Neutral Citation Number: [2018] EWHC 533 (QB)

Case No: HQ16X03275

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2018

Before :

MRS JUSTICE LAMBERT

- -

Between :

KEVIN HINCKS	**Claimant**
- and -	
SENSE NETWORK LTD	**Defendant**

- -
- -

Paul Strelitz (instructed by Blake Morgan) for the Claimant
Richard Samuel (instructed by Reynolds Porter Chamberlain) for the Defendant

Hearing dates: 13th – 16th February 2018, 19th February 2018, 23rd February 2018

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE LAMBERT

Mrs Justice Lambert:

1. The Claimant is the subject of a reference which is critical of his conduct as an Independent Financial Advisor. He claims that elements of the reference are not true and accurate, that overall it gives a misleading impression and that the opinions expressed in the reference are based on an internal investigation which he characterises as having been no more than "an inadequate sham". The Claimant claims damages in tort and contract for the loss of earnings which result from the unfavourable reference. The action raises the issue of the nature of the duty which is owed by a reference writer to the subject of the reference and, in particular, whether in discharging that duty, a reference writer should consider the adequacy and fairness of antecedent investigations upon which facts and opinions in the reference are based.

2. By the Order of Master Kay, the hearing before me relates to liability only.

3. Although the action is based on the reference, the real target of the Claimant's criticisms is the investigation into his conduct which was undertaken by the Defendant in November/December 2014 and the subsequent termination of his authorisation to work as an independent financial advisor. The Claimant's case is that the Defendant's Compliance Director, Mr John Netting, conducted the investigation in bad faith and that its outcome was predetermined. It is necessary therefore to examine the Claimant's work history with the Defendant in more detail than might otherwise have been necessary. The following summary is taken from the documents in the trial bundles and the witness evidence which I heard at trial over a period of 5 days.

Factual Background

The Parties

4. The Claimant is now aged 54. He had a track record as a successful financial advisor until 2012 when, together with the rest of his team, he was made redundant. Until that point he had always acted as a tied agent: advising and selling only those financial products which were offered by the company which employed him. Following redundancy he started working for Co-operative Independent Financial Solutions (CIFS) as an independent financial advisor (IFA) and, as such, was expected to research the entire financial market in search of the optimum product for his clients before making his recommendation.

5. CIFS was a small company with only two directors, Mr Charles Mosley and Mr Stuart Mann. The company was not authorised to conduct activities regulated by the Financial Conduct Authority but obtained the necessary authorisation by acting as one of a number of Appointed Representatives for the Defendant, Sense Network Limited. The Defendant was an authorised body under the Financial Services and Markets Act 2000 and provided a "regulatory umbrella" for its many Appointed Representatives which were then able lawfully to carry out regulated activities as the Defendant's agent.

6. The Defendant was also a small company with no more than two or three directors at various times. During the period between October 2012 and February 2015, the

Compliance Director was Mr John Netting; Mr Adam Owen was Head of Training until October 2013 and from October 2013 to May 2015 Head of Operational Compliance; Mr Steve Reynolds was Compliance Auditor between December 2013 and May 2015; Mr Keith Thompson and Mr David Sigsworth were both Training and Competence Supervisors throughout the material time. All gave evidence before me.

7. The relationship between CIFS and the Defendant was set out in the Appointed Representative Agreement dated October 2012. In effect, the Defendant was to act and operate as CIFS' compliance department. In general terms, the Defendant agreed to use its reasonable endeavours to monitor and supervise CIFS' regulated business activities; in turn CIFS undertook to co-operate with the Defendant and accept the Defendant's role as CIFS' principal and supervisor in complying with the regulatory regime. The Defendant agreed to act in good faith towards CIFS and its staff in respect of compliance and regulatory matters and use its powers of discipline, suspension and termination in relation to the staff proportionately and fairly.

8. In January 2014, the relationship between the Claimant and CIFS was formalised in an Advisor Agreement. The Advisor Agreement spelt out for the first time the raft of obligations which the Claimant owed to both CIFS and, in like terms, to the Defendant. Again, in general terms, the obligations required the Claimant to facilitate the Defendant's regulatory control over the business.

9. Both as a tied advisor and during his engagement by CIFS, the Claimant had a Control Function 30 authorisation (CF30). He was therefore approved by the Financial Conduct Authority (FCA) to work with clients and sell to clients through an authorised body, such as the Defendant. The Claimant's authorisation by the FCA required the approval of an authorised body such as the Defendant and it was this authorisation which was terminated by the Defendant in December 2014.

February 2013: 100% Pre-Approval

10. In February 2013, only 4 or so months after he had started work with CIFS, concerns were raised by the Defendant over the adequacy of advice which the Claimant had given to two clients. The Claimant was made subject (by the Defendant) to the need to obtain pre-approval for all advice and sales. The Claimant was authorised to complete the sales process up to, but short of, the point of product advice being offered to the client. The Claimant could therefore undertake the early stages of the sales process: so-called "fact finding" (identifying relevant facts from the client from which it would be possible to assess the client's objectives) and the market research for suitable products. The Claimant could not offer advice or transact final sales before the Defendant's case review team had "signed off" the Claimant's proposals as suitable. 100% pre-approval was the tightest level of regulatory control available, intended to avoid client detriment and also to provide appropriate regulatory cover for both the advisor and the Defendant.

Re-Registration of Client Files: autumn 2013

11. Things continued to go badly for the Claimant.

12. In the autumn of 2013, the Defendant discovered that the Claimant had been re-registering existing client files on to one of the two new financial platforms without either obtaining pre-approval, as he was required to do, and without uploading the relevant information on to the Defendant's online database, Intelligent Office. A large number of client files were involved, although it was the same two problems replicated across all of the files. The apparent breach of the 100% pre-approval process was discussed at a meeting of the Defendant's Compliance Risk and Audit Committee in autumn 2013 and led to a meeting between the Claimant, Mr Stuart Mann, Mr Netting and Mr Adam Owen and others.

13. The Claimant had already, in July 2013, recognised the mistakes he had been making in both re-registering existing clients on to the new platforms without approval and failing to upload the relevant data on to the central database. The Claimant's strong view was that, although he had made a mistake, the fault did not lie with him because he had never been advised about the proper process to be followed in re-registrations. He also explained that CIFS (specifically, Mr Stuart Mann) had tacitly approved his mistakes because Mr Mann had been aware of what the Claimant was doing but never corrected him. Following the meeting, it was accepted by the Defendant that the Claimant's error had been an administrative error based on a misunderstanding of the procedures which had then been replicated. It was agreed that the Claimant would "remediate" the files by uploading the relevant data in respect of each of the files which had been re-registered. He remained on 100% pre-approval.

The Bass Case: December 2013

14. On 12th December 2013, the Claimant was suspended for non-compliance with the 100% pre-approval process. This was an "internal" network suspension, rather than a formal suspension of his FCA authorisation. The perceived problem was, once again, one of failing to obtain pre-approval before making a financial product transaction. The client involved was Mrs Patricia Bass.

15. On the 5th December 2013 the Claimant made an application to a product provider on behalf of Mrs Bass. It is common ground that this step was taken in the absence of authorisation by the Defendant. The Claimant had then continued with the process of seeking pre-approval, even after the application had been submitted.

16. The Claimant explained the apparent breach of the 100% pre-approval requirement by saying that it was the fault of the Defendant in failing to acknowledge work which he had done on the Bass file; that Mrs Bass put him under pressure to make the application; and that he had brought the matter to the attention of Mr Mann, his line manager, and had only made the application for the financial product after having been given approval to do so by Mr Mann.

17. Mr Mann denied having given the Claimant his approval to make the transaction.

18. Mr Mann appreciated that the Claimant's authorisation was now in jeopardy. When the apparent pre-approval breach came to light, he wrote an email to Mr Netting on 11th December 2013 setting out his views as follows:

> "*I've discussed at length with Kevin who understands that he has jumped the process given no sign off received. In support of his position, the pressure he has received from the client due to the timescales I believe has forced his hand and this error of judgment. I am confident that there is no malicious disregard of process and pressure borne from the client due to timescales is the primary and sole reason for this position.*"

Mr Mann then set out a series of proposals as to how the Claimant might be supported going forward.

19. I pause to note that, if the Claimant's account was true and Mr Mann had given him authority to make the sale to Mrs Bass, then Mr Mann's email can only be regarded as having been cynically and dishonestly self-serving. Either that, or the Claimant's account is unreliable.

20. The Bass incident is of particular relevance given the Claimant's account of, and explanation for, the further breach of the approval process rather later in his history, when he sold a financial product to Mrs Carter on 5th/6th November 2014.

21. On 15th December 2013, Mr Mosley added his voice to that of Mr Mann and emailed Mr Netting. He explained that he thought that terminating the Claimant's contract would be the wrong decision. Whilst he recognised the risks that the Claimant's activities had caused, he thought that the Claimant "*guilty of over enthusiasm and a willingness in his eyes to please clients. Kevin has had to go through the biggest learning journey … his passion is to try and help as many people as he can. An honest individual can be taught almost anything in life*"

22. In the circumstances, Mr Netting decided not to terminate the Claimant's authorisation but to attempt to resolve the situation. However, the Claimant's suspension continued pending the remediation of the cases which had been re-registered in the absence of full documentation having been uploaded.

The Suspension: December 2013

23. The effect of the suspension was that the Claimant was unable to transact any business via CIFS or the Defendant nor carry out any client meetings. He was to continue the so-called remedial work on the files which had been the subject of re-registration. This was back-office work and involved the Claimant uploading the information on to the network database, which he had previously failed to do, so that the Defendant's case review team could then be satisfied that the advice which he had provided had been appropriate.

24. In July of 2014 the process of remediating the files was converted by the Defendant into the more formal past business review. The process of "past business review" was a different and distinct process from the remedial process which had been ongoing since the late autumn of the previous year. It did not involve the Claimant. Indeed, it is doubtful whether the Claimant was even aware at the time that a past business review had been started. By instigating a past business review, the Defendant was acknowledging that the many files which had been the subject of remedial work by the Claimant could not, in fact, be put in order. The past business review was aimed

at ascertaining possible client detriment and, if necessary, offering compensation if loss had been suffered. Within the network, the fact that a past business review was started, reflected negatively on the Claimant; it implicitly recognised that things had gone wrong which could not be remedied.

25. The suspension continued until the autumn of 2014 when a staged re-introduction to work was initiated. For the period of suspension however, the Claimant was not able to undertake the planned annual reviews which his clients were entitled to and which they paid for. At trial, it was accepted that redress in the sum of £12,905 was offered to 63 affected clients in respect of the annual review service which the clients had paid for but not received.

26. It is not disputed that the suspension continued for far longer than either the Claimant or the Defendant anticipated, although the reason for the prolongation of the suspension is contentious. The Claimant contends that Mr Owen and others dragged their heels in responding to the remedial file review work which he had submitted and that the Defendant was constantly moving the goalposts as to what was required of him. The Defendant (in particular Mr Owen) contended that the reason that the suspension went on for much longer than anticipated was because the Claimant had misled him (and others) in the autumn of 2013 into believing that the necessary information was to hand such that the files could be remediated in the first place.

27. The suspension was lifted in various stages and in September 2014 the Claimant was permitted to undertake client annual reviews unaccompanied. The Claimant remained however at all times subject to the 100% pre-approval process. He was not permitted to give advice on an appropriate financial product, nor make any sale before his proposals had been signed off by the Defendant's case review team. There is no doubt that the Claimant was well aware of this restriction on his business activities. It was confirmed to him by email by Mr Mann. The Claimant did not, before me, dispute that he was subject to 100% pre-approval and that he was aware of this at the time of the next incident, which concerned his client, Mrs Carter.

The Carter Case

28. On 5th/6th November 2014 the Claimant sold an investment to Mrs Carter one of his long-standing clients. The investment was a structured capital at risk product (a SCARP). It was this sale which led to the Defendant's investigation and the termination of the Claimant's authority.

29. On 15th October 2014, the Claimant undertook a routine annual financial review with Mr and Mrs Carter. He attended on his own, as he was permitted to do. Mrs Carter had a SCARP which had matured and she told the Claimant that she wanted to reinvest the proceeds into a similar plan which she had identified and which was open for sale only until 7th November 2014.

30. There were a number of restrictions on the Claimant's business activities at this time. He remained subject to 100% pre-approval and so was not entitled to give advice or to transact any business without that advice having been signed off by the Defendant. He was also not permitted to provide advice to clients without being accompanied by a Training and Compliance Supervisor. There was a further important limitation upon

the Claimant's business activities which was not specific to him but applied to all advisors; this was that no financial product which exposed the investor to a risk of loss of capital could be transacted in the absence of pre-approval. A SCARP was, by definition, just such an investment. It was the Claimant's case at trial, as at the time of his investigation, that he was not aware that a SCARP could only be sold after pre-approval had been obtained.

31. Having undertaken the annual review and in the knowledge that Mrs Carter was keen to re-invest her matured SCARP, the Claimant enlisted Mr Mosley (one of the CIFS directors) to accompany him to the Carters as the Claimant had not, by this stage, been signed off to undertake fact find meetings on his own. The visit took place on 17th October 2014. Mrs Carter was not present for the meeting. Much is disputed between Mr Mosley and the Claimant concerning what, if anything, was said during the meeting about Mrs Carter and her investment plans and how much Mr Mosley knew about Mrs Carter's investment plans. It is the Claimant's case that Mr Mosley knew that Mrs Carter had a SCARP which had matured. Mr Mosley said in evidence that he did not think that he would have paid much attention during the meeting to Mrs Carter's investments as she was not present and he would not have taken his instructions on Mrs Carter's investment wishes or her risk profile from Mr Carter.

32. Following the meeting on 17th October, the Claimant started the process known within the Defendant's business as "building the file", that is, assembling all the relevant information necessary for compliance purposes preceding a transaction. Although Mrs Carter's matured investment was a SCARP, the Claimant nonetheless built a file for a low risk deposit product as he thought that this would be more consistent with what he understood to be Mrs Carter's risk appetite. He uploaded onto the online database the "fact find" document and sent an email to Mr Mosley during the evening of 17th October asking that it be forwarded on quickly to the administrative team (the paraplanners) which were engaged to perform back-office work, including the drafting of a suitability letter which would set out a summary of the investment recommendations and the reasons for them. The email made reference to Mrs Carter wishing to reinvest into an "*Investec Deposit Plan FTSE 100 Kick Out Plan providing low risk and low complexity*". It was common ground at trial that the product description in the email was a contradiction in terms. A product which was linked to the FTSE and which "kicked out" was, by its nature, a SCARP. Such a product would not be a "deposit" product and would not be low risk and low complexity. The email was forwarded on to the appropriate paraplanner, Ms Geraghty, by Mr Mosley without comment. Mr Mosley told me that, although he had received the email, he had probably not read it.

33. On 3rd November the Claimant was copied in to an email from Mr Owen to Mr Mann confirming that the Claimant was "*signed off for fact find meetings and can now do these unaccompanied. Presentation meetings are still subject to 100% observation (by the Defendant). Just to confirm Kevin will remain on 100% pre-approval for all new business*". Following this email, the Claimant arranged for three further "live observations" to take place on 17th November 2014. One of those meetings was to be with the Carters.

34. On 4th November, the Claimant spoke with Mr Mosley and told him that he was being put under a lot of pressure to arrange for the investment to be completed. It was arranged that Mr Mosley would attend the Carters once again on 5th November in

order to give advice and progress the sale. However, for various reasons, Mr Mosley was unable to attend the meeting on 5th November. He told the Claimant to telephone the Defendant and speak with Mr Adam Owen, the Defendant's Head of Compliance. The purpose of the call from Mr Mosley's viewpoint was to see if the Defendant's compliance team would relax the restrictions on the Claimant's authorisation to allow him to give advice and make a transaction so that the business could be completed in time for the 7th November deadline. He understood that the product to be sold was a "non-regulated" product, that is, a deposit based low risk product.

35. Acting on this advice, the Claimant contacted the Defendant and spoke to someone from the Training and Compliance team. The Claimant thought that he spoke to Keith Thompson. In fact, he spoke to David Sigsworth. The contents of the conversation between the Claimant and Mr Sigsworth is contentious. The Claimant's case is that he told Mr Sigsworth of the limits on his authority to do business; that Mrs Carter had a SCARP which she wished to re-invest and that Mr Mosley had visited the client with him on 17th October and completed the preliminary stages of the sales process. The Claimant says that he asked Mr Sigsworth for his permission to complete the process at the meeting that day so that the sale could be made before the deadline passed. Mr Sigsworth told him that he could do so, provided that an authorised advisor was prepared to endorse the sale. By endorsed, the Claimant understood Mr Sigsworth to mean "give permission". The Claimant says that there was no ambiguity: he repeated back to Mr Sigsworth his understanding, namely, that he could complete the application provided another advisor endorsed the application.

36. Mr Sigsworth denies that he gave permission for the sale to proceed. He says that he told the Claimant that there could be no relaxation on the limits on the Claimant's business activities and that the restrictions continued to apply: an approved advisor would have to make the transaction.

37. It was common ground between the Claimant and Mr Mosley that, following the call with Mr Sigsworth, the Claimant phoned Mr Mosley back and relayed his version of the conversation to him. He told Mr Mosley that the sale could go ahead provided that an approved advisor endorsed it. Mr Mosley agreed to endorse the sale and it was arranged that the Claimant would bring the application form in to the office the next day for Mr Mosley to sign.

38. The Claimant then attended the Carters. However, Mrs Carter rejected the Claimant's proposal that she should reinvest in a deposit-based product. Unhappily for the Claimant, she repeated what she had told the Claimant at the annual review; that she wanted to purchase a structured investment plan, not a deposit plan. The Claimant therefore advised Mrs Carter on the relative risks of a deposit-based product and a SCARP. The application form was completed in Mr Mosley's name and Mrs Carter signed it.

39. At some stage, either during the meeting or shortly afterwards, the Claimant decided that no fee would be charged in respect of the sale.

40. Later that evening he sent another email to Ms Geraghty, the paraplanner, which was copied to Mr Mosley. The email records that "*Janet Carter – error made on my original email about the Structured product. JC has a maturing Investec FTSE Enhanced Kick Out plan 38. Customer would like to reinvest the total proceeds into a*

similar plan.. JC would like to complete this option and not as previously noted. Also no initial fee is now being charged for this reinvestment". There is no doubt from this email that the Claimant was making it clear that the product selected by Mrs Carter was a SCARP. It would not however have been clear to Ms Geraghty at this stage that the transaction was already in process. On the contrary, on a plain reading of the email, the sale had yet to take place.

41. It had been intended that the Claimant and Mr Mosley would meet the following day, 6th November. The Claimant was unable to go into the office and so he spoke with Mr Mosley by telephone. The Claimant's case is that he told Mr Mosley on the telephone that Mrs Carter had decided to reinvest in a structured investment plan rather than a deposit plan and Mr Mosley approved the Claimant signing the form and sending it off. Mr Mosley had no detailed recollection of what he remembered to be a short telephone call. However, he disputed that he would have sanctioned the form being sent off in his name if this had been raised. The Claimant then signed his own name on the application form directly above Mr Mosley's printed name. Although it was the Claimant's "normal" signature, the signature was illegible. Without comparison, the reader would not know that it was not Mr Mosley's signature.

42. On the face of it and subject to explanation, the Carter transaction was undertaken by the Claimant in breach of a number of the Defendant's processes:

a) the Claimant's suspension had not been lifted to the extent of entitling him to give clients advice on a suitable product in the absence of member of the Defendant's training and compliance team;

b) the Claimant remained subject to 100% pre- approval for all products;

c) the SCARP product which had been the subject of the transaction was subject to 100% pre-approval from the Defendant, whoever the advisor;

d) the application form for the product was in Mr Mosley's name, even though Mr Mosley had not met Mrs Carter nor given her advice;

e) the application form was not signed by Mr Mosley but by the Claimant.

43. Following the sale, the Claimant continued to upload documentation to the online database as if he were following the pre-approval process. He did not upload the application form (in Mr Mosley's name) because, he told the Court, he forgot to do this. He did however upload a volume of material that, if read, would have made clear that the Carter transaction involved a SCARP. For example:

a) the Claimant uploaded a "fact find" document which was relevant to both Mr and Mrs Carter which made clear that the transaction relevant to Mrs Carter was a SCARP and that Mr Mosley had endorsed the sale. The fact find did not make clear that the sale had already been transacted;

b) the version of the suitability letter bearing the date 10th November included the following statement relevant to Mrs Carter's sale: "*we have agreed to reinvest the total amount back into another Investec Investment Plan…I feel that the proposed investment is affordable and appropriate*";

c) on 11th November, he sent an email to the paraplanner enclosing documents saying "*customers …will sign during our appointment which will be observed by Keith Thompson from Sense.. Please forward for pre-approval*";

d) on 14th November he sent Mr Mosley SCARP comparable product information, seeking assistance in uploading it; Mr Mosley confirmed that it had been uploaded a short while later;

e) he attached to his email to Mr Mosley a copy of a file review sheet which had been completed by the paraplanners which had raised a number of queries of the Claimant concerning the transaction and his annotated responses. One of the questions raised by the paraplanner was "*the investec brochure states that the closing date for this product is 7th November 2014. Please clarify whether this date has been extended*". The Claimant's annotated response was "*Charles Mosley has visited customers and has endorsed and completed this product due to the time frame and closing date of the product*".

44. Matters finally came to the attention of the Defendant's compliance team in mid-November. The Claimant was spoken to and confirmed that the application had already been submitted. The matter was therefore referred upwards to Mr Owen and Mr Netting. Mr Mosley and the Claimant were asked to provide written accounts setting out their respective involvement in the Carter transaction. Those documents were prepared on Monday 17th November and sent to the Defendant. The planned live observed presentation with the Carters (scheduled for 17th November) was cancelled.

45. Enquiries were made by the Defendant (either Mr Owen or Mr Netting) of the compliance supervisors to find out whether any of them had given authorisation to the Claimant to make the transaction on the basis of an endorsement by Mr Mosley. Mr Sigsworth by email on 14th November stated as follows "*I recall I had a conversation with Kevin Hincks earlier this month about the pre-approval process. It concerned a product with a deadline and the surrounding timescales. The outcome was that he was told, in order to meet the deadline, the advice would have to be conducted by an advisor who was authorised to conduct the business within the deadline*". His account of the conversation was therefore very different to that of the Claimant.

46. At trial, the core elements of the Claimant's "case" in respect of the Carter sale were the following:

a) he did not know, and had never known, that SCARPS were subject to 100% pre-approval in anyone's hands;

b) he was fully aware of the difference between a low risk, deposit-based, product and a SCARP, but he had received inadequate training by CIFS and the Defendant on the need for pre-approval for these products;

c) so far as he was concerned, he had received authorisation from Mr Sigsworth to make the sale, subject to Mr Mosley's endorsement, and Mr Mosley had agreed to endorse it;

d) in any event, the sale was not his sale. It was Mr Mosley's sale. All that he was doing was undertaking the background work to enable Mr Mosley to make the transaction. Hence it was Mr Mosley's name on the application form. His signature was added in a rush and it would have been better if he had made it clear on the form that he was only signing the application "pp" for Mr Mosley;

e) there had never been an intention to mislead anyone about the transaction. He had forgotten to upload the application form. All would have become clear during the planned "live observation" which had been scheduled to take place on 17th November.

47. The Claimant says that this account would have emerged clearly if a fair investigation had taken place. He says that his account would have been believed, supported as it was by documents which he had uploaded, but for the biased and unreasonable nature of the investigation.

The Claimant's Written Account:

48. The account records the history of the transaction from the Claimant's perspective. The Claimant emphasised that the limits upon his authority to conduct business had been relaxed by the Defendant, subject to endorsement from an approved advisor and that Mr Mosley had been the approved advisor. He said that both he and Mr Mosley thought that the product to be sold was an unregulated product but that when Mrs Carter said she wanted to buy a SCARP he gave her appropriate advice on the risks associated with the product. His account does not mention the application form made out in the name of Mr Mosley but bearing his signature. He does not say in his account that, in his mind, it was Mr Mosley's sale and not his, and that he was acting only as administrator. He made no mention of pre-approval procedures. The Claimant said that none of these matters had been flagged up with him beforehand and it did not therefore occur to him to include them in the report.

Mr Mosley's Written Account:

49. Mr Mosley records his involvement in the meeting of 17th October 2014. He said that he had hoped that the Claimant would do the necessary research which would be followed by a further meeting with the Carters which would be observed by the Defendant. The process would thus help the Claimant regain full authority from the Defendant. He said that, when the Claimant called him on 4th November, he was in a panic as the Carters were putting him under pressure to complete a sale by the deadline of 7th November. He said his understanding was that the sale was to be of a non-regulated product and so he thought it was worthwhile asking the Defendant

whether the restrictions might be relaxed. He agreed that on the basis of what he was told by the Claimant he endorsed the product sale.

The Investigatory Meeting on 19th November 2014.

50. Mr Mosley told me that he was clear at the time when he was asked to write the report that it was a serious situation with potentially serious consequences. Although he was worried for himself, he was more worried for the Claimant who had been subject to a suspension and was not yet fully rehabilitated. His forecast was that termination of authorisation was a possible outcome for the Claimant given his history.

51. The Claimant, by contrast, said that he did not understand the seriousness of his position. No one had told him. Nor was he told specifically what the meeting was to be about; although he understood that the meeting concerned the Carter transaction, he knew nothing more than this. The Claimant asserted that the investigatory meeting was nothing short of an ambush and this was compounded by the hostility which Mr Netting and Mr Owen demonstrated during the meeting.

52. A typed note of parts of the 90-minute investigatory meeting is the only record of the meeting. It was prepared by Mr Owen who had attended the meeting and made notes on his ipad, doing his, admittedly inadequate, best to keep up with the conversation. All involved have agreed that the note is not a full version of the discussion which took place. Much time was spent in Court trying to fill in the gaps in the note and much remained in dispute at the end as to the true meaning of what is recorded in context. For all of its deficiencies though, the note gives a flavour of the areas of questioning and some of the Claimant's responses.

53. The note records that:

a) the Claimant explained to Mr Netting that the transaction was not his sale, but Mr Mosley's. He said that, from 17th October, Mr Mosley had taken over responsibility for giving advice to the Carters and that the only reason why he (ie the Claimant) was "building the file" was because the case came back to him to prepare for the live observation;

b) the Claimant recognised that there was more risk associated with a SCARP than a deposit-based product;

c) even though he was aware of the difference between a SCARP and a deposit-based product, he had not considered reverting to Mr Mosley when unexpectedly Mrs Carter did not accept his advice to buy a deposit-based product on 5th November;

d) he did not know that SCARPS required pre-approval;

e) he had been given authority by the Defendant to make the sale, subject to endorsement;

f) he submitted the application form in Mr Mosley's name because there was a chance that the application might not be accepted if it wasn't signed by an approved advisor;

g) he had throughout the process acted honestly.

Termination letter 5th December

54. Following the investigation meeting, the Claimant sent Mr Netting some further emails in which he insisted that he had called the Defendant on 5th November before the sale had been made. He invited Mr Netting to check the telephone logs at the company which would confirm this. He told Mr Netting that he had signed the application form for the Carter sale, forgetting to amend Mr Mosley's printed name underneath the signature line. He said this was a complete oversight.

55. On 5th December, Mr Netting wrote to the Claimant informing him that his FCA authorisation was to be terminated by the network. Mr Netting's reasoning was explained in the letter as follows:

a) he had treated the breach as a "repeat breach" given the Claimant's history of past breaches;

b) he had concluded that the Claimant's breach of approved processes was "malicious" (a term of art, meaning that the breach which had been committed for personal gain). Mr Netting's view was that the Claimant had made a personal gain from the Carter product transaction as he had generated fee income from it;

c) he had concluded that the Claimant had attempted to conceal the fact that the application had been submitted. He had reached this conclusion because the Claimant had continued with the mandatory pre-sale checking, which was inconsistent with the Claimant's explanation that approval had already been given for the transaction by Mr Sigsworth; the Claimant had continued to make arrangements for the mandatory live observed interview process; the Claimant had not uploaded the application form; Mr Netting did not accept that the Claimant had not understood that investment based schemes were always 100% pre approval in spite of training; the Claimant had signed the application form in Mr Mosley's name which was inconsistent with the account which he had given, namely, that the Claimant himself had been authorised to conduct the sale as a result of his conversation with Mr Sigsworth.

d) The letter also recorded the basis for Mr Netting's conclusion that the Claimant had knowingly breached pre-approval procedures. Mr Netting said that the Claimant should have been aware of the pre-approval process. Mr Netting wrote that the steps which the Claimant had, in fact, taken following the transaction on 5/6th November demonstrated that he did know what was required of the pre-approval

process and that, as the Claimant had been recently suspended, he was on enhanced supervision which required pre approval in all cases.

56. The Claimant submitted an appeal and provided a letter in support which made the following points:

a) He denied generating fee income from the product sale. He informed the Defendant that he had waived his fee in respect of the sale.

b) He strongly asserted that a telephone call had been made to the Defendant in which he had been authorised to go ahead with the sale provided that an approved advisor endorsed the sale.

c) He denied that he had gone to lengths to conceal the sale. He drew Mr Netting's attention to the Suitability Letter which had not been altered and which recorded that the sale had already been undertaken and that Mr Mosley was fully aware that the product had been sold.

d) The application form was not uploaded because he was too busy preparing for three live observations.

e) He insisted that he had had approval from the Defendant to transact the sale but that he did not make a distinction between a structured deposit and structured investment plan: he did not know that SCARPs were 100% pre approval. He had intended that Mr Mosley would sign the application form and so, him adding his own signature, had been a complete oversight. He said that Mr Mosley had visited the customer on 17th October and a full fact find, attitude to risk and updated customer objectives were either completed or validated. Mr Mosley was in full knowledge that the application had been submitted in his name and was fully informed about the nature of the application.

f) As to the allegation that he knowingly breached the procedures he said that the Defendant had been made fully aware that Mr Mosley had previously met the customers and the urgent time frames. He said that he was merely completing the application for Mr Mosley to endorse the transaction therefore there was no knowing breach.

g) Finally, he said that he had 26 years' service as a productive tied advisor and at no point had his honesty and integrity been called into question. He complained that he had not had an opportunity to obtain representation for the investigation meeting.

Mr Newman's Response to the Appeal: 6th January 2015.

57. Mr Newman is currently unwell and did not therefore give evidence before me. His response to the appeal is set out in his letter dated 6th January 2015. His letter records that he had personally reviewed Mr Netting's findings.

58. He accepted the Claimant's point that no fee income had been generated as a result of the sale but he recorded that he nonetheless considered that the Claimant's actions had been motivated by the desire to preserve the profitable relationship which the Claimant had built up with the Carters.

59. He also accepted that there had been a telephone conversation between the Claimant and Mr Sigsworth, but pointed out that "*there were obvious differences between your version of the guidance provided and David's version*".

60. He concluded that Mr Netting's conclusion that the Claimant had taken steps to conceal the fact that the transaction had already taken place was reasonable. He took into account that the application form had not been uploaded; that there was no note on the file of any meeting having taken place between the Carters and the Claimant on 5th November; the draft suitability report. He also, like Mr Netting, rejected the Claimant's case that he was not aware that SCARP required 100% pre-approval.

61. He said that he recognised that the Claimant's motivation was to ensure that the client did not miss out on a good product.

62. Mr Newman rejected the appeal. He concluded that the Claimant had knowingly breached procedures by transacting a high-risk product without pre-approval and without anyone in attendance. He concluded that the motive was not the fee but the desire to meet the Carter's demand to reinvest within a tight timescale and, as such there was personal gain. He concluded that the Claimant had concealed from the network that the product had been sold and then concocted a story to justify the inappropriate action which he had taken.

The Reference.

63. The reference was written by Mr Netting, the Compliance Director.

64. I set out below the relevant section of the reference:

> "*On 11th December 2013 we established that Mr Hincks had undertaken a large number of re-registrations of client investments where he had not documented or followed procedures correctly. Whilst we had significant concerns over this, our investigations concluded that he had misunderstood the procedure and that we would undertake the following actions:*
>
> *1. Suspend the advisor from new business while we undertook a full past business review of all the cases.*
>
> *2. Compensate the clients in accordance with our complaints procedure.*
>
> *3. Undertake full rehabilitation retraining prior to lifting the suspension.*

> *As a result of the past business review, to date redress amounting to £12,905.87 has been offered to 63 affected customers.*
>
> *Following completion of the past business review a rehabilitation programme was implemented. This included reinstatement of the advisor's authorisation on 16th October 2014 subject to the following enhanced monitoring:*
>
> *- 100% pre-approval for all cases*
>
> *- All client appointments attended by either the network Supervisor or a CF30 authorised AR principal.*
>
> *In November 2014, we became aware that the advisor had transacted a product outside of our normal pre-approval process and without anyone accompanying him during the client presentation meeting.*
>
> *Our subsequent investigation concluded that, in spite of the explanations offered by Mr Hincks, it was reasonable to conclude that he had knowingly and deliberately circumvented the agreed process.*
>
> *He was terminated on 13th January 2015.*"

65. In his evidence to me, Mr Netting stood by the terms of the reference. He said his approach was in part dictated by the regulatory obligations on a reference writer set out in the FCA's Supervision Manual. Those requirements were to provide "complete and accurate information" concerning the person's fitness and propriety. He said that he had however carefully reviewed the available information and the reference was more benign than it might have been. He said that it was not an option open to him to make no comment upon the various restrictions on the Claimant's ability to conduct business independently before the Carter transaction but nonetheless he had done his best to provide a fair reference. Specifically:

    a) in respect of the problem surrounding the Claimant's re-registration of files, he said that he thought that it was reasonable to refer to this episode as "*a failure to follow procedures about which the Defendant had had significant concerns*" but that in fairness to the Claimant he had made it crystal clear that the Defendant had concluded at the time that the Claimant had misunderstood the procedures.

    b) He said that he made a decision not to highlight the Bass case (in which the Claimant had in the words of Mr Mann "*jumped the process*") as the Defendant had, at the time, decided to treat all of the issues with the re-registration cases as part of the same overall picture.

    c) He said that he thought it was reasonable to refer to the Past Business Review. The FCA rules required the reference to include details of customer complaints and, whilst the Past Business Review was not

technically a complaints process, his view was that, had a customer made a complaint, it would have been difficult to rebut it given the lack of information which the Claimant had uploaded. He said that "past business review" was not an defined industry term and its negative connotations would not have been apparent to the reader of the reference.

d) Mr Netting recognised that his description of the Claimant's actions as a "*knowing and deliberate circumvention of the agreed process*" was an expression of negative opinion. To describe the Claimant's actions in respect of the Carter transaction in such a way was, he considered, a significant watering down of his own personal view following the investigation. He did not record in the reference for example his own view, shared by Mr Newman, that the Claimant's conduct following the transaction had been intended to conceal the fact that the sale had already taken place.

e) He told me that his intention when stating that there had been "*knowing and deliberate circumvention*" was to suggest that the Claimant was someone who "*sailed close to the wind*" and who needed "*careful monitoring*". He thought that this was how a reader would interpret the comment. He thought that the effect of the reference would have been to have made the Claimant an unattractive candidate for a post in a large company where the supervision would inevitably be more remote. He did not think it ruled out the Claimant's employment by a smaller company. He said that he had deliberately avoided describing the Claimant as being dishonest. Although that was his opinion, he was striving to be fair in the reference and, in effect, give the Claimant the benefit of the doubt.

The Claimant's criticisms of the reference:

66. The Claimant contends that there are a number of relatively minor factual inaccuracies in the reference. So far as this claim is concerned however, he makes three major criticisms of it, all of which focus on the section of the reference set out above under the heading "Disciplinary Record (including breaches of company/FCA rules)". I set them out below.

67. The statement in the reference that "*as a result of the past business review, to date, redress amounting to £12,905.87, has been offered to 63 affected customers*" is misleading. It is not disputed that redress payments had been made by the Defendant. However, the redress payments were made to clients for annual review meetings which the Claimant had not been able to perform because he had been suspended. Mr Strelitz on behalf of the Claimant submitted that an informed reader would appreciate that redress payments may become due because of inadequate or unsuitable advice and the reference ought to have made clear that the redress payments had been in respect of a service which the Claimant had not provided and which he could not have provided, rather than the more serious failure to provide adequate advice. The absence of such amplification was therefore "negatively misleading".

68. The statement that a "*full rehabilitation retraining" process was to be undertaken before the suspension was lifted*" was also misleading. It would give the reader the impression that the full rehabilitation retraining had been completed before November 2014 when the product transaction had occurred. Mr Netting should have made it clear, Mr Strelitz argued, that the rehabilitation retraining and the phased re-introduction to work had not been completed before the reinstatement of the Claimant's authorisation on 16th October. This was important given that the Claimant had, it was argued, received no sufficient training from either the Defendant or CIFS on the mandatory pre-sale approval needed for SCARPs. The failure to make this additional statement was therefore misleading.

69. The statement that the "*subsequent investigation concluded that, in spite of explanations offered by Mr Hincks, it was reasonable to conclude that he had knowingly and deliberately circumvented the agreed process*" was unsurprisingly the main focus of the Claimant's criticism. Mr Strelitz made a number of observations:

a) The statement that all client appointments had to be monitored by the attendance of either a network supervisor or a CF30 authorised principals was wrong. By the time of the Carter transaction, the Claimant had been authorised to conduct annual reviews and fact finding meetings. The incorporation of that inaccurate statement in the reference, to be read in conjunction with the subsequent statement that the Claimant had "circumvented the agreed process", would suggest to the reader that the Claimant's meetings with the Carters were all clandestine. This was wrong.

b) The negative opinion expressed by Mr Netting was wrong. It followed a sham and pre-judged investigation. The investigation was conducted in bad faith. Mr Netting did not genuinely believe the opinions he expressed in the reference.

c) The investigation was unfair in a great many respects. The investigatory meeting of 19th November was an ambush: the Claimant had not been told before the investigation meeting what the allegations against him were; allegations were made during the meeting and he was denied the opportunity of responding, or responding properly; the meeting itself was conducted in an harassing manner by Mr Netting and Mr Owen who had pre-judged the situation; Mr Owen told the Claimant during the meeting that "*this is fraud*"; the Defendant had not searched for relevant documentation before the meeting, relevant witnesses were not interviewed and the Claimant was not given access to the relevant documents.

d) Had a fair and reasonable investigation been conducted, then the reasonable investigator could not have reached the conclusions, nor formed the opinions, which were expressed in the reference.

The Claim: negligent misstatement

70. The claim is pleaded in tort and in contract. I consider the claim in tort first.

71. Both parties accepted that Mr Netting owed the Claimant, as the subject of the reference, a duty of care and that the nature of the duty, broadly formulated, was to exercise reasonable skill and care in providing a reference which was true, accurate and fair. The existence of the duty of care was derived from *Spring v Guardian Assurance PLC* [1995] 2AC 296 and the so-called "tripartite" standard (to provide a reference which was true, accurate and fair) was derived from the judgment of Robert Walker LJ in *Bartholomew v London Borough of Hackney* [1999] IRLR 246. Both Counsel also accepted that in discharging the duty, the author of a reference must take reasonable care to ensure that the reference is not misleading either by reason of what is left out of the reference, or by including facts which, although viewed discretely might be accurate, nonetheless either through nuance or innuendo generated a misleading picture when considered overall (again, see *Bartholomew*).

72. There was however a fundamental difference between Mr Strelitz for the Claimant and Mr Samuel for the Defendant as to the nature of the duty on a reference writer whose reference goes beyond statements of fact and includes negative statements of opinion which have been formed on the basis of an antecedent investigation.

73. Mr Strelitz submitted that if the reference writer is to include negative opinion then, whatever the source of the opinion, the reasonable reference writer must satisfy him or herself that the opinion is reasonable and premised upon a reasonably held belief. In the context of negative opinions which are founded on an investigation and the conclusions of an investigation, it was incumbent upon the referee to go much further: he or she must be satisfied that the investigation was reasonably conducted and procedurally fair, consistent with the standard to be expected of a reasonable employer.

74. At my invitation, Mr Strelitz provided the Court with a document setting out the staged approach which he submitted should be followed by the reasonable author in discharging his or her duty. I set it out in full below:

> *"When considering the nature of the duty, the reference writer should consider first whether any statement to be included may reasonably be considered to be detrimental to the subject. If so, then the author should satisfy himself that the same is accurate and fair in that:*
>
> *i) In the case of a statement of fact, it is plainly true.*
>
> *ii) In the case of a statement of opinion it is premised upon a reasonably held belief; or*
>
> *iii) in the case of findings or conclusions following any process that is or relates to misconduct or capability matters they are themselves premised upon a reasonable investigation that would be expected of a reasonable employer.*
>
> *In each case the said statement must also neither itself be misleading nor lead to a misleading impression of the reference as a whole.*

> *If any of the thresholds above are not met, or if they cannot be met without the reference being misleading, then it is incumbent upon the drafter to do one of the following (i) carry out his/her own reasonable investigation into the said fact, opinion or finding or (ii) if a reasonable investigation is not possible, clearly and fairly to state as such within the reference together with a fair summary of all relevant events and evidence together with a fair summary of the subject's comments or inability to comment.*
>
> *If not possible the proposed statement should not be included, save in exceptional circumstances.*"

75. In advancing his argument that the reasonable reference writer must consider the procedural fairness of an earlier investigation, Mr Strelitz placed considerable emphasis upon the judgment of Mummery LJ in *Cox v Sun Alliance Life Limited* [2001] EWCA Civ 649. In *Cox*, the reference provider had informed the putative employer, amongst other things, that Mr Cox had been suspended pending investigations into allegations of dishonesty and would have been dismissed had he not resigned. The Court of Appeal dismissed the Defendant's appeal holding that the judge below had not erred in finding that the reference was negligent. Mummery LJ considered the nature of the duty owed by the reasonably careful reference writer who is asked to provide a reference for someone who had resigned before the employer had completed pending disciplinary proceedings into allegations of misconduct. He said that useful guidance was to be derived in such a case from the law relating to unfair dismissal for a reason relating to conduct. In those circumstances, the general principle would be that the employer should have a genuine belief that the employee was guilty of misconduct, should have reasonable grounds for that belief, and should have carried out as much investigation into the matter as was reasonable in all the circumstances. Mummery LJ said that a similar approach would have applied to Mr Cox if he had not resigned but been dismissed for misconduct; and if that approach had been followed then the employer would and should have confined unfavourable statements in the reference to only those matters into which they had made a reasonable investigation and had reasonable grounds for believing to be true. I will return to this case below when I set out my views on the appropriate standard of care in this situation. I note at this stage only that, in *Cox*, no investigation had taken place and yet the reference asserted in unambiguous terms what would, hypothetically, have been the outcome had an investigation had it been conducted. This is a very different scenario to the case which is before me.

76. In his closing submissions, again at my invitation, Mr Strelitz provided a "model reference" which he asserted would have been the product of reasonable skill and care on the part of the Defendant. The model contains a number of adjustments which relate to the first two criticisms made (see paragraphs 67 and 68 above). However, in respect of the statement that the Claimant had "knowingly and deliberately circumvented agreed procedures" Mr Strelitz substituted "*We have reconsidered our investigation undertaken at the time and have concluded that this transaction took place as a result of confusion by Mr Hincks and his CF30 authorised AR Principal despite the training that they had each received. No client detriment was identified and no customer complaint was received*".

77. Mr Strelitz justified going beyond a neutral and balanced rehearsal of the competing positions on the basis that Mr Netting (as both the investigator and reference writer) would have been able to perform that investigation again, or at least re-evaluated his earlier forensic analysis.

78. Mr Samuel acknowledged that the duty on the reference writer was to provide a reference which was accurate, true and fair. He however sought to inject a note of reality into the analysis of the appropriate standard of care. He emphasised to me that this Court should be alert to the potential problems of prescribing a standard which was too high and went well beyond what was reasonable. He submitted that the effect of the proposal advanced by the Claimant was to equate the standard of care to be exercised by the reasonable reference writer with the exercise which would, in other circumstances, be undertaken by the Employment Tribunal. An Employment Tribunal would ask itself whether the procedure adopted before dismissal was a fair one. It would also engage in a fact-finding question of the likely outcome had a fair process been followed. To impose upon a reasonable reference writer such a standard of care would be unsustainable. It would lead in effect to a silting up of the "market" for references which requires references to be succinct and provided quickly.

79. Mr Samuel submitted that questions of the fairness of the process and procedure in underlying investigations was not part of the required duty. He reminded me of the words of Lord Slynn in *Spring*, that reference writers are not being asked to warrant absolutely the accuracy or the validity of the opinions expressed and that the "*courts should be trusted to set a standard which is not higher than the law of negligence demands*". His submission was that the standard of care upon a reference writer was:

    a) To conduct a sufficient review of the file to ensure that the reference writer had an accurate grasp of the facts of the Claimant's time under the Defendant's authorisation;

    b) To express all relevant facts accurately in the reference;

    c) To ensure that any opinions that are expressed are supported by the facts and are fair.

80. Mr Samuel accepted that there may be occasions when the duty goes further than this, either because an obvious error is apparent following a file review or because the writer becomes aware of relevant information concerning the subject of the reference from a third party. In those circumstances, the reasonable reference writer cannot close his eyes or ears to that relevant information and Mr Samuel accepted that either scenario might operate as a trigger for further investigation by the reference writer. Other than in these instances however the standard of care was more limited.

Analysis

81. There are formidable difficulties associated with the Claimant's submission that the reasonable reference writer should inquire into the procedural fairness of earlier investigations.

82. First, the Claimant's analysis assumes that an assessment of the fairness of the investigation is possible. It does not acknowledge that in a number of instances a

retrospective inquiry of the sort proposed by the Claimant will be impossible. An assessment of the procedural fairness of an investigation may involve consideration of a whole range of matters such as: what the subject was told before the investigation (eg as to the allegations, the gravity of the allegations, the opportunity to be accompanied to any meeting or to take advice); the way the investigation was conducted; the recovery of documents by the investigator and disclosure to the subject. Where the reference request is made months or even years after an investigation, the reference writer may have access to very limited or no relevant documentation or information covering these points and staff involved in the investigation may have left. On the Claimant's proposed staged approach, the reasonable reference writer would simply not get off first base. The Claimant's formulation of the duty does not reveal what, in these circumstances, the reasonable reference writer should do. By analogy though, he or she must follow the path which leads to either a re-investigation or, if a re-investigation is not possible, a statement to this effect coupled with a summary of relevant events, the competing positions and any suitably hedged conclusions. Alternatively, no reference at all would be supplied.

83. Second, even if such an inquiry into procedural matters is possible, the burden which the proposed standard imposes on a reference writer is, on any view, very considerable. To take one example only; in order to be sufficiently satisfied that there has been reasonable disclosure of relevant documents, the reference writer would have to identify by one means or another the relevant documents which were available, then ascertain whether they had been seen by the investigator and, if so, whether they were then shown to the subject of the reference. This exercise will be resource intensive, take a long time and often yield only uncertain results.

84. In tacit acknowledgement of the burden placed on a reference writer by the formula he proposes, Mr Strelitz relies upon the importance to the subject of a true, accurate and fair reference. Although not expressed in quite these terms, he argues that the standard of care of a reference writer is to be judged, and judged to be higher, by the importance of the outcome for the subject. I accept that as a matter of principle the standard of care should be calibrated by reference to the seriousness of the effects of a potential breach. There were many references to that effect in *Spring* and in the other cases to which my attention has been drawn. However, the importance of the reference for the subject's livelihood is just one of the important considerations to be taken into account when judging the standard of care. The practical effect of the proposed standard and its utility are also important factors for the Court to take into account when judging the proposed standard. I see considerable force in Mr Samuel's submission that the effect of the duty described by the Claimant in this case would be stultify the business of reference writing; the production of references would be time consuming and expensive and their delivery to a putative employer would be delayed. In a large number of cases, the product of the Claimant's proposed approach would, at best, be a reference circumscribed by qualifications and uncertainty.

85. In cases when an assessment of the fairness of antecedent investigations are not possible, or the reference writer is not satisfied that the proceedings were fair, then to follow the Claimant's algorithm he or she should embark upon his or her own re-investigation. This proposal is also deeply problematic. Setting aside the obvious problems of delay and the resource implications of the proposal, it will rarely, if ever, be possible to conduct an investigation into allegations when the subject of the

reference has left the employment of the organisation. This was acknowledged in *Bartholomew* and *Cox*. In many cases, the author of the reference will not be equipped (either by training or otherwise) to re-investigate and act as fact finder. The Claimant's proposal that the reference writer should conduct a re-investigation only raises the further question of the standard of care and intensiveness which should be applied to that re-investigation. These are problems which the Claimant's analysis simply does not grapple with.

86. Nor do I think that Mr Strelitz's formulation has the support of authority that he suggests it attracts. The judgment of Mummery LJ's in *Cox* must be considered in the context of the facts of that case. In *Cox*, the reference which had been provided (negligently as the Court found) included a statement that, but for Mr Cox's resignation on terms, he would have been dismissed. In those circumstances, the approach which would have been taken by an Employment Tribunal considering unfair dismissal was an appropriate test by which to measure the reasonableness of such a statement. It does not follow that in cases in which there has been an internal inquiry, followed by dismissal, the reference writer must embark upon the laborious detailed inquiry into the procedural fairness of the earlier investigations and their outcome which the Claimant proposes.

87. An authority which more directly confronts the Claimant's submission is *Jackson v Liverpool City Council* [2011] EWCA Civ 1068. It does not support Mr Strelitz's formulation of the duty. Mr Jackson was a social worker who, having left his employment with a favourable reference, was then the subject of allegations that he had not had contact with certain young people in his care, in spite of his having made a record that he had done so. A reference was provided which identified that there were some issues in respect of recording and recordkeeping; the reference went on to suggest that these issues would have been addressed by supervision and a formal improvement plan but for Mr Jackson having left the service before this process was instigated. At first instance, HHJ Gore had found in favour of the Claimant in tort, his reasoning being that, although the reference was true and accurate, it was not fair because it carried with it "*an unanswered, un-investigated, un-particularised unspecified allegation, implying he was unsatisfactory for employment*", which the Claimant had had no opportunity to refute or answer. HHJ Gore thought that this made the reference unfair. The appeal came before Leveson LJ. The focus of the appeal was HHJ Gore's reasoning on the issue of fairness. The Court of Appeal concluded that the trial judge had, wrongly, considered the reference to fairness in *Bartholomew* in a procedural sense: that is, in the sense of the existence of some procedural mechanism which might have permitted the ex-employee to challenge an adverse opinion. The Court held that fairness in this context relates to nuances or innuendo which might be drawn from factual or other assertions and not fairness in the form of the existence of a set of procedural safeguards.

88. In determining the standard of care to be exercised by a reasonable reference writer, I have found it helpful to return to the various statements of general principle in *Spring v Guardian Assurance PLC*. The case established the existence of the duty, variously described as an extension of the *Hedley Byrne* principle, an assumption of responsibility or an application of *Caparo* which was not in dispute in the present case. In their debating of the policy considerations which were relevant to the existence of the duty however the Court expressed the essential broad nature of the

duty. Lord Goff observed that "*reasonable skill and care should be exercised by the employer in ensuring the accuracy of any facts which either (1) are communicated to the recipient of the reference from which he may form an adverse opinion of the employee or (2) are the basis of an adverse opinion expressed by the employer himself about the employee*". Lord Slynn observed that references should be and are capable of being sufficiently robust as to express frank and honest views after taking reasonable care both as to the factual content and as to the opinion expressed. Lord Lowry cautioned that the duty of the referee was to exercise reasonable care only: he or she was not guaranteeing the accuracy of the reference.

89. In my view, the standard of care to be exercised by a reasonable reference writer should be expressed in broad terms. It would not be appropriate to prescribe the specific level of care required in every case, as in each case the nature of the duty will depend on the surrounding facts. It is possible however to identify certain common features of the duty. They are:

a) to conduct an objective and rigorous appraisal of facts and opinion, particularly negative opinion, whether those facts and opinions emerge from earlier investigations or otherwise;

b) to take reasonable care to be satisfied that the facts set out in the reference are accurate and true and that, where an opinion is expressed, there is a proper and legitimate basis for the opinion;

c) where an opinion is derived from an earlier investigation, to take reasonable care in considering and reviewing the underlying material so that the reference writer is able to understand the basis for the opinion and be satisfied that there is a proper and legitimate basis for the opinion;

d) to take reasonable care to ensure that the reference is fair, in the *Bartholomew* sense, of not being misleading either by reason of what is not included or by implication, nuance or innuendo.

90. As Mr Samuel observed in his submissions, there may be occasions when the content of the duty goes beyond what I have set out above. I agree with him that, if there are obvious errors on the material available to the reference writer, reasonable care would dictate that these errors are checked. Likewise, if the reference writer has become aware of information which casts a doubt on the reliability or integrity of the facts or opinions in the underlying material, reasonable care would involve further inquiry. However, save where there is a "red flag" prompting further inquiry, I do not accept that there is a duty to examine the procedural fairness of the underlying investigation.

Conclusions: Bad Faith

91. On the Claimant's analysis, the claim that the Defendant acted in bad faith is relevant only to the claim in contract and not tort. Mr Strelitz submits that the duty to act in good faith is a product of his proposed contractual relationship between the Claimant and Defendant. It is unclear why he seeks to restrict his argument in this way. If the Claimant is able to establish bad faith by those employed by the Defendant in respect of the investigation into the breaches of approval procedure then, I agree with Mr

Samuel that, as the fruits of that investigation were set out in the reference, it would demonstrate a lack of reasonable care in the preparation of the reference and an approach to the reference writing which was, in the words of Lord Slynn in *Spring,*: "*careless of the true facts of the case*" in which case breach of duty would be established. For this reason, it is logical to consider the allegation of bad faith first. There is the added practical advantage that many of my findings on this topic are directly relevant to my conclusions on the reference itself.

92. The Claimant alleges that Mr Netting and others had no intention of conducting a fair investigation: a decision had already been made that the Claimant's authorisation was to be terminated and the investigation and the appeal were all pre-determined. In alleging bad faith, the Claimant's target is Mr Netting, and to a lesser extent, Mr Owen and Mr Newman. Mr Strelitz did not identify any particular event, decision or matter in support of the allegation; rather the allegation of bad faith was advanced on the basis that all or at least the majority of the matters which formed the substance of the allegations of breach of duty were also evidence of bad faith. No particular reason was advanced before me as to why Mr Netting and others should have an ulterior motive other than, inferentially, that the Claimant had had such an unsatisfactory career and required so much support that his engagement was no longer thought to be worthwhile.

93. Mr Netting denied the allegation. He told the Court that, far from him approaching the investigation with a mindset to terminate the Claimant's authorisation, it was in his commercial interests to maintain the authorisation. The Defendant's business was derived from IFAs such as the Claimant and so the loss of the Claimant represented a loss to the business as a whole. He accepted that the events which gave rise to the investigation were of very grave concern to him as, subject to explanation, the Claimant had, in selling the SCARP to the Carters, once again acted in breach of the requirement of pre-approval which had been imposed on him and any breach of procedures may have regulatory implications for the company and for Mr Netting. He said that the close supervision which had been imposed on the Claimant was for the protection of clients and, as the Compliance Director for the company, it was his job to ensure that the company, its appointed representatives and all advisors were compliant with internal and external policies and regulations. He therefore took the potential breaches very seriously.

94. I need to consider a number of aspects of the allegation of bad faith. I do so below.

Procedural Unfairness

95. It is the Claimant's case that, before the 19th November 2014, he did not know the seriousness of his predicament and certainly did not know that his job was in jeopardy. No one told him. Mr Owen and others accepted that they may not have not informed the Claimant of his predicament: they would have assumed that it would have been obviously clear to him given his history.

96. My view is that the assumption by those engaged by the Defendant and CIFS that the Claimant would have appreciated his predicament was justified. Any other view is just not plausible. The Claimant knew that the investigation concerned his sale of an investment to Mrs Carter, that the sale was of a high-risk investment product and that he had given Mrs Carter advice concerning the risks associated with the investment. I

accept that he did not know before the investigatory meeting that Mr Sigsworth's account of the conversation was at odds with his own account, but he must have appreciated that the terms of the authorisation which he said that he obtained from him was to be under scrutiny. He knew that he had had, to put it neutrally, a very chequered work history since 2012 and that, at the time of the Carter sale, he had just emerged from a lengthy period of suspension which followed on the heels of the Bass incident and the re-registration debacle. Whilst I agree that it would have been desirable for someone to have spelt out to the Claimant the challenge which lay ahead, I do not find the Claimant's assertion that he did not know either that he was in potentially in serious trouble and that his authorisation may be at stake to be plausible. It was reasonable to believe that it would have been obvious to him. I do not therefore find that the failure to inform the Claimant of the seriousness of his predicament is evidence pointing in the direction of bad faith.

97. The Claimant also says he was ambushed in the sense that he did not know the allegations which he was to face at the investigatory meeting. Mr Netting and Mr Owen accepted that they had not told the Claimant the precise terms of the allegations: they said the meeting was an investigatory meeting to find out more about what had happened and they would have expected the Claimant to have been aware in broad terms about what was to be discussed. I find this to have been a reasonable approach. I find it very unlikely that the Claimant was not aware in broad terms of the topics which were to be discussed in the meeting. He must have been aware that the reason why he had stepped outside his pre-approval procedure would be a topic for discussion. He must have known that, even though he had not uploaded the application form, there was a possibility that the Defendant would have tracked it down and, if so, the very surprising circumstances in which it came to bear his signature above Mr Mosley's name would be a particularly hot topic for discussion. It is inconceivable that, having already sold the investment to Mrs Carter, he would not have appreciated that his actions in continuing the pre-approval processes would need to be explained. Again, although it would have been desirable for any specific concerns to have been communicated to the Claimant in advance of the meeting, I do not find, in context, that not doing so is evidence of bad faith.

98. The Claimant told me that the behaviour of Mr Netting and Mr Owen during the investigation meeting was partisan and aggressive. He said that he felt harassed by them. I agree that the impression from the note, limited as it is, is that both Mr Netting and Mr Owen may have expressed their frustration during the meeting. Mr Netting told me that he felt as though he could not get a straight answer from the Claimant, whose explanations chopped and changed when questioned. I pause to note that the Claimant exhibited a similar inability to answer straightforward questions in a straightforward way in this trial, notwithstanding courteous questioning by Mr Samuel. For example, when, during the trial, the Claimant was confronted by the inconsistency between his assertion that he was insufficiently supported and trained and the contents of an email in March 2013 from him to the Defendant and Mr Mann ("*I have had some fantastic support from Chaz and Stuart.. also individuals like yourself from Sense..thank you for your continued support")* he was unable to explain whether it was a false statement (said for effect) or true (up to a point). This is but one example of a number of occasions when the Claimant's account shifted in response to probing questions. If, therefore, frustration was demonstrated by those

conducting the investigatory meeting, I do not conclude that it points in the direction of bad faith.

99. There are two further particular points which I need to consider within this topic: Mr Owen's statement to the Claimant that "*this is fraud*" and Mr Netting's apparent rejection of the Claimant's case that a telephone call had been made by him to the Defendant on 5th November. Mr Owen accepted that he told the Claimant, possibly on more than one occasion "*this is fraud*" when referring to the application form which bore Mr Mosley's name. He said this in an effort to impress upon the Claimant the serious regulatory implications of what he had done. I accept that this was the context of the statement. It is not evidence of bad faith on the part of Mr Owen.

100. The note of the investigatory meeting includes a reference to Mr Netting saying that he did not accept that a conversation took place between the Claimant the Defendant on 5th November. The statement as recorded in the note however is incomplete. Mr Netting's evidence at trial was that he thought that he had mentioned his understanding that Mr Sigsworth accepted that the Claimant had spoken to him. Whilst I accept that the Claimant may have left the meeting under the impression that the existence of a conversation between him and an employee of the Defendant was being doubted, an unambiguous dialogue concerning the conversation of the 5th November between the Defendant's employee and the Claimant was likely to have been confounded by the Claimant's belief that he spoke to Keith Thompson (rather than Mr Sigsworth). Again, I do not find that the point indicates bad faith on the part of Mr Netting.

101. The Claimant points to the absence of a search for exculpatory information and documentation by Mr Netting and others as evidence of bad faith. I do not accept this. It misses the point. It was common ground that, at the time when the Claimant's authorisation was terminated, Mr Netting had reviewed a very substantial body of material from the Claimant which made clear that the Carter transaction involved a SCARP. This was not the focus of Mr Netting's concern though. His concern was that the fact of the sale on 5th November was concealed from the company. Other than the emails sent to Mr Mosley by the Claimant there is no document which contains a clear statement from the Claimant that the sale had already taken place.

102. Finally, Mr Strelitz has submitted in his written closing submissions that a failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures as evidence in itself of bad faith. This is a bad point. I note that the Foreward to the document records that a failure to follow the Code does not in itself make a person or organisation liable to proceedings. The Defendant also had its own Internal Investigation and Breach Procedures which had been drafted by Mr Netting which, although broadly framed, required the Defendant's powers of suspension and termination to be exercised fairly and provided some general guidance on how this might be achieved. In these circumstances, I reject this submission.

Absence of Genuine and Reasonable Belief in Conclusions

103. The second tranche of allegations in support of the Claimant's case that the Defendant acted in bad faith is that Mr Netting and Mr Newman did not, and could not have, genuinely believed that either there had been a pre-approval breach or that there was a

knowing breach. I reject this submission. In my view there was ample material to support their conclusions that there had been a knowing breach.

104. Mr Netting did not accept that the Claimant was not aware of the 100% pre-approval requirement, nor did Mr Newman. Mr Netting noted in the termination letter that "*you have previously been sent communications from the Network confirming how the pre-approval process works and what products/advice areas require pre-approval. The process clearly sets out that the recommendation should not be made to the client or the application completed/submitted until such time as final sign off approval is given*". Much Court time was spent exploring the Claimant's training by CIFS and the Defendant. It boiled down to this; that the Claimant may have received limited training on the products which required pre-approval and have received by email some bulletins explaining the need for pre-approval for high risk financial products and compliance updates but did not read them, either because he was too busy, or because they were not considered to be relevant by him. The Claimant denied that he had a responsibility to familiarise himself with the products which required pre-approval. However, in my view, Mr Netting would have been justified in believing that the Claimant had received sufficient training during the induction process, that he would have read the updates and that, of equal importance, he would have taken his personal professional responsibility to keep up to date seriously. Mr Netting's conclusion was justified and does not suggest bad faith.

105. Mr Netting and Mr Newman also found that the Carter transaction was a knowing breach of the Claimant's own personal limitation. Again, this was, in my view, a reasonable conclusion. The Claimant's explanation for making the sale was that he had two "authorisations" for the derogation from the limitation on his own practice. The first from Mr Sigsworth who had given him the green light to undertake the transaction subject to the endorsement of an approved advisor. The second from Mr Mosley who had provided the necessary endorsement. Mr Netting and Mr Newman had before them two wholly diverging accounts of the Sigsworth conversation. Neither can have accepted the Claimant's version. They were entitled to do this. In their position, I would not have accepted the Claimant's version of events either. Standing back for a moment, as Mr Netting and Mr Newman must have done, it would have been an extraordinary authorisation for Mr Sigsworth, as part of the compliance team, to have given in the light of the Claimant's work history and his recent suspension. One might have at very least expected him to have consulted with Mr Netting or another before giving such authority. As Mr Netting said in his letter of termination, the restrictions on the Claimant's practice were extensive: "*the enhanced supervision made no allowance or exemptions and required that pre-approval and live observed interviews were undertaken on all cases*".

106. Moreover, as Mr Netting apparently noted during the investigation meeting, if such prior authority had been given by the Defendant in the clear and unambiguous terms suggested by the Claimant then it is eyebrow raising (to say the least) that it was not formally recorded anywhere by the Claimant in the material which he uploaded onto the database. Common sense, or more acutely, self-protection would have indicated the need to make a formal note. Had I been in Mr Netting's position, I would also have been struck by the fact that this was now the second time that the Claimant had excused or explained a pre-approval breach by someone giving him the authority to

do so: in the Bass case, the Claimant had said that Mr Mann gave him the authority to make the sale (although this had been denied by Mr Mann).

107. Mr Netting and Mr Newman also took into account a number of other features of the evidence which in their view reflected badly on the Claimant. On any analysis, the Claimant had exceeded the authority which he had been given by Mr Mosley. Although the extent of Mr Mosley's knowledge of the product which had matured was disputed, both Mr Mosley and the Claimant were anticipating that the transaction was to be of a deposit based product. In selling Mrs Carter a SCARP the Claimant was (a) not only going beyond what Mr Mosley had authorised but also (b) having to give advice on a product which was outside his authority. These are matters which clearly concerned both Mr Netting and Mr Newman and, given their compliance obligations, their concern was justified. It does not demonstrate bad faith.

108. Mr Netting and Mr Newman found that the Claimant had taken steps to conceal the fact that the transaction had taken place on 5/6th November. In support of this, Mr Netting identified that the Claimant had not uploaded the application form onto the database; that he had continued with the pre-approval procedure as if the sale had yet to take place; that there was no note uploaded to the effect that the meeting on 5th November had taken place. In my view, Mr Netting and Mr Newman were fully entitled to find that the Claimant had taken steps to conceal the fact that the transaction had taken place. Again, had I been in their position, I would have done the same. There was no clear statement from the Claimant to the Defendant that the sale had already taken place to counteract the logical inference from the continuation of the pre-approval process that the sale had not yet been transacted.

109. Both Mr Netting and Mr Newman were concerned, with justification in my view, that the application had been made in Mr Mosley's name, and yet signed by the Claimant. Given this highly unusual state of affairs, the failure to upload the form onto the database on the basis that this step had been "overlooked" is, if not incredible, then of dubious reliability. Likewise, the explanation given by the Claimant for the form being completed in Mr Mosley's name (on the basis that it was Mr Mosley's sale, and not the Claimant's) does not fit with the many other documents which make clear that the sale process was being undertaken in the Claimant's name. Again, Mr Netting and Mr Newman were entitled to draw an adverse inference from these features. I would have done the same.

110. It was submitted by Mr Strelitz that the "killer blow" to the reasonableness of the conclusion that the Claimant had attempted to conceal the transaction was the planned meeting between the Claimant and the Carters, to be "live-observed" by a member of the Defendant's training and compliance team, on the 17th November. It was common ground that it would have then emerged that the sale had already been transacted, barring some truly nefarious activity on the part of the Claimant. However, I do not accept that it follows from this that Mr Netting and Mr Newman were wrong in concluding that the Claimant had taken steps to conceal the fact of the transaction having taken place from the Defendant. There was no evidence that the Claimant had formulated a "joined up" plan to deceive the Defendant on 5th November. Mr Netting and Mr Newman referred to the pressures on the Claimant to meet the objectives of his clients and Mr Mosley referred to the Claimant being in a panic to meet those objectives. In the circumstances in which the Claimant found himself on 5th November and thereafter, he may well not have thought through the implications

of his actions. The live observed meeting is only significant if the Claimant had constructed a plan to deceive the Defendant, rather than muddling through from day to day, rather more in hope than expectation of the fact of the sale having occurred not emerging. I do not find that the Claimant had embarked on such a neatly constructed plan of deceit. Mr Newman was correct in saying that the motivation for the sale was the desire to keep the Carters happy. Everything then flowed from that poor judgement. The fact that the Claimant would be "found out" does not undermine Mr Netting's and Mr Newman's conclusions, nor do those conclusions demonstrate bad faith.

Conclusions: the reference

111. Having given my findings on bad faith, I now turn to the particular sections of the reference in respect of which negligence is alleged. Given my findings above, I am able to deal with this topic rather more succinctly than otherwise. I consider the three areas of criticism in turn.

(a) Redress Payments:

112. The submission advanced is that the statement that redress payments were offered in the sum of £12,905 is misleading, without including the additional qualification that the payments were offered in respect of annual reviews which the Claimant had been unable to perform during his suspension. I agree with the Defendant that there is no substance to the point. The reference is silent on the reason for the redress payments being offered, it suggests neither inadequate advice nor any other reason. If the recipient of the reference had requested further information concerning the basis for the payments being offered, then a question could have been posed of the Claimant (or of the Defendant) and an answer given. I do not accept that the absence of explanation for the redress payments is misleading either by reason of insufficient information or by implication or innuendo.

113. Nor do I accept that the coupling of the reference to "past business review" with the reference to redress payments leads to inaccuracy or creates a misleading impression. Mr Netting said that the phrase "past business review" was not an industry term. Although within the Defendant's network it had a negative connotation, this would not have been apparent to the reader of the reference. Even if, contrary to the evidence of Mr Netting, the reader considered that a past business review reflected negatively on the Claimant, then this would still not be misleading. The need for the past business review followed on from the re-registration errors which the Claimant accepted (although he sought to deflect criticism on to Mr Mann). I accept that the past business review was necessary because relevant product information was not uploaded by the Claimant. Therefore, even if a negative connotation were to be read into the reference, it would not make the reference misleading.

(b) "full rehabilitation"

114. It is submitted that the reference is inaccurate or misleading in not making clear that the rehabilitation programme had not taken place before the reinstatement of the Claimant's authorisation in October 2014. Again, I find that there is no merit in the point. The reference is neither inaccurate, nor misleading. The reference makes plain that the rehabilitation programme *included* reinstatement of the Claimant's

authorisation on 16th October subject to monitoring in the respects described. The reference does not suggest that the rehabilitation programme had been completed by 16th October 2014 (or by any date).

(c) "knowingly and deliberately circumvented the agreed process"

115. There are a number of ways in which it is alleged that the statement was negligent.

116. First, by the inaccurate statement that all client appointments were to be attended by a network supervisor and the implication that one of the ways in which the Claimant had therefore circumvented agreed procedures was in meeting with the Carters on his own. In fact, it is submitted, the Claimant was entitled to visit clients on his own: first for the purpose of the annual review and second (from rather later in time) for the purpose of a fact finding session. Again, there is no force in this allegation. The reference makes no mention of fact finding meetings or annual reviews. It is clear from the relevant section of the reference that the sting, so far as the reference is concerned, is that the Claimant had attended a client presentation meeting without a supervisor. Even on his own case, taken at its highest, this is accurate: Mr Sigsworth did not authorise him to give SCARP advice, nor did Mr Mosley. An objective review of the documents by a reasonable reference writer would have justified the inclusion of this statement.

117. Second, by stating that the Claimant had knowingly and deliberately circumvented the agreed process. The attack on this statement is broad. It encompasses the procedural unfairness of the investigation. The Claimant also submits that no reasonable investigation could have yielded the negative opinion which then finds expression in the reference. I do not accept this submission.

118. On my analysis, the standard of care to be applied by the reasonable reference writer, will involve an objective, reasonably rigorous, interrogation of the relevant material to establish whether there is a proper and legitimate basis for the opinions which have been expressed by those who conducted the investigation leading to the termination. In this context, the relevant material will include the statements prepared by the Claimant and Mr Mosley; the note of the investigatory meeting of 19th November; the termination letter; the Claimant's submission on appeal and Mr Newman's appeal letter. There is nothing within those documents which would trigger the need for a wider examination of the circumstances of the findings or the procedural fairness of the investigation.

119. I find that, on a careful and rigorous review of that material, the conclusions, including the negative opinion expressed in the reference, are more than amply supported.

120. The underlying material makes clear, on an objective analysis, that the Claimant had advanced explanations for the apparent breach of his personal pre-approval and the pre-approval required by the product. Those explanations had not been accepted by Mr Netting and Mr Newman.

121. The underlying material provides a proper and legitimate basis for the conclusion that the Claimant knowingly breached the pre-approval requirements. I refer back to my

analysis of the similar point within the context of the allegation of bad faith (see above paragraphs 103 to 110). Mr Netting's and Mr Newman's rejection of the Claimant's assertions that he did not know of the need for pre-approval for a SCARP were set out in their letters; those reasons, viewed in context, are justified. The letters and other material provide a legitimate and proper basis for the negative opinion in the reference. Their rejection of the Claimant's explanation for his derogation from his personal pre-approval is explained in detail. Those reasons again viewed in context are justified and provide a legitimate and proper basis for the negative opinion.

122. It follows from the above that I do not conclude that the impugned section of the reference is a negligent misstatement.

The Claim in Contract

123. Mr Strelitz submits that the only additional ingredient which his claim in contract adds, is to bring into play a duty on the part of the Defendant to act towards the Claimant in good faith. I have already considered this above and found that neither Mr Netting nor Mr Newman acted in bad faith. In these circumstances, it is not necessary for me to consider whether there was such a contract or agreement, whether by implication or by way of a collateral agreement between the Claimant and Defendant. To embark on such an examination would take the Claimant no further.

Causation

124. The Claimant called Mr Andrew Redhead in support of his contention that the effect of the reference had been to lead Mr Redhead's company True Potential to take no further steps to progress the Claimant's application for a job with that company. Mr Redhead made clear that this was not is decision; rather it was the decision of the other partners in the company. Although Mr Samuel tried to persuade Mr Redhead that it was not the reference which had led to True Potential turning the Claimant's job application down, rather than other documents including the termination letter, Mr Redhead would not accept this point. However, given that it was not Mr Redhead's decision to take the application no further and I did not hear from the others within the company who did make the decision, I was left evidentially with a loose end.

125. However, ultimately both Mr Strelitz and Mr Samuel accepted that the effect of the reference was to cause the Claimant the loss of a chance of employment. No doubt, but for my findings on breach, the parties would have presented very different assessments as to the percentage loss. However, I am satisfied that, but for my conclusions on breach, the Claimant has sustained loss in the form of a loss of a chance of employment.

126. For the reasons given above, I dismiss this claim. There must be judgment for the Defendant. I invite the parties to draw up the appropriate Order.