Neutral Citation: [2025] UKUT 00413 (TCC)

Case Number: UT-2023-000050

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
FINANCIAL SERVICES

Rolls Building, London

Financial Services – financial penalty under section 66 Financial Services and Markets Act 2000 ("FSMA"): effect of competing claims from HMRC and the Official Receiver on the calculation of the amount to be disgorged section 69 FSMA and paragraph 6.5B.1 of the Authority's Decision Procedure and Penalties manual – limitation: when did the Authority first know of the Applicant's misconduct? – section 66(4)-(5ZA) FSMA

Heard on: 22-24 September 2025
Judgment date: 15 December 2025

Before

JUDGE MARK BALDWIN
MR PETER FREEMAN
MRS JEAN PRICE

Between

DARREN ANTONY REYNOLDS

The Applicant

and

THE FINANCIAL CONDUCT AUTHORITY

The Authority

Representation:

For the Applicant: Michael Uberoi and Henry Reid of counsel, instructed by Keystone Law under the FSLA Pro Bono Scheme

For the Authority: Eleanor Campbell and Richard Nicholl of counsel, instructed by the Authority

DECISION

INTRODUCTION

1. Mr Reynolds has referred (the "Reference") to this Tribunal a Decision Notice dated 2 May 2023 (the "Decision Notice"), which followed on from a Warning Notice (the "Warning Notice") issued on 10 August 2022, by which the Authority concluded that Mr Reynolds lacks honesty and integrity and is therefore not a fit and proper person to perform functions in relation to any regulated activity. In light of those findings the Authority decided to:

(1) make an order prohibiting Mr Reynolds from performing any function in relation to any regulated activities carried on by any authorised or exempt persons or exempt professional firm pursuant to section 56 of the Financial Services and Markets Act 2000 ("FSMA") ("the Prohibition"); and

(2) impose on Mr Reynolds a penalty of £2,212,316 pursuant to section 66 FSMA (the "Penalty").

2. The scope of the Reference has evolved since it was first made by Mr Reynolds. Initially in correspondence it was indicated to the Tribunal that Mr Reynolds accepted the Prohibition and only wished to challenge the Penalty on certain limited grounds.

3. During the hearing of Mr Reynolds' privacy application (reported with neutral citation [2023] UKUT 00234 (TCC)) the Tribunal and the Authority understood that, whilst Mr Reynolds did not dispute the Authority's findings and its conclusion that he lacked honesty and integrity, he also wished to challenge limited aspects of the scope of the Prohibition. With the Authority's agreement, he was given permission to amend the Reference to do this.

4. Subsequently, Mr Reynolds indicated that this understanding on the part of the Tribunal and the Authority was a misunderstanding and that he in fact wished to refer the Authority's factual findings and its conclusion that he lacked honesty and integrity. He was subsequently given permission to expand the scope of the Reference to include certain of the Authority's findings and their impact on the Penalty.

5. Shortly before the substantive hearing of the Reference Mr Reynolds withdrew his challenge to the Authority's findings of fact and its conclusion that he lacked honesty and integrity. He also withdrew his challenge to the Penalty on the ground of serious financial hardship. During the substantive hearing of the Reference, Mr Reynolds withdrew his challenge to the scope of the Prohibition. Mr Reynolds acted in person in relation to these aspects of the Reference.

6. As a result, the Reference no longer includes any challenge to the Prohibition and Mr Reynolds' challenges to the Penalty are limited to the limitation and disgorgement issues outlined below.

MR REYNOLDS' ADMITTED DISHONEST BEHAVIOUR

7. The events which are the subject of the Authority's findings in the Decision Notice (and allegations in the Warning Notice) took place between 12 March 2015 and 5 February 2018 (the "Relevant Period"). At that time Mr Reynolds was an approved person at Active Wealth (UK) Limited ("Active Wealth"), a small financial advice firm based in the West Midlands. Active Wealth was authorised by the Authority with permission to conduct regulated activities, including advising on pension transfers.

8. The Authority's allegations, which Mr Reynolds no longer disputes, are summarised below.

9. Between March 2015 and September 2016 Mr Reynolds dishonestly advised a significant number of Active Wealth's retail customers to invest in a portfolio of high risk, illiquid investments called Portfolio Six or P6 that was managed by Greyfriars Asset Management LLP ("Greyfriars"). The Authority required Greyfriars to cease accepting new funds into P6 in October 2016. Mr Reynolds knew that P6 was not a suitable investment for all Active Wealth's retail customers but nonetheless allowed it to be Active Wealth's default recommendation and arranged for such customers to invest a higher proportion of their SIPP funds in P6 than he knew was suitable. This gave rise to a significant risk that Active Wealth's customers would suffer loss that they could not financially bear. Mr Reynolds, on behalf of Active Wealth, signed a declaration in the P6 Application Form that investments in unregulated investments to the proportions specified were suitable for the relevant customer's risk profile, circumstances, knowledge and experience.

10. Active Wealth instructed two fund managers to create investment portfolios that partly or wholly contained investments in sub-funds of UCITS products promoted by Active Wealth. Between December 2016 and November 2017, Active Wealth advised about 400 customers to switch or transfer their pensions to SIPPs and to invest in the portfolios consisting of the UCITS sub-funds. Active Wealth's customers invested in share classes of the UCITS sub-funds which imposed an exit fee of up to 5% for disinvesting from the UCITS sub-funds within the first five years. Mr Reynolds dishonestly failed to disclose the exit fee to Active Wealth's customers adequately or at all. In some cases (particularly where customers specifically raised with him the question of exit fees), Mr Reynolds dishonestly told customers that no exit fee would apply to their investments or that the exit fee would not apply if they remained customers of Active Wealth. In this way Mr Reynolds deprived customers of the opportunity to make an informed decision on the potential impact of the exit fee, in particular whether they could bear the cost of incurring the exit fee if their circumstances changed and they could no longer follow Active Wealth's investment strategy. The Authority concluded that Mr Reynolds' motive in misleading customers about the existence of the exit fees was to ensure that they invested in the UCITS sub-funds in order that Mr Reynolds and Active Wealth's other advisers would earn commission from them doing so. Mr Reynolds and Active Wealth's other advisers received prohibited commission payments that were directly linked to the investments.

11. During the Relevant Period, Mr Reynolds dishonestly advised and persuaded customers to transfer their British Steel Pension Scheme ("BSPS") pensions to an alternative pension arrangement, usually a SIPP. About 140 of these customers' SIPPs were invested, or were to invest, in the UCITS sub-funds.

12. Mr Reynolds's advice in relation to members of BSPS has generated significant public interest. The relevant background is well known. In summary, in June 2017 BSPS had approximately 125,000 members and £15 billion of assets. In March 2017 BSPS was closed to future accruals, meaning no new members could join it, and existing members could no longer build up their benefits. In the Autumn of 2017, existing members were required to choose between certain options offered by BSPS. The decision was not straightforward, and, given that many members were not financially sophisticated, it was particularly important that any advice they received was balanced, fair and clearly explained.

13. In the Authority's view Mr Reynolds knew that a transfer from BSPS to a SIPP was unlikely to be suitable for most of Active Wealth's customers. He knew that Defined Benefit Schemes offered valuable, guaranteed benefits which increased annually. He also knew the risks to which a customer would be exposed if they transferred out of a Defined Benefit Scheme following his advice and the potential impact this could have on the customer's pension fund. Mr Reynolds also knew that, after transferring to a Defined Contribution Scheme, the customer's pension benefits were not guaranteed but would be dependent on the performance

of the underlying investments. Nevertheless, he advised and persuaded customers to transfer out of BSPS when he knew it was not likely to be in their best interests.

14. Active Wealth was required to send a suitability report to each of its customers setting out its advice in writing. However, none of the suitability reports prepared by Active Wealth reflected Mr Reynolds' oral advice to transfer out of BSPS. The suitability reports gave the false impression that Active Wealth customers had been given suitable advice to remain in BSPS and that customers had insisted on transferring to a SIPP against Mr Reynolds' recommendation. The Authority says that the suitability reports were deliberately drafted in this way because Mr Reynolds knew that his oral advice to transfer out of BSPS to a SIPP was likely to be unsuitable for most customers. In most cases the suitability reports were not provided to customers until after Active Wealth had taken steps to transfer their funds out of BSPS and it was too late for them to change their minds. In the Authority's view, the purpose of the timing was to ensure that Active Wealth's customers proceeded with the transfer that they believed was in accordance with Mr Reynolds' recommendation.

15. The Authority concluded in the Decision Notice that, during the Relevant Period, Mr Reynolds dishonestly created, maintained and concealed a significant conflict of interest that went to the heart of Active Wealth's business model so that he and the other financial advisers at Active Wealth could receive prohibited commission payments. He exploited this conflict of interest to the detriment of Active Wealth's customers and advised the vast majority of Active Wealth's customers to invest in investments for which Active Wealth received prohibited commission. Mr Reynolds arranged for commission to be paid to him and other employees of Active Wealth via two separate companies to disguise the prohibited commission payments and conceal the true nature of the payments. As Miss Campbell described the position to us, Mr Reynolds' business was one in which every aspect was corrupt. We agree with that description. Mr Reynolds' direct financial benefit from the prohibited commission payments amounted to £1,014,976,

16. The Authority also concluded that Mr Reynolds knowingly allowed two individuals to provide pensions advice to Active Wealth's customers in breach of the FSMA requirements. Neither was personally approved by the FCA to carry on the relevant activities, and in one case the individual was unqualified. This constitutes a reckless disregarding of the risk to the interests of those customers. Mr Reynolds dishonestly misled the Authority and the Insolvency Service during the Relevant Period and thereafter. After the end of the Relevant Period Mr Reynolds recklessly allowed the destruction of his Active Wealth email account, which contained evidence relevant to the Authority's investigation. He also transferred his family home to a trust in an attempt to avoid the Authority or customers or other creditors of Active Wealth having recourse to the property in order to meet his and/or Active Wealth's liabilities.

17. As a result of Mr Reynolds' misconduct, the Financial Services Compensation Scheme ("FSCS") had, by 5 August 2022, paid compensation of over £17.6 million to over 470 of Active Wealth's customers, at least 231 of whom suffered losses that exceeded the FSCS compensation cap of £50,000.

18. On 25 May 2021, Mr Reynolds was disqualified by the High Court from being a company director for 13 years following an investigation by the Insolvency Service that found that he failed to act in the best interests of Active Wealth's customers in respect of advice he gave to transfer their pensions to SIPPs and invest in P6.

19. Mr Reynolds is clearly guilty of dreadful misconduct over a protracted period, which had very serious adverse impacts on a large number of retail customers. He is, as the Authority alleged, a corrupt and dishonest man lacking integrity.

THE APPLICABLE LEGISLATIVE PROVISIONS

The Authority's Powers

20. Section 56 FSMA provides:

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

21. Section 66 FSMA (so far as relevant for us) provides that:

> "(1) A regulator may take action against a person under this section (whether or not it has given its approval in relation to the person) if—
>
> (a) it appears to the regulator that he is guilty of misconduct; and
>
> (b) the regulator is satisfied that it is appropriate in all the circumstances to take action against him.
>
> (1A) For provision about when a person is guilty of misconduct for the purposes of action by a regulator—
>
> (a) see section 66A, in the case of action by the FCA, and
>
> (b) see section 66B, in the case of action by the PRA.…
>
> (3) If the regulator is entitled to take action under this section against a person, it may do one or more of the following —
>
> (a) impose a penalty on him of such amount as it considers appropriate;
>
> …
>
> (4) A regulator may not take action under this section after the end of the relevant period beginning with the first day on which the regulator knew of the misconduct, unless proceedings in respect of it against the person concerned were begun before the end of that period.
>
> (5) For the purposes of subsection (4)–
>
> (a) a regulator is to be treated as knowing of misconduct if it has information from which the misconduct can reasonably be inferred; and
>
> (b) proceedings against a person in respect of misconduct are to be treated as begun when a warning notice is given to him under section 67(1).
>
> (5ZA) "The relevant period" is—
>
> (a) in relation to misconduct which occurs before the day on which this subsection comes into force, the period of 3 years, and
>
> (b) in relation to misconduct which occurs on or after that day, the period of 6 years."

22. Section 66A FSMA provides that:

> "(1) For the purposes of action by the FCA under section 66, a person is guilty of misconduct if any of conditions A to C is met in relation to the person.
>
> (2) Condition A is that—
>
> (a) the person has at any time failed to comply with rules made by the FCA under section 64A, and
>
> (b) at that time the person was—
>
> (i) an approved person,

(ii) an employee of an authorised person, or

(iii) a director of an authorised person."

23. Section 69 FSMA provides that:

> "(1) Each regulator must prepare and issue a statement of its policy with respect to—
>
> (a) the imposition of penalties, suspensions, conditions or limitations under section 66;
>
> (b) the amount of penalties under that section; ...
>
> (2) A regulator's policy in determining what the amount of a penalty should be, or what the period for which a suspension or restriction is to have effect should be, must include having regard to—
>
> (a) the seriousness of the misconduct in question in relation to the nature of the principle or requirement concerned;
>
> (b) the extent to which that misconduct was deliberate or reckless; and
>
> (c) whether the person against whom action is to be taken is an individual.
>
> …
>
> (8) In exercising, or deciding whether to exercise, its power under section 66 in the case of any particular misconduct, a regulator must have regard to any statement of policy published by it under this section and in force at the time when the misconduct in question occurred."

The Authority's Policy on Financial Penalties

24. So far as the Authority's policy on section 66 FSMA financial penalties is concerned, the Authority's Decision Procedure and Penalties manual ("DEPP") sets out at paragraph 6.5.2 the three principles applicable to penalties:

> 'The FCA'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.'

25. At paragraph 6.5B.1 DEPP sets out the Authority's position on disgorgement:

> 'The FCA will seek to deprive an individual of the financial benefit derived directly from the breach (which may include the profit made or loss avoided) where it is practicable to quantify this. The FCA will ordinarily also charge interest on the benefit. Where the success of a firm's entire business model is dependent on breaching FCA rules or other requirements of the regulatory system and the individual's breach is at the core of the firm's regulated activities, the FCA will seek to deprive the individual of all the financial benefit he has derived from such activities.'

26. As set out in DEPP 6.5B 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 income from the employment connected to the breach, being the gross amount of all benefits received by the individual for the period 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, but not including any amount to be disgorged as set out at Step 1, to take into account factors which aggravate or mitigate the breach. Any such adjustment will be made by the making 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.

The Tribunal's Jurisdiction

27. So far as the Tribunal's jurisdiction and powers in relation to the References are concerned, these are set out in section 133 (5) – (7) FSMA, 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 considers appropriate for giving effect to its determination.
>
> …
>
> (6) In any other case, the Tribunal must determine the reference or appeal by either—
>
> (a) dismissing it; or
>
> (b) remitting the matter to the decision-maker with a direction to reconsider and reach a decision in accordance with the findings of the Tribunal.
>
> (6A) The findings mentioned in subsection (6)(b) are limited to findings as to—
>
> (a) issues of fact or law;
>
> (b) the matters to be, or not to be, taken into account in making the decision; and

(c) the procedural or other steps to be taken in connection with the making of the decision.

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

Pursuant to s 133(7A) FSMA "disciplinary reference" includes a decision to take action under section 66 FSMA, that is to impose a financial penalty on a person. The term does not include a reference to impose a prohibition order under section 56 FSMA. Mr Reynolds' reference of the decision to impose a financial penalty is a "disciplinary reference" and accordingly the Tribunal has power to determine at its discretion what (if any) is the appropriate action for the Authority to take.

28. As this Tribunal indicated in *Tariq Carrimjee v FCA* [2015] UKUT 0079 (TCC) the Tribunal is not bound by the Authority's policy when assessing 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.

29. This approach was followed by the High Court in *FCA v Da Vinci Invest Limited and others,* [2015] EWHC 2401 (Ch), where Snowden J said in the context of the imposition of a penalty for market abuse at [201]:

> "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. It occurred to me that in this regard there is some analogy with the approach of the criminal courts to the application of the sentencing guidelines produced by the Sentencing Council."

30. There is no dispute as to the jurisdiction of this Tribunal in relation to the References.

THE REMAINING ISSUES IN THE REFERENCE

31. The Authority calculated the Penalty in three stages:

(1) Step 1: disgorgement amount: calculation of the financial benefit to Mr Reynolds of his misconduct. The Step 1 figure in this case was £1,390,416, comprising (i) the prohibited commissions received by Mr Reynolds: £1,014,976; (ii) the entirety of Mr Reynolds' salary from Active Wealth during the Relevant Period: £12,425; and (iii) interest on (i) and (ii), of £363,015.

(2) Step 2: punitive element: calculation of a figure which reflects the seriousness of the breach. This is a percentage of the relevant income, in this case, the sum of the commission and salary figures which form part of the Step 1 figure (i.e. £1,027,401). The Authority concluded that the seriousness of Mr Reynolds' misconduct was of the highest level, and therefore calculated the Step 2 figure as 40% of the relevant income of £1,027,401: £410,960.

(3) Step 3: uplift on punitive element: application of any uplift on the Step 2 figure in light of any aggravating factors or any reduction in light of any mitigating factors. The

Authority concluded that the serious aggravating factors in this case warranted a 100% uplift on the Step 2 figure, resulting in a total figure of £821,920.

32. The Authority did not consider any further adjustments to be necessary to ensure the Penalty had a sufficient deterrent effect, nor was any settlement discount applied as Mr Reynolds had not entered into any settlement with the Authority. The total amount of the Penalty was therefore the Step 1 figure of £1,390,416, plus the £821,920 applied at Steps 2 and 3, giving a total of £2,212,316.

33. The remaining issues we need to decide are:

(1) **The Limitation Ground:** No penalty ought to have been imposed in respect of conduct which could and should have been reasonably inferred from the information available to the FCA prior to 10 August 2016, because the Warning Notice, which was issued on 10 August 2022, was more than six years after the date on which the FCA acquired such knowledge;

(2) **The Disgorgement Ground:** Certain amounts or prohibited commission payments received by Mr Reynolds ought not to have been taken into account at Step 1 of the Penalty calculation (disgorgement), because they are the subject of a claim against him by the liquidator of a company through which he received certain commission payments, and/or he is in discussion with HMRC as to tax allegedly due in respect of payments by that company.

THE LIMITATION GROUND

34. The evidence on the Limitation Ground comprises the witness evidence of Mr Bradley Raphael ("Mr Raphael") and the documents he exhibited. Mr Raphael gave evidence before us and was cross-examined by Mr Uberoi. We summarise his evidence and the documents we reviewed below.

Mr Raphael's Evidence

35. Mr Raphael is a Manager in the Authority's Supervision, Policy and Competition Directorate. The Authority did not call the Senior Associate - Mr Christopher Slater ("Mr Slater") - who led on its investigation of Mr Reynolds and Active Wealth, because Mr Slater has retired. At the relevant time, Mr Raphael was a Manager within the Authority's Complex Event's team within Supervision and was Mr Slater's line manager.

36. We found Mr Raphael to be a careful, measured witness, who did not overstate his case. We have no difficulty in accepting his evidence.

37. To prepare his evidence, Mr Raphael said that he had refreshed his memory by considering documents provided to him for the purpose. He understands that these documents were collated following a search of various sources at the Authority for materials that could shed light on the information available to the Authority relevant to Mr Reynolds' alleged misconduct. Mr Raphael says that, as the events took place approximately a decade ago and happened during a period when his work at the Authority was especially busy, he has only a limited recollection in relation to specific events or documents. He has no reason to doubt the accuracy of the documents he considered, but, in some cases, he does not have a specific recollection of having read or written them. His recollection is clearer in relation to the more high-level functioning of his team, during the relevant period.

38. Mr Raphael joined the Complex Events team in 2013. At that time the Authority had identified concerns with advice given to retail customers, typically to switch from their existing pension arrangements into self-invested personal pensions ("SIPPs") and to invest in high-risk and often non-standard investments. He was brought in to work on a pension mis-selling

workstream, which was established with a view to identifying firms involved in this sort of business model and, where appropriate, intervening to prevent consumer harm.

39. Around January 2016 he set up and became a joint manager of the "Pension Scams team". The team was large, and its initial focus was looking at financial advisers who recommended retail customers to invest their pension savings into high-risk investments through SIPPs. Part of the Pension Scams team's role was to assess information received by the Authority that suggested financial advisers were involved in potential pension mis-selling. There was another team which was tasked with specifically looking at SIPP operators, and the work of the two teams overlapped from time to time. Mr Slater had day to day conduct of the cases within the Pension Scams team connected to Greyfriars and P6; the SIPPs team had its own cases concerning these too.

40. Greyfriars' business included being a SIPP operator, a discretionary fund manager and a financial adviser. In March 2014 Greyfriars was initially visited as part of the Authority's thematic review of SIPP operators. A colleague of Mr Raphael (Lorraine High) sent him an email on 16 September 2014 in which she indicated that there was a potential risk in Greyfriars' business model, as Greyfriars was both a financial adviser, a discretionary fund manager, and a SIPP operator. Ms High described this as "the ideal set up for setting up unregulated investments through SIPP and SSAS". Mr Raphael had not come across Greyfriars before. He copied Mr Slater into his reply, to ask him and Ms High whether they thought they should ask Greyfriars for their new business register ("NBR").

41. Enquiries into Greyfriars continued and, once the Pension Scams team understood what the investments in P6 were, they started looking more closely at firms advising clients to invest in P6. The Pension Scams team appears to have had no further interest in Greyfriars between November 2014 and October 2015, when it came to their knowledge that another IFA (not Active Wealth) was advising its clients to invest in P6.

42. On 10 November 2015, Mr Raphael says that he received an email from Mr Slater where he made the following points:

> "As you know I am currently dealing with two IFA firms (Moneywise & Blue Ocean) which appear to be non-compliantly switching relatively low risk personal pensions into SIPPs with underlying high risk non-standard assets. Both IFA's are promoting the Greyfriars Asset Management Portfolio 6, which purports to be a Discretionary Portfolio Management arrangement.
>
> I have serious concerns about this product which invests exclusively in non-standard investments, all of which are part of the Best Group. Greyfriars is also part of the Best Group. Marketing material attempts to promote the product as standard on the basis that liquidity issues will be overcome through a financial contribution from Best."

43. At this point, Mr Slater suggested "setting up a case" on Greyfriars and P6. Although Mr Slater did not require Mr Raphael to approve this step, he thinks it is likely that he implicitly agreed to setting up a case.

44. Earlier that same day, Ian Brotzman (a Lead Associate in Event Supervision) said in an email to Mr Slater that he "[did not] see how an adviser could establish that such a product is suitable," as "doing the due dil[igence] as an adviser would be nigh impossible." In more general terms, Mr Brotzman commented that he was

> "deeply unhappy about the Portfolio Six proposition generally. It has the hallmarks of a major fraud – obscure investments in foreign companies (including ones we already have long-standing concerns about), warehousing arrangements by an unregulated entity that just crops up in the agreement with

> no proper identification, illiquid investments that gain some sort of magical liquidity using this mysterious arrangement…"

45. In cross-examination, Mr Raphael agreed that, as well as being concerned about conflicts of interest in Greyfriars' business model or that it might be paying commission to introducers, there were also serious concerns about IFAs who were selling retail customers into P6. Mr Raphael observed that IFAs might be making money from advice fees from clients; it did not follow from large scale selling of a particular product that commissions were being paid.

46. In the second half of 2015 the Authority began looking at firms and IFAs connected with non-standard investments. This was a general concern, not focused on Greyfriars/P6. In July 2015, the Pension Scams team gathered a list of firms with SIPP operator permissions and wrote to them about the non-standard investments they were holding. The results were amalgamated into a table. On 26 November 2015 Mr Slater emailed Mr Raphael a table summarising the top-selling IFAs investing in SIPPs with non-standard assets, which had been received in response to a recent information request to SIPP operators. Active Wealth was not in this list.

47. Between December 2015 and January 2016, one of Mr Raphael's colleagues in the Pension Scams team carried out analysis on the SIPP data to identify financial adviser firms to be targeted for further investigation. The criteria set to establish a firm as a 'target' firm was those with more than thirty clients invested in non-standard investments after 1 January 2015, or those with more than £1 million invested in non-standard investments in total, where the firm was not already under assessment. Active Wealth was not included in the list of target firms produced as a result of this analysis either. This is because the data provided by the SIPP operators did not show that Active Wealth met the criteria to be included in it.

48. In an email on 27 January 2016 a member of the Pension Scams team requested answers to a number of questions and the provision of certain materials by Greyfriars. One question (number 9) was "Please confirm whether IFAs or Introducers receive any payments at all from Greyfriars or from any other company (including IFA to introducer, or from the Best Group) on Greyfriars behalf?" Their answer was "Greyfriars makes no payment to IFA's from our own funds but have made limited payments from client funds where the IFA has an agreement with the client (see DFM12). Our parent does not make any payments to IFA's or introducers from their own funds but will sometimes administer a marketing payment made by SPV's as part of their capital raising exercise."

49. Mr Raphael exhibited a feedback letter that followed a visit to an IFA firm (Chadkirk Wealth Management Ltd ("Chadkirk")) by the Pension Scams team dated 19 February 2016. In the letter it was noted that a number of introducers (who had introduced clients to Chadkirk) were receiving marketing allowances for each customer who invested in P6, believed by the firm to be at a rate of "up to 9%". By this point, Mr Raphael told us, the Authority had some concerns about the incentive model in place for introducers and the effect on outcomes for customers. At that stage, however, marketing fees were believed to have been paid to introducers and not IFAs or individual advisers.

50. Mr Raphael exhibited a note of a visit by Authority staff (including Mr Slater) to another IFA, Vanguard Wealth Management ("VWM"), on 19/20 April 2016. In the course of a review of VWM's introducer firms, the following comments were made about one particular individual:

> **"Ben Kent –** Was actually a client. He is an ex-IFA who introduced a couple of cases. He asked VWM to get involved in a new product. VWM "wouldn't deal with Ben because of the business he was trying to get involved in". VWM received information from Best International regarding P6. JB went to speak

> to Best, got lots of documentation but did not like the product. There were big commissions for VWM and Ben Kent and this raised concerns. "There was an expectation that VWM would put customers into P6" which has an in built marketing allowance of 9% of the investment value to payable to firms such as VWM. P6 was focussed on uncorrelated investments such as Dubai car parks. The SIPP providers were pre-ordained – Greyfriars or Novia. Ben Kent also knew of a firm in Dublin, keen to move expats in the UK, with final salary schemes in the UK, back to the Republic. VWM's PI insurer suggested it steer clear. VWM received two cases from Ben."

Mr Raphael regarded this as a clear allegation that Greyfriars was paying big commissions to introducers and IFAs for putting clients into P6.

51. Mr Raphael exhibited an email of 29 April 2016 about another IFA firm (referred to as "Argentous") (which was not in any way related to Active Wealth) from Mr Slater to Mr Jon Khamis (a colleague in the Authorisations Division who was looking into an application by this other IFA firm). In it, Mr Slater stated he was very concerned about P6 "which introducer firms were targeting customers for and for which Greyfriars were paying a marketing fee" when a customer invested in P6 through a SIPP. Mr Raphael said that, at that time, his understanding was that P6 was paying marketing fees (commissions) to introducer firms (rather than to IFAs). In cross-examination he said that the Authority had anecdotal evidence that IFAs were getting payments, but he did not think there was any hard evidence at the time. He would have believed that they were receiving fees for their services. He did not know if they were receiving commissions from P6 itself.

52. On 11 May 2016 Gareth Roberts of Greyfriars emailed Edmund Weighell at the Authority to tell him that they had noted the Authority's "'concerns' about the business model, so we have engaged ATEB in an exercise to review our business model and procedures". ATEB is a firm of regulatory consultants on the Authority's Skilled Person Panel. Mr Slater replied asking for details of ATEB's scope of work and for "a simple spreadsheet/database showing all of the IFA firms which have sold P6, including volumes. I realise this information may be extractable from the information already supplied but this is not obvious."

53. On 13 May 2016 Mr Slater sent Mr Raphael a note about P6. He summarised the position as follows:

> "The Pension Scams Team has become increasingly aware since 2015 of the Greyfriars Asset Management ("GAM") Portfolio 6 which has been recommended in large numbers by a number of financial adviser firms, strongly supported by numerous unregulated firms. It is promoted as a Discretionary Fund Management Service ("DFM"), whilst in reality it would seem to be a fund raising mechanism for a range of high risk non-mainstream investments promoted by Best Asset Management ("Best"), the parent company to GAM. Consumers targeted are generally unsophisticated financially and are placing a significant portion of their pension pots at risk."

54. He expressed some concerns about Greyfriars' marketing strategy:

> " … it would seem that a key strand of the GAM/Best marketing strategy is through the use of unregulated introducers. Of course, the difficulty here is that these introducers are almost certainly working for Best (as opposed to GAM) which makes it a more difficult line to pursue as Best is unregulated.
>
> The strategy is also potentially lucrative for the authorised financial advisers who are given a supply of leads for no effort on their part Typically, these might receive a fee of perhaps 3% of the fund value by way of a fee deductible from the fund. So a £50,000 fund could pay the adviser £1500. Furthermore

> the adviser might agree an on-going servicing arrangement which might generate, maybe, another 1%pa.
>
> This strategy for identifying potential customers inevitably leads to customers who are financially unsophisticated and to advisers (IFAs) who are less discerning when considering customers' needs. This combination has led to high volume and unsuitable distribution of a high risk and largely illiquid product to customers with limited resources for retirement provision."

Mr Raphael told us that neither of these payments would constitute a prohibited commission; they would be referred to as initial and ongoing advice fees and would typically be paid by the client, by way of a deduction from their investment funds.

55. On 27 May 2016, the Authority received a spreadsheet from Greyfriars which identified the IFAs who had been promoting P6. This set out the number of clients involved and the volume of funds. Active Wealth was included in this spreadsheet.

56. Mr Slater highlighted Active Wealth in an email to Mr Raphael on 1 June 2016, pointing out that Active Wealth appeared to be a replacement for Active Investment Services as both firms had a similar address and one common individual. The spreadsheet shows that the firms were based in Willenhall in the West Midlands and, taken together, the two firms had introduced £21m funds under management to P6, making them the largest introducer.

57. Mr Raphael replied, "As mentioned, lets open a case on Active Wealth and allocate it to yourself". Mr Raphael explained that this was the first step in the process by which the team would request information from the firm in line with the team's standard practices. He agreed with Mr Uberoi that this email refers to a discussion with Mr Slater, perhaps where they discussed that there were obvious red flags around Active Wealth and Mr Reynolds and that they should be investigated as a priority.

58. In cross examination he agreed with Mr Uberoi that, by this time, it would have been clear to him and Mr Slater that Active Wealth and Mr Reynolds were likely to have been giving unsuitable advice. He said he would not have been aware of Active Wealth/Mr Reynolds receiving commissions, but Mr Uberoi suggested that there could have been no other obvious explanation as to why a small IFA in the Midlands might have £21m of pension switch business in relation to a product as unsuitable as P6. Mr Raphael suggested that the advice fees for such a large number of clients would have added up to a substantial sum. He also said that it is not possible to tell whether an investment would be classed as suitable or not until you can see the individual client. For all he knew, Active Wealth could have had lots of very rich customers, who were investing a small amount of their money into P6, in which case there would be less argument that it would be unsuitable.

59. On 8 June 2016 Greyfriars sent the Authority the report produced by ATEB on 20 April 2016. The report referred to question 9 in the Authority's request for information (see [45] above) and set out Greyfriars' answer, "Not applicable for the IFA Life and Pension Division of Greyfriars Asset Management". ATEB said that they had identified that an IFA in the Greyfriars group was receiving payments (5% of the amount invested in P6, with various descriptions in client files). They were not sure where the payments came from but thought it might be the issuers of the mini-bonds. ATEB were also unclear whether payments were made just to the Greyfriars IFA or also to other external IFAs. They noted that FCA rules prevented a regulated firm from receiving such a payment. ATEB thought that "payments are being made/received that breach regulation and further that an inaccurate response has been given to the FCA". On 2 June 2016 ATEB added an addendum at this point in their report, which explained that ATEB had subsequently received confirmation from Greyfriars that no payments had been made by it or Best to IFAs or by any other company on behalf of

Best/Greyfriars. Payments had been received in error by Greyfriars, which had taken the remedial action it had described to the Authority.

60. On 13 June 2016 Mr Slater sent Mr Raphael an email attaching a copy of the report "(covered in my highlights and scribbles)". His overall comment was that the report "shows P6, Greyfriars and Best in a very poor light and broadly reflects our own unsubstantiated views on P6". He identified issues highlighted in the report around the high-risk nature of P6 and the standard/non-standard status of the assets within it, lack of disclosure and the lack of control surrounding the provision of P6 advice provided by Greyfriars' own IFA business. and then observed:

> "The one area which does not appear to have been satisfactorily understood is that of the marketing strategy for P6. I sense that ATEB are themselves of the opinion that they do not have the full facts. The report mentions the relationships between Greyfriars and the various IFA and introducer firms it works with as well as marketing allowances / intermediation fees payable. However Greyfriars seemed to be inconsistent in their responses on this. There is an addendum to the report (2.6.2016) in which it is recorded that Greyfriars have explicitly stated that no payments are made to IFAs, although it does not mention unregulated introducers. Separately, Greyfriars concede that two (of eleven) unregulated introducers (SIPPclub and Stephen Cave) have been receiving payments of £250 for introductions and "checking documentation". We certainly have anecdotal evidence suggesting this practice is more widespread on this (Chadkirk) and I am now proposing to take a more robust approach on this point when visiting Consumer Wealth next month."

61. In his witness statement Mr Raphael said that he would have read the ATEB report (including the addendum) and noted that the concern around IFAs being paid commission in respect of investments in P6 appeared unfounded. Mr Uberoi suggested that it was unlikely he would have believed the concern originally expressed by ATEB was unfounded simply because of the brief commentary in the addendum. Mr Raphael replied that he would go back to the point that was made on the previous visits, that Mr Slater said that the information the Authority had was largely anecdotal, so there was no actual evidence of it, and based on this there still did not seem to be any actual evidence of prohibited commissions being paid.

62. Against the addendum Mr Slater had made some manuscript comments, including that the comments in the addendum conflicts with what he had learned at Chadkirk and that he would vigorously pursue the point at Consumer Wealth. Mr Raphael agreed that Mr Slater is questioning what the Authority was being told in the addendum.

63. On 1 July 2016 Mr Slater sent an email to John Thorp (which he also forwarded to Olivia Wood) about another IFA (Consumer Wealth) in which he wrote:

> "Our principal interest is around the mass marketing of Greyfriars Asset Managers P6 DFM project. Consumer Wealth is of particular interest because we are aware of 400+ "advice" transactions @ £8.6m in the last year. They have written no other business. So the key areas of interest are:
>
> …
>
> - What are the financial arrangements between CW and Best/GAM. We believe there are inducements to either IFA firms or introducer firms but our info is thin and largely anecdotal."

64. Mr Raphael replied 5 minutes after receiving this email, "Let's set up a meeting please, with Lucy (and Ian?)". Mr Raphael does not recall this meeting.

65. In September 2016 a team from the Authority, including Mr Slater, visited Greyfriars' offices and identified several concerns. Following this, the Authority considered it to be necessary for Greyfriars to appoint a Skilled Person under section 166 FSMA. Following the Authority's intervention in 2016 Greyfriars stopped accepting any new money into P6 on a permanent basis. In November 2016, the Authority opened an investigation into Greyfriars which was subsequently closed. In January 2017 Greyfriars appointed a Skilled Person. In October 2018 Greyfriars entered administration. In February 2019 FSCS began accepting claims against Greyfriars.

66. Mr Raphael says that Active Wealth first came to the Authority's attention when it was identified as a significant distributor of Greyfriars P6 on 1 June 2016, following analysis of Greyfriars' IFA promotion spreadsheet. It was apparent from the spreadsheet that Active Wealth was the single biggest distributor of P6.

67. On 18 July 2016 Mr Salter asked Mr Reynolds for Active Wealth's NBR and complaints register.

68. Also on 18 July 2016 Mr Slater uploaded to the Authority's system a "Pensions Scams – Checklist" case opening document relating to Active Wealth, identifying Mr Reynolds. It reported a "High" risk score and in the "Complete subject" box noted:

> "As of May 2016 firm has transacted 189 Greyfriars P6 SIPP switches @ 14.6m. This firm was previously authorised as Active Investment Services (FRN 501900) and had transacted 98 x P6 @ £6.6m. **Total P6 = 287 @ £21.2m** (Data supplied by GAM)."

69. Mr Uberoi pointed out to Mr Raphael that Mr Slater categorised Active Wealth as high risk long before the NBR was received and he did not need the NBR to confirm the obvious fact that Active Wealth and Mr Reynolds were likely to be giving unsuitable advice and receiving commission in exchange. Mr Raphael did not agree that Mr Slater would have been able to work anything out about commissions; there was confusion over that point and ATEB had reported that they did not think commissions were being taken.

70. Mr Raphael says that the Pension Scams team's analysis of Active Wealth's NBR showed that a large proportion of Active Wealth's new business came from recommendations to transfer pension benefits into Greyfriars products including P6. He commented that it is important to note that analysis of suitability of the advice is only possible on a case-by-case basis, taking into account the individual circumstances of the client and the advice given. For example, it may be the case that only a tiny fraction of the client's overall assets is invested in a particular investment in accordance with their risk profile, but the NBR would not show the client's overall assets or risk profile. Therefore, no conclusion on suitability (or otherwise) can be reached solely because advice was given to invest in a particular investment.

71. Active Wealth's NBR and complaints register were supplied on 2 August 2016. The NBR showed that the majority of Active Wealth's business comprised pension switches with the vast majority of pension switches being put into GAM, Novia funds.

72. On 3 August 2016, the Authority asked Mr Reynolds to provide six specified Active Wealth client advice files alongside information on the firm's advice process, monitoring arrangements, organisational chart, current management accounts, last compliance report, details of other interests held by the firm and its Conflicts of Interest policy and register. Save for the company accounts, Mr Reynolds provided these to the Authority on 17 August 2016.

Mr Reynolds' Case on Limitation

73. Mr Uberoi submits that the primary relevant misconduct in this case is the receipt of prohibited commission payments, and the recommendation of unsuitable investments. The

Authority had information from which the misconduct could be inferred before 10 August 2016.

74. By way of example, on 1 June 2016, Mr Slater sent an email stating that he had reviewed the IFA data sent by Greyfriars. His email identified Active Wealth and Active Investment Service. The attached spreadsheets showed Active Wealth to be the largest single contributor of funds under management (even before taking account of the work of Active Investment Service). This evidence is not simply information creating a general impression. It is evidence from which Mr Reynolds's misconduct may reasonably be inferred. The Authority clearly thought so too; they opened a case on Active Wealth the same day. Opening a case into Active Wealth cannot sensibly be argued to be the neutral commencement of the Authority's investigation or enquiries into Active Wealth, given the advanced state of their enquiries into Greyfriars; all the Active Wealth information must be seen in the context of the Authority's wider investigation into Greyfriars. In fact, the decision to open a case against Active Wealth is more consistent with the Authority having actual knowledge of misconduct, let alone constructive knowledge. It is obvious, in Mr Uberoi's submission, that, looking at the number of Active Wealth clients invested in P6 and the amounts invested against the background of what the Authority know and their concerns about P6, Mr Raphael and Mr Slater both felt it was necessary to investigate this urgently. In cross-examination Mr Raphael agreed that this was likely the case and that there "were red flags that indicated that there was misselling".

75. Another piece of evidence that clearly links Mr Reynolds' misconduct to the matters being investigated at the time is the Pension Scam Team's Checklist dated 18 July 2016. The Checklist includes several features which demonstrate the extent of Mr Slater's concerns. By way of example, it gave Active Wealth a risk score of 'High' and expressly mentioned Mr Reynolds as a linked individual. Evidently, the Authority had information from which the particular misconduct could be inferred. Mr Slater completed the checklist showing Active Wealth as high risk long before the NBR was received. Mr Raphael agreed that by this point he knew the case was of sufficient seriousness to warrant further investigation.

76. The Authority's primary position is that it acquired knowledge when it received the evidence presented to it by Mr Reynolds in the client files, because (i) those files made clear that Mr Reynolds was advising clients to invest in P6 when their attitude to risk made clear it was not appropriate, and (ii) the files also made clear that the application forms were falsified. But this is more akin to direct evidence of Mr Reynolds' misconduct, as opposed to anything of relevance to section 66(5)(a) FSMA.

77. The Authority argues an alternative position, that if it did have knowledge prior to 10 August 2016 of Mr Reynolds' receipt of commission payments, the Authority did not have knowledge of the mechanism through which such payments were being received. However, in *Jeffery* the UT said at [335], "the time at which the limitation clock is set cannot be when the case has been fully investigated and the Authority is ready to proceed". To require the Authority to know how or why mis-selling occurs amounts to the case being fully investigated such that the Authority is ready to proceed, which is not the correct test.

78. The Authority (Mr Slater, Mr Raphael and others) had clearly formed the view that P6 was a highly unsuitable product for the vast majority of retail customers by November 2015. Mr Brotzman had commented that "I honestly don't see how an adviser could establish that such a product is suitable -- doing the due dil as an adviser would be nigh on impossible." Mr Uberoi says that this view is relevant to the suggestion being put forward by the Authority that the £21 million that ended up being invested in P6 via Active Wealth perhaps involved over 200 clients who all happened to be of extremely high wealth and therefore we cannot draw the conclusion that Mr Reynolds was giving inadequate advice. That was clearly the Authority's

approach in practice; we saw evidence of at least two or three of the IFAs who were visited agreeing to cease any regulated investment activity at all. We also see in correspondence the Authority asking Greyfriars specifically about IFAs involved with P6.

79. In relation to commissions, Mr Uberoi submits that the idea that £21 million of funds under management could have gone into P6 from Active Wealth just as a result of unsuitable advice and that it wouldn't have dawned on anyone that commission was likely to be being received as well is very far-fetched. The Authority learned on their VWM visit that big commissions were being offered. It was Mr Slater who visited VWM, so he knew this. We saw his concerns about P6, and he reviewed the Greyfriars IFA spreadsheet and learned about Active Wealth's role. It is not the Authority in some abstract sense, but rather Mr Slater as an individual, who knew all this.

80. Turning to the ATEB report, Mr Uberoi described the addendum (with Greyfriars' denials relating to commission) as highly unconvincing. Mr Slater was sceptical about it. The Authority cannot say that, just because Greyfriars denied paying commissions, there was no suspicion of commissions here. Mr Uberoi points to the narrative on the preceding page (before the addendum) where ATEB notes that Greyfriars IFA is receiving commissions, but they don't know the source or whether they are also paid to external IFAs. They think they may come from the SPVs which issue the mini bonds. The addendum does not address ATEB's concerns. It simply says that no payments have been made by or on behalf of Greyfriars/Best to external IFAs.

81. Mr Uberoi says that the relevant misconduct here is the recommendation of unsuitable investments and the receipt of prohibited commission payments. They are two sides of the same coin, which cannot be sensibly separated, although if you do separate them the answer is still that both can be reasonably inferred before the relevant date. Mr Raphael confirmed that the Authority's concern with Greyfriars was not restricted to the potential conflict of interest that was discussed in its business model or that perhaps it might be paying commission to introducers as opposed to IFAs. There were also serious concerns about IFAs who were selling retail customers into P6 and receiving commissions.

82. Looking at the test in section 66 FSMA, Mr Uberoi pointed us to an Oxford dictionary definition of "infer" as "To deduce or conclude something from evidence and reasoning, rather than from explicit statements." He says that we need to bear that in mind in looking at the wording in section 66 FSMA. To infer something is to deduce it, to infer something you will always have to join the dots to some extent from evidence; you do not just read something which makes explicit that an offence has been committed and then take action, there's no deductive process in that. That really shows the fallacy in the Authority's suggested date of 17 August 2016, when they received the sample files.

83. Mr Uberoi says that *Jeffery* is supportive of Mr Reynolds' position. At [334] – [335], the degree of certainty required before time can be regarded as running is analysed. At [336] the Tribunal says that "On that basis, for time to start running it is not necessary that the Authority has the full picture that would justify the issue at that stage of a Warning Notice. … the limitation period starts to run from an earlier time, when the Authority knows or has information from which the misconduct can reasonably be inferred. The Authority must, however, have sufficient knowledge of the particular misconduct, or such knowledge must be capable of being reasonably inferred, to justify an investigation. Mere suspicion is not enough, nor is any general impression that misconduct may have taken place." [338] deals with a case where the Authority uncovers information in a piecemeal way.

84. So (Mr Uberoi says) it is clear that the Authority had relevant information of the particular misconduct to justify an investigation, and that is a key way which the test is then

framed in *Burns*. Mr Raphael accepted that he had reason to investigate further long before 10 August 2016.

85. On the effect of the limitation ground (if we accept it), Mr Uberoi says that, if misconduct prior to 10 August 2016 is time-barred, Mr Renolds will not have to disgorge any amount of money earned before that date and his relevant income (at Step 2) picks up everything he receives on or after 11 August 2016.

The Authority's Case on Limitation

86. The Authority's case on limitation is that it was not until it received some sample client files from Active Wealth on 17 August 2016, that it had information from which any misconduct by Mr Reynolds could reasonably be inferred. Moreover, the only misconduct which could reasonably be inferred from those files was that Mr Reynolds' misconduct in recommending that Active Wealth clients invest in P6 was the giving of unsuitable investment and the making of false statements on P6 application forms.

87. Secondly, even if Mr Reynolds succeeds in showing that the Authority had some (actual or objective) knowledge of some misconduct prior to 10 August 2016 (and the Authority says it did not), it does not follow that the amount of the penalty will fall to be reduced. Even if Mr Reynolds can show that the Authority knew or had information from which it could reasonably be inferred that Mr Reynolds was giving inappropriate advice in relation to investments in P6 prior to 10 August 2016, this would not impact the disgorgement figure, and Mr Reynolds' numerous other acts of dishonest misconduct (such as falsifying P6 application forms, which no one suggests the Authority could have known about before 17 August 2016) would be sufficient to justify the penal elements of the penalty.

88. There is also evidence that Active Wealth advised clients to invest in P6 after 20 August 2016. Action in relation to those acts of misconduct is not time-barred on any view. The Authority accepts that, if Mr Reynolds can show that it knew, or had information from which it reasonably could have inferred, that Mr Reynolds had received particular prohibited commissions prior to 10 August 2016, then proceedings in relation to those particular commissions would be time-barred.

89. Mr Reynolds' case on limitation relies on the Authority's knowledge of P6 and Greyfriars, including information it received in relation to other firms recommending investments in P6, in addition to its knowledge of Active Wealth and Mr Reynolds specifically. Mr Reynolds says that once the Authority became aware of the number of Active Wealth clients which were investing in P6, it would have been reasonable to infer that at least some of that advice must have been unsuitable, given that by then the Authority was already of the firm view that P6 was not suitable for most retail investors.

90. However, as far as giving unsuitable investment advice in relation to P6 is concerned, the Authority submits that, until it was able to analyse some sample Active Wealth files, it had nothing more than a mere suspicion, or a general impression, of misconduct by Active Wealth and Mr Reynolds. The situation of each client will vary, and without reviewing some examples of clients whom Mr Reynolds had advised, the Authority did not know, nor did it have information from which it should reasonably have been inferred, that Mr Reynolds had given unsuitable advice for the investment of pensions in P6.

91. So far as receiving prohibited commissions in respect of investments in P6 is concerned, in the first half of 2016 the Authority had received information from only two sources which suggested that independent IFAs might be receiving prohibited commissions in respect of investments in P6. The Authority, rightly, remained alive during this period to the possibility that IFAs were receiving prohibited commissions for investments in P6. Any suggestion that

the Authority had information from which it was able reasonably to infer that Mr Reynolds was receiving prohibited commissions, is (Miss Campbell says) hopeless. This is compounded by the fact that the commissions received by Mr Reynolds were not being paid to Active Wealth or even to him directly, but to a "front" company. There can be no suggestion that the Authority could possibly have appreciated this in the summer of 2016.

92. On this issue, over the period from 2014 to summer of 2016 there was an emerging picture for the Authority in relation to the business of Greyfriars and P6. However, it was only on 27 May 2016 that Greyfriars provided the Authority with the spreadsheet listing all the IFAs who had advised clients to invest in P6. That was the moment at which Active Wealth first came on to the Authority's radar. Mr Raphael agreed that, in the light of the information that the Authority already had at that point, that there were obvious red flags around Mr Reynolds and Active Wealth and that they needed to be investigated. He was very clear that the Authority did not have information that Active Wealth was receiving commissions, or from which it could have inferred that it was, but he did agree that unsuitable advice was a possibility. He did accept that this was a point where the Authority understood it needed to pursue its enquiries in relation to Active Wealth, and that is exactly what it did.

93. Around the same time, the Authority received the ATEB report. ATEB were clearly told that Greyfriars did not pay commissions to advisers. So, far from being information from which the Authority might infer that commission was being paid, this is quite the opposite, it is a denial of commission being paid, and that denial being accepted by the reviewer. Mr Slater made it clear that P6 marketing was an area that was not satisfactorily understood by ATEB and there was a sense that ATEB were themselves of the opinion that they did not have the full facts. So, the Authority continued to be concerned about commissions, but it did not know that they were being paid; at best it had thin/anecdotal evidence. In fact, Mr Reynolds is the only IFA that the Authority ever found to have a commission payment arrangement in respect of investments in P6 by clients.

94. If the Authority had looked for evidence of P6 or the mini-bond issuers paying commissions to Active Wealth or Mr Reynolds, it would not have found it, because the commissions were being paid through various "front" companies. It was only in 2018, when the Authority obtained banking information from these other entities, via the Insolvency Service, that it was able to piece together this jigsaw. So, from a practical perspective, this was a very real problem, and it took the Authority years to get to the bottom of it. There is no suggestion that the Authority could have appreciated that in August 2016.

95. Miss Campbell submits that what comes out of the three authorities in this area, *Jeffery*, *Burns* and *Page*, is the focus on the particular misconduct that one sees in the warning notice, and a close examination of the information that it was said the Authority had in those cases, by reference to the misconduct that is actually referred to in the warning notice and the decision notice itself. So, the Authority can have a general sense that there is pension mis-selling, but that is not something that can be put in a warning notice; for time to run there needs to be a real suspicion of specific examples of misconduct in relation to the selling of pensions, whether that is not doing due diligence on the assets, not properly assessing the clients, not properly considering the attitude to risk, or whatever. Here, there was a very short period between the Authority identifying Active Wealth as a firm that was advising lots of people to invest in P6 and it getting the files and appreciating what was going on. But (she submits) until it did, we cannot infer or impute knowledge to the Authority. By way of example, one piece of misconduct alleged against Mr Reynolds is that he knew that P6 was not a suitable investment for all Active Wealth's retail customers but nonetheless allowed it to be Active Wealth's default recommendation and arranged for customers to invest up to 60% of their 'investable assets'. The Authority could not possibly have known this without looking at individual clients' files.

96. The misconduct which was set out in the warning notice in relation to Mr Reynolds' receipt of prohibited commissions and in relation to giving unsuitable investment advice in relation to P6 was that he had acted dishonestly in both cases in breach of Statement of Principle 1 (Integrity).

97. What was alleged was not simply the receipt of commissions, it was that he received those dishonestly, knowing they were prohibited, and indeed he set up a mechanism for their receipt which was designed to conceal what was going on. That was integral to the allegation in relation to commissions. Again, in relation to commissions, the warning notice alleged that Mr Reynolds dishonestly established, maintained and concealed a conflict of interest that was at the heart of Active Wealth's business model so that he, and the other advisers, could receive prohibited commission payments, paid as a result of unsuitable advice given to retail customers. He exploited this conflict of interest to the detriment of Active Wealth's customers, including financially unsophisticated retail customers who had no option but to decide about their pension because BSPS was closing. So again, not only was there a conflict of interest, but it was one that was deliberately set up by Mr Reynolds acting dishonestly.

98. Then it is alleged that Mr Reynolds dishonestly advised Active Wealth's customers to invest in P6 knowing that it was not suitable for them. There are other acts of dishonest misconduct listed, the first of which is the falsification of P6 application forms. Then there is a reference to his dishonest conduct in relation to BSPS, suitability reports, and exit fees. The relevant part of the warning notice is full of allegations about Mr Reynolds' state of mind, that he had a dishonest state of mind, and that when he was advising customers to invest in P6 he was doing so dishonestly. So Miss Campbell says, this is a case similar to *Page* where it was only when the Authority found out information about the particular actions of Mr Page by visiting the firm that it could possibly have had any inkling that there was dishonesty in play.

99. Miss Campbell's submission is that the misconduct in relation to Mr Reynolds' P6 advice and receipt of commissions is "a million miles" from the amount of information that was available to the Authority at the relevant time. It was said that the Authority effectively knew that no IFA could properly advise a client to invest in P6. But the misconduct set out in the warning notice in relation to Mr Reynolds' P6 advice was not some failure to do proper due diligence. This was not a situation where Mr Reynolds advised clients to invest in P6 not knowing whether it was suitable or not. It was not a situation where he was negligent, it was not even a situation where he was reckless. The misconduct that the Authority set out in the warning notice was that Mr Reynolds advised Active Wealth customers to invest in P6 knowing that it was unsuitable for them, and that is not something that the Authority could have known simply because it had formed the view that IFAs could not conduct proper due diligence on these assets.

100. Mr Uberoi says that once the Authority had sufficient information to prompt it to investigate further, time has started to run. But, looking at the "investigation trigger" in *Jeffery* at [337], the Tribunal was clear that the Authority "must, however, have sufficient knowledge of the particular misconduct, or such knowledge must be capable of being reasonably inferred, to justify an investigation. Mere suspicion is not enough ..." The Tribunal contemplates a situation where the Authority is making enquiries into a firm, had enough information to prompt it to make enquiries or, to use the language of Judge Berner, to begin an investigation. What it does not have, when it starts that investigation, is knowledge of the particular misconduct that is set out in the warning notice. And that is exactly what happened here. There was a point in time when the Authority had enough information about Active Wealth to prompt it to make enquiries in relation to the advice that it was giving in respect of investments in P6. But it does not follow from that that it had knowledge of (or could infer) the actual misconduct that was subsequently set out in the warning notice. This distinction (between knowing of

certain factual matters which later become part of the Authority's case on misconduct and knowing of dishonest misconduct that is the subject of the warning notice) is made very clear by the Tribunal in its decision in *Page* at [1155] and [1162].

Discussion of the Limitation Ground

101. We will start our discussion of the Limitation Ground by looking at the three decisions cited to us where limitation was discussed.

102. The limitation provisions in section 66 FSMA were discussed by this Tribunal in *Jeffery v FCA*, (Ref: FS/2010/0039) ("*Jeffery*"), at a time when the limitation period was two years rather than six, where these comments were made:

> "331. The two- year period runs from the time at which the Authority either knew of the misconduct or had information from which the misconduct could reasonably be inferred (s 66(4), (5)).
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> 332. The first of these is a subjective test which looks at the actual knowledge of the Authority. It relates to actual knowledge of the misconduct. That has to be construed by reference to s 66(1). For time to start running in this respect the Authority must have actual knowledge that the particular person against whom action is to be taken has either failed to comply with a statement of principle issued under s 64, or has otherwise contravened as provided by s 66(2)(b).
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> 333. The second test – the inference test – is an objective test. It is whether, absent actual knowledge, the Authority ought, on the basis of the information available to it, and applying a test of reasonableness, to have inferred that the relevant person had failed to comply with a statement of principle or had otherwise contravened.
>
> 334. There is a particularity to each of these tests. It is not sufficient that the Authority has information in its hands that would give rise to a mere suspicion. Nor is it enough that the information might suggest that there was misconduct, but that the person in question has not been identified as the apparently guilty party. The Authority must either know or be treated, by reasonable inference, as knowing of the misconduct by a particular person. The reference in s 66(4) to "the misconduct" (our emphasis) clearly refers to the particular misconduct in respect of which action is to be taken against a particular person, and not to conduct of a similar nature in respect of which information may have been obtained earlier.
>
> 335. Questions will arise as to the degree of certainty required before time can be regarded as running. There is a clear purpose in s 66 that the Authority should be allowed a reasonable period to investigate before being required to issue a Warning Notice. Consistent with that purpose, and to provide a balance for the affected person, the time at which the limitation clock is set cannot be when the case has been fully investigated and the Authority is ready to proceed. Time must start running at an earlier stage in the process.
>
> …
>
> 337. … for time to start running it is not necessary that the Authority has the full picture that would justify the issue at that stage of a Warning Notice. Although the Authority may only take action under s 66(1) if it appears to it that the relevant person is guilty of misconduct, the limitation period starts to run from an earlier time, when the Authority knows or has information from which the misconduct can reasonably be inferred. The Authority must, however, have sufficient knowledge of the particular misconduct, or such knowledge must be capable of being reasonably inferred, to justify an

investigation. Mere suspicion is not enough, nor is any general impression that misconduct may have taken place.

338. There will be cases where information about possible misconduct will be received by the Authority piecemeal and over an extended period. At an early stage in the process such information may be inadequate for the Authority to know of a particular misconduct by a particular person, or to be able to infer such misconduct. A mere allegation or assertion unsupported by evidence would be unlikely to be regarded as sufficient to amount to knowledge of misconduct or as information from which it would be reasonable for the Authority to have inferred misconduct, although it might be expected to give rise to further enquiry. Knowledge of an allegation of misconduct is not the same as knowledge of the misconduct. As an investigation progresses more information may come to light as a result of which there comes a time when the Authority either knows, or it can reasonably be inferred from information which the Authority has, that there is substance to an allegation of misconduct in relation to a particular person. It is only at the latter stage that the time limitation begins to run in respect of that misconduct. Provided a Warning Notice is issued in respect of the misconduct within two (now three) years from the earliest time when the Authority knew of the misconduct or the misconduct could be reasonably inferred, the Authority may rely on all the information it has obtained, both before and after that time.

339. Where the Authority becomes aware of more than one act of misconduct of which a particular person appears to be guilty, the time limit operates separately in respect of each. The Authority may not take action in respect of misconduct of which it knew or which could reasonably be inferred more than two (now three) years before the issue of a Warning Notice. But if it also comes to know of misconduct, whether or not of the same nature as the misconduct it knew of earlier, or such misconduct can reasonably be inferred at a time not earlier than two (three) years before the Warning Notice, action in respect of that misconduct may be taken, notwithstanding the earlier failure to act in time in respect of similar misconduct. The fact that the Authority fails to take action in respect of certain misconduct cannot shut the Authority out from taking action, by issuing a timely Warning Notice, in relation to other misconduct, whether of the same or a different nature.

…

342. It follows from this analysis that we agree … that the correct way to approach the issue of limitation is, first, to determine what the misconduct is that the Authority contends that an applicant is guilty of, and secondly to determine the earliest date on which the Authority knew of the misconduct or had information from which the misconduct could reasonably be inferred. The misconduct in question in this case comprises the specific incidents of misconduct set out in the Warning Notice. Any knowledge of other misconduct, whether of the same nature or not, or other facts not referable to the specific incidents of misconduct so set out are not relevant to the question of limitation bearing upon those specific incidents, and cannot accordingly inhibit the action that may be taken by the Authority in relation to those specific incidents."

103. *Jeffery* concerned an insurance broker who had been prosecuted in the criminal courts (but acquitted). The Tribunal analysed what the Authority knew in relation to one particular alleged instance of wrongdoing (involving a Mr and Mrs Coxon) because it was the only case where it had seen evidence that information in relation to the actual complaint referred to in the Warning Notice was given to the Authority before 29 May 2008 (the relevant limitation

date). Firstly, it looked at an email exchange between the Authority and the Financial Ombudsman Service ("FOS") on 6/7 June 2007. The Tribunal concluded (at [406]) that:

> " … whilst the email exchange of 7 July 2007 did provide the Authority with some basic information, it was not information from which the Authority knew at that stage that there had been a failure on the part of Mr Jeffery to act with integrity, or such a failure could reasonably have been inferred. At the stage of receipt of the FOS's email, the information consisted of nothing more than an allegation or assertion unsupported by evidence. Even if the facts stated had been accepted, they were not such as could have resulted in any reasonable inference that there had been misconduct on the part of Mr Jeffery. It may have been enough to justify further investigation, but there was at 7 June 2007 insufficient material available to the Authority to give rise to any proper inference of a lack of integrity on the part of Mr Jeffery in respect of his dealings with Mrs Coxon."

104. Later (but not before 26 August 2008) the Authority received provisional and final decisions of the FOS. This is what the Tribunal had to say (at [407]-[408]) about these documents:

> "407. The provisional and final decisions of the FOS referred to the FOS's concerns that the Firm had invited renewal of a policy with Folgate when that agency had been terminated, when it had no idea what the premium would be, and failed to provide a refund of the difference between the premium paid of £825.85 and the premium for the Home and Legacy policy of £465.44. It was concerned also that the Firm did not make clear to Mrs Coxon that the Folgate policy could not be renewed and that it had arranged an alternative policy, nor had the Firm informed Mrs Coxon that the policy had been cancelled in early February 2006. It referred to the implication that the fresh proposal had been completed and submitted by someone other than Mrs Coxon and that, although the Firm had implied that it had been completed and signed by Mr Coxon, the FOS did not consider that the signature on the form matched that of Mr Coxon.
>
> 408. Had the provisional and/or final decisions been in the hands of the Authority prior to 29 May 2008, we would have taken the view that misconduct in relation to Mrs Coxon, and the forgery of Mr Coxon's signature, could each reasonably have been inferred from the information those decisions provided to the Authority. There is, however, no evidence that those decisions were sent to the Authority at any time prior to 26 August 2008, and we are satisfied that the first time the Authority had information from which it could reasonably have inferred Mr Jeffery's misconduct in this respect was 26 August 2008."

105. The Authority had received information from Surrey Police, but that was held (at [410]) not to have any impact on the limitation question as the information they provided related to cases contained in the indictment of Mr Jeffery (none of which formed any part of the Warning Notice or the reference) and "the actual or constructive knowledge of the Authority must relate to the specific incidents of misconduct set out in the Warning Notice. Knowledge of similar past misconduct, whether actual or inferred, does not start time running generally in respect of different cases of the same or similar misconduct".

106. In *Burns v FCA*, [2018] UKUT 246 (TCC) ("*Burns*"), the allegation against the individual (Mr Burns) was that he had failed to ensure that a company called TMI (in which he held a significant stake and of which he was a director) managed fairly, and disclosed clearly, Mr Burns's personal conflicts of interest and the conflicts of interest of other individuals at TMI, despite being aware of the respective roles of TMI and a related company called TMAI

and how he and other individuals at TMI benefited financially from the relationship between the firms.

107. Mr Burns had an interest in the outcome of the advice TMI (an IFA specialising in the giving of advice to retail customers on the merits of their transferring their pension monies into Self Invested Personal Pension Schemes) was giving to customers referred to it by TMAI (a company which promoted alternative investments such as biofuel oil, farmland and overseas property) which was separate and distinct from the customer's interest in the same advice. There was therefore an obvious conflict between the interests of Mr Burns and those of TMI's customers. Typically, agents of TMAI would introduce customers who had decided to purchase one or more alternative investments through TMAI to TMI for pension transfer advice. It was envisaged that the customer's purchase of the alternative investments would be effected through a SIPP if TMI recommended that a SIPP was suitable for the customer. The SIPP would be funded by a transfer of the proceeds of the customer's existing pension funds. TMAI was remunerated by commission from the provider of the alternative investment product concerned, provided the customer subsequently invested in that alternative investment following a pension transfer. Typically, the customer was not informed either by TMI or TMAI of the payment of this commission or its amount. Mr Burns had a significant stake (and therefore economic interest) in TMI and TMAI.

108. In *Burns* it was argued that the Authority had information, from which Mr Burns' failure to manage the conflict of interest could have been inferred, from a date more than three years (then the applicable limitation period) before the issue of the warning notice. In rejecting this submission Judge Herrington emphasised the need to focus on the precise misconduct in issue. He explained that whilst the Authority had had information suggesting there was a wider conflict of interest issue which merited further investigation, the relevant question was whether it had had information from which the particular misconduct could be inferred. That misconduct was the applicant's failure to appreciate a particular conflict arising out of a specified relationship, and his failure to manage that conflict (at [318]). He concluded that the Authority had not had such information:

> "322. The decision in *Jeffery* indicates that in order for the limitation period to start running the Authority must know enough for it to be reasonable to investigate further, and that what is necessary is not a full appreciation of all the relevant facts but "a broad knowledge of the essence": see [336] of the decision. However, these principles need to be applied in the context of the particular misconduct that is being alleged. In this case, the relevant misconduct is Mr Burns's failure to appreciate that there was a conflict, and consequently the failure on the part of TMI to manage that conflict. It is apparent from our findings on the facts that the Authority had no knowledge of those matters until its further investigations that commence with its letter of 20 December 2012. As the Tribunal in *Jeffrey* said at [337] of its decision, the Authority must have sufficient knowledge of the **particular misconduct**, [emphasis added] or such knowledge must be capable of being reasonably inferred, to justify an investigation.
>
> 323. Clearly the Authority had no knowledge of the particular misconduct in this case. Neither in our view was such knowledge capable of being reasonably inferred from the information that it did have. It certainly had enough information on which it could take steps to find out whether the conflicts of interest which it had identified by 9 December 2012 were being properly managed, but, in our view, it could not be inferred from the information it had that they were not being managed. We therefore characterise the information that the Authority did have before 9 December

> 2012 as giving rise to no more than mere suspicion, and, as explained by the Tribunal in *Jeffery* at [337] of its decision, that is not enough."

109. The particular question was whether or not the Authority had information to satisfy the requirements of section 66 (4) FSMA on or before 9 December 2012. There was no suggestion that the Authority had actual knowledge that conflicts were not being properly managed and disclosed before that date. Mr Burns relied on three matters to support his contention that this was the case:

> (1) The information obtained by the Authority in the course of an investigation into a SIPP operator called Montpelier;
>
> (2) The information obtained by the Authority in the course of another group company's application for authorisation, and in particular at a meeting held on 16 January 2012, where group-wide conflicts were discussed, and the further information obtained following that meeting; and
>
> (3) The information received from a visit to an IFA firm called 1 Stop which explored whether 1 Stop was managing conflicts properly as it did not disclose to customers its connection with the distributor of certain products and whether it received a commission on the purchase of the unregulated investment, which was subsequently acquired through a SIPP recommended by 1 Stop, a model very similar to that operated by the group of which TMI was part.

110. The Tribunal held that, as a result of the information the Authority obtained during the Montpelier investigation, it was alerted to the possibility that TMI may be giving unsuitable advice to its customers because a high proportion of the SIPPs which were referred to Montpelier contained esoteric and illiquid investments.

111. The Tribunal also held that, as a result of the meeting held with the Authority on 16 January 2012 and the information provided in the application itself, the Authority had information about the group structure and the roles of the various companies within the group, from which it might reasonably be inferred that issues regarding conflicts of interest may be of concern in relation to TMI bearing in mind its business model. But there was no disclosure at that meeting as regards conflicts so far as they concerned TMI and the only discussion regarding conflicts centred around the potential conflict with customer's interests that could arise because of the relationship between TMI and the company seeking authorisation (not TMAI).

112. Likewise, the Tribunal held that the information that the Authority obtained during the 1 Stop visit did not take matters further. The Authority had concerns at that point about how 1 Stop managed conflicts of interest, but that information could not be extrapolated to say that, because of TMI operating a similar business model which inevitably involved conflicts of interest, it was not managing those conflicts.

113. *Page & Ors v FCA,* [2022] UKUT 124 (TCC) ("*Page*"), is a very long and complex decision of which limitation forms only a very small part. One of the applicants (Mr Henderson) was held to have acted recklessly in allowing a company called HCA to adopt a seriously flawed business model and acted dishonestly in misrepresenting the features of that model to a large number of unsophisticated customers, causing serious harm to those investors. Mr Henderson alleged that the Authority's action in imposing a financial penalty against him was time barred in some respects.

114. The Tribunal cited with approval the passages at [332]-[338] in *Jeffery* and [322] in *Burns*.

115. The particular issue in *Page* was whether the Authority had sufficient information either to know that Mr Henderson's alleged misconduct in relation to certain matters amounted to a breach of Statement of Principle 1 on the part of Mr Henderson or reasonably to infer it before 25 July 2014.

116. The Tribunal held that certain information that was available to the Authority in May 2014 should probably have prompted further enquiries at that time. For reasons which were not clear, the matter was not pursued. If it had been, the Authority might have been able to take intervention action earlier than it did. However, the Tribunal held that the information available in May 2014 was not sufficient to trigger an investigation. At [1161]-[1162] the Tribunal summarised what the Authority knew in May 2014 like this:

> "The Authority had knowledge of an execution only model, perhaps being used by Mr Henderson. It knew that HJL were in some form of arrangement with HCA and that cold calling might be taking place. Put together, those were all matters that merited further enquiries, but the Authority would need considerably more information to trigger any kind of investigation, let alone an investigation as to whether Mr Henderson had been guilty of misconduct which breached Statement of Principle 1. None of the information available to the Authority at that point indicated that a breach of that Principle by Mr Henderson could reasonably have been inferred.
>
> 1162. In particular, none of the information available to the Authority, or which it ought to have known at that point, could lead to an inference that Mr Henderson had been reckless in relation to the conflicts of interest in the Execution-Only Process, reckless as to the adoption and use of the Pension Review and Advice Process or dishonest in respect of the statements made in the Service Proposition and the Brochure. Put at its highest, the Authority was aware of certain factual elements relating to those matters."

117. The points we take from these cases are:

(1) Whilst the Authority can only take action against a person under section 66 FSMA once it appears to it that the person in question is guilty of misconduct, it cannot start proceedings (here, issue a warning notice) under section 66 FSMA more than six years after the first day on which it knew of the misconduct in respect of which the Authority is taking action.

(2) As well as actual ("subjective") knowledge, the Authority is treated as knowing (it has "objective knowledge") of misconduct if it has information from which that misconduct can reasonably be inferred.

(3) The first step, therefore, is to identify the precise misconduct which the Authority contends the person is guilty of. As *Page* makes clear, that includes not only whatever it is that the Authority says the applicant did (or did not do) that was wrong, but also any relevant attitude or state of mind (to use language from another branch of the law, the *actus reus* and (where relevant) the *mens rea* of the alleged regulatory breach).

(4) So far as objective knowledge is concerned, the next step is to identify the information the Authority had at a particular point in time and ask whether that was sufficient for that misconduct to be reasonably inferred.

(5) The level of information required to amount to objective knowledge has been described as having enough information of particular misconduct to justify an investigation. That description can be misleading to the extent it suggests that all that is needed to start the limitation clock running is the Authority having enough information about a firm to be concerned about it (even in particular respects) and wanting to find out

more about what it is getting up to. Indeed, in *Jeffery* at [406] the Tribunal described the email exchange of 7 July 2007 as providing the Authority with an allegation unsupported by evidence, and then went on to observe that, even if the facts stated had been accepted, "they were not such as could have resulted in any reasonable inference that there had been misconduct on the part of Mr Jeffery. It may have been enough to justify further investigation". The Tribunal clearly contemplates that not every piece of information that could justify opening an investigation will give the Authority objective knowledge of relevant misconduct.

(6) The Oxford English Dictionary tells us that "to infer" means,

> "To bring in or 'draw' as a conclusion; *spec.* in *Logic*, To derive by a process of reasoning, whether inductive or deductive, from something known or assumed; to accept from evidence or premisses; to deduce, conclude."

So, to start the limitation clock running, the Authority must have information which gives it a broad knowledge of the essence of the issue in question, which addresses all the required features of the misconduct (including any subjective factors such as recklessness or dishonesty on the part of the subject), and that information must be of a quality that enables a conclusion (rather than just a suspicion) to be drawn.

(7) At that point the Authority would be expected to start (or continue) an investigation to confirm (or not) what it has (or could have) worked out for itself and make sure that it had all relevant information before it took action. In so far as an investigation threshold is a useful test, this is the type of investigation (not some initial fact-finding exercise) the authorities contemplate.

(8) So, at one end of the timespan, we have information (such as unsupported allegations or assertions) which would give rise to a suspicion of misconduct, but which is insufficient to enable the misconduct to be deduced; this is not enough to start the limitation clock running. At the other end of the spectrum, the limitation clock does not start to run only when the Authority has a full appreciation of all the relevant facts that ultimately justified the issue of the warning notice and is ready to proceed.

(9) Knowledge of misconduct not included in the warning notice does not start the limitation clock running in relation to the misconduct in question, even if it is very similar behaviour by the same person, or related behaviour by connected persons.

118. We start our analysis, therefore, by looking at the misconduct the Authority alleged against Mr Reynolds, which he does not contest.

119. In paragraph 2.1 of the Warning Notice and the Decision Notice the Authority asserts that "Mr Reynolds breached Statement of Principle 1 (Integrity) of the Authority's Statements of Principle for Approved Persons. He did this by acting dishonestly and recklessly when performing his controlled functions in relation to the pension business of Active Wealth (UK) Limited (Active Wealth) and by acting dishonestly in his interactions with the Authority".

120. Although paragraph 2.1 of the Warning Notice and the Decision Notice referred to Mr Reynolds acting "dishonestly and recklessly", all but two of the particularised allegations in the Decision Notice refer to dishonesty, and the two allegations of reckless behaviour all relate to matters which took place well within the limitation period.

121. So far as relevant to the Limitation Ground, the Authority's particularised allegations in the Warning Notice and the Decision Notice (with our underlining – the numbers refer to the (identical) paragraph numbers in the Decision Notice and Warning Notice) are that:

(1) "The Authority's rules prohibited Active Wealth and its advisers, including Mr Reynolds, from receiving commissions, remunerations or benefits of any kind apart from charging for advice provided. Mr Reynolds dishonestly contravened this rule by …" (2.5);

(2) "Mr Reynolds dishonestly established, maintained and concealed a conflict of interest that was at the heart of Active Wealth's business model so that he, and the other advisers, could receive prohibited commission payments" (2.7).

(3) "Mr Reynolds dishonestly:

(1) advised Active Wealth's customers to invest in [P6] knowing that it was not suitable for them;

(2) falsified the P6 application forms …; (2.8)"

There are many more allegations of dishonest behaviour, all well within the limitation period.

122. At this point it may be helpful to pause and remind ourselves of the Authority's Statements of Principle for Approved Persons (the "Statements of Principle") and some of the concepts they employ. Statement of Principle 1 is that "An approved person must act with integrity in carrying out his accountable functions". Statement of Principle 2 is that "An approved person must act with due skill, care and diligence in carrying out his accountable functions".

123. As far as Statement of Principle 1 is concerned, the concept of "integrity" was discussed at [56]-[64] in *Page*. We need not set out that summary in full, but for the purposes of this decision the following points are relevant:

(1) A person who acts dishonestly is obviously also acting without integrity.

(2) Where dishonesty is in point, the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. Once his actual state of mind as to knowledge or belief as to facts is established, the question of whether his conduct was honest or dishonest is to be determined by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.

(3) 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, 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.

(4) A person may lack integrity without being dishonest. If a person either lacks an ethical compass, or their ethical compass to a material extent points them in the wrong direction, that person will lack integrity.

(5) Reckless behaviour is capable of being characterised as a lack of integrity.

(6) 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. In *Markou v FCA*, [2024] EWCA Civ 1575 at [12], the test was expressed slightly differently, "Recklessness in this context has both subjective and objective elements: ... . The subjective element requires a finding that the person concerned appreciates that there is a risk that a relevant circumstance exists or that a relevant result may occur; the objective element requires a finding that it was unreasonable for them to take that risk".

124. Statement of Principle 2, on the other hand, is a purely objective test: Did the individual act with due skill, care and diligence? This is often equated with asking whether someone was negligent, which involves an entirely objective enquiry as to whether the person in question behaved with the level of care that a reasonable person would have exercised under the same circumstances.

125. The precise allegations of misconduct laid against Mr Reynolds which are relevant to the Limitation Ground are all allegations that he acted in breach of Statement of Principle 1 by acting dishonestly. As *Page* makes clear, to find dishonesty "the [Authority] must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts". As the short points we have taken from *Page* and set out at [123] above make clear, it is not possible to infer (as opposed to allege or suspect) dishonesty, or recklessness for that matter, without some information about what an individual actually knew or believed (in the case of dishonesty) or appreciated (in the case of recklessness). It may be possible to infer negligence (which is a purely objective matter) without knowledge of a person's state of mind. We did wonder whether, to infer negligence in this context, the Authority would need to have ruled out recklessness and dishonesty first, but on balance we consider that negligence can be inferred from purely objective, external features. If negligence could be inferred in this way, the Authority would (as the authorities contemplate) be expected to investigate to determine whether the subject's behaviour was "merely" negligent or worse.

126. If we turn to look at what the Authority knew on 10 August 2016, we see the following:

(1) The Authority knew a great deal about P6, so much so that, long before August 2016, Mr Brotzman had expressed the view that he could not see how an advisor could conclude that P6 was suitable for his clients, as carrying out the required due diligence would be impossible. In addition, Mr. Brotzman was concerned that P6 was an instrument of fraud.

(2) So far as IFAs being paid prohibited commissions in relation to P6 is concerned, we see that:

(a) during visits the Authority carried out in February and April 2016 Chadkirk and VWM made unsubstantiated allegations that Greyfriars was paying commission. The allegations during the Chadkirk visit related to paying introducers (not prohibited), whereas the allegations during the VWM visit were that prohibited commissions were being paid to IFAs;

(b) in answer to the Authority's questions from January 2016, Greyfriars had said that they made no payments to IFAs from their own funds. They also said that their parent company did not make such payments;

(c) in June 2016, the Authority received ATEB's report on Greyfriars. This recorded ATEB's suspicion that commissions were being paid, but ATEB were unsure who they were paid by and whether they were paid to external IFAs. Subsequently ATEB added an addendum which purported to clarify their concern, although as we have seen the addendum made a very narrow point, that no such payments had been made to Best or Greyfriars or by them or any other company on their behalf to IFAs. It did not address the question of whether prohibited commissions were paid to external IFAs by the issuers of the mini-bonds; and

(d) Mr Slater was sceptical about the comments in the ATEB report and there was, and had been for some time, a serious concern within the Authority about Greyfriars' means of distributing P6, but the only information is that set out in (a)-(c) above.

(3) As far as Active Wealth and Mr Reynolds were concerned, the Authority found out on 27 May 2016 that Active Wealth and a related entity linked to Mr Reynolds were the largest introducer to P6, having introduced £21m of funds under management. As at 10 August 2016, all the Authority knew about Active Wealth and Mr. Reynolds was that they were the largest single introducer to P6.

127. As far as IFAs earning prohibited commissions from P6 is concerned, we do not consider that the Authority had information on 10 August 2016 which would allow it to infer that prohibited commissions were being paid to IFAs in relation to P6. They had received two anecdotal, second-hand allegations that generous commissions were available to businesses who introduced investors to P6, but nothing had been produced to substantiate them. Moreover, Greyfriars had denied that it or its parent company made payments to IFAs. ATEB raised the question whether prohibited commissions were paid by the mini-bond issuers, and Greyfriars had avoided addressing this issue. There are alternative explanations about how IFAs might be rewarded in relation to P6; one is that they could perfectly properly receive an advice fee, and if they received a high volume of advice fees in relation to clients pointed to them (with no effort on their part) by introducers, that would itself be quite a remunerative arrangement: not as remunerative as receiving prohibited commissions, but attractive nonetheless.

128. None of this amounted to material from which the Authority could infer, as opposed to suspect, that someone was paying prohibited commissions to IFAs in relation to P6.

129. The only basis on which the Authority could suspect that Mr Reynolds was receiving prohibited commissions was by adding to its suspicion that prohibited commissions were being paid the fact that Mr Reynolds' businesses were the largest introducers to P6. We can see why, if the Authority suspected that prohibited commissions were being paid to IFAs in connection with P6, they might suspect that Mr Reynolds, by virtue of being such a large introducer of funds to P6, was himself receiving those prohibited commissions.

130. Although they might very well suspect that that was the case, the Authority had no material from which it could infer that commissions were being paid to IFAs or introducers. If it could not infer that, still less could it infer that such commissions were being paid to Mr. Reynolds.

131. Even if the Authority could infer that prohibited commissions were being paid to IFAs, there was nothing from which the Authority could infer the receipt of such payments by Mr Reynolds beyond the level of business he introduced to P6. We do not consider that this would do more than justify a suspicion on the Authority's part. Just because some IFAs were receiving prohibited commissions in relation to P6, it does not follow (as seems to have been the case here in fact – Mr Reynolds is the only IFA the Authority has identified as receiving such commissions) that they all were. More would be needed to infer that Mr Reynolds was receiving prohibited commissions. So thorough was the way Mr Reynolds concealed the prohibited commissions, that the Authority was only able to work out what he was doing when the Insolvency Service provided additional evidence (relevant banking records) in 2018.

132. So far as Mr Reynolds' advice is concerned, we know that Mr Brotzman thought that an IFA could not carry out the required level of due diligence in order properly to conclude that P6 would be a suitable investment recommendation for retail customers, in addition to thinking that P6 was an instrument of fraud. The Authority did not just suspect this; it had reached this conclusion for itself by looking at P6. The Authority then discovered that Mr Reynolds was the largest introducer of retail customers to P6. We consider that, by the end of May 2016, the Authority could infer that Mr Reynolds was giving bad advice to retail customers in relation to P6. In principle, Mr. Raphael may well be right when he says that P6 might be suitable for a small proportion of a client's investments and Mr Reynolds may have introduced a large

number of investors who all made, relative to their overall portfolios and means, modest investments in P6. That, however, does not deal with Mr Brotzman's conclusion that no IFA could properly recommend P6, because it was impossible to do the required due diligence.

133. If the Authority had alleged a breach of Statement of Principle 2 against Mr Reynolds, we would have found that by 27 May 2016 the Authority could infer a breach of Statement of Principle 2. It could have done that quite easily by adding together Mr Brotzman's conclusions about P6 (that it was impossible to do the necessary due diligence) and what they had learned about the volume of Mr Reynolds' introductions of retail customers to P6. But that, of course, is not the case. The Authority's allegations against Mr Reynolds, in respect of both the commissions and his advice, are that he was corrupt and dishonest and acted in breach of Statement of Principle 1. To allege dishonesty on Mr Reynolds' part, the Authority needed to know something about his state of mind.

134. So far as the receipt of prohibited commissions is concerned, Mr Reynolds' receipt of commissions would only be dishonest if he knew that he should not have received them but nevertheless went ahead and took them. Mr Reynolds has now admitted this, and the complicated web of companies he used to disguise his receipts makes that abundantly clear. However, even if the Authority had been able to infer that Mr Reynolds was being paid prohibited commissions in respect of P6 in August 2016 (and we should stress that we do not consider this to be the case at all), it still knew nothing about Mr Reynolds' state of mind. Mr Reynolds might have believed, as he once asserted was the case, that the receipt of commissions was widespread, known to the Authority and therefore perfectly fine. That, of course, is far from the truth, but the Authority could not have inferred that Mr Reynolds was dishonestly receiving prohibited commissions, as opposed to just receiving prohibited commissions, without knowing more about the circumstances of Mr Reynolds' receipt of these commissions.

135. The same is true of Mr Reynolds' advice in relation to P6. As we have seen, if that was its allegation, the Authority could easily have concluded that Mr Reynolds' advice was negligent long before August 2016. However, the Authority could not conclude that Mr Reynolds was being dishonest, without a greater understanding of what he was doing (for example, falsifying P6 application forms) and some subjective knowledge of his state of mind. If that is what it chose to allege, it could have inferred that Mr Reynolds was negligent, which is an entirely objective measure, without regard to his state of mind, but the Authority could not infer dishonesty simply from knowing that Mr Reynolds had introduced a large number of retail customers to P6 and having concluded that it was impossible for an IFA to do proper due diligence on P6.

136. For the reasons set out above, we have concluded that the Authority did not have information from which Mr Reynolds' dishonest misconduct (as alleged in the Warning Notice and Decision Notice) could reasonably be inferred before 17 August 2016 (at the earliest), and therefore the Limitation Ground is not made out.

DISGORGEMENT

137. We can deal with the Disgorgement Ground more briefly, as the issues between the parties have narrowed quite considerably. The only outstanding issue here is whether, in the circumstances that confront us (rather than as a point of principle), we should reduce the disgorgement element of the penalty to reflect the competing claims to the amount that would otherwise be disgorged and, if we should, how we should go about doing that.

138. The £1,014,976 of commission payments to be disgorged by Mr Reynolds includes £579,002 received from Haoma (UK) Limited ("Haoma"), one of the companies used by him to funnel the prohibited commissions he dishonestly charged. These amounts were paid to Mr Reynolds pursuant to a purported loan agreement between Haoma and Mr Reynolds, dated 30

June 2016, for up to £1 million, at zero interest. Haoma is in liquidation and the Official Receiver (as liquidator of Haoma) claims, based on comments Mr Reynolds made in an interview with the Authority on 27 February 2019, that payments Mr Reynolds received from Haoma totalling £248,002 (not, slightly to our surprise, the full £579,002 and not on the basis that Mr Reynolds should repay an amount he borrowed) resulted from transactions at an undervalue. The Official Receiver seeks repayment of that amount by Mr Reynolds.

139. Mr Reynolds told us that there have been continuing efforts by him and the Official Receiver to reach a settlement and that he was in "advanced stage" negotiations with the Official Receiver as regards the amounts being claimed. He told us that the Official Receiver was content for the existence of those negotiations to be disclosed, but not the detail of them.

140. In addition, HMRC, who have been enquiring into Mr Reynolds' tax affairs, consider that he has extracted some £572,000 from Haoma in the form of taxable income. There was some debate between HMRC and Mr Reynolds as to whether the amounts he received from Haoma were consultancy fees or were to be treated as a loan. HMRC now clearly consider that these amounts are consultancy fees paid to Mr Reynolds, rather than money borrowed by him, and they have assessed Mr Reynolds to income tax together with interest and penalties. Mr Reynolds has raised the nature of HMRC's characterisation with the Official Receiver, which considers that it would still have a sound claim against Mr Reynolds, even if HMRC are right.

141. We understand that Mr Reynolds has appealed against these assessments. So far as relates to the payments from Haoma, Mr Reynolds seems to be arguing that the payments he received were loans which have been held to be invalid and need to be repaid, although that would seem only to deal with part of the money HMRC are treating as Mr Reynolds' income. He has other open issues with HMRC, but his position in relation to the payments received from Haoma is that those amounts need to be repaid and so should not be taxed on him.

142. In the light of the decision of the Upper Tribunal in *Toni Fox-Bryant & Anor v FCA*, [2025] UKUT 87 (TCC) ("*Fox-Bryant*"), the Authority accepts the point of principle that tax can be taken into account in the penalty calculation at Step 1 (disgorgement). In *Fox-Bryant* the UT said (at [11]):

> "[A]t least to the extent that it is permanent (clearly, if the payment of the penalty reverses the tax liability triggered by the receipt of the benefit, so that the tax can be reclaimed, no credit should be given for it) and capable of being calculated (or, at least, reasonably estimated), a liability to tax which erodes the value of a benefit should be taken into account in the calculation of the amount to be disgorged."

143. The Authority now also accepts that, if payments relating to amounts which would otherwise be included in the Step 1 calculation are in fact made to HMRC or the Official Receiver, those sums should be removed from the Stage 1 calculation.

144. Unprompted, the Authority also conceded, following *Fox-Bryant*, that the rate of interest to be used in calculating the Step 1 (disgorgement) amount should not automatically be 8%. On that topic, the UT in *Fox-Bryant* said (at [30]-[31]):

> "We agree with Mr Temple's submission that the amount to be disgorged should reflect the secondary benefits derived by the wrongdoer from the way they invested or used the benefits they obtained directly because of their wrongdoing. This would include investment returns obtained or (the example we gave in our November Decision) money saved by paying off an expensive debt.
>
> 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."

145. The Authority does still argue that the interest to be applied at Step 1 should include interest on any amounts payable by Mr Reynolds to the Official Receiver or HMRC for the period when Mr Reynolds had the benefit of that money, that is to say from the time he took the money out of Haoma until he repays the Official Receiver or HMRC, as the case may be.

146. For Mr Reynolds, Mr Reid submits that the Step 1 penalty amount should be recalculated. DEPP envisages disgorgement of benefits or profits at Step 1. That language envisages a person's net gain from their misconduct. The Tribunal must apply DEPP flexibly having regard to the circumstances of the case. There is no doubt that the amounts are being actively pursued, and the amounts claimed cannot properly be viewed as contingent. Accordingly, the Step 1 calculation should calculate Mr Reynolds' benefit as the net position having regard to these liabilities.

147. We agree with Mr Reid that the provisions of DEPP must be applied flexibly according to the circumstances of the case. This is clear from this Tribunal's decision in *Arian Financial LLP v FCA* [2024] UKUT 00352 (TCC) ("*Arian*"). This Tribunal said this when considering the interpretation of the phrase "financial benefit" as used in Step 1 of the five-step process set out in DEPP:

> "The phrase "financial benefit" should not be construed in an overly legalistic fashion. The policy should not be construed in the same way as a statutory provision and should be capable of being applied flexibly, depending on the facts. Therefore, for instance, in a case where the firm is legally entitled to receive the full amount of the income it derives from the misconduct in question in circumstances where it is obliged to meet certain expenses out of the amount received, the fact that it had a legal entitlement to the whole amount should not be decisive as to the amount of the financial benefit. Whether the "financial benefit" is the gross amount, or a lesser amount to take account of expenses, needs to be considered on a case-by-case basis."

148. In *Staley v FCA*, [2025] UKUT 203 (TCC) ("*Staley*"), this Tribunal considered that a similar approach should be followed in determining the amounts "received" by an individual for the purposes of the Step 2 calculation. The point being addressed there was whether the value of certain unvested shares should be included in Mr Staley's relevant income. After citing the passage from *Arian* set out above, the Tribunal went on to say:

> "528.We do not accept the Authority's submission to the effect that the use of the term "earned" in DEPP 6.5B.2G(3) shows that the term "received" always includes sums to which an individual may become entitled subject to the satisfaction of any contingencies. It is important to note that DEPP 6.5B.2G(3) is merely guidance and as we have said, should not be construed in an overly legalistic fashion. In any event, there is nothing in this provision which clearly indicates that the use of the term "earned" was intended to be a wider scope than "received", bearing in mind that the opening line of the provision refers to an individual who "receives remuneration".

> 529.We understand that there may be occasions when it is appropriate to calculate relevant income on the basis of an estimate of what is likely to be received in respect of benefits where their receipt is dependent upon the satisfaction of conditions. We do not criticise the Authority for having taken that approach at the Decision Notice stage on the basis of the information available to the Authority at the time or its approach of applying a contingency adjustment to the value of the deferred shares based on the average percentage of LTIPs awarded to Mr Staley in previous years.
>
> 530.However, if, as in this case, the matter is referred to the Tribunal, in our view it is clear that the Tribunal must look at all the circumstances that exist at the time it comes to determine the reference. If circumstances change, as in this case, and benefits which the Authority considered were likely to be received will not in fact be received, then the Tribunal must take that into account. As the authorities demonstrate, whilst the Tribunal should pay due regard to the provisions of DEPP and its application in the circumstances of the case by the Authority, it is able to depart from the Authority's calculation where it is in the interests of justice to do so."

149. The operation of the Step 1 calculation is particularly problematic in this case, because of the significant uncertainty surrounding the competing claims in respect of amounts which would otherwise fall to be disgorged and the relationship between those claims.

150. Mr Reynolds is in discussions with the Official Receiver which he hopes will lead to a settlement, but we know no more than that. In addition, there is an unclear remark from the Official Receiver's solicitors in the correspondence which suggests that the amount the Official Receiver is claiming might be affected by the outcome of our decision on the Penalty.

151. So far as the tax issue is concerned, Mr. Reynolds has appealed HMRC's assessment to the First-tier Tribunal. It is far from clear when Mr Reynolds' tax appeal will be heard by the FTT. It is also not clear whether Mr Reynolds's tax appeal in relation to the amounts withdrawn from Haoma turns only on the fact that some of these amounts will need to be repaid, or at least have been claimed by the Official Receiver, or whether he still maintains a fundamental challenge to the taxability of the amounts, on the basis that they were withdrawn pursuant to a loan agreement. It may be, therefore, that HMRC's claim is to some extent dependent on the outcome of the Official Receiver's claim (which, slightly to our surprise, is not for the full amount withdrawn by Mr Reynolds from Haoma, whereas HMRC claim that the full amount is taxable as income).

152. We agree with Miss Campbell when she says that the determination of the Penalty cannot possibly be allowed to wait on the resolution of all these issues or be the subject of some further recalculation exercise, which would be plagued by all the uncertainties we have just discussed. Ultimate resolution may be some years away; moreover, the timing of any resolution will be wholly outside the Authority's control. As far as the tax issue is concerned, this will depend on the speed with which Mr Reynolds and HMRC proceed with the tax appeal and the capacity of the FTT to hear it. Similar points can be made about the Official Receiver's claim, although this appears closer to resolution. The events with which the Reference is concerned took place a long time ago. There is a clear public interest in Mr Reynolds being seen to suffer the consequences of his corrupt and dishonest behaviour.

153. In the ordinary course, it might be possible, as the Tribunal indicated in *Staley* in relation to the Step 2 calculation, to proceed based on estimates, in this case estimates of amounts payable to the Official Receiver or due to HMRC. However, given Mr. Reynolds' challenges to those competing claims and the uncertainty which surrounds these issues, it is not possible

to arrive at a reliable estimate of how much Mr Reynolds is likely to end up paying to either claimant.

154. Mr Reynolds is a dishonest man lacking in integrity, and therefore it would be wholly wrong for him to be able to influence the timing of the calculation of the Penalty, as would be the case if this needed to wait on the resolution of the competing claims. Similarly, it would be wrong to calculate the Penalty based on estimated liabilities and leave Mr Reynolds in a position to benefit from a settlement with HMRC or the Official Receiver at amounts lower than the estimates used to calculate the Penalty.

155. These complexities are essentially of Mr Reynolds' making. They arise from the prohibited commissions Mr Reynolds received as a result of giving unsuitable advice to financially unsophisticated customers and the complex way he tried to conceal them and avoid paying tax on them. Miss Campbell says that the Tribunal should have limited (if any) sympathy for Mr Reynolds and not bend over backwards to try to rescue him from the consequences of his own greed and dishonesty. To put the point colloquially (which Miss Campbell did not), Mr Reynolds has made his bed, and he must lie in it.

156. All of that would point in favour of fixing the Penalty now and making no allowance for these competing liabilities. However, to do that would be to ignore the fact that the Step 1 calculation is designed to make an individual disgorge any benefit obtained from their wrongdoing and is not intended to penalise the individual for their wrongdoing, which is the proper function of subsequent steps in the penalty calculation.

157. In advance of the hearing the Tribunal suggested to the parties the possibility of the Penalty being subject to adjustment in the future if it becomes clear that amounts are due from Mr Reynolds to HMRC or the Official Receiver and those amounts will in fact be paid. For the Authority Miss Campbell indicated that this might cause some practical difficulty if Mr Reynolds had paid the Penalty, as penalties collected by the Authority are not retained but paid to the Treasury. Although making provision for the Penalty to reduce after it has been paid would require some finessing between the Authority and the Treasury, Miss Campbell did not suggest that there was any legal impediment to the Tribunal providing for a penalty to be subject to subsequent adjustment, whether before or after it is paid.

158. Bearing all of this in mind, we have decided that the only adjustment to be made to the disgorgement element of the Penalty at this stage is the adjustment contemplated by the Authority's concession recorded at [144] above. The Step 1 (disgorgement) amount is to be increased by reference to (a) any measurable economic benefits derived by using or investing all or part of those monies or (b) in the absence of any such benefits, or if such benefits do not fully reflect the value to Mr Reynolds of having received benefits some time previously, by charging interest on those monies using an interest rate equal to the Bank of England Base Rate from time to time compounded every six months. (see *Fox-Bryant,* at [38](1)-(2)).

159. At this stage, no further adjustment should be made to the amount of the Penalty. However, if it becomes clear at some point in the future that Mr Reynolds has a finally determined liability to the Official Receiver or HMRC in respect of amounts included in the disgorgement calculation at Step 1 and that liability has been fully discharged, then Mr Reynolds may apply to the Authority (or this Tribunal if necessary) for the total amount of the Penalty to be reduced to take the amount of such liability into account. The points outlined in paragraph [160] below should be taken into account in calculating the amount of any such reduction.

160. It is important that any subsequent adjustment should not indirectly subsidise any other liabilities of Mr Reynolds. In particular, the calculation of any tax liability should take the full value of all available losses, reliefs etc into account (even if they might also be available against

other unrelated amounts), to make sure that any reduction in the Penalty is not effectively funding tax that Mr Reynolds might otherwise be liable to pay at some point. So, to the extent Mr Reynolds makes any payment to the Official Receiver or HMRC, it is to be assumed:

(1) whether this is the case or not, that Mr Reynolds will settle all his other liabilities to the Official Receiver or HMRC before he makes any payment in respect of amounts included in the disgorgement calculation, and

(2) whether Mr Reynolds actually does this or not, that any losses or other amounts available to reduce the amount of tax payable on funds taken out of Haoma were all applied in reducing the tax payable on such amounts.

In addition:

(3) Amounts paid by Mr Reynolds to HMRC by way of penalties (which are imposed because of a taxpayer's behaviour in relation to their tax obligations and so are separate from the matters we are concerned with) are to be ignored.

(4) If amounts are paid to HMRC and the Official Receiver in respect of the same amount withdrawn from Haoma and included in the disgorgement calculation (most obviously if an amount withdrawn remains taxable even though it has been repaid), the total reduction in the Penalty is to be capped at the amount withdrawn from Haoma and included in the disgorgement calculation.

(5) Interest payable by Mr Reynolds to the Official Receiver or HMRC on an amount taken into account in reducing the amount to be disgorged can also be taken into account in reducing the amount to be disgorged, but (i) not to the extent that such interest is charged at a rate higher than that used by the Authority in its disgorgement calculation and (ii) only to the extent that the period over which such interest is charged overlaps with the period over which the Authority calculated interest in the Step 1 calculation.

161. If the amount of the Penalty is subject to adjustment in this way, that will produce a fair and just answer which accords with the core principle in DEPP, that the disgorgement element is exactly that and not a penalty. To this limited extent, the Disgorgement Ground succeeds.

162. Notwithstanding the decision of this Tribunal in *Staley*, it was not suggested to us that any of the matters we have just discussed should have any impact on the calculation of the Penalty beyond Step 1 (disgorgement). There is a greater level of freedom of action for the Authority (and therefore this Tribunal) in the subsequent Steps in the calculation of a financial penalty, and so it is not clear that, if any of these factors were taken into account at Step 2, this would necessarily lead to a reduction in the Penalty. For example, any reduction in the Step 2 figure might need to be balanced by an increase at Step 4. In the absence of submissions on this by Mr Reynolds or the Authority, we do not consider that we should interfere with the subsequent steps in the calculation of the Penalty.

163. The reality of the matter, as Miss Campbell submitted and Mr Reid did not question, is that Mr Reynolds is very unlikely to be able to pay the Penalty and, once a Final Notice is issued, Mr Reynolds will likely be declared bankrupt. In the light of that, Miss Campbell said that the Authority would be prepared to undertake to the Tribunal that, if Mr Reynolds is made bankrupt, it will not prove in Mr Reynolds' bankruptcy for the full amount of the Penalty to the extent that either or both of the Official Receiver or HMRC prove in Mr Reynolds' bankruptcy for amounts, which (taking into account the points made in [121]-[123] above) would, on a claim being made by Mr Reynolds, have been taken into account in making a subsequent reduction in the Penalty were they were to have been paid, and their proof is accepted by Mr Reynolds' trustee in bankruptcy. In those circumstances, the Authority would reduce its claim in Mr Reynolds' bankruptcy by reference to such amounts. In such a case the

effect of the Authority's undertaking would be sufficient to produce a fair and just answer, and the Penalty itself need not be subject to adjustment.

DISPOSITION

164. So far as the Prohibition is concerned, the Reference is dismissed. It is therefore open to the Authority to make a prohibition order against Mr Reynolds in the terms set out in the Decision Notice.

165. So far as the Penalty is concerned, we determine that the appropriate action for the Authority to take is to impose on Mr Reynolds the financial penalty set out in the Decision Notice subject only to the immediate modification discussed at [158], which is to be made before the Final Notice is issued, and the possibility of a subsequent adjustment as discussed at [159]-[160] above.

166. We remit the Reference to the Authority with a direction that effect be given to our determinations.

167. If the Authority and Mr Reynolds cannot agree on the detailed calculation of the financial penalty, there is liberty to apply to the Tribunal.

168. Our decision is unanimous.

169. We record the Authority's undertaking to this Tribunal set out at [163] above.

MARK BALDWIN
UPPER TRIBUNAL JUDGE

RELEASE DATE: 18 December 2025