UT Neutral citation number: **[2026] UKUT 00281 (TCC)**

UT (Tax & Chancery) Case Numbers: UT-2024-000009
UT-2024-000010

Upper Tribunal
(Tax and Chancery Chamber)

At the Rolls Building, London

FINANCIAL SERVICES – whether to uphold Prohibition Orders – whether to impose penalties – quantum of disgorgement – other computational matters – Prohibition Orders upheld and penalties reduced

Heard on 24 and 25 June 2026
Judgment given on: 27 July 2026

Before

JUDGE ANNE REDSTON
TRIBUNAL MEMBER ADAM SAMUEL
TRIBUNAL MEMBER JOHN WOODMAN

Between

RICHARD BRIAN FENECH
HEATHER IMOGEN DUNNE

Applicants

and

THE FINANCIAL CONDUCT AUTHORITY

Respondent

<u>Representation:</u>

For Mr Fenech: Alexander dos Santos KC, instructed by K&L Gates LLP

For Ms Dunne: Douglas Cherry, instructed by Fladgate LLP

For the Authority: Simon Pritchard of Counsel, instructed by the Financial Conduct Authority

DECISION

INTRODUCTION

1. This is our second decision[1] in relation to the references ("the References") made to this Tribunal on 29 January 2024 by Mr Fenech and Ms Dunne (together, "the Applicants") of Decision Notices issued by the Authority[2] on 2 January 2024 ("the Decision Notices").

2. Ms Dunne was a pension transfer specialist and the appointed representative ("AR") of Financial Solutions Midhurst Ltd ("FSML"), an advisory firm owned and operated by Mr Fenech.

3. The Authority issued the Decision Notice to Ms Dunne on the following basis:

(1) she had breached Statement of Principle 2 ("SoP 2") by failing to act with due skill, care and diligence when giving advice about pension transfers from defined benefit ("DB") schemes to defined contribution ("DC") schemes ("Pension Transfers"), because her approach did not comply with the applicable regulatory requirements. In particular, based on a sample of client files ("the Sample"), she always failed to collect the necessary information, and in all cases which the Authority was able to assess, the advice given was unsuitable; and

(2) she had breached Statement of Principle 1 ("SoP 1") because she was knowingly concerned in the dishonest provision of a backdated AR agreement to the Authority, and so demonstrated a lack of integrity.

4. The Authority issued its Decision Notice to Mr Fenech on the basis that:

(1) he had breached Statement of Principle 7 ("SoP 7") because he had failed to ensure adequate management and oversight of Ms Dunne; and

(2) he had breached SoP 1:

(a) by failing to respond to warnings given to him by an external compliance consultant about Ms Dunne's advice, and was thus reckless; and

(b) by deliberately providing a backdated AR agreement to the Authority and so demonstrating a lack of integrity.

5. The relevant period for Ms Dunne was 29 April 2015 to 22 June 2017 and that for Mr Fenech was 3 January 2015 to 22 June 2017.

6. Under s 66 of the Financial Services and Markets Act 2000 ("FSMA"), the Authority imposed a penalty of £399,817 on Ms Dunne and a penalty of £270,646 on Mr Fenech. Because the Authority accepted that Ms Dunne would suffer serious financial hardship, her penalty had been limited to the disgorgement amount plus interest.

7. Under FSMA s 56, the Authority imposed orders on both Applicants prohibiting them from performing any function in relation to any regulated activity ("the Prohibition Orders").

8. A hearing took place in January and February 2026 ("the First Hearing") and our judgment was published on 27 April 2026 under reference [2026] UKUT 00162 (TCC) ("the First Decision"). We came to the following conclusions:

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[1] In addition, Judge Jones previously decided Ms Dunne's privacy application, see *Dunne v FCA* [2024] UKUT 00416 (TCC) and Judge Redston issued an interlocutory judgment relating to expert evidence, see *Fenech and Dunne v FCA* [2026] UKUT 00020

[2] References in this judgment to "the Authority" also include the Financial Services Authority, as the Financial Conduct Authority was previously known

(1) We decided that both Applicants had dishonestly provided the Authority with a backdated AR agreement and in so doing had breached SoP 1. In relation to Mr Fenech, this was a one-off action at a time he was under significant personal and professional pressure, and was out of character. Ms Dunne similarly acted under pressure in relation to the provision of that agreement, but also acted dishonestly when she knowingly provided Confirmation Letters and Advice Declarations to a number of DB schemes before the issuance of Suitability Reports, albeit her purpose was to assist her clients.

(2) We found as a fact that at least 18% of Ms Dunne's clients had received unsuitable advice, and there were also more general compliance failings in her approach to giving advice; see the summary at [18] of the First Decision[3]. Taking into account both the unsuitable advice and the other compliance failings, we found that Ms Dunne's conduct breached SoP 2.

(3) We decided that Mr Fenech had breached SoP 7 because he failed adequately to supervise Ms Dunne, but we also found that he had not been reckless and so did not breach SoP 1 for that reason.

9. All parties asked to defer their submissions on the Prohibition Orders and the penalties until after the Tribunal had issued its decision on whether the Applicants had breached one or more of the SoPs, and we agreed that this was in the interests of justice. This judgment sets out our decision on those issues.

10. At both hearings, Mr Alexander dos Santos KC represented Mr Fenech, Mr Douglas Cherry represented Ms Dunne, and Mr Simon Pritchard represented the Authority. We thank them for their excellent written and oral submissions. We are particularly grateful to Mr Cherry and Fladgate LLP, whose services were provided to Ms Dunne on a *pro-bono* basis. We also thank members of the legal teams who prepared the bundles and assisted in other ways with the case preparation, and we are grateful to all parties for the work carried out in the days leading up to the hearing (and during the adjournments), during which they agreed almost all of the underlying financial figures relevant to the penalties.

The Prohibition Orders

11. For the reasons given in the main body of this judgment, we dismiss the References in so far as they related to the Prohibition Orders. In so doing we have rejected the following submissions on behalf of the Applicants:

(1) that Ms Dunne's Prohibition Order should be redrafted to state that the Authority was "minded to" revoke it at the end of 5 years; and

(2) that Mr Fenech's Prohibition Order should be remitted back to the Authority because the findings made by the Tribunal were significantly at variance with those on which the Prohibition Order had been based. Although we agreed that there were major differences between our findings and those of the Authority, in particular with regard to recklessness, if we had remitted the decision, the Authority would inevitably have come to the same conclusion.

The penalties

12. By the end of this hearing the Authority had accepted it had miscalculated the income and benefits received by both Mr Fenech and Ms Dunne during their relevant periods, and it also reduced the interest from the original 8% to a rate equal to the Bank of England Base Rate

[3] In this decision, our cross references to that judgment are shown in square brackets, without any further identifier

from time to time compounded every six months in accordance with the decision of the Tribunal in *Fox-Bryant v FCA* [2025] UKUT 87 (TCC) ("*Fox-Bryant: Penalties*") at [38(1)].

13. The Authority's new position was that Ms Dunne's penalty should be reduced from £399,817 to £277,087 and Mr Fenech's from £270,646 to £106,724.

14. However, we decided those figures were still significantly too high, and we remit the References to the Authority with directions to:

(1) reduce the penalty on Ms Dunne to £41,230; and

(2) reduce the penalty on Mr Fenech to £16,046.

15. The reasons why we directed that the penalties be further reduced can be summarised as follows:

(1) Step 1 of the penalty calculation relates to disgorgement. The Authority's position at this hearing was that Ms Dunne should disgorge all of the benefits from her pension transfer work because her Suitability Reports contained systemic errors: Mr Pritchard cited the presence of templated passages and the fact that information about the disadvantages of the transfer was hard to locate. However, disgorgement is not proportionate or appropriate whenever there has been *any* breach of the rules, and it was not proportionate or appropriate to require disgorgement as the result of the errors now relied on by the Authority. Instead, we based disgorgement on our finding of fact that at least 18% of Ms Dunne's clients had received unsuitable advice: it was clearly correct that Ms Dunne should disgorge that percentage of the benefits she had received. We reduced the disgorgement figure to 18%, and took the same approach to Mr Fenech's share of the benefits received from Ms Dunne's work.

(2) The Authority had added interest to their disgorgement amounts; this had been calculated as accruing over the nine years from the end of the relevant periods to the date of this hearing. We decided, on the specific facts of this case, that it was not in the interests of justice to apply interest.

(3) In relation to Mr Fenech, the Authority carried out the Step 2 calculation on the basis that his "relevant income" was all the money he earned from FSML during the relevant period. For the reasons given in the main body of this decision, we decided that the appropriate starting point was Mr Fenech's income from the work carried out for FSML by Ms Dunne as its AR.

16. We also considered but rejected Mr Cherry's submissions (made in the alternative) on behalf of Ms Dunne that:

(1) public censure was sufficient and no penalty should be charged;

(2) she should not have to disgorge the benefits, because she was suffering serious financial hardship; and

(3) the amounts should be further reduced to take into account a number of other costs and because certain files had been excluded from the Sample.

17. We also rejected the following submissions made by Mr dos Santos on behalf of Mr Fenech:

(1) the basis for calculating the penalty set out at Step 2 of the guidance the Authority's Decision Procedure and Penalties Manual ("DEPP") should be reduced to take tax into account;

(2) the seriousness of the breaches was at Level 3 rather than at Level 4 of the DEPP guidance; and

(3) the penalty should be further reduced to recognise Mr Fenech's co-operation with the Authority.

The guidance

18. In the course of this judgment, we make frequent reference to the Authority's guidance on prohibition orders and penalties, in particular to those in DEPP. In *Carrimjee v FCA* [2015] UKUT 0079 (TCC) ("*Carrimjee*") at [15], the Tribunal held that it was not bound by the Authority's policy when making an assessment of a financial penalty, but would pay the policy due regard when carrying out its overriding objective of doing justice between the parties, and in so doing would look at all the circumstances of the case.

19. In *FCA v Da Vinci Invest Ltd* [2015] EWHC 2401 ("*Da Vinci Invest*") at [201], Snowden J (as he then was) said this:

> "It was the FCA's submission, and I accept, that in determining any penalty under section 129, the starting point for the court should be to consider the relevant DEPP penalty framework that was in existence at the time of commission of the market abuse in question. To do otherwise would risk introducing an inequality of treatment of defendants depending upon whether the proceedings were taken against them under the regulatory route or the court route and depending upon how long the proceedings had taken to come to a conclusion. By the same token, however, in common with the Upper Tribunal, the court is not bound by that framework, or by the FCA's view of how it should be applied. But if the court intends to depart from the framework in a particular case, it should explain why it considers it appropriate to do so."

20. In *Arian Financial LLP v FCA* [2024] UKUT 00352 (TCC) ("*Arian*") at [65] the Tribunal said that the Authority's policies "should be capable of being applied flexibly, depending on the facts", while in *Staley v FCA* [2025] UKUT 00203 (TCC) ("*Staley*") at [526] the Tribunal similarly said that "the provisions of DEPP must be applied flexibly according to the circumstances of the case".

21. We have taken the same approach as set out in the above case law: although the guidance is not binding on us, we have paid it due regard and have identified any point at which we have departed from it, based on the circumstances of this case.

THE PROHIBITION ORDERS

22. We begin with the Tribunal's jurisdiction in relation to prohibition orders, and then consider the position of the Applicants.

The Tribunal's jurisdiction

23. Where the Authority decides to impose a prohibition order, and the decision is referred to the Tribunal, it is a "non-disciplinary reference". FSMA s 133 relevantly provides:

> "(6) …the Tribunal must determine the reference…by either—
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> (a) dismissing it; or
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> (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
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> (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 any determination of, and any direction given by, the Tribunal."

24. In *Carrimjee* at [31] and [32], the Tribunal set out the Explanatory Notes and an earlier policy document relevant to s 133 (6A) FSMA, and subsequently said:

> "39. If, having reviewed all the evidence and the factors taken into account by the Authority in making its decision, and having made findings of fact in relation to that evidence and such other findings of law that are relevant, the Tribunal concludes that the decision to prohibit is one that is reasonably open to the Authority then the correct course is to dismiss the reference.
>
> 40. Alternatively, if the Tribunal is not satisfied that in the light of its findings that the decision is one that in all the circumstances is within the range of reasonable decisions open to the Authority, the correct course is to remit the matter with a direction to reconsider the decision in the light of those findings. For example, that course would also be necessary were the Tribunal to make findings of fact that were clearly at variance with the findings made by the Authority, and which formed the basis of its decision…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."

25. At [44] the Tribunal stated that the Authority had:

> "…a discretionary power to determine whether an individual is 'fit and proper' which is only subject to a supervisory review by the Tribunal and not to a full merits jurisdiction."

26. In *Charles Palmer v FCA* [2017] UKUT 0358 (TCC) at [49] the Tribunal similarly said:

> "In relation to Mr Palmer's reference of the Authority's decision to impose a prohibition order…the powers of the Tribunal as set out in s 133(6) are more limited. The jurisdiction may now be characterised as a supervisory rather than a full jurisdiction; in that unless the Tribunal believes the reference to have no merit and therefore dismisses it its powers are limited to remitting the matter to the Authority with a direction to reconsider its decision in accordance with the findings of the Tribunal."

27. In the same judgment, the Tribunal said at [270]:

> "We have considered, whether in the light of the fact that we have not accepted all of the factors that led the Authority to conclude that a prohibition order 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 be appropriate to remit the decision to the Authority for further consideration. However, in our view the seriousness of the failings which we have found would lead inevitably to the Authority reaching the same decision were that course to be followed."

28. Those findings are consistent with the classic description of a supervisory jurisdiction given by the Court of Appeal in the tax case of *John Dee Ltd v Customs & Excise Commissioners* [1995] STC 941, the conclusions of which were summarised in *HMRC v*

Houseley [2015] UKUT 0071 (TCC). The emphasis is in the original, and the term "the Commissioners" refers to HMRC:

> "19. The Court of Appeal [in *John Dee*] held that, in the statutory appeal in question, the tribunal had to consider (i) whether the Commissioners had acted in a way which no reasonable panel of commissioners could have acted (ii) whether they had taken into account some irrelevant matter or disregarded something to which they should have given weight and (iii) (in some cases) whether the Commissioners had erred on a point of law…However, the tribunal could not exercise a fresh discretion.
>
> 20. Nonetheless, where the Commissioners' error was to fail to take into account something which they should have taken into account, the tribunal could dismiss the appeal if the decision would **inevitably** have been the same had account been taken of the additional material."

The purpose of a prohibition order

29. In *Staley,* the Tribunal said at [505]:

> "It is well established that prohibition orders are a protective measure, intended to protect the public in pursuit of the Authority's statutory objectives. The primary purpose of a prohibition is not to punish the individual."

30. Two of those statutory objectives are "the consumer protection objective" and "the integrity objective", see FSMA s 1B(3). The former is defined as "securing an appropriate degree of protection for consumers", and the latter as "protecting and enhancing the integrity of the UK financial system", see FSMA s 1C(1) and 1D(1).

31. Mr dos Santos submitted, and we agree, that:

> "The power to impose a prohibition order under section 56 is defensive and forward looking, not retrospective. The decision as to whether to impose a prohibition centres on whether an individual should be allowed to perform regulated functions in the future, rather than punishing past conduct for its own sake."

32. At the time the Decision Notices were issued, the Authority's guidance on prohibition orders was set out in Chapter 9 of the Enforcement Guide ("EG"). Since June 2025, the Authority's policy is contained within Chapter 5 of the revised Enforcement Guidance ("ENFG"). In this judgment, we have had regard to the latter.

33. ENFG 5.3.1G includes this passage:

> "In deciding whether to…make a prohibition order, the FCA will consider in each case whether its statutory objectives can be achieved adequately by imposing disciplinary sanctions – for example, public censures or financial penalties."

34. ENFG 5.3.2G says that when considering whether to make a prohibition order, the Authority will "consider all the relevant circumstances of the case". These may include whether the individual is "fit and proper" to perform functions in relation to regulated activities. Two of the most important considerations[4] in deciding whether or not a person is "fit and proper" are the person's "honesty, integrity and reputation" and whether s/he has the necessary "competence and capability".

[4] FIT 1.3.1BG

35. In relation to the former, the Authority will have regard[5] to “all relevant matters” including whether the person has:

(1) contravened any regulatory requirements;

(2) been the subject of a justified complaint relating to regulated activities;

(3) been criticised by the Tribunal; and/or

(4) been “candid and truthful” in all their past dealing with any regulatory body.

36. In relation to the second, competence and capability, the Authority will again have regard[6] to “all relevant matters”, including whether the person “has demonstrated by experience and training that they are suitable to perform the function they are intended to perform”.

The Prohibition Order issued to Ms Dunne and the findings in the First Decision

37. The Decision Notice issued to Ms Dunne stated that:

> “The Authority considers that it is appropriate and proportionate to prohibit Ms Dunne from performing any function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm because for the reasons given…above, she is not a fit and proper person to perform such functions.”

38. The reasons given for issuing the Prohibition Order were that:

(1) Ms Dunne had breached SoP 2 because she failed to act with due skill, care and diligence in providing Pension Transfer advice; in particular, all the files in the Sample were non-compliant with regulatory rules and guidance relating to the suitability of Pension Transfer advice;

(2) she breached SoP 1 by being knowingly involved in the provision of the backdated AR agreement and so acted dishonestly; and

(3) she operated a deficient two-adviser model and continued to do so after she was made aware of concerns that it was not compliant[7]. In the First Decision we adopted Mr Pritchard’s term for that model, being the “Transfer in Isolation” or “TII” model.

39. In relation to SoP 2, we found[8] that Ms Dunne had advised at least 18% of her clients to make a Pension Transfer when that advice was not suitable for those clients, but that the Authority had not proved that Ms Dunne gave unsuitable pension advice to any higher percentage of her clients. In addition, all her Suitability Reports had some failings (such as templated passages) and some had additional failings.

40. As regards SoP 1, we agreed[9] with the Authority that Ms Dunne had acted dishonestly when she worked with Mr Fenech to backdate the AR agreement, and we also found that she was dishonest in sometimes providing Confirmation Letters and Advice Declarations to the ceding defined benefit schemes stating that she had advised that the Pension Transfer was suitable and in their best interests, when she had not yet done so. In relation to the AR agreement, she had acted under pressure because of the effect on her business, and the possibility of damage to her clients and staff. In relation to the latter, she was motivated by a desire to assist her clients.

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[5] FIT 2.1

[6] FIT 2.2

[7] The Authority was prevented by limitation from relying on the TII model in relation to the penalties, but not in relation to the Prohibition Order, see [245] to [252]

[8] Part Four of the First Decision

[9] Part Seven of the First Decision

Submissions about Ms Dunne's Prohibition Order, and the Tribunal's conclusion

41. In asking the Tribunal not to remit the Authority's decision relating to Ms Dunne's Prohibition Order, Mr Pritchard relied in particular on the following findings of the Tribunal in the First Decision:

(1) Ms Dunne's dishonesty in relation to the backdated agreement and the Confirmation Letters/Advice Declarations;

(2) the systemic issues in all the Suitability Reports;

(3) the provision of unsuitable advice to at least 18% of her clients; and

(4) she operated her TII model throughout the relevant period, when a reasonable person in her position would have realised that it failed to comply with the Authority's guidance.

42. Mr Pritchard also submitted that throughout the First Hearing, Ms Dunne "showed no insight…staunchly defending all instances of her advice", and had shown no remorse.

43. In response, Mr Cherry did not seek to argue that Ms Dunne should not be subject to a prohibition order. However, he relied on ENFG 5.2.5G, which reads:

> "Where the FCA issues a prohibition order, it may indicate in the decision notice or final notice that it would be minded to revoke the order on the application of the individual in the future, in the absence of new evidence that the individual is not fit and proper. If the FCA gives such an indication, it will specify the number of years after which it would be minded to revoke or vary the prohibition on an application. However, the FCA will only adopt this approach in cases where it considers it appropriate in all the circumstances."

44. Mr Cherry referred to a number of Final Notices, where the Authority had issued a "minded to revoke" indication. In relation to *Mothahir Miah*, the Authority said:

> "Mr Miah admitted his misconduct to Aviva Investors when he was first questioned and he has been open and contrite in his dealings with the Authority. The Authority is therefore minded to revoke the Prohibition Order after five years…"

45. In relation to *Alexis Stenfors*, the Authority issued a prohibition order with a similar "minded to revoke" indication, for the following reasons:

(1) shortly after his managers at Merrill Lynch started to ask questions about his activities, he admitted his misconduct; co-operated fully with investigations by Merrill Lynch and by the Authority; and, in particular, made full admissions to the Authority;

(2) he accepted that his conduct was improper and expressed remorse; and

(3) he had not previously been the subject of regulatory action taken by the Authority.

46. Mr Cherry asked us to remit Ms Dunne's Prohibition Order to the Authority with a direction that it consider reissuing it with a "minded to revoke in five years" indication. He supported his submission by reference to the following:

(1) in the period before the Authority's investigation, Ms Dunne pro-actively communicated with, sought advice from and openly explained her TII model to the Authority;

(2) she co-operated fully with the Authority's enquiries and investigations, providing her client files and responding to questions promptly; and

(3) nearly ten years have already passed since the end of her relevant period, during which time she has not worked in financial services. When added to a five year "minded to revoke" period, this "represents a significant period for reflection and understanding of the criticisms she faces and with the benefit of the findings of fact made by this Tribunal".

47. However, we agree with Mr Pritchard that whether the Authority indicates that it is "minded to" revoke a prohibition order in the future is not a matter for us. Our jurisdiction on a non-disciplinary reference allows us to remit the decision to the Authority "in accordance with the findings of the Tribunal", but those findings are limited to (a) issues of fact and law; (b) matters which are, or are not, to be taken into account in making the decision, and (c) related procedural steps, see FSMA s 133(6) and (6A) cited above. Those powers do not include upholding a prohibition order, but also remitting it with a direction that it be reconsidered at a future date.

48. In *Hussein v FCA* [2018] UKUT 186 (TCC) ("*Hussein*"), the Tribunal came to the same conclusion. It first said at [225] that there was no basis on which the Tribunal could ask the Authority to reconsider its decision to issue a prohibition order, because "[it] cannot be said that in the light of the circumstances, the decision to prohibit is one that is not reasonably open to the Authority to make", the Tribunal continued at [226] (emphasis added):

> "This is a tragedy for Mr Hussein because we do not believe him to be a thoroughly bad person. He has made a serious error of judgment but nevertheless we do not think that it is one that should bar him from working in the financial services industry indefinitely. <u>Although this is not a matter for us, and is entirely now in the hands of the Authority,</u> we are aware that it has the power to indicate that it would be willing to revoke the prohibition order after an appropriate period of time and it may consider whether it is appropriate to do so in this case."

49. In Ms Dunne's case, the decision to impose a prohibition order is plainly within the range of reasonable decisions open to the Authority, and Mr Cherry did not seek to submit to the contrary. That is because Ms Dunne acted dishonestly in relation to both the backdated agreement and the Confirmation Letters/Advice Declarations; the Suitability Reports breached SoP 2 because at least 18% of customers received unsuitable advice and for the other reasons set out at [530] of the First Decision. We refuse to remit Ms Dunne's Application so far as it relates to the Prohibition Order.

The Prohibition Order issued to Mr Fenech and the findings in the First Decision

50. The Decision Notice issued to Mr Fenech similarly said:

> "The Authority considers that it is appropriate and proportionate to prohibit Mr Fenech from performing any function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm because for the reasons given…above, he is not a fit and proper person to perform such functions"

51. The reasons for issuing the Prohibition Order were that:

(1) Mr Fenech breached SoP 1 because he:

(a) recklessly permitted Ms Dunne to continue utilising her TII model;

(b) acted dishonestly by deliberately providing the Authority with the backdated AR agreement; and

(2) breached SoP 7 by failing adequately to supervise Ms Dunne.

52. In the First Decision we found that:

(1) Mr Fenech had not acted recklessly, but his provision of the backdated agreement was dishonest. However, we also found[10] that this was “a one-off action which was out of character”; and

(2) Mr Fenech did not adequately supervise Ms Dunne, and so breached SoP 7[11].

Submissions about Mr Fenech’s Prohibition Order, and the Tribunal’s view

53. On behalf of Mr Fenech, Mr dos Santos submitted that the First Decision “substantially departs” from the Authority’s reasons for issuing the Prohibition Order. He focused in particular on the findings that (a) Mr Fenech was not reckless; (b) many of Ms Dunne’s clients received suitable advice, and (c) Mr Fenech’s dishonesty was “a one-off action which was out of character”.

54. In relation to the last of those points, he submitted that Mr Fenech’s dishonesty was “at the lowest end of the range of possible findings”. He relied on *Watters v Nursing and Midwifery Council* [2017] EWHC 1888 (Admin), where the judge had held that a distinction should be made between “different forms of dishonesty”, and that when imposing sanctions a “more nuanced approach” should be adopted. Mr dos Santos asked the Tribunal to remit the case with a direction for the Authority to take into account:

(1) the finding that Mr Fenech’s dishonesty was a one-off action which was out of character;

(2) the length of time since the relevant period;

(3) Mr Fenech’s otherwise unblemished record; and

(4) the fact that his breaches of SoP 7 related only to the supervision of Ms Dunne, and not to the other activities of his firm, FSML.

55. As set out at §25, the Tribunal said in *Carrimjee* that it “would be necessary” to remit a decision “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”. We agree with Mr dos Santos that our findings about recklessness and the suitability of the advice given by Ms Dunne are “clearly at variance” with some of the factors on which the Authority based its decision: in other words, the Authority had wrongly taken those matters into account.

56. We went on to consider whether, if we were to remit back, the Authority’s decision “would inevitably be the same”. We took into account the guidance in ENFG 5.3.2G, set out earlier in this decision, which says that in deciding whether to make a prohibition order, the Authority will take into account all relevant circumstances, including whether a person is “fit and proper”. That in turn engages the following factors, each of which is in italics below, followed by their relevance to Mr Fenech:

(1) *Contravened any regulatory requirements and/or been criticised by the Tribunal*: In the First Decision, we found that Mr Fenech had breached SoP 1 and SoP 7.

(2) *Been the subject of a justified complaint relating to regulated activities*: FSML was the subject of complaints to FOS, at least one of which was upheld[12].

(3) *Been “candid and truthful” in all their past dealing with any regulatory body*. Mr Fenech provided the backdated AR agreement and in so doing acted dishonestly.

[10] [613] and [615]
[11] Part Five of the First Decision
[12] The Mr T complaint at [124]; the FOS decision at [147] to [150], and the further complaint at [174] and [185]

57. If the decision was remitted back, we are in no doubt that the Authority would place very significant weight on that third factor. In *Hussein,* the Tribunal held at [224] that "it is a very serious matter not to be candid and truthful with one's regulator…" and this went "right to the heart of whether a person wishing to work in the financial services industry can be relied on to act honestly and with integrity". In *Staley,* the Tribunal similarly said at [507]:

> "…for the proper functioning of the regime of oversight of the financial services sector and the market, the Authority relies upon, and must be able to rely upon, the veracity and completeness of the representations made to it and openness in disclosing matters of which it would reasonably expect to be given notice."

58. It follows that, were we to remit the decision for the Authority to consider whether or not to impose a prohibition order, in our view the decision would inevitably be the same: the Authority would issue a prohibition order in reliance on Mr Fenech's dishonesty if for no other reason. Although backdating the AR agreement was "a one-off action which was out of character", nevertheless, as Mr Pritchard said, "what is important to the Authority is being able to rely on a person at all times" including at "times of stress and high pressure". Mr Pritchard added, again entirely correctly:

> "If there is a spectrum of dishonesty, the dishonesty here is not at the low end. We would submit it's not even in the medium end. It comes in the context of interactions with the regulator."

59. We therefore decided not to remit the Prohibition Order for the Authority to exercise a fresh discretion.

Conclusion

60. For the reasons set out above, we dismiss the non-disciplinary parts of the references made by Ms Dunne and Mr Fenech.

61. That does not prevent either Applicant from applying to the Authority for the Prohibition Order to be revoked or varied: FSMA s 56(7) provides that:

> "The regulator that has made a prohibition order may, on the application of the individual named in the order, vary or revoke it."

THE TRIBUNAL'S JURISDICTION IN RELATION TO THE PENALTIES

62. A reference to the Tribunal of a decision by the Authority to impose a penalty under FSMA s 66 is a "disciplinary reference" pursuant to section 133(7A). The Tribunal's jurisdiction and powers on a disciplinary reference are set out in FSMA s 133(5) as follows:

> "In the case of a disciplinary reference…the Tribunal
>
> (a) must determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter; and
>
> (b) on determining the reference, must remit the matter to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination."

FINANCIAL HARDSHIP

63. The guidance at DEPP 6.5D relates to "serious financial hardship". It begins by saying at DEPP 6.5D.1:

> "The FCA recognises that penalties may affect persons differently, and that the Authority should consider whether a reduction in the proposed penalty is appropriate if the penalty would cause the subject of enforcement action serious financial hardship."

64. DEPP 6.5D.1(2) states that the Authority will consider whether to reduce the proposed penalty only if: (a) the individual or firm provides verifiable evidence that payment of the penalty will cause them serious financial hardship; and (b) the individual or firm provides full, frank and timely disclosure of the verifiable evidence, and cooperates fully in answering any questions asked by the Authority about their financial position. DEPP 6.5D.1(3) explains that the onus is on the individual to satisfy the Authority that payment of the penalty will cause serious financial hardship.

65. DEPP 6.5D.2 says that the Authority takes the view that:

> "an individual will suffer serious financial hardship only if during [a reasonable period for paying the penalty] his net annual income will fall below £14,000 and his capital will fall below £16,000 as a result of payment of the penalty."

Ms Dunne: hardship

66. Ms Dunne provided the Authority with evidence which was sufficient to satisfy it that she would suffer serious financial hardship and we accepted that this was the position.

Mr Fenech: hardship

67. Mr Fenech's evidence to the Tribunal was that he had:

> "zero retirement provision [and was] in a financially perilous position with no disposable assets and a large mortgage and other debts well in excess of £650,000. I currently have total average monthly drawings of circa £6,000 which enable me to get by and service my debts which have grown significantly in recent years."

68. That evidence was not challenged in cross-examination. However, Mr Fenech did not provide the Authority with financial information about his income and capital, despite having been invited to do so both before and after the First Hearing. Although Mr dos Santos's skeleton for that hearing submitted that "imposition of the proposed fine would cause exceptional hardship to the Applicant", the skeleton filed for this hearing contained no reference to hardship, and Mr dos Santos made no oral submissions on the point. We have thus taken it that Mr Fenech is no longer arguing that his penalty should be reduced because of hardship. That outcome would also be consistent with the approach taken in earlier Tribunal decisions, in particular *Sejean v FSA* FS/2011/0002 and *Ford & Owen v FCA* [2018] UKUT 0358 (TCC) ("*Ford*").

MS DUNNE: PUBLIC CENSURE OR PENALTIES

69. Although the Authority had accepted that Ms Dunne would suffer serious financial hardship, it nevertheless required her to disgorge the profits she had made.

70. Mr Cherry submitted that Ms Dunne should not have to pay the disgorgement element of the penalty and that a public censure was sufficient: the Authority disagreed with both submissions. We first discuss whether a public censure should be directed; disgorgement is considered at §100.

The guidance in DEPP

71. DEPP 6.4.2G sets out the Authority's criteria for "determining whether it is appropriate to issue a public censure rather than impose a financial penalty", and identifies eight particular considerations, which we have summarised as follows:

(1) whether deterrence may be effectively achieved by issuing a public censure;

(2) whether the person has made a profit as a result of the breach, as a person should not be permitted to benefit from the breach;

(3) whether the breach is serious, given that the more serious the breach, the more likely the Authority is to impose a financial penalty;

(4) whether the person has brought the breach to the attention of the Authority;

(5) whether the person has admitted the breach and has provided full and immediate co-operation with the Authority, and has taken steps to ensure that those who have suffered loss due to the breach have been fully compensated for those losses;

(6) whether the person has a poor disciplinary record or compliance history;

(7) the Authority's approach in similar previous cases: it seeks to achieve a consistent approach to its decisions on whether to impose a financial penalty or issue a public censure; and

(8) the impact on the person concerned, although it would only be in an exceptional case that the Authority would be prepared to agree to issue a public censure rather than impose a financial penalty, if a financial penalty would otherwise be the appropriate sanction. An example of an exceptional circumstance would be where the penalty would be reduced to zero following the Authority's approach to financial hardship.

The parties' submissions and our view

72. Mr Cherry structured his submissions by reference to the DEPP guidance; Mr Pritchard responded accordingly, and we have followed the same approach.

Deterrence

73. Mr Cherry submitted that deterrence would be effectively achieved by issuing a public censure, because Ms Dunne had been required to cease providing pension transfer advice over nine years ago, and because there had already been publicity about the Authority's investigation and the Tribunal's previous decisions[13]. Mr Cherry said that this "provides a clear deterrent signal to the market of the Authority's expectations and standards of behaviour required of senior regulated individuals". Mr Pritchard disagreed, saying that given the findings of the Tribunal in the First Decision, a public censure was insufficient.

74. We concur with Mr Pritchard. The passage of time does not change what happened, and publicity is not a relevant factor: it would be unfair to change the penalty position because of the amount or type of external media coverage. The applicants in *Donaldson and Arden v FCA* [2025] UKUT 00185 (TCC) ("*Donaldson*") made similar submissions, which were also rejected, see [622] of that judgment.

Profit

75. Although Mr Cherry submitted that Ms Dunne had spent most of the money she had received from the pension advice on paying the employees of her limited company, HDC Ltd, ("HDC") and settling other obligations after the business was suspended, it was nevertheless common ground that she did make a profit during the relevant period.

Seriousness

76. Mr Cherry said that Ms Dunne did not deliberately fail to comply with the regulations, and was always "forthcoming with the Authority, providing her client files and complied with all further information requirements promptly and thoroughly".

77. Mr Pritchard rightly emphasised that the Tribunal had (a) made two findings of dishonesty against Ms Dunne; (b) identified systemic errors in her work and (c) found that at

[13] Not only the First Decision, but the earlier judgments on privacy and following the pre-trial review, see *Dunne v FCA* [2024] UKUT 00416 (TCC) and *Fenech and Dunne v FCA* [2026] UKUT 00020 (TCC)

least 18% of her clients received unsuitable advice. We agree that the dishonesty findings and the failure to give suitable advice lie at the more serious end of the spectrum.

Brought to the attention and admitting the breach

78. It was common ground that Ms Dunne did not bring the breaches to the attention of the Authority or take steps to ensure that those who suffered loss due to the breach (in particular, where the advice was unsuitable) were fully compensated for any resulting losses. In addition, as Mr Pritchard pointed out, Ms Dunne did not "admit the breach". He said:

> "Ms Dunne did not come to this tribunal and say 'I accept there were faults with my advice, I accept that I was dishonest'. We had a lengthy trial in order to get to those conclusions."

Poor disciplinary record

79. Neither party relied on this point. We note that, although Ms Dunne did not have "a poor disciplinary record or compliance history" with the Authority, her work had been the subject of complaints to FOS, at least one of which was upheld[14].

Similar cases

80. Mr Cherry drew parallels with *Tinney v FCA* [2019] UKUT 0227 (TCC) ("*Tinney*"), where the Tribunal found that Mr Tinney had acted recklessly and without integrity, but had been subject to a public censure and no penalty.

81. Mr Pritchard emphasised that *Tinney* did not concern dishonesty, and that the Tribunal had also taken into account that no consumers were harmed by his actions, whereas in this case "there has been a huge risk which has crystallised for 18% of consumers who had unsuitable advice". We add that the Tribunal in the *Tinney* case also took into account that Mr Tinney did not personally profit from the breach; he did not deliberately mislead and his relevant period was relatively brief. We agree with Mr Pritchard that there is no relevant parallel between Ms Dunne's case and that of Mr Tinney.

82. Mr Cherry also relied on the Final Notice issued to *Pritchard Stockbrokers Limited (In Special Administration*), where the Authority also issued a public censure. It said:

> "The circumstances of this case merit a financial penalty. Were it not for Pritchard's financial position, the Authority would have imposed on Pritchard a financial penalty of £4,932,600. However, Pritchard entered into Special Administration in March 2012 after the Relevant Period with a view to it being wound up and its assets realised and distributed amongst its creditors. The Authority considers that any assets available to Pritchard should be made available to its creditors and accordingly has decided not to impose a financial penalty upon it."

83. As Mr Pritchard said during the hearing, that decision was made because the Authority wanted assets to be available for redress to customers, which is not the case here. We agree that there is no relevant parallel.

Impact on Ms Dunne

84. Mr Cherry submitted that Ms Dunne's case was "exceptional" because the Authority had accepted she would suffer serious financial hardship. However, the Authority's policy was to treat cases as "exceptional" where the penalty would be "reduced to zero" as the result of financial hardship. That was not the position here: although the Authority accepted that Ms Dunne would suffer serious financial hardship, it had also determined that she should

[14] The Mr T complaint at [124]; the FOS decision at [147] to [150], and the further complaint in 2016 at [174] and [185]

nevertheless disgorge the profits that had been made (and for the reasons set out below, we agreed with the Authority on that point).

85. Mr Cherry also asked us to take into account the Authority's delays, which have caused Ms Dunne significant stress. We discuss the delays at §137ff, and accept that they have had an adverse impact on Ms Dunne. However, that is not sufficient, given all the other factors pointing towards a financial penalty, for us to find that the appropriate sanction is a public censure.

Conclusion

86. For all the above reasons, we agree with the Authority that a public censure would not be appropriate in this case.

THE PENALTY FRAMEWORK

87. DEPP 6.1.2 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.

88. DEPP 6.5.2 states that the Authority's penalty-setting regime is based on the following principles:

(1) disgorgement - a firm or individual should not benefit from any breach;

(2) discipline - a firm or individual should be penalised for wrongdoing; and

(3) deterrence - any penalty imposed should deter the firm or individual who committed the breach, and others, from committing further or similar breaches.

89. DEPP 6.5.3 sets out a five-step framework to determine the appropriate level of financial penalty, with further details provided in subsequent chapters, and it states that these steps "will apply in all cases".

90. In relation to non-market abuse cases such as these, the relevant framework for individuals is at DEPP 6.5B, which begins as follows.

> *Step 1: Disgorgement*
>
> The FCA will seek to deprive a firm of the financial benefit derived directly from the breach…
>
> *Step 2: The seriousness of the breach*
>
> (1) The FCA will determine a figure which will be based on a percentage of an individual's "relevant income". "Relevant income" will be the gross amount of all benefits received by the individual from the employment in connection with which the breach occurred (the "relevant employment"), and for the period of the breach. In determining an individual's relevant income, "benefits" includes, but is not limited to, salary, bonus, pension contributions, share options and share schemes; and "employment" includes, but is not limited to, employment as an adviser, director, partner or contractor.
>
> (2) Where the breach lasted less than 12 months, or was a one-off event, the relevant income will be that earned by the individual in the 12 months preceding the end of the breach...
>
> (3) This approach reflects the FCA's view that an individual receives remuneration commensurate with his responsibilities, and so it is reasonable to base the amount of penalty for failure to discharge his duties properly on

his remuneration. The FCA also believes that the extent of the financial benefit earned by an individual is relevant in terms of the size of the financial penalty necessary to act as a credible deterrent. The FCA recognises that in some cases an individual may be approved for only a small part of the work he carries out on a day-to-day basis. However, in these circumstances the FCA still considers it appropriate to base the relevant income figure on all of the benefit that an individual gains from the relevant employment, even if their employment is not totally related to a controlled function.

(4) Having determined the relevant income the FCA will then decide on the percentage of that income which will form the basis of the penalty. In making this determination the FCA will consider the seriousness of the breach and choose a percentage between 0% and 40%.

(5) This range is divided into five fixed levels which reflect, on a sliding scale, the seriousness of the breach. The more serious the breach, the higher the level. For penalties imposed on individuals there are the following five levels:

(a) Level 1 - 0%;

(b) Level 2 - 10%;

(c) Level 3 - 20%;

(d).Level 4 - 30%; and

(e) Level 5 - 40%.

(6) The FCA will assess the seriousness of a breach to determine which level is most appropriate to the case.

(7) In deciding which level is most appropriate to a case against an individual, the FCA will take into account various factors which will usually fall into the following four categories:

(a) factors relating to the impact of the breach;

(b) factors relating to the nature of the breach;

(c) factors tending to show whether the breach was deliberate; and

(d) factors tending to show whether the breach was reckless."

91. Factors relating to the impact of the breach are at DEPP 6.5B(8), which reads as follows:

"(a) the level of benefit gained or loss avoided, or intended to be gained or avoided, by the individual from the breach, either directly or indirectly;

(b) the loss or risk of loss, as a whole, caused to consumers, investors or other market users in general;

(c) the loss or risk of loss caused to individual consumers, investors or other market users;

(d) whether the breach had an effect on particularly vulnerable people, whether intentionally or otherwise;

(e) the inconvenience or distress caused to consumers; and

(f) whether the breach had an adverse effect on markets and, if so, how serious that effect was. This may include having regard to whether the orderliness of, or confidence in, the markets in question has been damaged or put at risk."

92. Factors relating to the nature of a breach include:

"(a) the nature of the rules, requirements or provisions breached;

> (b) the frequency of the breach;
>
> (c) the nature and extent of any financial crime facilitated, occasioned or otherwise attributable to the breach;
>
> (d) the scope for any potential financial crime to be facilitated, occasioned or otherwise occur as a result of the breach;
>
> (e) whether the individual failed to act with integrity;
>
> (f) whether the individual abused a position of trust;
>
> (g) whether the individual committed a breach of any professional code of conduct;
>
> (h) whether the individual caused or encouraged other individuals to commit breaches;
>
> (i) whether the individual held a prominent position within the industry;
>
> (j) whether the individual is an experienced industry professional;
>
> (k) whether the individual held a senior position with the firm;
>
> (l) the extent of the responsibility of the individual for the product or business areas affected by the breach, and for the particular matter that was the subject of the breach;
>
> (m) whether the individual acted under duress;
>
> (n) whether the individual took any steps to comply with FCA rules, and the adequacy of those steps;…"

93. Factors which tend to show that the breach was deliberate include:

> "(a) the breach was intentional, in that the individual intended or foresaw that the likely or actual consequences of his actions or inaction would result in a breach;
>
> (b) the individual intended to benefit financially from the breach, either directly or indirectly;…
>
> (f) the individual was influenced to commit the breach by the belief that it would be difficult to detect…"

94. DEPP continues by saying that factors which are likely to be considered "Level 4 factors" or "Level 5 factors" include the following:

> "(a) the breach caused a significant loss or risk of loss to individual consumers, investors or other market users;
>
> (b) financial crime was facilitated, occasioned or otherwise attributable to the breach;
>
> (c) the breach created a significant risk that financial crime would be facilitated, occasioned or otherwise occur;
>
> (d) the individual failed to act with integrity;
>
> (e) the individual abused a position of trust;
>
> (f) the individual held a prominent position within the industry; and
>
> (g) the breach was committed deliberately or recklessly."

95. Factors which are likely to be considered "Level 1 factors", "Level 2 factors" or "Level 3 factors" include:

> "(a) little, or no, profits were made or losses avoided as a result of the breach, either directly or indirectly;
>
> (b) there was no or little loss or risk of loss to consumers, investors or other market users individually and in general;
>
> (c) there was no, or limited, actual or potential effect on the orderliness of, or confidence in, markets as a result of the breach;
>
> (d) the breach was committed negligently or inadvertently;…"

96. DEPP 6.5.3(3) states that "a penalty must be proportionate to the breach" and that the Authority "may decrease the level of the penalty arrived at after applying Step 2 of the framework if it considers that the penalty is disproportionately high for the breach concerned".

97. Step 3 is "mitigating and aggravating factors" and provides that the Authority may increase or decrease the figure arrived at following Step 2, to take into account factors which aggravate or mitigate the breach.

98. Step 4 is "adjustment for deterrence" and Step 5 is "settlement discount". The Authority did not submit that the former was relevant, and neither party settled with the Authority.

THE AUTHORITY'S POSITION

99. By the Decision Notices, the Authority imposed a penalty of £399,817 on Ms Dunne and a penalty of £270,646 on Mr Fenech. By the end of this hearing, the Authority had accepted it had miscalculated the income and benefits received by both Mr Fenech and Ms Dunne during their relevant periods. It also reduced the interest from 8% to a rate equal to the Bank of England Base Rate from time to time compounded every six months, in accordance with the decision of the Tribunal in *Fox-Bryant: Penalties* at [38(1)]. The Authority's revised position was that Ms Dunne's penalty should be reduced to £277,087 and Mr Fenech's to £106,724.

STEP 1: DISGORGEMENT – MS DUNNE

100. We first summarise the submissions of Mr Cherry and Mr Pritchard in relation to Step 1 as applied to Ms Dunne.

The parties' cases

101. Mr Cherry's primary submission was that Ms Dunne should not have to pay any penalty, because the Authority had accepted she would suffer serious financial hardship.

102. The parties agreed, that were the Tribunal to reject that submission, the starting point for calculating Ms Dunne's disgorgement amount would be £229,055. That figure had already been adjusted for tax, in accordance with the approach set out in *Fox-Bryant: Penalties*.

103. From that starting point, Ms Dunne's case was that:

(1) the figure of £229,055 should be further reduced by other costs of £28,229;

(2) only 18% of the total should be disgorged, reflecting the Tribunal's finding of fact about unsuitable advice provided to clients; and

(3) there should be an adjustment for certain client files not included in the Sample.

104. The Authority disagreed with all of the above, and also submitted that interest should be added to the disgorgement figure. We consider each of those issues below.

Hardship

105. The Authority had accepted that Ms Dunne would suffer serious financial hardship, were she to have to pay a penalty, see §66, but maintained that she should nevertheless disgorge the profits she made.

106. As at the date of the Decision Notices, there was no published guidance on this point. On 15 June 2026, ten days before this hearing, the Authority published Consultation Paper 26/19 entitled "Decision Procedure and Penalties Manual updates". Under the heading "Disgorgement and SFH" it includes the following passages:

> "**2.42** One of the principles of our penalty policy is that a person should not benefit from their misconduct. This is why the first step in our process to calculate a penalty is an amount that represents that benefit. This disgorgement ensures that a person loses any financial benefit they gained (including any losses they avoided) from their wrongdoing.
>
> **2.43** This is why we do not reduce the disgorgement part of a penalty where we give a discount for early settlement or where we reduce the penalty for SFH [serious financial hardship].
>
> **2.44** Although we state in our settlement discount policy in DEPP 6 that a settlement discount does not apply to the disgorgement part of a penalty, DEPP does not expressly set this out for SFH. We consider that it should, to make clear that any disgorgement amount in a penalty will not be reduced, even where payment of this will cause the person SFH. We propose to amend DEPP 6 accordingly to reflect our practice."

107. We find that the above passages reflected the Authority's existing policy even though there was no reference to it within DEPP, see *Fox Hayes v FSA* (FIN/2006/0015) ("*Fox Hayes*") at [15]; *Ford* at [660] and *Fox-Bryant v FCA* [2024] UKUT 00357 (TCC) ("*Fox-Bryant*") at [221].

108. Mr Cherry submitted that the Tribunal should depart from that approach in Ms Dunne's case, saying:

> "Ordering disgorgement almost 10 years after the start of the Relevant Period, in circumstances where the Applicant has been impecunious for many years due to the consequences of the Authority's intervention in 2017 and ongoing investigations (notified since September 2021), would now amount to a penal sanction going beyond the purpose of disgorgement."

109. He suggested by way of alternative that Ms Dunne make a "finite payment of £100 to the FSCS [Financial Services Compensation Scheme]" on the basis that this represented "more than [her] current limited liquid assets"; he drew attention to the Final Notices issued to *Anthony Cuming*, *Steven Sahota* and *Kyle Jones* in 2024 where the Authority took a similar approach.

110. Mr Pritchard asked us to apply the usual policy of requiring disgorgement irrespective of Ms Dunne's financial hardship. We see no reason to depart from that policy, indeed Mr Cherry himself rightly acknowledged:

> "There's a general principle here, which is that one ought not to generally be able to plead that, 'Well, I've got no money so I get to keep my ill-gotten gains'."

111. As Sir Stephen Oliver said in *Fox Hayes,* there is no punitive element to disgorgement, it is simply the repayment of money obtained as the result of a breach of the regulatory or other requirements. We agree with Sir Stephen that it "would be wrong" not to confirm the Authority's decision on this point.

112. The Authority's approach in *Cuming, Sahota* and *Jones* does not change that. The Authority there did impose penalties, but subsequently agreed not to enforce them. The Tribunal only has jurisdiction to determine *whether* the penalty is appropriate and if not, to remit with directions. We do not have the jurisdiction to direct the Authority *not to enforce* an

appropriate penalty. Thus, it will be for Ms Dunne to discuss with the Authority how they will collect the disgorgement amount, and she can of course request that they waive collection.

The other costs

113. As explained in the First Decision, Ms Dunne worked as a sole trader under the name HDIFA; she was also the owner and director of HDC, a separate unregulated company which provided paraplanning services to HDIFA and other firms. When HDIFA received fees from clients for the provision of pension advice, it paid over most of that money to HDC as "consultancy fees", because HDC bore most of the administrative costs.

114. In calculating Ms Dunne's income, it was common ground that:

(1) the dividends and salary she received from HDC should be included; and

(2) the consultancy fees paid by HDIFA to HDC should be deducted from the income received by HDIFA, to avoid double counting.

115. However, some costs remained within the accounts of HDIFA. The reason these costs had not been recharged to HDC was unclear: for example, in the year to 5 April 2014, there were £12 of travel costs and £626 of "rent, rates, power and insurance", although similar cost headings were also within HDC's accounts.

116. Mr Cherry said that, given the passage of time, Ms Dunne was unable to give evidence about the reasons why some costs remained within HDIFA and had not been recharged to HDC. At the time it was therefore thought for whatever reason, that they should be excluded from the recharges to HDC, and we found on the balance of probabilities that this was because they did not relate to the provision of pension advice.

Reduction to 18%

117. The Decision Notice stated that Ms Dunne should disgorge all the benefits she received because she had breached SoP 2 in the following ways:

> "…by failing to act with due skill, care and diligence in providing Pension Transfer advice. In particular, during the course of its file review exercise in 2019-2020, the Authority found that all 17 files it reviewed were non-compliant with regulatory rules and guidance relating to the suitability of Pension Transfer advice..."

118. On the basis of evidence given by an expert statistician, Dr Purdon, the Authority then extrapolated from that sample; the Decision Notice said:

> "The statistician advised that the 95% confidence interval in relation to the Authority's review of 17 files as being non-compliant is 82% to 100%. Therefore, the Authority can infer, with 95% confidence, that the percentage of non-compliant Defined Benefit Pension Transfer advice across the whole population of HDIFA's files is within the range 82% to 100%."

119. As we explained in the First Decision, the 17 files had been reviewed by a team of pension transfer specialists from Grant Thornton ("GT"). However:

(1) GT's findings were that in eight out of 17 cases, Ms Dunne had correctly advised that a Pension Transfer was suitable for the client;

(2) the Authority subsequently "recalibrated" those eight "suitable" files on the basis that Ms Dunne was unable to give compliant advice because of the way she operated her TII model, and in consequence, all Ms Dunne's files were re-assessed as being "non-compliant";

(3) the Authority extrapolated from the Sample and decided that all Pension Transfers made by Ms Dunne during her relevant period were non-compliant; but

(4) the Authority was out of time[15] to rely on the TII model.

120. In consequence, the Authority could neither rely directly on Ms Dunne's operation of the TII model nor could it rely on the file review outcomes which had been decided on the basis that Ms Dunne had operated that model. Those included not only the "recalibrated" files, but other cases where the GT assessor had taken a similar view to the Authority.

121. During the First Hearing, Mr Pritchard sought to identify, by reference to the material in the Sample, other failures in Ms Dunne's advice in addition to those consequential upon her operation of the TII model. We then carried out our own review of the Sample, and having done so, we found as a fact that at least 18% of Ms Dunne's clients had received unsuitable advice, so the position was significantly different from that in the Decision Notices. However, in some of the client files we identified other breaches of the regulations, and in all files[16] we found that Ms Dunne's Suitability Reports:

> "…included templated passages which were not tailored to the customer; these made the Reports unclear and risked obscuring important matters. In addition, information about what was being given up by the Pension Transfer was often hard to locate, and more prominence was given to the benefits of the transfer."

122. The Authority's position on disgorgement was unchanged by the First Decision. Mr Pritchard's skeleton said:

> "The Tribunal has found that HD's advice was non-compliant. Parts of that noncompliance were systemic and affected all of the advice she gave. The Authority's primary position is therefore that disgorgement should encompass all of HD's advisory work because it was all based on advice which breached various requirements. For example, the SRs breached COBS 4.2.1R due to the inclusion of templated passages which were not tailored to the customer, which made them unclear and risked obscuring important matters; additionally, information about what was being given up by the transfer was hard to locate, and more prominence was given to the benefits of the transfer *{Dunne/§530(5)}*. Given that the Tribunal found that aspects of all of the advice HD gave were non-compliant, and that HD breached SoP 2 including by virtue of giving such non-compliant advice, all of the fees HD received from pension transfer advice during the relevant period derived from her breach."

123. It would however be disproportionate and inappropriate to require disgorgement whenever there is *any* breach of a regulatory rule. DEPP 6.5.2 states that one of the principles of the Authority's penalty regime is to punish "wrongdoing"; the Tribunal said in *Ford* at [684] that "the principle of disgorgement is to deprive the wrongdoer of the benefit of their wrongdoing", and in *Fox-Bryant: Penalties* the Tribunal similarly said "'Disgorgement is looking to deprive a wrongdoer of any benefit from their wrongdoing".

124. In previous cases where the Tribunal has upheld disgorgement, there was clearly "wrongdoing". To give the most recent examples:

(1) In *Reynolds v FCA [2025]* UKUT 00413 (TCC), disgorgement was applied to prohibited commissions.

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[15] See [245] to [251]

[16] See [530(5)]

(2) In *Fox-Bryant,* the applicants were found to have been "reckless" in operating a "flawed pension transfer business" from which almost all of their income derived.

(3) In *Arian,* the inadequacy of the applicant's systems and controls allowed them to be used to facilitate "sophisticated financial crime on an enormous scale" by executing purported over-the-counter equity trades of approximately £37 billion in Danish equities and £15 billion in Belgian equities.

(4) In *Page and others v FCA* [2022] UKUT 124 (TCC), the applicants had adopted a business model which had been designed so that customers would invest their pensions into high-risk products.

(5) In *Ford,* the applicant "engaged in conduct of the most egregious kind", and "consciously and deliberately set aside his regulatory responsibilities in pursuit of entrepreneurial ambition".

125. It is neither appropriate or proportionate for Ms Dunne to "disgorge" *all* the benefits arising during the relevant period on the basis that the Suitability Reports contained templated passages, or because it was hard to locate the disadvantages of the transfer.

126. Mr Pritchard went on to submit (our emphasis):

> "As a result of the non-compliance across all of the advice instances, there was a risk that all customers were not in a position to make a properly informed decision as to whether or not to transfer their pensions. Had they been provided with compliant pension transfer advice (including advice which clearly set out the risks of transferring rather than prioritising the benefits of doing so), <u>some of them may have decided not to do so</u>."

127. However, this is purely hypothetical; we made no finding to that effect. Our finding as to the effect of the advice on Ms Dunne's clients is at [450]:

> "…we find as a fact at least 18% of the total population of Ms Dunne's clients were given advice to carry out a Pension Transfer when that advice was unsuitable. The Authority has not proved that Ms Dunne gave unsuitable Pension Transfer advice to any higher percentage of her clients, and we make no related finding."

128. Ms Dunne must thus disgorge the benefit she received from providing unsuitable advice to 18% of her clients, as Mr Cherry rightly accepted. It was common ground that if the Tribunal agreed with Mr Cherry on this point, the post-tax disgorgement amount was £41,230.

The seven files

129. As set out at [307], the Sample excluded eight files which had previously been reviewed by the Authority's supervision division ("the Supervision Review"), leaving 352 files. In his closing submissions at the First Hearing, Mr Pritchard said that one of these files was outside the relevant period, and so had been ignored when the Authority calculated the disgorgement figure, but that the fees received for the work carried out for the other seven clients should be removed, as they did not form part of the Sample. Those fees were £48,764. However, by the time of this hearing, the Authority had changed its position and submitted that there should be no adjustment. Mr Cherry asked that the Tribunal adopt the Authority's previous position, and exclude the fees relating to those seven clients.

130. We do not agree, and have made no adjustment for the seven files, for the following reasons:

(1) The £48,764 is the gross fees received, while Ms Dunne's income has been calculated on the basis of her dividends and salary from HDC, plus a small residual amount from HDIFA.

(2) The distortion is evident from the fact that removing the whole of the £48,764 would reduce her income by around 21%, while the files were only 2% of the total.

(3) There is no reason to think that the percentage of unsuitable files was any different: the outcome of the Supervision Review mirrored GT's review of the Sample[17].

Interest

131. DEPP 6.5B.1G states that the Authority "will ordinarily charge interest" on the disgorgement amount, although in *Da Vinci Invest,* Snowden J did not add interest, observing that "interest rates have generally been very low over the last few years".

132. In *Fox-Bryant: Penalties,* the UT said at [31]:

> "Where there are no investment or other measurable economic benefits derived by the subject or these do not fully reflect the value to the subject of having received benefits some time previously, interest should be charged on the amounts directly derived by the subject, in order (if nothing else) that what is disgorged is the present value of a benefit derived some time ago. 'Disgorgement' is looking to deprive a wrongdoer of any benefit from their wrongdoing, not to compensate a person they have wronged or to penalise the wrongdoer, and so the rate of interest used in such a case should reflect prevailing deposit interest rates over the relevant period. This may mean, as it did in *Da Vinci Invest*, that in a time of ultra-low interest rates no interest should be charged."

133. The Tribunal in *Fox-Bryant: Penalties* went on to decide that interest should be charged "using an interest rate equal to the Bank of England Base Rate from time to time compounded every six months".

134. Mr Pritchard submitted that we should take the same approach in this case, with the result that Ms Dunne would be charged interest for the eight year period from 22 June 2017 (the end of her relevant period) until the date of this hearing, being £48,032.

135. Mr Cherry disagreed, saying it was unreasonable to impose interest, given in particular that:

> "…the interest has significantly compounded due to delays by the Authority in bringing, and progressing, the investigation and a timeline outside of the Applicant's control."

136. For the first five years, from June 2017 to June 2022, the interest rate averaged 0.44%, so this was a time of ultra-low interest rates. Had the hearing finished by June 2022, no interest would have been charged.

137. We then considered the delays. As set out in the First Decision:

(1) On 15 June 2017, the Applicants agreed to suspend all pension transfer work, having been told that the Authority would otherwise impose a suspension on FSML; on 22 June 2017, the Applicants replied to the Authority's questions; this date marks the end of both Applicants' relevant periods; and on 29 June 2017, the Authority sent a letter setting out their concerns (see [208] to [211]).

[17] [467]

(2) There was then a nine month gap from July 2017 to March 2018. On 19 March 2018, FSML was referred to Enforcement. On 19 April 2018 and 11 May 2018 respectively, Mr Fenech and Ms Dunne were interviewed on a "compelled" basis[18].

(3) There was then another gap of about a year. At some point between 30 April and 6 June 2019, Enforcement obtained and considered a random sample of Ms Dunne's files, see [234]; in August 2019, the Authority asked Dr Purdon about an appropriate sample size, see [310]; in September and October 2019, GT carried out the Review, see [234] and in November 2019, Dr Purdon provided 95% confidence intervals, see [314]. Between December 2020 and March 2021, the Authority discussed the initial outcomes of the Review, and the files were "recalibrated", see [317].

(4) The next gap was shorter, around six months. On 10 September 2021, Enforcement appointed investigators into Ms Dunne and Mr Fenech.

(5) After a further six months, on 9 March 2022, Enforcement carried out a second compelled interview with Mr Fenech, and on 4 July 2022 with Ms Dunne.

(6) Around six months later, on 17 January 2023, the Authority sent both Mr Fenech and Ms Dunne annotated draft Warning Notices, followed on 6 March 2023 by Warning Notices. The penalties set out in those Notices relied on the files provided by Ms Dunne on 8 March 2017, and the Warning Notices were thus issued two days before the expiry of the six year limitation period in FSMA s 66(5ZA)(b). Various communications between the Applicants' representatives and the Authority then followed. On 2 January 2024, the Authority issued the Decision Notices, and on 26 and 29 January 2024, the Applicants made the References.

138. The period from the suspension of FSML to this hearing has thus been around nine years, during which there were gaps totalling around three years. Mr Cherry described these as "large lengths of time where there was no progress, no significant communication".

139. We noted that Mr Cherry had raised the issue of delay at least as early as 17 November 2023, in correspondence with the Authority, when he said that "the FCA's extreme delay in pursuing its case against her has resulted in a prolonged interest period". The Authority was thus on notice long before the First Hearing that the link between delays and the interest charged was in issue.

140. However, as Mr Cherry pointed out (as did Mr dos Santos in relation to the interest charged to Mr Fenech), there was no evidence or explanation for those delays. The Authority did call Mr Smart, who worked on the Applicants' case between January 2021 to July 2022, and from July 2024 onwards, but Mr Smart did not explain what was happening in the gap periods, or give reasons for the earlier delays. Mr Pritchard suggested that the Applicants could have cross-examined him to extract that evidence, but the burden here is on the Authority, not on the Applicants.

141. Mr Pritchard also drew attention to the six year limitation period, but we do not consider that to be of assistance: those provisions allow the Authority to issue a penalty within six years, but that of itself does not justify or explain why the Authority took all but two days of that six year period to issue the Warning Notices.

142. Had the Authority issued those Notices three years sooner, the hearing would have been finished in mid-2023 rather than mid-2026. The interest rates were negligible for the first five years, just as they were in *Da Vinci Invest.* Rates only began to rise in the sixth year, being 2.11% for the first six months and then 4.08% in the period which ended just before the

[18] [230]

issuance of the Decision Notices on 2 January 2024. These imposed a penalty of £399,817 on Ms Dunne and a penalty of £270,646 on Mr Fenech. As is clear from the outcome of the First Decision, neither Applicant could sensibly have been advised to accept that those sums were properly due, and the References have caused further time to elapse.

143. We decided, on the particular facts of this case, that interest should not be charged. There were multiple unexplained periods of delay; the significant interest rate increases fell in the later years, and the Applicants were correct to challenge the Decision Notices. This is also not a case where the Applicants invested the disgorged amounts, so they have not benefitted from interest rates when they rose; instead, they used the money to fund their living costs following what Mr Cherry called "the financial disruption" of their businesses closing down.

144. We do not see our conclusion as contradicting the DEPP guidance that interest is "ordinarily" chargeable; instead this is a case where it is not appropriate to charge interest. As the Tribunal said in *Staley* "the provisions of DEPP must be applied flexibly according to the circumstances of the case".

Conclusion on Step 1: Disgorgement – Ms Dunne

145. For the reasons given above, Ms Dunne's post-tax disgorgement amount is £41,230. Interest is not added to that sum, and there is no deduction for the "other costs" or in relation to the seven files considered in the Supervision Review.

STEP 1: DISGORGEMENT – MR FENECH

146. It was common ground that Mr Fenech had earned £28,697 from the pensions work carried out by Ms Dunne; that figure is net of tax. Mr Pritchard submitted that all of this amount should be disgorged, and that interest should be charged on it, but for the same reasons as set out above in relation to Ms Dunne, we find that the figure to be included at Step 1 is £5,165, being 18% of the total amount, with no interest added.

STEP 2: THE SERIOUSNESS OF THE BREACH – MR FENECH

147. Step 2 and the remaining Steps are relevant only to Mr Fenech, because the Authority accepted that Ms Dunne would suffer serious financial hardship. In *Da Vinci Invest,* Snowden J said that he regarded Step 2 as "designed to arrive at a measure of seriousness of the misconduct and responsibility for the harm caused to others".

148. The Step begins with the calculation of Mr Fenech's "relevant income", followed by an evaluation of the penalty level to be applied to that income.

Mr Fenech's "relevant income"

149. The approach in DEPP 6.5B is based on total income in the person's "employment", and the term "employment" is defined to include, but not be limited to, employment as an adviser, director, partner or contractor.

150. There were several points of dispute under this heading:

(1) whether the starting point for "relevant income" was all of Mr Fenech's income from FSML or that derived from the AR agreement;

(2) whether the figure should be reduced to 18% to reflect the finding about unsuitable advice; and

(3) whether tax should be deducted.

The starting point

151. The Authority originally calculated that Mr Fenech had received £455,446 from FSML during the relevant period, and used that figure in the Decision Notice. By the end of the

hearing, the parties were agreed that there were significant errors in that calculation, and that Mr Fenech had instead received £240,033.

152. Mr Pritchard submitted that the Step 2 calculation should be based on that figure, whereas Mr dos Santos's position was that the relevant income was that derived from the work carried out by Ms Dunne under the AR arrangement. It was common ground that this was 15.11% of Mr Fenech's income, so £36,269.

153. One of the reasons given by the Authority in DEPP 6.5B for taking the total income from "employment" as the starting point is that:

> "an individual receives remuneration commensurate with his responsibilities, and so it is reasonable to base the amount of penalty for failure to discharge his duties properly on his remuneration."

154. That is of course correct for employees, but Mr Fenech's income came from running FSML. The greater part of his income did not derive from the AR agreement with Ms Dunne, but from entirely separate workstreams.

155. We note that the Authority takes a different approach to firms, where the separate guidance at DEPP 6.5A reads (our emphasis):

> "The FCA will determine a figure that reflects the seriousness of the breach. In many cases, the amount of revenue generated by a firm <u>from a particular product line or business area is indicative of the harm or potential harm</u> that its breach may cause, and in such cases the FCA will determine a figure which <u>will be based on a percentage of the firm's revenue from the relevant products or business areas</u>."

156. We recognise that this is not an exact parallel with Mr Fenech's situation, because it is based on the "revenue generated" from the product line or business area, whereas Mr Fenech has received dividends and salary which were paid out of profits. Nevertheless, we find that his remuneration from the AR agreement is a more appropriate proxy for the "measure of seriousness of the misconduct and responsibility for the harm caused to others" than taking the whole of his earnings from FSML.

157. In coming to that conclusion we have not overlooked the passage in DEPP 6.5B which states that "[t]he FCA also believes that the extent of the financial benefit earned by an individual is relevant in terms of the size of the financial penalty necessary to act as a credible deterrent". While it is important that the penalty is of a sufficient size to be an appropriate deterrent, that should not distort this part of the calculation: the framework allows for a further adjustment at Step 4 if the penalty is insufficient to deter the individuals or others from committing similar breaches.

158. The Authority also say, in the same part of the guidance:

> "The FCA recognises that in some cases an individual may be approved for only a small part of the work he carries out on a day-to-day basis. However, in these circumstances the FCA still considers it appropriate to base the relevant income figure on all of the benefit that an individual gains from the relevant employment, even if their employment is not totally related to a controlled function."

159. We agree that this is the correct approach for employees whose regulatory obligations are only a part of their role, as was the case in *Donaldson*. However, the AR agreement was entirely separate from the rest of FSML's business, and Mr Fenech's position is different from that of an employee.

160. For all those reasons, we agree with Mr dos Santos that the starting point is £36,269.

The 18% and the tax

161. Mr dos Santos submitted that the figure should be based on 18% of Mr Fenech's income from the AR agreement, and then further reduced for tax, in both cases for the same reasons as set out at Step 1.

162. On these points we agree with Mr Pritchard. The income figure forms the basis for calculating a penalty to reflect the seriousness of the misconduct; its purpose is different from Step 1, which concerns the disgorgement of profits from an individual's wrongdoing. Mr Fenech was responsible for supervising all of Ms Dunne's work, and there is no good reason for restricting this proxy figure by reference to our findings on unsuitable advice or to take account of tax.

The level of seriousness

163. In the Decision Notice the Authority determined that the seriousness of Mr Fenech's breach was at Level 5, taking into account in particular his dishonesty in providing the backdated agreement and his recklessness.

164. Following the issue of the First Decision, where we found that Mr Fenech had not been reckless, Mr Pritchard submitted that the penalty should instead be assessed as Level 4. Mr dos Santos's position was that this was too high, and he "invited the Tribunal to consider a lower level of seriousness".

165. We took into account all the factors set out earlier in this decision. Of the level 4 and 5 factors, there was no dispute that the provision of the backdated agreement was deliberate and that Mr Fenech failed to act with integrity in doing so. His failure to supervise Ms Dunne allowed her to provide unsuitable advice to at least 18% of her clients, and this caused a significant risk of loss to the clients in question.

166. Of the Level 1-3 factors, the failure to supervise Ms Dunne was negligent, but this is not a case where "there was no or little loss or risk of loss to consumers" or "little, or no, profits were made…as a result of the breach, either directly or indirectly".

167. As regards the list of separate factors, we found as follows:

(1) In relation to the impact of the breaches, the failure to supervise Ms Dunne put individual consumers at risk of loss, and it is evident from some of the cases in the Sample that there was an unintentional "impact on particularly vulnerable people", such as Clients D, H, L and O. Thus, factors (b), (c) and (d) are engaged.

(2) In relation to the nature of the breaches, Mr Fenech failed to act with integrity, a breach of SoP 1, albeit that this was an isolated incident and out of character. He breached SoP 7 because he failed to ensure adequate management and oversight of Ms Dunne throughout the relevant period, despite that being his responsibility and notwithstanding his many years of industry experience. In consequence, factors (a), (b), (e), (g), (j) and (l) are engaged.

(3) In relation to factors relating to deliberateness, the provision of the backdated agreement was intentional and carried out so as to make it difficult to detect, so factors (a) and (f) are engaged.

168. Taking into account the foregoing, we agree with Mr Pritchard that Level 4 is appropriate, which produces a Step 2 figure of £10,881 (30% of £36,269).

STEP 3: AGGRAVATING OR MITIGATING FACTORS

169. The Authority did not identify any aggravating factors, and we agree. As regards mitigation, Mr dos Santos submitted that the penalty should be reduced because Mr Fenech

had an otherwise unblemished record during his 30 years in the industry, and also because he "co-operated with the Authority at all times throughout both investigation and enforcement proceedings". Mr dos Santos gave the following examples:

(1) Mr Fenech's attendance at interviews with the Authority (including an initial interview at a time when he was not the subject of investigation);

(2) his timely and thorough responses to all information requests, both before and during the liquidation of FSML; and

(3) his general co-operative and responsive manner which is evident from various correspondence included in the Bundles.

170. Mr Pritchard pointed out that during those interviews Mr Fenech had denied he had been either negligent or dishonest, and submitted that no reduction should be given at Step 3. We agree: this is not a case where, as happened in *Donaldson* "there has never been any attempt by either individual to present anything other than a full and honest account of the events to the Authority".

171. It is also relevant that Mr Fenech did not take steps before the Authority became involved to remedy the compliance failures: the only formal external review of Ms Dunne's files was that carried out by Ms Hill in May 2017, two months after Supervision had asked for eight of her files, see [545]. Although Mr Fenech had not previously been the subject of regulatory action, there had been adverse FOS decisions.

STEP 4: DETERRENCE

172. The Authority did not suggest that the penalty needed to be increased because it was "insufficient to deter the individual who committed the breach, or others, from committing further or similar breaches". However, as we have reduced the penalty compared both to that in the Decision Notice and to the lower amount put forward by Mr Pritchard in this hearing, we have considered this Step for ourselves.

173. The penalty as calculated so far is £16,046, being £5,165 at Step 1 and £10,881 at Step 2. We have no doubt that this is sufficient to deter Mr Fenech. The unchallenged evidence in his witness statement is that he is in "a financially perilous position" with a low income, large debts and no pension provision. In our judgment, the penalty is also sufficient to deter others from being anything other than entirely candid with their regulator, and from taking on an AR who they then fail adequately to supervise.

DISPOSITION

174. For the reasons set out above:

(1) we dismiss both References in so far as they relate to the Prohibition Orders; and

(2) we determine that the appropriate action for the Authority to take is to reduce the penalty charged to Ms Dunne to £41,230 and that charged to Mr Fenech to £16,046. We find those penalties to be proportionate to the breaches.

175. The Decision Notices are remitted back to the Authority for it to give effect to our determination, which was unanimous.

ANNE REDSTON
UPPER TRIBUNAL JUDGE