deterrence. Notwithstanding the Authority's previous interventions, the Applicant's conduct exposed FSE to the risk of being used as a vehicle for mortgage fraud, and the interests of consumers were not appropriately protected;
119.4. the Authority considers it likely that, if no action was taken against the Applicant, similar breaches would be committed by him or other individuals in the future; and
119.5. the Authority considers that a penalty based on the Applicant's relevant income will not act as a deterrent, due to the Applicant having no relevant income.
120. The penalty figure after Step 4 is therefore £25,000.

Step 5: settlement discount
121. No settlement discount applies.
122. The penalty figure after Step 5 is therefore £25,000.
123. Having regard to all the circumstances, the Authority considers it appropriate to impose a financial penalty of £25,000 together with continuing interest on the Applicant.

457. For the purposes of section 133(5)(a) of the Act, we must determine what is the appropriate action to take in relation to the financial penalty. While we are not bound to assess the penalty by applying the five-step approach adopted by the Authority, it is our duty to take into account all the circumstances of the case and do justice between the parties.

458. In the absence of any finding that the Applicant has failed to comply with any Statement of Principle as alleged we have determined that the appropriate action for the Authority to take is not to impose any financial penalty. It cannot be the appropriate action for the Authority to impose any financial penalty, let alone one of £25,000, where there has been no breach of Statement of Principle 1 as alleged – the basis on which it was calculated. We have not found that there has been any breach of Statement of Principle 1 and, for the reasons set out above, decided that we should not go on to make

any alternative findings regarding a breach of Statement of Principle 2 (or any other Principle).

459. A draft of our decision was circulated to the parties in early April 2023 in which we went on to direct that for the purposes of section 133(5)(b) the Authority should decide whether the Applicant had breached Statement of Principle 2 or any other Statement of Principle in relation to the allegation at paragraph 12.3 of the Statement of Case. The draft suggested that following remittal: a) no financial penalty could or should be imposed against the Applicant unless and until the Authority made any finding of a breach of a Statement of Principle; and b) the Authority was not bound to impose any financial penalty even then (for instance, it might seek to impose supervision or no action at all).

460. In submissions dated 24 April 2023 the Authority objected to the Tribunal making the proposed direction as being outside the scope of section 133(5)(b) of the Act. The Authority submitted that FSMA s.133(5)(a) provides that in a disciplinary reference the Tribunal "*must determine what (if any) is the appropriate action for the decision maker to take in relation to the matter"*. It argued that that the Tribunal, having found that the Applicant did conduct himself in the manner alleged by the Authority in paragraph 12.3 of the Authority's Statement of Case (albeit not recklessly), must go on to decide whether the Applicant's conduct was sufficient to amount to misconduct; and, if so, under which provision; and to decide further what if any sanction should follow as a result. The Authority argued that if the Tribunal found that misconduct had taken place and that it was appropriate to impose a sanction on the Applicant as a result, the Tribunal must direct the Authority to impose that sanction on the Applicant. The Authority noted it was not aware of any provision allowing the Tribunal the discretion to remit a disciplinary reference (in whole or in part) to the Authority for it to decide for itself what action it should take nor was it aware of any precedent decision of the Tribunal in which such an approach was directed.

461. In reply submissions of the same date, the Applicant rejected the Authority's approach. Mr Rees Phillips contended that, having decided that the appropriate action was not to impose a financial penalty, the Tribunal should simply remit the matter to the Authority with a direction that there should be no disciplinary sanction against the Applicant in respect of its findings on paragraph 12.3 of the Authority's Statement of Case. That issue had already been determined as the subject matter of the reference with the conclusion that no disciplinary sanction should be applied to the Applicant. Mr Rees Phillips argued that the Authority was seeking to go behind the Tribunal's decision not to consider whether the Applicant had breached any other Statements of Principle. The issues of the Applicant failing to prevent FSE conducting regulated business without PII cover and whether the Applicant's conduct was in breach of any Statement of Principle other than Statement of Principle 1, were not new allegations. They were firmly part of the subject matter of the reference the Tribunal had already determined. The subject matter had already been determined and there was a bar to any further consideration of the allegations (or alternatively they were prohibited from

being further considered by virtue of issue estoppel arising out of *res judicata* and the principle in *Henderson v Henderson* 67 ER 313).

462. We have considered the parties' submissions on the scope of section 133(5) and proposed terms of the remittal to the Authority in respect of the financial penalty (the disciplinary sanction). We have already decided that the Applicant has not committed the misconduct alleged, a breach of Statement of Principle 1, and declined to make any finding of an alternative breach of any Principle for the reasons given above. We therefore have made no findings of misconduct and no findings as to whether the Applicant has committed any other misconduct than that pleaded (a breach of Statement of Principle 1). We have already determined that pursuant to section 133(5)(a) the appropriate action for the Authority to take is not to impose any financial penalty.

463. The scope of any direction for remittal under section 133(5)(b) is only to give to effect to that determination rather than to direct the Authority to make any other determination. Therefore, pursuant to section 133(5)(b) we direct that the Authority not impose any financial penalty upon the Applicant in respect of our findings regarding paragraph 12.3 of the Statement of Case. We direct that the Authority take no disciplinary sanction against the Applicant as a result of our findings.

Non-disciplinary sanctions – withdrawal of approval and prohibition order

464. In relation to stage 4, we determine the Applicant's reference in relation to the Authority's decision to withdraw his approval and make a prohibition order. We have summarised our findings of fact and law in paragraph [420] above. We have made findings of fact that were clearly at variance with the findings made by the Authority and which formed the basis of its decisions to withdraw the Applicant's approval and make a prohibition order against him.

465. In the light of our findings, we are not satisfied that that the decisions to withdraw the Applicant's approval and make a prohibition order were ones that were within the range of reasonable decisions open to the Authority. We are satisfied that the decisions to withdraw the Applicant's approvals and prohibit him were unreasonable decisions. This is because none of the factual allegations of recklessness, acting without integrity or failing to comply with Statement of Principle 1, or the facts on which they were based, have been established on the balance of probabilities.

466. We apply the provisions of section 133(6)(b) of the Act to remit the matter to the Authority with a direction to reconsider and reach decisions on the non-disciplinary sanctions in light of our findings. We direct that it is to reconsider and reach decisions on non-disciplinary sanctions in accordance with our findings as to the issues of fact and law as set out in full and as summarised at [420] above (see section 133(6A)(a)). We have found as a matter of fact that Authority has not established that the Applicant acted recklessly or lacked integrity or breached Statement of Principle 1.

467. We also remit the matter with findings as to the matters to be taken into account and procedural or other steps in making the decision (133(6A)(b) & (c)): that the Authority may reconsider whether to make findings as to a breach of any other Principle in relation to the allegation in paragraph 12.3 of the Statement of Case such as whether the Applicant has acted without due care, skill and diligence.

468. We also direct the matters to be taken into account when reconsidering and making the non-disciplinary decisions (for the purposes of section 133(6A)(b)) are to include all the mitigation set out above at [367]-[373] and the following findings.

469. The Authority must take into account all five points of mitigation in relation to paragraph 12.3 of the Statement of Case that we have found at [367]-[373] above in reconsidering non-disciplinary sanctions. The Authority must also take into account the following further mitigation, some of which has occurred after the Relevant Period and after the Authority's enforcement proceedings were begun: a) FSE is no longer conducting mortgage business; b) there was no financial benefit to the Applicant; c) no mortgage fraud has been proved to have taken place; d) there has been no financial loss to the clients as no insurance claims have been made and the absence of PII has not made any difference; e) the delay, history and age of the case – the two sets of supervision, enforcement and reference proceedings in relation to FSE and the Applicant have been ongoing for over five years. There was an interval after the supervision proceedings against the Applicant, where the Authority opened and pursued separate proceedings against FSE which were unsuccessful, then reverting to the enforcement and RDC proceedings against him personally. We accept that the Authority's approach has caused delay and it has not acted in a timely manner against the Applicant, as a result of which, FSE has not traded since October 2017; f) the Applicant has suffered the stress proceedings - of preparing for and giving evidence twice, damage to his reputation and financial effects of two sets of Tribunal proceedings in which FSE's and his references have been allowed.

470. We reject the Applicant's suggestion that the Authority is pursuing any vendetta against him or victimising him – we accept that it investigated and instituted proceedings against the Applicant solely in furtherance of its statutory functions and duties. Nonetheless, we have considerable sympathy for his position. We invite the Authority to consider the proportionality of imposing any further non-disciplinary sanction against the Applicant in light of: a) our findings that he has not acted recklessly but with integrity; b) all the mitigation we have highlighted; and c) the findings of the FSE Tribunal.

471. We also direct that when the Authority reconsiders its decisions, it considers: a) whether the finding of the Applicant's failure in relation to paragraph 12.3 only warrants supervisory action; and b) whether to permit FSE to re-commence trading under his supervision.

472. We therefore remit the matter to the Authority with a direction to reconsider its decisions to withdraw the Applicant's approvals and to prohibit him in accordance with our findings.

Conclusion

473. We allow the reference.

474. In respect of the Authority's decision to impose a financial penalty of £25,000, the appropriate action is for it not to be imposed. The matter is remitted to the Authority with a direction not to impose a financial penalty or any other disciplinary sanction.

475. In respect of the Authority's decisions to withdraw the Applicant's approval and prohibit him (the non-disciplinary sanctions), we remit the matters to the Authority to reconsider them. We direct that it: a) reaches decisions in accordance with our findings of fact and law; b) reconsiders whether to make findings as to the Applicant breaching any Statement of Principle other than Principle 1 in relation to paragraph 12.3 of the Statement of Case; c) takes into account all the mitigation highlighted; and d) decides what, if any, is the appropriate enforcement or supervisory action to take in light of our findings and any further findings it makes.

JUDGE RUPERT JONES

UPPER TRIBUNAL JUDGE
RELEASE DATE: 28 April 2023