Appeal number: CMS/2016/0001

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
CLAIMS MANAGEMENT REGULATION

ELKADOR FINANCE LIMITED **Appellant**

- and -

THE CLAIMS MANAGEMENT REGULATOR **Respondent**

TRIBUNAL: **JUDGE ALISON MCKENNA**
Ms SUE DALE

Sitting in Chambers on 23 February 2018

RULING ON TURNOVER FROM REGULATED ACTIVITY FOR THE TWELVE-MONTH PERIOD UP TO 11 JANUARY 2016 AND REMITTAL TO CLAIMS MANAGEMENT REGULATOR

Background

1. On 13 March 2017, the Tribunal issued its determination in respect of the Appellant's appeal against the decision of the Claims Management Regulator ("CMR") dated 4 May 2016, that it had failed to comply with the terms of its authorisation and the imposition of a financial penalty of £315,000 payable by 1 June 2016. The Tribunal's Decision followed an oral hearing at which both parties were represented and at which the Tribunal heard oral evidence and submissions.

2. The appeal was allowed in part. The Tribunal concluded that (a) the Appellant was in breach of the terms of its authorisation; (b) that a financial penalty was warranted; (c) that a "nature" score of 2 and a "seriousness" score of 4 was appropriate, making a total score of 6, which would result in a penalty band of 5-8% of turnover; but (d) that it needed additional evidence in order to determine the correct turnover period and amount to which the penalty band should be applied.

3. The Tribunal issued Directions in order to obtain further evidence about the Appellant's turnover from regulated activity for the period of twelve months ending on 11 January 2016.

4. Since that date, the Tribunal has considered evidence provided by the Appellant and by the CMR. The parties agreed to a final determination of the question of relevant turnover and penalty on the papers and without convening a further oral hearing.

5. We understand from the CMR that the Appellant is now in liquidation. No one has contacted the Tribunal about the implications of that on behalf of the Appellant. The CMR has told us, and we accept, that no further submissions will be made by or on behalf of the Appellant in these proceedings. Accordingly, we now determine the sole outstanding issue as follows.

Evidence

6. The Decision of 13 March 2017 directed the Appellant to provide evidence of its income from regulated activities during the relevant period together with supporting material. The evidence produced in response was unsatisfactory, as were several addendum statements, as the witness failed to exhibit the relevant documentary evidence and/or repeatedly failed to address the key question of what part of the Appellant's income was attributable to activities not regulated by the CMR and why.

7. After considering witness statements produced by the Appellant in May, June, August and September 2017, the Tribunal finally gave the CMR permission to produce its own expert witness evidence. We are grateful to Allan Hodson FICA for his assistance.

8. Mr Hodson's witness statement dated 23 January 2018 explained that he had reviewed the Appellant's statutory accounts for the financial years ended May 2015 and 2016, also the VAT returns for all quarters in the period June 2014 to May 2016, plus the monthly management accounts and the sales invoice register for the relevant period. He had noted a significant number of missing invoice numbers. A revised list also contained missing invoice numbers, albeit that fewer were missing in the second list.

9. Mr Hodson's evidence was that he asked the Appellant to identify its unregulated income during the period but that the Appellant did not explain the basis on which it had calculated the figure it gave him. The CMR then asked questions in correspondence about the figure given, but letters sent to the Appellant in October, November and December 2017 were not answered.

10. Mr Hodson explains that he has treated income in the relevant period as from unregulated business only where it is derived from the Appellant's car hire activities. This amounts to a sum of £35, 790.06. He has included as regulated income all other payments, including some which were claimed by the Appellant to be in the unregulated category. He explains that he has treated as regulated income all payments from Scottish and Irish law firms (because there was no evidence of the country of residence of the claimants), also all the invoices in respect of which there was insufficient information about the business to conclude that it was unregulated, and also the income related to "mortgage mis-selling" claims, which is a regulated activity. He exhibits to his witness statement a helpful schedule in which he breaks down the relevant income streams.

11. Mr Hodson concludes that the total turnover figure for the relevant period is one of £2,814,129.46, from which £35,790.06 should be deducted as income derived from non-regulated activity.

Conclusion as to Turnover

12. We have considered the evidence provided by the Appellant but found it to be unsatisfactory. As we noted in the Decision of 13 March 2017, the Appellant's approach throughout these proceedings has been to "drip-feed" information to the CMR and to the Tribunal. This approach often raised more questions than it answered, with the result that the process of obtaining evidence has been overly protracted. It has also resulted, in our judgement, in the Appellant failing to discharge the burden of proof which it bears to satisfy us of the turnover figure it had claimed.

13. Having considered all these matters, we prefer the evidence of Mr Hodson and find on the balance of probabilities that the Appellant's turnover for the relevant period, excluding income from non-regulated activity, is £2,778,339.40.

Calculation of Penalty

14. As noted in the Decision of 13 March 2017, the Financial Services (Banking Reform) Act 2013 introduced power for the CMR to impose financial penalties on authorised persons. The Compensation (Claims Management Services) (Amendment) Regulations 2014 make provision for the determination, notification and enforcement by the CMR of a financial penalty, as follows:

" *Determining the amount of a penalty*

49(1) The Regulator must determine the amount of any penalty that an authorised person is required to pay under regulation 48 in accordance with this regulation and regulation 50.
(2) The amount of the penalty must be—
(a) for an authorised person whose business has a relevant turnover of less than £500,000, no more than £100,000;
(b) for an authorised person whose business has a relevant turnover of £500,000 or more, no more than 20 per cent of that turnover.
(3) The amount of the penalty may be the same as or greater or less than the proposed amount set out in the notice under regulation 51(1)(b).
(4) When determining the amount of the penalty that an authorised person is required to pay under regulation 48(1), (2) or (4) the Regulator must have regard to—
(a) the nature and seriousness of the acts or omissions giving rise to the Regulator's decision to exercise the power to require the authorised person to pay a penalty; and (b) the relevant turnover of the business of the authorised person.

Relevant turnover

50(1) In this Part "relevant turnover" means the figure determined by the Regulator in accordance with this regulation.

(2) The Regulator must determine such figure as the Regulator considers appropriate for the turnover of the business of the authorised person.

(3) The turnover to be determined is the turnover of the authorised person's business from regulated claims management services.
(4) The turnover to be determined is for the period of 12 months prior to the date on which the Regulator gives the notice under regulation 51(1).
(5) When determining the relevant turnover of an authorised person under this regulation the Regulator must have regard to—
(a) any figure for the annual turnover or the expected annual turnover used by the Regulator for the purposes of calculating the authorised person's most recent fee for authorisation;
(b) any more up to date information on turnover.
(6) When determining the relevant turnover of an authorised person under this regulation the Regulator may estimate amounts.

Procedure for requiring an authorised person to pay a penalty

52(1) If the Regulator decides to require an authorised person to pay a penalty the

Regulator must give written notice to the authorised person of that decision.
(2) The notice must specify—
(a) the amount of the penalty;
(b) the number of payments; and
(c) the date by which the penalty or each part of the penalty is required to be paid.
Treatment of unpaid penalty as a debt

53. If the whole or any part of a penalty imposed by the Regulator is not paid by the date by which it is required to be paid and either—
(a) no appeal relating to the penalty has been made under section 13 of the Act during the period within which such an appeal may be made; or(b) an appeal has been made under that section and has been determined or withdrawn, the Regulator may enforce as a debt due to the Regulator the penalty or that part of it."

15. The CMR's "minded to" letter of 11 January 2016 relied on a turnover figure calculated over the period 1 October 2014 to 30 September 2015. We concluded in the Decision of 13 March 2017 that we could not safely rely on the CMR's estimated turnover figure, because the period in respect of which it was calculated represented a breach of Regulation 50 (4). The Tribunal's Decision of 13 March 2017 therefore concluded that the Tribunal should make a fresh decision in relation to the correct turnover period and itself impose a fresh penalty pursuant to s. 13 (3) (da) and (db) of the Compensation Act 2006, as amended.

16. We note that the CMR originally imposed a financial penalty of £365,000, which equated to just over 6% of the turnover figure it then considered appropriate. Later, it reduced the financial penalty by £500 in response to the Appellant's representations, to reach a figure of £315,000 which equated to 5.17% of the turnover figure it then relied upon.

17. Our conclusion above as to the Appellant's turnover from regulated activity for the period of twelve months up to 11 January 2016 is that it was £2,778,339.40. We had already found that the applicable penalty band was between 5-8% of the turnover figure, which would produce a financial penalty of somewhere in between £138,916.97 (5%) and £222,267.15 (8%).

18. We note that, pursuant to the Compensation Act 2006 (as amended) s. 13 (1A) (3), the Tribunal:

> *"(da) may require a person to pay a penalty (which may be of a different amount from that of any penalty imposed by the Regulator);*
>
> *(db) may vary any date by which a penalty, or any part of a penalty, is required to be paid;*
>
> *(e) may remit a matter to the Regulator;"*

19. Accordingly, it is open to us now either to take the CMR's approach and impose a penalty calculated at 5.17% of the correct turnover figure, or to calculate a penalty ourselves, applying a different percentage within the relevant band. We find ourselves in some difficulty in adopting a different percentage in the

absence of further submissions on the point, and we note here the CMR's greater experience and expertise in applying the formulae set by Parliament. We also note that we have made fresh findings of fact on which the CMR must now rely in calculating the penalty afresh.

20. For this reason, we have decided to remit the matter of imposing a fresh penalty and date by which it must be paid to the CMR under s. 13 (1A) (3) (e) of the Compensation Act 2006. In so doing, we observe that the facts as we have found them to be suggest to us that a percentage higher than 5% of relevant turnover may be appropriate, but we leave the final decision as to the amount of penalty and the date by which it must be paid to the CMR.

21. These proceedings are now concluded.

(Signed)

ALISON MCKENNA **DATE: 23 February 2018**

PRINCIPAL JUDGE

Appeal number: CMS/2016/0001

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
CLAIMS MANAGEMENT REGULATION

ELKADOR FINANCE LIMITED **Appellant**

- and -

THE CLAIMS MANAGEMENT REGULATOR **Respondent**

TRIBUNAL: **JUDGE ALISON MCKENNA**
Ms SUE DALE

Sitting in public at Field House on 14 September 2016 and 13 February 2017

The Appellant was represented by Andrew Swan, solicitor, of Short Richardson & Forth LLP

The Respondent was represented by Brendan McGurk, counsel, instructed by the Government Legal Department

DECISION

1. The appeal is allowed in part. The Tribunal makes further directions in respect of the final disposal of one aspect of the appeal, set out at paragraph 126 below.

REASONS

2. The appellant company ("Elkador") appealed against the decision of the Claims Management Regulator ("CMR") dated 4 May 2016[1] that it had failed to comply with the terms of its authorisation and the imposition of a financial penalty of £315,000 payable by 1 June 2016.

1. Background to the Appeal

3. Elkador was authorised to provide regulated claims management services from February 2011. It remains so authorised. Its office is in Bournemouth, from where it handles personal injury claims, administered by its own staff. It also has an agent called LOAP Limited which operates from Manchester dealing with claims for mis-sold PPI and packaged bank accounts.

4. In 2014 the CMR audited Elkador and issued a report in December 2014[2] which recommended improvements to its procedures for conducting due diligence in relation to its business relationships with third parties. In January 2015, Elkador responded via its adviser Scott Robert, providing details of its revised due diligence procedures[3].

5. In May 2015, the Mail on Sunday ran a story about an authorised claims management business using stolen data. It transpired that the business referred to was Elkador. The CMR opened a formal investigation[4] into Elkador, pursuant to regulation 35 of The Compensation (Claims Management Regulation) Regulations 2006 on 18 May 2015. The CMR requested information in connection with its investigation by 1 June 2015[5]. On 8 June 2015 the CMR was provided by Scott Robert with bank statements, copies of contracts with solicitors, and a list of 152 individuals and businesses which had supplied Elkador with data and leads[6]. The CMR selected a sample of 20 names and asked for further evidence in respect of that sample[7].

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[1] (All footnotes refer to the hearing bundle). 4-589

[2] 4-9 and 4-32

[3] 4-40

[4] 4-176

[5] 4-178

[6] 4-180, 4-215

[7] 4-230

6. The CMR's investigation concluded with a further audit report in June 2015[8] which found that Elkador had failed to undertake appropriate due diligence checks in respect of the data, leads and referrals that it acquired and that it had not complied with the CMR's recommendations in the previous audit reports. Elkador's reply, submitted by its adviser Scott Robert, set out the procedures Elkador planned to take to comply with the terms of its authorisation[9]. The CMR understood this to be an admission that it had not previously been operating in compliance with the terms of its authorisation (although this interpretation was disputed).

7. The CMR sent Elkador a "minded to" letter dated 11 January 2016[10] which set out its conclusion that Elkador had breached the Conduct of Authorised Persons Rules by (a) failing to take all reasonable steps to confirm that referrals, leads or data had been obtained in accordance with the requirements of the legislation and Rules; (b) failing to maintain appropriate records and audit trails; and (c) by failing to ensure that publicity issued by a third party that is intended to solicit business for it complies with the rules. The CMR concluded that a financial penalty was warranted. It relied on an estimated turnover figure, calculated over the period 1 October 2014 to 30 September 2015. It proposed a financial penalty of £365,000 based on a "nature" score of 2 and a "seriousness" score of 4 (see paragraph 29 below).

8. Following the receipt of representations[11], the CMR's decision letter of 4 May 2016[12] maintained its view that Elkador had breached the terms of its authorisation, but reduced the penalty in view of submissions made. It decided that the appropriate level of penalty was £315,000 based on an estimated turnover of £6,091,951.36. This is the decision now appealed to the Tribunal.

2. Appeal to the Tribunal

9. By the time of the hearing, Elkador's position as set out collectively in its Grounds of Appeal and Response to the CMR's Grounds of Opposition was, in summary, that (i) the CMR's decision was flawed because its findings of fact as to lack of due diligence were erroneous and Elkador was not in breach of the terms of its authorisation; (ii) to the extent that the evidence showed any breaches of the terms of authorisation they were administrative in nature and there was no evidence of actual detriment caused to any third party; (iii) it had co-operated fully with the CMR throughout its investigation; (iv) the level of financial penalty imposed was in all the circumstances disproportionate; and (v) the estimated turnover figure was wrong. Mr Swan confirmed in response to a question from the Tribunal that Elkador's appeal was pursuant to s. 13 (1A) (a) and (b) of the Compensation Act 2006 (see paragraph 31 below).

[8] 4-183

[9] 4-234

[10] 4-554

[11] 4-560

[12] 4-589

10. Elkador had also initially submitted that the financial penalty was void and/or unlawful and had requested a preliminary hearing to determine that matter. That issue was not listed for determination before the final hearing and so was addressed in opening submissions. The Tribunal pointed out that the powers available to it in s. 13 (3) of the Compensation Act 2006 do not include an express power to quash a financial penalty for unlawfulness and that the penalty might need to be regarded as lawful in order to found a statutory right of appeal to the Tribunal. After some discussion of the jurisdictional nature of an appeal to the Tribunal (see paragraph 17 below), Mr Swan did not pursue his several public law challenges to the CMR's decision and accordingly we have not considered them in this decision save to say that we do not consider that the Tribunal holds the powers exercisable by the Administrative Court on hearing an application for judicial review.

11. The CMR had applied for Elkador's grounds of appeal to be struck out as having no prospect of success but that application was not listed for determination before the final hearing. In opening submissions, it was accepted by Mr McGurk that the appeal should now proceed to a final determination and accordingly that application was not pursued.

12. The CMR's amended grounds of opposition to the appeal were, in summary, as follows: grounds (i) and (ii) are misconceived. The CMR received a spreadsheet from Elkador, from which it selected a sample and asked for evidence that Elkador had carried out due diligence checks in relation to that sample. Had Elkador been acting within the terms of its authorisation it would have been able to supply such evidence. It did not do so, despite asserting that evidence had previously been provided; Elkador disputes that it received referrals or data from 7 business in the sampled 20, but in relation to the remaining 13 businesses it has not produced evidence that due diligence checks had been carried out. As Elkador did not provide further evidence when requested to do so, the CMR reasonably relied on the information Elkador had previously supplied; ground (iii), Elkador failed to act on the warnings contained in the audit reports and the CMR takes the view that Ekador failed to co-operate with its investigation, in particular that it failed to provide evidence when asked; (iv) the proportionality of the financial penalty was considered by the CMR. A financial penalty is not the most severe form of sanction available to the CMR. The penalty is not based on evidence of actual detriment but (permissibly) on the potential detriment arising from lack of due diligence; (v) Elkador provided the CMR with several different turnover figures. The CMR had to estimate the turnover figure because Elkador did not supply it. The CMR noted that the turnover figure suggested to the Tribunal by Elkador, £2 million, was much higher than Elkador's earlier figure of £865,000 supplied to the CMR. It was submitted that this cast doubt on the reliability of Elkador's figures. The CMR submitted it had been transparent about its calculation and given Elkador the opportunity to provide invoices and/or receipts to dispute the calculation, but it had failed to do so.

13. The CMR's grounds of opposition also applied for costs against Elkador. The Tribunal pointed out that s. 13 (3) (f) of the Compensation Act 2006 would appear to preclude this, although it was not immediately clear to us how that provision inter-related with s. 29 of the Tribunals, Courts and Enforcement Act 2007 and rule 10 of

The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. We agreed to hear further argument on that issue at the conclusion of these proceedings, if necessary.

14. The Tribunal held an oral hearing of the appeal over two days, on 14 September 2016 and 13 February 2017. It was unfortunate that there was such a long interval between the two days, but it proved difficult to co-ordinate every one's diaries. The Tribunal heard oral evidence from Ms Fox on behalf of the Appellant and Mr Williams on behalf of the CMR. Both witnesses had filed statements in relation to which they were cross examined and re-examined. The Tribunal is grateful to them for their assistance. Both parties also relied on the statements of witnesses who were not called to give evidence; we refer to these witnesses below. The Tribunal considered an agreed bundle of documentary evidence comprising over 700 pages.

15. We are grateful to Mr Swan and Mr McGurk for their helpful oral and written submissions.

16. The issues for the Tribunal to decide were (i) whether Elkador had breached the terms of its authorisation by failing to conduct adequate due diligence checks; (ii) if so, whether a financial penalty was warranted in relation to that conduct; (iii) if so, what was the correct level of penalty to be applied having regard to the nature and seriousness of the conduct; and (iv) what was the relevant turnover figure in relation to which the correct level of penalty (if any) should be applied and when should it be paid.

17. It was agreed that the nature of the Tribunal's jurisdiction in relation to these issues is *de novo* i.e. that we stand in the shoes of the CMR and take a fresh decision on the evidence before us, giving appropriate weight to the CMR's decision. In taking a fresh decision, the Tribunal is not required to undertake a reasonableness review of the CMR's investigation or its decision to impose a financial penalty. Any problems with CMR's investigation or conclusions may be cured by the Tribunal taking a fresh decision. Elkador's appeal therefore needed to address the four issues afresh and aim to put the Tribunal in a position to make its own decision on each one.

18. It was common ground that the burden of proof rested with the Appellant and that the standard of proof to be applied by the Tribunal in making its findings of fact was the balance of probabilities.

19. Both representatives agreed that the Tribunal should proceed to determine points (i) (ii) and (iii) on the basis of the evidence before it. In relation to point (iv), Mr Swan recognised that Elkador had not provided satisfactory original evidence of turnover and submitted that the Tribunal should issue further directions for the preparation of an independent accountant's report on turnover for the correct period. Mr McGurk's primary submission was that the Tribunal should uphold the CMR's estimated turnover figure. His secondary submission was that, if we felt unable to do so, then we should proceed as Mr Swan had suggested.

3. The Law

(i) The Regulatory Framework

20. The regulatory framework within which Elkador operates is as follows:

21. The primary legislative provision is the Compensation Act 2006 (as amended), which provides at s. 4 that a person may not provide regulated claims management services unless they are an authorised person, or an exempt person. An authorised person is one authorised by the CMR under s. 5 of the Act. The Schedule to the Act makes provision for Regulations to be issued, including Regulations for the conduct of authorised persons. The Financial Services (Banking Reform) Act 2013 introduced power for the CMR to impose financial penalties and the ability to appeal to the Tribunal against a penalty (see paragraph 31 below).

22. The Compensation (Claims Management Services) Regulations 2006 (amended in 2014) provide for the grant and refusal of authorisation and the imposition of conditions of authorisation for claims management businesses. Regulations 12(5)(a) and (b) impose a requirement to comply with the Rules and any applicable code of practice. This is a reference to the Conduct of Authorised Persons Rules 2014. Regulation 12 (5) (c) imposes a condition that, if the business accept referrals of potential business from another person it must take steps to ensure that the other person obtains the business in a way consistent with the Rules. Regulation 35 provides for the Claims Management Regulator to investigate complaints or suspicions of unprofessional conduct.

23. The Compensation (Claims Management Services) (Amendment) Regulations 2014 make provision for the imposition by the CMR of a financial penalty. The provisions relevant to this appeal are as follows:

Requirement to pay a penalty

48.—*(1) If, after investigation of an alleged or suspected failure by an authorised person to comply with a condition of authorisation that applies by virtue of regulation 12(5)(a), (b),(d), (h) or (i), the Regulator is satisfied that the authorised person has failed to comply with the condition the Regulator may require the authorised person to pay a penalty.*

Determining the amount of a penalty
49.—(1) The Regulator must determine the amount of any penalty that an authorised person is required to pay under regulation 48 in accordance with this regulation and regulation 50.
(2) The amount of the penalty must be—
(a) for an authorised person whose business has a relevant turnover of less than £500,000, no more than £100,000;
(b) for an authorised person whose business has a relevant turnover of £500,000 or more, no more than 20 per cent of that turnover.
(3) The amount of the penalty may be the same as or greater or less than the proposed amount set out in the notice under regulation 51(1)(b).
(4) When determining the amount of the penalty that an authorised person is required to pay under regulation 48(1), (2) or (4) the Regulator must have regard to—
(a) the nature and seriousness of the acts or omissions giving rise to the Regulator's decision to exercise the power to require the authorised person to pay a penalty;

and (b) the relevant turnover of the business of the authorised person.

Relevant turnover

50.—(1) In this Part "relevant turnover" means the figure determined by the Regulator in accordance with this regulation.

(2) The Regulator must determine such figure as the Regulator considers appropriate for the turnover of the business of the authorised person.

(3) The turnover to be determined is the turnover of the authorised person's business from regulated claims management services.
(4) The turnover to be determined is for the period of 12 months prior to the date on which the Regulator gives the notice under regulation 51(1).
(5) When determining the relevant turnover of an authorised person under this regulation the Regulator must have regard to—
(a) any figure for the annual turnover or the expected annual turnover used by the Regulator for the purposes of calculating the authorised person's most recent fee for authorisation;
(b) any more up to date information on turnover.
(6) When determining the relevant turnover of an authorised person under this regulation the Regulator may estimate amounts.

Notice of proposed penalty and written submissions
51.—(1) Before requiring an authorised person to pay a penalty, the Regulator must give written notice to the authorised person—
(a) stating that the Regulator proposes to require the authorised person to pay a penalty;
(b) setting out the proposed amount of the penalty;
(c) setting out the proposed date by which the penalty would be required to be paid or the proposed date by which each part of the penalty would be required to be paid;
(d) setting out the figure used by the Regulator for the relevant turnover and the basis on which the Regulator determined that figure;
(e) setting out the reasons for the Regulator's decision, and a summary of the evidence on which the Regulator relies;
(f) inviting the authorised person to make a written submission in relation to the matters in the notice; and
(g) specifying a reasonable period within which the authorised person must do so.

(2) The Regulator must take into account any written submission made by the authorised person within the period allowed under paragraph (1)(g) or any further period allowed by the Regulator—
(a) in determining whether to require an authorised person to pay a penalty;
(b) in determining the amount of the penalty; and
(c) in determining the date by which the penalty is required to be paid or the date by which each part of the penalty is required to be paid.

Procedure for requiring an authorised person to pay a penalty
52.—(1) If the Regulator decides to require an authorised person to pay a penalty the Regulator must give written notice to the authorised person of that decision.
(2) The notice must specify—
(a) the amount of the penalty;
(b) the number of payments; and
(c) the date by which the penalty or each part of the penalty is required to be paid.
Treatment of unpaid penalty as a debt

53. If the whole or any part of a penalty imposed by the Regulator is not paid by the date

by which it is required to be paid and either—
(a) no appeal relating to the penalty has been made under section 13 of the Act during the period within which such an appeal may be made; or(b) an appeal has been made under that section and has been determined or withdrawn, the Regulator may enforce as a debt due to the Regulator the penalty or that part of it.

24. The Conduct of Authorised Persons Rules were amended in October 2014. Rule 2 (e) required businesses "*to take all reasonable steps in relation to any arrangement with third parties to confirm that any referrals, leads or data have been obtained in accordance with the requirements of the legislation and Rules*". General Rule 2 (d) required regulated businesses to "*maintain appropriate records and audit trails"*.

25. The CMR also publishes guidance for authorised businesses. In July 2013, the CMR published Marketing and Advertising Guidance for regulated businesses[13], which advised that

> "*Businesses that outsource their telemarketing or use a third party to instigate marketing calls on their behalf must ensure that the third party is complying with all the relevant legislation as part of their due diligence. You should have processes in place to monitor the activities of any third party you contract with…*
>
> *Obtaining assurances from third parties may form part of your due diligence checks but it is not sufficient for the purposes of ensuring your compliance alone".*

26. In May 2014, the CMR issued a bulletin to all regulated businesses warning that

> *Many businesses are relying on assurances from third parties, contractually or otherwise, that personal data has been obtained fairly and lawfully*

27. This bulletin also advised businesses to conduct robust checks to ensure that they were complying with The Privacy and Electronic Communications (EC Directive) Regulations 2003 and Data Protection Act 1998 ("PECR"), referring to guidance issued by the Information Commissioner. Regulation 21 of the PECR provides that unsolicited telemarketing calls should not be made to numbers on the Telephone Preference Service ("TPS") register. Such calls may, however, be made without the need to screen against the TPS where the caller has obtained prior consent. This requires claims management companies (or those acting on their behalf) to obtain a specific "opt in" from the consumer.

28. In September 2014, the CMR published guidance in relation to the new Conduct of Authorised Persons Rules, stating that where businesses purchase referrals, leads or data they must operate a procedure that verifies its source and that there must be evidence that the procedure has been followed. It also advised that businesses must not rely on third party assurances alone but must carry out their own checks to verify

[13] 4-610

that information was lawfully and compliantly obtained. Businesses were advised that they must hold documentation to demonstrate compliance with the Rules.

29. When making a decision to impose a financial penalty, the CMR has regard to the "*nature and seriousness*" of the breach under Regulation 49 (4) (a) (see paragraph 23 above). The CMR has also published A Financial Penalty Scheme Guidance Note[14]and an Enforcement Policy[15] which together set out its approach to deploying a range of formal and informal enforcement tools.

30. Claims Management Companies are under an obligation not to put a solicitor to whom they refer cases in breach of the solicitors' own conduct rules. Solicitors are not permitted to make unsolicited approaches or to accept referrals that have been obtained as a result of an unsolicited approach.

(ii) Appeal to the Tribunal

31. The Compensation Act 2006 (as amended by the Tribunals Courts and Enforcement Act 2007 and the Financial Services (Banking Reform) Act 2013) provides at s. 13 for appeals to the Tribunal as follows:

(1)A person may appeal to the First-tier Tribunal ("the Tribunal") if the Regulator—

(a) refuses the person's application for authorisation,

(b) grants the person authorisation on terms or subject to conditions,

(c) imposes conditions on the person's authorisation,

(d) suspends the person's authorisation,

(e) cancels the person's authorisation, or

(f) imposes a penalty.

(1A) A person who is appealing to the Tribunal against a decision to impose a penalty may appeal against –

(a) The imposition of the penalty,

(b) the amount of the penalty, or

(c) any date by which the penalty, or any part of it, is required to be paid.

(2) …

(3) On a reference or appeal under this section the Tribunal—

[14] 4-657

[15] This was handed up during the hearing

(a) may take any decision on an application for authorisation that the Regulator could have taken;

(b) may impose or remove conditions on a person's authorisation;

(c) may suspend a person's authorisation;

(d) may cancel a person's authorisation;

(da) may require a person to pay a penalty (which may be of a different amount from that of any penalty imposed by the Regulator);

(db) may vary any date by which a penalty, or any part of a penalty, is required to be paid;

(e) may remit a matter to the Regulator;

(f) may not award costs.

(3A)…

4. *Evidence*

(i) Witness Evidence called by Elkador

32. Kate Fox gave oral evidence to the Tribunal on oath. She is the Compliance Officer for Elkador, a post she has held since early 2016. Prior to that she held the role of Sales, Complaints and Vetting Officer for Elkador, having worked for Elkador since March 2011. She told the Tribunal she had not been involved in the CMR's audits of 2014 and 2015. Ms Fox stated that prior to her appointment as Compliance Officer that role had been filled by a woman called Lucy Parker. She had now left Elkador's employment but remained on good terms with the company. Mr McGurk asked why Ms Parker had not made a witness statement in these proceedings and Ms Fox replied that she had not thought it relevant to ask her. Ms Fox said she did not know why Mr Haydon (the sole director of Elkador, who sat in the hearing room throughout the proceedings) had not made a witness statement. Ms Fox confirmed that she had been appointed by Mr Haydon, and that although she had received no external training for the role, she had relevant knowledge from her previous employment in relation to mortgages.

33. Ms Fox expressed the view that the CMR has given Elkador insufficient guidance and complained that the CMR did not warn Elkador of any deficiencies prior to imposing a financial penalty. She also expressed the view that a financial penalty was not warranted in this case. Mr McGurk asked her to describe the regulatory framework within which Elkador operated and she struggled to remember the Conduct of Authorised Persons Rules, calling them "COPD". She said that she had read them and takes advice from Scott Robert. Mr McGurk asked her what were the conditions of Elkador's authorisation and she said she did not understand the question and felt she was being put "*on the spot*". When referred to the CMR's

Marketing and Advertising Guidance Note[16] she said that she had read it but that Elkador does not do telemarketing and does not need to screen against the Telephone Preference Service as it does not make calls. When referred to the "*Vetting/Hotkey*" script for Elkador staff making calls[17], she said such calls were made to persons who had "opted in" and staff ask the customer to confirm that they were expecting a call from Elkador. Mr McGurk referred her to the letter sent by Scott Robert to the CMR dated 1 January 2016[18] which states that "*our client has its own TPS licence and re-screens all data….*". He put to her that Elkador does not have a TPS licence as claimed. She said she thought it did, but also said that it did not need to conduct TPS screening because they always confirm with the client that they have asked Elkador to call. She said she guessed that Scott Robert's letter about TPS is referring to LOAP but she has nothing to do with them.

34. Mr McGurk asked Ms Fox about the DMA Code, the CMR Bulletin of May 2014, the ICO guidance and the Solicitors' conduct rules. She said she had read some of them, and was aware of others.

35. In her witness statement dated 22 August 2016[19], Ms Fox explains that her role at Elkador involves ensuring that due diligence checks are made and states that she is satisfied that a proper and sensible level of due diligence has been undertaken. She refers to the enhancements of procedures which were adopted by Elkador after consultation with external compliance advisers Scott Robert Consulting Limited. When asked about a "Due Diligence Checklist" appended to her own witness statement she stated that this was an internal document only and in use prior to her appointment so Ms Parker would have been responsible for filling it in.

36. Mr McGurk asked Ms Fox about Elkador's relationship with a company called Visioneye Limited. She said she was aware that it had the same address as Elkador but did not know when it was incorporated, or who were its directors. Mr McGurk put to her that Visioneye acts as Elkador's agent and that Elkador pays Visioneye for referrals. She said "no". Mr McGurk then referred her to an e mail to the CMR from David Gullick, formerly a director of Elkador, dated 3 August 2015 in which it was stated that "*Visioneye Limited…have been used as brokers to pay certain individuals and businesses on behalf of Elkador…This enables us to free up time and resources to be able to deal with other aspects of the business*"[20]. She said she did not know about any payments made by Visoneye. It was put to Ms Fox that Visoneye made payments to companies called R H Data, James Pickup and D A Group in order to avoid them having a direct link to Elkador. She said *"I don't agree with what you are suggesting"*. She was then asked about payments made by Visioneye to a payee called "Kate Fox Marketing". In response to this question she gave three different answers. First, she said that these payments were for referrals she had made of

[16] 4-610

[17] 4-56

[18] 4-560 (should be dated 1/2/16)

[19] 3 - 1

[20] 4-234

friends who had had accidents. Second, she said the payments were commission on sales. Third, she said the payments were a bonus but she did not know why her employer had paid her a bonus through Visoneye. In answer to a question from the Tribunal she said she did not know in advance if she was going to receive a bonus. Mr McGurk put it to her that her receipt of payments from third parties for referrals to Elkador represented a conflict of interest with her role as Elkador's Compliance Officer, but she disagreed with his suggestion.

37. Ms Fox said that it was important to Elkador to look after the consumers of its services and that it did the most due diligence it could, involving the consumers in that process. Later, in response to a question from Mr McGurk, she explained that Elkador itself asks customers to confirm that they are happy to be contacted and have not been cold-called. She said there is no way that this constituted a potential detriment to law firms because Elkador checks that calls are not unsolicited before they refer customers to a solicitor. With reference to Elkador's "*Vetting/Hotkey*" script[21], she explained that the staff member making the call cannot move forward to the next screen on the computer until the cold calling question has been answered. Ms Fox confirmed that Elkador had not received complaints from consumers or third parties in respect of its claims handling.

38. Ms Fox describes in her witness statement how Elkador prepared a spreadsheet of 152 businesses with which Elkador "*may have dealt*" although subsequently Elkador had taken the view that this spreadsheet erroneously included businesses which were not relevant to the CMR's investigation. The CMR had then asked for further information in relation to 20 businesses only but Ms Fox states that Elkador had not accepted business at the relevant time from "*many*" of the businesses referred to. (Her witness statement says that Elkador did not do business with "*any*" of the 20 but this was said to be a typographical error and the subsequent content of the statement bears this out). She gives a short account of Elkador's relationship with each of the 20 businesses.

39. In her oral evidence, Ms Fox was critical of the CMR's approach to the spreadsheet of 20 businesses[22]. She stated that the CMR had cut and pasted information from Elkador's own spreadsheet into the wrong place. When cross examined by Mr McGurk about the sample of 20 businesses she said that of the 20, only 13 of the businesses listed had provided business to Elkador prior to December 2014. She said that the CMR had made a false assumption that if Elkador had sent a business the new due diligence documentation in March 2015 then it must have been trading with that business in the period December 2014 onwards. However, if the due diligence documents had not been returned by March 2015 then Elkador had not traded with those businesses afterwards.

40. Mr McGurk asked whether this was the case with a company called Base Marketing. This company is referred to at paragraph 5.i of Ms Fox's witness statement, in which she states that Base Marketing did not return the due diligence

[21] 4 - 56

[22] 1-22

information requested[23] in October 2014 so no further business was done. Mr McGurk referred Ms Fox to Elkador's bank statement which showed a payment from Base Marketing of £10,000 on 17 November 2014.[24] She said this could have been a refund, there could be numerous reasons for it, and that she couldn't give an explanation here and now. Mr McGurk also referred to other payments shown in the bank statements from businesses in relation to which there had in the CMR's view been inadequate due diligence after October 2014. These were British Personal Injury, Be Sure and Citizens Advice. She said they could be payments for car hire, or for Scottish business, or that there had been a payment mistake. In re-examination, Ms Fox stated that there were sometimes cases in which payment to Elkador was deferred until there had been an admission of liability so this might account for the payment date.

41. With regard to the issue of whether adequate due diligence was carried out by Elkador, Ms Fox's evidence was that the CMR had made inappropriate assumptions about the due diligence checklists, as she said it could not be assumed that because a date beyond which no referrals were accepted is listed in the schedule that referrals were necessarily accepted before that date. She explained that Elkador had introduced revised due diligence checklists in January 2015 in response to the CMR's concerns, and revised them further in March 2015. She said that by that time, many of the businesses which had not returned the checklists were no longer trading with Elkador. For that reasons, it was not possible to evidence the compliance checks which CMR required. In relation to a company called Diamond Marketing, Ms Fox was asked where was the evidence of opt-ins being obtained? Ms Fox said there is another questionnaire for that issue but its not in the bundle. In relation to a company called Acton Marketing Claims AKA Think Link, Mr McGurk asked where was the evidence that it was an exempt business? Ms Fox said it had not been documented but that did not mean Elkador hadn't checked. She said she was confident about that.

42. Ms Fox's evidence was that most of Elkador's work during the relevant period was sent by authorised claims management companies or exempt introducers. She thought that a small number of other cases may have been accepted in error but the implementation of revised due diligence procedures had remedied that problem. She understood that the CMR had received all the relevant documents to show this via Scott Robert. Mr McGurk took Ms Fox to the updated Due Diligence lists in the bundle[25]. He pointed out that the forms don't allow the reader to identify *how* any consent or opt ins have been obtained because the form merely aks "is data screened through TPS" with a box to add "Y/N". Ms Fox explained that this is an in-house record which must be viewed hand in hand with the other information asked for. Mr McGurk referred her to Elkador's "Prospective Introducer Questionnaire"[26] where, in response to the question "*how do you acquire the leads that are referred to your business*" the answer had been put as "*word of mouth/social media*". Ms Fox said that

[23] 3-13

[24] 4-228/100

[25] 4-242-333

[26] 4-393

this was a misunderstanding and was a question about how leads are referred to Elkador, not the introducer's own business. This had been clarified at a later stage. Mr McGurk asked where was the record that further evidence had been obtained? Ms Fox said that Elkador had supplied this to the CMR in all cases where there was an on-going business relationship. When asked where we could find sample wording for opt ins, Ms Fox said these had already been supplied to the CMR. When asked how Elkador checks whether an introducer is exempt, Ms Fox said they do as many checks as they can, visiting and looking on the internet. In response to further questions, Ms Fox said that unless she sat in other peoples' offices there is only so much she could do so she had to take peoples' word to some extent.

43. Ms Fox stated that Elkador's turnover figure had been provided to the CMR in May 2015. It was initially thought to be £2.5 million but there had been confusion about whether the figure was for all turnover or just that derived from regulated business. She said that Elkador had fully co-operated with the CMR and sent all the information requested.

44. Elkador also relied on a witness statement dated 26 July 2016 prepared by Hixsons Business Advisers from Bournemouth[27]. It purported to be an independent expert report confirming Elkador's turnover from regulated activity. The Tribunal may admit evidence which would not be admissible in a civil trial[28], but it would have been usual for Elkador to have applied for permission to introduce expert evidence. It did not do so.

45. We are unsure whether Hixsons is accredited to act as expert witnesses, but the formalities of the report were inadequate in not containing the usual statement required of an expert witness. Indeed, the individual who signed the report does not even identify him or herself. We also note that, in direct contravention of the requirements of CPR 35, to which we have regard as guidance, the report contains a disclaimer.

46. Hixsons report states that Elkador's turnover from regulated activity is £2,722, 514.10, which we note is considerably more than the figure previously produced by Elkador itself. However, as Hixsons has based its report on the 12 month period to 18 May 2015, which is (a) a different period from that relied upon by the CMR in this case and (b) a different period to that required by Regulation 50 (4), its conclusions are of negligible evidential value.

(ii) Witness Evidence called by CMR

47. Mr Greg Williams is a Principal Officer in the CMR and leads its Direct Marketing Team. The investigation into Elkador was carried out by officers who

[27] 1-73

[28] Rule 15 (2) (a) (i) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009

reported to him. Mr Williams made a witness statement[29] in relation to this appeal, gave supplementary oral evidence and was cross examined by Mr Swan.

48. Mr Williams' evidence was that the audits of Elkador conducted by the CMR in August 2014 (Bournemouth) and September 2014 (Manchester) were triggered by complaints made to the CMR. The audit report noted that Elkador was undertaking "*very limited, and in some cases no, due diligence prior to and during [its] business relationship with third parties"*. Elkador had responded to the CMR via Scot Robert, providing details of a new due diligence procedure which was implemented in response to the audit. Thereafter, the Mail on Sunday report of Elkador receiving stolen data prompted the opening of a formal investigation.

49. Mr Williams' evidence was that the CMR requested documentary information from Elkador during the investigation and carried out a further audit in 2015 during which it found that Elkador was still failing to carry out adequate due diligence checks on suppliers of leads, referrals and data.

50. The audit report dated October 2015 stated:

> "*The [previous] audit report asked you to provide the due diligence procedure you intend to implement for the purchase of data having regard to the guidance provided…yet we found that you are still not following the guidance in the audit report when buying in data"*.

51. Mr Williams' evidence was that during its investigation, the CMR had asked Elkador to supply it with a list of all businesses or individuals that it had received claims from and copies of all invoices from the same. Elkador had provided in July 2015 a list of 152 businesses and individuals. The CMR selected a sample of these in respect of which it asked for documentary evidence that due diligence checks had been carried out. Elkador provided this in the form of a spreadsheet[30] and supporting documents. The CMR's view was that these failed to demonstrate appropriate due diligence and that Elkador was relying on assurances provided by its suppliers. The CMR therefore asked Elkador again in August 2015[31] for evidence of due diligence checks, the dates on which data had been purchased from each of the businesses, the volume and frequency of such purchases and the date the commercial arrangement with those businesses had ended. Elkador replied[32] that it had already provided this information and provided no further evidence.

52. Mr Williams' evidence to the Tribunal in respect of the CMR's estimation of Elkador's turnover was as follows. In October 2015, Elkador told the CMR that its turnover for the period 1 October 2014 to 30 September 2015 was £865,506.49.[33] However, the CMR had noted that Elkador's bank statements showed that sums

[29] 3-107

[30] 4-241

[31] 4-407

[32] 4-414

[33] 4-417

totalling £4,105,198.88 had been paid into its bank account between October 2014 and May 2015. A second bank account showed payments in of £377,569.91 between January and June 2015.

53. The CMR therefore requested further information and evidence to substantiate the turnover figure declared by Elkador. In November 2015[34], Elkador informed CMR that its turnover for the year from 1 October 2014 was in fact lower than previously stated, at £795,906.49. Elkador explained that its earlier figure had erroneously included turnover from Scottish and Irish work and non-regulated activities which were not relevant for the purposes of the CMR's calculation. Mr Williams stated that Elkador provided the CMR with a spreadsheet of payments received but no supporting evidence such as invoices or receipts. Mr Williams' evidence was that, when reviewed, the spreadsheet appeared to contradict earlier information provided. This necessitated further correspondence with Elkador, with the result that the 12 month turnover period was no longer the 12 month period required by Regulation 50 (4) because the notice under regulation 51 (1) (the "minded to " letter) was not issued until 11 January 2016. Mr Williams' view was that, nevertheless, Elkador was aware of the turnover period which was being looked at by the CMR but had failed to provide sufficient evidence in respect of that period. The CMR therefore estimated Elkador's turnover for the period 1 October 2014 to 30 September 2015.

54. In correspondence, Elkador submitted[35] that the list of suppliers it had originally provided was erroneous, because some of the businesses had not supplied data to it in the relevant period. Of those who had, Elkador insisted that it had already provided evidence of due diligence. It complained that the CMR had not responded to its requests for advice as to what was required of it, but Mr Williams' evidence was that there was only one record of a request for advice being received from Elkador, as a result of the CMR's Unauthorised Activity Team contacting third parties with whom Elkador did business. Whilst Mr Williams accepted that that particular request was not answered, he maintained that Elkador had been given both generic and business specific advice about its obligations which should have been sufficient.

55. Mr Williams explained that in accordance with Regulation 49 (4) (a) and the CMR's financial penalties scheme guidance, it was determined that the "nature" of the breaches of the Code perpetrated by Elkador warranted a score of 2, which is "escalated". This was in view of Elkador's failure to follow guidance about due diligence and failure to provide further information when it was requested. A "seriousness" score of 4 was allocated because, although there was no evidence of direct detriment to any business or person, the breaches were felt to have the potential to cause moderate detriment to consumers and to the solicitors to whom Elkador referred claims. Mr Williams' evidence was that the seriousness score also took into account that the breaches identified were systemic, suggesting that a larger number of consumers could be affected, but that CMR had reviewed only the due diligence evidence in relation to businesses from which Elkador had accepted it received data,

[34] 4-439

[35] 4-560

leads or referrals. CMR was satisfied that the due diligence checks in relation to these businesses were insufficient.

56. In response to a question from the Tribunal, Mr Williams stated that he did not know what other business was undertaken by Elkador to account for the claimed differential between income from regulated activity and its other income.

57. Mr Williams answered some supplemental questions from Mr McGurk with the permission of the Tribunal. He confirmed that Visioneye was not authorised by the CMR. He said he thought that Visoneye was providing introductions to Elkador and that Elkador was paying Visoneye for these. He also confirmed that neither R H Data or James Pickup were authorised and said it did not appear to him that they were exempt.

58. Mr Swan cross examined Mr Williams about the various officers involved in the CMR's investigation and the loss for a period of time of two boxes of documents supplied by Elkador to the CMR. Mr Swan put it to Mr Williams that the CMR's investigation had been "chaotic". Mr Swan also suggested that, because the CMR had lost documents, it could not fairly say that Elkador had not co-operated with the investigation. Mr Williams said that it had only recently come to his attention that any documents were missing but that he had now found and reviewed them and did not consider any of them to be relevant to the appeal. In re-examination, Mr McGurk took Mr Williams through the chain of correspondence in which the CMR asked for information, Elkador provided information, and the CMR replied, asking for clarification and/or supporting documentation.[36]

59. Mr Swan put to Mr Williams that, if the CMR had received complaints about Elkador, these would have been mentioned in the audit reports. Mr Williams said he believed that the CMR had identified lack of due diligence as the main issue to be addressed, so the complaints may not have been mentioned. He said that the Mail on Sunday report had heightened that concern, as if Elkador did not know that it had received stolen data then its due diligence procedures were once again the issue. Mr Williams confirmed that the newspaper report was the reason for opening the Regulation 35 investigation, and it was not due to dissatisfaction by the CMR with the audits. He readily accepted that Elkador had co-operated during the audits.

60. With regard to the turnover figure, Mr Swan took Mr Williams to Elkador's declaration made for the purposes of renewing its authorisation[37] which in February 2015 gave a turnover figure of £2.5 million. The Tribunal asked about a letter from someone else at the CMR querying that figure[38] but Mr Williams did not recall it.

61. Mr Swan put to Mr Williams that the reference to the SRA code at paragraph 19 of this witness statement was a provision which was no longer in force. Mr Williams

[36] 4-210 to 4-234

[37] 4-166

[38] 4-408

replied that he had spoken to the SRA and clarified that the "outcome" identified there was still relevant to solicitors' conduct.

62. With regard to the penalty score which the CMR had concluded was appropriate for Elkador, Mr Swan put to Mr Williams that as Elkador had been co-operative, a seriousness score of 4 was unwarranted. Mr Williams did not accept this. He reiterated that the CMR's financial penalty score related to potential detriment rather than actual detriment arising from lack of due diligence. He did not accept Mr Swan's suggestion that Ms Fox's evidence that consumers were asked if they were happy to be contacted minimised any detriment. He said that asking the question once they were on the phone was far too late.

63. Mr Williams maintained that information that the CMR had asked Elkador to provide had not been forthcoming, even after the "minded to" letter gave Elkador a final opportunity to supply it. Mr Swan put to Mr Williams that the CMR had breached its own enforcement policy by failing to give informal advice or a warning prior to imposing a penalty. Mr Williams said that the CMR felt that the breaches of the terms of authorisation were sufficiently serious to merit a financial penalty and that previous advice to Elkador in the form of the audit reports had not been followed.

64. With regard to the sample of 20 businesses, Mr Williams explained that the financial penalty score was not based exclusively on the information received in respect of those 20 but on the indication they gave of more widespread problems. He maintained that reviewing the evidence for a sample of businesses was a proportionate approach.

65. The CMR also relied upon the witness statement of Vicki McAusland, who is a Senior Regulation and Policy Manager, which very helpfully set out the legal and regulatory framework within which authorised claims management companies such as Elkador are required to operate. This was not challenged.

(iii) Documentary Evidence

66. The Tribunal had before it an agreed hearing bundle of over 700 pages. This had been prepared in accordance with standard directions in the General Regulatory Chamber, whereby the Regulator serves a draft index of documents on the Appellant and the Appellant is able to suggest the inclusion of additional documents. During the hearing of this appeal Mr Swan (in argument) and Ms Fox (in evidence) repeatedly suggested that there were documents which they had expected to be in the bundle but were not. In the interval between the two hearing dates, two boxes of documents were found at the CMR's offices which had been provided by Elkador and apparently not digitised. However, after both parties had had the opportunity to review those documents, they had each concluded that none of them was relevant to the issues the Tribunal had to decide, and so no supplementary bundle was produced.

67. Mr Swan produced a small number of additional documents during the hearing itself, which had not been included in the bundle. We admitted these into evidence and have referred to them where necessary to do so but note that, because of the

unconventional manner in which they were provided to us (not produced by a witness but simply by a photocopy being handed up) the CMR was given no opportunity to check their provenance or to ask questions about them. Accordingly, as we explained to the parties, we may ascribe to such documents less weight than the other documents which were produced for the Tribunal in the usual way that these things are done.

5. Argument

68. We turn now to consider the arguments put to us in respect of each of the four issues we have identified at paragraph 16 above.

(i) Was there a breach?

69. The CMR's case, as set out in its "minded to" letter of 11 January and its decision letter of 4 May 2016, was that it was a condition of Elkador's authorisation that it complied with Conduct of Authorised Persons Rules but that the evidence supplied to it by Elkador did not demonstrate its compliance with General Rule 2 (e) because it did not demonstrate that Elkador had carried out its own checks to establish how and when consent for the referral had been obtained, whether the consent was clear and intelligible, and whether screening against the Telephone Preference Service had been undertaken.

70. The CMR submitted that, without undertaking these checks, Elkador was in breach of General Rule 2 (e) and that its failure to hold and produce documentation in relation to such checks was a breach of General Rule 2 (d).

71. Elkador submitted that the CMR had made incorrect assumptions about its processes because it did not accept referrals from 7 of the 20 businesses in the sample during the relevant period. Elkador agreed that it had accepted business from 13 sources of the 20 businesses since 29 December 2014. It argued that it had supplied the CMR with evidence of due diligence in respect of these.

72. The CMR's case was that, notwithstanding the dispute about the 20 businesses, it had considered a representative sample of Elkador's work which showed that Elkador had systemic problems with due diligence and that it had reasonably concluded that the problems it had identified were likely to extend to more of Elkador's work. In respect of the business which Elkador agreed it had accepted, this was insufficient to demonstrate compliance with the Conduct of Authorised Persons Rules. Elkador had repeatedly been asked to provide evidence of compliance but had not done so.

73. The CMR also suggested that the Tribunal could not safely rely on Elkador's assertion that it had done no business with certain referrers since Dec 14 because the bank statements suggested otherwise.

74. The CMR accepted that the revised due diligence forms introduced after the 2014 audit "*could* constitute sufficient due diligence" but stated that it had received no indication that evidence had been obtained to verify the information given by the

referrer, or to substantiate claims that the referrer was exempt or that the customer had opted in.

75. In his closing submissions on this point, Mr McGurk asked the Tribunal to consider (i) what evidence Elkador had provided and (ii) what it showed. He described Elkador as "drip-feeding" information to the CMR during its investigation and submitted that the documents it had provided did not even to begin to show that Elkador was conducting due diligence checks as required. He pointed to the absence of inter-partes correspondence or copies of documents provided to Elkador by way of verification. Elkador had not provided any such evidence to the CMR and had not provided it to the Tribunal.

76. Mr McGurk also submitted that Elkador had not put before the Tribunal those witnesses best able to give an account of its due diligence procedures (Mr Haydon and Ms Parker) and that Ms Fox's evidence had shown her to be unequal to her role, with limited knowledge of the regulatory framework and giving evidence which contradicted Elkador's own documents.

77. Mr Swan submitted that the Tribunal could safely rely on Ms Fox's evidence as her daily task was ensuring compliance with the Code. He asked the Tribunal to regard the documents exhibited to Ms Fox's witness statement as demonstrating that appropriate due diligence checks were in operation.

78. Mr Swan submitted that it was unfair for the CMR to seek to impose a financial penalty in respect of conduct which went beyond the sample of evidence provided and that it was not entitled to make assumptions about matters in respect of which it had not received direct evidence. He submitted that the failings identified in relation to the sample were administrative in nature, as there was no evidence of actual detriment to individuals or solicitors.

(ii) If so, was a penalty warranted?

79. Elkador submitted that the CMR had failed to act as a proper and sensible regulator in failing to give Elkador advice when asked, and in failing to comply with its own enforcement policy which (it was submitted) required the giving of informal warnings before taking formal steps. Mr Swan submitted that authorised businesses had a legitimate expectation that the CMR would use informal methods before resorting to formal penalties.

80. The CMR submitted that it had identified systemic breaches by taking a representative sample of business and that this warranted a formal penalty. It asserted that it had given Elkador informal advice in the audit reports which it had concluded had not been followed and had also issued generic guidance.

81. The CMR's case was that it was incorrect to say that the enforcement methods outlined in its guidance were required to be applied in a linear fashion, as to do so would fetter its discretion as to the appropriate action in each case.

(iii) What is the correct level of penalty?

82. The CMR's minded-to and decision letters explain the nature and seriousness scores it applied to the breaches it found Elkador to have committed. It based its case on potential detriment, rather than actual detriment, having considered a representative sample of evidence of Elkador's business systems.

83. Mr Swan submitted that a "nature" score of 2 was inappropriate in this case because it is an "escalated" score suitable (referring to the CMR's guidance) for cases where there is increased concern, previous advice has not been taken on board and there had been less co-operation with the investigation than from authorised persons generally. Mr Swan submitted that on the CMR's own case a nature score of 1 was merited, being the score for basic cases involving minor or administrative failings and where the business has co-operated with the investigation and taken steps to remedy the issues raised.

84. Mr Swan also submitted that the "seriousness" score of 4 was inappropriate for this case because it would be appropriate for breaches likely to have affected a number of consumers or other organisations and there is potential for more widespread detriment if action is not taken. He submitted that a score of 2 would be more appropriate for this case, as there were no complaints from consumers and no evidence of actual detriment.

85. Elkador's case was that it had co-operated with the CMR's investigation but the CMR's investigation had been chaotic and involved losing Elkador's documents.

86. Elkador accepted that it had received 213 leads from 11 suppliers in the sample, and the total payment in relation to these was approximately £21,000 so that the penalty score was in all the circumstances disproportionate.

(iv) What is the Relevant Turnover Figure?

87. There was a considerable degree of confusion in the pleadings and evidence as to the turnover period which should be used by the Tribunal for the purposes of calculating any financial penalty. This arose as follows. The CMR's "minded to" letter (i.e. the "Notice of Proposed Penalty" for the purposes of Regulation 51 (1) – see paragraph 23 above) was dated 11 January 2016. Regulation 50 (4) provides that the relevant turnover period is the 12 month period prior to the date of the Notice. However, in this case, the CMR relied in its 11 January letter on the 12 month period prior to 30 September 2015. This was because it had prospectively requested turnover information, with a date of 30 September in mind for the issue of the "minded to" letter. Owing to the delay by Elkador in providing a turnover figure and the difficulties the CMR had in verifying the figure given, the date for issuing the "minded to" letter had slipped. This resulted in the "minded to" letter referring to a turnover period which had commenced several months previously.

88. To complicate matters further, Elkador's Grounds of Appeal erroneously suggested that the 12 month period should be calculated from the date of commencement of the Regulation 35 investigation, which was May 2014. The

CMR's Grounds of Opposition to Elkador's appeal then also erroneously referred to the period May 2015 to July 2016 (although this was later corrected with the permission of the Tribunal).

89. Mr Swan submitted that the effect in law of the CMR using a date other than that referred to in Regulation 50 (4) was that the CMR's opposition to the appeal was fatally flawed.

90. Mr McGurk submitted that there was a "structural difficulty" within the legislative framework because the CMR is required to send a "minded to" letter referring to a twelve month turnover period ending with the date of that letter, which pre-supposes that the CMR has already been provided with evidence of turnover. He acknowledged that Regulation 49 (1) is expressed in mandatory terms but submitted that the CMR's area of non-compliance was with Regulation 50 (4) only. Parliament had not set out what the consequence of such non-compliance should be. The Tribunal was referred to case law in which it had been held that breach of a statutory provision was not to be regarded as invalidating subsequent steps unless it was clearly the intention of Parliament that this should be so: *R v Soneji* [2005] UKHL 49; *R (on the application of Vital Nut Co Ltd) v HMRC* [2016] EWHC 1797 (Admin).

91. Mr McGurk submitted that the Tribunal should endorse the CMR's pragmatic approach to the difficulties of applying the legislation in the face of Elkador's lack of co-operation and that it should have regard to Regulation 49 (3) which permits the CMR to impose a penalty the same as, greater, or less than that referred to in the "minded to" letter, and Regulation 50 (2) which permits the CMR to determine the relevant turnover figure, as demonstrating that Parliament had expected the CMR to exercise its discretion in determining the appropriate turnover figure and penalty.

92. The CMR had asked Elkador for its turnover figure in relation to regulated business. On 5 October 2015, Elkador stated that the figure for the previous 12 months was £865,506.49. However, the bank accounts showed payments in of just over £4 million between October 2014 and May 2015. The CMR therefore asked Elkador to confirm its turnover figure. Elkador responded on 11 November 2015 stating that the correct figure was in fact £795,906.49 as it had identified that the previous figure was incorrect due to £69,000 being included that related to Scottish and Irish solicitors. It was stated that payments into the bank account of over £3 million did not relate to regulated claims management activity.

93. There was no dispute before us that the Appellant's turnover for the relevant period was in excess of £500,000 so that the CMR was entitled to impose a penalty in excess of £100,000. However, the Appellant's exact turnover figure for the relevant period was very much disputed. The Appellant did not accept that the CMR's estimate had produced the right figure or that the CMR had made its estimate in relation to the correct period. The CMR argued that it had taken a pragmatic approach to estimating the figure in the light of poor co-operation from the Appellant.

94. The evidence of turnover which Elkador produced to the CMR and the Tribunal referred to the following periods and turnover figures: (a) e-mail from Elkador to the

CMR dated 7 October 2015 which gave the figure as £865, 506.49 for the period 1 October 2014 to 30 September 2015; (b) a letter (handed up during the hearing) dated 25 August 2015 from Pauline Brown, Elkador's Accounts Manager. This used the period from 1 December to 30 November in each year commencing 2010 and ending 2014 to provide a "renewal turnover" figure (i.e. the income derived from authorised claims management services relevant to the renewal of authorisation fee). These were given as £282, 723 (2010 – 2011), £426, 550 (2011 – 2012), £833, 493 (2012 – 2013) and £2, 548. 948 (2013 – 2014); and (c) Hixson's report for the period May 2014 to 2015, giving a figure of £2,722514.10 and which we have referred to in more detail at paragraphs 44 to 46 above.

95. Mr McGurk submitted that in all the circumstances the CMR was entitled under the legislative provisions to estimate Elkador's turnover from regulated activity and that the Tribunal should uphold the CMR's estimated turnover figure.

6. Conclusions

96. We record here that we were troubled in a number of respects by Elkador's conduct of its appeal to the Tribunal. Whilst Mr Swan told us that he understood that this was a *de novo* hearing and that Elkador bore the burden of proof in relation to its case, Elkador's approach to the appeal focussed more on criticising the CMR than it did on providing the Tribunal with the evidence on which to base a fresh decision.

97. We found Elkador's approach to the documentary evidence particularly surprising in this regard, as Mr Swan frequently complained about the absence of evidence from the bundle (to which he had agreed) but did not then produce to the Tribunal additional documentary evidence to support Elkador's case. This deficiency was perhaps most striking in relation to the absence of satisfactory evidence of Elkador's turnover, which we consider further below.

98. We also found Elkador's choice of witnesses surprising. Ms Fox was, in many respects, an unsatisfactory witness. As she had not been in post during the relevant period she could not give direct evidence of the due diligence practices in operation at the relevant time. We noted that Mr Haydon, the owner of Elkador, sat in the hearing room throughout the proceedings and might have been able to answer some of our questions, but he had not made a witness statement. Members of staff referred to, some but not all of whom had now left Elkador's employ, were not called as witnesses as to matters of which they would have had direct knowledge.

99. We turn now to our conclusions on the issues identified at paragraph 16 above.

(i) Was there a breach of the terms of authorisation?

100. The Conduct of Authorised Persons Rules require business to take reasonable steps to confirm that referrals, leads and data received are in accordance with the legislation and Rules. They also require businesses to maintain appropriate records and audit trails (see paragraph 24 above).

101. As noted in the CMR's "minded to" letter of 11 January 2016 and the Decision Letter of 4 May 2016, Elkador had provided the CMR with details of the questions it asked third parties by way of due diligence, but it had failed to provide audit trail evidence that checks had been carried out to verify whether the answers to those questions were correct. In discharging the burden of proof upon it in making an appeal to the Tribunal, we would have expected Elkador to have shown us copies of correspondence with the third parties included in the sample or otherwise, demonstrating that relevant questions had been asked and appropriate replies given. But Elkador did not provide any such evidence to the Tribunal. We are not satisfied that such documents were ever provided to the CMR as alleged and we are not satisfied that the CMR's investigation was so chaotic as to lose such important evidence. Even if it had been, Elkador should have been able to reproduce the lost evidence to the Tribunal, which it did not – apparently preferring to ask the Tribunal to find that documents which it had not seen (a) existed (b) had been provided to the CMR and (c) had been lost.

102. We find ourselves unable to accept the evidence of Ms Fox that compliant due diligence checks were made in the absence of documentary evidence to corroborate her statement. Indeed, we find it difficult to accept that Ms Fox understands what checks are required, let alone that she makes them. She demonstrated to us a concerning lack of familiarity with the regulatory framework within which Elkador operates, compounded by a misplaced confidence in Elkador's practices, for example her assertion that Elkador could meet the requirements of the Rules regarding the TPS by asking the person whom they had telephoned if they were happy about it. A charitable interpretation of Ms Fox's position is that there are things that go on at Elkador of which she is unaware, although her acceptance of payments to herself from Visioneye suggests to us that she may have been economical with the truth in at least some of her evidence to the Tribunal.

103. Elkador complained that the CMR's sampling of its documents was unfair. We reject that submission. The CMR was in our view entitled to select a sample of Elkador's customers and ask for evidence to enable it to drill down into how due diligence was practiced on the ground. It seems to us that this is a proportionate approach on the part of the CMR to investigating compliance, provided that the business's practices identified in the sample are indicative of the businesses general approach.

104. In this respect, Elkador was at liberty at any time to suggest that the sample was not representative of its usual practices and to produce evidence to the CMR and the Tribunal that its due diligence procedures were more robust in relation to other of its business clients. It did not do so. In those circumstances, we also concur with the CMR that the sample was indicative of a systemic failure by Elkador to comply with the terms of its authorisation.

105. In conclusion on this point, we concur with the CMR's finding that Elkador was in breach of the terms of its authorisation. Elkador has not satisfied us on the balance of probabilities that it undertakes all reasonable steps in relation to its arrangements with third parties to confirm that referrals, leads or data have been

obtained in accordance with the legislation and Rules. It has not satisfied us that it maintained appropriate records and audit trails. In particular, it has not satisfied us that it undertakes appropriate due diligence in respect of the sources of referrals, the status of referrers as exempt or otherwise, and the ability to be sure whether customers have opted in under the TPS. We find that its conduct had the potential to put solicitors to whom it referred business in breach of their own code of conduct in these circumstances.

106. We dismiss Elkador's appeal in relation to this issue.

(ii) Is a penalty warranted?

107. We have considered the business specific guidance which the CMR gave to Elkador in its audit reports. We have also considered the generic advice given by the CMR to authorised businesses by way of bulletins.

108. We note that the CMR's final audit report concluded that the advice given to Elkador in previous reports had not been followed. We also note that the CMR had concluded that there was a systemic problem with lack of appropriate due diligence checks at Elkador so that the potential detriment to consumers and solicitors went beyond the problems identified in the sampling exercise.

109. We find that there is no foundation to Mr Swan's assertion that the CMR was required to take informal action against Elkador before considering a financial penalty. We consider this submission to be misconceived as it would fetter the CMR's discretion as to the appropriate penalty in each case.

110. We have considered the CMR's financial penalty guidance which refers to the likely imposition of a financial penalty in circumstances where there has been a failure to comply with the Conduct of Authorised Persons Rules, and failure to provide information and documents to the Regulator. We are satisfied, as recorded above, that Elkador was operating in breach of the Conduct of Authorised Persons Rules. We consider under (iii) below the extent to which Elkador failed to co-operate with the CMR in its investigation.

111. In all the circumstances we conclude that a financial penalty was warranted and we dismiss Elkador's appeal in relation to this issue.

(iii) If so, what is the correct level of penalty?

112. The CMR's "minded-to" letter of 11 January 2016 explained that the CMR intended to allocate a "nature" score of 2 and a "seriousness" score of 4, making a total score of 6 which resulted in a penalty band of 5-8% of turnover. It invited Elkador to make representations on this proposal but the issue was not addressed in Scott Robert's letter of 1 January (should be February) 2016.

113. The CMR is required to have regard to the nature and seriousness of the acts or omissions in respect of which the penalty is to be imposed by Regulation 49 (4) (a)

(see paragraph 23 above). Mr Williams explained to the Tribunal the CMR's analysis of this issue, having regard to its Financial Penalty Scheme Guidance Note.

114. We consider that a nature score of 2 is the appropriate score, having regard to the circumstances of this case and the CMR's financial penalty guidance. As we have found above, there are a number of factors causing concern in this case, including the CMR's finding in the final audit report that Elkador had not taken on board the advice previously given to it in the earlier audits.

115. We are also satisfied that Elkador repeatedly failed to provide information and documents to the CMR when requested to do so. We note in particular the correspondence conducted between June and August 2015, in which we are satisfied that (to use Mr McGurk's phrase) Elkador "drip-fed" information to the CMR. From the opening of the investigation on 18 May 2015, we note that the CMR requested further information on 22 June, 25 June, and 30 June. It received information on 30 June in respect of which it asked for further information on 14 July, 20 July, and 3 August. It was still requesting further information in the "minded to" letter of 11 January 2016 which was not supplied. We also take into account the difficulties (noted further below) which the CMR had in obtaining a reliable turnover figure from Elkador - a process which has still not been concluded.

116. We are satisfied that the seriousness score of 4 was appropriate in all the circumstances of this case. The CMR based its case on the potential widespread detriment arising from systemic failings and we are satisfied that this conclusion, based on its analysis of a representative sample of business, was correct.

117. We conclude that the nature and seriousness scores allocated by the CMR were appropriate and we dismiss Elkador's appeal in respect of this issue.

(iv) What is the correct turnover figure to which the correct level of penalty should be applied?

118. Elkador's evidence as to turnover was unsatisfactory for a number of reasons. Firstly, the Hixsons Report related to the wrong period and was in a format which, as we have explained, made it difficult for us to accept it as an expert report. Nevertheless, we note that the turnover figure given by Hixsons was considerably in excess of the figure that Elkador had (twice) previously submitted.

119. Secondly, there were the unsubstantiated assertions contained in Elkador's e mail of October 2015 (with figures amended in November). Thirdly the further letter from Pauline Brown to the CMR dated 25 August 2015 which was not included in the hearing bundle. This was not produced by a witness or formally introduced into evidence in any way but merely handed up at the hearing. Mr McGurk commented that he had not seen it before and that, unlike the other copy letters, it was not on Elkador's headed paper. We find it difficult to make any finding of fact on the basis of this letter and note that there is no supporting information attached to it. We refer to it as contributing to the general confusion generated by Elkador as to its relevant turnover. Fourthly, we find we cannot rely on the figure given to the CMR by Elkador

for the purposes of calculating its renewal of authorisation fee as there is correspondence before us indicating that this is a matter in dispute between the parties.

120. Bearing in mind that Elkador bears the burden of proof as to its turnover figure, it is to say the least disappointing that we have reached this stage in the proceedings without being able to accept any of the evidence it has produced.

121. As noted above, the CMR's "minded to" letter of 11 January 2016 relied on a turnover figure calculated over the period 1 October 2014 to 30 September 2015. We reject Mr Swan's submission that the financial penalty is fatally impugned for that reason because Parliament has not clearly specified that this would be the consequence of the CMR breaching Regulation 50 (4).

122. We sympathise with Mr McGurk's description of the legislative framework as structurally flawed and can quite see the logistical difficulty for the CMR in being required to use a turnover period which immediately precedes the "minded to" letter. However, it seems to us that the difficulty for the CMR in complying with Regulation 50 (4) might be managed by sending an earlier "minded to minded to" letter which did not constitute the formal Regulation 51 (1) Notice, or that a second (amended) Regulation 51 (1) Notice might be sent in cases where, as here, more time was needed to gather information from the authorised business. In this case, we conclude that we may not safely rely on the CMR's estimated turnover figure because the period in respect of which it is calculated is in breach (however understandable) of Regulation 50 (4).

123. We note once again that the nature of an appeal to this Tribunal is an appeal by way of re-hearing and it seems to us that, if the CMR finds itself in breach of the Regulations for imposing a financial penalty in relation to the wrong turnover period then it must have been Parliament's intention not that a financial penalty should be invalidated but that the Tribunal should cure the CMR's breach by making a fresh decision in relation to the correct turnover period. To that extent we allow Elkador's appeal in respect of the financial penalty.

124. However, in view of the other findings we have made, we are satisfied that the Tribunal should itself impose a fresh penalty pursuant to s. 13 (3) (da) and (db) of the Compensation Act 2006, as amended (see paragraph 31 above).

7. Next Steps

125. Elkador's failure to produce reliable evidence of its turnover has left the Tribunal unable to determine the remaining matters before us, namely the correct amount of the financial penalty and the date for payment. For the reasons set out above, we are not satisfied that it is appropriate for us to rely on the CMR's estimation of turnover and conclude that we should make a fresh decision.

126. In the circumstances, we have decided to direct Elkador to supply us with the evidence of its turnover for the correct period. The CMR will have an opportunity to

comment on that evidence (and Elkador an opportunity to reply) before the Tribunal issues its own financial penalty. Accordingly, we now make the following directions.

DIRECTIONS

Pursuant to rules 5 and 15 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 we now **direct** as follows:

(i) Elkador is, within 28 days of the date appearing below, to file with the Tribunal and serve on the CMR a witness statement, made by a person of its choosing and containing both (a) a statement of truth and (b) an acknowledgement that the witness understands that misleading the Tribunal may result in proceedings for contempt of court;

(ii) The witness statement referred to at (i) above is to give factual evidence of Elkador's turnover from authorised claims management activity during the period of 12 months preceding the 11 January 2016;

(iii) The witness statement referred to at (i) above is to exhibit the evidence which has been used to calculate the turnover figure, for example bank statements, management accounts, invoices, receipts, corporation tax and VAT returns, and any other evidence relied upon;

(iv) If the turnover figure is significantly different from the figure put forward by Elkador in the Hixsons report (concerning the earlier period of May 2014 to May 2015), the witness statement referred to at (i) above is to explain the reasons for any fluctuation in Elkador's business;

(v) The witness statement referred to at (i) above is to explain why the evidence in the hearing bundle supporting the CMR's estimated turnover in respect of the period of 12 months preceding 30 September 2015 should not also be taken into account by the Tribunal;

(vi) The CMR may file with the Tribunal and serve on Elkador its submissions on the witness statement referred to at (i) above within 28 days of it being served. This may include submissions on the Tribunal's power to award costs and an application for costs if that application is pursued by the CMR;

(vii) Elkador may file with the Tribunal and serve on the CMR a Reply to the CMR's submissions (including as to costs) within 14 days of the CMR's submissions being served;

(viii) Both parties are, when making their submissions, to state the date by which the financial penalty should be paid and whether in instalments;

(ix) Unless the parties request a further oral hearing, the Tribunal will then proceed to make a final decision in respect of the turnover period and penalty

and date for payment on the basis of the evidence contained in the witness statement, taking into account any submissions made by the parties, and will issue a final written determination in relation to that matter;

(x) The parties may apply to vary these directions on notice to each other and in advance of any date set for compliance.

(Signed)

ALISON MCKENNA **DATE: 13 March 2017**

PRINCIPAL JUDGE